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**THE LEGALITY UNDER
INTERNATIONAL LAW OF TARGETED
KILLINGS BY DRONES LAUNCHED BY
THE UNITED STATES**

COMMITTEE ON INTERNATIONAL LAW

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NEW YORK CITY BAR ASSOCIATION
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THE LEGALITY UNDER INTERNATIONAL LAW OF TARGETED KILLINGS BY
DRONES LAUNCHED BY THE UNITED STATES

Association of the Bar of the City of New York

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June 16, 2014

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INTRODUCTION

This Report analyzes the legality of targeted killings by drones launched by the United States in the context of current international law. In a world where States are increasingly engaged in military operations with non-State actors, targeted killings by drones and perhaps other remote means may over time become more common, and the availability of lethal drone technology is likely to spread beyond the United States. Therefore, it is essential that the legal principles applicable to targeted killings be clearly understood, within and among nations.

The legal issues are complex. We note where there is a lack of consensus as to the applicable law, and we have tried to distill the law in some but not all areas. We address current international law, including International Humanitarian Law and International Human Rights Law, but we do not suggest whether, or how, international law should evolve. Indeed, just as there is lack of consensus as to some aspects of current international law—and as to the application of that law to the limited available facts—there is no agreement on whether, or how, the law should evolve to address this new dimension in armed conflict—robotic, largely covert warfare—particularly with regard to disclosure.

To ground our analysis, we have come to certain conclusions, based on our understanding of the limited facts that have been made public. For example, since the legality of targeted killings involves initially an assessment of whether they are occurring in the context of an armed conflict (since the applicable law is quite different depending upon whether an armed conflict exists), we have had to address this mixed question of law and fact. We acknowledge there is a lack of consensus, at least in the United States, as to where armed conflicts have been and are occurring.

The Report does not address the legality of the targeted killings under domestic U.S. law. Nor does it discuss the appropriate policy that should be followed even if that policy is not prohibited by law.

However, we recognize that decisions regarding the U.S. targeted killings policy must be considered in the context of this nation's democratic process. There are serious constitutional and other implications of conducting a largely secret war, and policy issues on its wisdom and morality. Thus, this Bar Association has urged that the U.S. Government make public the legal justification of its targeted killings policy. In a 2012 letter to President Obama, Association President Carey R. Dunne said, "Given the importance and relative novelty of the drone strategy, we believe this program should be the subject of informed public discussion and that, so long as the program is in use, decisions to use drone strikes should be made with the strictest of scrutiny and in a manner best calculated to avoid collateral damage."

We are issuing this Report in the hope that it will spur public discussion of all aspects of targeted killings, including both law and policy. We believe the discussion should begin with the legal principles, and that is what we have sought to foster in the following pages with regard to international law. We urge further discussion and debate, both within the U.S. and on a global basis, and encourage further scholarship and analysis in this vital area.

EXECUTIVE SUMMARY

This Report, prepared by the International Law Committee of the Association of the Bar of the City of New York, evaluates the legality under international law of “targeted killings” by drones launched by the United States Government.¹

Six factors complicate the analysis in the Report.

First, there is no controlling authority for international law. Not only is there no central legislative body, but given the breadth of factors that can be considered as sources of international law, there is a profusion of “authority”. International treaties and State practice are considered the most authoritative sources of international law. We discuss the sources of international law in Appendix C. Where State practice is difficult to determine, we have found judicial decisions and scholarly writings to be helpful as a “subsidiary means” for determining the applicable rules of law. However, since the scholarly writings on this topic are often based on non-legal policy choices (such as the wisdom and/or effectiveness of drones or the desirability of more transparency), we have devoted considerable space to identifying the actual legal issues and specifying our choices on disputed points. This Report does not take a position on important questions such as whether the drones program constitutes good public policy, is effective or is morally justifiable.

Second, there is no obvious international court to resolve the legality of the drone strikes under international law.² In the first place, there are obstacles to the

¹ The Report does *not* address issues of domestic U.S. law, such as the rights of U.S. citizens under the Constitution of the United States or the scope of the AUMF. (See Appendix B, *infra*, for a glossary that provides terms relevant to the analysis in the Report.) Domestic law may yield different answers as to the legality of the conduct that we address in the Report.

² Although this Report does not address domestic law, including domestic U.S. law, we are aware of the possibility of decisions on legality under international law in domestic U.S. actions (such as ATS,

jurisdiction of the ICJ over a dispute between the United States and another affected State.³ In the second place, the United States vigorously disputes the jurisdiction of the ICC⁴ and has taken steps to prevent its nationals from being prosecuted in that court.⁵

Bivens or *Charming Betsy* cases), *see, e.g.*, *Al-Aulaqi v. Panetta*, Civ. A. No. 12-1192, 2014 WL 1352452 (D.D.C. Apr. 4, 2014), or in foreign courts purporting to have universal jurisdiction, *see, e.g.*, Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001) (discussing purported exercise by Spanish court of universal jurisdiction over former military ruler of Chile).

³ The U.S. has not generally accepted the ICJ's jurisdiction, and we assume it would not consent to jurisdiction over a particular suit by a State claiming a violation of its sovereignty. Moreover, we are unaware of any treaty that could refer a dispute on that subject matter to the ICJ for resolution. *See Jurisdiction and Treaties*, ICJ, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4>. We take no position on whether those obstacles could be overcome. As a theoretical matter, the U.S. and another State could submit a particular dispute to the ICJ by special agreement. We consider that unlikely to occur, because such an agreement would involve the U.S. consenting to the ICJ's jurisdiction over the matter, which the U.S. generally has been unwilling to do. We are aware that the UN General Assembly could submit the question of the program's legality to the ICJ for an advisory opinion, even over an objection by the U.S. *See* ICJ Statute art. 65 (providing for the ICJ to issue advisory opinions at the request of bodies authorized to do so under the UN Charter); U.N. Charter art. 96, para. 1 (providing that "[t]he General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question."); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 47 (July 9) (explaining that "the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion"). We do not express any view as to whether that is likely.

⁴ The U.S. has refused to ratify the Rome Statute and disputes that the ICC should have jurisdiction over its nationals. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to the Secretary General of the U.N. (May 6, 2002), *available at* <http://2009.state.gov/r/pa/prs/ps/2002/9968.htm> (stating that "the United States does not intend to become a party" to the Rome statute). We assume the U.S. would not consent to ICC jurisdiction and that it would use its veto power in the Security Council to block any attempt by that body to refer a matter regarding U.S. nationals to the ICC. Nationals of non-parties to the Rome Statute are subject to ICC jurisdiction when they have committed a crime on the territory of a State that *has* accepted the ICC's jurisdiction, but the U.S. contends that such an exercise of jurisdiction over U.S. nationals without the consent of the U.S. would be contrary to international law. *Compare, e.g.*, David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999) (contending that subjecting U.S. nationals to ICC jurisdiction violates international law); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROB. 13, 27 (2001) (same); Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 199-200 (2001) (same); with Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 620 (2003) (arguing that U.S. nationals legally may be subject to ICC jurisdiction); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 99-103 (2001) (same). We do not seek to resolve that dispute.

⁵ The U.S. has executed treaties with other States, purportedly in accordance with Article 98 of the Rome Statute, by which those States have agreed to refrain from referring a U.S. national to the ICC. To our knowledge, of the States in which drone strikes reportedly have taken place—Afghanistan, Pakistan, Yemen, Iraq, Somalia, Libya, and Mali—only Mali both (a) is a party to the Rome Statute, and (b) does not have such an agreement with the U.S. *See The State Parties to the Rome Statute*, ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (omitting Pakistan, Yemen, Iraq, Somalia, and Libya); U.S. DEP'T OF STATE, TREATIES IN FORCE 2, 223, 319 (2013), *available at* <http://www.state.gov/documents/organization/218912.pdf> (listing Article 98

Third, the terminology of international law can be confusing to the non-specialist. The Report principally addresses two different legal doctrines with similar names that have some elements with identical names—a framework that can and does often lead to confusion. *Ius ad bellum* concerns the duty of a State to refrain from using force against other States and the right of a State under certain circumstances to use force in self-defense. This doctrine addresses the infringement of the sovereignty of the territorial State. By contrast, *ius in bello* governs the use of force during an “armed conflict”. Its focus is on the legality of a drone strike as a targeted killing of a human being. We have devoted considerable space to differentiating between these doctrines.⁶

Fourth, the United States has not released a thorough statement of its position under international law.⁷ We therefore have devoted an entire section to

treaties with Afghanistan, Pakistan and Yemen). Should the U.S. execute a drone strike in the territory of a State that is a party to the Rome Statute and which has not signed an Article 98 agreement with the U.S., that State could refer the issue to the ICC prosecutor for prosecution.

⁶ To add to the confusion, *ius in bello* is also called International Humanitarian Law, which is different from International Human Rights Law, which governs the use of force against individuals during peacetime (and can have continuing applicability in an armed conflict). See Appendix B, *infra* (glossary entries on “*ius in bello*”, “IHL”, “IHRL”, “*ius ad bellum* and *ius in bello* compared”, and “*ius in bello* and IHRL compared”).

⁷ As the President of the Association of the Bar of the City of New York noted in October 2011:

“[T]he people of the United States and its allies have received only incomplete or unofficial insights into the Government’s legal position. Over the past year and half, State Department Legal Advisor, Harold Hongju Koh, and Assistant to the President for Homeland Security and Counterterrorism, John Brennan, have delivered speeches presenting the most substantive public explanations of the Administration’s policies on legitimacy in the use of force. More recently, reports based on leaks have appeared in the media. But to date, the Administration has not offered a thorough and transparent legal analysis – the likes of which are critical for the meaningful development of the law at home and around the world.” Letter from Samuel Seymour, President of the New York City Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011), *available at* http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf.

Although there have been some additional speeches and leaks since October 2011, *see* Factual Background, Part II, *infra*, the Administration still has not offered a “thorough and transparent legal analysis”.

deriving the United States' legal justification for the drone strikes.⁸ On April 21, 2014, the U.S. Court of Appeals for the Second Circuit ordered the United States to release a memorandum that reportedly details the legal basis for the targeted killings of three U.S. citizens.⁹ Subsequently, the United States agreed to release the memorandum in redacted form,¹⁰ and President Obama has made promises of increased transparency.¹¹ It is unclear whether that memorandum, once released, will provide additional insight into the United States' position on international law.¹²

Fifth, although the analysis of the legality of a drone strike is highly fact-specific, the facts surrounding the strikes are unclear. The strikes occur in what may well be armed conflicts in areas that are geographically remote and not easily accessible to

⁸ See Factual Background, Part II, *infra*.

⁹ See *New York Times Co. v. U.S. Dep't of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514 (2d Cir. Apr. 21, 2014).

¹⁰ See Ashley Parker, *Memo Approving Targeted Killing of U.S. Citizen to Be Released*, N.Y. TIMES, May 20, 2014, <http://www.nytimes.com/2014/05/21/us/politics/memo-approving-targeted-killing-of-us-citizen-to-be-released.html>; Karen DeYoung & Sari Horwitz, *U.S. to reveal justification for drone strikes against American citizens*, WASH. POST, May 20, 2014, http://www.washingtonpost.com/world/national-security/us-to-reveal-justification-for-drone-strikes-against-american-citizens/2014/05/20/f607bb60-e066-11e3-8dcc-d6b7fed081a_story.html.

¹¹ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) (“I also believe we must be more transparent about both the basis of our counterterrorism actions and the manner in which they are carried out. We have to be able to explain them publicly, whether it is drone strikes or training partners.”).

¹² The court addressed only the issue of disclosure under U.S. law and did not address the legality of the drones program or any strikes, either under international or domestic law. See *New York Times Co. v. U.S. Dep't of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514, at *1 (2d Cir. Apr. 21, 2014) (“We emphasize at the outset that the Plaintiffs’ lawsuits do not challenge the lawfulness of drone attacks or targeted killings.”). The court’s decision, which was based on a theory of waiver, was premised on the notion that much of the concealed memorandum’s substance already has been made public, both in the DOJ White Paper and in statements of United States officials. See *id.* at *12 (noting that Attorney General Eric Holder has “acknowledged the close relationship between the DOJ White Paper and [the undisclosed memorandum]”). Those disclosed materials are discussed in this Report. See Factual Background, Part II, *infra*. Moreover, since the memorandum—like the DOJ White Paper—concerns the killing of U.S. citizens, it is likely to address matters of U.S. due process law, which are outside the scope of this Report.

outsiders.¹³ Moreover, the United States has not disclosed many facts on drone strikes, including its criteria for targeting and the consequences of the strikes.¹⁴ We have therefore devoted an entire section to deriving even generalized facts on the drones program and the States in which those strikes take place.¹⁵

Sixth, the facts continue to develop, including because of changing attitudes by governments and ongoing violence in the armed conflicts discussed in this Report, and because of the fierce public debate involving these important issues. For example, two UN Special Rapporteurs and two NGOs issued significant reports in 2013. These reports seamlessly interweave policy issues—such as an appeal for greater transparency, the alleged ineffectiveness of the drones program and the need for compensation—with the legal issues that we address. Moreover, their focus is different than ours. Although each report contemplates that some targeted killings are legal under *ius in bello*, each report focuses on specific drone strikes as possibly illegal and calls for

¹³ Amnesty International has described the difficulty of gathering information in Pakistan in light of “the remote and lawless nature of the region”—“[o]btaining reliable information about drone strikes in North Waziristan is extremely difficult due to ongoing insecurity and barriers on independent monitoring imposed by armed groups”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 10, 14 (2013). Similarly, Human Rights Watch has noted the “[l]ack of access to the attack areas [in Yemen], most of which are too dangerous for international media and investigators to visit, [which] makes it extremely difficult to verify casualty figures, conclusively determine how many of those killed were civilians, and learn the full circumstances of a strike.” HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 20 (2013).

¹⁴ We are not alone in this observation. Amnesty International states: “The US Government’s utter lack of transparency about its drones program posed a significant research challenge. The USA refuses to make public even basic information about the program, and does not release legal or factual information about specific strikes.” AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 11 (2013). Similarly, Lubell has noted that

“the lack of transparency regarding the decision making process and the targets, and the scant information from the ground as to the consequences of the strikes, turn any attempt at assessing the legality and seeking accountability into a grueling task.” Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT’L CRIM. JUST. 1, 23 (2013).

¹⁵ See Factual Background, Part I, *infra*.

the United States to disclose more facts so that the writer of the report can judge the legality of the strikes.¹⁶ By contrast, this Report focuses on the generalized principles that would provide a framework for the United States Government to describe the rules that govern its conduct and for others to evaluate the program's legality.¹⁷ Thus, this Report provides principles that define the legality (or illegality) of drone strikes generally; it does not proceed from the assumption that we are the judge of possibly illegal strikes or from the erroneous proposition that the United States has a duty under international law to provide us with more information to discharge that responsibility.

The contours of our analysis, and our conclusions, are as follows.

A. *Ius ad Bellum: the Legality of the Use of Force in a Territorial State*¹⁸

As a threshold matter, the *ius ad bellum* inquiry depends on whether the territorial State has consented to the drone strike. If there is consent, there is no

¹⁶ For example, Amnesty International states repeatedly that since the “US Government refuses to provide even basic information on particular strikes, including the reasons for carrying them out, Amnesty International is unable to reach firm conclusions about the context in which the US drone attacks . . . took place, and therefore their status under international law”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 8 (2013). Moreover, it states that “the continuing lack of information makes it very difficult to assess the lawfulness of individual drone strikes with complete certainty” and that “it is impossible to reach any firm assessment without a full disclosure of the facts surrounding individual attacks and their legal basis”. AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 50, 56 (2013). Similarly, a recent report by a UN Rapporteur selected “sample strikes” for analysis, specifically choosing strikes about which there have been allegations of civilian casualties. See Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, *Civilian impact of remotely piloted aircraft*, ¶ 34, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson) (noting that one of the criteria for strikes included in his list was that “there is an allegation emanating from an apparently reliable source . . . that civilians have been killed, seriously injured or had their lives put at immediate risk”).

¹⁷ There is a long-standing history of the United States providing guidance on war crimes. Thus, President Lincoln's General Order No. 100 in 1863, constituted a manual on war crimes that could be used by officers in the field. See The Lieber Code of 1863, General Order No. 100 (Apr. 24, 1863), available at <http://www.civilwarhome.com/liebercode.htm>; see also Rick Beard, *The Lieber Codes*, N.Y. TIMES, Apr. 24, 2013, <http://opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/>; JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

¹⁸ Does the use of force by the United States violate principles of *ius ad bellum* by unlawfully infringing upon the sovereignty of the State into which the drone strikes are launched? See Legal Analysis, Part I, *infra*.

infringement on sovereignty. Although a definitive answer to this factual question is impossible without access to confidential material, the publicly-available information suggests that States (with the apparent exception of Pakistan) have given their consent to U.S. drone strikes.

Given Pakistan’s public statements on a lack of consent, we consider whether alternative justifications provide a legal basis for continued U.S. drone strikes in Pakistan.

Absent consent, the inquiry principally involves two provisions of the UN Charter.

The first is Article 2(4), which generally prohibits States from using force against other States, a prohibition that is a bedrock principle of Public International Law.

The second is Article 51, which preserves each State’s “inherent right of individual or collective self-defense if an armed attack occurs”. The contours of that right of self-defense are the subject of intense debate. We reach the following conclusions concerning the law of self-defense:

First, the inherent right to self-defense is available against non-State actors, such as terrorist groups, and not just against States, if there is an actual or threatened “armed attack” by the non-State actor.¹⁹

Second, in the exercise of the right of self-defense against a non-State actor, a State may, in appropriate circumstances, use force against that actor within the territory of another State—even if the territorial State is not responsible for the actions of the non-State actor—so long as the force is directed against the non-State actor and is not

¹⁹ See Legal Analysis, Part I.A, *infra*.

directed at the territorial State itself.²⁰

Third, acts of violence by non-State actors can rise to the level of an “armed attack” within the meaning of Article 51 if they are of sufficient scale and effect. Although not all acts of terrorism justify the use of armed force, as opposed to a law enforcement response, a single act of terrorism may constitute an “armed attack” if it is of sufficient intensity. Moreover, under some circumstances, the accumulation of smaller acts of violence committed by a non-State actor may constitute an “armed attack”.²¹

Fourth, the use of force in self-defense is constrained by the principles of necessity and proportionality. Specifically, for forcible measures directed at a non-State actor to be “necessary”, the territorial State must be either unwilling or unable to address the threat through its own efforts (or obtaining the territorial States’ consent is not feasible); and for force to be “proportional”, the scope of the use of force must bear a relationship to the scale of the armed attack or to the gravity and imminence of the continuing threat.²²

Fifth, international law allows some leeway to use force before an armed attack has occurred, in anticipation of such an attack. The touchstone for anticipatory self-defense is whether the use of force is *necessary*, meaning that the victim State has “no choice of means” to protect itself short of the use of force. In evaluating whether there is “no choice of means”, the State may consider the imminence of attack and the nature and gravity of the threat, as well as the feasibility of effectively addressing the

²⁰ See Legal Analysis, Part I.B, *infra*.

²¹ See Legal Analysis, Part I.C, *infra*.

²² See Legal Analysis, Part I.D, *infra*.

threat with measures short of force.²³

Based on these principles and the facts in the public record, we reach the following conclusions with regard to *ius ad bellum* as applied to the drones program:²⁴

First, the terrorist attacks of September 11, 2001 constituted an “armed attack” by al-Qaeda on the U.S., giving rise to a right of armed self-defense against al-Qaeda pursuant to Article 51 of the UN Charter.

Second, the invasion of Afghanistan was a legitimate exercise of force in self-defense in response to the armed attacks of September 11. It was necessary, among other reasons, because the Taliban rejected U.S. demands to remove the continuing threat to the United States. It was proportional because of the severity of the September 11 attacks and the continuing threat posed by al-Qaeda.

Third, the September 11 attacks alone no longer supply a legal basis for additional measures taken in self-defense against al-Qaeda. The United States is no longer defending itself against those attacks. If the continued use of force is to be justified on the basis of self-defense, it must be justified by *current* “armed attacks”.

Fourth, we are unable to conclude whether the U.S. currently has a legitimate Article 51 claim with respect to strikes in Pakistan. The U.S. is faced with armed attacks by remnants of al-Qaeda and the Taliban from Pakistan, and it is sufficient under international law that United States armed forces *stationed abroad* (e.g., in Afghanistan) are the objects of armed attacks. We do not have sufficient facts to know, however, whether U.S. drone strikes are in defense of such armed attacks, or whether the other requirements of Article 51—such as necessity and proportionality—are met.

²³ See Legal Analysis, Part I.E, *infra*.

²⁴ See Legal Analysis, Part I.F, *infra*.

Fifth, the killing of Osama bin Laden in Pakistan was consistent with *ius ad bellum* principles. In his role as the operational leader of al-Qaeda, bin Laden was continuously planning armed attacks on the U.S. and on U.S. forces abroad, particularly across the border from Pakistan into Afghanistan. Infringement of Pakistani sovereignty was necessary because of the continuing danger and the U.S.’s justifiable skepticism of Pakistan’s willingness or ability to remove the threat.

Sixth, the use of force worldwide against organizations that are not al-Qaeda core—including any alleged “affiliates” of al-Qaeda—cannot be justified as an *ius ad bellum* matter by the attacks of September 11 alone. We do not interpret the U.S. to be taking that position, but rather to be claiming the right to use force based either on consent or on *current* threats from al-Qaeda and associated forces.

Seventh, if Pakistan currently denies consent to U.S. drone strikes, as it has stated publicly, the U.S. has a duty to report to the Security Council on its invocation of Article 51 with respect to those strikes.²⁵ Consistent with its prior practice, the U.S. should disclose the armed attack(s) giving rise to the right to act in self-defense and the measures that the U.S. is taking in the exercise of that right.²⁶ It does not appear that the U.S. has met its disclosure obligations under Article 51 with respect to Pakistan.

B. The Existence of an Armed Conflict²⁷

The existence of an armed conflict determines whether *ius in bello* or

²⁵ To the extent that other States have consented to the use of force by the U.S., disclosure to the Security Council is not required. If, however, the U.S. initiates drone strikes in other States’ territory without their consent, the U.S. also should disclose to the Security Council its invocation of the right of self-defense with respect to those strikes.

²⁶ See Legal Analysis, Part I.G, *infra*.

²⁷ Are the drone strikes taking place in the context of an armed conflict? See Legal Analysis, Part II, *infra*.

IHRL supplies the rules for determining whether a targeted killing is lawful.

Except in extreme circumstances, a targeted killing outside of an armed conflict is almost certain to be contrary to IHRL, which guarantees to each individual the right to life. Under IHRL, an extrajudicial killing outside the context of an armed conflict is legal only if it is “proportionate”, meaning that the killing is required to protect life; and “necessary”, meaning that there are no means short of lethal force to prevent the threat to life. It is generally accepted that a targeted killing could not meet those requirements except in very rare (and perhaps only theoretical) circumstances in which it is the only means of preventing an imminent threat to life.²⁸

Analysis of the legality of a targeted killing must therefore start with the question of whether it was undertaken in the context of an armed conflict.

Whether an armed conflict exists depends on (a) whether the violence is of sufficient “intensity” to be considered an armed conflict rather than an internal disturbance or an isolated act of violence; and (b) whether the belligerents are sufficiently organized to be identified as “parties” to an armed conflict. The evaluation of each of these criteria is a factual question driven by local circumstance.

This analysis is complicated by the rhetoric for and against the existence of a “global” armed conflict with a cohesive “al-Qaeda”. The Bush administration declared a “war on terror”, with a claimed right to strike terrorist organizations anywhere.²⁹ Although the Obama administration has abandoned the “war on terror”

²⁸ See Legal Analysis, Part II.A, *infra*. We interpret the U.S. position to be that the targeted killings are taking place within armed conflicts, not that they are carried out legitimately outside armed conflicts. See Factual Background, Part II.B, *infra*.

²⁹ On September 20, 2001, President Bush, in addressing a Joint Session of Congress, described the September 11 attacks as an “act of war” and declared that the United States was “at war with terrorism”:

“Our war on terror begins with al Qaeda, but it does not end there. It will not

terminology, it too claims to be in a global armed conflict against al-Qaeda and “associated forces”. On the other hand, critics claim that al-Qaeda is no longer a cohesive organization, and therefore poses little, if any, threat to the U.S., and that the U.S. in fact is attacking members of diffuse organizations having little or no connection to the organization that plotted and carried out the September 11 attacks.

Resolution of this debate would not be easy. Based on the publicly-available information, there has been an “armed conflict” between the U.S. and al-Qaeda at least from September 11, 2001 (and the ensuing military operations in Afghanistan), but whether this armed conflict involves a global conflict with “al Qaeda and associated forces” does not turn on whether there is now a unified organization—which there does not seem to be despite the use of the al-Qaeda name by several groups—but on whether the groups fighting the United States and its allies should be viewed as a combined group by analogy to the law on co-belligerency.³⁰

We do not seek to resolve this debate. Indeed, we believe the debate should shift from whether there is a global armed conflict against a combined group to whether the U.S. is a party to *domestic* armed conflicts in different States, albeit against possibly different parties. Regardless of the existence of some “global” transnational

end until every terrorist group of global reach has been found, stopped and defeated.” President George W. Bush, Address to the Joint Session of 107th Congress (Sept. 20, 2001) (transcript available at <http://edition.cnn.com/2004US/091201.gen.bush.transcript>).

The Bush administration did not invoke the “war on terror” to justify its conduct as a matter of international law. Quite the reverse. The Bush Administration used this rhetoric to justify invoking inherent war powers to support its refusal to apply the 1949 Geneva Conventions to Al-Qaeda members.

³⁰ Co-belligerency is a principle of the law of neutrality, which applies in the context of international armed conflicts, and it is unsettled whether it extends to non-international armed conflicts. Although the law is unsettled, we note that there is some support in the facts and law for the existence of a transnational armed conflict between the United States and forces declaring allegiance to al-Qaeda. *See* Legal Analysis, Part II.C.1(b), *infra*.

conflict, there are now hostilities in Afghanistan (with a spill-over into Pakistan), Iraq, Yemen, Somalia, Mali and Libya—the countries where drone strikes have or may have taken place—between the Government of the State, supported by the U.S., and an organization or organizations dedicated to the overthrow of the Government. The determination of whether the hostilities in those States rise to the level of “armed conflict” must be made on a State-by-State basis, examining whether the violence is of sufficient “intensity” and whether the individual non-State organizations in those countries have the structure required to qualify as “parties” to an armed conflict.³¹

Although the existence of a single transnational conflict is controversial, it is generally accepted that there are and have been discrete armed conflicts in at least some of the States in which drone strikes have been carried out, at least during some periods of time. For example, U.N. Special Rapporteur Ben Emmerson has concluded that the “overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict”.³² Similarly, Amnesty International and Human Rights Watch have acknowledged the existence of armed conflicts in Pakistan and Yemen.³³

³¹ See Legal Analysis, Part II.C.2, *infra*.

³² Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 59, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

³³ See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 48 (2013) (concluding that the U.S. has participated “in a number of specific armed conflicts . . . on the territory of several states” and that [t]he conflict in Afghanistan might also extend to some of the drone strikes the USA carries out in parts of Pakistan’s Tribal Areas”); HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 7, 84 (2003) (concluding that there is an armed conflict between the government of Yemen and AQAP).

C. *Ius in Bello: International Humanitarian Law*³⁴

Whether the criteria of IHL are met requires a factual assessment concerning each strike, a task that is beyond the scope of this Report. Instead we lay out the general principles flowing from the requirements of distinction, necessity and proportionality that constitute the principles of *ius in bello*.

First, in the context of an armed conflict against a non-State actor, we follow the ICRC Guidance that the principle of distinction permits the United States to target and kill a member of the non-State actor’s “armed forces”, *i.e.*, a member of the armed group who performs a “continuous combat function”. We reject the view that non-international armed conflict involves only *civilians* who may be targeted only if and for such time as they “directly participate in hostilities”. Although there is no term “combatant” in the Geneva Conventions on non-international armed conflict, that does not mean that non-State armed groups who disguise themselves among the civilian population until the opportunity arises to launch an attack may achieve greater protection than State armed forces who wear uniforms and otherwise comply with the laws of war.³⁵ Rather, such persons who perform a “continuous combat function” may be targeted and killed for so long as they perform that function within the armed group.

Accordingly, the principle of *distinction* permits the United States to target and kill either a member of an armed group who is performing a “continuous combat

³⁴ What are the constraints imposed on the use of deadly force within an armed conflict? *See* Legal Analysis, Part III, *infra*.

³⁵ *See* Legal Analysis, Part III.A., *infra*.

function” or a member of an armed group, even if he does not perform a continuous combat function, if he is directly participating in hostilities.³⁶ In particular:

- (a) The determination of whether an individual has a continuous combat function within a non-State group or is directly participating in hostilities must be made in good faith based upon the information reasonably available, with a presumption of civilian status in cases of uncertainty. Mistaken killings do not necessarily indicate a violation of international law;
- (b) Although there is a fierce public debate over whether the United States is, in fact, targeting only individuals who have a continuous combat function or are participating directly in hostilities, resolution of that debate involves factual issues beyond the scope of this Report; and
- (c) The public debate over “kill lists” and “signature strikes” largely misses the point. The legality (or illegality) of drone strikes in an armed conflict depends on the principle of distinction described above, not on any blanket prohibition of particular nomenclatures. Thus, in an armed conflict, premeditated killing (whether or not from a kill list) is legal so long as it is directed at a legitimate target and otherwise complies with IHL. Likewise, the lawfulness of “signature strikes” depends upon whether or not the “signature” is adequate to comply with the principles of distinction and precaution. We discuss those principles further below.

Second, since the principle of *necessity*, which prohibits unnecessary destruction, does not require armed forces to take additional risk in order to capture rather than kill, it is likely not to have an impact on the analysis of the legality of a particular

³⁶ See Legal Analysis, Parts III.A.2, 3, *infra*.

As described below, the ICRC Guidance does not resolve all the issues definitively. For example, some scholars, asserting that the Guidance does not address the realities of non-international armed conflicts, argue that membership in a non-State armed group should go beyond the ICRC definition of “continuous combat function” and there is also an intense dispute over the so-called “revolving door” of civilian protection.

drone strike.³⁷

Third, there are insufficient facts to reach a conclusion on the principle of *proportionality*, which balances the projected collateral damage against the perceived military advantage. Given the nearly total lack of facts about the projected collateral damage or the perceived military advantage, it is not surprising that we do not reach a conclusion on this principle. Indeed, we observe that the public debate on the principle has been largely about each individual author's policy preferences rather than international law.³⁸

Fourth, beyond the disclosures required by Article 51, which concern the invocation of the right of self-defense in the *ius ad bellum* context, the United States is not required to make further disclosures on targeted killings under international law, no matter how desirable such disclosures might be as a matter of policy or ethics.³⁹ We note that disclosures to the Security Council, which we conclude are required under Article 51, might go some way to satisfying calls for greater transparency.

³⁷ See Legal Analysis, Part III.B., *infra*. In the *ius in bello* section, we address only the IHL principles of necessity and proportionality. Principles with the same names exist in *ius ad bellum* and IHRL, but they are distinct doctrines with their own requirements.

³⁸ See Legal Analysis, Part III.C, *infra*.

³⁹ See Legal Analysis, Part III.D, *infra*. On October 11, 2011, the President of the Association of the Bar of the City of New York sent a letter to the Attorney General of the United States requesting “information and clarification on the position of the United States Government on the law governing targeted killings”. See Letter from Samuel Seymour, President of the New York City Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011), *available at* http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceLetterreLawofTargettedKillings.pdf. Although the primary focus of this letter was the legal reasoning under the U.S. Constitution to justify the “decision to kill an American citizen”, a topic not addressed in this Report, the letter addressed disclosure more broadly as well. We discuss the policy arguments raised by this letter in Appendix D, *infra*.

FACTUAL BACKGROUND

I. ARMED CONFLICTS

In the years since the attacks of September 11, 2001, the U.S. has developed a program of using unmanned aircrafts, colloquially called “drones”,⁴⁰ to kill individuals overseas. Although the program was initially kept secret, the U.S. Government has acknowledged in recent years that it uses drones to target members of al-Qaeda and “associated forces”.⁴¹ The U.S. Government claims the right to do so even outside of an “active battlefield”.⁴² Outside of the active battlefields of Afghanistan and Iraq, the U.S. is reported to have used drones to engage in targeted killings in Pakistan, Yemen⁴³ and Somalia, and drones are also rumored to have been used for targeted killings in North Africa, including in Libya and Mali.⁴⁴ Reports vary on the number of casualties caused by drone strikes, but it is thought to be in the thousands.⁴⁵ The reported

⁴⁰ These remotely piloted unmanned aircraft are also referred to as remotely piloted aircraft or unmanned aerial vehicles.

⁴¹ See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (“Yes, in full accordance with the law . . . the United States Government conducts targeted strikes against specific al-Qaeda terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.”) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

⁴² See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>). As discussed below, the U.S. contends that *all* drone strikes against al-Qaeda or associated forces are carried out as part of a non-international armed conflict against such parties, even if they take place outside an “active battlefield”. See Factual Background, *infra*, Part II.B.

⁴³ The first U.S. drone strike outside of the battlefield in Afghanistan is reported to have occurred in Yemen in 2002. See Sources: *U.S. Kills Cole Suspect*, CNN (Nov. 5, 2002), <http://edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast>.

⁴⁴ See Michael J. Boyle, *The costs and consequences of drone warfare*, 89 INT’L AFFAIRS 1, 2 n.10 (2013); *The Defense Secretary: Leon Panetta*, CBS NEWS (June 10, 2012), http://www.cbsnews.com/8301-18560_162-57448437/the-defense-secretary-leon-panetta/; David S. Cloud, *U.S.: Defense Secretary Refers to CIA Drone Use*, L.A. TIMES, Oct. 7, 2011, http://latimesblogs.latimes.com/world_now/2011/10/us-pakistan-yemen-cia-drones.html.

⁴⁵ The facts set forth in this section are drawn from public sources. We accept them as true for purposes of the analysis in this Report. In particular, we have looked to data from NAF and BIJ for statistics on the number of fatalities caused by drone strikes. Their numbers vary considerably. A recent

number of “civilian” casualties has also varied—according to the NAF, approximately 10% of those killed by drones from 2002 to 2014 were “civilians”,⁴⁶ whereas BIJ reports a “civilian” death toll of between 14% and 23% in Pakistan, Yemen, and Somalia combined.⁴⁷

We discuss first the conflict in Afghanistan (and Pakistan) and then the other regional conflicts.

A. The Conflict in Afghanistan (and Pakistan)

1. Al-Qaeda Before September 11, 2001

Al-Qaeda began as part of the resistance to the Soviet occupation of Afghanistan from 1979 to 1989.⁴⁸ In 1984, Osama bin Laden established a network of offices in the Middle East, Europe and the United States aimed at recruiting and fundraising for the resistance.⁴⁹ When the Soviet Union withdrew from Afghanistan, bin Laden shifted his focus to resisting western influences and combating secular, pro-western leaders, including in Egypt and Saudi Arabia.⁵⁰

Columbia Law School study concluded that BIJ estimates were most consistent with its own findings (see *Counting Drone Strike Deaths*, Columbia Law School Human Rights Clinic (2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/ColumbiaCountingDronesFinalNotEmbargo.pdf>), while a recently-published analysis in the Chatham House journal *International Affairs* deemed BIJ “more circumspect about calling the victims of drone strikes ‘militants’”. Michael J. Boyle, *The costs and consequences of drone warfare*, 89 INT’L AFFAIRS 1, 5-6 (2013).

⁴⁶ *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>.

⁴⁷ *Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>.

⁴⁸ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

⁴⁹ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011); see also John Roth et al., Staff Report to the Commission, *Monograph on Terrorist Financing*, National Commission on Terrorist Attacks Upon the United States 88 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf.

⁵⁰ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

Beginning in the early 1990s, al-Qaeda launched a series of deadly attacks on U.S. and western targets, including:⁵¹

- On December 29, 1992, al-Qaeda bombed a hotel in Yemen, killing two Austrian tourists, in an apparent attempt to kill U.S. servicemen on the way to Somalia.⁵²
- On February 26, 1993, al-Qaeda operations detonated a bomb in the underground garage of the World Trade Center in New York, killing six people and injuring over a thousand.⁵³
- In October 1993, Somalis reportedly trained by al-Qaeda shot down two U.S. Special Forces helicopters in Mogadishu, resulting in the death of 18 Americans and the withdrawal of U.S. troops from Somalia.⁵⁴
- On June 25, 1996, a truck bomb was set off at the Khobar Towers complex in Saudi Arabia, killing 19 Americans and wounding 400 people. Osama bin Laden is believed to have been behind the attack.⁵⁵
- On August 8, 1998, al-Qaeda suicide bombers detonated truck bombs at the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The blasts killed over 240 people, including 12 Americans.⁵⁶

⁵¹ See generally Robert Windrem, *Al-Qaida timeline: Plots and attacks*, NBC NEWS, http://www.nbcnews.com/id/4677978/ns/world_news-hunt_for_al_qaida/t/al-qaida-timeline-plots-attacks/.

⁵² See *Foreign Tourist Killed*, BLOOMBERG NEWS, Dec. 30, 1992; *Austrian Killed in Aden Bomb Blast*, BLOOMBERG NEWS, Dec. 30, 1992; *Timeline: Al Qaeda's Global Context*, PBS (2004), <http://www.pbs.org/wgbh/pages/frontline/shows/knew/etc/cron.html>.

⁵³ See Robert McFadden, *Explosion at the Twin Towers: The Overview; Blast Hits Trade Center, Bomb Suspected; 5 Killed, Thousands Flee Smoke in Towers*, N.Y. TIMES, Feb. 27, 1993, <http://www.nytimes.com/learning/general/onthisday/big/0226.html>; Malcolm Gladwell, *At Least 5 Die, 500 Hurt as Explosion Rips Garage Under World Trade Center*, WASH. POST, Feb. 27, 1993, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/09/AR2007080900867.html>.

⁵⁴ See John Broder & Art Pine, *Clinton to Send 2,000 More GIs to Somalia*, L.A. TIMES, Oct. 7, 1993, http://articles.latimes.com/1993-10-07/news/mn-43269_1_senior-administration-official; Keith B. Richburg, *Somalia Battle Killed 12 Americans, Wounded 78*, WASH. POST, Oct. 7, 1993, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001784.html>; Nat'l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

⁵⁵ See Alan Sipress, *Attack Shakes U.S. and Saudi Royals*, PHILA. INQUIRER, June 27, 1996, articles.philly.com/1996-06-27/news/25628128_1-saudi-arabia-saudi-defense-minister-mecca-and-medina; Douglas Jehl, *Bombing in Saudi Arabia: The Overview; Saudis, Aided by the F.B.I., Seek Blast Clues*, N.Y. TIMES, June 27, 1996, <http://www.nytimes.com/1996/06/27/world/bombing-in-saudi-arabia-the-overview-saudis-aided-by-the-fbi-see-blast-clues.html>; Robert Windrem, *Al-Qaida timeline: Plots and attacks*, NBC NEWS (2005), http://www.nbcnews.com/id/4677978/ns/world_news-hunt_for_al_qaida/t/al-qaida-timeline-plots-attacks.

⁵⁶ See Michael Grunwald & Vernon Loeb, *U.S. Is Unraveling Bin Laden Network; End of Terrorists'*

- On October 12, 2000, a boat driven by al-Qaeda operatives detonated a bomb near the USS Cole in the port of Aden in Yemen, resulting in the death of 17 American sailors.⁵⁷

Al-Qaeda distinguished itself from other terrorist groups by establishing an organizational structure. The CSIS has observed that “al Qaeda had a constitution and by-laws, a leadership council, and committees dedicated to military affairs, politics, information, administration, security, and surveillance”.⁵⁸ Some analysts describe the group as similar to a corporation, in which members were expected to report to their superiors and even received performance reviews.⁵⁹ One scholar notes that:

“Al Qaeda has a hierarchical command structure. A former al Qaeda analyst for the CIA recently described al Qaeda as a group with ‘bylaws, committee structures, [and] rules for succession.’ The group’s governance structure also includes regional commanders who operate in accordance with the ‘Annual Plan’ adopted at the ‘command council,’ where Osama bin Laden and Ayman al-Zawahiri casted ‘the deciding vote[s].’ In addition, al Qaeda has multiple tiers of management, and mid-level officers sometimes move up to replace senior leaders who die in combat.”⁶⁰

Al Qaeda sometimes “behaves like a political entity”—“[b]efore the fall of the Afghan

Thread Is Unknown, WASH. POST, Sept. 20, 1998; Karl Vick, *149 Confirmed Dead in Embassy Blasts*, WASH. POST, Aug. 9, 1998, <http://www.washingtonpost.com/wp-srv/inatl/longterm/eafricabombing/stories/main080998.htm>.

⁵⁷ See John F. Burns, *The Warship Explosion: The Overview; Elite U.S. Team Investigates Ship Attack*, N.Y. TIMES, Oct. 15, 2000, <http://www.nytimes.com/2000/10/15/world/the-warship-explosion-the-overview-elite-us-team-investigates-ship-attack.html>; Roberto Suro & Thomas Ricks, *Israel Strikes Palestinian Sites; Blast in Yemen Kills U.S. Sailors: Terrorism Suspected in Harbor Explosion*, WASH. POST, Oct. 13, 2000.

⁵⁸ Rick Nelson, Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf (citing LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11* 162-63 (2007)).

⁵⁹ Adam Martin, *The Corporate Shortcomings of Al Qaeda’s Most Difficult Employee*, N.Y. MAG. (May 29, 2013), <http://nymag.com/daily/intelligencer/2013/05/shortcomings-of-al-qaedas-worst-employee.html>; see also John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011) (“Some analysts describe pre-9/11 Al Qaeda as akin to a corporation, with Osama Bin Laden acting as an agile Chief Executive Officer issuing orders and soliciting ideas from subordinates.”).

⁶⁰ Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 743-44 (2011).

Taliban, cooperation between al Qaeda and that government was readily apparent”, and “many of the group’s stated goals, including the replacement of certain secular governments with religious leadership, are political”.⁶¹

2. September 11, 2001 and the Invasion of Afghanistan

On September 11, 2001, 19 al-Qaeda members hijacked four transcontinental flights bound for Los Angeles and crashed the planes into the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and a field in Shanksville, Pennsylvania, killing 2,977 people.⁶² The “nation suffered the largest loss of life. . . on its soil as a result of a hostile attack in its history”.⁶³ Osama bin Laden was quickly identified as the orchestrator of the attacks, and he later took credit in a video statement released on October 29, 2004.⁶⁴

On September 20, 2001, the U.S. issued an ultimatum to the Taliban, the *de facto* Government of Afghanistan, to “[d]eliver to United States Authorities all the leaders of al Qaeda” residing in Afghanistan, and “[c]lose immediately and permanently every terrorist training camp”.⁶⁵ On September 21, the Taliban rejected the ultimatum.⁶⁶

On October 7, 2001, the U.S. and its allies began a bombing campaign that

⁶¹ Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 744 (2011).

⁶² Nat’l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>. The attacks are believed to have been the culmination of a plan begun by Khalid Sheikh Mohammed in 1996. *Id.* at 253.

⁶³ Nat’l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 311 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

⁶⁴ *Full transcript of bin Ladin’s speech*, AL JAZEERA (Nov. 1, 2004), <http://www.aljazeera.com/archive/2004/11/200849163336457223.html>.

⁶⁵ President George W. Bush, Address to the Joint Session of 107th Congress (Sept. 20, 2001) (transcript available at <http://edition.cnn.com/2004US/091201.gen.bush.transcript>).

⁶⁶ See Norman Kempster & Tyler Marshall, *Taliban Rejects Bush Ultimatum*, L.A. TIMES, Sept. 22, 2001, <http://articles.latimes.com/2001/sep/22/news/mn-48537>.

ultimately led to an invasion and a protracted effort to defeat al-Qaeda and the Taliban regime.⁶⁷ The same day, the U.S. formally notified the UN Security Council that it was exercising its right to individual and collective self-defense in taking action “designed to prevent and deter further attacks on the United States”, including “measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”.⁶⁸

3. Al-Qaeda’s Migration to Pakistan

As a result of the U.S.-led military operation, many al-Qaeda members were captured or killed.⁶⁹ On May 2, 2011, a team of U.S. Navy SEALs killed Osama bin Laden inside his compound in Abbottabad, Pakistan.⁷⁰

Shortly after the U.S. invaded Afghanistan in 2001, then-prime minister Hamid Karzai pledged support for U.S. efforts to capture or kill members of al-Qaeda and the Taliban.⁷¹ The Afghan Government continues to seek U.S. assistance dealing

⁶⁷ See Patrick Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns ‘Taliban Will Pay a Price’*, N.Y. TIMES, Oct. 8, 2001, <http://www.nytimes.com/2001/10/08/world/nation-challenged-attack-us-britain-strike-afghanistan-aiming-bases-terrorist.html>; Nat’l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report 337-38* (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>; *The War in Afghanistan: A Timeline*, CBS NEWS (Dec. 1, 2009), http://www.cbsnews.com/2100-501704_162-5850224.html.

⁶⁸ See Letter of John Negroponte, The Representative of the United States of America to the United Nations, to the President of the Security Council (Oct. 7, 2001), available at http://avalon.law.yale.edu/sept11/un_006.asp.

⁶⁹ According to one study, “nearly 80 percent of the group’s fighters in Afghanistan were killed within the first two months of the campaign”. Rick Nelson, Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf. (citing Lawrence Wright, *The Master Plan*, NEW YORKER, Sept. 11, 2006, http://www.newyorker.com/archive/2006/09/11/06091fa_fact3).

⁷⁰ See President Barack Obama, Remarks on Osama bin Laden (May 2, 2011) (transcript available at <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead>).

⁷¹ John Pomfret, *Karzai to Bush: Stand with us*, STAR-LEDGER, Dec. 11, 2001. In an interview with a Washington Post reporter, Karzai said of Osama bin Laden and the al-Qaeda network, “[w]e must finish them all, completely burn them out”. *Id.*

with threats from armed groups. Although we are unaware whether Afghanistan has specifically sought drone strikes, President Karzai has asked the U.S. to provide drones for Afghan security forces to use for surveillance purposes.⁷² In late November 2013, however, President Karzai declared that he would not sign a proposed security agreement with the United States until the U.S. suspended all strikes that resulted in civilian casualties, stating, “[i]f America wants to conclude a security agreement with us, America needs to respect the security of Afghan homes”.⁷³

The Taliban and al-Qaeda are trying to regain the territory that they lost as a result of the invasion.⁷⁴ The Taliban has claimed responsibility for a number of attacks on U.S. and Afghan military personnel in the past year, including a series of bombings on August 28, 2013, which killed at least 26 people, many of whom were Afghan soldiers,⁷⁵ and a September 13, 2013 attack on the U.S. consulate in Herat that killed at least three people.⁷⁶ Al Qaeda reportedly is operating “training camps in the remote [Afghan] provinces of Kunar and Nuristan” for the purpose of training militants to carry out attacks in Afghanistan and Pakistan.⁷⁷

⁷² Emma Graham-Harrison, *Hamid Karzai: Afghans will decide on scale of US post-2014 presence*, GUARDIAN (Jan. 14, 2013), <http://www.theguardian.com/world/2013/jan/14/hamid-karzai-afghanistan-washington-2014>.

⁷³ Rod Nordland, *Afghan Leader Lashes Out at U.S. Allies After NATO Drone Strike*, N.Y. TIMES, Nov. 28, 2013, <http://www.nytimes.com/2013/11/29/world/asia/afghan-leader-lashes-out-at-us-allies-after-nato-drone-strike.html>.

⁷⁴ *Two bomb attacks kill 10 Afghans*, BOSTON GLOBE (Jan. 27, 2014), <http://www.bostonglobe.com/news/world/2014/01/27/roadside-bomb-kills-afghan-civilians/EQZNsQIMx9l49cNZkaByZO/story.html>; Joe Sterling & Pam Benson, *Intelligence report cites strides, threats*, CNN (Jan. 31, 2012), <http://www.cnn.com/2012/01/31/us/threat-assessment/index.html>.

⁷⁵ *Bombing in Afghanistan kills six*, AL JAZEERA AMERICA (Aug. 28, 2013), <http://america.aljazeera.com/articles/2013/8/28/bombing-in-afghanistankillssix.html>.

⁷⁶ Elise Labott and Masoud Popalzai, *US consulate in Herat, Afghanistan, attacked; 3 reported dead*, CNN (Sept. 13, 2011), <http://www.cnn.com/2013/09/13/world/asia/us-consulate-afghanistan-attack/index.html>.

⁷⁷ Bill Roggio, *3 al Qaeda military “training experts” killed in US drone strike in Pakistan*, LONG

As allied forces killed and captured al-Qaeda and Taliban forces in Afghanistan, many of their members retreated to the mountainous tribal region along the border between Afghanistan and Pakistan, and are now using these areas as training grounds to carry out attacks against American and Afghan forces across the border in Afghanistan.⁷⁸ They conduct attacks in collaboration with other like-minded groups, such as TTP, which holds a stronghold in the northwest region of Pakistan.⁷⁹ Although TTP is distinct from the Afghan Taliban, the groups share an ideology and reportedly work in concert to plot attacks on “Pakistani cities, across the border into Afghanistan, and on targets in Western Europe and the United States”.⁸⁰ TTP itself has targeted American personnel, including the December 30, 2009 attack on a CIA base in Khost, Afghanistan, which killed seven Americans, as well as an April 2010 attack on the U.S. consulate in Peshawar.⁸¹ TTP also reportedly helped facilitate the May 1, 2010 attempted

WAR JOURNAL (July 31, 2013), http://longwarjournal.org/archives/2013/07/3_al_qaeda_military.php.

⁷⁸ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf; see also Bill Roggio, *3 al Qaeda military “training experts” killed in US drone strike in Pakistan*, LONG WAR JOURNAL (July 31, 2013), http://longwarjournal.org/archives/2013/07/3_al_qaeda_military.php; Joe Sterling & Pam Benson, *Intelligence report cites strides, threats*, CNN (Jan. 31, 2012), <http://www.cnn.com/2012/01/31/us/threat-assessment/index.html>; Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Bomb Plot*, N.Y. TIMES (May 5, 2010), <http://www.nytimes.com/2010/05/06/nyregion/06bomb.html>.

⁷⁹ Amnesty International has described “[t]hree main armed group networks [that] operate in North Waziristan”, which “operate with impunity” in an area “not effectively governed by the Pakistan state”. See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 14, 26, 33 (2013); see also Ben Brumfield, *Who are the Pakistani Taliban?*, CNN (Oct. 17, 2012), <http://www.cnn.com/2012/10/17/world/asia/pakistan-taliban-profile/>; Greg Bruno and Jayshree Bajoria, *Shared Goals for Pakistan’s Militants*, CFR (May 6, 2010), <http://www.cfr.org/pakistan/shared-goals-pakistans-militants/p22064>.

⁸⁰ Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Bomb Plot*, N.Y. TIMES, May 5, 2010, <http://www.nytimes.com/2010/05/06/nyregion/06bomb.html>; see also Greg Bruno and Jayshree Bajoria, *Shared Goals for Pakistan’s Militants*, CFR (May 6, 2010), <http://www.cfr.org/pakistan/shared-goals-pakistans-militants/p22064> (quoting U.S. General David Petraeus’s observation that “[t]here is clearly a symbiotic relationship between all of these different organizations; al-Qaeda, the Pakistani Taliban, the Afghan Taliban”).

⁸¹ Charlie Savage, *U.S. Adds Legal Pressure on Pakistani Taliban*, N.Y. TIMES, Sept. 1, 2010, <http://www.nytimes.com/2010/09/02/world/asia/02talib.html>.

bombing in New York City's Times Square,⁸² and has attacked NATO forces.⁸³

Some analysts believe that, today, the al-Qaeda group residing along the Pakistani-Afghani border constitutes more of an ideological influence than a genuine direct threat to the United States. Brian Jenkins of the RAND Corporation, for example, has opined that the core of al-Qaeda essentially has been defeated:

“The architects of 9/11 have been captured or killed. Al Qaeda's founder and titular leader is dead. Its remaining leadership has been decimated. The group's wanton slaughter of Muslims has alienated much of its potential constituency. Cooperation among security services and law enforcement organizations world-wide has made its operating environment more hostile. Al Qaeda has not been able to carry out a significant terrorist operation in the West since 2005, although, as demonstrated on the tenth anniversary of 9/11, it is still capable of mounting plausible, worrisome threats.”⁸⁴

Moreover, in a May 2013 speech on counterterrorism, President Obama asserted that “[t]oday, the core of al-Qaeda in Afghanistan and Pakistan is on a path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us.”⁸⁵ CIA Director John Brennan had previously painted a similar picture:

“Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal

⁸² Kathleen Hennessey, *N.Y. Bomber has al Qaeda tie, White House says*, L.A. TIMES (May 10, 2010), <http://www.sfgate.com/news/article/N-Y-bomber-has-al-Qaeda-tie-White-House-says-3264841.php>. Hakimullah Mehsud, the late leader of TTP, declared his intentions to attack U.S. targets in a 2010 audio message stating, “[f]rom now on the main targets of our fedayeen (fighters) are American cities”. Ben Brumfield, *Who are the Pakistani Taliban?*, CNN (Oct. 17, 2012), <http://www.cnn.com/2012/10/17/world/asia/pakistan-taliban-profile/>.

⁸³ *See Taliban claim Nato tanker attack*, AL JAZEERA (Oct. 4, 2010), <http://www.aljazeera.com/news/asia/2010/10/201010413141352242.html> (quoting TTP spokesperson as stating that the group “will continue such attacks all over the country to avenge drone attacks and attacks by foreign forces inside Pakistani territory”).

⁸⁴ *Al Qaeda After Bin Laden: Hearing Before the House Armed Services Committee, Subcommittee on Emerging Threats and Capabilities*, 112th Cong. (2011) (testimony of Brian Michael Jenkins of RAND Corporation).

⁸⁵ *See* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some new members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly.”⁸⁶

More recently, President Obama explained that “today’s principal threat no longer comes from a centralized al Qaeda leadership”.⁸⁷

4. Drone Strikes In Pakistan

The largest number of reported drone strikes has been in Pakistan.

According to Amnesty International:

“A number of US drone strikes appear to have been carried out in response to alleged plots linked to groups present in North Waziristan. . . .

“Missiles fired from US drone aircraft have reportedly inflicted significant losses on the Taliban and other armed groups operating in northwest Pakistan.”⁸⁸

BIJ counted 383 attacks, from June 2004 to March 2014, mostly in northwest border areas closest to Afghanistan, and estimated between 2,296 and 3,718 fatalities, of which between 416 and 957 were “civilians”, including 168-202 children.⁸⁹

⁸⁶ John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

⁸⁷ President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

⁸⁸ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 12 (2013).

⁸⁹ *Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>.

The NAF estimates 2,080-3,428 killed through March 2014. See *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>. According to NAF, 1,623-2,787 of the people killed by drones (2,080-3,428) were considered “militants”, 258-307 were considered “civilians”, and the rest were of undetermined status. See *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>.

Recent reports by Amnesty International and UN Special Rapporteur Ben Emmerson have produced

Pakistan initially consented to U.S. drone strikes.⁹⁰ In a statement in April 2013, former President Pervez Musharraf admitted that his administration had a secret pact with the United States to allow drone strikes on Pakistani soil.⁹¹ Indeed, cables released by WikiLeaks indicate that both Pakistani General Ashfaq Parvez Kayani and Pakistani Prime Minister Yousaf Raza Gilani consented to such strikes, even while publicly speaking out against them.⁹² In recent public statements, Pakistan has denounced all U.S. drone strikes, declaring that they are a breach of its sovereignty.⁹³ In his inaugural address, the new Pakistani Prime Minister, Nawaz Sharif, “called for an immediate end to US drone strikes”.⁹⁴

additional data. See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 13 (2013); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 32, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson). Emmerson reports that there were 27 reported drone strikes in Pakistan in 2013 and no reports of civilian casualties. See Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, *Civilian impact of remotely piloted aircraft*, ¶ 26, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson).

⁹⁰ According to Emmerson, there is “strong evidence” that strikes between June 2004 and June 2008 were “conducted with the active consent and approval of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior Government figures”. See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 53, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁹¹ See Sib Kaifee, *US drone pact revealed by former Pakistani president*, FOX NEWS (Apr. 13, 2013), <http://www.foxnews.com/world/2013/04/13/us-drone-pact-revealed-by-former-pakistani-president/>.

⁹² *WikiLeaks: Kayani wanted more drone strikes in Pakistan*, THE EXPRESS TRIBUNE (May 20, 2011), <http://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes/> (quoting Prime Minister Gilani as stating “I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it.”). Pakistani officials also claimed publicly that no agreement existed permitting such strikes. Zeeshan Haider, *Pakistan denies accord with U.S. on drone attacks*, REUTERS (Nov. 17, 2008), <http://www.reuters.com/article/2008/11/17/us-pakistan-drones-idUSTRE4AG57V20081117>.

⁹³ Amanda Hodge, *Pakistan allowing CIA to use airbase for drone strikes*, THE AUSTRALIAN (Feb. 19, 2009), <http://www.theaustralian.com.au/news/pakistan-permits-cia-base-for-strikes/story-e6frg6t6-111118893683>.

⁹⁴ *Pakistan summons US ambassador to protest against latest drone killings*, GUARDIAN (June 8, 2013), <http://www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings>. The Pakistani Parliament has in addition passed resolutions objecting to any continuing U.S. drone strikes on Pakistani territory. We are unaware of whether or not in secret correspondence Pakistan nevertheless has authorized

B. Other Potential Armed Conflicts

Even before September 11, 2001, al-Qaeda had a strategy of establishing affiliated cells in different regions.⁹⁵ Moreover, the invasion of Afghanistan resulted in regional “affiliate” groups, some of which also call themselves “al-Qaeda”, playing a more important role in violence with local Governments. For example, some al-Qaeda members who fled Afghanistan are reported to have joined groups operating in Somalia and Yemen.⁹⁶

1. AQAP in Yemen

AQAP’s main goal is to overthrow the Government of Yemen and establish an Islamic State.⁹⁷ AQAP is believed to be under the leadership of Nasser al-Wahishi, Osama bin Laden’s former secretary.⁹⁸ AQAP formally declared allegiance to al-Qaeda in January 2009 in the organization’s online journal “Sada al Malahim” (Echo

U.S. strikes, as it has done sometimes in the past. We do not seek to base any conclusion on that possibility.

⁹⁵ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf. (“According to one analyst, the group’s organizational strategy was to assemble a coalition of regional militant groups and ‘point all the players in one direction (via propaganda, technical assistance, broad strategic direction, and occasional direct guidance)’.”) (*quoting* DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA: FIGHTING SMALL WARS IN THE MIDST OF A BIG ONE 14* (Oxford University Press, 2009)).

For example, al-Qaeda had a relationship with the affiliate group Jemaah Islamiyah (JI) in Southeast Asia beginning in the late 1980s. JI reached an agreement with al-Qaeda “whereby the former ‘would perform necessary casing activities and locate bomb-making materials and other supplies,’ while the latter ‘would underwrite operations, provide bomb-making expertise, and deliver suicide operatives’”. *Id.* (*quoting* Nat’l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report 253* (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> .

⁹⁶ See BRIAN MICHAEL JENKINS, *AL QAEDA IN ITS THIRD DECADE, IRREVERSIBLE DECLINE OR IMMINENT VICTORY?* (RAND Corp. 2012) (“In recent years, American officials indicated that some surviving members of al Qaeda’s core have relocated to Somalia and Yemen. There also have been reports indicating that some of al Qaeda’s leaders in Yemen have moved to Somalia. These reports confirm a degree of connectivity and mobility amongst jihadists in the three countries.”).

⁹⁷ Christopher M. Blanchard, Cong. Research Serv., RL32759, *Al Qaeda: Statements and Evolving Ideology*, (July 9, 2007).

⁹⁸ Scott Nicholas Romaniuk, *Sacred Terror: Global Salafi Jihad and the Future of al Qaeda*, 4 TERRA SEBUS. ACTA MUSEI SABESIENSIS 323, 339 (2012).

of Epics) and was accompanied by an online propaganda video.⁹⁹ Some reports have suggested that AQAP may have received strategic support from al-Qaeda, including signals to launch attacks and guidance on leadership.¹⁰⁰ For example, on August 4, 2013, the U.S. State Department announced the closing of 19 embassies and consulates in the Middle East, reportedly as a result of intercepted communications between al-Qaeda leader Ayman al Zawahiri and AQAP leader Nasser al-Wuhayshi, alluding to an attack that “would likely involve some type of bomb plot”.¹⁰¹

AQAP’s violence includes an October 9, 2010 attack that killed 14 senior officers of the Yemeni counterterrorism unit; a June 25, 2011 suicide bombing that killed at least nine Yemeni soldiers and injured another 21; a February 25, 2012 car bombing that killed 26 Republican Guard troops;¹⁰² and a May 21, 2012 suicide bombing that

⁹⁹ See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011), at 10 (citing Adam Entous, *Pakistan Al Qaeda Aids Yemen Plots*, WALL ST. J., Nov. 4, 2010); *Arabian Peninsula al Qaeda groups merge*, LONG WAR JOURNAL (Jan. 26, 2009), http://www.longwarjournal.org/archives/2009/01/arabian_peninsula_al.php.

¹⁰⁰ See, e.g., Adam Entous, *Pakistan Al Qaeda Aids Yemen Plots*, WALL ST. J., Nov. 4, 2010, <http://online.wsj.com/news/articles/SB10001424052748704805204575594672841436244> (reporting that “Osama bin Laden and other al Qaeda leaders are believed to be providing strategic and philosophical guidance from Pakistan to Yemen-based al Qaeda in the Arabian Peninsula, or AQAP”).

¹⁰¹ See Eric Schmitt & Mark Mazzetti, *Qaeda Leader’s Edict to Yemen Affiliate Is Said to Prompt Alert*, N.Y. TIMES, Aug. 5, 2013, <http://www.nytimes.com/2013/08/06/world/middleeast/qaeda-chiefs-order-to-yemen-affiliate-said-to-prompt-alert.html>; Siobhan Gorman, *Terror Links Spurred Alert – Pakistan, Yemen Al Qaeda Leaders Discussed Plans*, WALL ST. J., Aug. 6, 2013, <http://online.wsj.com/news/articles/SB20001424127887323514404578650333681440310>. *The Wall Street Journal* reported that Zawahiri and Wuhayshi have known each other for decades and share “a close working relationship”. Citing a discussion with Georgetown University professor Bruce Hoffman, the article states:

“The relationship between al Qaeda’s core leadership in Pakistan and its affiliates is a delicate one, in which the leadership in Pakistan rarely exerts authority over affiliates but seeks to encourage them and keep tabs on their activities, Mr. Hoffman said. The message from Mr. Wuhayshi to Mr. Zawahiri, combined with Mr. Wuhayshi’s new role within the larger al Qaeda organization, shows how much the stock of AQAP has risen in such a short time, he said.” Full cite.

¹⁰² Cody Curran et al., *AQAP and Suspected AQAP Attacks in Yemen Tracker 2010, 2011, and 2012*, AEI Critical Threats (May 21, 2012), <http://www.criticalthreats.org/yemen/aqap-and-suspected-aqap-attacks-yemen-tracker-2010>.

killed 96 Yemeni soldiers as they were rehearsing for a parade to mark the 22nd anniversary of Yemen's reunification.¹⁰³ On December 5, 2013, alleged AQAP militants bombed their way into the Yemeni Defense Ministry headquarters and opened fire, killing 52 people "including soldiers, doctors, patients and a number of foreigners".¹⁰⁴

AQAP has attacked the U.S. and other western States in Yemen and abroad. In 2008, AQAP conducted two attacks on the U.S. embassy in Sana'a, leaving 17 people dead.¹⁰⁵ The U.S. embassy was again targeted on December 16, 2010, when an explosive detonated under an armored truck carrying four embassy employees in Sana'a.¹⁰⁶ Moreover, AQAP has "claimed responsibility for at least two major plots directed at the U.S.: the December 25, 2009 attempted bombing of a transatlantic flight bound for Detroit and the October 2010 plan to ship explosives to the United States on cargo planes".¹⁰⁷ AQAP also has launched attacks on British embassy workers¹⁰⁸ and has

¹⁰³ Jamal al-Jabiri, *Yemen, US vow to crush Qaeda after troops massacred*, AFP (May 22, 2012), <http://en.starafrica.com/news/yemen-cancels-army-parade-after-troops-m-233773.html>.

¹⁰⁴ Nasser Arrabyee & Ben Hubbard, *Assault on Yemeni Defense Ministry Compound Kills 52*, N.Y. TIMES Dec. 5, 2013, http://www.nytimes.com/2013/12/06/world/middleeast/yemen-attack.html?_r=0.

The Defense Ministry compound is home to a hospital where much of the violence took place. Following the attack, AQAP released a videotaped apology in which their leader, Qassim al-Raimi, stated "[w]e confess to this mistake and fault. We offer our apologies and condolences to the families of the victims". Yausuf Basil and Catherine E. Shoicer, *Al-Qaeda: We're sorry about Yemen hospital attack*, CNN (Dec. 22, 2013), <http://www.cnn.com/2013/12/22/world/meast/yemen-al-qaeda-apology/index.html>.

¹⁰⁵ See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

¹⁰⁶ See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011); *U.S. Embassy Staff Attacked in Yemen*, FOX NEWS (Dec. 16, 2010), <http://www.foxnews.com/world/2010/12/16/embassy-staff-attacked-yemen/>.

¹⁰⁷ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf.

AQAP also has been responsible for the radicalization of western individuals, including Nidal Hasan, who perpetrated the November 5, 2009 Fort Hood shootings, and Faisal Shahzad, who attempted to detonate a car bomb in Times Square on May 1, 2010. Both men admitted to being influenced by the rhetoric of Anwar al-Awlaki, an American-born AQAP member who was killed by a U.S. drone strike on September 30, 2011. AQAP's efforts to radicalize westerners have been led by Samir Khan, thought to be the author of the group's online English language magazine, as well as (until his death) Al-Awlaki. The magazine, called "Inspire", is meant to encourage westerners to attack their homelands or to move to the

attempted to assassinate members of the Saudi royal family.¹⁰⁹

The Yemeni Government has responded to AQAP with military force. On May 12, 2012, Yemen launched a military offensive against AQAP that reportedly resulted in the death of over 400 AQAP members.¹¹⁰ In June 2013, the Yemeni military launched another assault, “backed by tanks and aircraft”, that reportedly left 70 militants and 40 Yemeni troops dead, according to a Yemeni security official”.¹¹¹

There is evidence that U.S. and Yemeni forces have been working together in those efforts. For example, on August 7, 2013, three U.S. drone strikes were reported east of Yemen’s capital hours after Yemeni security forces announced that they had “foiled an audacious plot by Al Qaeda to seize an important port and kidnap or kill foreign workers there”.¹¹² In a May 2013 speech, President Obama remarked that, in

Arab world to join AQAP, and it includes instructions for making a homemade bomb and suggests US targets that would result in high amounts of civilian casualties. See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011). We take no position on whether efforts to radicalize individuals within the United States constitute “hostilities” that may contribute to the designation of armed conflict.

¹⁰⁸ On April 26, 2010, AQAP made an unsuccessful assassination attempt of British Ambassador Timothy Torlot and, on October 6, 2010, shot British embassy workers in Sana’a, injuring three. See Robert F. Worth, *Suicide Attacker Misses British Ambassador’s Convoy Traveling in Yemeni Capital*, N.Y. TIMES, Apr. 26, 2010, <http://www.nytimes.com/2010/04/27/world/middleeast/27yemen.html>; James Gallagher, *Al Qaeda in the Arabian Peninsula in 2010: The Intensification of the Near War*, AEI: CRITICAL THREATS (Mar. 8, 2011), <http://www.criticalthreats.org/yemen/aqap-2010-intensification-near-war-march-8-2011>.

¹⁰⁹ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011) (“Since their expulsion from the kingdom, they have used their positions within AQAP to strike back against the Saudi royal family, as was vividly illustrated by a failed assassination attempt in August 2009 against Assistant Interior Minister Prince Mohammed bin Nayef bin Abdelaziz Al Saud, the director of the kingdom’s counterterrorism campaign . . .”).

¹¹⁰ *Suicide bomber kills Yemen anti-Qaeda general*, AFP (June 18, 2012), <http://www.google.com/hostednews/afp/article/ALeqM5gh9pzBwpZqjj08byRNmeyI1DKFw?docId=CNG.763de37c7fa31e7e7d0945f48842f043.b41&hl=en>.

¹¹¹ Maria Abi-Habib et al., *Yemen Steps Back From Terror-Plot Claims, Highlighting U.S.’s Challenge*, WALL ST. J., Aug. 7, 2013, <http://online.wsj.com/news/articles/SB10001424127887323838204578654070290876106>.

¹¹² Nasser Arrabyee & Alan Cowell, *Yemen, on Alert for Terrorism, Says it Foiled a Qaeda Plot*, N.Y. TIMES, Aug. 7, 2013, <http://www.nytimes.com/2013/08/08/world/middleeast/yemen-authorities-foil-qaeda>

Yemen, the United States is “supporting security forces that have reclaimed territory from AQAP”,¹¹³ and he noted in a May 2014 speech that the United States has been “training security forces in Yemen who have gone on the offensive against al Qaeda”.¹¹⁴ On December 12, 2013, a U.S. drone strike killed 14 people on their way to a wedding near the town of Radda; although Yemeni officials claimed that “[n]one of the killed was a wanted suspect of the Yemeni government”,¹¹⁵ separate reports assert that the target was a “mid-level al-Qaeda leader” who was injured in the strike.¹¹⁶

BIJ reports that, from November 2002 to November 2013, there were (a) between 67 and 71 “confirmed” drone strikes in Yemen and an additional 92 to 111 “possible” U.S. drone strikes;¹¹⁷ (b) between 295 and 433 dead in the “confirmed” strikes and between 311 and 499 dead in the “possible” strikes; and (c) between 30 and 74 “civilians” killed in the confirmed strikes and between 24 and 44 “civilians” killed in the “possible” strikes.¹¹⁸

plot-reports-say.html.

¹¹³ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

¹¹⁴ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-presidentwest-point-academy-commencement-ceremony>).

¹¹⁵ Hakim Almasari, *Yemen says U.S. drone struck a wedding convoy, killing 14*, CNN (Dec. 13, 2013), <http://www.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding/>.

¹¹⁶ *Yemen drone strike ‘targeted al-Qaeda leader’*, Al Jazeera (Dec. 20, 2013), <http://www.aljazeera.com/news/middleeast/2013/12/yemen-drone-strike-targeted-al-qaeda-leader-20131220192937914455.html>.

¹¹⁷ The NAF study counts 104 total air strikes in Yemen, from 2004 to March 2014, but this number does not distinguish between unmanned drone strikes and manned aircraft attacks. See *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>.

¹¹⁸ *Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>. Some casualty estimates from the “confirmed” attacks run to nearly twice these numbers. See, e.g., Owen Bowcott, *U.S. Drone Strikes in Pakistan ‘Carried Out without Government’s Consent’*, GUARDIAN, Mar. 15, 2013, <http://www.theguardian.com/world/2013/mar/15/us-drone-strikes-pakistan>.

In 2009, President Abed Rabbo Mansour Hadi of Yemen told the Washington Post that he had personally approved every United States drone attack on Yemeni territory.¹¹⁹ Similarly, a defense ministry official stated in 2012 that Yemen's own armed forces have the final word on any U.S. drone strikes in Yemen.¹²⁰ Yemen informed Special Rapporteur Ben Emmerson that the United States "routinely seeks prior consent, on a case-by-case basis" for lethal strikes and that "[w]here consent is withheld, a strike will not go ahead".¹²¹

2. AQI and ISIS in Iraq

AQI developed out of the Sunni insurgency following the U.S.-led invasion of Iraq.¹²² It was established by Abu Musab al-Zarqawi, a man whom Osama bin Laden called "the prince of al-Qaeda in Iraq".¹²³ AQI formally declared allegiance to al-Qaeda in October 2004.¹²⁴ The partnership, announced online by al-Zarqawi,

NAF estimates that through March 2014, there have been 732-942 deaths from all U.S. air strikes in Yemen, of which 78-84 were "civilians". *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>.

¹¹⁹ Greg Miller, *In interview, Yemeni president acknowledges approving U.S. drone strikes*, WASH. POST (Sept. 29, 2009), http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf_story.html, (quoting President Hadi as stating that "[e]very operation, before taking place, they take permission from the president").

¹²⁰ See Tom Finn, *U.S. drone strikes in Yemen cause political strain*, Reuters (May 9, 2012), REUTERS, <http://www.reuters.com/article/2012/05/09/us-yemen-security-idUSBRE8480S320120509>, (quoting Yemeni defense ministry official as stating that "[t]he Yemeni armed forces remain the sole determinant of all military operations within its borders. We have the final word on all proposed air strikes, regardless of U.S. intelligence. No strikes will take place without our prior consent.").

¹²¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 52, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson); accord Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, *Civilian impact of remotely piloted aircraft*, ¶ 29, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson) .

¹²² This Report does not address the legality of the U.S. invasion of Iraq in 2003.

¹²³ Scott Nicholas Romaniuk, *Sacred Terror: Global Salafi Jihad and the Future of al Qaeda*, 4 TERRA SEBUS. ACTA MUSEI SABESIENSIS 323 (2012).

¹²⁴ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in*

reportedly came about after months of deliberations.¹²⁵ According to the official statement, al-Zarqawi considered bin Laden “the best leader for Islam’s armies against all infidels and apostates”.¹²⁶

AQI has attacked U.S. and Iraqi forces in Iraq.¹²⁷ During the U.S. occupation of Iraq, American troops were engaged in continuous battles with AQI. By early 2008, 2,400 AQI members had been killed and 8,800 captured.¹²⁸ Since the withdrawal of U.S. troops in 2011, AQI has continued to attack Iraqi targets. The Council on Foreign Relations has reported that “there were roughly a dozen days in 2012 on which AQI executed multi-city attacks that killed at least twenty-five Iraqis. On at least four of those days, coordinated attacks left more than a hundred Iraqis dead.”¹²⁹ For example, on February 23, 2012, AQI launched a series of coordinated attacks in twelve Iraqi cities, including Baghdad, leaving 55 Iraqis dead, and two weeks later, AQI attacked a group of Iraqi police officers in the city of Haditha, killing “27 officers and

2011, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf. The allegiance was believed to provide further legitimacy and support for al-Zarqawi’s organization, while extending bin Laden’s reach in the Arab world. See Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, ATLANTIC (July 1, 2006), <http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/>.

¹²⁵ Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, THE ATLANTIC (Jul. 1, 2006), http://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/?single_page=true.

¹²⁶ *Al-Zarqawi group vows allegiance to bin Laden*, NBC (Oct. 18, 2004), <http://www.nbcnews.com/id/6268680/>.

¹²⁷ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf. Writing in 2011, the CSIS explained that AQI “seems unable to launch attacks on the U.S. homeland, but because of the large U.S. military presence in Iraq, the group poses a continuing threat to American interests”. *Id.*

¹²⁸ M.J. Kirdar, *Al Qaeda in Iraq*, CSIS (June 2011), http://csis.org/files/publication/110614_Kirdar_AlQaedaIraq_Web.pdf.

¹²⁹ Zachary Laub & Jonathan Masters, *Al-Qaeda in Iraq (a.k.a. Islamic State in Iraq and Greater Syria)*, CFR (July 25, 2013), <http://www.cfr.org/iraq/al-qaeda-iraq-k-islamic-state-iraq-greater-syria/p14811>.

two high-ranking police commanders”.¹³⁰

After the outbreak of civil war in neighboring Syria, violence in Iraq increased, and AQI adopted a new name, the Islamic State of Iraq and Syria (ISIS).¹³¹ ISIS led a deadly campaign of bombings, assaults on Iraqi security forces, and assassination attempts. More than 600 people were killed in Iraq in October 2013, in addition to about 880 in September.¹³² In January 2014, ISIS captured Falluja from government forces.¹³³ In February 2014, ISIS had a falling out with al-Qaeda, and al-Qaeda leaders have disavowed any ties with the group.¹³⁴ Nevertheless, intense hostilities between ISIS and the Iraqi Government continue.¹³⁵

The Iraqi Government continues to request U.S. assistance, including possibly lethal drone attacks, in order to combat ISIS.¹³⁶ In August of 2013, Iraq’s Foreign Minister, Hoshyar Zebari, made a plea to the United States to provide more

¹³⁰ Daniel DePetris, *Al-Qaeda in Iraq’s Strategy for 2012*, FOREIGN POLICY IN FOCUS (Mar. 27, 2012), <http://fpif.org/mediahits/al-qaeda-in-iraqs-strategy-for-2012/>.

¹³¹ See Zachary Laub & Jonathan Masters, *Background: Al-Qaeda in Iraq (a.k.a. Islamic State in Iraq and Greater Syria)*, CFR (Jan. 9, 2014), <http://www.cfr.org/iraq/al-qaeda-iraq-k-islamic-state-iraq-greater-syria/p14811>.

¹³² Ben Van Heuvelen, *Car Bombs Kill Scores in Baghdad, in Sign of Crisis in Iraq*, WASH. POST, Oct. 27, 2013, http://www.washingtonpost.com/world/middle_east/car-bombs-kill-scores-in-baghdad-in-sign-of-crisis-in-iraq/2013/10/27/7ae9c376-3cb3-11e3-b7ba-503fb5822c3e_story.html.

¹³³ See Jim Michaels, *Al-Qaeda militants in Iraq seize Fallujah*, USA TODAY, Jan. 4, 2014, <http://www.usatoday.com/story/news/world/2014/01/04/al-qaeda-iraq-fallujah-ramadi/4317125/>.

¹³⁴ See, e.g., Liz Sly, *Al-Qaeda disavows any ties with radical Islamist ISIS group in Syria, Iraq*, WASH. POST, Feb. 3, 2014, http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html.

¹³⁵ See Loveday Morris, *Iraqi army struggles in battle against Islamist fighters in Anbar province*, WASH. POST, Feb. 25, 2014, http://www.washingtonpost.com/world/middle_east/iraqi-army-struggles-in-battle-against-islamist-fighters-in-anbar-province/2014/02/25/b76792d2-9b00-11e3-8112-52fdf646027b_story.html.

¹³⁶ See, e.g., Lara Jakes, *Iraq seeks help from US amid growing violence*, DENVER POST, Aug. 16, 2013, http://www.denverpost.com/nationworld/ci_23875007/other-crises-overshadow-growing-violence-iraq (reporting that Foreign Minister Hoshyar Zebari has requested a “U.S. assistance package” that could include “lethal drones”); *Iraq would ‘welcome’ US drones to fight Al-Qaeda*, RT (Aug. 17, 2013), <http://rt.com/news/iraq-us-drones-al-qaeda-619>.

assistance to his country's security and counterterrorism efforts; in a press conference held with the U.S. Secretary of State, he stated:

“We need U.S. support in the field of security and fighting terrorism, as well as building our armed forces to repel the increased danger from Al-Nusra Front and Qaeda organization in the Middle East.”¹³⁷

In October 2013, Iraqi Prime Minister Nuri Kamal al-Maliki made new pleas for assistance from the U.S. in the form of aid for Iraq's own military, writing in an editorial in *The New York Times*:

“We urgently want to equip our own forces with the weapons they need to fight terrorism, including helicopters and other military aircraft so that we can secure our borders and protect our people.”¹³⁸

Press reports indicate that the U.S. continues to assist Iraq in its fight against ISIS, even though the group has parted ways with al-Qaeda.¹³⁹

3. Al-Shabaab in Somalia

Somalia has been embroiled in violent civil war since the early 1990s.¹⁴⁰

From 2000 to 2012, the international community recognized a series of transitional

¹³⁷ *Zebari Demands US Support in Fighting Terrorism*, NAT'L IRAQI NEWS AGENCY (Aug. 16, 2013), http://www.ninanews.com/english/News_Details.asp?ar95_VQ=GJHEDI.

¹³⁸ Nuri Kamal al-Maliki, *Have Patience With Us: The Iraqi Prime Minister's Plea to Americans*, N.Y. TIMES, Oct. 29, 2013, www.nytimes.com/2013/10/30/opinion/international/have-patience-with-us.html.

¹³⁹ See Loveday Morris, *Iraqi army struggles in battle against Islamist fighters in Anbar province*, WASH. POST, Feb. 25, 2014, http://www.washingtonpost.com/world/middle_east/iraqi-army-struggles-in-battle-against-islamist-fighters-in-anbar-province/2014/02/25/b76792d2-9b00-11e3-8112-52fdf646027b_story.html.

¹⁴⁰ *Somalia Civil War*, GLOBALSECURITY.ORG (Oct. 5, 2013), <http://www.globalsecurity.org/military/world/war/somalia.htm>; see also *Fact Sheet: U.S. Relations with Somalia*, U.S. DEPARTMENT OF STATE (Aug. 16, 2013), <http://www.state.gov/r/pa/ei/bgn/2863.htm>; see also Jeffrey Gettleman, *Harvard-Educated Technocrat Chosen as Somalia Premier*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/world/africa/24somalia.html> (reporting that “Somalia has cycled through more than a dozen transitional Governments since the central Government collapsed in 1991”).

governments.¹⁴¹ In 2012, the Federal Government of Somalia was established.¹⁴²

Until 2006, most of southern Somalia was controlled by the Islamic Courts Union (ICU), a group of Sharia courts united in opposition to the officially recognized Government.¹⁴³ In 2006, the Government defeated the ICU in the southern part of Somalia and recaptured the capital city of Mogadishu. In December 2006, the ICU splintered into factions, including al-Shabaab.¹⁴⁴

Al-Shabaab's principal goals are to overthrow Somalia's Government, expel African Union peacekeepers, and establish an Islamic state.¹⁴⁵ The group declared allegiance to al-Qaeda in February of 2010.¹⁴⁶ In its statement of support, al-Shabaab

¹⁴¹ See generally The World Factbook: Africa: Somalia, THE CENTRAL INTELLIGENCE AGENCY (Aug. 22, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>.

In 2000, the Somalia National Peace Conference held in Djibouti resulted in the formation of the Transitional National Government. See, e.g., *In Depth: Somali National Peace Conference*, IRIN (July 10, 2000), <http://www.irinnews.org/indepthmain.aspx?InDepthId=54&ReportId=72039>; Matt Bryden, *Somalia Redux? Assessing the New Somali Federal Government*, CSIS (Aug. 2013), http://csis.org/files/publication/130819_Bryden_SomaliaRedux_WEB.pdf. That government suffered from internal problems and external threats, and it ultimately collapsed in late 2003. In 2004, a new peace process led by the Government of Kenya resulted in the formation of a Transitional Federal Government (TFG) with an elected parliament. See also Stephanie Hanson & Eben Kaplan, *Somalia's Transitional Government*, CFR (May 12, 2008), <http://www.cfr.org/somalia/somalias-transitional-Government/p12475/>; *Somali Peace Process*, African Union Mission in Somalia (AMISOM) (2013), <http://amisom-au.org/about-somalia/somali-peace-process>. The TFG was originally expected to remain in power until 2009, but amendments to its mandate delayed the transition until 2012. See *Somalia: UN Envoy Says Inauguration of New Parliament in Somalia 'Historic Moment'*, All Africa: Forum on China-Africa Cooperation (Aug. 21, 2012), <http://allafrica.com/stories/201208220474.html>.

¹⁴² The World Factbook: Africa: Somalia, CENTRAL INTELLIGENCE AGENCY (Aug. 22, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>; see also *Somali leaders back new constitution*, BBC NEWS (Aug. 1, 2012), <http://www.bbc.co.uk/news/world-africa-19075685>; see also PROVISIONAL CONSTITUTION, Aug. 1, 2012 (Fed. Republic of Som.), available at http://www.somaliweyn.com/pages/news/Aug_12/Somalia_Constitution_English_FOR_WEB.pdf.

¹⁴³ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

¹⁴⁴ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

¹⁴⁵ See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011); Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf.

¹⁴⁶ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in*

said that the “jihad of Horn of Africa must be combined with the international jihad led by the al-Qaeda network”.¹⁴⁷ In February 2012, following bin Laden’s death, al-Shabaab leader Mukhtar Abu al-Zubair posted a message on the group’s web site addressed to al-Qaeda leader Ayman al-Zawahiri, stating: “On behalf of the soldiers and the commanders in al-Shabaab, we pledge allegiance to you. So lead us to the path of jihad and martyrdom that was drawn by our imam, the martyr Osama.”¹⁴⁸ In a contemporaneous video message, al-Zawahiri announced “the joining of the Shabaab al-Mujahideen Movement in Somalia to Qaeda al-Jihad, to support the jihadi unity against the Zio-Crusader campaign and their assistants amongst the treacherous agent rulers”.¹⁴⁹

Since around 2008, al-Shabaab has engaged in violent clashes with the Government of Somalia, including a major offensive in May 2009 that left hundreds killed and injured and resulted in al-Shabaab taking Mogadishu,¹⁵⁰ which the Government recaptured in 2011.¹⁵¹ On April 14, 2013, al-Shabaab attacked Government buildings in Mogadishu, resulting in the death of at least 35 people.¹⁵² In September

2011, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf; *see also*

¹⁴⁷ *Somali Islamists al-Shabab ‘join al-Qaeda fight’*, BBC NEWS (Feb 1, 2010), <http://news.bbc.co.uk/2/hi/8491329.stm>.

¹⁴⁸ *See Al-Shabaab joining al Qaeda, monitor group says*, CNN (Feb. 10, 2012), <http://www.cnn.com/2012/02/09/world/africa/somalia-shabaab-qaeda/>; Bill Roggio, *Somali Islamist group formally declares allegiance to Shabaab, al Qaeda*, LONG WAR JOURNAL (Feb. 25, 2012), http://www.longwarjournal.org/archives/2012/02/somali_islamist_grou.php.

¹⁴⁹ *See* Tristan McConnell, *Al Shabaab and Al Qaeda co-produce video*, GLOBAL POST (Feb. 10, 2012), <http://www.globalpost.com/dispatches/globalpost-blogs/africa/al-shabaab-and-al-qaeda-post-joint-video>; Katharine Houreld, *Somali militant group al-Shabaab formally joins al-Qaida*, GUARDIAN, Feb. 9, 2012, <http://www.theguardian.com/world/2012/feb/09/somali-al-shabaab-join-al-qaeda>.

¹⁵⁰ Paula Cristina Roque, *The Battle for Mogadishu: Revealing Somalia’s fluid loyalties and identities*, 18 AFR. SECURITY REV. 74 (2009).

¹⁵¹ Christopher Anzalone, *Al Shabaab’s Tactical and Media Strategies in the Wake of its Battlefield Setbacks*, Combating Terrorism Center at West Point (Mar. 27, 2013), <http://www.ctc.usma.edu/posts/al-shababs-tactical-and-media-strategies-in-the-wake-of-its-battlefield-setbacks>.

¹⁵² *UN chief slams deadly terrorist attacks in Somali capital*, XINHUA GEN. NEWS SERV. (April 15,

2013, al-Shabaab raided the Westgate mall in Nairobi, Kenya, killing at least 67 people in a four-day siege.¹⁵³ Al-Shabaab has stated that the attacks inside Kenya were intended to pressure Kenya to remove its troops from Somalia.¹⁵⁴

Somali Prime Minister Abdi Farah Shirdon has described his Government's efforts to combat al-Shabaab as "a military campaign against an enemy that has been reduced to terrorism and guerrilla operations".¹⁵⁵ In a speech in May 2013, President Obama stated that, in Somalia, the United States has "helped a coalition of African nations push al-Shabaab out of its strongholds".¹⁵⁶

President Obama acknowledged in a recent speech that the United States has carried out drone strikes in Somalia.¹⁵⁷ According to the BIJ, there were between five and eight drone attacks by the United States in Somalia between 2007 and March 2014; with between ten and twenty-four killed; and zero to one of those killed were said

2013), <http://english.cri.cn/6966/2013/04/16/2701s759592.htm>.

¹⁵³ See Afua Hirsch, *Westgate mall siege over, declares defiant Kenyatta*, GUARDIAN, Sept. 24, 2013, <http://www.theguardian.com/world/2013/sep/24/nairobi-mall-siege-over-declares-kenya-president>.

¹⁵⁴ See *Kenya tells Somalia to 'put house in order'*, AL JAZEERA (Oct. 2, 2013), <http://www.aljazeera.com/news/africa/2013/10/kenya-tells-somalia-put-house-order-201310205138510729.html>.

¹⁵⁵ *Somali parliament expected to debate anti-terror bill*, BBC, Apr. 30, 2013.

¹⁵⁶ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

Along with the Government of Somalia, the main force combating al Shabaab is the African Union Mission in Somalia (AMISOM), which is dedicated to bringing peace to Somalia and surrounding regions. AMISOM enjoys support from the United States. As of 2012, "the U.S. ha[d] provided approximately \$258 million for logistics support, equipment, and pre-deployment training for its forces". See Morgan Lorraine Roach & Ray Walser, *Saving Somalia: The Next Steps for the Obama Administration*, HERITAGE FOUNDATION (May 18, 2012), <http://www.heritage.org/research/reports/2012/05/saving-somalia-the-next-steps-for-the-obama-administration>.

¹⁵⁷ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

to be civilians.¹⁵⁸

4. AQIM in Mali

AQIM formally “united” with al-Qaeda in September of 2006.¹⁵⁹ The CSIS has reported that “[t]he merger brought enhanced prestige for AQIM along with the associated fund-raising and recruiting benefits.”¹⁶⁰ Upon accepting the 2006 merger, al-Qaeda leader Ayman al Zawahiri stated: “Our brothers will be a bone in the throat of the American and French crusaders and their allies.”¹⁶¹ Since the merger, AQIM’s rhetoric against the west has increased.¹⁶²

AQIM originated in Algeria, where for the past decade it has launched attacks on government targets.¹⁶³ Moreover, on December 11, 2007, AQIM launched an attack on the UN office in Algeria. It also has killed and kidnapped foreign aid workers

¹⁵⁸ *Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>.

¹⁵⁹ John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011); Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf. The leader of AQIM, Abdelmalek Droukdal, cited religious beliefs in his decision to merge with Al Qaeda. See Souad Mekhennet et al., *A Ragtag Insurgency Gains a Qaeda Lifeline*, N.Y. TIMES, June 7, 2012, <http://www.nytimes.com/2008/07/01/world/africa/01algeria.html>.

¹⁶⁰ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf.

¹⁶¹ Thomas Joscelyn & Bill Roggio, *Report: Al Qaeda conference call led to US diplomatic closures*, LONG WAR JOURNAL (Aug. 7, 2013), http://www.longwarjournal.org/threat-matrix/archives/2013/08/the_press_quickly_learned_that.php.

¹⁶² John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011).

¹⁶³ See Carol Migdalovitz, Cong. Research Serv., RS21532, *Algeria: Current Issues*, (Nov. 1, 2010); *Al-Qa’ida in the Lands of the Islamic Maghreb (AQIM)*, National Counterterrorism Center: Counterterrorism 2013 Calendar (2013), <http://www.nctc.gov/site/groups/aqim.html>; *Profile: Al Qaeda in North Africa*, BBC NEWS (Jan. 17, 2003), <http://www.bbc.co.uk/news/world-africa-17308138>.

from countries including Canada, Spain, France, and the U.S.¹⁶⁴ The U.S. has provided Algeria with training, funding and equipment to aid its efforts against AQIM.¹⁶⁵

AQIM, along with other groups, has been fighting with the Government of Mali for control of the northern part of the country.¹⁶⁶ In late March 2012, separatists supported by Islamist forces seized the city of Timbuktu, and on April 6, 2012, they declared independence. The declaration of independence was rejected by the African Union, the European Union, and France. The interim president of Mali threatened to “wage a total and relentless war” on the rebels unless they released their control of northern Malian cities.¹⁶⁷

Tensions among separatist and Islamic groups that had been allies in the fight against the government ultimately led to a split in the groups. By July 2012, the Islamist groups, including AQIM, had control of most of the north.¹⁶⁸ According to the

¹⁶⁴ See Scott Barber, *Kidnapping: Al-Qaeda's cash cow terrorizes Western tourists and workers in Africa's Sahel region*, NAT'L POST (Feb. 24, 2013), <http://news.nationalpost.com/2013/02/24/kidnapping-al-qaeda-cash-cow-terrorizes-western-tourists-and-workers-in-africas-sahel-region/>; Alex Thurston, *AQIM kidnapping, and murder, a brief history*, CHRISTIAN SCIENCE MONITOR (Jan. 19, 2011), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0119/AQIM-kidnapping-and-murder-a-brief-history>.

¹⁶⁵ See John Rollins, Cong. Research Serv., R41070, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Jan. 25, 2011); *Algeria gets US military assistance to combat terrorism*, BBC MONITORING MIDDLE EAST – POLITICAL, July 31, 2013.

¹⁶⁶ The campaign against the Government of Mali was led initially by the National Movement for the Liberation of Azawad (MNLA), which was seeking to establish in Azawad an independent homeland for the Tuareg people. See *Dozens of Tuareg rebels dead in Mali clash, says army*, BBC NEWS (Jan. 19, 2012), <http://www.bbc.co.uk/news/world-africa-16643507>. MNLA was supported by the Islamist group Ansar Dine. See *Explainer: Tuareg-led rebellion in north Mali*, AL JAZEERA (Apr. 3, 2012) <http://www.aljazeera.com/indepth/features/2012/03/201232211614369240.html>.

¹⁶⁷ See *Mali's new leader threatens 'total war' against Tuareg rebels*, TELEGRAPH (Apr. 13, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/mali/9201664/Malis-new-leader-threatens-total-war-against-Tuareg-rebels.html>; Stephane Barbier, *Mali's new leader, Dioncounda Traore, threatens rebels with 'total war'*, AFP (Dec. 4, 2012), <http://news.nationalpost.com/2012/04/12/malis-new-leader-threatens-rebels-with-total-war/>.

¹⁶⁸ See *Mali: Islamists seize Gao from Tuareg rebels*, BBC NEWS (June 27, 2012), <http://www.bbc.co.uk/news/world-africa-18610618>; *Tuaregs claim 'independence' from Mali*, AL JAZEERA (Apr. 6, 2012), <http://www.aljazeera.com/news/africa/2012/04/20124644412359539.html>.

Brookings Institute, since the fall of the Taliban in Afghanistan, al-Qaeda had not enjoyed a foothold anywhere that is as significant as AQIM's in Mali.¹⁶⁹

On January 11, 2013, France intervened, launching airstrikes in the northern part of the country, in response to “an urgent plea from the Malian Government” after Islamist militants “charged southward with a force of 800 to 900 fighters and 50 to 200 vehicles, taking over a frontier town that had been the de facto line of Government control”.¹⁷⁰ France received logistical support from other States, including the United States, several European States, and a Security Council-authorized group of West-African States.¹⁷¹ The French operation succeeded in helping Mali recapture much of the northern territory.¹⁷²

In his May 2013 speech, President Obama announced that the United States is “providing military aid to French-led intervention to push back al Qaeda in the

¹⁶⁹ Bruce Riedel, *Al Qaeda's Dangerous Play in Mali*, BROOKINGS (Jan. 15, 2013), <http://www.brookings.edu/research/opinions/2013/01/15-al-qaeda-mali-riedel>.

¹⁷⁰ See François Hollande, President of the French Republic, Statement of the President of the Republic: Situation in Mali (Jan. 11, 2013) (transcript available at <http://www.franceonu.org/france-at-the-United-nations/geographic-files/africa/mali-1202/article/mali>); *Counterterrorism and Humanitarian Engagement in Somalia and Mali: Background Briefing*, Harv. Counterterrorism and Humanitarian Engagement Project (Mar. 2013); Adam Nossiter & Eric Scmitt, *France Battling Islamists in Mali*, N.Y. TIMES (Jan. 11, 2013), <http://www.nytimes.com/2013/01/12/world/africa/mali-islamist-rebels-france.html>; see also *France launches Mali military intervention*, AL JAZEERA (Jan. 11, 2013), <http://www.aljazeera.com/news/africa/2013/01/2013111135659836345.html>.

¹⁷¹ See, e.g., Ingrid Formanek & Dana Ford, *U.S. steps up involvement in Mali*, CNN (Jan. 28, 2013), <http://www.cnn.com/2013/01/26/world/africa/mali-unrest/> (describing U.S. intervention); *Canadian C-17 joins allied efforts en route to Mali*, CBC NEWS (Jan. 15, 2013), <http://www.cbc.ca/news/politics/canadian-c-17-joins-allied-efforts-en-route-to-mali-1.1305804> (describing intervention by Canada and by a group of West-African States); Peter Beaumont et. al., *Britain to send aircraft to Mali to assist French fight against rebels*, GUARDIAN (Jan. 12, 2013), <http://www.theguardian.com/world/2013/jan/12/mali-somalia-france-rebels-islamist-francois-hollande> (describing intervention by U.K.); see also President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) (acknowledging that the U.S. has been “facilitating French operations in Mali”).

¹⁷² The World Factbook: Africa: Mali, CENTRAL INTELLIGENCE AGENCY (Sep. 9, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html>.

Maghreb, and help the people of Mali reclaim their future”.¹⁷³ Direct American involvement reportedly has been limited—some reports suggest that the U.S. has been using drones flown from a base in Nigeria to provide surveillance for French and African troops on the ground in Mali.¹⁷⁴

5. AQIM in Libya

In February 2011, protests in the Libyan city of Benghazi escalated into a full-scale rebellion and civil war.¹⁷⁵ On March 17, 2011, the Security Council adopted Resolution 1973, authorizing military intervention in the war.¹⁷⁶ The conflict between rebel forces and those loyal to Colonel Muammar Gaddafi raged for months, with rebel forces supported by NATO airstrikes.¹⁷⁷ On September 16, 2011, the United Nations recognized the Transitional National Council as the Government of Libya.¹⁷⁸

Hostilities have continued to rage between the new Libyan Government’s security forces on the one hand, and forces loyal to the old regime and Islamist groups, on

¹⁷³ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

¹⁷⁴ Yochi Dreazen, *The New Terrorist Training Ground*, ATLANTIC (Oct. 2013), <http://www.theatlantic.com/magazine/print/2013/10/the-new-terrorist-training-ground/309446/>.

¹⁷⁵ See, e.g., Maya Bhardwaj, *Development of Conflict in Arab Spring Libya and Syria: From Revolution to Civil War*, University of Montreal (Mar. 1, 2012), http://www.operationspaix.net/DATA/DOCUMENT/7367~v~Development_of_Conflict_in__Arab_Spring_Libya_and_Syria__From__Revolution_to_Civil_War.pdf.

¹⁷⁶ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). The resolution authorized Member States to “take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . while excluding a foreign occupation force of any form on any part of Libyan territory”. *Id.* ¶ 4.

¹⁷⁷ Christopher M. Blanchard, Cong. Research Serv., RL33142, *Libya: Transition and U.S. Policy*, (Oct. 18, 2012); see *Operation UNIFIED PROTECTOR: Final Mission Status*, NATO (Nov. 2, 2011), http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf.

¹⁷⁸ See Press Release, United Nations General Assembly, After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country’s Representative for Sixty-Sixth Session, U.N. Press Release GA/11137 (Sept. 16, 2011), *available at* <http://www.un.org/News/Press/docs/2011/ga11137.doc.htm>.

the other. The Islamist groups include the Salafist militia group Ansar al Sharia, which seeks to establish an Islamic state in Libya, as well as AQIM.¹⁷⁹ The militias are heavily armed, and the conflict has resulted in deadly clashes with Government forces, as well as assassinations of Government officials.¹⁸⁰ There also has been deadly fighting among different militias and tribal groups.¹⁸¹

On September 11, 2012, the U.S. Ambassador to Libya Christopher Stevens and three other U.S. personnel were killed in an attack on two United States diplomatic sites in Benghazi.¹⁸² It was reported that dozens of heavily armed militants attacked the main U.S. diplomatic compound, resulting in the death of Ambassador Stevens and a fire that caused many to flee to a second compound where two more

¹⁷⁹ See FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, AL-QAEDA IN LIBYA: A PROFILE 2 (2012), available at <http://www.fas.org/irp/world/para/aq-libya-loc.pdf>; see also Jamie Dettmer, *Al Qaeda Headquarters in Libya*, DAILY BEAST (May 6, 2013), <http://www.thedailybeast.com/articles/2013/05/06/the-al-qaeda-headquarters-in-libya.html>.

¹⁸⁰ See, e.g., Ulf Laessing & Suleiman Al-Khalidi, *Insight: Militia rivalries threaten new war in post-revolt Libya*, REUTERS (Oct. 18, 2013), <http://news.yahoo.com/insight-militia-rivalries-threaten-war-post-revolt-libya-063748016.html>; Wil Crisp, *In Libya, militias call the Government's shots*, CHRISTIAN SCIENCE MONITOR (Oct. 23, 2013), <http://www.csmonitor.com/World/Security-Watch/2013/1023/In-Libya-militias-call-the-Government-s-shots>. For examples of assassination attempts see, e.g., Human Rights Watch, *Libya: Wave of Political Assassinations* (Aug. 8, 2013), <http://www.hrw.org/news/2013/08/08/libya-wave-political-assassinations>; Ali Shuaib et al., *Head of Libya's parliament survives assassination attempt*, REUTERS (Jan. 6, 2013), <http://www.reuters.com/article/2013/01/06/us-libya-parliament-attack-idUSBRE90507U20130106>.

¹⁸¹ In June 2012, for example, tribal fighting erupted in western Libya following the death of a Zintan man at a checkpoint as he was transporting weapons. According to the Libyan Government, the violence resulted in the death of 105 people and left nearly 500 injured. See Dominique Soquel, *105 killed in week of clashes in west Libya*, AFP (June 20, 2012), <http://www.google.com/hostednews/afp/article/ALeqM5it2MqJLdJSr2SFculMVc81MSJOUA?docId=CN G.917b5707976c17134e95893e46cd2f43.951&hl=en>; *Libya's tribal clashes leave 105 dead*, BBC NEWS: AFRICA (June 20, 2012), <http://www.bbc.co.uk/news/world-africa-18529139>.

¹⁸² See, e.g., David D. Kirkpatrick & Steven Lee Myers, *Libya Attack Brings Challenges for U.S.*, N.Y. TIMES, Sept. 12, 2012, <http://www.nytimes.com/2012/09/13/world/middleeast/us-envoy-to-libya-is-reported-killed.html>; Karen DeYoung et. al., *U.S. officials: Attack on consulate in Libya may have been planned*, WASH. POST, Sept. 12, 2012, http://www.washingtonpost.com/world/news-agencies-us-ambassador-to-libya-killed-in-attack-outside-consulate/2012/09/12/665de5fc-fcc4-11e1-a31e-804fccb658f9_story_4.html; *U.S. official dies in Libya consulate attack in Benghazi*, BBC NEWS (Sept. 12, 2012), <http://www.bbc.co.uk/news/world-africa-19562692>; see also Christopher M. Blanchard, Cong. Research Serv., RL33142, *Libya: Transition and U.S. Policy* (Oct. 18, 2012).

Americans were killed in a subsequent attack.¹⁸³ Among the assailants were believed to be members of Ansar al Sharia, as well as “Libyan fighters trained by AQIM”.¹⁸⁴

Reports suggest that U.S. drones conducted multiple strikes in Libya during the country’s civil war.¹⁸⁵ One Pentagon spokesman claimed that 145 drone strikes were conducted in Libya between April and October of 2011.¹⁸⁶ More recently, it appears that drones have been used in Libya primarily for surveillance purposes.¹⁸⁷

¹⁸³ Christopher M. Blanchard, Cong. Research Serv., RL33142, *Libya: Transition and U.S. Policy*, (Oct. 18, 2012).

¹⁸⁴ Yochi Dreazen, *The New Terrorist Training Ground*, ATLANTIC (Oct. 2013), <http://www.theatlantic.com/magazine/print/2013/10/the-new-terrorist-training-ground/309446/>.

¹⁸⁵ Julian E. Barnes, *U.S. Launches Drone Strikes in Libya*, WALL ST. J., Apr. 22, 2011, <http://online.wsj.com/news/articles/SB10001424052748704889404576277413211029304>.

¹⁸⁶ *US drones bombed Libya more than Pakistan*, RT (Oct. 20, 2011), <http://rt.com/usa/us-libya-pakistan-drone-325/>.

¹⁸⁷ Barbara Starr et al., *Drones expected to hunt for suspects in Libya attack*, CNN (Sept. 13, 2012), <http://www.cnn.com/2012/09/12/world/africa/libya-us-ambassador-killed-pentagon/>.

II. THE U.S. GOVERNMENT'S DISCLOSED LEGAL BASIS FOR THE DRONES CAMPAIGN

The Obama administration has not released a comprehensive statement of its legal position on targeted killings. We have derived the following from various public statements by executive branch officials and leaks to the press.¹⁸⁸

A. *Ius ad Bellum*

First, the U.S. Government has stated, without providing details, that it is acting with the consent of the States in which the targeted killings are taking place.¹⁸⁹

Second, the U.S. Government asserts that, even without such consent, the drone strikes are a valid exercise of the “inherent right of national self-defense” recognized by the UN Charter.¹⁹⁰ Officials have stated that the right of self-defense includes the right to engage in targeted killings “outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat”.¹⁹¹ President Obama has argued that the United States’ ability to respect the

¹⁸⁸ As noted above, *see* Executive Summary, *supra*, on April 21, 2014, the U.S. Court of Appeals for the Second Circuit ordered the United States to release a memorandum that may provide a more detailed presentation of the United States’ legal position than has been disclosed previously. *See* New York Times Co. v. U.S. Dep’t of Justice, Nos. 13-422, 13-445, 2014 WL 1569514 (2d Cir. Apr. 21, 2014).

¹⁸⁹ In a speech on May 23, 2013, President Obama stated that the United States’ efforts “[i]n many cases, . . . involve partnerships with other countries”. *See* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>). He noted that:

“[a]lready, thousands of Pakistani soldiers have lost their lives fighting extremists. In Yemen, we are supporting security forces that have reclaimed territory from AQAP. In Somalia, we helped a coalition of African nations push al-Shabaab out of its strongholds. In Mali, we’re providing military aid to French-led intervention to push back al Qaeda in the Maghreb, and help the people of Mali reclaim their future.” *Id.*

¹⁹⁰ When Secretary of State John Kerry was asked to address the possibility that Pakistan had withdrawn consent to the drone strikes, he added that continuing drone strikes in Pakistan are “a matter of self-defense”. *See* Interview by Hamid Mir with John Kerry, Secretary of State, in Islamabad, Pakistan (Aug. 1, 2013) (transcript available at <http://www.state.gov/secretary/remarks/2013/08/212626.html>).

¹⁹¹ *See* John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S.

sovereignty of other States is enhanced by the fact that it is able to pinpoint strikes on al-Qaeda personnel in places that the territorial States are not able to reach.¹⁹²

Third, in addressing the right of self-defense, the U.S. Government has taken the position that it may undertake forcible measures to eliminate a threat before an armed attack has occurred, and even before a specific impending attack has been identified. In a 2011 speech, then National Security Assistant John Brennan claimed that there is:

“increasing recognition in the international community that a more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”¹⁹³

Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>); John Brennan, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an/>) (“[A]s President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other Governments are unwilling or unable to take the necessary actions themselves.”). Similarly, according to the DOJ White Paper, it is consistent with principles of sovereignty to expand the armed conflict to the territory of a different state in a situation in which there is consent of the host nation or in which “the host nation is unable or unwilling to suppress the threat posed by the individual targeted”. DOJ White Paper at 5. *See also* Attorney General Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>) (asserting that “the use of force in foreign territory would be consistent with . . . international legal principles if conducted, for example, with the consent of the nation involved or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States”).

¹⁹² Google + Hangout with President Barack Obama (Jan. 30, 2012), <http://www.whitehouse.gov/photos-and-video/2012/01/30/president-obama-s-google-hangout>; *see also* *President Obama Hangs Out with America*, WhiteHouseBlog (Jan. 30, 2012), <http://www.whitehouse.gov/blog/2012/01/03/president-obama-hangs-out-america> (explaining that drones are “able to pinpoint-strike an al Qaeda operative in places where [the local military] may not be able to get them. So obviously a lot of these strikes have been . . . going after al Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan.”); Your Interview with the President – 2012, YouTube, <http://www.youtube.com/watch?v=eeTj5qMGTAI> (at 28:37-29:23) (Jan. 30, 2012).

¹⁹³ John Brennan, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our

The U.S. Government takes the position that the threat posed by al-Qaeda and its “associated forces” requires a very broad concept of “imminence” in judging whether the right to self-defense is triggered.¹⁹⁴ The DOJ White Paper, which presents due process analysis under domestic constitutional law¹⁹⁵ rather than international law, contends that an “imminent threat” need not be supported by “clear evidence” and that “an ‘imminent’ threat of violent attack . . . does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” because in an era of asymmetric warfare, “the threat posed by al-Qaeda and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making use of force appropriate”.¹⁹⁶ In a May 2014 speech, President Obama referred to the need to use force when there is a “continuing, imminent threat”.¹⁹⁷

Fourth, administration officials have taken the position that self-defense is justified by the attacks of September 11, 2001 and also in response to an ongoing threat.

Values and Laws (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an/>).

¹⁹⁴ See DOJ White Paper at 7-8.

¹⁹⁵ Although this Report does not address issues specific to United States citizens, we note that the DOJ White Paper concludes that lethal force could be used lawfully against a U.S. citizen in foreign territory if “(1) an informed, high-level official of the U.S. Government has determined that the targeted individual poses an individual threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles”. See generally DOJ White Paper; see also *id.* at 2, 3, 6, 7, 8, 9, 16. The authors on several occasions explain that this determination must be made by “an informed, high-level official of the U.S. Government”. *Id.* at 1, 6, 7, 9, 14, 16.

¹⁹⁶ DOJ White Paper at 7, 8.

¹⁹⁷ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

Thus President Obama has stated:

“America’s actions are legal. We were attacked on 9/11. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort and in self defense.”¹⁹⁸

And Brennan has stated:

“Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives.”¹⁹⁹

B. The Existence of an Armed Conflict

Fifth, the U.S. Government asserts that targeted killings are taking place within a non-international armed conflict with “al Qaeda, the Taliban, and their associated forces”.²⁰⁰ The U.S. Government takes the position that this armed conflict is

¹⁹⁸ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

¹⁹⁹ See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

²⁰⁰ See Attorney General Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>). (“Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law.”); Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.State.gov/s/l/releases/remarks/139119.htm>) (“as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law”); DOJ White Paper at 2 (“The United States is in an armed conflict with al-Qa’ida and its associated forces”); John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>); Jeh Johnson, Speech at the Oxford Union: Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>) (“The United States Government is in an armed conflict against al Qaeda and associated forces, to which the laws of armed conflict apply”); see also Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>) (“Instead, ever since Congress passed its Authorization for the Use of Military Force (AUMF) one week after September 11, we have engaged in an armed conflict with a knowable enemy—the Taliban, al-Qaeda, and associated forces—that does not limit its activities to a single country’s borders.”).

not limited by geographical boundaries. Although the Obama administration disclaims a “global war on terror”,²⁰¹ United States officials continue to insist that the armed conflict against al Qaeda and associated forces is being waged outside the confines of an active battlefield.²⁰² Thus, Brennan has explained that:

“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time.”²⁰³

According to the DOJ White Paper, as part of the “non-international armed conflict with al-Qa’ida and its associated forces”, “[a]ny U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.”²⁰⁴

We do not interpret the DOJ White Paper to claim a broad right to engage in targeted killings outside of an armed conflict. Rather, the DOJ White Paper claims

²⁰¹ In his May 23, 2013 speech, President Obama stated that “Beyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent targeted efforts to dismantle specific networks of violent extremists that threaten America”. See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

²⁰² See Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>) (“But September 11 made clear that the term ‘non-international armed conflicts’ can include transnational battles that are not between nations: for example, between a nation-state (the United States) and the transnational nonstate armed group (Al Qaeda) that attacked it.”); Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.State.gov/s/l/releases/remarks/139119.html>) (“In the conflict occurring in Afghanistan *and elsewhere*, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).” (emphasis added)).

²⁰³ John Brennan, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an/>).

²⁰⁴ DOJ White Paper at 3 (emphasis added).

that the non-international armed conflict against al-Qaeda and associated forces is being waged outside of “zones of active hostilities”. It states:

“the United States retains its authority to use force against al-Qa’ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa’ida and its associated forces. Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.”²⁰⁵

Sixth, the Obama administration defines an “associated force” as having two characteristics: “(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners”; “the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners.”²⁰⁶ Thus, an “associated force” is not any terrorist group in the world that merely embraces the al-Qaeda ideology, and a radicalized individual who is merely inspired by al-Qaeda is subject only to civilian law enforcement measures, not military force.²⁰⁷

²⁰⁵ DOJ White Paper at 3 (emphasis added).

²⁰⁶ Jeh Johnson, Speech at Yale Law School: National security law, lawyers and lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>).

Koh similarly explained that “the U.S. Government has made clear that an ‘associated force’ must be (1) an organized, armed group that (2) has actually entered the fight alongside al Qaeda against the United States, thereby becoming (3) a co-belligerent with al Qaeda in its hostilities against America.” See Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>).

²⁰⁷ See Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>) (“Just because someone hates America or sympathizes with Al Qaeda does not make them our lawful enemy.”). See also Jeh Johnson, Speech at the Oxford Union: Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <http://lawfareblog.com/2012/11/jeh-johnson-speech-at-the-Oxford-union/>) (“Nor does our enemy in this armed conflict include a ‘lone wolf’ who, inspired by al Qaeda’s ideology, self-radicalizes in the basement

C. *Ius in Bello*

Seventh, U.S. Government officials have asserted that the legality of targeted killings, even when undertaken as part of covert operations, should be assessed with reference to “conventional legal principles”, namely “the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of [domestic] statutory construction”.²⁰⁸

Eighth, the U.S. Government asserts that in conducting the non-international armed conflict against al-Qaeda and “associated forces”, it is complying with requirements of *ius in bello*. Government officials claim that 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

of his own home, without ever actually becoming part of al Qaeda. Such persons are dangerous, but are a matter for civilian law enforcement, not the military, because they are not part of the enemy force.”).

²⁰⁸ See Jeh Johnson, Speech at Yale Law School: National security law, lawyers and lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>) (“And, given its unconventional nature, President Obama – himself a lawyer and a good one – has insisted that our efforts in pursuit of this enemy stay firmly rooted in conventional legal principles.”).

Likewise, Koh asserted that the Obama administration carries out targeted killings in accordance with “all applicable law, including the laws of war”. See Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.html>); Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (explaining after stepping down from the U.S. administration that “in conducting this conflict, the United States is bound by law. It is not free and it never has been free to conduct that conflict outside the law.”). Brennan is to the same effect. See John Brennan, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an/>) (“We will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say ‘all our actions’, that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions even when conducted out of public view remain consistent with our laws and values.”).

with all applicable law”.²⁰⁹ In particular, the Obama administration asserts that it only conducts a drone strike when there is “confidence that we are not going to . . . inflict collateral damage”, and “if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances”.²¹⁰ President Obama stated, in May 2013 and again in May 2014, that a drone strike is carried out only when there is “near certainty” that civilians would not be killed or injured.²¹¹ According to Koh, necessity means the target must have “definite military value”; distinction dictates that only “lawful targets” (e.g., combatants, civilians directly participating in hostilities, and military objectives) may be “targeted intentionally”; proportionality requires that “the anticipated collateral damage [is] not . . . excessive in relation to the anticipated military advantage”; and humanity requires that the weapons “will not inflict unnecessary suffering”.²¹²

²⁰⁹ See Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.State.gov/s/1/releases/remarks/139119.html>).

²¹⁰ John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

In congressional testimony following his nomination to become Director of the CIA, Brennan emphasized “the care that we take, the agony that we go through to make sure that we do not have any collateral injuries or deaths”. See Pam Benson, *Five Things We Learned from John Brennan’s Confirmation Hearing*, CNN SECURITY CLEARANCE (Feb. 7, 2013), <http://security.blogs.cnn.com/2013/02/07/five-things-we-learned-from-john-brennans-confirmation-hearing/>.

²¹¹ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>); President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

²¹² Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.State.gov/s/1/releases/remarks/139119.html>); see also Attorney General Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>) (reciting similar criteria and definitions); Jeh Johnson, Speech at the Oxford Union: Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the->

Ninth, the U.S. Government asserts that its “procedures and practices for identifying lawful targets are extremely robust”.²¹³ Such determinations are “fact specific,” and often “time-sensitive”—they “may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel”.²¹⁴

Press reports provide a glimpse of the process by which drone targets are selected.²¹⁵ According to Brennan, decisions on drone attacks take place at very high levels within the Executive Branch:

oxford-union/) (“We employ lethal force, but in a manner consistent with the law of war principles of proportionality, necessity and distinction.”); DOJ White Paper at 8 (“Third, it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering).”).

²¹³ See Harold Koh, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

²¹⁴ Attorney General Eric Holder Speaks at Northwestern University School of Law, U.S. Dep’t of Justice (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

The Attorney General described a three-part test employed to determine whether a U.S. citizen may be targeted for death. The test “incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States”. Since terrorist organizations tend to strike without warning, “the Constitution does not require the President to delay action until some theoretical end stage of planning when the precise time, place, and manner of an attack become clear”. See Attorney General Eric Holder Speaks at Northwestern University School of Law, U.S. Dep’t of Justice (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

President Obama stated in his May 23, 2013 speech at the National Defense University that it is the preference of the administration to capture, rather than kill terrorist suspects. See Remarks by the President at the National Defence University, May 23, 2013, *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defence-university>. Capture is said to be preferable to killing, for practical reasons: “so we can elicit intelligence from them . . . so that we can disrupt follow-on terrorist attacks. So I’m a strong proponent of doing everything possible short of killing terrorists, bringing them to justice, and getting that intelligence from them.” *Open Hearing on the Nomination of John O. Brennan to Be Director of the Central Intelligence Agency, Before the S. Select Comm. on Intelligence* (Feb. 7, 2013), Tr. at 38. Brennan has explained that, although capture is preferred the “reality, however, is that since 2001 such unilateral captures by U.S. forces outside of hot battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.” *Id.*

²¹⁵ See, e.g., Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, www.washingtonpost.com/world/national-security/; Kimberly

“We . . . draw[] on the full range of our intelligence capabilities [and] may ask the intelligence community to . . . collect additional intelligence or refine its analysis so that a more informed decision can be made. . . . We listen to departments and agencies across our national security team [and] don’t just hear out differing views, we ask for them and encourage them.”²¹⁶

President Obama has stated that the administration is judicious in its use of drones and “very careful in terms of how it’s been applied” and does not carry out such operations “willy-nilly”; the program is a “targeted, focused effort at people who are on a list of active terrorists who are trying to go in and harm Americans, hit American facilities, American bases, and so on”; it is “kept on a very tight leash” and is not “a bunch of folks in a room somewhere just making decisions”; and it is “part and parcel of our overall authority when it comes to battling al-Qaeda. It is not something that is being used beyond that.”²¹⁷ Moreover, Congress is briefed on every drone strike:

Dozier, *Who Will Drones Target? Who in the U.S. Will Decide?*, AP (May 21, 2012), <http://bigstory.ap.org/content/who-will-drones-target-who-us-will-decide>.

President Obama reportedly has “placed himself at the helm of a top-secret ‘nominations’ process to designate terrorists for kill or capture, for which the capture part has become largely theoretical”; approximately one hundred “members of the government’s national security apparatus”, “a grim debating society that vets the PowerPoint slides bearing names, aliases and life stories” of suspected terrorists; “it can take five or six” of these weekly sessions “for a name to be approved” for the list and since the President is “determined to make these decisions [and] to keep the tether pretty short”, he “signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan—about a third of the total”. Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principle and Will*, N.Y. TIMES, May 29, 2010, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?gwh=2E3F9001FDA35048A516D11F99DBB621>.

²¹⁶ John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

Since this suggests that some kill-list decisions might *not* receive direct approval from the White House, there is reason to believe that some strikes in Pakistan were authorized by the Director of the CIA, following in-house vetting at Langley. See, e.g., Karen DeYoung, *A C.I.A. Veteran Transforms U.S. Counterterrorism Policy*, WASH. POST, Oct. 24, 2012, www.washingtonpost.com/world/national/security/cia-veteran-john-breman-has-transformed-us-counterterrorism; Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009, www.newyorker.com/repairing/2009/10/26/091026fa-fact-mayer.

²¹⁷ Google + Hangout with President Barack Obama, Jan. 30, 2012, <http://www.whitehouse.gov/photos-and-video/2012/01/30/president-obama-s-google-hangout>.

“I’ve insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike.”²¹⁸

Officials in the Obama administration have expressed the desire to move CIA drone targeted-killing operations to the direction of the Department of Defense; transferring operations to the DOD would allow for more transparency due to differing open-government rules and Freedom of Information standards regarding military and intelligence functions.²¹⁹ Despite those intentions, however, the CIA continues to conduct targeted killing operations, and there is resistance in the executive and legislative branches to shifting control away from the CIA.²²⁰ Moreover, even if the transition to the DOD were completed, U.S. intelligence agencies inevitably would continue to be deeply involved in other aspects of targeted killing, including target selection.

Tenth, some administration officials, including President Obama, have suggested that the “armed conflict” must at some point come to an end at which point the

²¹⁸ President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

²¹⁹ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) (remarking that the U.S. “will increasingly turn to our military to take the lead and provide information to the public about our efforts” and acknowledging the limitations of the “intelligence community” in providing transparency); Daniel Klaidman, *Exclusive: No More Drones for CIA*, DAILY BEAST (Mar. 19, 2013), <http://www.thedailybeast.com/articles/2013/03/19/exclusive-no-more-drones-for-cia.html>; Chris Anders, *Obama’s drone killing program slowly emerges from the secret state shadows*, GUARDIAN, Mar. 26, 2013, <http://www.theguardian.com/commentisfree/2013/mar/26/obama-drone-killing-program-secret-state>.

See Appendix D, *infra*, for a discussion of the covert character of the CIA drone program.

²²⁰ See Mark Mazzetti, *Delays in Effort to Refocus C.I.A. From Drone War*, N.Y. TIMES, Apr. 6, 2014, at A1, available at <http://www.nytimes.com/2014/04/06/world/delays-in-effort-to-refocus-cia-from-drone-war.html>.

threat must be addressed through conventional law enforcement methods. As Johnson has stated:

“At that point, we must be able to say to ourselves that our efforts should no longer be considered an ‘armed conflict’ against al Qaeda and its associated forces; rather, a counterterrorism effort against individuals who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our Government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.”²²¹

Similarly, Koh noted in May 2013 that the “armed conflict” with al-Qaeda has stretched a great number of years:

“Only four months from now, this coming September 11, the United States’ armed conflict with Al Qaeda will turn twelve years old. That is eight years longer than the Civil War or World War II, and nearly four years longer than the Revolutionary War.”²²²

Moreover, President Obama noted that the AUMF “is now nearly 12 years old” and “[t]he Afghan war is coming to an end”—the core of al Qaeda “is a shell of its former self” and that “[g]roups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States.”²²³

²²¹ Jeh Johnson, Speech at Yale Law School: National security law, lawyers and lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>).

²²² See Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>).

²²³ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>). President Obama expressed a desire to engage with Congress to “determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing”. *Id.*

LEGAL ANALYSIS

I. *IUS AD BELLUM*

The starting point for the *ius ad bellum* analysis is the general prohibition on the unilateral use of force by States. States have the inherent legal right to be free from the military violence of other States, as well as a legal duty to refrain from the use of force in their relations with other States. Since at least 1945, one of the primary aims of Public International Law, which specifies the rights and duties of States in their relations with one another, is to limit the circumstances in which a State may lawfully resort to force. The prohibition against the use of force formed the basis of the Nuremberg Charter and criminal prosecutions for the crime of aggression after the Second World War.

The prohibition on the use of force has been codified in Article 2(4) of the UN Charter, which the ICJ has characterized as a “cornerstone” of the Charter.²²⁴

Article 2(4) provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

The Charter allows for three general exceptions to the prohibition on the use of force by one State against another.

First, Article 42 of the UN Charter provides the Security Council with the power to authorize the use of force as necessary “to maintain or restore international peace and security”.²²⁵

²²⁴ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 148 (Dec. 19).

²²⁵ U.N. Charter art. 42; *see also* U.N. Charter art. 2, para. 7 (“[T]his principle [of non-intervention in

Second, because Article 2(4) prohibits only the unilateral use of force, consent to the use of force obviates the need for any sovereignty analysis.²²⁶ The publicly-available information gives reason to believe that the States in which drone strikes have taken place have consented to the strikes.²²⁷ However, since it remains open to a State to withdraw consent,²²⁸ Pakistan’s recent statements disclaiming consent are controlling (unless there is secret diplomatic correspondence to the contrary).

Third, States may use force in accordance with the right of self-defense recognized in Article 51 of the Charter, which provides:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council

domestic affairs] shall not prejudice the application of enforcement measures under Chapter VII.”). In addition, Articles 43 and 45 instruct member States to contribute armed forces and logistical support to Security Council-authorized actions. *See* U.N. Charter arts. 43 (calling on Members to undertake to provide military and other assistance to the Security Council), 45 (calling on Members to hold “immediately available” national air-force contingents for combined international enforcement action). Over the past two decades, Security Council authorization has been invoked to support humanitarian intervention when a crisis is deemed a threat to international peace and security. *See generally*, THOMAS G. WEISS AND DON HUBERT, *THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND* (IDRC 2001).

Several scholars have argued for another exception to the rule against the use of force, permitting actions taken by regional organizations, such as NATO, when the Security Council fails to act. *See, e.g.*, James P. Terry, *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism*, 8 *ARMY LAWYER* 30, 46 (2004). NATO’s action in Kosovo in the 1990s, which was ultimately deemed “legitimate, but not legal”, provides one example of how such an exception would work in practice. *See* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* (2000), *available at* <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>. We do not take any position on this argument.

²²⁶ *See* Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 51, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (“A State’s valid consent to the use of force by another State on its territory precludes any claim that its territorial sovereignty has been violated.”).

²²⁷ In the case of Libya, some drone strikes may have been undertaken as part of the Security Council-authorized military intervention under Resolution 1973, rather than on the basis of consent. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

²²⁸ “Consent may be given ad hoc or in advance via treaty: it may always be restricted in scope and – depending on the form of consent – withdrawn unilaterally.” JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 769 (8th ed. 2012).

has taken the measures necessary to maintain international peace and security.”

Under Article 51, a State may exercise force in self-defense, without prior approval of the Security Council, although it must provide notice to the Security Council of the measures taken in self-defense.²²⁹

The contours of this right of self-defense as it relates to drone strikes are the subject of considerable debate. That debate concerns, among others, the following legal questions:

- (a) Whether the right of self-defense includes the right to use force against non-State actors, such as terrorist groups, or only against other States;
- (b) Whether a State may use force in self-defense against a non-State actor located within the territory of another State, even if the territorial State is not responsible for the actions of the non-State actor and does not consent to the forcible measures;
- (c) Whether acts of violence by non-State actors, such as terrorist groups, can ever amount to an “armed attack” giving rise to a right of self-defense, or whether they must be treated as criminal acts that may be addressed only through law enforcement efforts;
- (d) Whether the requirements of necessity and proportionality impose temporal or geographical limits that constrain the exercise of self-defense; and
- (e) Whether the right of self-defense includes the right to use force *before* an “armed attack” has occurred, sometimes referred to as “anticipatory” or “preemptive” self-defense.

We discuss these issues in turn. We then apply these principles to the

²²⁹ As discussed below, *see* Legal Framework, Part I.G, *infra*, Article 51 provides that, upon taking action in self-defense, the State must report the exercise of that right to the Security Council:

“Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

drones program.

A. Self-Defense Against Non-State Actors

The evolution of warfare and the rise of powerful non-State actors has given rise to the question of whether—and under what circumstances—the right of self-defense includes the right to take forcible measures against the non-State actor itself, as opposed to the State in which that actor is located. In this subsection we address one aspect of that question, which is whether there is any right of self-defense against non-State actors at all.

We conclude that the right of self-defense recognized by Article 51 is not confined to the use of force against States, and that extraterritorial force may be used against a non-State actor without attributing that actor’s hostilities to the territorial State, so long as the other requirements of self-defense are satisfied.²³⁰

First, the language of Article 51 itself is not limited to the use of force against States.

Although Article 51 refers to the right to self-defense “if an armed attack occurs against a Member of the United Nations”, nothing in the language requires that the “armed attack” be committed by another State.²³¹ Whereas Article 2(4) refers to the use

²³⁰ This view is supported by the majority of international law scholars. See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 238-239 (2010) (collecting numerous sources) (“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 responsive force directed against a non-state actor occurs within a foreign country”).

Although Emmerson asserts that there is “currently no clear international consensus” on this issue, see Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶¶ 56-57, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson), we believe, as we show below, that the contrary view is unsupported.

²³¹ See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 241 (2010) (“[N]othing in the language of

of force by “Members” against “any State”, Article 51 is silent on who might commit an “armed attack” giving rise to the right of self-defense.²³² It recognizes the right of self-defense if “an armed attack occurs”, without regard to the source of that attack.²³³

Second, the right to engage in forcible self-defense against non-State actors has been recognized by the UN Security Council in binding resolutions.

The day after the attacks of September 11, 2001, the Security Council adopted Resolution 1368, which affirmed its determination “to combat by all means threats to international peace and security caused by terrorist acts” and recognized “the inherent right of individual or collective self-defense in accordance with the Charter”. On September 28, 2001, in Resolution 1373, the Security Council again recognized “the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)”.²³⁴ In issuing those resolutions,

Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a ‘state.’ 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.”); 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, 90 (2009) (“Nothing in the language of Article 51 . . . limits the right of self-defense to attacks by other States.”)

²³² See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 31-32 (2010) (“Unlike other articles in the UN Charter (such as Article 2(4) on the prohibition on the use of force) which *do* mention specifically that they refer to states, Article 51 *does not* mention the nature of the party responsible for the attack, but only that of the entity which has the right of response.”); 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, 41 (2002) (“There is nothing in Article 51 of the U.N. Charter that requires the exercise of self-defense to turn on whether an armed attack was committed directly by another state. Indeed, the language used in Article 2(4) (which speaks of a use of force *by* one ‘Member’ *against* ‘any state’) is not repeated in Article 51. Rather, Article 51 is silent on who or what might commit an armed attack justifying self defence.”).

²³³ See Ashley S. Deeks, “*Unwilling or Unable*”; *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483, 493 (2012) (asserting that there is a “lack of textual support in Article 51 for drawing a distinction between an armed attack by a state and an armed attack by a nonstate actor”).

²³⁴ The members of the Security Council voting unanimously for Resolution 1373 were: China, France, Russia, the United Kingdom, the United States, Bangladesh, Colombia, Ireland, Jamaica, Mali, Mauritius, Norway, Singapore, Tunisia, and Ukraine.

the Security Council recognized terrorist acts by non-State groups to be a threat against which the right of self-defense exists within the meaning of Article 51 without the need to attribute the terrorist attacks to any State.

Third, the right of self-defense against attacks by non-State actors is supported by State practice, both in response to the attacks of September 11 and on other occasions.

With respect to the September 11 attacks:

- (a) On October 7, 2001, the United States formally notified the Security Council that it was exercising its right to self-defense pursuant to Article 51 in taking action against the Al-Qaeda organization in Afghanistan;²³⁵
- (b) The members of NATO invoked Article 5 of the NATO Treaty, which provides that if “an armed attack occurs” against one treaty party, the other parties shall “in [the] exercise of the right of individual or collective self-defense recognized by article 51 of the Charter of the United Nations” take necessary action, “including the use of armed force”, to restore security;²³⁶ and
- (c) The parties to the Inter-American Treaty of Reciprocal Assistance, 1947, invoked article 3(1) of that treaty, which provides for collective action in the case of “an armed attack . . . in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations”.²³⁷

²³⁵ Letter of John Negroponte, The Representative of the United States of America to the United Nations, to the President of the Security Council (Oct. 7, 2001), *available at* http://avalon.law.yale.edu/sept11/un_006.asp.

²³⁶ Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>. As of September 2001, the members of NATO were: Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, and the United States.

²³⁷ Organization of American States, *Terrorist Threat to the Americas*, OAS Doc. OAE/Ser.F/II.24, RC.24/RES.1/01 (Sep. 21, 2001), *available at* <http://www.oas.org/OASpage/crisis/RC.24e.htm> (resolving that the September 11 attacks “are attacks against all American States and that, in accordance with . . . the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) . . . all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks”); *see* Inter-American Treaty of Reciprocal

Thus, the parties to those treaties accepted that the attack by a non-State actor constituted an “armed attack” giving right to self-defense within the meaning of Article 51.

Moreover, States have invoked self-defense as a justification for the use of extraterritorial force against non-State actors both before and after September 11, 2001, without attributing the conduct of those actors to any other State:

- (a) In 1993, Tajikistan invoked self-defense as justification for attacking Islamic rebels based in Afghanistan;²³⁸
- (b) From the mid-1990s, Iran invoked Article 51 on several occasions to justify the use of force against the Mujahedin-e Khalq Organization on Iraqi territory;²³⁹
- (c) In 1996, after attacks by Kurdish militias, Turkey invoked self-defense as justification for strikes on their bases in Northern Iraq;²⁴⁰
- (d) In 1998, after attacks on the American embassies in Kenya and Tanzania, the United States invoked self-defense pursuant to Article 51 as justification for launching missiles against al-Qaeda in Afghanistan and Sudan;²⁴¹
- (e) In 2002, after a string of terrorist attacks targeting Israeli civilians,

Assistance art. 3, Sept. 2, 1947, 4 U.S.T. 599, 21 U.N.T.S. 77 (“The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.”). The parties to this treaty are: Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Trinidad & Tobago, the United States, Uruguay, and Venezuela.

²³⁸ Permanent Rep. of Tajikistan to the U.N., Letter Dated 4 August 1993 From the Permanent Rep. of Tajikistan to the U.N. Addressed to the Secretary-General, U.N. Doc. S/26241 (Aug. 5, 1993).

²³⁹ See Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 380 (2009).

²⁴⁰ U.N. S.C., Identical Letters Dated 27 June 1996 From the Charge d’Affairs A.I. of the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996); see also Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 379 (2009) (observing that “since the 1990s, Turkey has repeatedly invoked a right to use force against Kurdish PKK bases in northern Iraq”).

²⁴¹ The United States gave notice to the Security Council that it was invoking its right of self-defense. See Letter Dated 20 August 1998 From the Permanent Rep. of the United States of America to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998); see also Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 379-380 (2009).

Israel invoked self-defense as justification for an incursion into the West Bank,²⁴²

- (g) Following the Bali bombings of October 2002, Australia claimed a right to use extraterritorial force against terrorists threatening to attack its citizens;²⁴³ and
- (h) In 2013, France invoked collective self-defense as a justification for its intervention in Mali against non-State actors.²⁴⁴

There is thus a clear pattern of States asserting the right to use force in self-defense against non-State actors, without the need to attribute the conduct of those actors to the territorial State. Moreover, we are not aware of any Security Council action rejecting any of the listed claims on the basis of the non-State character of the entities against which the right of self-defense was involved.

Thus, in our view, State practice has established that the right of self-defense may be invoked against non-State actors.²⁴⁵

²⁴² See U.N. S.C., 4503rd mtg. at 6, U.N. Doc S/PV.4503 (Mar. 29, 2002).

²⁴³ See Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 380 (2009).

²⁴⁴ See Press conference given by M. Laurent Fabius, French Minister of Foreign Affairs (Jan. 1, 2013) (transcript available at <http://basedoc.diplomatic.gouv.fr>).

²⁴⁵ As one scholar has written, “the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defense against terrorist attacks not imputable to another state”. Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 381 (2009). As Heyns notes, “State practice since 11 September . . . suggests that international law may now permit” the notion that “force could be used in self-defense in response to an armed attack by a non-State group whose acts were not attributable to a State”. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 88, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

Although we agree that Article 2(4) represents “an effort to create a stronger system of constraints on the use of force, in order to reduce the incidence of armed conflicts among states”, see CLAIRE FINKELSTEIN ET AL., *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 228 (2012), we do not believe that fact supports the additional claim that self-defense is permitted only if the non-State actor’s conduct can be imputed to the territorial State. See *id.* at 229 (arguing that “it is the state to which the operations of the [non-state actor] can be imputed for purposes of legal responsibility that is the sole legal object of the state use of force. And such use of force can only be justified if indeed the actions of the [non-state actor] can be imputed to the state against which the force is being employed.”). Finkelstein’s argument is largely based on the assertion that “[p]ermitting the use of force against States that have not assisted terrorists acting within their territory would . . . increase the risk of armed conflict among nations”. *Id.* at 242. We take that to be a factual assertion, even if it is not provable. We do not view it as a principle of international law. Indeed, we do not even view it as consistent with Article VIII of the Charter, which

Fourth, the inherent right of self-defense against non-State actors is supported by customary international law dating back more than a hundred years, as agreed by the parties in the *Caroline* incident.²⁴⁶ Although the U.S. disputed the legitimacy of the British use of force, it did not dispute the asserted British right to use force against threats on U.S. territory that were not attributable to the U.S. itself. The incident stands for “the proposition that self-defense is permissible as a reaction to attacks by non-Governmental entities (in that case, support by U.S. nationals for a rebellion in Canada)”.²⁴⁷

Fifth, the ICJ has left the question open.

We disagree with writers who read the ICJ’s decisions in *Nicaragua v. United States* and *DRC v. Uganda* to suggest that armed attacks by a non-State actor operating within another State do not give rise to a right of self-defense unless those hostilities can be attributed to that State.²⁴⁸

In *Nicaragua*, the U.S. was found to have violated the sovereignty of

does not reflect the broader view of Article 2(4) that Finkelstein espouses, or the other principles of international law that we have cited.

²⁴⁶ For a discussion of *Caroline*, see Legal Analysis, Part I.E *infra*; see also Appendix B (glossary entry on *Caroline*).

²⁴⁷ 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).

²⁴⁸ See, e.g., Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 279 (Simon Bronitt et al. eds., 2012) (“Even where militant groups remain active along a border for a considerable period of time, their armed cross-border incursions are not considered attacks under Article 51 giving rise to the right of self-defense unless the state where the group is present is responsible for their actions.”); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 55, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (contending the ICJ has concluded that “the use of force in self-defense by one State against a non-State armed group located on a territory of another State can be justified only where the actions of the group concerned are imputable to the host State”); see also Kimberley N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1049, 1052 (2009) (noting that “*Nicaragua* and *DRC v. Uganda* [are] most often cited for the attribution-based definition of ‘armed attack’”).

Nicaragua by supporting Contra guerillas in their rebellion against the Nicaraguan Government.²⁴⁹ The U.S. claimed that it had acted in collective self-defense with the Government of El Salvador, in response to the supply of arms from the territory of Nicaragua to groups inside El Salvador.²⁵⁰ The ICJ held that, even if such arms trafficking did take place, it could not conclude that the trafficking could be imputed to official acts of Nicaragua²⁵¹ and that the use of force *against Nicaragua* was not justified by the right of self-defense. Since the non-State actor's conduct was not attributable to a State, the focus of the ICJ concern was on the lawfulness of the use of force *against the State itself*. The ICJ did not reach the legality of a use of force directed only at an aggressive non-State actor residing on the territory of the State. As one scholar has written:

“The Court’s insistence that armed attacks be attributable to a state before they give rise to a right to use force in self-defense . . . has to be understood in the context of its findings of fact. These decisions should be read as drawing a distinction between uses of defensive force *against* a host state – in which case the armed attacks being responded to must be attributable to that state – and uses of defensive force against (and only against) non-state actors *within* a host state’s territory, without pronouncing on the legitimacy thereof (as the issue, on the facts, was not before the Court).”²⁵²

Indeed, in its subsequent decision in *DRC v. Uganda*, the ICJ explicitly left open the question of whether extraterritorial force against a non-State actor without

²⁴⁹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 292 (June 27).

²⁵⁰ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 48 (June 27) (“It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua.”)

²⁵¹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 160 (June 27).

²⁵² Kimberley N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1049, 1052 (2009).

attribution to a State is permissible. The Court emphasized that Uganda’s defensive measures were carried out against the Democratic Republic of Congo (DRC) itself, not just the non-State actor, including in areas where the non-State actor did not operate.²⁵³

Accordingly, it concluded that:

“the Court has 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-defense against large-scale attacks by irregular forces”.²⁵⁴

Thus, “the Court avoided the questions whether there may be an armed attack by non-state actors in the absence of state involvement, and what measures a state may take against such an attack”.²⁵⁵

B. The Justification for Infringement on Sovereignty

We now address whether such a use of force unduly infringes on the sovereignty of the State in which the non-State actor is located.

We conclude that infringement on State sovereignty is permissible, if the requirements of self-defense are otherwise met, so long as the State itself is not the target of the forcible measures.²⁵⁶ Specifically, forcible measures are permissible when (a) an

²⁵³ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 118, 147 (Dec. 19).

²⁵⁴ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19).

²⁵⁵ CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 134 (3d ed. 2008); *see also* Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 384 (2009) (explaining that the ICJ “expressly left open the question ‘whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces’”); Kimberley N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1049, 1051 (2009) (“[A] careful reading of the International Court of Justice’s (ICJ’s) jurisprudence reveals that it does not actually require armed attacks by non-state actors to be attributable to the host state before defensive force can be used against (and only against) those non-state actors in the host state’s territory.”)

²⁵⁶ The right to exercise force in self-defense within the territorial State does not confer the right to target the territorial State’s facilities and personnel, unless the non-State actor’s activities can be attributed to the territorial State. Rather, only the non-State actor’s personnel and facilities may be targeted. *See*

armed attack emanates from the State's territory, and (b) the requirement of "necessity" is met, which requires (among other things) that the territorial State is either unwilling or unable to prevent the attack and protect the victim State.²⁵⁷

First, nothing in the language of Article 51 limits *where* the force in self-defense can be exercised "if an armed attack occurs". As one scholar has written:

"It does not follow from the fact that the right of self-defense pursuant to Art. 51 is restricted to the case of an 'armed attack' that defensive measures may only affect the attacker. Thus it is compatible with Art. 51 and the laws of neutrality when a warring state fights hostile armed forces undertaking an armed attack from neutral territory on the territory of the neutral state, provided that the state concerned is either unwilling or unable to curb the ongoing violation of its neutrality."²⁵⁸

Second, if Article 51 preserves the right to exercise force against non-State actors in self-defense, as we have concluded that it does, then the Article must logically excuse the violation of sovereignty.²⁵⁹ The right of self-defense against a non-State actor would be meaningless if it could not be used within the territory of another State, because

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, 102 (2009).

²⁵⁷ For a discussion of "necessity" under *ius ad bellum*, see Legal Analysts, Parts I.D, I.E, *infra*.

²⁵⁸ Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 661-78, 673 (Bruno Simma et al. eds., 1994), (concluding that "[f]or the purpose of responding to an 'armed attack', the state acting in self-defense is allowed to trespass on foreign territory, even when the attack cannot be attributed to the state from whose territory it is proceeding"); see also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 249 (2010) ("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.").

²⁵⁹ Kimberley N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT'L L. 1049, 1049-1050 (2009) ("Using defensive force against the base of operations of non-state terrorist actors within a foreign host state's territory, even if that force targets only the non-state actors, still amounts to a violation of the host state's territorial integrity. If Article 51 is to be a true exception to the prohibition on the use of force as set out in Article 2(4), it must in some way excuse the violation of the host state's territorial integrity.").

armed attacks by non-State actors virtually always emanate from the territory of a State.

Third, a limited infringement on sovereignty for the purpose of exercising force in self-defense against a non-State actor is supported by State practice as reflected in the *Caroline* incident.²⁶⁰ In *Caroline*, “the United 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”.²⁶¹

Nevertheless, both parties accepted that a British measure of self-defense during a time of peace between the two States could be permissible, so long as the use of force otherwise met international legal standards.²⁶²

Fourth, a limited infringement on sovereignty for the purpose of self-defense is, to some degree, supported by intuitive notions of self-defense as the means necessary to protect the State.²⁶³ Although the Charter seeks largely to eliminate the use of force by one State against another, Article 51 recognizes that States must be left some leeway to take actions necessary to protect their people. If an armed attack emanates from another State, and that State is unwilling or unable to take measures to protect the victim State, then the victim State should have some flexibility to protect itself in

²⁶⁰ See Ashley S. Deeks, “*Unwilling or Unable*”; *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483, 486 (2012) (“More than a century of state practice suggests that it is lawful for State X, which as suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.”).

²⁶¹ Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 243-244 (2010).

²⁶² Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 244 (2010) (“[I]t was understood that self-defense could be permissible outside the context of war and without consent of the territorial state from which the non-state actor attacks emanate.”).

²⁶³ See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 241 (2010) (“[N]othing 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.”).

appropriate circumstances.

Our conclusion on this point does not depend on Security Council Resolution 1373, which many writers take to justify an infringement on sovereignty for the purpose of exercising self-defense against non-State actors. As we now explain, the right of self-defense is unaffected by Resolution 1373.

Since September 2001, even the passive failure of a State to act against non-State actors carrying out terrorist activities within its territory amounts to a violation of international law. In Resolution 1373, which is binding on all UN members, the Security Council made it an affirmative obligation of all States to take steps to prevent terrorist acts and to deny terrorists safe-haven.²⁶⁴ The resolution provides, among other things, that each State shall “[t]ake the necessary steps to prevent the commission of terrorist acts”; “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”; and “[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”.²⁶⁵ Resolution 1373 arguably codified a preexisting rule under customary international law that States must not allow their “territory to be used for acts

²⁶⁴ See, e.g., Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 736 (2011) (citing S.C. Res. 748, U.N. Doc. S/RES/508 (Mar. 31, 1992)) (“A state is required to prevent extra-state forces, which engage in hostile acts towards other states, from operating within its borders. In particular, the [Security Council] has said that ‘every state has the duty to refrain from . . . acquiescing in activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.’”); 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, 85 (2009) (“Simply put, States have an affirmative responsibility under international law to prevent the commission of terrorist acts from within their borders, both generally and specifically. While this general duty originally rose as guidance from the U.N. General Assembly, since September 11th it has morphed into a specific legal obligation on the part of all States . . .”).

²⁶⁵ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

contrary to the rights of other States”²⁶⁶.

Some scholars contend that the rule embodied in Resolution 1373 means a State’s right to use force in self-defense on another States’ territory may be triggered if the territorial State that does not meet this affirmative obligation to prevent terrorist attacks²⁶⁷ because that “state’s continuing breach poses a risk to the injured State”.²⁶⁸ In other words, according to those scholars, a State that has failed to meet its obligations under international law “cannot expect to preserve its territorial integrity against lawful measures of self-defense”.²⁶⁹ Accordingly, in the view of those scholars, the State suffering an armed attack or threatened with one need not wait until the territorial State comes into compliance with its international obligations before invoking self-defense; if

²⁶⁶ Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 680 (2011) (“The general affirmative obligation that every State not knowingly allow ‘its territory to be used for acts contrary to the rights of other States’ was first articulated by the I.C.J. in the *Corfu Channel* case. This concept was confirmed in the context of transnational terrorism in Security Council Resolution 1373, passed shortly after September 11, 2001.”)

²⁶⁷ See, e.g., Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 680 (2011) (“Security Council Resolution 1373 confirms that a State’s failure to prevent its territory from being used as a safe haven triggers the right to self-defense against the non-State actors located within the host State’s territory. The exercise of self-defense in this context is an exception to the host State’s right to territorial integrity, waived because of its failure to comply with international obligations.”); 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, 86 (2009) (explaining that, under Security Council Resolution 1373, “States are ultimately responsible for preventing terrorist acts committed from within their borders” and warning that “[a] breach of this responsibility opens the door to possible action by injured States”).

²⁶⁸ 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, 97-98 (2009); see also *id.* at 57 (referring to Security Council Resolution 1373, among other resolutions, in explaining that “States have a legal responsibility to prevent the commission of terrorist acts from within their borders. If a terrorist organization operates within a host State, and that host State cannot or will not act to prevent the terrorist organization from attacking another State, the injured State may act in self-defense against the terrorist organization, with or without the consent of the host State.”).

²⁶⁹ Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 679 (2011) (citing YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 247 (4th ed. 2005).)

the territorial State does not control its territory sufficiently to remove the threat, the victim State may act unilaterally.²⁷⁰

We do not adopt that view. Although a State's violation of a Security Council resolution may give rise to legal consequences, including sanctions at the hands of the Security Council itself, it does not necessarily give rise to another State's right to engage in self-help in the form of armed force, which is an extreme measure, or excuse that State from complying with the U.N. Charter. Thus, we conclude that the right of self-defense is neither enlarged nor diminished by Resolution 1373.

C. Armed Attacks by Non-State Actors

We now turn to the question whether—and under what circumstances—an act by a non-State actor may rise to the level of an “armed attack” sufficient to trigger the “inherent right of . . . self-defense” under Article 51.

Some scholars contend that terrorist attacks are more akin to criminal acts and can never (or almost never) rise to the level of an “armed attack” under Article 51.²⁷¹

Others deny that there is an “armed attack” requirement at all.²⁷² We reject each extreme.

²⁷⁰ See Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 661, 680 (2011) (concluding that “a State should not have to defer to another State's territorial sovereignty or await consent to use force in self-defense in that State's territory where that State does not control its territory or has no legitimate means of controlling its territory, such as Somalia or other failed or failing States”).

²⁷¹ See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 278 (Simon Bronitt et al. eds., 2012) (“An armed response to a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes, not of armed attacks that can give rise to the right of self-defence. Terrorist attacks are usually sporadic and are rarely the responsibility of the state where the perpetrators are located.”).

²⁷² These scholars argue that a State should be entitled to respond in self-defense to any threat, or at least any threat above a “de minimis” level, even if it does not rise to the level of an “armed attack”, because the “armed attack” requirement creates a gap in the law under which a State cannot respond to serious threats against its people and must instead stand by and wait until the threat escalates. See Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The*

We conclude that there is such a requirement and that an attack by a non-State actor rises to the level of an “armed attack” when it meets the same minimum qualifying criteria—in gravity and magnitude—as an armed attack by a State.²⁷³

Although the ICJ has not provided specific guidance on the meaning of “armed attack”, and there is not otherwise an authoritative definition, some principles may be gleaned from ICJ jurisprudence and scholarly writings.

First, a use of force must cross some threshold before it may be deemed an “armed attack”.²⁷⁴ In *Nicaragua*, the ICJ determined that not all uses of force against a State trigger the right of self-defense under Article 51. Rather, the Court stated that it

Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law, 39 DENV. J. INT’L L. & POL’Y 661, 675 & nn.109-10 (2011) (summarizing the minority view). The “armed attack” threshold is open to the criticism that “states which suffer attacks that fall short of the [ICJ’s] ‘armed attack’ threshold must . . . simply endure low-intensity violence, even in the face of a paralyzed Security Council that proves consistently unable to respond as the charter presupposes”. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 82 (2010).

Despite the criticism, we reject the argument for three reasons. *First*, it is inconsistent with the plain language of Article 51, which recognizes the right of self-defense only if “an armed attack occurs”, as does the ICJ jurisprudence. *Second*, we disagree that an armed attack threshold leaves States powerless to respond to low-intensity violence; it means only that low-intensity violence must be addressed by means short of armed force, including by law-enforcement efforts, diplomacy, and resort to the Security Council. That limitation is consistent with the Charter’s effort to limit the resort to armed force. *Third*, we conclude that low-intensity violence over time can justify forcible measures of self-defense under the accumulation theory of “armed attack”, and the principles of anticipatory self-defense enable a State to act before low-intensity violence results in a grave threat to the State.

²⁷³ In *Nicaragua*, the ICJ held that the actions of irregular forces can amount to an armed attack “if such an operation, because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces”. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27); see 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, 72-73 (2009) (discussing *Nicaragua*). Although the Court was focused on whether the armed attack could be attributed to a State, the decision also stands for the proposition that attacks by “irregular forces”, under at least some circumstances, can cross the threshold of violence required to constitute an “armed attack”.

²⁷⁴ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 50 (2010) (“The possible required threshold is . . . an issue that is not settled with regard to the well-established concept of self-defense against states, and consequently the same question remains open with regard to armed attacks by non-state actors.”). Lubell suggests that there be a higher threshold for attacks by non-State actors so that low-level violence by armed groups would not trigger the right to incursion into another State. See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 51 (2010).

was “necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”.²⁷⁵ The ICJ has reaffirmed this conclusion in subsequent decisions.²⁷⁶

Second, the determination of whether an act qualifies as an “armed attack” depends upon its “scale and effect”.²⁷⁷ In *Nicaragua*, the ICJ held that a “mere frontier incident” does not give rise to the right of self-defense and that providing assistance to rebels in the form of weapons or logistical support also is insufficient.²⁷⁸

²⁷⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 191 (June 27); see Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 709 n.31 (2005) (“The ICJ . . . confirmed that states do not have a right of individual or collective armed response to acts that do not constitute an ‘armed attack’.”); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 277 (Simon Bronitt et al. eds., 2012) (“The [ICJ] has restated in several cases that the Charter means what it says. The ICJ in the 1986 *Nicaragua* case made clear that acts triggering the right to use armed force in self-defence must themselves amount to armed attacks. In *Nicaragua*, the Court held that low-level shipments of weapons did not amount to an armed attack and could not be invoked as a basis for self-defence.”).

²⁷⁶ See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 51 (Nov. 6) (“As the Court observed in [*Nicaragua*], it is necessary to distinguish ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’ since ‘In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack.’”) (Internal citations omitted); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 147 (Dec. 19) (“[T]he Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has 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.”); see also Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 387 (2009) (explaining that the ICJ “has reaffirmed the threshold requirement on various occasions. In the *Oil Platforms* case, it expressly affirmed the distinction between ‘most grave’ and ‘less grave forms’ of the use of force in the context of inter-state conflicts. In *DRC-Uganda*, insofar as it left open whether states could respond to ‘attacks by irregular forces’, it contemplated self-defence only if directed against ‘large scale attacks’”).

²⁷⁷ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27); Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 23 (2003); 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, 72 (2009).

²⁷⁸ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27) (contrasting “armed attack” with “a mere frontier incident” and concluding that “armed attack” does not include “assistance to rebels in the form of the provision of weapons or logistical or other support”); see also Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 277 (Simon Bronitt et al. eds., 2012) (“The ICJ has made clear that the armed attack that gives rise to this right of self-defense must be an attack that involves a significant amount of force—it must be more

Third, a single act of violence may constitute an armed attack if it is of sufficient scale and effect. In the *Oil Platforms* case, the ICJ acknowledged that that “the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defense’”.²⁷⁹ Although the ICJ found insufficient evidence that Iran actually carried out the bombing at issue in the case, “the majority opinion made it clear that an individual act of violence is sufficient to constitute an armed attack”.²⁸⁰

Fourth, under some circumstances the accumulation of multiple smaller attacks, none of which individually amounts to an “armed attack”, may amount to an “armed attack”.²⁸¹ This so-called “accumulation doctrine” has received increasing support in recent years²⁸², and we disagree with those who contend that each attack must be looked at individually.²⁸³ Acts of violence are not always singular events—they may be part of a larger operation—and, at some point, the accumulation of smaller attacks

than a mere frontier incident, such as sporadic rocket fire across a border.”); Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 676 (2011) (“According to the I.C.J., only the ‘most grave forms of the use of force’ constitute an armed attack. An armed attack must reach a certain significant scale of violence, above ‘mere frontier incidents.’”).

We note that providing assistance to terrorist organizations in the form of weapons or logistical support may violate other obligations, including Security Council Resolution 1373. As explained above, such violations do not in themselves give rise to the right to use force unilaterally in self-defense.

²⁷⁹ *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 72 (Nov. 6); see Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 737 (2011).

²⁸⁰ Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 737 (2011).

²⁸¹ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 53 (2010) (describing the debate surrounding the “accumulation doctrine”).

²⁸² See Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. OF INT’L L. 359, 390 (2009).

²⁸³ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 41, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston). Although he does not rule out the validity of self-defense against non-State actors, Alston contends that a non-State actor will “very rare[ly]” be able to conduct an attack on a scale that would give rise to the right of self-defense. See *id.* ¶ 40.

starts to look like a military campaign.²⁸⁴ Ultimately, the existence of an “armed attack” is a factual issue that turns on whether the level of violence against the State is of sufficient “scale and effect”, whether that violence consists of a single large use of force or a series of smaller forcible acts.

D. The Requirements of Necessity and Proportionality²⁸⁵

Although the *ius ad bellum* requirements of necessity and proportionality are not expressly set out in the UN Charter, the ICJ held in the *Nuclear Weapons* case that “[t]he submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law”.²⁸⁶ Although the concepts of necessity and proportionality are related, they are often analyzed separately.

The requirement of “necessity” in *ius ad bellum* means that force may be used only if there is no alternative available short of the use of force.²⁸⁷ A State may use force only if diplomatic or law enforcement measures are insufficient to stop the attack, thereby making force necessary.²⁸⁸ The requirement reflects the policy that force—and

²⁸⁴ See 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, 74 (2009) (noting that “terrorist attacks cannot always be viewed as singular events”); *id.* at 76-77 (concluding that “an ongoing series of small-scale terrorist attacks may, in a cumulative fashion”, have the required “scale and effect”).

²⁸⁵ This analysis is distinct from the *ius in bello* analysis of necessity and proportionality. See Legal Analysis, Parts III. B, C, *infra*.

²⁸⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8). The ICJ’s holding has been reaffirmed in several of its decisions. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 149-50 (3d ed. 2008) (citing *Nicaragua*, *Oil Platforms*, and *DRC v. Uganda*); see also Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in *SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE* 263, 278 (Simon Bronitt et al. eds., 2012) (“In addition to a lawful basis in the Charter, states using force must show that force is necessary to achieve a defensive purpose. If a state can show the necessity element, it must also show that the method of force used will not result in disproportionate loss of life and destruction compared to the value of the objective.”).

²⁸⁷ See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 150 (3d ed. 2008) (“Necessity is commonly interpreted as the requirement that no alternative response be possible.”)

²⁸⁸ See Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International*

in particular unilateral force—should be used only as a last resort.²⁸⁹

The principle of necessity raises particular issues in the context of an armed attack by a non-State actor. One possible measure short of using force—time permitting—is to ask the territorial State to take measures to prevent the hostile activities by the non-State actor. Logically, in most circumstances,²⁹⁰ the requirement of “necessity” has not been met until those measures have been tried.²⁹¹ Accordingly, a State suffering an armed attack, or facing a threat of an armed attack, by a non-State actor “should first attempt to have the territorial state take measures against the non-state actor”.²⁹² In other words, the victim State should first identify the territorial State and

Humanitarian Law, 39 DENV. J. INT’L L. & POL’Y 661, 681 (2011) (“The principle of *necessity* in the context of self-defense requires that force only be used when there is no other alternative course of action to deter the attacks against the State. If the State cannot rely on diplomatic or law enforcement measures to stop the attacks, it may respond with necessary force. This restriction on self-defense essentially requires that a State use force only when no other viable option exists to deter the attacks.”).

²⁸⁹ See Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 283 (Simon Bronitt et al. eds., 2012) (“Necessity in the *jus ad bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defence.”).

²⁹⁰ The requirement of necessity may be met if it is infeasible under the circumstances to secure the cooperation of the territorial State during the window of time available for self-defense, and there may be limited circumstances in which it is not feasible to give that State prior notice. See Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483, 523 (2012) (“There may be certain limited situations in which the victim state has a high level of confidence that making [a request to the territorial State] either will be futile or will cause tangible harm to the victim state’s national security. In particular, if the victim state has very strong reasons to believe that the territorial state is colluding with the nonstate actor, asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the nonstate actor before the victim state can act.”)

²⁹¹ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 46 (2010) (“The state which suffered the armed attack, can attempt turning to the territorial state requesting, or even demanding, that it exercise its jurisdiction and take measures to prevent the hostile activities by the non-state actor. This means that there is an additional tool in the box of available options, this being the possibility of seeking a solution via the territorial state. So long as this option exists and has not been tried, then it can be said that the requirement of necessity has not been fulfilled.”).

²⁹² NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 46 (2010); see also Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483, 521 (2012) (“Virtually every state that publicly has defended its use of force in another state’s territory [against a non-State actor] has indicated that it first asked the territorial state to take the requisite steps to suppress the nonstate actors’ activities, whether by arresting them, ejecting the actors from the country, transferring them to the victim state, or using military force against them.”).

“call upon the legal responsibility of the host State to prevent the commission of terrorist attacks from within its borders”.²⁹³ If the territorial State either is unwilling or unable to act,²⁹⁴ the victim State may use force consistently with the requirement of necessity.²⁹⁵ As Heyns notes, “unwillingness or inability” does “not refer to an independent justification for the use of force on foreign soil” but is “at best” part of “the requirement that action taken in self-defense must be necessary”.²⁹⁶

As an example, after the attacks of September 11, 2001, the United States first demanded that the *de facto* Government of Afghanistan (the Taliban) “[d]eliver to United States authorities all the leaders of al Qaeda”, close all al-Qaeda training camps in Afghanistan, and “[g]ive the United States full access” to enable the U.S. to confirm their

²⁹³ 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, 84 (2009).

²⁹⁴ For an in-depth discussion of the “unwilling or unable” concept and its origins, *see generally* Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483 (2012).

²⁹⁵ *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 42 (2010) (concluding that “if the territorial state will not or cannot prevent the attacks launched by the non-state actor operating from within its borders, the victim state may have the right to take self-defense measures against the non-state actor in the territorial state”); Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 736 (2011) (“Because of Pakistan’s failure to prevent al Qaeda from operating within its borders, Pakistan ‘may not oppose its sovereign rights to any foreign State that intends lawfully to use force against’ al Qaeda.”). Lubell provides this description of “unable” and/or “unwilling”:

“if the territorial state finds the non-state actor operations objectionable, but is unable to prevent them, it would avoid the need for unilateral force by the victim state were it to co-operate with that state and allow it, or others, to assist in countering the non-state actor. By choosing not to do so it hovers on the borderline between ‘unable’ and ‘unwilling’.” NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 41 (2010).

²⁹⁶ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 91, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns); *see also* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 46 (2010) (“[T]he relationship between the territorial state and the non-state actor may be such that it will choose not to take the demanded measures—in which case it may be in violation of other international obligations—or it might claim an inability to act. In both these cases, the victim state could then claim to have *no remaining option* but to use force.” (emphasis added)).

closure.²⁹⁷ After the Taliban refused to do so, the United States informed the Security Council that it was invoking its right to self-defense under Article 51.²⁹⁸

Because *ius ad bellum* concerns the infringement on State sovereignty, the necessity test must be applied separately for each of the territories in which the victim State believes that it must act against the non-State actor in self-defense. As Heyns notes:

“[A] State must report afresh when the material facts have changed, for example, where self-defense is used as a basis for the use of force on the territory of a new State, or new parties are added to the conflict.”²⁹⁹

Thus, although the use of force against al-Qaeda in Afghanistan may be justified by the refusal of the Taliban to take action, the use of force might not necessarily be justified, for example, against an al-Qaeda cell in Turkey.³⁰⁰ In the latter case, the United States

²⁹⁷ See President George W. Bush, Address to the Joint Session of 107th Congress (Sept. 20, 2001) (transcript available at http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf).

²⁹⁸ See Letter dated 7 October 2001 from the Permanent Rep. of the United States of America to the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

²⁹⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 94, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

United States officials have asserted that because there is an “armed conflict” with al-Qaeda, there is no need to do “a separate self-defense analysis each time”. See John Brennan, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an/>). This represents a confusion between the threat of an “armed attack”, which underlies the self-defense justification for an incursion on sovereignty, and the existence of an “armed conflict”, which has a bearing on the legality of the targeted killing under *ius in bello*. We accept that within an armed conflict, there is no need for a separate *ius in bello* analysis of each use of force, but that assertion does not address the *ius ad bellum* requirement of necessity.

³⁰⁰ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 67 (2010) (explaining that “the necessity test must be applied separately for each of the territories concerned. For example, whilst there may have been the necessity of carrying out self-defense operations against Al-Qaeda bases in Afghanistan, this would not have been the case with regard to cells operating from many other territories—whether it is cells in Hamburg or Tashkent—in which the territorial state would readily take action itself. As raised earlier, in the context of self-defense against non-state actors, the requirement of necessity dictates the need to first establish that the territorial state itself is unwilling or unable to put an end to the armed attacks.”); CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 233 (2012).

would not be justified engaging in forcible measures until it had pursued the possibility of the Turkish government taking the necessary steps to eliminate the threat.³⁰¹

The principle of “proportionality” relates to the “size, duration and target of the response”.³⁰² The measures taken in self-defense must be proportional to either (a) “the armed attack that gave rise to the self-defense”; and/or (b) “the threat being faced and the means necessary to end the attack”.³⁰³ There is some dispute as between those two options. The ICJ’s decision in *Nicaragua* suggests that the use of force must be proportional to the armed attack itself.³⁰⁴ On the other hand, many scholars take the view that self-defense contemplates an ongoing threat, and so the measures taken should be in proportion to that threat. That could mean that the acts taken in self-defense are more or less significant than the armed attack itself, if such measures are required to eliminate the ongoing danger.³⁰⁵

³⁰¹ See Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT’L L. 483, 547 n.236 (2012) (explaining that, assuming a State may be in an armed conflict with a nonstate actor in multiple states, “the victim state would need to undertake an ‘unwilling or unable’ analysis to evaluate whether it could use force in that armed conflict in a new territorial state”).

³⁰² CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 150 (3d ed. 2008).

³⁰³ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 64 (2010).

³⁰⁴ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27) (explaining that it is “a rule well established in customary international law” that self-defense warrants “only measures which are proportional to the armed attack and necessary to respond to it”); see also Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 737 (2011).

³⁰⁵ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 66 (2010) (contending that “proportionality cannot be confined to an exact measurement against the original attack, and must include a balancing of the means necessary to achieve an end to the danger”).

E. Anticipatory Self-Defense

Perhaps the most intensely debated aspect of the right of self-defense is the extent to which it permits a State to act in anticipation of a future attack, rather than to repel an existing attack.³⁰⁶

Although some scholars argue that force may not be used until an “armed attack” actually has occurred,³⁰⁷ we believe that the better view is that international law recognizes some ability to use force in “anticipation” of an attack. By contrast, the U.S. Government has asserted a right of “preemptive” self-defense,³⁰⁸ even broader than an anticipatory right, which does not require knowledge of a specific impending attack, but rather may be exercised “even if uncertainty remains as to the time and place of the enemy’s attack”.³⁰⁹

³⁰⁶ This issue was central to the debate over the legality of the U.S. invasion of Iraq in 2003, which this Report does not address. It is less significant in the context of the drones program, where the strikes often are made in the context of ongoing violence rather than in anticipation of future attacks.

³⁰⁷ See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963) (asserting that it “can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence”).

³⁰⁸ Reisman defines preemptive self-defense as:

“a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet directly threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost. A credible claim for [anticipatory self-defense] must point to a palpable and imminent threat; a claim for [pre-emptive self-defense] need only point to a possibility, a contingency. The further one moves from an actual armed attack . . . the greater the interpretive latitude given the would-be unilateralist and the heavier the burden of proof.” Michael W. Reisman, *Self Defense in an Age of Terrorism*, 97 Am. Soc’y. Int’l L. Proc. 141, 143 (2003), available at http://digitalcommons.law.yale.edu/fss_papers/1005.

³⁰⁹ See, e.g., President George W. Bush, Graduation Speech at West Point (June 1, 2002) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html>) (stating that the U.S. will “be ready for preemptive action when necessary to defend our liberty and to defend our lives”, arguing that “[i]f we wait for threats to fully materialize, we will have waited too long”); The White House, *The National Security Strategy of the United States of America* 15 (2002), available at <http://www.state.gov/documents/organization/63562.pdf> (“The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat,

We explore the contours of this debate.

1. The Pre-Charter Regime and the Principle of Necessity

The doctrine of anticipatory self-defense in customary international law goes back to the *Caroline* case.

In 1837, a group of Canadian rebels and U.S. sympathizers had begun to amass an invasion force on Navy Island, a small island on British territory on the Canadian side of the Niagara River. British forces determined that the destruction of the American vessel called *Caroline* would prevent further reinforcements from reaching Navy Island. Under cover of darkness, British forces crossed into U.S. territory, captured the ship, and destroyed it, killing at least one American.³¹⁰

The incident led to correspondence between U.S. Secretary of State Daniel Webster and Alexander Baring, 1st Baron Ashburton, concerning the British claim that

the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather."); U.S. Department of Defense, *The National Defense Strategy of the United States of America 9* (2005), available at <http://www.defense.gov/news/mar2005/d20050318nds1.pdf> ("Terrorists have demonstrated that they can conduct devastating surprise attacks. Allowing opponents to strike first—particularly in an era of proliferation is unacceptable. Therefore, the United States must defeat the most dangerous challenges early and at a safe distance, before they are allowed to mature").

Noting that the impetus for "pre-emptive" self-defense has come from the involvement of non-State actors, who are not subject to the "dynamic of reciprocity and retaliation that underlies international law" in the same way that territorial sovereigns are, and that the U.S. Government has implicitly relied on such a claim since the Iraq war of the 1990s, Reisman concludes that "the legal danger of an abuse of preemptive self-defense is no greater than for anticipatory self-defense, which also does not have to be justified by an armed attack". In each case, the problem is "not the absence of legal criteria", but the unilateral nature of resort to the use of force in the name self-defense before an armed attack has actually occurred, the validity of which can only be assessed ex post facto on the customary international law principles of necessity, proportionality and discrimination. Michael W. Reisman, *Self Defense in an Age of Terrorism*, 97 AM. SEC'Y INT'L L. PROC. 141, 143 (2003), available at http://digitalcommons.law.yale.edu/fss_papers/1005.

³¹⁰ For the facts of the *Caroline* case, see, e.g., HOWARD JONES, *TO THE WEBSTER-ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS* (1977).

the use of force on U.S. territory was in self-defense.³¹¹ The common ground between the two is often considered to be evidence of customary international law.³¹²

The fundamental area of agreement between Webster and Ashburton was that self-defense requires *necessity*. Webster asserted that the lawful use of force on another State's territory requires "nothing less than a clear and absolute necessity".³¹³ He further claimed, using oft-cited language, that the right of self-defense "should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'".³¹⁴ Ashburton, for his part, agreed that "a strong, overpowering necessity" would permit the use of force on another State's territory, excusing the infringement of sovereignty.³¹⁵ In applying that principle, Ashburton adopted Webster's terminology:

"Agreeing, therefore, on the general principle [*i.e.*, the inviolable character of a State's territory], and on the possible exception to which it is liable [*i.e.*, self-defense], the only question between us is whether this occurrence came within the limits fairly to be assigned to such exception—whether, to use your words, there was 'that necessity of self-defense, instant, overwhelming, leaving no

³¹¹ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 110 (1848), available at <https://archive.org/details/diplomaticoffici03webs>; see also, e.g., JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 750-751 (8th ed. 2012); MALCOLM N. SHAW, INTERNATIONAL LAW 1131 (6th ed. 2008).

³¹² The rule of customary law recognized in the *Caroline* case has not been carried forward unchanged by subsequent State practice. We discuss *Caroline* in light of its prominence in the literature and debate on anticipatory self-defense.

³¹³ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 105 (1848), available at <https://archive.org/details/diplomaticoffici03webs>; see also *id.* at 111 (conveying message from President of the U.S. stating that invasion of a State's territory requires "the most urgent and extreme necessity"), 112 (referring to "pressing or overruling necessity").

³¹⁴ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 118 (1848), available at <https://archive.org/details/diplomaticoffici03webs>; see also *id.* at 110 (arguing that a State must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation").

³¹⁵ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 113 (1848), available at <https://archive.org/details/diplomaticoffici03webs>.

choice of means,' which proceeded the destruction of the Caroline while moored to the shore of the United States.”

Although they apparently agreed on the applicable legal principles, Webster and Ashburton disagreed on their application. Webster took the view that there was no “necessity” because the incident “could have been prevented by any ordinary course of proceeding”; he maintained that, if informed, the U.S. Government itself would have put a stop to the actions of the U.S. sympathizers, as their conduct was in violation of U.S. law.³¹⁶ Ashburton insisted, however, that under the circumstances Britain was entitled to act without waiting for the U.S. Government to control its own territory. As there had been a “gradual accession of numbers and of military ammunitions” on Navy Island over the course of two weeks, he contended that the standard set forth by Webster was satisfied; that there was ““a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation””.³¹⁷ Ashburton does not appear to have claimed that an *attack* by the forces on Navy Island was “instant” or “overwhelming”. Rather, he claimed—using Webster’s words—that the *necessity* of self-defense was “instant” and “overwhelming”, leaving the British forces with “no choice of means” to safeguard their people.

³¹⁶ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 105 (1848), available at <https://archive.org/details/diplomaticoffici03webs>.

³¹⁷ See DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 114 (1848), available at <https://archive.org/details/diplomaticoffici03webs>. Ashburton asked rhetorically:

“Supposing a man standing on ground where you have no legal right to follow him, has a weapon long enough to reach you, and is striking you down and endangering your life, how long are you bound to wait for the assistance of the authority having the legal power to relieve you? or, to bring the facts more immediately home to the case, if cannon are moving and setting up in a battery which can reach you, and are actually destroying life and property by their fire, if you have remonstrated for some time without effect, and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so than by seizing your assailant on the verge of a neutral territory?”

2. The UN Charter and the Concept of an “Armed Attack”

The UN Charter limited the *Caroline* rule by referring to the occurrence of an “armed attack”. Article 51 provides, in relevant part:

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

Some argue that Article 51 limits the pre-Charter rule in that it requires an “armed attack” to occur before a State may resort to force.³¹⁸ There is some support in the drafting history of the charter³¹⁹ and in some early commentary³²⁰ for the proposition that Article 51 embodied an effort to limit a State’s ability to act before an armed attack actually had taken place. By contrast, other scholars argue that Article 51 preserves the “inherent right” that preceded the Charter, and that the “inherent right” included the right

³¹⁸ See, e.g., Federico Sperotto, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUR. J. INT’L L. 1043, 1047 (2009) (“To summarize, according to the Charter regime a state can adopt unilateral forcible measures *against another state* when an attack *occurs*. The pre-Charter rule includes the right to respond to immediate menaces, acting in a regime of *anticipatory self-defense*.”). Sperotto describes the rise of anticipatory self-defense as a “pre-Charter revival”. *Id.* at 1045.

³¹⁹ See *Minutes of 48th Meeting of United States Delegation* (May 20, 1945), in 1 FOREIGN RELATIONS OF THE UNITED STATES 813, 818 (1945), available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1945v01> (reflecting the view that “this was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred.”).

³²⁰ See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275-78 (1963) (asserting that it “can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence”); see also NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 56-57 (2010) (summarizing this view).

to act in an anticipatory fashion to prevent an attack from occurring.³²¹ The latter interpretation has been accepted by the ICJ, and we adopt it here.³²²

The “anticipation” of an “armed attack” is particularly complicated in the context of non-State actors.

The rise of non-State actors capable of committing massive attacks has raised new challenges.³²³ Terrorist attacks are not past, present and future in the way many State armed attacks are. Rather they happen, often suddenly and without warning as far as the victim is concerned, and then they are over. The consequence is that self-defensive measures are taken when the armed attack is either past or future, so that they respond to an “armed attack occur[ring]” once that attack is over, or in anticipation of a future attack.

A victim State desiring to act lawfully is thus placed in a bind: acting in response to a past armed attack may be seen as an unlawful reprisal, but acting in anticipation of a future attack may be seen as unlawfully preemptive or premature. As

³²¹ Some point to the reference in Article 51 to the “*inherent* right of individual or collective self-defense”, which could be read to preserve the pre-Charter regime. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 711-12 (2005) (describing the view that “Article 51 speaks of the Charter not impairing an ‘inherent right’ of self-defense, meaning that Article 51 does not create a right of self-defense but instead preserves a right that pre-existed the Charter”).

³²² The ICJ has recognized that rather than creating a new right to self-defense, the UN Charter was recognizing a pre-existing right based upon customary international law. In *Nicaragua*, the ICJ explained:

“Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. . . . It cannot, therefore, be held that article 51 is a provision which ‘subsumes and supervenes’ customary international law.”
Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27).

Moreover, the French text of the Charter, which is equally authoritative as the English text, preserves the inherent right of self-defense “dans un cas où un Membre des Nations Unies est l’objet d’une agression armée”, *i.e.*, “in a situation where a Member of the United Nations is the object of an armed aggression”, which arguably reads more broadly than the English version. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 712 (2005).

³²³ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 60 (2010).

one scholar has written:

“Because the state must respond quickly to an armed attack and may even counter the attack as the offensive attack commences, states have a problem responding lawfully using military force in the case of terrorist attacks. These attacks are usually brief and do not result in an ongoing wrong such as the unlawful occupation of territory. It usually takes some time to find out who the perpetrators are and where they are. But force may not be used long after the terrorist act has ended as it loses its defensive character and becomes an unlawful reprisal.”³²⁴

With regard to past attacks, we agree that “recent practice seems to have largely abandoned the functional understanding of self-defense as a protective means of ‘repelling armed attacks’”:

“while unequivocally condemning the doctrine of armed reprisals, the international community seems indeed . . . gradually to accept armed reprisals disguised as self-defense. In so doing, it may re-introduce an altogether flexible exception to the ban on force which had been considered illegal for decades, and abandon an inherent feature of the right of self-defence”³²⁵.

This conclusion is supported by another scholar who notes that “[t]he problem of how one characterizes a ‘defensive’ response is even more apparent in the context of responding to terrorist attacks, which are designed as sudden, single attacks without further sustained paramilitary engagement”; he concludes that, under contemporary understandings of the self-defense doctrine, the occurrence of an armed attack gives rise

³²⁴ Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 278-79 (Simon Bronitt et al. eds., 2012); see also CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 228 (2012) (arguing that the “modern doctrine of self-defense [under Article 51] does not permit the use of force to prevent the development of potential future threats, or to punish past attacks”). Another scholar has noted that, under the “traditional approach” to self-defense, “[u]nless the ‘accumulation doctrine’ was accepted (which, by and large, it was not), this meant that responses against terrorist attacks of an instant character could not easily qualify as self-defense, as ‘coming after the event and when the harm has already been inflicted’, they could not ‘be characterized as a means of protection.’” Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 370-371 (2009) (quoting Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 3 (1972)).

³²⁵ Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 389, 391 (2009).

to the right to use force in order to prevent future attacks on the theory “that a state, having been attacked, may ward off future similar attacks through defensive action”, noting that “the likelihood of future attacks is much more apparent when an attack already has occurred, but nevertheless the defensive response focuses on preventing future attacks, not simply repulsing the prior attack”.³²⁶ Indeed, States and scholars generally are unwilling to accept that a State must wait until it has suffered an attack in order to use force to protect itself, at which point it may be too late.³²⁷

The terrorist attacks of September 11, 2001 present the most visible example of States’ acceptance of the right to exercise self-defense in response to a past terrorist attack:

“Most international lawyers believe that the United States: (1) sustained an armed attack in September 2001 from a terrorist group supported by Afghanistan’s de facto Government and therefore (2) was entitled, under Article 51, to respond in self-defense in November 2001, deploying military forces to Afghanistan to eliminate Al Qaeda bases and topple the Taliban Government that tolerated them. This factual sequence of self-defense is relatively straightforward and was accepted by Security Council, the North Atlantic Treaty Organization (NATO) and the

³²⁶ Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 734-35 (2005).

³²⁷ See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 57 & n.75 (2010) (collecting sources); LINDSAY MOIR, REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR 13 (2010).

Since modern weaponry can launch an attack with great speed, which gives the target State little time to react to an armed attack before the attack is completed, it is unrealistic—and dangerous—to expect a State to wait for an armed attack to take place before defending itself. As D.W. Bowett wrote in 1958, “[n]o state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence”. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958) (“It is not believed, therefore, that Art. 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent danger but before ‘an armed attack occurs’. In our view such a restriction is both unnecessary and inconsistent with Art. 2(4) which forbids not only force but the threat of force, and, furthermore, it is a restriction which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defense immediately if it is to be of any avail at all.”). Thus, “the concept of imminence might also need to be interpreted to take into account the nature and gravity of the threat, and the capabilities, means and technologies of delivery”. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 62 & n.105 (2010) (collecting authority).

Organization of American States.”³²⁸

The use of self-defense was justified in that context in the judgment of the Security Council and other international bodies—even though the armed attack against the United States was over, and no defensive action at that point could prevent its harm, and even though there was no indication that a specific future threat was known to exist.

With regard to future attacks, some participants in the debate have focused on a concept of “imminence”, arguing that a State may resort to armed force only if a specific known attack is “imminent”.³²⁹ Some have gone so far as to claim that “the precise threshold for determining imminence is the subject of dispute”.³³⁰

The origin of this “imminence” concept is not apparent to us—it does not appear in the *Caroline* letters or in Article 51.

We think the better view, more in keeping with the history of self-defense doctrine, is that the touchstone for anticipatory self-defense is “necessity”, not the creation of another separate requirement (imminence). Thus, a State must have no options available to protect itself short of force; in Webster’s words, that the threat against the State leaves it with “no choice of means” to protect itself from harm.³³¹ This

³²⁸ Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 734 (2005).

³²⁹ See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 62 (2010) (arguing that self-defense should be “limited to the strict confines of imminent attacks”). The concept of imminence featured prominently in the DOJ White Paper, although the White Paper itself was engaging in a due process analysis under the U.S. Constitution, rather than an *ius ad bellum* analysis. See Factual Background, Part II.A, *supra*.

³³⁰ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 57, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

³³¹ In the context of modern warfare with non-State actors, a developing threat as a practical matter may leave “no choice of means” before the non-State actor is on the verge of an attack. See, e.g., DOJ White Paper at 7 (arguing that waiting until attack is “immediate” “would not allow the United States sufficient time to defend itself”); Michael N. Schmitt, *State-sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 647-48 (1992) (arguing that “imminence” should be defined in relation to the “window of opportunity” to prevent a terrorist attack, noting that “a state that hesitates to act

standard is consistent with the accepted principle that force should be used only as a last resort.

The imminence of an attack is one criterion, but not the only one, in the determination of whether the use of force is “necessary”. Necessity also depends on the severity of the anticipated attack and the availability of alternatives short of armed force such as diplomacy, economic pressure, or resort to the Security Council.³³² If there remain non-forcible alternatives, self-defense is not “necessary”. If the severity of an anticipated attack—such as the detonation of a weapon of mass destruction—leaves a State in a position in which it cannot reasonably wait any longer to act, “necessity” may well be met. As one scholar observes, “the less imminent the attack, the more likely it is that non-forcible alternatives can be tried before resorting to forcible self-defense”.³³³

This understanding of “necessity” has several advantages. It respects the intuitive notion of self-defense as the State’s inherent right—and responsibility—to protect its people from harm. Moreover, it is consistent with: (a) the traditional notion that the use of force in self-defense is justified only when it is “necessary”, that is, when no effective means short of force is available; (b) modern realities that the “instant” use of force often is not feasible, especially when the attacker is a non-State actor and time and “deliberation” are required to determine the nature of the threat and to mobilize resources (and to consider the availability of non-forcible alternatives); and (c) the

against terrorists may lose the opportunity to act at all”). For example, the window for the effective use of non-forcible measures may run out if a terrorist group is on the verge of acquiring weapons of mass destruction, even if the use of such weapons is not imminent.

³³² Even some scholars who rely on the “imminence” concept have suggested that “the concept of imminence might need to be interpreted to take into account the nature and gravity of the threat, and the capabilities, means and technologies of delivery”. *See* NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 62 (2010). In our view this is simply another way of stating that “necessity” is the correct standard, and that it has multiple criteria.

³³³ NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 62 (2010).

recognition—by the Security Council and others—of the right of the United States to use force in self-defense following the attacks of September 11, even though the initial attacks were past, no known future attacks were “imminent” in the literal sense, and time and deliberation passed before the United States acted. This approach is also consistent with Article 2(4) in that a State is “the object of an armed attack” when the threat of such an attack has reached the point that no means short of force will effectively prevent it.

We agree that the requirement of “necessity” is *not* met, however, if a future attack is merely speculative or nonspecific. To the extent the U.S. claims otherwise, we disagree with its position. Few States or other observers are willing to accept such a right of preemptive self-defense.³³⁴ Moreover, in *DRC v. Uganda*, the ICJ made clear that “Article 51 . . . does not allow the use of force by a State to protect perceived security interests”.³³⁵ The majority view among scholars is that a right of “pre-emptive action” in the face of uncertain threats is without support in international law.³³⁶

The reluctance to accept pre-emptive self-defense stems in part from the fear that acts of “self-defense” against nonspecific future threats could become a pretext

³³⁴ The former principal Legal Advisor to the U.K. Foreign and Commonwealth Office, for example, has asserted that “international law permits the use of force in self-defense against an imminent attack but does not authorize the use of force to mount a pre-emptive attack against a threat that is more remote”. See Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 1, 3 (2010); see also Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. OF INT’L L. 359, 389-390 (2009) (“By and large, few states were willing to accept the United States’ assertion of a right of pre-emptive self-defence.”). According to Alston, “the use of force even when . . . uncertainty remains as to the time and place of the enemy’s attack . . . lacks support under international law”. See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, ¶ 45, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston) (internal quotation marks omitted).

³³⁵ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 148 (Dec. 19).

³³⁶ See, e.g., NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 63 (2010) (“There is not . . . any substantial support for the claim that international law has now stretched the boundaries of self-defense so as to allow for pre-emptive action against anything other than an imminent attack which cannot be prevented without recourse to force. This is as true with regard to non-state actors as it is in the context of attacks by states.”).

for unprovoked aggression, leading to an international order in which States freely disregard the prohibition on the use of force on the theory that they are preempting future dangers.³³⁷ Moreover, the use of force in the absence of an identifiable threat does not satisfy the requirements of necessity and proportionality. As one scholar has stated:

“It is simply not possible to gauge with any degree of confidence whether an act of preemptive self-defense today is necessary to deal with a threat that may not materialize for months or years. Similarly, one cannot gauge whether the act of preemptive self-defense today is proportionate to an inchoate future threat.”³³⁸

On the other hand, the “imminence” of an attack is not—and never has been—the sole criterion for determining necessity. A more remote attack—even one that cannot be predicted with complete certainty—still may leave a State without non-forcible alternatives if, for example, a State’s efforts to prevent the anticipated attack with non-forcible means have been futile and the anticipated attack is severe enough that the target State may be unable to defend itself if the attack continues to take shape. This concept may come into play, in particular, if a terrorist group were on the verge of obtaining weapons of mass destruction with the announced intention to use them against the victim State, in which case waiting until a known attack using those weapons is “imminent” may leave a State without the effective ability to defend its people.

F. Application to the Drones Program

Based upon the facts and law set forth above, we reach the following

³³⁷ See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 713-714 (2005) (discussing the concern that “accepting the legality of preemptive self-defense would place the law on a very slippery slope, taking us back into the pre-Charter world in which nations resorted to warfare for ‘just’ causes”); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 62 (2010) (“Allowing for pre-emptive self-defense in the absence of a known imminent attack which cannot be thwarted by other means (ie outside the *Caroline* formula), leaves the system on a perilous slippery slope, at the bottom of which is an international order in which states would freely disregard the foundational prohibition on the use of force, by alleging that they were pre-empting obscure future dangers or threats.”).

³³⁸ Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 715 (2005).

conclusions.

First, the terrorist attacks of September 11, 2001 constituted an “armed attack” within the meaning of Article 51 of the UN Charter. States around the world, as well as the Security Council and other international bodies, recognized that the attacks were of sufficient scale to trigger the right to self-defense.

Second, the invasion of Afghanistan was a legitimate exercise of force in self-defense in response to the attacks of September 11. It was endorsed by the Security Council and States around the world.³³⁹ The invasion of Afghanistan was necessary, among other reasons, because the Taliban refused, after the United States’ request, to control or turn over the perpetrators of the attack and remove the continuing threat to the United States. It was proportional because the attacks of September 11 were particularly severe and al-Qaeda continued to pose a significant, ongoing threat to the United States and its allies.

Third, the September 11 attacks alone no longer supply a legal basis for additional measures taken in self-defense against al-Qaeda. The United States is no longer defending itself against these attacks within the meaning of *ius ad bellum*. Even if it were, such an exercise of self-defense—lasting 12 years—would not be proportional. Rather, if the continued use of force is to be justified at all, it must be justified by current armed attacks or threatened armed attacks giving rise to a current right of self-defense.

Fourth, we do not have sufficient facts to conclude whether the U.S. currently has a legitimate Article 51 claim with respect to Pakistan. The U.S. is faced

³³⁹ See, e.g., BEN SMITH & ARABELLA THORP, BRITISH HOUSE OF COMMONS LIBRARY, THE LEGAL BASIS FOR THE INVASION OF AFGHANISTAN 2, Doc No. SN/IA/5340 (2010), available at <http://www.parliament.uk/briefing-papers/SN05340.pdf> (explaining that the invasion was not specifically authorized by the UN, but it was widely recognized as “a legitimate form of self-defense under the UN Charter”).

with armed attacks by remnants of al-Qaeda and the Taliban from Pakistan. Although we know of no imminent attack on United States soil, it is sufficient under international law that United States armed forces *stationed abroad* are the objects of armed attacks.³⁴⁰

However, we do not have sufficient facts to know whether the U.S. drone strikes are in defense of such armed attacks or whether the other requirements of Article 51—such as necessity and proportionality—are met with respect to these attacks or threatened attacks.

Fifth, the killing of Osama bin Laden in Pakistan was consistent with *ius ad bellum* principles. In his role as the operational leader of al-Qaeda, bin Laden was continuously planning armed attacks on the U.S. and on U.S. forces abroad, particularly across the border from Pakistan into Afghanistan. The infringement of Pakistani sovereignty was necessary (the United States presumably considered it infeasible to ask Pakistan for assistance, for fear of jeopardizing the mission, as bin Laden had been living in Abbottabad for years)³⁴¹ and it was proportional in light of the danger bin Laden posed to the U.S. and the limited scope of the raid. Although the threat bin Laden posed to the

³⁴⁰ In *Oil Platforms*, the ICJ stated that the mining of a single military vessel might qualify as an armed attack giving rise to the right of self-defense. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 72 (Nov. 6). On the facts, the ICJ was unable to conclude that Iran was responsible for the mining of the U.S. vessel and therefore did not conclude that there had been an armed attack. See also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 238-239 (2010) (“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” (emphasis added)).

³⁴¹ See Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 51 VA. J. INT'L L. 483, 523 n.128 (2012) (explaining that “the driving force behind the U.S. decision not to seek assistance from the Government of Pakistan to capture or kill bin Laden” appears to have been the view that “making such a request either [would] be futile or [would] cause tangible harm to the victim state’s national security” because Pakistan might tip bin Laden off before the U.S. could act).

U.S. generally may have been uncertain, that threat was nevertheless so severe as to outweigh the uncertainty.³⁴²

Sixth, the use of force worldwide against organizations that are not al-Qaeda core—including any alleged “affiliates” of al-Qaeda—is not made necessary or proportionate by the attacks of September 11 alone. Indeed, when it notified the Security Council of its use of force in self-defense, the United States announced only that it was taking “measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”. It did not claim a right to take any measures in self-defense outside of Afghanistan or against any organizations other than al-Qaeda or the Taliban. Despite some statements to the contrary, we do not interpret the United States as justifying continued infringement of State sovereignty based only upon the attacks of September 11, but rather that it claims consent or a current threat from al-Qaeda and associated forces. Indeed, Brennan has stated:

“Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives”.³⁴³

Again, we lack the facts to assess the validity of those assertions.

G. Required Disclosure by the United States

We conclude that, to the extent the U.S. is relying on self-defense to justify the continued use of armed force on the territory of another State, the U.S. must make certain disclosures to the Security Council concerning its exercise of that right. To

³⁴² Whether Osama bin Laden’s killing was consistent with *ius ad bellum* principles is a separate issue from whether it complied with *ius in bello*, IHRL, and/or other law.

³⁴³ See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

date, the U.S. has failed to make such disclosures.

Article 51 of the UN Charter provides that, upon taking action in self-defense, a State must report the exercise of that right to the Security Council. It states:

“Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” (Emphasis added.)

The U.S. complied with that provision of Article 51 following the attacks of September 11. On October 7, 2001, the U.S. advised the Security Council by letter that it was exercising its right to self-defense against Afghanistan pursuant to Article 51:

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001.

“On September 11, 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania, and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than five thousand persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since September 11, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defense requires further actions with respect to other organizations and other States.

“The attacks on September 11, 2001, and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan,

the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

“In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.”

The letter: (a) identified the armed attack giving rise to the right of self-defense; (b) indicated that measures short of force had failed (that “[d]espite every effort by the U.S. and the international community, the Taliban regime has refused to change its policy [of harboring al Qaeda]”); and (c) specified the “measures” that the United States was taking in self-defense (the U.S. was taking “measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”).

This disclosure is consistent with the letter the U.S. delivered to the Security Council invoking its right of self-defense against al-Qaeda in response to the 1998 embassy bombings. In that letter, the U.S. (a) identified the armed attacks giving rise to the right of self-defense; (b) indicated that measures short of force had failed; and (c) specified the actions it was taking in self-defense.³⁴⁴

³⁴⁴ See Letter Dated 20 August 1998 from the Permanent Rep. of the United States of America to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998). The letter stated:

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defense in responding to a series of armed attacks against United States embassies and United States nationals.

“My Government has obtained convincing information from a variety of reliable sources that the organization of Osama Bin Ladin is responsible for the devastating bombings on 7 August 1998 of the United States embassies in

This disclosure does not cover the drone strikes into Pakistan. If the U.S. is taking measures in Pakistan without Pakistan's consent, as Pakistan has asserted publicly, then the U.S. should make a disclosure to the Security Council to support its assertion that it is engaging in such forcible measures "in self-defense".³⁴⁵ Twelve years have passed since the U.S. provided the 2001 report to the Security Council. In the intervening years, al Qaeda has largely been driven from Afghanistan and most of its core leadership, including Osama bin Laden, has been killed. The U.S. operation is no longer

Nairobi and Dar Es Salaam. Those attacks resulted in the deaths of 12 American nationals and over 250 other persons, as well as numerous serious injuries and heavy property damage. The Bin Ladin organization maintains an extensive network of camps, arsenals and training and supply facilities in Afghanistan, and support facilities in Sudan, which have been and are being used to mount terrorist attacks against American targets. These facilities include an installation at which chemical weapons have been produced.

"In response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces today struck at a series of camps and installations used by the Bin Ladin organization to support terrorist actions against the United States and other countries. In particular, United States forces struck a facility being used to produce chemical weapons in the Sudan and terrorist training and basing camps in Afghanistan.

"These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.

"In doing so, the United States has acted pursuant to the right of self-defense confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.

"It is the sincere hope of the United States Government that these limited actions will deter and prevent the repetition of unlawful terrorist attacks on the United States and other countries. We call upon all nations to take the steps necessary to bring such indiscriminate terrorism to an end.

"I ask that you circulate the text of the present letter as a document of the Security Council."

³⁴⁵ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

limited to “measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”. We do not mean to suggest that the U.S. should disclose each drone strike or each military operation as those acts take place. Rather, as it did on October 7, 2001, the U.S. should disclose in general terms (a) the armed attacks giving rise to the right of self-defense; (b) whether measures short of force have failed or are futile; and (c) the actions it is taking in self-defense.

Our conclusion is unchanged by the fact that, as we conclude above, armed attacks by al-Qaeda and TTP in Pakistan are targeting U.S. forces in Afghanistan.³⁴⁶ The United States has not disclosed these armed attacks giving rise to the right of self-defense. The September 11 attack is no longer the armed attack to which the United States is responding. Indeed, the armed attacks are coming from groups which were not identified in the October 2001 notice.³⁴⁷ Likewise, the U.S. has not disclosed the *measures* that it is currently taking in self-defense. The United States disclosed in 2001 only that it would be taking measures “against Al-Qaeda terrorist training camps and military installations of the Taliban regime *in Afghanistan*”. The United States has not reported measures in Pakistan at all.

Further disclosure to the Security Council is consistent with the spirit of Article 51. The Charter contemplates that the Security Council, and not individual States, bears primary responsibility for maintaining peace and security. In recognizing the inherent right of self-defense, Article 51 provides that “[n]othing in the present Charter

³⁴⁶ See Factual Background, Part I.A.3, *supra*.

³⁴⁷ The drones program today is directed “against a number of different groups, and in a number of different countries, but there has been no clear explanation to identify the armed attacks against which the use of force is responsive”. See CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 233 (2012). The United States has “provided no detailed account to explain how the use of force against various organizations . . . is tied to specific attacks”. *Id.*

shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . *until the Security Council has taken measures necessary to maintain international peace and security*” and provides that self-defense measures taken by States “shall not in any way affect *the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security*”.³⁴⁸ The notice provision of Article 51 enables the Security Council to discharge its responsibility by putting it on notice of threats to Member States of sufficient gravity to merit a forcible response.³⁴⁹

³⁴⁸ U.N. Charter art. 51 (emphasis added).

³⁴⁹ We recognize that the Security Council is not likely to be an effective forum but that is not a legal point.

II. THE EXISTENCE OF AN ARMED CONFLICT

The first step in the analysis of whether a particular individual is a legitimate target of lethal force is to determine whether or not the force is being used in the context of an armed conflict. The existence or not of an armed conflict determines whether the more restrictive rules of IHRL, or the more permissive rules of IHL, govern the legality of the use of force against an individual.

A. The Illegality of Targeted Killings Under IHRL

We first explain why an extrajudicial killing outside an armed conflict, where the rules of IHRL apply, is virtually always unlawful.

Basic principles of IHRL are announced in the ICCPR, to which the United States and most other States are parties. Article 6 of the ICCPR provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”³⁵⁰ This fundamental right to life is found in every major source of human rights law.³⁵¹ It also has been held to be a rule of customary international law, thus binding on all States regardless of whether they are treaty signatories.³⁵²

Under IHRL, targeted killings are almost always illegal because they

³⁵⁰ ICCPR, art. 6, ¶ 1.

³⁵¹ See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3. U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to life, liberty and security of person.”); African Charter on Human and People’s Rights, art. 4, June 26, 1981, OAU Doc CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”); American Convention on Human Rights, art. 4, ¶ 1, Nov. 22, 1969, 1144 U.N.T.S. 143 (“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”).

³⁵² See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 170 & n.8 (2010) (collecting authority).

violate the right to life.³⁵³ Under IHRL, a state extrajudicial killing outside the context of an armed conflict is legal only if it is “proportionate” and “necessary”.³⁵⁴ The IHRL concept of “proportionate” means that the killing is required to protect life,³⁵⁵ while the IHRL concept of “necessary” means that there is no other means, such as capture or non-lethal incapacitation, of preventing the threat to life.³⁵⁶

It is generally accepted that targeted killings could not meet the requirements of necessity and proportionality except under very rare circumstances.³⁵⁷

Some writers contend that a targeted killing could *never* be lawful under IHRL.³⁵⁸ Other writers are willing to entertain the possibility that an extrajudicial killing might be

³⁵³ See, e.g., Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 60, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (explaining that drone strikes “will rarely be lawful outside a situation of armed conflict”); AMNESTY INTERNATIONAL, “WILL I BE NEXT?: US DRONE STRIKES IN PAKISTAN 44 (2013) (“[I]t is highly unlikely that any US drone strikes in Pakistan satisfy the law enforcement standards that govern intentional use of lethal force outside armed conflict.”).

³⁵⁴ It is also permissible under the ICCPR to impose the death penalty after a fair trial “pursuant to a final judgment rendered by a competent court”, so long as it is imposed only on adults and only “for the most serious crimes”. See ICCPR, art. 6, ¶¶ 2, 5.

³⁵⁵ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 173 (2010) (“For the use of lethal force to be considered a proportionate measure, its objective should be the prevention of a real threat to life, and outside the preservation of life, lethal force is likely to be disproportionate.”); Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 671 (2011); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, ¶¶ 32-33, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

³⁵⁶ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 173 (2010).

³⁵⁷ See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 173 (2010) (“By and large, it is hard to envision how [targeted killings] could be the only available option and therefore fulfill the requirement of necessity.”); Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 671-72 (2011).

³⁵⁸ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 33, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston) (opining that “under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation”).

necessary and proportionate in very narrow circumstances in which the target is imminently³⁵⁹ carrying out a deadly attack and there is no means of preventing the loss of life short of killing the target.³⁶⁰ Such a situation might arise, according to those writers, if the target is in a remote area where a capture mission is infeasible.³⁶¹

Outside such extreme—perhaps purely theoretical—circumstances, a targeted killing cannot meet the necessity and proportionality standards of IHRL.

B. The Legal Framework for the Existence of an Armed Conflict

In contrast to IHRL, *ius in bello* permits the use of force—including lethal force—against persons so long as force is exercised consistently with certain guidelines, including the need to prevent disproportionate civilian casualties. We therefore proceed to consider whether the drone strikes are being carried out in an armed conflict.

Since there are separate guidelines relating to international armed conflicts and non-international armed conflicts, the first step is to determine whether either of these categories applies in the context of the drones campaign.

International armed conflicts are armed conflicts between two or more States.³⁶² Arguably, when the U.S. and its allies attacked Afghanistan in 2001, the

³⁵⁹ Despite having the same name, this concept of “imminence” is distinct from the concept of “imminence” that is often, albeit we believe incorrectly, used in the context of *ius ad bellum*.

³⁶⁰ See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 175-76 (2010) (hypothesizing that if “the only way to prevent [certain individuals] from carrying out an imminent devastating attack was by targeting them in that fashion and at that point in time . . . it might theoretically be possible to claim that an action of this type could be legitimate under the rules of human rights law”).

³⁶¹ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 176 (2010) (noting that the facts surrounding the November 2002 drone strike in Yemen that killed alleged Al-Qaeda leader Qaed Salim Sinan al-Harethi “do not appear too far removed” from a situation that might justify the use of lethal force under IHRL).

³⁶² International armed conflicts are regulated by the 1949 Geneva Conventions and the first 1977 Additional Protocol. See Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 172 (2009). The Additional Protocols have not been ratified by the United States.

hostilities produced an international armed conflict between the U.S. and its allies on the one hand, and the Taliban as Afghanistan's *de facto* Government on the other, with al-Qaeda operating as a participant in that conflict.³⁶³ Now that the U.S. and Afghanistan are allies, the conflict taking place in Afghanistan is a non-international armed conflict.³⁶⁴ Moreover, the U.S. is not engaged in an international armed conflict with any other State where drone attacks are occurring. An "armed conflict between a state and an organized armed group should be classified as non-international, even if it includes an extraterritorial manifestation."³⁶⁵ Therefore, the drones campaign is not governed by the law of international armed conflict.

We do not accept the view that "where a foreign State fights against a non-state group in the territorial State but without the consent of the territorial State", there exists an international armed conflict between the foreign State and the territorial State.³⁶⁶ One scholar contends that an international armed conflict exists because the use of force on a State's territory constitutes a use of force *against* that State under Article 2(4) of the UN Charter, and a state of armed conflict "automatically arises" as a result of that use of

³⁶³ See Kelisiana Thynne, *Targeting the 'Terrorist Enemy': The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT'L L.J. 161, 172 (2009) ("Originally, when the US and its allies attacked Afghanistan in 2001, the conflict was an international armed conflict: a number of States (the US and its allies) were attacking another State (Afghanistan). . . . Al-Qaeda and associated groups, and the Northern Alliance, were engaged in the armed conflict.").

³⁶⁴ The hostilities taking place in Afghanistan today constitute a non-international armed conflict with multiple participants: the State of Afghanistan and its allies, including the U.S., on one side, and several different non-State armed groups within Afghanistan, including Al Qaeda and the Taliban, on the other. See Kelisiana Thynne, *Targeting the 'Terrorist Enemy': The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT'L L.J. 161, 173 (2009).

³⁶⁵ Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. OF INT'L CRIMINAL JUSTICE 1, 3 (2013).

³⁶⁶ See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in ELIZABETH WILMSHURST, ED., *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* (2012); see also Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 54, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns) (summarizing this view).

force.³⁶⁷ That view confuses the infringement on sovereignty under *ius ad bellum* with the rules governing existence of an armed conflict. It is not the case that a breach of Article 2(4) automatically results in an armed conflict. Rather, for there to be an armed conflict, as detailed below, there must be identifiable “parties” to the conflict and the “intensity” of the fighting must cross the required threshold.³⁶⁸ Where the fighting is carried out by the non-State actor and not by the State itself, the State is not a “party” to the conflict, and therefore the armed conflict is non-international in character.

We thus look to the law with respect to a non-international armed conflict, which is an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” of the Geneva Conventions.³⁶⁹ *First*, we consider whether Common Article 3 is applicable. *Second*, we provide the criteria for the existence of an “armed conflict”. *Third*, we analyze what “armed conflicts” may exist in the context of the drones campaign.

1. The Applicability of Common Article 3

We conclude that Common Article 3 is, in principle, applicable to an armed conflict between a State and a non-State group operating *outside* of that State’s territory (*i.e.*, in the territory of a different High Contracting Party). Although it is possible to read Common Article 3 to apply only to armed conflicts internal to a single State,³⁷⁰ we adopt the more prevalent view that Common Article 3 applies to any conflict

³⁶⁷ See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in ELIZABETH WILMSHURST, ED., *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32, 73-74 (2012).

³⁶⁸ See Legal Analysis, Part II.B.2, *infra*.

³⁶⁹ See Common Article 3.

³⁷⁰ That reading has some support in the drafting history of the treaty:

“A fair reading of the negotiating history suggests that this ‘common Article 3’ paradigm was principally designed to address the situation of an armed conflict

that is not between States, including conflicts between a State and a non-State actor operating outside of that State's territory.³⁷¹ We reach this conclusion for two reasons.

First, Common Article 3 does not actually require that the State in which the conflict occurs be a party to the conflict.³⁷² It provides only that the conflict must take place *in the territory of* “one of the High Contracting Parties”. Rather than limiting its applicability to internal conflicts, the language “simply recall[s] that according to the principle of the relative force of treaties, those treaty rules apply only on the territories of

internal to a single state. One of the parties to that armed conflict would normally be the Government of the state; the other party would be a major insurgent group seeking to obtain control of the country. Thus, common Article 3 contemplates an armed conflict between a state and nonstate actor, but does so largely in the context of the classic civil war.” Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”*, (Geo. Wash. Law Sch. Pub. Law and Legal Theory, Working Paper No. 329, 2007) at 10.

The *DOJ White Paper* rejects the argument that a non-international armed conflict must be confined to the territory of a particular state, stating:

“U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.” *DOJ White Paper* at 4.

That contention is changed from the position the Government took in *Hamdan v. Rumsfeld*, which failed to persuade a majority of the U.S. Supreme Court. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 719 (2006) (Thomas, J., dissenting) (citing the Government's position that the armed conflict between the United States and al-Qaeda is “international in character in the sense that is occurring in various nations around the globe” and opining that “Common Article 3 is principally concerned with furnishing minimal protection to rebels involved in a civil war” (internal quotation marks and alterations omitted)).

³⁷¹ *See* NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 104 (2010), (“The notion that extraterritorial hostilities between a state and a non-state actor can be regulated by the rules of non-international armed conflict finds support in the views of numerous commentators. The essence of this claim rests primarily on viewing the category of non-international armed conflict as *non-international*, ie [*sic*] a conflict that is not between states, whether or not it is purely *internal*.”).

³⁷² *See* NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 102 (2010) (“[T]he Common Article 3 requirement does not actually require that the state in which it occurs should be involved in the conflict. Theoretically, one could read it to mean that state A could be involved in an armed conflict not of an international character, occurring in the territory of state B, which is a high contracting party to the Conventions, without state B having a part in the conflict. Insofar as the Geneva Conventions have achieved global recognition with 194 state parties, virtually any territory would be that of a high contracting party.”).

States that have accepted them”.³⁷³ On this reading, it applies to any conflict between a State and a non-State entity so long as the hostilities take place in the territory of any State party to the treaty. Given that the Geneva Conventions have been ratified by 195 State parties, virtually any territory would be that of a “High Contracting Party”.³⁷⁴

Second, the narrow reading would create “an inexplicable regulatory gap in the Geneva Conventions” in that:

“the Conventions would cover international armed conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state.”³⁷⁵

This would be particularly problematic in that non-international armed conflict “is the predominant form of warfare in this century”.³⁷⁶ We agree that “[t]here is no principled (or pragmatic) rationale for this regulatory gap”³⁷⁷. The broader reading, on the other hand, takes account of the reality that cross-border conflict is common in non-international armed conflict.³⁷⁸

³⁷³ Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW & INEQ. 195, 200-01 (2004) (arguing that “[f]rom the perspective of the aim and purpose of IHL, the [broader] interpretation must be correct, as there would otherwise be a gap in protection, which could not be explained by States’ concerns about their sovereignty”).

³⁷⁴ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 102 (2010); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 173 (2009) (“As has been pointed out by the ICRC, since all States are ‘High Contracting Parties’ to the 1949 Geneva Conventions, ‘any armed conflict between Governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention’.”).

³⁷⁵ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 40-41 (2003).

³⁷⁶ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 643 (2010).

³⁷⁷ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 41 (2003).

³⁷⁸ Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 174 (2009) (“In an era of technology that extends to use of space satellites, internet and remote-controlled weapons, the person who controls a weapon or engages in fighting could be geographically remote from the territory on which there is an armed conflict.”).

Our conclusion is consistent with that of the United States Supreme Court in *Hamdan v. Rumsfeld*.³⁷⁹ In that case, the Court rejected the view that Common Article 3 applies only to internal conflicts. Although the Court recognized that “an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character’, *i.e.*, a civil war”, the Court concluded that the plain language of the Article suggests a “conflict not of international character” is any armed conflict that is not a conflict “between nations”.³⁸⁰

Ultimately, this issue is moot insofar as the drone strikes are taking place in the context of internal armed conflicts in which the United States has been invited to participate by the territorial State.³⁸¹ The issue does come into play where there is not an invitation by the territorial State, as in the case of Pakistan.

2. The Criteria for the Existence of an “Armed Conflict”

The Geneva Conventions do not establish an authoritative definition to determine whether a particular set of hostilities rises to the level of an “armed conflict”.³⁸² Indeed, there is evidence that the drafters purposefully avoided any rigid definition out of concern that it might be read to limit the scope of the treaty’s application.³⁸³ The Commentary on the Conventions suggests that the scope of Common

³⁷⁹ 548 U.S. 557 (2006).

³⁸⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

³⁸¹ See Legal Analysis, Part II.C.2, *infra*.

³⁸² As one scholar has written, “[t]he Diplomatic Conference rejected several proposed definitions of ‘armed conflict’ on the grounds that (1) precision would risk exclusion, and (2) under-specification would encourage application of the rules in questionable cases”. Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 24 (2003); see also Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 742 (2011) (observing that “[n]either the Geneva Convention nor the additional Protocols define an ‘armed conflict’”).

³⁸³ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 24 (2003).

Article 3 should be as wide as possible, while excluding from its scope of application “mere act[s] of banditry or . . . unorganized and short-lived insurrection[s]”.³⁸⁴

In the absence of a definition in the governing treaties, commentators have looked to the Appeals Chamber of the ICTY for guidance.

In *Prosecutor v. Tadić*, the ICTY held 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”.³⁸⁵ In *Prosecutor v. Boškoski*, the ICTY explained that this test consists of two criteria: “(i) the intensity of the conflict and (ii) the organization of the parties to the conflict”.³⁸⁶ Stated differently, there must be “protracted armed violence” and identifiable “parties” to the conflict.³⁸⁷ The purpose of the two-part test is to distinguish

³⁸⁴ I COMMENTARY ON GENEVA CONVENTION 50 (Jean S. Pictet ed., 1952).

³⁸⁵ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Oct. 2, 1995).

³⁸⁶ *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (ICTY July 10, 2008); see also Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 742 (2011) (summarizing the test established in *Tadić* and *Boškoski*); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 166 (2009) (explaining that, under the principles set forth by the ICTY, “[t]he fighting must reach a certain level of intensity and be protracted, and the parties must be organized into a military structure and represent an identifiable group”).

The test has been reaffirmed in additional decisions of the ICTY and has been adopted by the ICTR. See Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 167 (2009) (citing *Prosecutor v. Limaj*, Case No. IT-03-66-T, ¶ 84 (ICTY Nov. 30, 2005); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 602, 625 (Sept. 2, 1998)); see also *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 248 (Jan. 27, 2000) (“The expression ‘armed conflicts’ introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the Government is forced to resort to police forces or even armed units for the purpose of restoring law and order.”).

In addition, the ICC Statute provides that it applies “to armed conflicts that take place in the territory of a State when there is protracted armed violence between Governmental authorities and organized armed groups or between such groups”. ICC Statute art. 8 at ¶ 2(f).

³⁸⁷ See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 105 (2010) (“The ICTY description of armed conflict speaks of ‘protracted armed violence between Governmental authorities and organized armed groups’. According to this, the primary elements that must be present are

armed conflict ““from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law””.³⁸⁸

We discuss each of the two criteria in turn, and then a territorial nexus criterion that some scholars have sought to add to the test.

(a) The “Intensity of the Conflict”

Common Article 3 itself does not contain a description of the necessary level of hostilities. Despite the disagreement among the commentators as to the threshold, we discern the following principles.

First, there must be *some* threshold level of violence—either in intensity or duration, or both—for there to be an armed conflict.³⁸⁹ The existence of an armed conflict has been understood to give States more leeway to use lethal force than they have during peacetime, so that if there were no threshold, States could claim a broader right to use force.³⁹⁰ We do not interpret international law to permit that outcome.

Second, as interpreted in Additional Protocol II and the ICTY decisions, the definition of “armed conflict” does *not* extend to “situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence”³⁹¹ or to other

a certain level of violence and the existence of parties to the conflict.”)

³⁸⁸ Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 175 (ICTY July 10, 2008) (quoting Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 562 (ICTY May 7, 1997)).

³⁸⁹ See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 130 (2010) (“As for a requisite threshold of intensity of violence, clearly there must be one as states would otherwise be able to declare IHL applicable at will and engage in acts only permissible under IHL.”); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, ¶ 52(ii), U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

³⁹⁰ The strengthening of IHRL has had a paradoxical result that, “rather than deny the applicability of IHL, some states have been quicker to assert that they are involved in armed conflict, and that IHL should regulate their actions rather than human rights law or the law enforcement paradigm”. Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 86 (2011).

³⁹¹ AP II, art. 1, ¶ 2 (classifying those situations “as not being armed conflicts”).

low-level confrontations such as “banditry” and “unorganized and short-lived insurrections”.³⁹²

Third, in its decisions after *Tadić*, the ICTY has identified a number of factors, including the seriousness of the attacks, as well as:

“the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones”.³⁹³

In addition to those factors, the involvement of the Security Council is also considered to be indicative of an armed conflict.³⁹⁴

Fourth, the term “protracted” may refer “more to the intensity of the armed violence than to its duration”.³⁹⁵ The ICTR has suggested that armed violence extending over only a few months may satisfy the “protracted” requirement and given its intensity may constitute an “armed conflict” within the meaning of Common Article 3.³⁹⁶

³⁹² See Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 175, 186 (ICTY July 10, 2008); see also Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 685-86 (2011) (citing ICTY decisions).

³⁹³ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (ICTY Apr. 3, 2008).

³⁹⁴ See Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (ICTY Apr. 3, 2008); see also Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 685-86 (2011) (discussing relevant factors from ICTY jurisprudence).

³⁹⁵ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (ICTY Apr. 3, 2008); see NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 106 (2010).

³⁹⁶ See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 28-29 (2003) (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 619-27 (Sept. 2, 1998)).

(b) Identification of the “Parties”

Common Article 3 itself does not provide any definition for what makes a non-State actor a “party” to an armed conflict.³⁹⁷

At a minimum, however, the non-State armed group must be identifiable by objective and verifiable criteria, so that States are able to distinguish between lawful targets and “civilians”.³⁹⁸ The non-State actor should have some level of organization, including “the ability to command and control members of the group, and carry out the group’s operations”.³⁹⁹ According to Emmerson, “[o]rganization implies at least a common command structure, adequate communications, joint mission planning and execution, and cooperation in the acquisition and distribution of weaponry”.⁴⁰⁰ In *Boškoski*, the ICTY considered factors including the armed group’s ability to “carry out [military] operations in an organized manner”, its hierarchical “command structure”, and the existence of corresponding political operations.⁴⁰¹ In *Haradinaj*, the ICTY reviewed

³⁹⁷ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 109 (2010) (“The existence of an armed conflict implies (at least) two opposing parties. Common Article 3 does not give criteria as to the definition of a party to a conflict, although it would appear to envisage a clear level of organization.”); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 169 (2009) (noting that “Common Article 3 provides no specific guidance as to how the parties must conduct themselves”).

³⁹⁸ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 52(i), U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

³⁹⁹ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 110 (2010); see also Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 169 (2009) (“The parties must exhibit a certain amount of organization and military structure to be identifiable as a party to an armed conflict.”).

⁴⁰⁰ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 66, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴⁰¹ See Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 199-203 (ICTY July 10, 2008) (detailing five categories of factors); see also Andrew C. Orr, Note *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 743 (2011).

the court’s prior decisions and identified the following “indicative factors”, even though none is essential:

“the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords”⁴⁰².

(c) The Alleged Territorial Nexus

Some scholars contend that, in addition, there must be a “territorial nexus” for an armed conflict to exist.⁴⁰³

We disagree. The geographic scope of an armed conflict is constrained by *ius ad bellum* principles of necessity and proportionality, which place limits on when belligerent States may use force within the territory of an unconsenting State.⁴⁰⁴ There is no separate requirement in international law of a geographical nexus criterion for the existence of an armed conflict.⁴⁰⁵

⁴⁰² Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (ICTY Apr. 3, 2008).

⁴⁰³ See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶52(iii), U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Phillip Alston) (arguing that, although a non-international armed conflict may cross State borders, “[t]his does not mean, however, that there is no territorial nexus requirement”); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 173 (2009) (arguing that there must be “a territorial nexus to a particular geographic State or region for a conflict to exist”); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) (“In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension.”).

⁴⁰⁴ According to Emmerson, the ICRC view of *ius in bello* “does not permit the targeting of persons . . . who are located in non-belligerent States, given that, otherwise, the whole world is potentially a battlefield”. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 64, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson). We think that this view confuses *ius ad bellum* and *ius in bello*.

⁴⁰⁵ Although Emmerson contends that there is an “absence of a clear international consensus on the issue”, he acknowledges that there is an “absence of State practice or settled opinio juris to imply the

First, the “territorial” view is at tension with the reality that modern warfare involving non-State actors often is not confined to a particular territory.⁴⁰⁶ Indeed, we concluded that Common Article 3 was not limited to non-international armed conflict occurring *within* a State for precisely this reason.⁴⁰⁷ As Emmerson notes, most proponents of the territorial nexus requirement have to “make allowance for a situation in which a non-international armed conflict spills across the border of a neighbouring State”.⁴⁰⁸ In fact, “the geography of conflict has evolved, and . . . where a State is engaged in non-international armed conflict with a non-State armed group operating transnationally there is no traditional battlefield”.⁴⁰⁹ The “concept of the battlefield is as unpredictable as it is provisional, and defies static geographic delineation”:

“In effect, the concept of a battlefield simply denotes the location in which hostilities are occurring, and its spatial dimensions are shaped and subject to change by hostilities.”⁴¹⁰

Second, we disagree with the argument that the criteria for the existence of an armed conflict—intensity of hostilities and organization of the parties—can only be

existence of a legal rule confining non-international armed conflicts to a defined geographical area”. See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶¶ 64-65, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴⁰⁶ O’Connell argues that “[a]rmed conflict inevitably occurs in limited spaces—a theater of operations, zone of combat, or conflict zone”. Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 860 (2009). We take that to be an empirical observation, not a legal principle, and we disagree that it is true in all cases.

⁴⁰⁷ See Legal Analysis, Part II.B.1, *supra*.

⁴⁰⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 63, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴⁰⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 65, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴¹⁰ Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. OF INT’L CRIMINAL JUSTICE 1, 9 (2013).

evaluated with reference to a specific territory.⁴¹¹ In accordance with the *Tadić* factors, the intensity of hostilities may (and should) be evaluated with reference to the attacks exchanged between the two parties to the conflict, the types of munitions used, and so forth, regardless of the location of such attacks.⁴¹² Moreover, the organization of a party is evaluated based upon that party's own organization structure, regardless of how it is distributed geographically, by applying the factors identified in *Boškoski* and *Haradinaj*.⁴¹³ For example, an organization operating on the territory of one State is no less organized by virtue of the fact that its leadership is located in another State, so long as it is equally able to coordinate and carry out military operations.⁴¹⁴

Third, we disagree that it is necessary to define the geographical scope of the conflict in order to determine whether IHL or IHRL applies to a particular military operation, or else “the law would permit attacks that result in proportionate civilian casualties in areas that are otherwise free of hostilities”.⁴¹⁵ In the first place, to determine whether IHL applies, one must look to whether the operation is carried out by one party

⁴¹¹ Some scholars claim, for example, that “[i]ntensity . . . is a relative criterion that has traditionally been measured by analyzing the frequency and severity of armed attacks being conducted within a given area”. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 63, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴¹² See Legal Analysis, Part II.B.2, *supra*.

⁴¹³ See Legal Analysis, Part II.B.2, *supra*.

⁴¹⁴ We disagree that “for fighting to reach the requisite level of intensity between groups that are sufficiently well organized control of territory is generally a necessity” or that “[s]ufficient weapons for intense fighting, space to train with weapons, a command structure, and training to act in a coordinated fashion under command . . . all require some territorial control”. Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009). The facts described above indicate that non-State actors have the capacity to engage in intense and coordinated fighting without territory of their own. See Factual Background, Part I.B, *supra*.

⁴¹⁵ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 63, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (summarizing this view).

against another in connection with an existing armed conflict between those two parties, regardless of geography. Moreover, the collateral damage analysis does not make it “necessary” to exclude all attacks in areas that “are otherwise free of hostilities”. Rather, the requirement of proportionality under *ius in bello* controls such situations and remains adequate to protect civilians. We agree with Heyns that, in applying the principle of proportionality to particular strikes:

“The risk to civilians may be exacerbated where drone strikes are carried out far away from areas of actual combat operations, especially in densely populated areas, and unsuspecting civilians may suddenly find themselves in the line of fire.”⁴¹⁶

Therefore, we do not see the need for a separate geographical nexus requirement.

Fourth, it is hard to see why, even if there were a “given area”, that this area should be the only area in which, say, killing Osama bin Laden would be permissible under *ius in bello* principles. For this issue, we need to address “in what circumstances . . . extraterritorial drone strikes [will] be considered part of an armed conflict”. We agree that “any of the following three elements weaken – although not necessarily break – the nexus between the target and the armed conflict:

1. the geographical distance from the primary sphere of hostilities;
2. the level and nature of military operations occurring at the target area; and
3. the link between the target and an already occurring armed conflict.”⁴¹⁷

⁴¹⁶ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 75, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁴¹⁷ Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. OF INT’L CRIMINAL JUSTICE 1, 12 (2013). For Lubell, the “latter point is a key question in the context of the ‘war on terror’”, because “it is not always clear whether the individuals targeted are in fact members of the same organized armed group the U.S. is combating in Afghanistan”. That, however, is not necessarily a question of geography.

C. Armed Conflict and the Drones Program

The existence of an armed conflict is a fact-driven analysis.⁴¹⁸

We first consider the armed conflict between the U.S. and al Qaeda, including whether there is today a transnational armed conflict between the United States and “al Qaeda and associated forces”, as the U.S. Government contends. We then consider whether there are other armed conflicts taking place in the States in which the U.S. has conducted targeted killings by drones.

1. Armed Conflict with Al-Qaeda

(a) September 11, 2001

We conclude that there was an armed conflict between the U.S. and al-Qaeda beginning, at the latest,⁴¹⁹ with the attacks of September 11, 2001 and the

⁴¹⁸ See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Follow-up to country recommendations – United States of America*, ¶ 77, A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns) (“[T]he situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of armed conflict”); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 64, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (citing ICRC’s view that “the existence of a non-international armed conflict must be determined by reference to each situation of violence on a case-by-case basis”).

⁴¹⁹ There is some dispute as to whether the United States and al Qaeda were engaged in an armed conflict *prior* to those attacks. Some writers consider the history of violence to be evidence of an ongoing armed conflict. One scholar writes, for example:

“The cumulative chain of events is quite striking—the 1992 attempt to kill American troops in Aden on the way to Somalia; the 1993 ambush of American army rangers in Mogadishu; the 1993 truck bombing of the World Trade Center by conspirators who later announced that they had intended to topple the towers; the 1995 bombing of the Riyadh training center in Saudi Arabia; the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia (five weeks after bin Laden was permitted to leave Sudan); the 1998 destruction of two American embassies in East Africa; and the 2000 bombing of the U.S.S. Cole, in a Yemeni harbor. The innumerable other threats against American embassies and offices around the world; the plot to down ten American airliners over the Pacific and to bomb the Lincoln and Holland Tunnels in New York, as well as the United Nations; the smuggling of explosive materials across the Canadian border for a planned millennium attack at Los Angeles Airport; and finally, the attacks on the Pentagon and the World Trade Center—were taken to constitute a coherent campaign rather than the isolated acts of individuals. Al Qaeda’s open ambition to acquire a nuclear device has made the metaphor of war even more compelling.” Ruth Wedgwood, *Military Commissions: Al Qaeda, Terrorism*,

ensuing military operation in Afghanistan.⁴²⁰

First, the hostilities between the U.S. and al-Qaeda were of sufficient “intensity”. On September 11, 2001, al Qaeda operatives killed almost 3,000 people in the most deadly attack ever on American soil.⁴²¹ The military operations in Afghanistan that followed included sustained bombing campaigns against Taliban and al-Qaeda targets and resulted in open battles between soldiers fighting for the Taliban and al-Qaeda and the armed forces of the United States and its allies. Following the initiation of military operations in Afghanistan in October 7, 2001, al-Qaeda and its Taliban allies

and Military Commissions, 96 AM. J. INT’L L. 328, 330 (2002).

Others find the number of attacks over the years, although devastating in isolation, to be too sporadic over time to constitute an armed conflict. *See, e.g.*, Mary Ellen O’Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’I & COMP. L. 1, 3-4 (2006).

We need not form a conclusion on that question because it is not relevant to whether the drone strikes, which have taken place *after* the attacks of September 11, comply with international law.

⁴²⁰ Our conclusion is consistent with the views of a majority of scholars. *See, e.g.*, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 121 (2010) (concluding that “hostilities between the US and Al-Qaeda in Afghanistan” constitute an armed conflict); *id.* at 118 (stating that “up until 2001” al-Qaeda “could be identified as an organized group with a clear leadership and even a fixed location, including training camps and headquarters”); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 170-171 (2009). Thynne explains:

“Al-Qaeda forces in Afghanistan are engaged in the armed conflict. In the conflict, Al Qaeda soldiers do not wear uniforms; they use techniques that are in many cases considered underhand; and they do not necessarily abide by IHL. Nonetheless, they could be termed a party to the conflict in Afghanistan as they engage in war-like acts in Afghanistan and appear to be organised into some form of army. They provide training to their forces; they obtain weapons; they have been known to negotiate; they issue orders from a central command within Afghanistan; and the majority of them can be said to be engaged in continuous combat against the US (and Afghanistan). They appear to meet the test to be parties to the conflict in Afghanistan.” *Id.*

We prefer this view to that of a scholar who asserts that five or six large-scale attacks in six years is indeed “sporadic” and not sustained enough to constitute an armed conflict. *See* Mary Ellen O’Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’I & COMP. L. 1, 3-4 (2006). Even if the large scale attacks were not enough, there have been numerous smaller-scale attacks, as well as continuous planning, resembling a sustained military campaign.

⁴²¹ *See* Nat’l Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

engaged in organized armed resistance to the United States' invasion.⁴²² In addition, since September 2001, al-Qaeda has orchestrated additional large-scale attacks elsewhere around the world. In short, the hostilities have been more intense than mere "internal disturbances and tensions, such as riots, [or] isolated and sporadic acts of violence".⁴²³

Second, al Qaeda possessed sufficient organization to be considered a "party" to an armed conflict.⁴²⁴

(b) The Current Situation

We now turn to the question of whether there is *now* an armed conflict between the United States and "al-Qaeda and associated forces", as the U.S. contends, outside Afghanistan and Iraq.

This question is the subject of intense dispute, which typically revolves around the question of whether al-Qaeda *today* has sufficient organization (together with its "associated forces") to be considered a "party" to an armed conflict on a global scale. One group of scholars argues that "al Qaeda is clearly able to carry out military operations", including "the London bombings in 2005, and the bombing of the Danish embassy in Pakistan in 2008".⁴²⁵ Others doubt this position outside Afghanistan and

⁴²² Writing in 2003, Jinks observed that "Al Qaeda is a highly organized, well-funded entity with operational units in dozens of countries", noting that the attacks of September 11 "involved the coordinated application of force, and demonstrated al Qaeda's capacity to project force globally". Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 38 (2003) (concluding that the attacks of September 11 amounted to the initiation by Al Qaeda of an armed conflict against the United States).

⁴²³ AP II, art. 1, ¶ 2; see *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 186 (ICTY July 10, 2008).

⁴²⁴ See Factual Background, Part I.A, *supra*.

⁴²⁵ See Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 743 (2011); see also Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism"*, 46 Va. J. Int'l L. 165, 187 (2005) (arguing that application of the relevant factors to al Qaeda "strongly suggests that the 'armed conflict' requirement is satisfied" because "al Qaeda is an armed group with the organizational capacity to engaged in sustained hostilities on a global scale").

Iraq. They argue that, although al-Qaeda used to be a cohesive and hierarchical organization, it has developed into a dispersed network of separate groups without a unified command structure.⁴²⁶ Such scholars contend that, as a consequence, al-Qaeda no longer constitutes a “party” to an armed conflict, at least outside of Afghanistan and Iraq.⁴²⁷

Statements by the Obama administration may reflect a current view that al-Qaeda has been debilitated to the point that it lacks its former capacity to engage in organized military operations. In his May 23, 2013 speech on counterterrorism, President Obama asserted that “[t]oday, the core of al-Qaeda in Afghanistan and Pakistan is on a path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us.”⁴²⁸ Similarly, in a speech at the Wilson Center on

⁴²⁶ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 67, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (expressing “considerable doubt as to whether the various groups operating under the name of Al-Qaida in various parts of the world, or claiming or alleged to be affiliated with Al-Qaida, share an integrated command structure or mount joint military operations”); see also Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, ¶ 55, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston) (contending that the “associated forces” are often only loosely connected to al Qaeda, if at all, and therefore are not a proper “party” to an armed conflict under IHL).

⁴²⁷ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 118 (2010) (arguing that “[t]he US invasion of Afghanistan precipitated the physical dispersal of [al-Qaeda] and the transition towards a decentralized network of many groups and individuals operating on the basis of a shared ideology” so that it is “hard to conclude that it currently possesses the characteristics of a party to a conflict”, noting that “its description ranges from being a distinct group, to a network of groups, or even a network of networks, and in some cases an ideology rather than an entity”). See also Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 171 (2009) (“The groupings of Al-Qaeda outside Afghanistan are held together by an ideological belief, but have little contact with each other and appear to have autonomy in making decisions as to attacks and planning those attacks.”); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 65, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns) (questioning whether “the various terrorist groups that call themselves Al-Qaeda or associate themselves with Al-Qaeda today possess the kind of integrated command structure that would justify considering them a single party involved in a global non-international armed conflict”).

⁴²⁸ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

April 30, 2012, then Assistant to the President for Homeland Security and Counter-terrorism and current Director of the CIA, John Brennan, described the weakened state of al-Qaeda:

“Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They’re struggling to attract new recruits. Morale is low, with intelligence indicating that some new members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly.”⁴²⁹

More recently, President Obama asserted that the “principal threat” to the United States “no longer comes from a centralized al Qaeda leadership. Instead, it comes from decentralized al Qaeda affiliates and extremists, many with agendas focused in countries where they operate.”⁴³⁰ Indeed, U.S. officials and third-party reports have concluded that drone strikes have played a significant role in contributing to al Qaeda’s decline.⁴³¹

According to Emerson, statements by U.S. officials “may imply that, as a result of

⁴²⁹ See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

⁴³⁰ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

⁴³¹ See Qandeel Siddique, *The United States’ Drone Program in Pakistan: An Analysis of the Efficacy and the Pakistani Government’s Complicity*, Centre for International and Strategic Analysis (Apr. 8, 2013), http://strategiskanalyse.no/publikasjoner%202013/2013-04-08_SISA4_DroneProgram_QandeelS.pdf. (concluding that drone strikes have “been effective in weakening the terrorist networks, including al-Qaeda who has had to consider its self-preservation rather than plan further attacks”).

Documents found at Osama bin Laden’s compound purportedly support the administration’s view that drone strikes have contributed to al-Qaeda’s decline. In his May 2013 speech, President Obama referred to a document in which the al-Qaeda leader wrote, “we could lose the reserves to enemy’s air strikes. We cannot fight air strikes with explosives.” See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>). Brennan cited similar intelligence gathered from bin Laden’s compound, stating: “In documents we seized, he confessed to ‘disaster after disaster.’ He even urged his leaders to flee the tribal regions, and go to places, ‘away from aircraft photography and bombardment.’” See John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

military action against Al Qaeda and others, there will come a point in the foreseeable future at which the Administration no longer regards these disparate groupings in various parts of the world as representing an organized armed group” that is waging armed conflict.⁴³²

We conclude that this debate is beside the point. The question of whether there is a single armed conflict across the territory of multiple States turns not on whether al-Qaeda is a unified organization spanning each of those States (it is not), but on whether there are joint parties—al Qaeda and its allies, on the one hand, and the U.S. and its allies—fighting in armed conflict in various States. The U.S. has contended that groups like AQAP are “co-belligerents” with al-Qaeda in a non-international armed conflict between al-Qaeda and the U.S.⁴³³ The U.S. has labeled such groups as “associated forces” of al-Qaeda and has claimed a right to use lethal force against them.⁴³⁴

⁴³² See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 68, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴³³ See Memorandum in Support of Defendants’ Motion to Dismiss at 32-33, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2012), available at https://www.aclu.org/files/assets/Al-Aulaqi_USG_PI_Opp_MTD_Brief_FILED.pdf (stating that “the Executive Branch has determined that AQAP is a part of al-Qaeda—or at a minimum is an organized, associated force or co-belligerent of al-Qaeda in the non-international armed conflict between the United States and al-Qaeda”); see also Jeh Johnson, Speech at the Oxford Union: Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <http://lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>) (defining an “associated force” as an (1) “organized, armed group that has entered the fight alongside al Qaeda” who is (2) “a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners”).

⁴³⁴ Some scholars contend that the administration’s statements are ambiguous concerning the nature and scope of the armed conflict. See *Targeting Operations with Drone Technology: Humanitarian Law Implications* 4 (Columbia Law Sch. Hum. Rights Inst., Background Note for the Am. Soc. of Int’l Law Mtg., 2011). We believe that, when the statements of U.S. officials are properly analyzed, the Administration’s legal position is that the U.S. is at war with any organization that (a) possesses sufficient organization to be considered a “party” to an armed conflict; and that (b) has entered the fight against the United States as a co-belligerent of al-Qaeda under the laws of neutrality. See Factual Background, Part II, *supra*. On the other hand, scholars have expressed uncertainty as to whether the United States considers the war against al-Qaeda outside of Afghanistan to be the same as the war inside Afghanistan. See *Targeting Operations with Drone Technology: Humanitarian Law Implications* 8 (Columbia Law Sch. Hum. Rights Inst., Background Note for the Am. Soc. of Int’l Law Mtg., 2011). We agree that statements of U.S. officials have on occasion blurred the lines in that regard.

Co-belligerency is a principle of the international law of neutrality, which generally relates to the duties of neutral States in the event of an armed conflict between two or more other States.⁴³⁵ A “co-belligerent” in an international armed conflict is a State that has become “a fully fledged belligerent fighting in association with one or more belligerent powers”.⁴³⁶ For neutrals to remain legally immune from attack by a belligerent party, they must fulfill their duty of “refraining from participation in hostilities and remaining impartial between belligerents, that is, not supporting one side over the other in the war”.⁴³⁷

Whether and how principles of co-belligerency, or some analogy to those principles, apply to non-State actors is unsettled. Although we summarize here the arguments for and against, we do not reach any definitive conclusion.

At least one U.S. District Court appears to have accepted the premise, albeit in a domestic law context, holding that “associated forces” of al-Qaeda are legitimate subjects of attack under the AUMF if they are co-belligerents under international law.⁴³⁸ In *Al-Bihani v. Obama*, on the other hand, the U.S. Court of Appeals for the District of Columbia Circuit stated that “to apply the rules of co-belligerency to

⁴³⁵ See generally Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 2d ed. 2008).

⁴³⁶ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112 (2005) (quoting MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 531 (1959)); see also *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009).

⁴³⁷ Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT’L L.J. 1, 28 & n.147 (2011) (collecting authority); see also Tess Bridgeman, Note, *The Law of Neutrality and the Conflict with al Qaeda*, 85 NYU L. J. 1186, 1190 n.17 (2010) (“A neutral state may become a co-belligerent by (1) choosing to join one side or the other in a conflict; or (2) violating its duty of nonparticipation in the conflict by aiding the military operations of one side or the other.”).

⁴³⁸ See *Hamlily v. Obama*, 616 F. Supp. 2d 74-75 & n.16 (D.D.C. 2009) (“Like many other elements of the law of war, co-belligerency is a concept that has developed almost exclusively in the context of international armed conflicts. However, there is no reason why this principle is not equally applicable to non-state actors involved in non-international conflicts.”).

[any irregular fighting] force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons”.⁴³⁹ The D.C. Circuit’s dicta are, however, distinguishable on the facts.⁴⁴⁰

Some scholars argue against the U.S. position. Thus, Heyns questions the applicability of co-belligerency in this context:

“The idea that the concept of co-belligerency can be transposed into non-international armed conflicts has been met with resistance because it ignores the significant differences between various forms of armed conflict and opens the door for an expansion of targeting without clear limits.”⁴⁴¹

Heyns states further:

“The established legal position is that, where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups.”⁴⁴²

Likewise, Lubell asserts that the State “carrying out the drone strikes must be party to the hostilities— or acting at the request and jointly with a state which is party for the hostilities—for the drone strikes to be considered part of the [local] armed conflict”.⁴⁴³

⁴³⁹ *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010).

⁴⁴⁰ The context was the court’s rejection of Al-Bihani’s argument that, under the laws of neutrality, the 55th Arab Brigade—a paramilitary group that fought alongside the Taliban—should have been given notice and an opportunity to declare its neutrality before being considered a legitimate subject of attack. *See Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010). The court’s conclusion was that such notice was *not* required—because a paramilitary group is not entitled to the same respect as a sovereign State—not that the 55th Arab Brigade was in any way shielded from attack. *Id.*

⁴⁴¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 61, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁴⁴² Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 62, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns) (emphasis added).

⁴⁴³ Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT’L CRIMINAL JUSTICE 1, 13 (2013) (emphasis added).

We are not convinced by the strictness of the joint requirements proposed by Heyns and Lubell.⁴⁴⁴ If a non-State actor can be a “party” to an armed conflict, as we conclude it can, arguably it should be considered a co-belligerent in an armed conflict if it enters hostilities on the side of one party against another. We do not see “expansion of targeting without clear limits” by adding a “party” and we are not sure what “significant differences” there are (to use Heyns’ phrase). Nor do we understand why terrorist organizations and paramilitary groups should have *more* protection than sovereign States if they intentionally enter hostilities against a State or launch attacks on its citizens. Nor do we understand that the U.S. is arguing that *individuals*, as opposed to groups, can be co-belligerents.⁴⁴⁵

Moreover, there is factual support for considering the non-State actors that have been targets of drone attacks to be “co-belligerents” with al-Qaeda in a transnational conflict against the United States and its allies. In the first place, although AQAP, AQIM and al Shabaab have different domestic goals, each has formally declared allegiance to al-Qaeda—and some have adopted the name al Qaeda—and committed itself to armed hostilities against common enemies, including the U.S. and its allies.⁴⁴⁶ The same was true of AQI and its successor, ISIS, prior to the 2014 falling out between ISIS and al-Qaeda. Thus, each of these groups has affirmatively taken sides in the non-international

⁴⁴⁴ Heyns’ citation for this supposedly “established legal position” is “*Prosecutor v. Haradinaj*, p.144”. See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 62 n.48, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns). That citation does not support his claim. Although *Haradinaj* sets forth the requirements for the existence of an armed conflict, including that any “party” to the conflict have the requisite level of organization, it does not address cobelligerency at all. See *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-T, Judgment, ¶¶ 391-96 (ICTY Nov. 29, 2012). There was only one non-State party at issue in *Haradinaj*, the Kosovo Liberation Army (KLA). See *id.* ¶ 400 (explaining that there was an armed conflict between “(1) the armed forces of the [Former Republic of Yugoslavia] and the Republic of Serbia . . . and (2) the KLA”).

⁴⁴⁵ See Factual Background, Part II.B, *supra*.

⁴⁴⁶ See Factual Background, Part I.B, *supra*.

armed conflict between the U.S. and al-Qaeda, declaring itself to be an ally of al-Qaeda and enemy of the U.S. and its allies. Al-Qaeda leaders have issued statements reciprocating the alliances. Although declaring “allegiance” to al-Qaeda in some cases may be more of a political statement than a *de facto* alliance, helping the group to gain credibility and sources of funding and recruits,⁴⁴⁷ we do not believe that that fact affects the status of a group that declares itself to be the ally of one party to an armed conflict against the other, and also undertakes acts of violence against the United States. In the second place, there are reports of actual cooperation among different groups calling themselves al-Qaeda. In a September 2010 statement before the Senate Committee on Homeland Security and Governmental Affairs, FBI Director Robert Mueller testified:

“[T]he level of cooperation among Al Qaeda and other terrorist groups has changed in the past year suggesting that this collaboration and resulting threat to the homeland will increase. By sharing financial resources, training, tactical and operations expertise, and recruits, these groups have been able to withstand significant counterterrorism pressure from the United States, coalition, and local Government forces.”⁴⁴⁸

As noted above, reports of communication and collaboration between al Qaeda core and AQAP led to the closure of 19 U.S. embassies and consulates in the Middle East.⁴⁴⁹ In addition, several former bin Laden associates count themselves among the leadership of various al-Qaeda “affiliates”.⁴⁵⁰

⁴⁴⁷ Rick Nelson & Thomas Sanderson, *A Threat Transformed, al Qaeda and Associated Movements in 2011*, CSIS (Feb. 2011), at 10
http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf.

⁴⁴⁸ *Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland, Hearing Before the U.S. Senate Committee on Homeland Security and Government Affairs*, 111th Cong. (2010) (statement of Robert Mueller).

⁴⁴⁹ Siobhan Gorman, *Terror Links Spurred Alert – Pakistan, Yemen Al Qaeda Leaders Discussed Plans*, WALL ST. J., Aug. 6, 2013,
<http://online.wsj.com/news/articles/SB20001424127887323514404578650333681440310>.

⁴⁵⁰ See Factual Background, Part I.B, *supra*.

We repeat: we do not seek to resolve this debate. Rather, we wish to refocus the debate from whether there is a transnational armed conflict to whether the U.S. is engaged in a number of *domestic* armed conflicts in which individual States have invited the U.S. to participate.

2. Regional Armed Conflicts

Although the U.S. often portrays itself as the leading protagonist in a global struggle against terrorism, the Obama administration acknowledges that it has entered into local “partnerships” with various States.⁴⁵¹ Indeed, the States in which drone strikes have or may have taken place are engaged in their own struggles with local non-State groups, some of which call themselves “al-Qaeda”.

The determination of whether the hostilities in those States rise to the level of “armed conflict” must be made on a State-by-State basis, based upon whether the violence is of sufficient “intensity” and whether the non-State actor involved in the hostilities has sufficient organization to be considered a “party”. To have the required degree of “intensity”, the hostilities must not be mere “internal disturbances and tensions”, “isolated and sporadic acts of violence”, or “unorganized and short-lived

⁴⁵¹ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>) (“Beyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. In many cases, this will involve partnerships with other countries. Already, thousands of Pakistani soldiers have lost their lives fighting extremists. In Yemen, we are supporting security forces that have reclaimed territory from AQAP. In Somalia, we helped a coalition of African nations push al-Shabaab out of its strongholds. In Mali, we’re providing military aid to French-led intervention to push back al Qaeda in the Maghreb, and help the people of Mali reclaim their future.”); see also President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) (describing “partnerships” with Somalia, Libya, Mali and Yemen).

insurrections”.⁴⁵² To conclude that a non-State actor is a “party”, one must weigh a variety of criteria, including the existence of a hierarchy and command structure; “the ability to gain access to weapons, other military equipment, recruits and military training”; the “ability to plan, coordinate and carry out military operations”; the “ability to define a unified military strategy and use military tactics”; and the existence of political goals.

We do not undertake to resolve whether there are or have been armed conflicts in each State in which drone strikes have been carried out, at all relevant points in time. We observe, however, that even those who have been critical of the United States acknowledge that at least *some* drone strikes have been carried out in the context of armed conflicts. Indeed, Emmerson has observed that the “overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict”.⁴⁵³ Similarly, Amnesty International and Human Rights Watch have cited the existence of armed conflicts in Afghanistan, Pakistan and Yemen.⁴⁵⁴ The conclusion that there exist armed conflicts in States in which drone strikes have been carried out is implicit (as well as explicit) in the each of those recent reports, which assume that at least some drone strikes have been lawful. Since IHRL renders unlawful virtually any targeted killing outside an armed conflict, the assumption that some targeted killings have been lawful implies the existence of an armed conflict.

⁴⁵² See Legal Analysis, Part II.B.2(a), *supra*.

⁴⁵³ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 59, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴⁵⁴ See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 48 (2013) (concluding that the U.S. has participated “in a number of specific armed conflicts . . . on the territory of several states”); HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 7, 84 (2003) (concluding that there is an armed conflict between the government of Yemen and AQAP)

We set forth above the publicly available information from which one might begin to assess whether the fighting in the various States rises to the level of an armed conflict.⁴⁵⁵ Specifically:

(a) Afghanistan. The Taliban and al-Qaeda are in conflict with the Government of Afghanistan, supported by the U.S. Although many were driven from the country during the invasion, they continue to launch deadly attacks on Afghani and U.S. forces in an effort to take back territory.⁴⁵⁶ Amnesty International has concluded that the fighting between U.S. and Afghan forces on the one hand, and Taliban forces on the other, rises to the level of armed conflict.⁴⁵⁷

(b) Pakistan. There are several possible armed conflicts taking place in Pakistan, with parties that include the Taliban, al-Qaeda and TTP as non-State actors and the Governments of Pakistan and the U.S as State parties. Amnesty International has concluded that hostilities between the TTP and the Pakistani Government have risen to to the level of armed conflict:

“There has also been a non-international armed conflict in North Waziristan between Pakistani Taliban and other armed groups against Pakistan security forces. But whether this armed conflict persists is unclear. US drone attacks targeting members of the Pakistani Taliban may have taken place in the context of armed conflict, although it is unclear whether the current intensity of fighting in North Waziristan is sufficient to qualify it as such.”⁴⁵⁸

⁴⁵⁵ See Factual Background, Part I, *supra*.

⁴⁵⁶ See Factual Background, Part I.A, *supra*.

⁴⁵⁷ See AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 45 (2013) (concluding that “fighting in Afghanistan between US forces (allied with Afghan Government forces) and the Taliban meets the criteria for non-international armed conflict”).

⁴⁵⁸ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 45 (2013). See *also id.* at 43 (2013) (expressing “[u]ncertainty as to whether there is an armed conflict in North Waziristan and other areas where drones operate in Pakistan”).

In addition, Taliban and al-Qaeda forces are using northern Pakistan as a base of operations to launch attacks against U.S. and NATO forces in Afghanistan, as part of the armed conflict taking place there.⁴⁵⁹ As Amnesty International concludes, “fighting in Afghanistan between US forces (allied with Afghan Government forces) and the Taliban meets the criteria for non-international armed conflict”, and “[t]o the extent that drone attacks target Taliban fighters in North Waziristan they may be part of the armed conflict in Afghanistan”.⁴⁶⁰

(c) Yemen. In Yemen, the Government, assisted by the United States, is engaged in hostilities with AQAP. AQAP has been engaged in a sustained, highly coordinated campaign to attack Yemeni Government, military and security personnel with the aim of overthrowing the Government and establishing an Islamic state. The Yemeni Government has responded using armed force, including military campaigns supported by tanks and aircraft.⁴⁶¹ Human Rights Watch concludes that the “fighting between the Yemeni Government and AQAP since at least 2011 reached the level of an armed conflict”.⁴⁶²

⁴⁵⁹ See Factual Background, Part I.A, *supra*. See also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 254 (2010) (arguing 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 . . . the *de facto* theatre of war has expanded into parts of Pakistan at least since 2004”); AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 48 (2013) (asserting that the U.S. has participated “in a number of specific armed conflicts . . . on the territory of several states, including across the border from Pakistan in Afghanistan. The conflict in Afghanistan might also extend to some of the drone strikes the USA carries out in parts of Pakistan’s Tribal Areas.”).

⁴⁶⁰ AMNESTY INTERNATIONAL, “WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN 45 (2013).

⁴⁶¹ See Factual Background, Part I.B.1, *supra*.

⁴⁶² HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 84 (2003); see also *id.* at 7 (“Hostilities between AQAP and the Yemeni government have risen to the level of an armed conflict in recent years.”).

The report states that it is “not evident” that “there is a genuine armed conflict between the US and AQAP”, because it does not read the U.S.’s position to be that it is “a party to the Yemen-AQAP conflict”.

(d) Iraq. AQI and its successor, ISIS⁴⁶³, have conducted deadly attacks targeting military and Government personnel in their effort to overthrow the Iraqi Government, and the Iraqi Government, with the assistance of the U.S., has responded with military force.⁴⁶⁴

(e) Somalia. The hostilities between the Government of Somalia, assisted by the U.S., and al Shabaab have lasted years and have been characterized by armed, deadly clashes. During the course of the conflict, the Government and al Shabaab have captured territory from one another and, at times, al Shabaab effectively has governed large parts of the country.⁴⁶⁵

(f) Libya. The parties engaging in hostilities are the new Government of Libya and forces still loyal to Gadaffi, as well as Islamic groups including AQIM. The parties are heavily armed and are engaged in violent operations.⁴⁶⁶

(g) Mali. Since 2012, the Government of Mali has been engaged in hostilities with separatist and Islamic groups, including Ansar Dine and AQIM, for control of the Northern part of the State. The non-State parties are heavily armed and at times have controlled large swaths of territory.⁴⁶⁷

See HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 85 (2003). We do not understand this assertion.

⁴⁶³ In 2012, AQI adopted the name “Islamic State of Iraq and Greater Syria (ISIS)”. See Factual Background, Part I.B.2, *supra*.

⁴⁶⁴ See Factual Background, Part I.B.2, *supra*.

⁴⁶⁵ See Factual Background, Part I.B.3, *supra*.

⁴⁶⁶ See Factual Background, Part I.B.5, *supra*.

⁴⁶⁷ See Factual Background, Part I.B.4, *supra*. AQIM is also engaged in fighting in Algeria, which is Mali’s neighbor to the north, where military forces are combating AQIM with assistance from the United States.

III. *IUS IN BELLO*⁴⁶⁸

The analysis of whether killings in an armed conflict are lawful depends on the principles of distinction, necessity and proportionality. We discuss these in turn.

A. Distinction in a Non-International Armed Conflict

Distinction between those persons who are engaged in armed hostilities and those who are not is a fundamental principle of *ius in bello*.⁴⁶⁹ Individuals who are engaged in military operations are legitimate targets of armed force,⁴⁷⁰ whereas those who are not engaged in military operations, normally referred to as “civilians”, are legally protected. Article 51 of AP I recognizes the customary international law principle that the “civilian population as such, as well as individual civilians, shall not be the object of attack”.⁴⁷¹

⁴⁶⁸ Although the focus of this Report is on drones, there are not any legal issues unique to killing by drones as opposed to other methods. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 79, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston). Indeed, we discuss the killing of Osama bin Laden, even though drones were not used, because it involves the application of the same legal principles.

⁴⁶⁹ See COMMENTARY ON THE ADDITIONAL PROTOCOLS 598 (1987) (explaining that the principle of distinction is “the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law.”); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants”); see also NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 135 (2010); Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 175 (2009).

⁴⁷⁰ See, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 94 (2004) (“When a person takes up arms or merely dons a uniform as member of the armed forces, he automatically exposes himself to enemy attack.”).

⁴⁷¹ AP I, art. 51, ¶ 2. Although the United States has not yet ratified the 1977 Protocols, relevant portions of the Protocols have been recognized as customary international law. See ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (May 14, 2012), <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>; 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3-8 (2005); Fausto Pocar, *To What Extent is Protocol I Customary*

In an international armed conflict, the principle of distinction is relatively straightforward to apply. Members of the armed forces of a State party (with specified exceptions) are considered “combatants”,⁴⁷² who have the right to take part in the fighting and to be afforded prisoner of war status if captured.⁴⁷³ Combatants are also legitimate targets of force, including lethal force, unless they are *hors de combat*.⁴⁷⁴ On the other hand, “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities”.⁴⁷⁵

In a non-international armed conflict, where at least one party is a non-State actor, the principle of distinction is much more difficult to apply.⁴⁷⁶ In the first place, there are not definitions of the various terms used. The rules do not provide a

International Law?, in 78 INT’L L. STUDIES 337, 345 (Andre E. Wall, ed., 2002) (“As regards the protection of civilians and the civilian population against the effects of hostilities, there is no doubt that the principle of distinction as set forth in Article 48 of Protocol I, both as regards the distinction between combatants and noncombatants and between civilian objects and non-civilian objects, reaffirms a general rule of international law that has never been questioned despite being frequently disregarded in State practice.”)

⁴⁷² See AP I, art. 43, ¶2 (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”).

⁴⁷³ See GC III, art. 4 (defining “[p]risoners of war” to include, among other persons, “[m]embers of the armed forces of a Party to the conflict”); AP I, art. 43, ¶ 2 (providing that “combatants . . . have the right to participate directly in hostilities”); AP I, art. 44, ¶ 1 (providing that “[a]ny combatant . . . who falls into the power of an adverse Party shall be a prisoner of war”).

⁴⁷⁴ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 137 (2010) (citing, *inter alia*, GC 1, arts. 12, 13; GC 2, arts. 12, 13; GC 3, arts. 4, 13).

⁴⁷⁵ ICRC Guidance at 995, 997; see AP I, art. 51, ¶ 3 (“Civilians shall enjoy the protection [against military attack], unless and for such time as they take a direct part in hostilities.”). A member of a State’s armed forces becomes a civilian again “when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist”. ICRC Guidance at 1001.

⁴⁷⁶ See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 323 (2007) (explaining that “in non-international armed conflicts the principle of distinction cannot be conceptualised in the same way as in international armed conflicts”).

formal status of “combatant”,⁴⁷⁷ possibly because States are unwilling to grant to non-State actors any legal right to engage in hostilities or to receive prisoner of war treatment if captured.⁴⁷⁸ Similarly, although treaties governing non-international armed conflict use the terms “civilian”, “armed forces” and “organized armed group”, those terms are not expressly defined.⁴⁷⁹ In the second place, members of armed groups often do not wear uniforms or take other steps to distinguish themselves from the civilian population, as

⁴⁷⁷ See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 321 (2007) (“It is clear from the relevant conventional provisions and customary international humanitarian law that the formal status of ‘combatant’ does not apply in non-international armed conflicts.”); Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 88 (2011) (“The concept of combatants is one that is defined only in the rules of international armed conflict.”).

⁴⁷⁸ See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 137-38 (2010) (citing 1 COMMENTARY ON GENEVA CONVENTION 32 (Jean S. Pictet ed., 1952)); *Targeting Operations with Drone Technology: Humanitarian Law Implications* 16 (Columbia Law Sch. Hum. Rights Inst., Background Note for the Am. Soc. of Int’l Law Mtg., 2011) (“[C]onventional humanitarian law governing non-international armed conflict does not use the term ‘combatant,’ and states have never agreed to recognize the privileges and obligations of combatant status for rebels in internal situations.”).

Lubell argues that the “immunity from prosecution for lawful acts of war” is “one of the main reasons that a corresponding definition of combatants does not appear in the laws of non-international armed conflict.” Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 88 (2011). Similarly, Kleffner explains:

“The reason for the absence of combatant status in non-international armed conflicts is obvious: states are not prepared to grant their own citizens, and even less others who might engage in fighting on behalf of a non-state group, the right to do so. Nor are they willing to grant them any further reaching rights than common criminals if captured. Anything else would, in the eyes of states, undermine their claim to the monopoly of force, would promote the formation of non-state armed groups by those who are disenchanting, and encourage individuals to join such groups.” Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 322 (2007).

⁴⁷⁹ See ICRC Guidance at 1002; Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 324 (2007) (noting that “Additional Protocol II and subsequent treaties that apply in non-international armed conflicts employ the terms ‘civilians’ and ‘civilian population’ on various occasions” but “do not define the terms”).

required by the laws of war, making it difficult for State armed forces to differentiate between those who are engaged in hostilities and those who are not.⁴⁸⁰

Although the principle of distinction continues to apply in non-international armed conflicts,⁴⁸¹ the manner of applying that principle is the subject of extensive debate.⁴⁸² The debate centers largely around the treatment of members of non-State armed groups.

Some scholars contend that, because members of non-State armed groups are not defined as “combatants” under any treaty, they should be treated as civilians who lose their protection from attack only “for such time as they directly participate in hostilities”.⁴⁸³ Thus, Amnesty International argues that, even in an armed conflict, “individuals are entitled to a presumption of civilian status” and a civilian “is any individual who is not a member of the armed forces”.⁴⁸⁴ In its most extreme form, this

⁴⁸⁰ See ICRC Guidance at 1007 (“In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.”); Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 334 (2007) (noting that some groups that meet the threshold to qualify as “parties” to an armed conflict are nevertheless groups whose organizations are “amorphous, whose members do not distinguish themselves from the rest of the population, and who do not exercise control over territory”).

⁴⁸¹ See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 323 (2007) (“That the principle of distinction – in its generic meaning that parties to an armed conflict must distinguish between those who are legitimate objects of attack and those who enjoy protection – is equally applicable in non-international armed conflicts is beyond dispute.”).

⁴⁸² See Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 88 (2011) (observing that the lack of a definition of combatant “leads to a serious challenge in determining the status of individuals under the laws of non-international armed conflict, and a number of differing interpretations”).

⁴⁸³ See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 58, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston) (“In non-international armed conflict, there is no such thing as a ‘combatant’. Instead . . . States are permitted to directly attack only civilians who ‘directly participate in hostilities (DPH)’.”)

⁴⁸⁴ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 28, 45 (2013).

approach suggests that lethal force only can be used against a member of an armed group essentially at the moment that this member is engaged in hostilities.

The ICRC, after extensive debate and study,⁴⁸⁵ has rejected this approach on the grounds that it “would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction”, most notably because it would “create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population”.⁴⁸⁶ Instead, the ICRC considers an “organized armed group” in a non-international armed conflict to “constitute the armed forces of a non-State party to the conflict”, explaining that

“organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces”.⁴⁸⁷

According to the ICRC, the “organized armed group” consists of those individuals who take on a “continuous combat function” for the non-State party. Civilians, by contrast, are “all persons who are not members of State armed forces or organized armed groups of a party to the conflict”; such persons, as civilians, are entitled to protection from attack “unless and for such time as they take a direct part in hostilities”.⁴⁸⁸

⁴⁸⁵ The ICRC Guidance was the product of five meetings conducted at The Hague and Geneva from 2003 to 2008, “each bringing together 40 to 50 legal experts from academic, military, governmental, and non-governmental circles”. ICRC Guidance at 992. The agenda and reports for those meetings can be found on the ICRC website. *See* ICRC, ICRC clarification process on the notion of direct participation in hostilities under international humanitarian law (proceedings) (2009), *available at* <http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>.

⁴⁸⁶ ICRC Guidance at 1002-03.

⁴⁸⁷ ICRC Guidance at 1002, 1006.

⁴⁸⁸ ICRC Guidance at 1002.

We note that the adoption of the ICRC guidance affects the distinction analysis greatly. As Emmerson acknowledges candidly, “[d]ifferences of view about the forms of activity that amount to direct participation in hostilities . . . will almost inevitably result in different assessments of civilian casualty levels”.⁴⁸⁹ Indeed, given the lack of data on the strikes, it is hard to see how this Report or any of the other reports could reach any generalized conclusions on the legality of drone strikes without accepting the ICRC Guidance.

We address this important debate in four parts. *First*, we discuss the ICRC’s framework for the treatment of the members of organized armed groups. *Second*, we discuss why we conclude in favor of the ICRC position. *Third*, we describe the rules of distinction in a non-international armed conflict as they apply to “civilians”, defined as those who are neither members of State armed forces nor of organized armed groups. *Fourth*, we apply the rules of distinction to the drones campaign.

1. The ICRC Position on “Continuous Combat Function”

Under the ICRC position, a member of an armed group may be targeted for lethal operations at any time if he has assumed a “continuous combat function” within the group.⁴⁹⁰

According to the ICRC, membership in the non-State party’s armed forces depends on “whether the *continuous function* assumed by an individual [consists of] the

⁴⁸⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 23 n.4, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁴⁹⁰ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 69, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

conduct of hostilities on behalf of a non-State party to the conflict”.⁴⁹¹ Under this “continuous combat function” test, “organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities”.⁴⁹² A continuous combat function “requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict”.⁴⁹³ Once a member has taken on a continuous combat function in an organized armed group, no specific hostile act is required:

“Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”⁴⁹⁴

⁴⁹¹ ICRC Guidance at 1007 (emphasis added).

⁴⁹² ICRC Guidance at 1009.

⁴⁹³ ICRC Guidance at 1007; *see also* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 151 (2010) (explaining that, under the ICRC’s view, “[t]he organized armed group is the military/armed wing of the non-state party and constitutes its *de facto* armed forces.”)

⁴⁹⁴ ICRC Guidance at 1007. Emmerson interprets the ICC position as follows:

“Continuous combat function implies lasting integration into an armed group. This encompasses individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities; individuals who have been recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf; and individuals who have directly participated in hostilities on repeated occasions in support of an organized armed group in circumstances indicating that their conduct reflects a continuous combat role rather than a spontaneous or sporadic or temporary role assumed for the duration of a particular operation.” Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 69, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

Excluded from those having a continuous combat function are individuals who would not be considered part of the armed forces in a State party,⁴⁹⁵ such as purely political leaders, propagandists, weapons manufacturers, and other individuals who may provide support for the war effort but who do not actually participate in the fighting.⁴⁹⁶ Thus, a person whose sole responsibility is to disseminate propaganda on behalf of the non-State party, or to engage in political advocacy, for example, is considered a civilian, just as non-military personnel of a State party are considered civilians who are not legitimate targets of attack.

A member of a non-State actor who does not meet the continuous combat function “is to be regarded as having protected civilian status and may be targeted with deadly force only if and for so long as he or she is directly participating in hostilities”.⁴⁹⁷

Under the ICRC’s approach, the “continuous combat function” is the sole exception to the principle that individuals who are not members of State armed forces may be targeted only if and for such time as they take direct part in hostilities.

Occupying a continuous combat function may be viewed as being itself a form of direct participation in hostilities, or it may be seen as a third category distinct from civilians or members of State armed forces. The ICRC appears to take the latter view, defining the

⁴⁹⁵ As with State parties, non-State actors “may include members devoted to functions other than fighting”, including individuals—such as medical and religious personnel—who are “expressly entitled to protection”. See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 333 (2007) (“It is, therefore, submitted that only ‘fighters’ should be liable to attack for the entire duration of their membership, i.e., those members of organized armed groups who assume fighting functions on an ongoing basis, including those who are part of the command and control structure.”).

⁴⁹⁶ ICRC Guidance at 1008.

⁴⁹⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 70, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

term “civilians” as “all persons who are not members of State armed forces or organized armed groups of a party to the conflict”.⁴⁹⁸ Although we adopt the ICRC’s approach in full, as set forth in the Interpretive Guidance, we doubt the distinction makes much of a difference, if any, in practice.

2. Reasons to Choose the ICRC Position

We adopt the ICRC’s position, as described in the preceding subsection of this Report, for the following reasons:

First, the ICRC’s view has some textual support in Common Article 3, which provides that “each party to the conflict” must afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”.⁴⁹⁹ The text thus differentiates between persons “taking no active part in the hostilities” (*i.e.*, civilians) on the one hand, and “members of the armed forces” of “each party to the conflict” on the other. As the ICRC explains, because at least one party to a non-international armed conflict is necessarily a non-State actor, the text of Common Article 3 suggests that “both State and non-State parties to the conflict have armed forces distinct from the civilian population”.⁵⁰⁰ In other words, “Common Article 3 confirms the existence of, and membership in, ‘armed forces’ in non-international armed conflicts, while not distinguishing between state armed

⁴⁹⁸ ICRC Guidance at 1002.

⁴⁹⁹ See Common Article 3, ¶ 1.

⁵⁰⁰ ICRC Guidance at 1003; see also NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 147 (2010) (“Arguments for seeing members of armed groups as something other than civilians often rest upon the assertion that the rules of non-international armed conflict, by virtue of containing protections for civilians, seem to implicitly recognize that there is another category of persons who are not civilian, even if not giving them a name. This argument finds support in the views of commentators, as well as in the commentary to Protocol II.”).

forces and non-state armed forces”.⁵⁰¹

We stress that the textual argument is not by any means clear cut. Some scholars contend that the ICRC’s approach—and in particular the concept of a “continuous combat function”—lacks a foundation in the text of the governing treaties.⁵⁰² We agree with Watkin that the “concept of a continuous combat function is a term which is not found in treaty law” and “was created in discussions of the expert group” convened by the ICRC.⁵⁰³ Nevertheless, for the reasons discussed below, we consider the “continuous combat function” concept to be a defensible *interpretation* of treaty law, and we believe that it is not inconsistent with the text.

⁵⁰¹ Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 324 (2007). Kleffner further points out that the provision of Common Article 3:

“is addressed to ‘each Party to the conflict’, thereby recognizing the existence of collective entities that face each other, at least one of which is a non-state actor. Indeed, together with the intensity of the armed violence, it is the existence of these collective entities – organized armed groups – which is central in distinguishing genuine armed conflicts from mere internal disturbances, sporadic acts of violence and the like, which are beyond the reach of the laws of armed conflict.” *Id.* at 324.

⁵⁰² Heyns contends that the “ICRC test may rightly be criticized because of its lack of an authoritative basis in treaty law”. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 70, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns). Likewise, Lubell criticizes the ICRC “continuous combat function” approach on the grounds that, in his view, “the law simply does not define a third category”. See Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 94 (2011). Lubell argues that treating everyone as a civilian, unless he loses his protection, is the “closest . . . to the letter of the law” because “[t]he rules of IHL simply do not contain any definitions for categories of persons other than combatants and civilians”. *Id.* at 89. Similarly, Watkin notes that “organized armed groups” receive a “unique status” as “a third category” (other than state armed forces and civilians) with “criteria for membership that are unique and are not found in existing treaty or customary law.” Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 643 (2010).

⁵⁰³ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 655 (2010).

Second, the ICRC's recommendation is consistent with decisions of the ICTY, which concerned members of non-State parties to an armed conflict.⁵⁰⁴ In *Tadić*, for example, the ICTY stated that an individual "cannot be considered a traditional 'non-combatant' because he is actively involved in the conduct of hostilities by membership in some form of resistance group".⁵⁰⁵ Similarly, in *Galić*, the ICTY held that "[f]or the purpose of the protection of victims of armed conflict, the term 'civilian' is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict".⁵⁰⁶ Moreover, the ICRC's membership-based approach is consistent with the generally accepted standards set forth by the ICTY for the existence of a non-international armed conflict, which requires that there are "parties" to the conflict.⁵⁰⁷ The level of organization required for a non-State actor to be a "party" to

⁵⁰⁴ See Jann K. Kleffner, *From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT'L L. REV. 315, 330 (2007) (noting that the membership approach "draws support from the *Blaskic* and *Galic* judgments of the ICTY").

⁵⁰⁵ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 639 (ICTY May 7, 1997). In *Blagojević*, the ICTY recognized that, under Common Article 3, civilians include "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds[,], detention or any other cause". See Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 544 (ICTY Jan. 17, 2005).

⁵⁰⁶ Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 47 (ICTY Dec. 5, 2003). The ICRC's recommendation is also consistent with State practice. See Jann K. Kleffner, *From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT'L L. REV. 315, 326 (2007) (observing that "Colombia's Instructor's Manual defines as civilians 'those who do not participate directly in military hostilities (internal conflict, international conflict)'" and that "the Report on the Practice of Rwanda refers to a 1997 declaration by Rwanda's Minister of Defence to the effect that in non-international armed conflicts, civilians are those persons who do not carry arms nor commit inhumane acts against the population in relation to the hostilities").

⁵⁰⁷ See Jann K. Kleffner, *From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT'L L. REV. 315, 332 (2007) ("From a conceptual point of view, the strength of the membership approach consists of its accommodating most clearly the notion that an armed conflict involves at least two *parties* with their own armed forces, which are equal before the laws of armed conflict."); see also Legal Analysis, Part II.B.2, *supra* (explaining the criteria for the existence of an armed conflict).

the conflict is what distinguishes members of organized armed groups from civilians who do not take on a continuous role of fighting for a party to the conflict.⁵⁰⁸

Third, the ICRC’s view better reflects the realities of modern warfare, in which non-State actors have armed personnel with a quasi-military character. Indeed, in some conflicts, as in Afghanistan and Libya, the non-State party consists of a former Government of the State and its armed forces, which was replaced as the State party by the current Government. In other conflicts, such as Somalia⁵⁰⁹ and Mali,⁵¹⁰ non-State parties launch military operations from territory they control. Members of such groups are differently situated in relation to the armed conflict than are traditional civilians, who are individuals “who participate in hostilities independently from the parties”.⁵¹¹

Our conclusion that the ICRC’s view better reflects the realities of modern warfare does not, however, mean that the view is beyond cavil. We are aware of the criticism that the ICRC Guidance is based on a misperception of “the realities of how warfare is conducted”; that its emphasis on the “‘bearing of arms’ . . . fails to fully recognize how armed groups are organized or how they fight”; and that it erroneously assumes that it is difficult “to establish a civilian participant’s future intent from past practice”, rather than adopting a functional understanding of an individual’s participation

⁵⁰⁸ See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 332 (2007) (“Members of organized armed groups do not act as atomised individuals, but as part of a structured collective whose very purpose it is to use armed force and inflict death and injury and damage to objects of such an intensity so as to reach the threshold of a non-international armed conflict.”).

⁵⁰⁹ See Factual Background, Part I.B.3, *supra*.

⁵¹⁰ See Factual Background, Part I.B.4, *supra*.

⁵¹¹ Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 332 (2007).

in a group.⁵¹² Watkin notes that individuals who are not performing a “continuous combat function” and may be “carrying out substantial . . . support functions . . . are considered to be civilians even though the functions they perform are the same ones for which members of state armed forces can be attacked”.⁵¹³ According to Watkin, the “narrow definition of direct participation in hostilities . . . impacts directly on the targeting of both civilian participants and members of organized armed group”.⁵¹⁴

Fourth, the ICRC’s recommendation is consistent with the common sense premise that members of non-State armed groups should not be afforded *more* protection from attack than members of State armed forces.⁵¹⁵ Under *ius in bello*, members of State armed forces may be the subject of attack at any time, not only during the periods in which they are actively participating in hostilities. Treating members of non-State armed groups as “civilians” would entitle them to *more* protection by enabling them to take advantage of a “revolving door” of civilian status.⁵¹⁶ It would also reward the non-State actor for behavior that undermines the principle of distinction; *i.e.*, failing to distinguish themselves from the civilian population. We agree with the ICRC that individuals who

⁵¹² Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 644 (2010). Watkin contends that “the lack of clear guidance on the number of times a civilian can walk back through the ‘revolving door’ without being deemed a member of an armed group will ‘likely be particularly controversial’”. *See id.* at 611.

⁵¹³ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 644 (2010). Watkin sees this arguable imbalance between non-State groups and State armed forces as a “significant danger . . . to uninvolved citizens”. *Id.* at 675.

⁵¹⁴ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 659 (2010); *see also id.* at 680 (discussing individuals providing “logistical support”).

⁵¹⁵ *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 147 (2010) (explaining that removing members of organized armed groups from civilian protection “addresses an otherwise perceived imbalance that would have left members of state forces open to attack at any time, while regarding members of armed groups as civilians who might at times be protected”).

⁵¹⁶ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 142-43 (2010).

wage war unlawfully as a member of a non-State armed group should not be entitled to *more* protection under international law than soldiers who fight lawfully on behalf of a State, which is entitled to a monopoly on the legal use of force.⁵¹⁷

Fifth, the ICRC’s recommendation is more protective of civilians, defined as those who do not assume combat functions on behalf of any party to an armed conflict. If members of organized armed groups are not “civilians”, civilians can be given greater protection, as doing so would not put State parties at a disadvantage.

Sixth, the recent public reports, by and large, adopt the ICRC position.⁵¹⁸

⁵¹⁷ Lubell has expressed concern that the ICRC’s “membership approach” could give to States “a form of having the cake and eating it” as a State could “attack group members whenever it sees fit just as if they were combatants under the laws of international armed conflict, but is under no obligation to give them prisoner of war status upon capture”. See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 150 (2010). We do not believe the ICRC’s approach commits it to a position on the treatment that must be afforded members of non-State groups once captured, and we do not reach a view on that question, as it is outside the scope of this Report. We do note that, unlike soldiers in State armed forces, members of non-State armed groups are already subject to disadvantaged treatment as compared with members of State armed forces because they may be subjected to domestic legal proceedings simply for the act of fighting. See Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 322 (2007) (“In non-international armed conflicts . . . acts lawful under the laws of armed conflict, such as the killing of a member of the state armed forces or damage to, or the destruction of, a military objective, remain in principle punishable under domestic law.”).

⁵¹⁸ Amnesty International is the exception; it explicitly rejects the view that the United States can lawfully target people based merely on their membership in armed groups, rather than on the basis of their direct participation in hostilities. AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 45-46 (2013) (“Membership in an armed group alone is not a sufficient basis to directly target an individual.”)

Although Amnesty International accepts that not all US drone strikes violate human rights or international humanitarian law”, see AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 56 (2013), the group does not accept the ICRC position. Amnesty International specifically takes issue with reports that the United States targets individuals on a “kill list”, rather than “doing a case-by-case analysis of whether those persons are taking direct part in hostilities *at the time they are targeted*”. See *id.* at 45-46 (emphasis added). For example, Amnesty International discusses the killing of a senior Al Qaeda leader, whom it describes as “a prominent member of Al-Qa’ida with a significant international profile owing to his frequent appearance in the group’s propaganda videos and other materials.” *Id.* at 29. Amnesty International uses the direct participation formula, rather than the membership approach, to address whether he could be a lawful target. *Id.* at 29-30. Similarly, Amnesty International takes issue with “signature strikes” on the grounds that they ‘do not appear to require specific knowledge about an individual’s participation in hostilities’. *Id.* at 28. Indeed, Amnesty International states:

“[R]eports that the USA targets individuals on a ‘kill list’ suggest that the USA is not doing a case-by-case analysis of whether those persons are taking direct

Thus, Emmerson refers to organized armed groups as “those that recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces”.⁵¹⁹ He further notes that “[t]he majority of those killed [in Yemen] is believed to have been individuals with a ‘continuous combat function’ in Yemen’s internal armed conflicts, and therefore to have been legitimate military targets under the principles of international humanitarian law”.⁵²⁰ Similarly, Heyns observes that the ICRC approach has “the advantage that the question of who is a legitimate target is answered by reference to the performance of activity that directly causes harm to belligerents and/or civilians. This provides some objective basis for determining who may be targeted.”⁵²¹ Thus, Heyns appears to accept the legality of “targeting Taliban . . . on reliable information”.⁵²² Moreover, Human Rights Watch asserts that “[c]ombatants include members of armed groups taking a direct part in hostilities”, including “individuals actively planning or

part in hostilities at the time they are targeted. International humanitarian law is clear on this issue: making the civilian population or individual civilians not taking direct part in hostilities the object of attack is a war crime.” *Id.* at 46.

We disagree with Amnesty International’s approach. As we conclude below, targeting individuals based upon a “kill list” is not unlawful so long as the individuals on that list are members of an organized armed group that is a party to an armed conflict. *See* Legal Analysis, Part III.A.4, *infra*.

⁵¹⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 69, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵²⁰ *See* Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *The civilian impact of remotely piloted aircraft*, ¶ 27, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson).

⁵²¹ *See* Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 70, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁵²² *See* Special Rapporteur on extrajudicial, summary or arbitrary executions, *Follow-up to country recommendations – United States of America*, ¶ 78, A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns).

directing future military operations”; it contrasts such individuals with “civilians”, who “may only be deliberately attacked when and for that time they are ‘directly participating in hostilities’”.⁵²³

Seventh, the contrary view leads to unsatisfactory results. Under that view, it would be “virtually impossible for state armed forces to employ force offensively rather than defensively, except when the person deploys to directly participate in hostilities”.⁵²⁴ This would put the State party to the armed conflict at a disadvantage that is inconsistent with the principle of equality on the battlefield and with common sense.

3. “Civilians” and Direct Participation in Hostilities

Civilians are entitled to protection from attack “unless and for such time as they take direct part in hostilities”.⁵²⁵ We discuss the requirement of direct participation and then the temporal component of the participation.⁵²⁶

(a) Direct Participation in Hostilities

The ICRC’s guidance provides that, to constitute direct participation in hostilities,⁵²⁷ “each specific act by the civilian must meet three cumulative requirements”:

⁵²³ HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 6, 85-86 (2003).

⁵²⁴ Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 332-333 (2007).

⁵²⁵ AP I, art. 51, ¶ 3.

⁵²⁶ There are “two main elements to this rule . . . the acts that are to be considered as direct participation, and the temporal element of the period in which protection is lost”. Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 90 (2011).

⁵²⁷ “Hostilities” refers to “the (collective) resort by the parties to the conflict to means and methods of injuring the enemy”. ICRC Guidance at 1013. *See also, e.g.*, H CJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 33 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (“The accepted view is that ‘hostilities’ are acts which by nature and objective are intended to cause damage to the army.”); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. INT’L L & POL. 697, 705 n.24 (2010) (noting there is a “generally accepted understanding of ‘hostilities’”).

- (i) there must be a “threshold of harm” likely to result from the act, either by impacting military operations or harming civilians;
- (ii) there must be “a relationship of direct causation between the act and the expected harm”; and
- (iii) there must be a “belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict”, meaning that “it must be specifically designed to support the military operations of one party to the detriment of another”.⁵²⁸

We discuss these items in turn.

(i) Threshold of Harm

According to the ICRC, “[i]n order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack”.⁵²⁹ Thus, the ICRC distinguishes two categories: acts that adversely affect a party’s military operations and those that adversely affect a party’s civilians or civilian objects. If the act is expected to cause harm of a military nature, the threshold of harm is satisfied regardless of the gravity of harm; for example, sabotage, damage to military objects, the guarding of military

In its Commentary to the Additional Protocol I, ICRC defined hostile acts as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”. COMMENTARY ON THE ADDITIONAL PROTOCOLS 618 (1987). Similarly, the Inter-American Commission on Human Rights (an arm of the Organization of American States) states that “[i]t is generally understood in humanitarian law that the phrase ‘direct participation in hostilities’ means acts which, by their nature or purpose, are intended to causes actual harm to enemy personnel and material”. Inter-Am. Comm’n H.R., Third Report on the Human Rights Situation in Columbia, OEA/Ser.L/V/II.102, doc. 9 rev. 1 ch. 4 (Feb. 26, 1999).

⁵²⁸ ICRC Guidance at 1016; see NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 141-42 (2010) (discussing the ICRC’s requirements). For an analysis of the three “constitutive elements “ of direct participation, see generally Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. INT’L L & POL. 697 (2010).

⁵²⁹ ICRC Guidance at 1016.

prisoners, or interference with military computer networks.⁵³⁰ In the absence of military harm, however, the act “must be likely to cause at least death, injury, or destruction” to civilians or civilian objects; for example, acts like building fences or road blocks, interrupting food supplies, or manipulating civilian computer networks.⁵³¹

(ii) Direct Causation

“Participation” refers to an individual’s involvement in such hostilities, which may be either direct or indirect.⁵³²

Defining the contours of direct participation in hostilities, as opposed to indirect participation, has proved difficult and controversial: as the ICRC noted previously, “outside of [a] few uncontested examples . . . , in particular use of weapons or other means to commit acts of violence against humans or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice”.⁵³³

According to the ICRC, for the element of “direct causation” to be satisfied, “there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part”.⁵³⁴ Thus, in the ICRC’s view, direct causation is satisfied even when “a specific act does not on its own directly cause the required threshold of harm”, so long as “the act constitutes an integral part of a concrete and coordinated

⁵³⁰ See ICRC Guidance at 1017-18.

⁵³¹ See ICRC Guidance at 1018-19.

⁵³² ICRC Guidance at 1013 (citing AP I, arts. 43, 45, 51, 67; AP II, art. 13).

⁵³³ I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 23 (2005).

⁵³⁴ ICRC Guidance at 1019.

tactical operation that directly causes such harm”; for example, “the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation”.⁵³⁵ On the other hand, in the ICRC’s view, general support for the war effort, like the production of weapons, the construction or repair of roads, and the distribution of political propaganda do not constitute direct participation, even though such acts may indirectly harm the adversary or may increase “the capacity of a party to harm the adversary”.⁵³⁶

Courts addressing direct participation have taken an illustrative approach, which generally has been in accord with the ICRC’s definitions. We observe that, broadly speaking, acts that constitute direct participation are those that one might expect to be carried out by the military, as opposed to civilians. Thus, the ICTY explained:

“Examples of active or direct participation in hostilities includes: bearing using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts or observers on behalf of military forces”.⁵³⁷

Similarly, the Israeli Supreme Court in *PCATI* held that direct participation includes, among other things,

“a person who collects intelligence on the army, whether on issues regarding hostilities, or beyond those issues; a person who

⁵³⁵ ICRC Guidance at 1022-23.

⁵³⁶ ICRC Guidance at 1020-21; *see also* Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 70, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson) (describing the ICRC position).

⁵³⁷ *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶ 177 (ICTY July 17, 2008).

transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may be”.⁵³⁸

On the other hand, acts that constitute indirect participation are those that, although they may help the war effort, are the sorts of activities generally carried out by civilians rather than military personnel, and do not form “an integral part” of a military operation that causes harm to the other party in one step. Thus, the ICTY explained:

“Examples of indirect participation in hostilities include: participating in the activities in support of the war or military effort of one of the parties of the conflict, selling goods to one of the parties of the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.”⁵³⁹

Similarly, *PCATI* held that a person is only indirectly participating in hostilities if he “sells food or medicine to an unlawful combatant”, “aids the unlawful combatant by general strategic analysis, and grants them logistical, general support, including monetary aid”, or “distributes propaganda supporting those unlawful combatants.”⁵⁴⁰

The paradigmatic example of dispute on the issue is the question of whether a civilian’s participation in hostilities by driving an ammunition truck in a

⁵³⁸ HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 35 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (“All those persons are performing the function of combatants.”).

⁵³⁹ Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶¶ 177 (ICTY July 17, 2008).

⁵⁴⁰ HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 35 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

combat zone would qualify as direct or indirect participation.⁵⁴¹ The ICRC excludes from the scope of direct participation the “transport of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm”.⁵⁴² The ICRC concludes that driving an ammunition truck to the front lines qualifies as direct participation but driving ammunitions truck from the factory to the warehouse probably does not constitute direct participation.⁵⁴³ The ICRC’s conclusion is consistent with that of the ICTY.

Scholars have argued over the meaning of the term. Some scholars argue that, given the desire to protect innocent civilians who may become targets, “direct participation” should be interpreted narrowly.⁵⁴⁴ Others argue that a broader interpretation should be favored because it “creates an incentive for civilians to remain as distant from the conflict as possible—in doing so they can better avoid being charged with participation in the conflict and are less likely to be directly targeted”.⁵⁴⁵

We consider the approach adopted by the ICRC to present a coherent baseline for approaching cases that may arise.

⁵⁴¹ See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. INT’L L & POL. 697, 710 (2010).

⁵⁴² ICRC Guidance at 1021-22.

⁵⁴³ ICRC Guidance at 1023-24. The truck itself is a valid target, however, so any strike on the truck would have to factor in the risk to the civilian driver in a proportionality analysis. ICRC Guidance at 1024.

⁵⁴⁴ “The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the need to avoid killing innocent civilians.” AVERY PLAW, *TARGETING TERRORISTS: A LICENSE TO KILL?* 148 (2008) (quoting Antonio Cassese, who wrote a legal opinion supporting the plaintiffs in *PCATI*).

⁵⁴⁵ Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK* 505, 509 (Horst Fischer, ed., 2004), available at http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilities.pdf.

(iii) Belligerent Nexus

For an act to qualify as direct participation in hostilities, the “act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another”.⁵⁴⁶ The purpose of this “belligerent nexus” requirement is to ensure that an individual does not lose civilian protection for conduct that is not directed at the armed conflict, even if it has an incidental negative effect on a party to that conflict. Examples of conduct that lacks the required belligerent nexus might include refugees inadvertently blocking a strategically important road or persons engaging in individual self-defense, civil unrest, or inter-civilian violence.⁵⁴⁷ The ICRC has explained that the belligerent nexus relates to the *objective* manifest purpose of the act, as opposed to the actor’s subjective intent.⁵⁴⁸

(b) For Such Time As

Article 51(3) of AP I provides that civilians lose legal protection only “for such time as they directly participate in hostilities”. The interpretation of the phrase “for such time as”, which relates to the timeframe during which civilians lose their protection, is a matter of extensive debate.⁵⁴⁹

Under the ICRC’s framework, the temporal scope for the loss of

⁵⁴⁶ ICRC Guidance at 1016, 1025-26.

⁵⁴⁷ ICRC Guidance at 1028-30.

⁵⁴⁸ ICRC Guidance at 1026-27 (“Belligerent nexus should be distinguished from concepts such as subjective intent and hostile intent. These relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.”).

⁵⁴⁹ See, e.g., H CJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 39 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (noting that, therefore, there is “no choice but to proceed from case to case”); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 142 (2010) (“Another formidable obstacle, and certainly a debatable one, is the need to define the time during which those who take direct part lose their immunity. According to the rule, immunity is lost as long and for such time as the individual is taking a direct part.”).

protection is different for members of organized armed groups and others. Thus, “members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function”.⁵⁵⁰ Accordingly, “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group”.⁵⁵¹ Thus, a civilian who has joined an insurgency group or terrorist organization and commits to continuous participation in hostilities has forfeited his rights as a civilian;⁵⁵² persons who join “organized armed groups belonging to a non-state party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for so long as they assume their continuous combat function”.⁵⁵³

By contrast, “[c]ivilians lose protection against direct attack for the

⁵⁵⁰ ICRC Guidance at 1034. Although it endorses the “revolving door” of protection for civilians, the ICRC rejects the notion that members of organized armed groups can take advantage of the revolving door. The ICRC reasons that extending such protection to members of armed groups:

“would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis. This imbalance would encourage organized armed groups to operate as farmers by day and fighters by night. In the long run, the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessively liberal interpretations of IHL to outright disrespect for the protections it affords.” ICRC Guidance at 1036.

⁵⁵¹ ICRC Guidance at 1036.

⁵⁵² See, e.g., HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 39 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (“[A] civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts.”).

⁵⁵³ ICRC Guidance at 996.

duration of *each specific act* amounting to direct participation in hostilities”.⁵⁵⁴ The ICRC reasons that “the restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians and cannot be applied to organized armed groups”.⁵⁵⁵ Thus, a civilian who at a single time, or sporadically, was a direct participant in hostilities but who later removed himself from the hostilities would be entitled to protections as a civilian non-combatant.⁵⁵⁶ For example, a civilian who throws a rock at an approaching tank regains protection once the episode of violence is over, whereas a member of AQAP whose function within that organization is to throw rocks at Yemeni tanks has lost civilian protection for the length of time that he is a member of AQAP with a continuous combat function.

The ICRC endorses the so-called “revolving door” of civilian protection, but only for civilians as the ICRC defines them and not for members of organized armed groups. Thus, for civilians, the ICRC’s position is that “until the civilian in question again engages in a specific act of direct participation in hostilities,” the civilian retains his right not be attacked while in this resting stage.⁵⁵⁷ The ICRC approach would allow

⁵⁵⁴ ICRC Guidance at 1034 (emphasis added).

⁵⁵⁵ ICRC Guidance at 1036.

⁵⁵⁶ See e.g., HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 39 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (arguing that such a civilian “is not to be attacked for the hostilities which he committed in the past”).

⁵⁵⁷ ICRC Guidance at 1035 (noting that “[t]he ‘revolving door’ of civilian protection is an integral part, not a malfunction, of IHL”). See Bill Boothby, “*And For Such Time As,*” *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010) for a critique of the ICRC’s position.

civilians engaging in a conflict to retain civilian immunity easily and make it more difficult for armed forces to respond effectively to civilians engaging in hostilities.⁵⁵⁸

The ICRC position on revolving door is disputed. Emmerson notes:

“There is also disagreement over the ‘for such time’ criterion, with some arguing that if applied strictly it would create a near-insurmountable operational hurdle by requiring that an individual can be targeted only while actually engaged in an armed attack.”⁵⁵⁹

The U.S. rejects revolving door protection for civilians⁵⁶⁰ and the Israeli Supreme Court has stated that granting revolving door immunity “is to be avoided”.⁵⁶¹

⁵⁵⁸ See ICRC Guidance at 1035-1036 (defending this position because “it remains necessary to protect the civilian population from erroneous or arbitrary attacks and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis”). Boothby argues that the ICRC’s position creates “a legal inequality between the opposing parties [in an asymmetrical conflict], thus eroding the international law assumption that the law applies equally to each part to the conflict”. See Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741, 757 (2010).

⁵⁵⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 72, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁶⁰ See Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741, 758 (2010) (“The U.S. entirely rejects the notion of the revolving door of protection, on the basis that repeated participation in hostilities interspersed with claims of civilian status endangers law of armed conflict protections of civilians who do not participate”).

⁵⁶¹ HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 40 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

4. Distinction in the Drones Campaign

The U.S. takes the view that any “fighter” in a non-international armed conflict may be targeted.⁵⁶² The U.S. has not, however, explained the specific criteria according to which targeted killings are conducted. The press carries reports about “kill lists” that identify “high-value targets”⁵⁶³ and about “signature strikes”,⁵⁶⁴ but the U.S. has not explained how these groupings relate to the principle of distinction.

⁵⁶² See Michael N. Schmitt, *Unmanned Combat Aircraft*, 30 B.U. INT’L L.J. 595, 607 (2012) (citing Ashley Deeks, *Pakistan’s Sovereignty and the Killing of Osama Bin Laden*, 15 ASIL INSIGHTS (May 5, 2011), <http://www.asil.org/insights/volume/15/issue/11/pakistans-sovereignty-and-killing-osama-bin-laden>); see also Robert Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 3 (2011).

The DOJ White Paper maintains that Common Article 3 of the Geneva Conventions “does not alter the fundamental law of war principle concerning a belligerent party’s right in an armed conflict to target individuals who are part of an enemy’s armed forces or eliminate a nation’s authority to take legitimate action in national self-defense”. DOJ White Paper at 16. Emmerson notes:

“Some United States military lawyers argue that all members of an armed group, apart from medical and religious personnel, are legitimate targets at all times, and that the function of a particular individual within the group is irrelevant. Those who advocate this position suggest that in asymmetrical armed conflict a requirement for solid intelligence demonstrating a continuous combat function, or distinguishing between roles played by adherents to an armed group, is unrealistic and impracticable. They challenge the ICRC guidance on the ground that it would prevent attacks on targets acting as voluntary human shields and those who assemble and store improvised explosive devices.” Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 72, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁶³ Emmerson describes the category of “high-value target” thus:

“This classification implies that the identity, function and importance of the individual be established in advance. While it may be assumed that the list includes individuals identified by intelligence as senior leaders of Al-Qaida or an associated group, who would thus be deemed to have a continuous combat function, it is far from clear that the list is so confined.” Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 74, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁶⁴ Emmerson explains:

“A second category consists of what are known as ‘signature strikes’, in which a group or individual is identified as a target on the basis of their activities. . . . In this context, the analysis is used to determine whether an individual or group falls within the criteria identified in military targeting directives. The United

We therefore seek to apply the principles, based on the ICRC Guidance, to the facts that we can cull from the press reports about the U.S. practices.

First, the U.S. may engage in lethal targeting of members of a non-State armed group in an armed conflict (a) if they meet the ICRC test of continuous combat function, or (b) if they satisfy the ICRC test for a civilian’s “direct participation”.

Second, the principle of distinction must be applied in good faith based upon the intelligence that is practically available.⁵⁶⁵

Targeting intelligence is vital in an asymmetrical conflict where non-State armed groups often intermingle with the civilian population, whose members provide varying degrees of voluntary or involuntary support that may or may not amount to direct participation in hostilities.⁵⁶⁶ In distinguishing between “combatants” and civilians, the U.S. must comply with the principle of precaution, which provides that, prior to any attack, “all feasible precautions must be taken to verify that targeted persons are legitimate military targets”.⁵⁶⁷ That determination must be made “in good faith and in

States has formally denied that the mere fact that an individual is a military-aged male located in the vicinity of an armed group is sufficient to justify a targeting decision. There remains, however, considerable uncertainty as to the criteria used for the purpose of determining whether an individual’s habits of daily life are assessed as sufficient to identify him or her as a combatant.” Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 74, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁶⁵ See ICRC Guidance at 1008 (“In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances.”); Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 334 (2007) (“Much will depend on the availability of sufficient intelligence.”).

⁵⁶⁶ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 73, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁶⁷ ICRC Guidance at 1038 (citing AP I, art. 57, ¶ 2(a)(i)); Jann K. Kleffner, *From ‘Belligerents’ to*

view of all information that can be said to be reasonably available in the specific situation”.⁵⁶⁸ According to the ICRC, “this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision”.⁵⁶⁹ The ICRC concludes that distinction may be based upon either distinctive signs or a pattern of conduct:

“A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behavior, for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.”⁵⁷⁰

In cases of doubt, a party should apply a presumption of civilian protection and refrain from carrying out an attack until it has reached a “level of certainty that can reasonably be achieved in the circumstances”.⁵⁷¹

‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference, 54 NETH. INT’L L. REV. 315, 334-35 (2007) (explaining that the obligation to gather intelligence “with a view to establish the status of a person flows from the rules on precautionary measures, requiring, *inter alia*, that parties to an armed conflict do everything feasible to verify that targets are military objectives”).

⁵⁶⁸ ICRC Guidance at 1038. As the ICRC explains, “[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” ICRC Guidance at 1038 (*quoting, inter alia*, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol II, art. 3, ¶ 4, Oct. 10, 1980, 1342 U.N.T.S. 137).

⁵⁶⁹ ICRC Guidance at 1039.

⁵⁷⁰ ICRC Guidance at 1008-09.

⁵⁷¹ ICRC Guidance at 1039; *see also* Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETH. INT’L L. REV. 315, 335 (2007) (“If intelligence is ambiguous, the general presumption in favour of civilian status in case of doubt, which obliges parties to an international armed conflict to err on the side of caution, appears to be at least equally wise in non-international armed conflicts”) (citing AP I, art. 50, ¶ 1).

Third, there is substantial debate over whether the U.S. is, in fact, targeting the correct persons. We do not have sufficient facts to resolve this debate.

Thus, Human Rights Watch contends that “[s]ome of those targeted . . . as terrorist suspects may not in fact have been valid military targets,” because the United States allegedly is “applying an overly broad definition of ‘combatant’ in targeted attacks, for example by designating persons as lawful targets based on their merely being members, rather than having military operational roles, in the armed group”.⁵⁷²

Similarly, Lubell addresses “the question of targeting leadership or low-level militants” because “there is difficulty in assessing the meaning and accuracy of these terms”, especially because of “states’ likely inclination to aggrandize the value of the target”.⁵⁷³

Likewise, in the words of one expert, the U.S. is largely targeting individuals who are “lower and lower down the terrorist food chain” and who have “more and more tenuous links to al-Qaeda and the 9/11 attacks”— after interviewing “unnamed US officials”, a journalist from Reuters reported in 2010 that “of the 500 ‘militants’ the CIA believed it had killed since 2008, only 14 were ‘top-tier militant targets’”.⁵⁷⁴ Boyle similarly contends that drone strikes “have killed far more lower-ranked operatives associated with other Islamist movements and civilians than HVTs [High Value Targets] from Al-Qaeda.”⁵⁷⁵ Moreover, Emmerson considers that there is evidence to indicate that attacks

⁵⁷² HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 2, 7 (2013).

⁵⁷³ See Noam Lubell, *What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict*, 86 J. INT’L PEACE & ORG. 83, 100 (2011). Lubell notes that, though the leadership may be the “more obvious targets”, the “low-level militants might be those more directly involved in the acts of fighting, thereby more easily conforming to the notion of direct participation”. *Id.*

⁵⁷⁴ *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, International Human Rights and Conflict Resolution Clinic and Global Justice Clinic (Sept. 2012), <http://livingunderdrones.org/>.

⁵⁷⁵ Michael J. Boyle, *The costs and consequences of drone warfare*, 89 INT’L AFFAIRS 1, 9 (2013).

have been launched against much lower-level operatives, including those who have harbored identified targets.⁵⁷⁶ In addition, according to some critics, the U.S. employs an undisclosed and potentially flawed system for distinguishing between civilians and combatants. Becker and Shane cite unnamed officials purporting to reveal that the method for counting civilian casualties, “in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent”.⁵⁷⁷

Fourth, the legality of the targeted killings depends on the above principles, not on the nomenclatures of the targeting decisions. Thus, the use of a “kill list” to identify such individuals is not unlawful because, in an armed conflict, “the adoption of a pre-identified list of individual military targets is not unlawful; if based upon reliable intelligence it is a paradigm application of the principle of distinction”.⁵⁷⁸ Similarly, “signature strikes” are not necessarily illegal. As Heyns states:

“The legality of such strikes depends on what the signatures are. In some cases, people may be targeted without their identities being known, based on insignia or conduct. The legal test remains whether there is sufficient evidence that a person is targetable under international humanitarian law . . . by virtue of having a continuous combat function or directly participating in hostilities.”⁵⁷⁹

Fifth, although we have not seen facts to support the allegation that the

⁵⁷⁶ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 71, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁷⁷ Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principle and Will*, N.Y. TIMES, May 29, 2010, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

⁵⁷⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 24, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁷⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 72, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

U.S. has engaged in the “[d]eliberate targeting of rescuers”, we agree that *ius in bello* “prohibits attacks on the injured and others are hors de combat. Medical personnel and first-responders attempting to rescue the wounded must be respected and protected.”⁵⁸⁰

As Heyns notes:

“Where one drone attack is followed up by another in order to target those who are wounded and *hors de combat* or medical personnel, it constitutes a war crime in armed conflict”⁵⁸¹

Sixth, the public debate has devoted surprisingly little attention to the consequences of mistakes under international law.

President Obama recognized in his May 2013 speech that “much of the criticism about drone strikes – at home and abroad – understandably centers on reports of civilian casualties”.⁵⁸² As discussed above, it is difficult to determine how many of the casualties are targeted “militants” and how many are civilians.⁵⁸³ Although the U.S. propaganda emphasizes the certainty of drone strikes, we are impressed by Brooks’ testimony:

“War kills innocent civilians, period.”⁵⁸⁴

⁵⁸⁰ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 29-30 (2013).

⁵⁸¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 73, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁵⁸² See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>). President Obama also sought to make the point that “the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes”. *Id.*

⁵⁸³ Alston states that “[t]he accuracy of drone strikes is heavily contested and also impossible for outsiders to verify. Reports of civilian casualties in Pakistan range from approximately 20 (according to anonymous US Government officials quoted in the media) to many hundreds.” Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 19, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁵⁸⁴ *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks) at 2.

We agree with Emmerson:

“While the fact that civilians have been killed or injured does not necessarily point to a violation of international humanitarian law, it undoubtedly raises issues of accountability and transparency.”⁵⁸⁵

On mistakes in armed conflict, Amnesty International concludes:

“[I]f she was killed after being mistaken for a Taliban fighter engaged in hostilities at the time of the strike, then it does not appear that the necessary precautions were taken – particularly given the touted capability of drones, which enable their operators to survey a target for a considerable period of time before launching an attack. The fact that an elderly woman who clearly was not directly participating in hostilities was killed, suggests some kind of catastrophic failure: she was misidentified as the intended target; the target was selected based on faulty intelligence and the attack was not canceled after it became apparent that the target was a civilian; or drone operators deliberately targeted and killed [an elderly woman].”⁵⁸⁶

We recognize that the failure of some non-State actors to distinguish themselves from the civilian population—and indeed their deliberate efforts to hide among civilians—may contribute to targeting errors by State parties and undoubtedly increases the volume of civilian casualties. However, that fact does not detract from the principle of distinction or its application.

B. Necessity

The concept of necessity is “commonly described as a balance between the demands of military necessity and considerations of humanity.”⁵⁸⁷ Destruction of civilian life is permitted so long as it is necessary to accomplish the military objective⁵⁸⁸

⁵⁸⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 21, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁵⁸⁶ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 23 (2013).

⁵⁸⁷ JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 2 (2004).

⁵⁸⁸ *See, e.g.*, United States v. List, Case No. 7, 8 L.R.T.W.C. 34, 11 T.W.C. 1230, 15 I.L.R. 632 (Nuremberg Military Trib. 1948) (involving claim that German armed forces committed numerous killings

and does not cause unnecessary injury, destruction or suffering.⁵⁸⁹ The principle of necessity is related to but distinct from the principle of proportionality, which prohibits attacks from which the injury to civilians would be excessive in relation to the anticipated military advantage.⁵⁹⁰

The principle of necessity controls the issue of whether killing is legal in situations where capture is feasible. Some scholars argue that the State does not have the right to kill an enemy if capturing the enemy is equally feasible and will have the same strategic benefit, based on a least-restrictive-means analysis.⁵⁹¹ Others argue that “the military need not weigh the possibility of capture when deciding to carry out a strike”.⁵⁹²

The ICRC takes a middle view, that the principle of military necessity is “generally recognized to permit ‘only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources’”.⁵⁹³ In the ICRC’s view, it may not be “necessary” to shoot and kill unarmed civilians if capture is not justified by “military necessity”).

⁵⁸⁹ Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 30-31 (Dieter Fleck ed., 1995); *see also* ICRC Guidance at 1041-42 (“Complementing and implicit in the principle of military necessity is the principle of humanity, which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”).

⁵⁹⁰ *See* Legal Analysis, Part III.C, *infra*.

⁵⁹¹ *See* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR J. INT’L L. 819 (2013). This would mean that if there is a way to capture an enemy that would not risk the lives of soldiers, killing that enemy would not meet the requisite standard of necessity.

⁵⁹² Geoff Corn et al., *Corn, Blank, Jenks, and Jensen Respond to Goodman on Capture-Instead-of-Kill*, LAWFARE (Feb. 25, 2013), <http://www.lawfareblog.com/2013/02/corn-blank-jenks-and-jensen-respond-to-goodman-on-capture-instead-of-kill/>; Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the ‘Hot’ Conflict Zone*, 161 U. PENN. L. REV 1165, 1214 (2013).

⁵⁹³ ICRC Guidance at 1041 (collecting authority and quoting U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 2.2 (2004)).

feasible, but armed forces need not take additional risks upon themselves in order to capture an armed adversary alive.⁵⁹⁴ We therefore do not interpret the ICRC to deviate from the view that the military ordinarily need not weigh the possibility of capture in deciding whether to employ lethal force.⁵⁹⁵

We accept this view. We observe that it would be exceedingly rare for the principle of necessity to require armed forces to attempt capture of an enemy before using lethal force, because a capture mission virtually always might expose the armed forces to additional risks. That is particularly true when the killing is done at great distance by unmanned drones.⁵⁹⁶

C. Proportionality⁵⁹⁷

Proportionality, a fundamental principle of *ius in bello*,⁵⁹⁸ was codified in the First Additional Protocol to the 1949 Geneva Conventions. The principle prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive

⁵⁹⁴ ICRC Guidance at 1042.

⁵⁹⁵ We note that President Obama and CIA Director Brennan have described a preference for capture based on tactical considerations. See Factual Background, II.C, *supra*.

⁵⁹⁶ We do not interpret the approach taken by the Israeli Supreme Court in *PCATI* to be substantially different from the ICRC’s approach. In that case, the court stated that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed” and that “if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed”. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel ¶ 34 [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf. The court recognized, however, that “[a]rrest, investigation, and trial are not means which can always be used”, explaining that “[a]t times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required”. *Id.* The court noted that nonforcible means might be more feasible “under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities”. *Id.*

⁵⁹⁷ In the context of IHL, proportionality seeks to establish a balance between military necessity and the desire to protect innocent civilians. See ANTHONY P. ROGERS, *LAW ON THE BATTLEFIELD* 14 (1996).

⁵⁹⁸ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).

in relation to the concrete and direct military advantage anticipated”.⁵⁹⁹

There are three steps to the proportionality analysis.

The first step is to consider the anticipated collateral damage. This is an *ex ante* analysis, rather than an *ex post* measure of the actual outcome. The killing of civilians does not *per se* make an attack unlawful.

The second step is to assess the expected military advantage that the attack will confer on the attacker. There is considerable debate surrounding the scope of the “direct military advantage anticipated” used to justify the attack. Scholars disagree whether to perform the analysis in light of the specific benefit of the attack viewed in isolation⁶⁰⁰ or in light of the attack’s role in the overarching military objective.⁶⁰¹

The third step is to weigh the anticipated collateral damage against the military benefit and ensure that the former is not excessive as compared to the latter.⁶⁰²

The term *excessive* is not precise and there is little precedent to ascertain its exact meaning within the context of proportionality.⁶⁰³ Despite the lack of a clear standard, this

⁵⁹⁹ AP I, art. 51, ¶ 5(b).

⁶⁰⁰ See HELEN DUFFY, ‘THE WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 18-19, 231-235 (2005).

⁶⁰¹ See Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT’L HUMANITARIAN L. 79, 81, 98-99 (2004).

⁶⁰² In *Prosecutor v. Galić*, the Trial Chamber observed that proportionality should be considered under the lens of “whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack”, *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 (ICTY Dec. 5, 2003).

⁶⁰³ In *Gotovina*, the Trial Chamber considered that where the use of artillery weapons “created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects . . . the risk was excessive in relation to the anticipated military advantage”, and concluded that the attack in question was a “disproportionate attack”. *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1910 (ICTY Apr. 15, 2012) (emphasis added). While the Trial Chamber’s Judgment was overturned on appeal, the Appeals Chamber did not make any findings against the Trial Chamber’s principle of proportionality, but instead observed that the Trial Chamber’s determination failed to include “a concrete assessment of comparative military advantage, and did not make any findings on resulting

case-by-case analysis considers factors such as “the value of the target, the location of the attack, the timing of the attack, the number of anticipated civilian casualties, and the amount of damage anticipated to civilian objects, such as buildings, bridges, hospitals and utilities”.⁶⁰⁴

The lack of facts, either on the projected collateral damage⁶⁰⁵ or on the expected military benefit, let alone how to balance the two, makes analysis of the proportionality of individual drones strikes impossible.

The public debate on proportionality has nonetheless been fierce. We have noted the following issues, which we believe involve the author’s non-legal position on drone strikes rather than an issue of international law.

First, scholars have debated vigorously over whether drones killing is excessive because it allegedly will lead to a “Playstation” mentality.

One scholar writes that “[t]he operators never see with their own eyes the persons they have killed. Indeed, they have no physical contact with the place where the attacks are happening.”⁶⁰⁶ Another scholar suggests that “because operators are based thousands of miles away from the battlefield, and undertake operations entirely through

damages or casualties”. Prosecutor v. Gotovina, Case No. IT-06-90-A, Judgment, ¶ 82(ICTY Nov. 16, 2012).

⁶⁰⁴ Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 690 (2011).

⁶⁰⁵ We note that the U.S. has asserted that it generally does not anticipate collateral casualties because it does not engage in drone strikes if there is the possibility of civilian casualties. “[W]e only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances.” John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>).

⁶⁰⁶ Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263, 271 (Simon Bronitt et al. eds., 2012).

computer screens and remote audio-feed, there is risk of developing a ‘Playstation’ mentality to killing”.⁶⁰⁷

Other scholars argue the reverse. Brooks testified that just like any other soldier, drone operators are acutely aware of the impact of their actions and often suffer from Post Traumatic Stress Disorder, and “there’s little evidence that drone technologies ‘reduce’ their operators’ awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring.”⁶⁰⁸

Similarly, Bowden asserts that, because drones produce a very high-resolution image, operators see:

“the carnage close-up, in real time – the blood and severed body parts, the arrival of emergency responders, the anguish of friends and family. Often he’s been watching the people he kills for a long time before pulling the trigger. Drone pilots become familiar with their victims. They see them in the ordinary rhythm of their lives – with their wives and friends, with their children. War by remote control turns out to be intimate and disturbing. Pilots are sometimes shaken.”⁶⁰⁹

⁶⁰⁷ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 84, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶⁰⁸ *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks) at 4.

⁶⁰⁹ Mark Bowden, *The Killing Machines*, ATLANTIC (Aug. 14, 2013), <http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/>. Brooks’ historical perspective is valuable here:

“The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have ‘prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God.’ In the early 1600’s Cervantes took a similar view of artillery” *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks) at 4.

Moreover, it has been suggested that a soldier in combat, as opposed to a drones operator, may well be *more* likely to use deadly force because he is personally at risk.

We do not undertake to resolve this issue, which does not involve international law.

Second, there is a vigorous dispute, based on generalities rather than specific facts, about whether drones strikes lead to more killing.

Boyle argues that “the standards of proportionality have been eroded with drone warfare, as the US has engaged in attacks that kill more civilians than combatants”.⁶¹⁰ Similarly, Alston writes that “[t]he greater concern with drones is that because they make it easier to kill without risk to the State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively”.⁶¹¹

On the other hand, some scholars argue that drone strikes are responsible for relatively few civilian fatalities when compared to manned aircraft.⁶¹² The Jamestown Foundation study concluded:

“One conclusion that can be confidently drawn from this brief analysis of our database is that the available evidence on the CIA’s Predator campaign suggests that it is neither inefficient or disproportionate in terms of civilian casualties, at least in relation to alternative means of conducting hostilities and/or other recent

⁶¹⁰ Michael J. Boyle, *The costs and consequences of drone warfare*, 89 INT’L AFFAIRS 1, 8 (2013). This argument is often combined with an assertion that civilian deaths lead to radicalization. *See, e.g.*, David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html>.

⁶¹¹ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 80, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶¹² *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks) at 3.

targeting campaigns for which credible numbers are available.”⁶¹³

Moreover, Bowden argues that the weapons often offer the most efficient method of counterterrorism when compared to other options.⁶¹⁴ According to Bowden:

“The drone is effective. Its extraordinary precision makes it an advance in humanitarian warfare. In theory, when used with principled restraint, it is the perfect counterterrorism weapon. It targets indiscriminate killers with exquisite discrimination.”⁶¹⁵

We are not persuaded one way or the other by the statistics. That said, we do not see any reason to think drones necessarily result in more civilian harm than any

⁶¹³ Brian Glyn Williams et al., *New Light on the Accuracy of the CIA's Predator Drone Campaign in Pakistan*, 8 TERRORISM MONITOR (Nov. 11, 2010), http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=37165%20#.

The study indicated that in the 144 confirmed drone strikes in Pakistan as of June 19, 2010, 1,372 people were killed, and that (a) “only 68 (or 4.95%) could be clearly identified as civilians, while 1,098 (or 80%) were reported to be ‘militants’ or ‘suspected militants’”; the remaining 15% of that total were individuals whose status could not be ascertained and were therefore classified as “unknowns”; (b) even if each of the “unknowns” were classified as civilians, “the vast majority of fatalities would remain suspected militants rather than civilians – indeed, by more than a 4:1 ratio”; and (c) discounting “unknowns”, drone strikes are responsible for approximately a 16.5:1 ratio of suspected militant fatalities to civilian deaths.

As stated above according to NAF, approximately 15% of those killed by drones from 2002 to 2012 were civilians. See *National Security Studies Program*, NEW AMERICA FOUNDATION, <http://natsec.newamerica.net/>. According to BIJ, the rates of civilian deaths from drone strikes were 16%-26% for Pakistan, 16% for Yemen, and 7%-33.5% for Somalia. See *Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>.

⁶¹⁴ Some argue that drones are undesirable because they result in killing the targets without making an effort to arrest or capture them. See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 77, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston) (arguing that “rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain”). We view this as a policy argument, not a legal argument, because in an armed conflict there is no duty to attempt capture of an enemy engaging in armed hostilities. See *Legal Analysis*, Part III.B, *supra*.

⁶¹⁵ Mark Bowden, *The Killing Machines*, ATLANTIC (Aug. 14, 2013), <http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/>. Bowden cites the October 1993 U.S. Delta Force raid in Somalia in which an arrest mission resulted in the downing of two Black Hawk helicopters and an ensuing firefight that “killed an estimated 500 to 1,000 Somalis – a number comparable to the total civilian deaths from all drone strikes in Pakistan from 2004 through the first half of 2013”. He goes on to say that, “[c]hoosing police action over drone strikes may feel like taking the moral high ground. But if a raid is likely to provoke a firefight, then choosing a drone shot not only might pass legal muster . . . but also might be the more moral choice.” Similarly, he cites the 2011 raid that killed Osama bin Laden in which a small group of “the best-trained, most-experienced soldiers in the world” executed a successful mission that resulted in a 20 percent civilian death rate. He concludes, “even a near-perfect special-ops raid produced only a slight improvement over the worst estimates of those counting drone casualties. Many assaults are not that clean.” *Id.* Of the five total casualties, Bowden counted one (the wife of one of bin Laden’s protectors) as a civilian, although “she was helping to shelter the world’s most notorious terrorist”.

other kind of warfare. Brooks summed up this point well:

“Importantly, there does not appear to be anything inherent in drones as a weapon that tends to inflict more civilian harm than other kinds of weapons.

“[C]ritics often assert that US drone strikes are morally wrong because they kill innocent civilians. This is undoubtedly true and tragic – but it is not really an argument against drone strikes as such. *War* kills innocent civilians, period. But the best available evidence suggests that US drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare.”⁶¹⁶

Emmerson appears to agree, stating:

“If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict by significantly improving the situational awareness of military commanders.”⁶¹⁷

Thus, he considers drones to have “a positive advantage from a humanitarian law perspective”, citing the ICRC’s view that

“any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimize incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not”.⁶¹⁸

⁶¹⁶ *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks) at 2.

⁶¹⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 77, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson). Alston agrees that drones offer advanced accuracy and precision but notes, “[t]he precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based”. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 81, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶¹⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 28, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

Koh argues “[b]ecause drone technology is highly precise, if properly controlled, it could be more lawful and more consistent with human rights and humanitarian law than the alternatives”. Harold Hongju Koh, Speech at Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>); see also *id.* (“Some mistakenly think of drones as inherently evil, even though they are a

D. Is There a Duty to Disclose?

We now turn to the question of what disclosures, if any, international law requires the U.S. to make in connection with the drones program, other than the limited disclosure required under Article 51 of the U.N. Charter.⁶¹⁹

In considering this issue, we start with the principle that international law depends on consent, either express consent (in treaties) or implicit consent in that custom can create rules of general application.

The context here makes us very skeptical of any claim of implicit consent in terms of custom. Mankind has been engaged in warfare throughout recorded history.⁶²⁰ And warfare is an activity that lends itself—often legitimately—to claims of secrecy.⁶²¹ We therefore do not spend much time looking to a custom of disclosure in warfare. Indeed, Article 51 is an obvious attempt to force States to make disclosures in the context of *ius ad bellum*.

We thus turn to whether there are treaties that require disclosures in the context of *ius in bello* and, if so, what disclosures they require.

Alston argues that, under international law, States conducting targeted killings are under an obligation to disclose (a) the legal basis for the strikes, (b) the protocol for selecting targets, (c) and the safeguards in place to ensure compliance with

weapon that if precisely and accurately targeted, could be far more discriminate and lawful than such inherently indiscriminate weapons as chemical weapons or nuclear bombs.”).

⁶¹⁹ See Legal Analysis, Part I.G, *supra*.

⁶²⁰ In 1968, Will Durant observed in *The Lessons of History* that in “the last 3,421 years of recorded history only 268 have seen no war”. WILL AND ARIEL DURANT, *THE LESSONS OF HISTORY* 81 (1968). Our record since then has not decreased the percentage of war.

⁶²¹ See Appendix D, *infra*.

the law.⁶²² In his view, the “refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals”.⁶²³ Alston attempts to infer a duty of disclosure from an obligation under international law to investigate targeted killings after the fact to determine whether they were lawful and a responsibility to punish those who unlawfully target civilians. In particular, while acknowledging that “the Geneva Conventions do not specify a general duty to investigate alleged breaches”, he argues that:

- (a) “the grave breaches provisions of the Fourth Convention, which applies inter alia to ‘wilful killing’, require that effective penal sanctions be in place to punish those found to have committed such breaches”;
- (b) such “obligations would be hollow, if not illusory, if the state was not also required to demonstrate in practice that it is in compliance by investigating any alleged grave breach related to a targeted killing”; and
- (c) that requirement imposes on States the duty “to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another state that has made out a prima facie case for unlawfulness of a targeted killing”⁶²⁴.

⁶²² Alston asserts:

“States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the bases for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate, and if not, the remedial measures they would take.” Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 93, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶²³ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 87, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶²⁴ Philip Alston, *The CIA and Targeting Killings Beyond Borders* 22 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-64, 2011). Alston contends that a duty to investigate, prosecute and punish violations flows from human rights law and that such a duty is a feature

We do not agree with Alston’s analysis.

The existence of a “grave breaches” duty with respect to “wilful killing” does not by itself create a more generalized duty of disclosure.

Moreover, a duty to investigate—even where one exists, as for “grave breaches”—does not imply a corresponding duty to disclose the results of such investigations to the world. Nor does a State’s duty to comply with treaty law imply a duty to disclose the manner in which it ensures compliance. Rather, the State is simply obligated to comply. Thus, we disagree with Alston’s oft-quoted statement that the duty to impose penal obligations on those who commit grave breaches “would be hollow, if not illusory, if the state was not also required to demonstrate in practice that it is in compliance by investigating any alleged grave breach related to a targeted killing”.⁶²⁵ Such a conclusion—that States’ treaty obligations are “hollow” unless States are made to publicly demonstrate compliance—follows only if one assumes as a baseline that States do not follow their treaty obligations in good faith without supervision and, in the case of the United States, only if one assumes that the U.S. does not comply with its own policy of investigating credibly alleged breaches.⁶²⁶ We do not share those assumptions.

of customary international law. *Id.* at 22-23 (“The right to life has long been acknowledged as part of custom, and a duty to investigate has long been assumed to be a central part of that norm, not least by the United States when it consistently calls upon other Governments to investigate killings without invoking any specific treaty-based obligations binding upon the Governments concerned.”).

⁶²⁵ Philip Alston, *The CIA and Targeting Killings Beyond Borders* 21 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-64, 2011).

⁶²⁶ Cohen and Shany themselves point out that Department of Defense Directive 2311.01E “introduces a putative duty to investigate that goes well beyond the grave breaches regime”. See Amichai Cohen and Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 Y.B. INT’L HUMANITARIAN L. 37, 53 (2011). It defines a “reportable incident” as any “possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict”. See *id.* at 53 (citing U.S. Dep’t of Defense Directive 2311.01E). We are not aware of any claim that the United States has failed to abide by its policy of investigating any potential breach of IHL.

Nor do we find elsewhere either a requirement that a State disclose the legal basis for its actions or a requirement that a State disclose facts concerning its military operations. In particular, we do not find any support in international law for Emmerson's assertion that both the U.S. and the State in whose territory force was used have "an international law obligation to establish effective independent and impartial investigations into any drone attack in which it is plausibly alleged that civilian casualties were sustained".⁶²⁷ Emmerson sees an effective and independent investigation as the first step to determining which legal regime governs and whether the appropriate standards were met, and that "reparation" is appropriate when there are civilian casualties.⁶²⁸

Emmerson has asserted, without citation:

"Having regard to the duty of States to protect civilians in armed conflict, the Special Rapporteur considers that, in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial. The

⁶²⁷ See Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights, Statement concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency (Jan. 24, 2013) (transcript available at http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf). Emmerson has called upon States that use drone technology to "establish a system of independent investigation into the justification for the targeting, and the proportionality of the action taken". (Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights, Remarks at Harvard University (Oct. 25, 2012) at 12); see also Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights, Statement concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency (Jan. 24, 2013) (transcript available at http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf), at 1.

⁶²⁸ John F. Burns, *U.N. Panel to Investigate Rise in Drone Strikes*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html?gwh=570A74C8E119CFC3762B148715A1819E> (discussing "the duty of states to conduct thorough independent and impartial investigations" into cases involving civilian casualties "with a view to securing accountability and reparation where things have gone badly wrong").

obligation arises whether the attack was initiated by remotely piloted aircraft or other means, and whether it occurred within or outside an area of active hostilities.”⁶²⁹

Emmerson repeated this claim, still without citation, in his February 2014 report.⁶³⁰

Nor do we find support in international law for Heyns’ assertion that “[t]ransparency is a requirement” under IHL.⁶³¹ Heyns argues in favor of specification of “procedural safeguards in place to ensure in advance that targeted killings comply with international law, as well as the measures taken after such killings to ensure that its legal and factual analysis is accurate”.⁶³² Heyns asserts an “obligation to investigate and, where appropriate, punish those responsible in respect of alleged war crimes . . . under international humanitarian law,”⁶³³ but he does not use this obligation to assert that there must necessarily be public disclosures of the investigation. Instead, he states:

⁶²⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 78, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

⁶³⁰ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *The civilian impact of remotely piloted aircraft*, ¶¶ 32, 36-38, 75, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson).

⁶³¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Follow-up to country recommendations – United States of America*, ¶ 45, U.N. Doc. A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns).

⁶³² Special Rapporteur on extrajudicial, summary or arbitrary executions, *Follow-up to country recommendations – United States of America*, ¶ 79, U.N. Doc. A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns).

⁶³³ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 101, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns). Heyns cites articles of the Geneva Conventions requiring each contracting party to investigate persons alleged to have committed “grave breaches” of the Conventions and to establish effective penal sanctions for such persons. *See* GC I, art. 49 (“Each High Contracting Party shall . . . search for persons alleged to have committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts”); GC II, art. 50 (same); GC III, art. 129 (same); GC IV, art. 146 (same). Those provisions do not require any sort of public disclosure, including of the existence or result of such investigations. Similarly, article 85 of AP I, which Heyns cites, calls for the “repression of breaches and grave breaches” but does not make any requirement for public disclosure. *See* AP I, art. 85, ¶ 1. As examples of the prosecution of individuals for violations of IHL, Heyns cites the statutes of the ICC, ICTY and ICTR, which give the tribunals the authority to prosecute grave breaches or other serious violations of the Geneva Conventions. *See* ICTY Statute, art. 2; ICTR Statute, art. 4; ICC Statute, art. 8, ¶ 2(a). Those statutes, which establish international criminal tribunals, do not impose any disclosure duties on States.

“Wherever there are reasons to query whether violations of international humanitarian law may have occurred in armed conflict as a result of a drone strike, such as the incorrect designation of persons as targetable or disproportionate civilian harm, accountability demands at least a preliminary investigation.”⁶³⁴

We do not understand the basis in international law with his following sentence, made without citation: “Civilian casualties must be determined and should be disclosed.”⁶³⁵

Heyns goes even further in his recommendations, again without citation:

“States must be transparent about the development, acquisition and use of armed drones. They must publicly disclose the legal basis for the use of drones, operational responsibility, criteria for targeting, impact (including civilian casualties), and information about alleged violations, investigations and prosecutions.”⁶³⁶

We thus do not agree that there is a wider duty of disclosure under international law. In particular, we do not find in international law a broader “duty to disclose” or “duty of transparency” that would require the United States to disclose additional facts concerning targeted killings or to disclose the legal basis for the killings.⁶³⁷ On the contrary, State practice appears fairly uniformly to keep such facts

⁶³⁴ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 101, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns). Amnesty International asserts that the onus is on the U.S. Government “to conduct systematic, independent and comprehensive investigations” of potentially unlawful killings. AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 37 (2013).

⁶³⁵ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 101, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns) (emphasis added).

⁶³⁶ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 108, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁶³⁷ As Harwood stated:

“The remaining question, then, is whether LOAC requires states to publish the policies and criteria used in vetting targets and carrying out attacks using RPAs, as called for by Alston. In short, it does not. During armed conflicts, states are required to abide by LOAC and make targeting decisions on a case-by-case basis, but there is no requirement in LOAC to give notice of targeting criteria beforehand, nor to publicly announce a military strike and its legal and factual basis *post hoc*.” Major John C. Harwood, “*Knock, Knock; Who’s there?*”

secret so as to protect their intelligence-gathering, military operations, strategy, and other State secrets. While disclosure may be desirable from a policy standpoint,⁶³⁸ and while it may (or may not) assist observers in evaluating the legality of the U.S. drone strikes, it is not required by IHL.

We agree with Barnidge that:

“These interrelated concerns of transparency may or may not be understood as a matter of moral, ethical or policy preference, but they are not required from an international humanitarian law perspective. Certainly, American drone attacks must comply with the ‘cardinal principles contained in the texts constituting the fabric of humanitarian law,’ and the United States must perform its treaty obligations in good faith and interpret these obligations ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Apart from these broad legal obligations, the United States, as with all other States that engage in methods and means of warfare, is not required by international humanitarian law to reveal its tactical ‘playbook.’ The United States need not reveal its understanding of civilians who directly participate in hostilities, though it must, of course, interpret this concept in good faith.”⁶³⁹

Announcing Targeted Killing Procedures and the Law of Armed Conflict”, 40 SYRACUSE J. INT’L L. & COM. 1, 23 (2012).

⁶³⁸ See Appendix D, *infra*. Robert P. Barnidge, Jr., *A Qualified Defence of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 BOSTON UNIV. INT’L L. J. 409, 443-444 (2012).

⁶³⁹ Robert P. Barnidge, Jr., *A Qualified Defence of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 BOSTON UNIV. INT’L L. J. 409, 443-444 (2012).

APPENDIX A

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APPENDIX B

GLOSSARY

- AP I Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/470?OpenDocument>.
- AP II Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>.
- AP III Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 261, *available at* <http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/615?OpenDocument>.
- AQI Al Qaeda in Iraq, an alleged affiliate of al-Qaeda operating in Iraq.
- AQAP Al Qaeda in the Arabian Peninsula, an alleged affiliate of al-Qaeda operating in Yemen.
- AQIM Al Qaeda in the Islamic Magreb, an alleged affiliate of al-Qaeda operating in North Africa.
- Armed Conflict See *International Armed Conflict* and *Non-International Armed Conflict*.
- Article 2(4) U.N. Charter art. 2, para. 4.
- Article 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Article 51 U.N. Charter art. 51.

Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

ATS Alien Tort Statute, 28 U.S.C. § 1350.

AUMF The Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224.

The AUMF was passed by the United States Congress on September 14, 2001. It authorized the President of the United States “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”.

Al-Shabaab An alleged affiliate of al-Qaeda operating in Somalia.

BIJ Bureau of Investigative Journalism. The BIJ compiles information and statistics on drone strikes in Pakistan, Yemen, and Somalia. *See Covert Drone War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/>.

Bivens *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

In *Bivens*, the United States Supreme Court held that an implied cause of action exists for individuals whose Fourth Amendment right to be free from unreasonable searches and seizures allegedly has been infringed by the Federal Government. United States citizens who were allegedly victims of a targeted killing have brought *Bivens* actions against the United States. *See Al-Aulaqi v. Panetta*, Civ. A. No. 12-1192, 2014 WL 1352452 (D.D.C. Apr. 4, 2014).

Caroline

In the *Caroline* incident, which took place in 1837, Canadian rebels received support from United States sympathizers via a ship called the USS *Caroline*. The Royal Navy crossed on to United States territory and seized the ship. The seizure led to correspondence between U.S. Secretary of State Daniel Webster and Alexander Baring, 1st Baron Ashburton, concerning the British claim that the use of force on U.S. territory was in self-defense. The common ground between Webster and Baring is often considered to be evidence of customary international law. In particular, both parties agreed that the use of force might have been justified by the necessity of self-defense, although Webster disputed that such necessity in fact existed. *See, e.g.*, JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 750-751 (8th ed. 2012); MALCOLM N. SHAW, *INTERNATIONAL LAW* 1131 (6th ed. 2008); DANIEL WEBSTER, *THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE* 110 (1848), *available at* <https://archive.org/details/diplomaticoffici03webs>.

Charming Betsy

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

According to the *Charming Betsy* canon of interpretation, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”. *Id.* at 118.

It is argued that the *Charming Betsy* canon suggests that covert action by the CIA, including drone strikes, must comply with international law. The CIA’s responsibility to conduct those strikes was authorized by the President under Article 50 of the United States Code. As one scholar wrote, “[t]here is nothing in the text, legislative history, or subsequent course of practice under Title 50 that suggests Congress intended or acquiesced in the use of covert action to carry out acts amounting to the use of armed force without a justification such as a legitimate claim of self-defense or host state consent”. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539, 623 (2012).

Common Article 3

Common Article 3 to the Geneva Conventions.

Common Article 3 supplies the legal rules for the conduct of any non-international armed conflict; *i.e.*, an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. It provides, among other things, that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely”.

- CSIS Center for Strategic and International Studies.
- DOJ White Paper U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force (Nov. 8, 2011), *available at* <http://www.fas.org/irp/eprint/doj-lethal.pdf>. It is reported to have been written by David Barron and Martin Lederman of the DOJ Office of Legal Counsel. *See* Mark Mazzetti et. al., *How a U.S. Citizen Came to be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html> .
- The White Paper appears to have been “leaked” to the NBC television network in February 2013. *See* Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS (Feb. 4, 2013), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans . The DOJ later released an identical copy bearing the date November 8, 2011.
- EU European Union.
- GA General Assembly.
- GC I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 6.3 U.S.T. 3114, 75 U.N.T.S. 31, *available at* <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.
- GC II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 6.3 U.S.T. 3217, 75 U.N.T.S. 85, *available at* <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.
- GC III Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6.3 U.S.T. 3316, 75 U.N.T.S. 135, *available at* <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.
- GC IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6.3 U.S.T. 3516, 75 U.N.T.S. 287, *available at* <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.

ICC	International Criminal Court. Established by the <i>ICC Statute</i> on July 17, 1998, the ICC is a permanent international court with jurisdiction over “the most serious crimes of international concern”, including the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. <i>See</i> ICC Statute arts. 1, 5.
ICC Statute	Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, <i>available at</i> http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf .
ICCPR	The International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, <i>available at</i> http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf .
ICJ	International Court of Justice.
ICJ Statute	The Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 3 Bevens 1179, <i>available at</i> http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf .
ICRC	International Committee of the Red Cross.
ICRC Guidance	ICRC, <i>Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law</i> , 90 INT’L REV. RED CROSS 991 (2009), <i>available at</i> http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf .
ICTR	International Criminal Tribunal for Rwanda.
ICTY	International Criminal Tribunal for the Former Yugoslavia.
IHL	International Humanitarian Law. <i>See ius in bello</i> .
IHRL	International Human Rights Law.

IHRL is the set of legal rules guaranteeing and protecting the fundamental civil, political, and social rights of individuals and groups of people. Basic principles of IHRL have been codified in the ICCPR and other treaties. Among the rights guaranteed by IHRL is the right to life.

- International Armed Conflict An international armed conflict involves one or more States engaged in armed conflict with another. *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 95 (2010). Common Article 2 of the 1949 Geneva Conventions provides that the conventions apply to “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. Thus, an international armed conflict exists “whenever there is a resort to armed force between two or more states”. ICRC, How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law? (2008), *available at* <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.
- Ius ad bellum* The body of law governing the legality of the use of force by a State against another State.
- Ius ad bellum* is concerned with the circumstances in which one State may infringe upon the sovereignty of another State through the use of force against that State or on its territory.
- Ius in bello* The body of law that applies to the conduct of armed hostilities. Often used synonymously with *IHL* or *LOAC*.
- Ius in bello* is the set of legal rules regulating *how* a State may lawfully use military force; it defines the lawful and unlawful conduct of belligerents in armed conflict. The primary concern of *ius in bello* is the protection of various categories of victims and potential victims, including combatants and non-combatants, civilians and military personnel, the wounded and prisoners of war. *Ius in bello* rules are found in a series of multilateral treaties and conventions to which many (if not most) States are parties. The most notable of these are the four Geneva Conventions of 1949 and the 1977 Additional Protocols to those conventions.

Ius ad bellum and *Ius in bello*
Compared *Ius ad bellum* is distinct from the doctrine of *ius in bello*, which constrains the use of force within an armed conflict and must be analyzed independently. An act that is lawful under *ius ad bellum* because it was undertaken in self-defense might still be unlawful under the rules of *ius in bello* if it results in the commission of unlawful atrocities. Conversely, if a State violates *ius ad bellum* norms by engaging in an unprovoked military attack, its responsibility for aggression against the target State is not discharged because its forces have scrupulously observed all the *ius in bello* constraints in the Geneva Convention.

The sovereignty analysis does *not* curtail the *ius in bello* analysis. Thus, although the consent of the State in which force is used resolves sovereignty problems, “it does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person”. See Special Rapporteur on Promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 37, U.N. Doc. A/68/389 (Sep. 18, 2013) (by Ben Emmerson). Similarly, the invocation of “self-defense” does not absolve the targeting State of following the laws of IHL. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 43, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston). Thus, “even if the use of inter-state force is offered as a justification for a targeted killing, it does not dispose of the further question of whether the killing of a particular individual or individuals is lawful”. *Id.* ¶ 44.

Ius in bello and IHRL
Compared IHRL is a form of *lex generalis*, a body of law that governs general matters. IHL, on the other hand, is a form of *lex specialis*, which applies to the conduct of belligerent forces only in armed conflict situations. In an armed conflict, therefore, the rules of IHL are used to determine whether a violation of the right to life has occurred. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

In contrast to IHRL, the rules of *ius in bello* permit the use of force, including lethal force, against persons taking part in hostilities so long as force is exercised consistently with certain guidelines, including the need to prevent disproportionate civilian casualties.

Lieber Code The Lieber Code of 1863, General Order No. 100, published in April 1863. The Lieber Code described the “law and usages of war” (see *LOAC*) for use by Union officers in the field. It was influential internationally in codification of what would become IHL or LOAC.

LOAC	Law of Armed Conflict, formerly called the “Law of War”, “Laws and Customs of War” and “Laws and Usages of War”. <i>See ius in bello.</i>
NAF	New America Foundation. The NAF compiles information and statistics on drone strikes in Pakistan and Yemen. <i>See National Security Studies Program</i> , NEW AMERICA FOUNDATION, http://natsec.newamerica.net/ .
NATO	North Atlantic Treaty Organization.
NGO	Non-Governmental Organization
Special Rapporteur	Independent experts appointed by the United Nations Human Rights Council to “investigate, monitor, and recommend solutions to human rights problems”. They are considered experts in their respective fields but lack any formal power of enforcement.
Targeted Killing	A deliberate use of lethal force by a State against a specific individual who has not been afforded legal process.
TTP	Tehrik-i-Taliban Pakistan, the Pakistani Taliban reportedly fighting alongside al-Qaeda and the Afghan Taliban out of the tribal regions of northwest Pakistan.
UN	United Nations.
UN Charter	Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, as amended.
War Powers Resolution	War Powers Resolution 50 U.S.C. §§ 1541-1548 (1973). In 1973, Congress enacted the War Powers Resolution, which restricted the President’s ability to send military forces into combat without congressional notification and approval. Amongst other things, the War Powers Resolution requires the President (1) to notify Congress when military forces are deployed in situations where hostilities are expected; and (2) to withdraw military forces if Congress does not formally declare war or otherwise authorize the combat deployment within sixty days of deployment. <i>See</i> 50 U.S.C. §§ 1543, 1544. Since its enactment, every President has taken the position that the War Powers Resolution is an unconstitutional infringement upon the President’s commander-in-chief power. <i>See</i> Richard F. Grimmett, Cong. Research Serv., RL33532, War Powers Resolution: Presidential Compliance 2 (2012).

APPENDIX C

SOURCES OF INTERNATIONAL LAW

International law differs from domestic law in a number of respects, including importantly that there is no central legislative body and no positive authority. Instead, international law works on the basis of consent: sovereign States agree to bind themselves by treaty and may also be deemed to be bound by “rules” recognized by the implicit consent of the various States. Thus, “international law works on the basis that the general consent or acceptance of states can create rules of general application”.⁶⁴⁰

In this Appendix, we describe the sources of international law.

The most important modern authority on the sources of international law is Article 38 of the ICJ Statute. Article 38 stipulates that, in rendering decisions “in accordance with international law”, the ICJ shall apply law from four sources of law.⁶⁴¹

First, the ICJ shall apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”.⁶⁴²

Second, the ICJ shall apply “international custom, as evidence of a general practice accepted as law”.⁶⁴³

⁶⁴⁰ JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 20 (8th ed. 2012).

⁶⁴¹ Although Article 38 on its face merely sets forth the sources upon which the ICJ must rely in forming decisions, it is widely considered to describe the sources of international law generally. *See* JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 22 (8th ed. 2012); MALCOLM N. SHAW, *INTERNATIONAL LAW* 70-71 (6th ed. 2008) (“Article 38(1) of the Statute of the International Court of Justice is widely recognized as the most authoritative and complete statement as to the sources of international law.”).

⁶⁴² ICJ Statute, art. 38, ¶ 1(a).

⁶⁴³ ICJ Statute, art. 38, ¶ 1(b). The definition of custom in international law is “essentially a statement of this principle [of implicit consent], and not a reference to ancient custom as in English law”. JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 20 (8th ed. 2012); *see also* North Sea Continental Shelf (Ger./Neth.; Ger./Den.), 1969 I.C.J. 3, ¶¶ 73-74 (Feb. 20) (discussing recognition of new rules of customary international law); JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 26 (8th ed. 2012).

Third, the ICJ shall apply “the general principles of law recognized by civilized nations”.⁶⁴⁴ Such “general principles of law” include principles of domestic law that are common to many States.⁶⁴⁵

Fourth, the ICJ shall apply “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law”.⁶⁴⁶

“Highly qualified publicists” include scholarly writings, reports and statements by the U.N. International Law Commission, resolutions of the UN General Assembly and evidence of States’ opinions about legal norms.

This last category includes reports of United Nations Special Rapporteurs, independent experts appointed by the United Nations Human Rights Council to “investigate, monitor, and recommend solutions to human rights problems”, who are considered experts in the field they are appointed to investigate.⁶⁴⁷ They are typically

⁶⁴⁴ ICJ Statute, art. 38, ¶ 1(c).

⁶⁴⁵ For example, the ICJ has relied upon domestic law analogies in the field of evidence, including the propriety of relying on circumstantial evidence. *See* *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 18 (Apr. 9) (recognizing that circumstantial evidence “is admitted in all systems of law”). In addition, the ICJ has found applicable international law rules in the analogous rules of national legal systems, particularly in the fields of procedure, equity, and jurisdiction. *See, e.g.,* *North Sea Continental Shelf (Ger./Neth.; Ger./Den.)*, 1969 I.C.J. 3, ¶ 30 (Feb. 20) (estoppel); *Effects of Awards of Compensation Made by United Nations Administrative Tribunal, Advisory Opinion*, 1954 I.C.J. 21, 53 (July 13) (*res judicata*).

⁶⁴⁶ ICJ Statute, art. 38, ¶ 1(d). The ICJ’s reliance on “judicial decisions” is subject to Article 59 of the statute, which provides that decisions “have no binding force except between the parties and in respect of that particular case”. Although ICJ judicial decisions are binding only on the parties to that case, they nevertheless provide a means for interpreting treaty and customary law; the Court does attempt to maintain judicial consistency, *see* JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 38) (8th ed. 2012), and the rules announced in such decisions may over time rise to the level of customary law.

⁶⁴⁷ Anne Kelsey, *U.N. Special Rapporteur’s Report on Protecting Human Rights While Countering Terrorism*, 24 INT’L ENFORCEMENT L. REP. 1, 1 (2008). Throughout this report, we on several occasions refer to the views of Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary execution and his successor, Christof Heyns, and Ben Emmerson, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In so doing, we do not mean to imply that their views represent a definitive statement of what international law is any more so than do the views of other highly qualified publicists who write on these and related issues. Absent a specific act of the United Nations General Assembly they do not. However, because of the unusual degree of access to

instructed either to investigate human rights in a particular state, or to focus on a specific theme such as torture, executions, or other human rights issues.⁶⁴⁸ Although the views of the Special Rapporteurs are influential, the Rapporteurs lack any formal powers of enforcement.⁶⁴⁹

United Nations Special Rapporteurs have conducted investigations and released statements addressing the legality of targeted killings using drones. Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, produced a “Study on Targeted Killings” in 2010 and published his analysis as part of a larger academic paper in 2011.⁶⁵⁰ In March 2012, Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, published recommendations to the United States concerning the death penalty, deaths while in Government custody, and targeted killings, including those carried out by drones.⁶⁵¹ Heyns published an additional report on September 13, 2013 regarding the “promotion and protection of human rights” in

confidential materials and high visibility their reports have enjoyed in popular and academic press, we have considered their views in some detail.

⁶⁴⁸ Appointments for these positions are made by the President of the Human Rights Council based on a list developed by a Consultative Committee, a committee composed of one representative of each of the five regional groups of the Council. Philip Alston, *Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?* (N.Y.U. School of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-21 2011) at 7. The principal activities of Special Rapporteurs include “on-site fact-finding, communications to Governments alleging violations, thematic analyses, and the shaping of jurisprudence”. *Id.* at 8-9. They publish their findings in reports, which are made publicly available.

⁶⁴⁹ Philip Alston, *Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?* (N.Y.U. School of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-21 2011) at 3.

⁶⁵⁰ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston); Philip Alston, *The CIA and Targeting Killings Beyond Borders* (N.Y.U. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 11-64, 2011).

⁶⁵¹ See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Follow-up to country recommendations – United States of America*, U.N. Doc. A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns).

which he addresses the human rights implications of targeted killings.⁶⁵² Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights and a prominent human rights lawyer, published an interim report summarizing his investigation in September 2013.⁶⁵³ Emmerson published a continuation of that report in March 2014.⁶⁵⁴

⁶⁵² Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

⁶⁵³ See Special Rapporteur on Promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, U.N. Doc. A/68/389 (Sep. 18, 2013) (by Ben Emmerson).

⁶⁵⁴ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *The civilian impact of remotely piloted aircraft*, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson).

APPENDIX D

POLICY ARGUMENTS FOR FURTHER DISCLOSURE

War involves secrets. In his May 2013 speech, President Obama stated, “[a]s Commander-in Chief, I believe we must keep information secret that protects our operations and our people in the field”.⁶⁵⁵ Similarly, CIA Director John Brennan stated in 2012:

“I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost.”⁶⁵⁶

As Alston recognized, “[t]ransparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source)”.⁶⁵⁷

Domestic law has had an impact on the secrecy of the drones program.⁶⁵⁸

In particular, the arguably excessive secrecy behind the program emanates from the original delegation of that program to the CIA, rather than to the Department of Defense. After the September 11 attacks, President Bush issued a finding (still classified) for the

⁶⁵⁵ See President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

⁶⁵⁶ John Brennan, Speech at the Woodrow Wilson Center: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>). Brennan stated “that the United States Government has never been so open regarding its counterterrorism policies and their legal justification.” *Id.*

⁶⁵⁷ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 92, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston).

⁶⁵⁸ The President has made some disclosures in connection with the War Powers Resolution. See Letter from Barack Obama, President of the United States of America, to Congress (June 15, 2012) (available at <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>); Letter from Barack Obama, President of the United States of America, to Congress (June 21, 2013) (available at <http://www.whitehouse.gov/the-press-office/2013/06/21/letter-president-regarding-war-powers-resolution>).

CIA to conduct targeted killing.⁶⁵⁹ Reportedly, this finding contains the basis of the weaponization of drones, the targeted-killing program, and the program's assignment to the CIA's purview. The finding was drafted by the director of the CIA's Counterterrorism Center (CTC), Cofer Black, immediately after 9/11, and the President signed it on September 17, 2001.⁶⁶⁰ According to Mayer, as drafted,

“Black’s proposal was nothing less than a global plan for a secret war, fought not by the military, with its well-known legal codes of conduct and a publicly accountable chain of command, but instead in the dark by faceless and nameless CIA agents following commands unknown to the American public. . . . To give the President deniability, and to keep him from getting his hands dirty, the finding called for the President to delegate blanket authority to [CIA Director George] Tenet to decide on a case-by-case basis whom to kill, whom to kidnap, whom to detain and interrogate, and how. [T]he plan also called for the President to authorize the CIA to arm the Predator. . . . Virtually every item [except for certain domestic espionage provisions] on the CIA’s wish list was approved. . . . As soon as he received the paperwork, on Monday, September 17, Bush eagerly signed the new intelligence finding.”⁶⁶¹

The Obama administration reportedly has a preference to transfer the program to the DOD from the CIA to remove this obstacle to greater disclosure.⁶⁶² In May 2014, President Obama stated:

⁶⁵⁹ See MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH 1* (2013); Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid al Qaeda in Many Countries*, N.Y. TIMES, Nov. 10, 2008, <http://www.nytimes.com/2008/11/10/washington/10military.html>. In order to authorize covert action, the President first must issue a finding that “such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States”. 50 U.S.C. § 3093(a).

⁶⁶⁰ See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 39 (2009).

⁶⁶¹ JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 39-41 (2009).

⁶⁶² See Mark Mazzetti, *Delays in Effort to Refocus C.I.A. From Drone War*, N.Y. TIMES, Apr. 6, 2014, at A1, available at <http://www.nytimes.com/2014/04/06/world/delays-in-effort-to-refocus-cia-from-drone-war.html>; Greg Miller, *CIA remains behind most drone strikes, despite effort to shift campaign to Defense*, WASH. POST, Nov. 25, 2013, <http://www.washingtonpost.com/world/national-security/cia-remains-behind->

“I also believe we must be more transparent about both the basis of our counterterrorism actions and the manner in which they are carried out. We have to be able to explain them publicly, whether it is drone strikes or training partners. I will increasingly turn to our military to take the lead and provide information to the public about our efforts. Our intelligence community has done outstanding work, and we have to continue to protect sources and methods. But when we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, we erode legitimacy with our partners and our people, and we reduce accountability in our own government.”⁶⁶³

In addition to principles of government secrecy, however, the United States has invoked the attorney-client privilege to shield from disclosure the legal basis for its conduct. On April 21, 2014, the U.S. Court of Appeals for the Second Circuit rejected the Government’s claim of privilege over a memorandum justifying the killing of three U.S. citizens, holding that the U.S. had waived privilege over that memorandum by repeatedly assuring the public that the killings were lawful.⁶⁶⁴ The U.S. subsequently agreed to release the document in redacted form.⁶⁶⁵

In addition to the Obama Administration’s stated preference, a number of arguments have been posed in favor of greater disclosure. Although some of them may

most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1_story.html; Daniel Klaidman, *Exclusive: No More Drones for CIA*, DAILY BEAST (Mar. 19, 2013), <http://www.thedailybeast.com/articles/2013/03/19/exclusive-no-more-drones-for-cia.html>.

⁶⁶³ President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-com-mencement-ceremony>).

⁶⁶⁴ See *New York Times Co. v. U.S. Dep’t of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514, at *12 (2d Cir. Apr. 21, 2014) (“After senior Government officials have assured the public that targeted killings are ‘lawful’ and that OLC advice ‘establishes the legal boundaries within which we can operate’, and the Government makes public a detailed analysis [redacted], waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred.”).

⁶⁶⁵ See Ashley Parker, *Memo Approving Targeted Killing of U.S. Citizen to Be Released*, N.Y. TIMES, May 20, 2014, <http://www.nytimes.com/2014/05/21/us/politics/memo-approving-targeted-killing-of-us-citizen-to-be-released.html>; Karen DeYoung & Sari Horwitz, *U.S. to reveal justification for drone strikes against American citizens*, WASH. POST, May 20, 2014, http://www.washingtonpost.com/world/national-security/us-to-reveal-justification-for-drone-strikes-against-american-citizens/2014/05/20/f607bb60-e066-11e3-8dcc-d6b7fede081a_story.html.

well be appealing as a matter of policy, we do not believe that they raise issues of international law.

First, some have urged the U.S., now pre-eminent in drone technology, to set a norm to regulate the conduct of others who obtain drone technology.⁶⁶⁶ For example, a group of human and civil rights groups urged President Obama that “[b]ecause of the impact that U.S. policy will have on global standard setting on the use of drones in targeted killings, it is critically important that U.S. legal standards be fully disclosed”.⁶⁶⁷ Similarly, the President of the Association of the Bar of the City of New York, in requesting disclosures by the United States, has referred to “global implications that may undermine humanity’s general assumptions about the security of life under the law, even in wartime”, warning that “[w]ithout access to the reasoned opinions of the U.S. Government, the practice of targeted killings appears more likely to spread”.⁶⁶⁸

⁶⁶⁶ In fact, other countries will soon have the ability to use drone strikes in targeted killings. More than 40 countries currently have drone technology that allows them to conduct surveillance and gather intelligence and it is likely that several of those countries also have the ability to arm their drones. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 27, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston). Some sources suggest that as many as 76 countries have drone technology. See *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, International Human Rights and Conflict Resolution Clinic and Global Justice Clinic (Sept. 2012), <http://livingunderdrones.org/>. Brooks warns that “we should assume that Governments around the world – including those with less than stellar human rights records, such as Russia and China – are taking notice”. *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks). Siddique suggests that “[t]he use of drones appears to be symbolic of modern morphing of conventional warfare; where wars are not fought between nation states but at a subcutaneous level through the targeting of individuals or groups of individuals.” Qandeel Siddique, *The United States’ Drone Program in Pakistan: An Analysis of the Efficacy and the Pakistani Government’s Complicity*, Centre for International and Strategic Analysis (Apr. 8, 2013), http://strategiskanalyse.no/publikasjoner%202013/2013-04-08_SISA4_DroneProgram_QandeelS.pdf.

⁶⁶⁷ Letter from American Civil Liberties Union et al., to President Barack Obama (Apr. 11, 2013), available at <http://www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings>.

⁶⁶⁸ Letter from Samuel Seymour, President of the New York Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011) (available at http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf).

Amnesty International goes further in arguing that the United States' refusal to release information:

“creates the real possibility, perhaps even likelihood, that other states will similarly consider themselves to have a very wide latitude to kill people on the territory of virtually any other state, while refusing to acknowledge responsibility for particular attacks or asserting the right to keep the precise grounds for doing so secret.”⁶⁶⁹

President Obama recently hinted that the “issue of transparency is directly relevant to . . . our effort to strengthen and enforce international order”.⁶⁷⁰

On the other hand, some doubt the other drone users will be swayed by further disclosure. Admiral Dennis C. Blair, the former Director of National Intelligence, has discounted the idea that the United States can set the norms for the use of drones, contending that States will make their own “cost-benefit calculation” based on their own interests, which will involve the fear of retaliation, whereas terrorist groups “are not deterrable”.⁶⁷¹

Second, some commentators argue that lack of transparency weakens national security by imperiling the U.S.' reputation abroad.

Thus, the President of the Association of the Bar of the City of New York has expressed that

“full and faithful respect for the rule of law strengthens our country. Our system of justice . . . is a source of strength, not vulnerability . . . Only by making the legal reasoning transparent (and subject to scrutiny) can the United States

⁶⁶⁹ Amnesty International, *United States of America, 'Targeted Killing' Policies Violate the Right to Life* (2012).

⁶⁷⁰ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

⁶⁷¹ Admiral Dennis C. Blair, *Discussion on U.S. Drone Strike Policies*, CFR (Jan. 22, 2013).

establish the legitimacy of its policies and actions. In that spirit, we make this request with the intention of helping to promote the rule of law and strengthen our national security.”⁶⁷²

O’Connell contends that secrecy undermines efforts to defeat al-Qaeda, arguing that “al-Qaeda is losing support in the Muslim world because of its violent, lawless tactics. We can help eliminate the last of that support by distinguishing ourselves through commitment to the rule of law, especially by strict compliance with the rules governing lethal force.”⁶⁷³ Similarly, Amnesty International has argued that the administration’s failings:

“weaken the credibility of the USA as an advocate for respect for human rights by other states; they set dangerous precedents that other states may exploit to avoid responsibility for their own unlawful killings; and if unchecked there is a real risk that the US ‘global war’ doctrine will further corrode the foundations of the international framework for protection of human rights.”⁶⁷⁴

Moreover, the “lack of transparency inevitably fuels rumors and misinformation”.⁶⁷⁵ As Amnesty International has observed, “[m]isinformation and politically driven propaganda about drone strike deaths is abundant”.⁶⁷⁶ Indeed, President Obama recently conceded

⁶⁷² Letter from Samuel Seymour, President of the New York Bar Association, to Eric Holder, Attorney General of the United States (Oct. 11, 2011), *available at* http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf.

⁶⁷³ *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform*, 111 Cong. 120 (2010) (statement of Mary Ellen O’Connell).

⁶⁷⁴ Amnesty International, *United States of America, ‘Targeted Killing’ Policies Violate the Right to Life*, (June, 2012); *see also* Amnesty International, *The Devil in the (Still Undisclosed) Detail, Department of Justice ‘White Paper’ on Use of Lethal Force Against U.S. Citizens Made Public*, (Feb. 2013). (“The message sent is that a Government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it.”)

⁶⁷⁵ *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks), at 3.

⁶⁷⁶ AMNESTY INTERNATIONAL, “WILL I BE NEXT?”: US DRONE STRIKES IN PAKISTAN 36 (2013).

that “when we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, [and] we erode legitimacy with our partners and our people”.⁶⁷⁷ The United States’ general policy of silence does not help it respond to false rumors and misinformation.

Third, the lack of transparency is said to weaken domestic confidence in the U.S. Government.

Admiral Blair has noted that the “classified playbook does not reassure . . . the American people . . . who . . . are the primary ones that need to be convinced that their Government is doing the right thing”.⁶⁷⁸ He contends that “we tie ourselves into all sorts of legal knots and we put ourselves in bad situations . . . by running these as covert action under Title 50 and then only selectively talking about them in [a] way which . . . has put us completely on the . . . defensive”.⁶⁷⁹ According to Admiral Blair, the Obama administration has “just [made] a cold-blooded calculation that it’s better to bunker down and take the criticism . . . than it is to get into the public debate”. The “current open secret covert-action drone program” is one that “does nothing except enable the Pakistanis to allow us to do it, unofficially, and then officially to attack us for it”.⁶⁸⁰

Indeed, Admiral Blair notes that:

“[T]he [Pakistani] legislature can pass laws that say that we can’t do it, and . . . their Government actually gives us permission to use their airspace[.] Pakistan could shut us down anytime [T]hey have what they think is the best of all worlds; they get attacks against militants who are a threat to them as well as to us in

⁶⁷⁷ See President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>).

⁶⁷⁸ Admiral Dennis C. Blair, Discussion on U.S. Drone Strike Policies, CFR (Jan. 22, 2013).

⁶⁷⁹ Admiral Dennis C. Blair, Discussion on U.S. Drone Strike Policies, CFR (Jan. 22, 2013).

⁶⁸⁰ Admiral Dennis C. Blair, Discussion on U.S. Drone Strike Policies, CFR (Jan. 22, 2013).

Afghanistan and they get to blame us . . . for it.”⁶⁸¹

Similarly, Brooks argues that though many or all of the killings may be justifiable, “when a Government claims for itself the unreviewable power to kill anyone, anywhere on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law”.⁶⁸² While President Obama has assured the public that there are stringent processes in place for selecting targets and carrying out strikes, Brooks argues that “formal processes tend to further normalize once-exceptional activities – and ‘trust us’ is a pretty shaky foundation for the rule of law”.⁶⁸³

⁶⁸¹ Admiral Dennis C. Blair, Discussion on U.S. Drone Strike Policies, CFR (Jan. 22, 2013).

⁶⁸² *The Constitutional and Counterterrorism Implications of Targeted Killings, Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Rosa Brooks).

⁶⁸³ Rosa Brooks, *Take Two Drones and Call Me in the Morning: The perils of our addiction to remote-controlled war*, Foreign Policy (Sept. 12, 2012) http://www.foreignpolicy.com/articles/2012/09/12/take_two_drones_and_call_me_in_the_morning.