

38 Wm. Mitchell L. Rev. 1655

William Mitchell Law Review

2012

Part II: Article

TARGETED STRIKES: THE CONSEQUENCES OF BLURRING  
THE ARMED CONFLICT AND SELF-DEFENSE JUSTIFICATIONS

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### I. Introduction

Targeted strikes--predominantly using drones--have become the operational counterterrorism tool of choice for the United States over the past few years. Beginning in the mid-2000s, the United States has engaged in target-specific drone airstrikes against Taliban and al Qaeda militants in Pakistan, al Qaeda operatives in Yemen, and al-Shabab militants in Somalia. In the first such targeted killing after September 11, a CIA drone launched a Hellfire missile and killed six suspected al Qaeda members traveling in a car in southern Yemen in November 2002, including \*1656 the man believed to be responsible for the bombing of the USS Cole.<sup>1</sup> U.S. targeted strikes began in Pakistan in 2004, and have increased dramatically in the past few years. In 2009, the United States launched fifty-three strikes--a rate of one drone strike per week--before increasing to 118 strikes in 2010, and had launched over seventy by November 2011.<sup>2</sup> In Somalia, as early as 2007, the United States launched attacks against al Qaeda members suspected of involvement in the 1998 Embassy bombings.<sup>3</sup> After multiple attempts to target Saleh Ali Saleh Nabhan, the al Qaeda militant suspected of masterminding the 2002 attack on the Paradise Hotel in Mombasa, Kenya, the United States launched a commando raid in broad daylight, killing Nabhan and at least eight others.<sup>4</sup> Israel has used targeted killing extensively and openly for over a decade, targeting Hamas militants in Gaza and the West Bank.<sup>5</sup>

Targeted killing can be defined as "the use of lethal force attributable to a subject of international law with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."<sup>6</sup> Targeted killing can be used both within armed conflict \*1657 and in the absence of armed conflict, as a means of self-defense, usually as operational counterterrorism. Indeed, this duality lies at the heart of the United States' justifications

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for drone strikes from Afghanistan to Somalia. Within armed conflict, parties to the conflict have the right to use lethal force in the first resort against enemy forces, which includes, as detailed below, members of the regular armed forces, members of organized armed groups, or civilians directly participating in hostilities. International law also recognizes the right of states to use force in self-defense in certain circumscribed circumstances.

For the past several years, the United States has relied on both armed conflict and self-defense as legal justifications for targeted strikes outside of the zone of active combat in Afghanistan. A host of interesting questions arise from both the use of targeted strikes and the expansive U.S. justifications for such strikes, including the use of force in self-defense against non-state actors, the use of force across state boundaries, the nature and content of state consent to such operations, the use of targeted killing as a lawful and effective counterterrorism measure, and others.<sup>7</sup> Furthermore, each of the justifications--armed conflict and self-defense--raises its own challenging questions regarding the appropriate application of the law and the parameters of the legal paradigm at issue. For example, if the existence of an armed conflict is the justification for certain targeted strikes, the immediate follow-on questions include the determination of a legitimate target within an armed conflict with a terrorist group and the geography of the battlefield. Within the self-defense paradigm, key questions include the very contours of the right to use force in self-defense against individuals and the \*1658 implementation of the concepts of necessity and imminence, among many others.

However, equally fundamental questions arise from the use of both justifications at the same time, without careful distinction delimiting the boundaries between when one applies and when the other applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances.<sup>8</sup> To the extent such flexibility does not impact the implementation of the relevant law or hinder the development and enforcement of that law in the future, it may well be an acceptable goal. In the case of targeted strikes in the current international environment of armed conflict and counterterrorism operations occurring at the same time, however, the mixing of legal justifications raises significant concerns about both current implementation and future development of the law.

One overarching concern is the conflation in general of *jus ad bellum* and *jus in bello*. The former is the law governing the resort to force--sometimes called the law of self-defense--and the latter is the law regulating the conduct of hostilities and the protection of persons in conflict--generally called the law of war, the law of armed conflict, or international humanitarian law. International law reinforces a strict separation between the two bodies of law, ensuring that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany's crime of aggression neither rendered all German acts unlawful nor prevented German soldiers from benefitting from the protections of the *jus in bello*.<sup>9</sup> More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters on the grounds that they fought in a "legitimate war" to protect the government against the rebels.<sup>10</sup> The basic principle that the rights and obligations of *jus in bello* apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched. Indeed, if the cause at arms influenced a state's obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons hors de combat, states would justify all departures from *jus in bello* with reference to the purported justness of their cause. The result: an invitation to unregulated warfare.<sup>11</sup>

This article will focus on the consequences of the United States consistently blurring the lines between the armed conflict paradigm and the self-defense paradigm as justifications for the use of force against designated individuals. The first Part sets forth the basic legal paradigms of armed conflict and self-defense and the targeting of individuals within each paradigm. In the second Part, I analyze four primary categories in which the use of both paradigms without differentiation blurs critical legal rules and principles: geographical issues surrounding the use of force; the obligation to capture rather than kill; proportionality; and the identification of individual targets, namely the conflation of direct participation in hostilities and imminence. The final

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Part highlights three areas in \*1660 which this blurring of legal justifications and paradigms has significant contemporary and future consequences for the application of international law in situations involving the use of force. In particular, this blurring undermines efforts to fulfill the core purposes of the law, whether the law of armed conflict or the law governing the resort to force, hinders the development and implementation of the law going forward, and risks complicating or even weakening enforcement of the law.

Over the past two years, we have seen increasing calls for greater transparency from the U.S. government and intelligence agencies regarding the decision-making process for targeted killing, both the placing of individuals on a “kill list” and the actual decision to operationalize that decision with a targeted strike.<sup>12</sup> Additional information about the key indicators the United States views as critical to targeting determinations would certainly provide greater clarity for legal analysis of any given targeted strike. Much of the information sought, of course, is classified, making further detailed analysis difficult and, potentially, unlikely in the near future. However, the instant analysis offers an alternative approach both to understanding the effect of the existing United States framework for targeted strikes and, more importantly, for analyzing the consequences for implementation and enforcement of the law overall--now and in the future.

## II. The Legal Paradigms

In November 2002, a U.S. drone strike killed Abu Ali al-Harethi, an al Qaeda operative suspected of masterminding the October 2000 attack on the USS Cole. The exchange of viewpoints between the United States and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions set the stage early on for the dichotomy in approaches to target killing. After the attack, the U.N. Special Rapporteur asked the U.S. government to provide justification for the killing of al-Harethi. In \*1661 particular, the Special Rapporteur referred to the drone strike as an “extrajudicial execution” and framed the event within the paradigm of the International Covenant on Civil and Political Rights, human rights law overall, and law enforcement principles for the use of force. The U.S. response clearly showed an entirely different perspective, stating that “inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with [al Qaeda] do not fall within the mandate of the Special Rapporteur.”<sup>13</sup> For the United States, the Special Rapporteur simply did not have jurisdiction to address the event at all because it took place within an armed conflict between the United States, al Qaeda, and associated terrorist groups. This discourse highlights the divergent approaches to the appropriate framework for targeted strikes.<sup>14</sup>

Now, almost ten years later, the paradigms are no longer so clearly delineated but have become blurred through consistent parallel use. In March 2010, State Department Legal Advisor Harold Koh stated, in a much-discussed speech before the American Society of International Law, that the United States uses force, through targeted strikes for example, either because it “is engaged in an armed conflict or in legitimate self-defense.”<sup>15</sup> Similarly, in a brief before the District Court of the District of Columbia, the government asserted that it had legal authority to target Anwar al-Awlaki either in the context of the armed conflict with al Qaeda and associated forces as authorized in the 2001 Authorization to Use Military Force (AUMF) or under “the inherent right to national self-defense recognized in international law.”<sup>16</sup> The following subsections offer a brief background on \*1662 targeting within these two legal regimes: armed conflict and self-defense.

### A. The International Law of Self-Defense

Jus ad bellum is the Latin term for the law governing the resort to force, that is, when a state may use force within the constraints of the United Nations Charter framework and traditional legal principles.<sup>17</sup> Modern jus ad bellum has its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact, and the United Nations Charter.<sup>18</sup> In particular, the United Nations Charter prohibits the use of force by one state against another in Article 2(4): “All members shall refrain in their

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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.”<sup>19</sup> This article, in many ways, is the foundation of the U.N.’s goal of “sav[ing] succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,”<sup>20</sup> through severe restrictions and prohibitions on the use of force.

The Charter provides for two exceptions to the prohibition on the use of force: the multinational use of force authorized by the Security Council under Chapter VII in Article 42, and the inherent right of self-defense in response to an armed attack under Article 51. It is the latter that builds on and establishes the basic framework of the jus ad bellum, stating: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>21</sup> The classic formulation of the parameters of self-defense stems from the Caroline Incident. British troops crossed the Niagara River to the \*1663 American side and attacked the steamer Caroline, which had been running arms and materiel to insurgents on the Canadian side. The British justified the attack, which killed one American and set fire to the Caroline, on the grounds that their troops had acted in self-defense. In a letter to his British counterpart, Lord Ashburton, U.S. Secretary of State Webster declared that the use of force in self-defense should be limited to “cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”<sup>22</sup> Furthermore, the force used must not be “unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”<sup>23</sup> Given the extensive literature analyzing the right of self-defense and, in particular, the parameters of the right of self-defense in response to terrorist attacks,<sup>24</sup> this article will provide simply a brief synopsis of the fundamental issues and elements of the framework.

Nothing in Article 51 of the U.N. Charter specifies that the right of self-defense is only available in response to a threat or use of force by another state. Nonetheless, the precise contours of which type of actor can trigger the right of self-defense remains controversial. Some argue that only states can be the source of an armed attack--or imminent threat of an armed attack--to justify the use of force in self-defense.<sup>25</sup> The International Court of Justice \*1664 has continued to limit the right in this manner in a series of cases.<sup>26</sup> However, state practice in the aftermath of 9/11 provides firm support for the existence of a right of self-defense against non-state actors, even if unrelated to any state.<sup>27</sup> Indeed, the Caroline incident, which forms the historical foundation of the right to self-defense, involved an armed attack by non-state actors. United Nations Security Council Resolution 1368, for example, recognized the inherent right of self-defense against the September 11 attacks and “[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regard[ed] such acts, like any act of international terrorism, as a threat to international peace and security.”<sup>28</sup> Similarly, the North Atlantic Council issued a statement activating the collective self-defense provision in Article 5 of the North Atlantic Treaty, as did the Organization of American States regarding its constituent treaty.<sup>29</sup> \*1665 Several other states have asserted the same right, including Turkey, Israel, Colombia, and Russia, for example.<sup>30</sup>

One additional component to the use of force in self-defense against a non-state actor is that the state using force will be doing so in the territory of another state, one that did not launch the original attack. It must therefore either act with the consent of the territorial state or on the grounds that the territorial state is unwilling or unable to take action to remove the threat posed by the non-state actor and to repel future attacks.<sup>31</sup> The overall debate has substantial consequences for the legality of the use of force as part of counterterrorism operations outside of an armed conflict.

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For the purposes of the instant analysis, most relevant are the parameters of the self-defense paradigm with regard to the identification of targets and authorization of the use of force. Under Article 51 and the historical right of self-defense, a state can use force in self-defense in response to an armed attack as long as the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.<sup>32</sup> Thus, the law focuses on whether the defensive act is appropriate in relation to the ends sought. The requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. The requirement of necessity addresses whether there are adequate non-forceful options to deter or defeat the attack. To this end, “acts done in self-defense must not exceed in manner or aim the necessity provoking them.”<sup>33</sup> A third criterion is immediacy, which addresses the temporal constraints on the use of force either before or in response to an armed attack.

With regard to targeted strikes against individuals, necessity plays out in perhaps greater detail than with regard to state action \*1666 to repel an attack by another state. In most cases, targeted strikes are used to neutralize a non-state actor who poses a threat to the security of the responding state--by planning, and potentially launching, a terrorist attack against the state, the state's interests, or the state's nationals. Effective counterterrorism seeks to prevent such attacks, not only to identify and attack those responsible after the fact. In this framework, there are two main components to the necessity prong of the self-defense paradigm--imminence and alternatives. First, the threat posed by the non-state actor must be imminent. An imminent threat in the terrorism paradigm is just that--a clear and present danger--that unless mitigated endangers innocent civilians. It is not an amorphous threat, distant in time; quite the opposite for it indicates that unless specific measures are taken with respect to the person posing the threat harm will befall those not in a position to protect themselves.<sup>34</sup>

In effect, targeting an individual requires two levels of necessity analysis. The first layer is whether targeting him or her is “necessary in the sense that [the “host” state] is unable or unwilling to act effectively to suppress the threat he poses,” and the second examines whether “targeting him would advance the goal of preventing further attacks.”<sup>35</sup> One detailed framework for assessing imminence with regard to terrorist threats is as follows, for example:

- (1) the intent of the terrorist group and the probability of attack (have they made clear their determination to attack and is there reliable intelligence to suggest they are planning to attack?);
- (2) capacity (what is their capacity to attack . . .?);
- (3) methods of attack (terrorists use deception and stealth and there will likely be no advance warning; thus waiting until an attack is underway will be too late for effective self-defense);
- (4) gravity of likely harm (given what is known about the terrorists' intent and capacity, what is the likely harm expected from an attack?); and
- (5) urgency of the threat (is there good \*1667 reason to believe that the likelihood of attack is increasing, and that acting now is critical to thwarting an attack?).<sup>36</sup>

Second, there must be no alternatives to the use of force as a means to deter or repel the threat posed by such individual. If the state has the option or ability to detain the individual (or seek his arrest by the territorial state's authorities) or otherwise thwart the attack, then the necessity prong will not be satisfied. Thus, as many scholars posit, “the targeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available.”<sup>37</sup>

To this point, this discussion has centered on the law governing the resort to force--in the context of targeted strikes, the legal regime that governs a state's use of force against a non-state actor in another state's territory. Another facet of the inquiry involves the appropriate legal parameters of the use of force against the individual himself or herself. In circumstances where the targeted strike takes place within the context of an armed conflict, the law of armed conflict will determine the legality of any lethal targeting, as discussed below. However, in many cases in which a state uses force against a non-state actor outside

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its own territory, it will be in the context of counterterrorism as self-defense, outside of any armed conflict. In the absence of an armed conflict, international human rights law and the principles governing the use of force in law enforcement will govern. Article 6 of the International Covenant on Civil and Political Rights states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>38</sup> In a slightly different formulation, the European \*1668 Convention on the Protection of Fundamental Rights and Freedoms establishes the right to life and states that any “[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence . . . .”<sup>39</sup> Here the use of lethal force is--appropriately-- tightly prescribed and extraordinarily restricted.

Under [international human rights law,] the intentional use of lethal force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and to due process of law. Any intentional use of lethal force by state authorities that is not justified under the provisions regarding the right to life, will, by definition, be regarded as an ‘extra-judicial execution.’<sup>40</sup>

The use of lethal force against suspected terrorists outside of armed conflict can therefore only be used when absolutely necessary to protect potential victims of terrorist acts. However, the understanding of precisely what constitutes a situation of “absolute necessity” remains quite broad, such that there can be varied interpretations of when a targeted strike is lawful outside the context of an armed conflict.<sup>41</sup> Indeed, some scholars have posited recently that there is, in essence, an additional paradigm called “self-defense targeting,” which holds that the jus ad bellum right of self-defense creates sufficient and exclusive authority for the use of military force to target a threat without relying on either the law of armed conflict (LOAC) or human rights law for regulating authority.<sup>42</sup> For the purposes of this article and this brief \*1669 background, however, what is essential is the distinction between the basic framework for the legality of targeting in self-defense outside of armed conflict and the legality of targeting within the context of an armed conflict, and that such a distinction exists and continues to have great value.

## B. Targeting in Armed Conflict

The LOAC--otherwise known as the law of war or international humanitarian law--governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>43</sup> The LOAC applies during all situations of armed conflict, with the full panoply of the Geneva Conventions and customary law applicable in international armed conflict and a more limited body of conventional and customary law applicable during non-international armed conflict. The lawfulness of targeting individuals and objects during armed conflict is determined by the principles of distinction, proportionality, and precautions. Again, as in the previous section detailing the parameters of the use of force in self-defense, this section will offer a brief background on these key components of the law of targeting.

\*1670 One of the most fundamental issues during conflict is identifying who or what can be targeted. The principle of distinction, one of the “cardinal principles” of the LOAC,<sup>44</sup> requires that any party to a conflict distinguish between those who are fighting and those who are not and to direct attacks solely at the former. Similarly, parties must distinguish between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I thus sets forth the basic rule: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>45</sup>

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Distinction lies at the core of the LOAC's seminal goal of protecting innocent civilians and persons who are hors de combat. The obligation to distinguish is part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia ("ICTY") held in the Tadic case.<sup>46</sup> The purpose of distinction--to protect civilians--is emphasized in Article 51 of Additional Protocol I, which states that "[t]he civilian population as such, as \*1671 well as individual civilians, shall not be the object of attack."<sup>47</sup> Furthermore, Article 85 of Protocol I declares that nearly all violations of distinction constitute grave breaches of the Protocol,<sup>48</sup> and the Rome Statute similarly criminalizes attacks on civilians and indiscriminate attacks.<sup>49</sup>

Distinction thus requires identification of lawful targets as a prerequisite to the use of force in armed conflict. A lawful attack must be directed at a legitimate target: either a combatant, member of an organized armed group, a civilian directly participating in hostilities, or a military objective. In international armed conflicts--those occurring between states--all members of the state's regular armed forces are combatants and can be identified by the uniform they wear, among other characteristics. Other persons falling within the category of combatant include members of volunteer militia who meet four requirements: wearing a distinctive emblem, carrying arms openly, operating under responsible command, and abiding by the law of armed conflict.<sup>50</sup> Members of the regular armed forces of a government not recognized by the opposing party and civilians participating in a levée en masse also qualify as combatants in international armed conflict.<sup>51</sup> Combatants can be attacked at all times and enjoy no immunity from attack, except when they are hors de combat due to sickness, wounds, or capture. In non-international armed conflicts, including state versus non-state actor conflicts, there is no combatant status, but individuals who are members of an organized armed group are legitimate targets of attack at all times.<sup>52</sup>

\*1672 Finally, civilians who take direct participation in hostilities are also legitimate targets of attack during and for such time as they engage directly in hostilities.<sup>53</sup> In certain limited circumstances, therefore, civilians may be directly and intentionally targeted during hostilities. Thus, "[t]he principle of distinction acknowledges the military necessity prong of [the law's] balancing act by suspending the protection to which civilians are entitled when they become intricately involved in a conflict."<sup>54</sup> In recent years, courts and commentators have struggled to define the concept of direct participation in hostilities and develop parameters for understanding when civilians--as the term is traditionally used--become legitimate targets by dint of such participation.<sup>55</sup> A detailed analysis of direct participation is outside the scope of this article; for the purposes of the instant discussion, it is sufficient to define direct participation in hostilities as acts intended to harm the enemy or the civilian population in a direct or immediate manner, therefore making the actor a legitimate target of attack for the purposes of distinction within the law of \*1673 armed conflict.

The second key principle, the principle of proportionality, requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. This principle balances military necessity and humanity, and is based on the confluence of two key ideas. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy. Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated "[t]he incidence of some civilian casualties . . . as a consequence of military action,"<sup>56</sup> although "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."<sup>57</sup> That is, the law requires that military commanders and decision makers assess the advantage to be gained from an attack and assess it in light of the likely civilian casualties.<sup>58</sup>

Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any "attack which

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may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>59</sup> This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears again in Articles 57(2)(a)(iii)<sup>60</sup> and 57(2)(b),<sup>61</sup> which \*1674 refer specifically to precautions in attack. Proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts.<sup>62</sup>

Lastly, the LOAC mandates that all parties take certain precautionary measures to protect civilians. In many ways, the identification of military objectives and the proportionality considerations are, of course, precautions. But the obligations of the parties to a conflict to take precautionary measures go beyond that. Beginning at the broadest level, Article 57(1) of Additional Protocol I states: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>63</sup> This provision is a direct outgrowth of and supplement to the Basic Rule in Article 48, which mandates that all parties distinguish between combatants and civilians and between military objects and civilian objects. The practical provisions forming the major portion of Article 57 discuss precautions to be taken specifically when launching an attack. Precautions are, understandably, a critical component of the law's efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful.

First, parties must do everything feasible to ensure that targets are military objectives. Doing so helps to protect civilians by \*1675 limiting attacks to military targets, thus directly implementing the principle of distinction. Second, they must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage. For example, during the 1991 Persian Gulf War, “pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that missed their targets--because they were dropped either too early or too late-- would hopefully fall in the river and not on civilian housing.”<sup>64</sup> Another common method of taking precautions is to launch attacks on particular targets at night when the civilian population is not on the streets or at work, thus minimizing potential losses. In addition, when choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects. Each of these steps requires an attacking party to take affirmative action to preserve civilian immunity and minimize civilian casualties and damage--in effect, to take “constant care.”<sup>65</sup> Proportionality considerations are also a major component of the precautions framework. Parties are required to refrain from any attacks that would be disproportionate and to cancel any attacks where it becomes evident that the civilian losses would be excessive in light of the military advantage. Finally, Article 57(2)(c) of Additional Protocol I requires attacking parties to issue an effective advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”

As noted in the introduction to this article, maintaining the separation between and independence of jus ad bellum and jus in bello is vital for the effective application of the law and protection of persons in conflict. The discussion that follows will refer to both the LOAC and the law of self-defense extensively in a range of situations in order to analyze and highlight the risks of blurring the lines between the two paradigms. However, it is important to note that the purpose here is not to conflate the two paradigms, but to emphasize the risks inherent in blurring these lines. Preserving the historic separation remains central to the application of both \*1676 bodies of law, to the maintenance of international security, and to the regulation of the conduct of hostilities.

### III. Blurring the Lines



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The nature of the terrorist threat the United States and other states face does indeed raise the possibility that both the armed conflict and the self-defense paradigms are relevant to the use of targeted strikes overall. The United States has maintained for the past ten years that it is engaged in an armed conflict with al Qaeda<sup>66</sup> and, notwithstanding continued resistance to the notion of an armed conflict between a state and a transnational terrorist group in certain quarters, there is general acceptance that the scope of armed conflict can indeed encompass such a state versus non-state conflict. Not all U.S. counterterrorism measures fit within the confines of this armed conflict, however, with the result that many of the U.S. targeted strikes over the past several years may well fit more appropriately within the self-defense paradigm. The existence of both paradigms as relevant to targeted strikes is not inherently problematic. It is the United States' insistence on using reference to both paradigms as justification for individual attacks and the broader program of targeted strikes that raises significant concerns for the use of international law and the protection of individuals by blurring the lines between the key parameters of the two paradigms.

**\*1677 A. Location of Attacks: International Law and the Scope of the Battlefield**

The distinct differences between the targeting regimes in armed conflict and in self-defense and who can be targeted in which circumstances makes understanding the differentiation between the two paradigms essential to lawful conduct in both situations. The United States has launched targeted strikes in Afghanistan, Pakistan, Yemen, Somalia, and Syria during the past several years. The broad geographic range of the strike locations has produced significant questions--as yet mostly unanswered--and debate regarding the parameters of the conflict with al Qaeda.<sup>67</sup> The U.S. armed conflict with al Qaeda and other terrorist groups has focused on Afghanistan and the border regions of Pakistan, but the United States has launched an extensive campaign of targeted strikes in Yemen and some strikes in Somalia in the past year as well. In the early days of the conflict, the United States seemed to trumpet the notion of a global battlefield, in which the conflict with al Qaeda extended to every corner of the world.<sup>68</sup> Others have argued that conflict, even one with a transnational terrorist group, can only take place in limited, defined geographic areas.<sup>69</sup> At present, the United States has **\*1678** stepped back from the notion of a global battlefield, although there is little guidance to determine precisely what factors influence the parameters of the zone of combat in the conflict with al Qaeda.<sup>70</sup>

Traditionally, the law of neutrality provided the guiding framework for the parameters of the battlespace in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality.<sup>71</sup> The law of neutrality is based on the fundamental principle that neutral territory is inviolable<sup>72</sup> and focuses on three **\*1679** main goals: (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce.<sup>73</sup> In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.<sup>74</sup> The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in "all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties."<sup>75</sup> In Common Article 3, non-international armed conflicts include conflicts between a state and non-state armed groups that are "occurring in the territory of one of the High Contracting Parties."<sup>76</sup> Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties.

The neutrality framework as a geographic parameter is left wanting in today's conflicts with terrorist groups, however. First, as a formal matter, the law of neutrality technically only applies in cases of international armed conflict.<sup>77</sup> Even analogizing

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to the situations we face today is highly problematic, however, because today's conflicts not only pit states against non-state actors, but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries.<sup>78</sup>

Simply locating terrorist groups and operatives does not therefore identify the parameters of the battlefield--the fact that the United States and other states use a combination of military operations and law enforcement measures to combat terrorism blurs the lines one might look for in defining the battlefield. In many situations, "the fight against transnational jihadi groups . . . largely takes place away from any recognizable battlefield."<sup>79</sup>

Second, a look at U.S. jurisprudence in the past and today demonstrates a clear break between the framework applied in past wars and the views courts are taking today. U.S. courts during World War I viewed "the port of New York [as] within the field of active [military] operations."<sup>80</sup> Similarly, a 1942 decision upholding the lawfulness of an order evacuating Japanese-Americans to a military area stated plainly that the field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive.<sup>81</sup>

In each of those cases, the United States was a belligerent in an international armed conflict; the law of neutrality mandated that U.S. territory was belligerent territory and therefore part of the battlefield or combat zone. The courts take a decidedly different view in today's conflicts, however, consistently referring to the United States as "outside a zone of combat,"<sup>82</sup> "distant from a zone of combat,"<sup>83</sup> or not within any "active [or formal] theater of war,"<sup>84</sup> even while recognizing the novel geographic nature of the conflict. Even more recently, in *Al Maqaleh v. Gates*, both the District Court and the Court of Appeals distinguished between Afghanistan, "a theater of active military combat,"<sup>85</sup> and other areas (including the United States), which are described as "far removed from any battlefield."<sup>86</sup> In a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining today's conflicts.

The current U.S. approach of using both the armed conflict paradigm and the self-defense paradigm as justifications for targeted strikes without further clarification serves to exacerbate the legal challenges posed by the geography of the conflict, at both a theoretical and a practical level. First, at the most fundamental level, uncertainty regarding the parameters of the battlefield has significant consequences for the safety and security of individuals. During armed conflict, the LOAC authorizes the use of force as a first resort against those identified as the enemy, whether insurgents, terrorists or the armed forces of another state. In contrast, human rights law, which would be the dominant legal framework in areas where there is no armed conflict, authorizes the use of force only as a last resort.<sup>87</sup> Apart from questions regarding the application of human rights law during times of war, which are outside the scope of this article, the distinction between the two regimes is nonetheless starkest in this regard. The former permits targeting of individuals based on their status as members of a hostile force; the latter-- human rights law--permits lethal force against individuals only on the basis of their conduct posing a direct threat at that time. The LOAC also accepts the incidental loss of civilian lives as collateral damage, within the bounds of the principle of proportionality;<sup>88</sup> human rights law contemplates no such casualties. These contrasts can literally mean the difference between life and death in

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many situations. Indeed, “If it is often permissible to deliberately kill large numbers of humans in times of armed conflict, even though such an act would be considered mass murder in times of peace, then it is essential that politicians and courts be able to distinguish readily between conflict and nonconflict, between war and peace.”<sup>89</sup> However, the overreliance on flexibility at present means that U.S. officials do not distinguish between conflict and non-conflict areas but rather simply use the broad sweep of armed conflict and/or self-defense to cover all areas without further delineation.

Second, on a broader level of legal application and interpretation, the development of the law itself is affected by the failure to delineate between relevant legal paradigms. “Emerging technologies of potentially great geographic reach raise the issue of what regime of law regulates these activities as they spread,”<sup>90</sup> and emphasize the need to foster, rather than hinder, development of the law in these areas. Many argue that the ability to use armed drones across state borders without risk to personnel who could be shot down or captured across those borders has an expansive effect on the location of conflict and hostilities. In effect, they suggest that it is somehow “easier” to send unmanned aircraft across sovereign borders because there is no risk of a pilot being shot down and captured, making the escalation and spillover of conflict more likely.<sup>91</sup> Understanding the parameters of a conflict with terrorist groups is important, for a variety of reasons, none perhaps more important than the life-and-death issues detailed above. By the same measure, understanding the authorities for and limits on a state's use of force in self-defense is essential to maintaining orderly relations between states and to the ability of states to defend against attacks, from whatever quarter. The extensive debates in the academic and policy worlds highlight the \*1683 fundamental nature of both inquiries. However, the repeated assurances from the U.S. government that targeted strikes are lawful in the course of armed conflict or in exercise of the legitimate right of self-defense--without further elaboration and specificity--allows for a significantly less nuanced approach. As long as a strike seems to fit into the overarching framework of helping to defend the United States against terrorism, there no longer would be a need to carefully delineate the parameters of armed conflict and self-defense, where the outer boundaries of each lie and how they differ from each other. From a purely theoretical standpoint, this limits the development and implementation of the law. Even from a more practical policy standpoint, the United States may well find that the blurred lines prove detrimental in the future when it seeks sharper delineations for other purposes.

## B. Surrender and Capture

In the immediate aftermath of the May 1, 2011 raid that killed Osama bin Laden, one issue that dominated news stories and blogs for several days was the question of whether the Navy Seals executing the mission were obligated to attempt to capture bin Laden before killing him and, as a subsidiary question, whether bin Laden attempted to surrender before he was killed.<sup>92</sup> This issue highlights the distinction between the armed conflict and self-defense regimes and the dangers of conflating them most directly.

Under the LOAC, an individual who is a legitimate target can be targeted with deadly force as a first resort. Once an individual is hors de combat, either through injury, sickness or capture, he or she may not be attacked.<sup>93</sup> Furthermore, the LOAC outlaws any \*1684 denial of quarter.<sup>94</sup> Indeed, killing or wounding an enemy fighter who has laid down his arms and surrendered is a war crime under Article 8(2)(b)(vi) of the Rome Statute of the International Criminal Court.<sup>95</sup> The prohibition on killing or harming detained persons, whether prisoners of war or other detainees, does not extend to an obligation to seek to capture before killing, however. Rather, “combatants and civilians directly participating in the hostilities must be hors de combat . . . before an obligation to capture attaches.”<sup>96</sup> Thus, while combatants must not attack persons who have surrendered (technically there is no obligation to actually capture persons who surrender; the law prohibits attacking persons who have surrendered), they have no obligation to offer opportunities for surrender.<sup>97</sup> As one scholar has explained,

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[O]nce an armed conflict exists, it is not incumbent on the army of the one party to inquire whether members of a military unit of the other party wish to surrender before attacking it. The onus is on the party that wishes to surrender and thereby prevent attack to make this clear.<sup>98</sup>

At the heart of the matter, therefore, the legal issue centers on a clear expression of the intent to surrender.<sup>99</sup> Surrender must be \*1685 accepted but need not be solicited. By all accounts, for example, this appeared to be the rules of engagement for the bin Laden raid. According to then-CIA director Leon Panetta's explanation, The authority here was to kill bin Laden. And obviously, under the rules of engagement, if he had in fact thrown up his hands, surrendered and didn't appear to be representing any kind of threat, then they were to capture him. But they had full authority to kill him.<sup>100</sup>

In contrast, human rights law's requirement that force only be used as a last resort when absolutely necessary for the protection of innocent victims of an attack creates an obligation to attempt to capture a suspected terrorist before any lethal targeting.<sup>101</sup> A state using force in self-defense against a terrorist cannot therefore target him or her as a first resort but can only do so if there are no alternatives--meaning that an offer of surrender or an attempt at capture has been made or is entirely unfeasible in the circumstances. Thus, if non-forceful measures can foil the terrorist attack without the use of deadly force, then the state may not use force in self-defense.<sup>102</sup> The supremacy of the right to life means that "even the most dangerous individual must be captured, rather than killed, so long as it is practically feasible to do so, bearing in mind all of the circumstances."<sup>103</sup> No more, this obligation to capture first rather than kill is not dependent on the target's efforts to surrender; the obligation actually works the other way: the forces \*1686 may not use deadly force except if absolutely necessary to protect themselves or innocent persons from immediate danger, that is, self-defense or defense of others. As with any law enforcement operation, "the intended result . . . is the arrest of the suspect,"<sup>104</sup> and therefore every attempt must be made to capture before resorting to lethal force.

In the abstract, the differences in the obligations regarding surrender and capture seem straightforward. The use of both armed conflict and self-defense justifications for all targeted strikes without differentiation runs the risk of conflating the two very different approaches to capture in the course of a targeting operation. This conflation, in turn, is likely to either emasculate human rights law's greater protections or undermine the LOAC's greater permissiveness in the use of force, either of which is a problematic result. An oft-cited example of the conflation of the LOAC and human rights principles appears in the 2006 targeted killings case before the Israeli Supreme Court. In analyzing the lawfulness of the Israeli government's policy of "targeted frustration," the Court held, *inter alia*, 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. . . . Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.<sup>105</sup>

The Israeli Supreme Court's finding that targeting is only lawful if no less harmful means are available--even in the context of an armed conflict--"impose [s] a requirement not based in [the LOAC]."<sup>106</sup> Indeed, the Israeli Supreme Court "used the kernel of \*1687 a human rights rule--that necessity must be shown for any intentional deprivation of life, to restrict the application of [a LOAC] rule--that in armed conflict no necessity need be shown for the killing of combatants or civilians taking a direct part in hostilities."<sup>107</sup> Although the holding is specific to Israel and likely influenced greatly by the added layer of belligerent

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occupation relevant to the targeted strikes at issue in the case,<sup>108</sup> it demonstrates some of the challenges of conflating the two paradigms.

First, if this added obligation of less harmful means was understood to form part of the law applicable to targeted strikes in armed conflict, the result would be to disrupt the delicate balance of military necessity and humanity and the equality of arms at the heart of the LOAC. Civilians taking direct part in hostilities--who are legitimate targets at least for the time they do so--would suddenly merit a greater level of protection than persons who are lawful combatants, a result not contemplated in the LOAC.<sup>109</sup> \*1688 Second, soldiers faced with an obligation to always use less harmful means may well either refrain from attacking the target--leaving the innocent victims of the terrorist's planned attack unprotected--or disregard the law as unrealistic and ineffective. Neither option is appealing. The former undermines the protection of innocent civilians from unlawful attack, one of the core purposes of the LOAC. The latter weakens respect for the value and role of the LOAC altogether during conflict, a central component of the protection of all persons in wartime.

From the opposing perspective, if the armed conflict rules for capture and surrender were to bleed into the human rights and law enforcement paradigm, the restrictions on the use of force in self-defense would diminish. Persons suspected of terrorist attacks and planning future terrorist attacks are entitled to the same set of rights as other persons under human rights law and a relaxed set of standards will only minimize and infringe on those rights. Although there is no evidence that targeted strikes using drones are being used in situations where there is an obligation to seek capture and arrest, it is not hard to imagine a scenario in which the combination of the extraordinary capabilities of drones and the conflation of standards can lead to exactly that scenario. If states begin to use lethal force as a first resort against individuals outside of armed conflict, the established framework for the protection of the right to life would begin to unravel. Not only would targeted individuals suffer from reduced rights, but innocent individuals in the vicinity would be subject to significantly greater risk of injury and death as a consequence of the broadening use of force outside of armed conflict.

### C. Proportionality in Three Acts

Proportionality is a term tossed around in a variety of ways and settings with regard to the use of force, by states, by individuals, against both individuals and objects. It is a central principle of the \*1689 LOAC, a key normative requirement framing the right to use force in self-defense, and an essential factor limiting the use of force within law enforcement and human rights parameters. Each concept of proportionality plays a central role in its own legal regime; each has important protective purposes.

The primary issue in analyzing jus ad bellum proportionality is whether the defensive use of force is appropriate in relation to the ends sought, measuring the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. This proportionality focuses not on some measure of symmetry between the original attack and the use of force in response, but on whether the measure of counter-force used is proportionate to the needs and goals of repelling or deterring the original attack.<sup>110</sup> As a report to the International Law Commission explains, [I]t would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself.<sup>111</sup>

In both *Nicaragua v. United States* and *Armed Activities on the Territory of the Congo*, the International Court of Justice reaffirmed that proportionality focuses on the degree of force needed to eliminate the danger or repel the attack.<sup>112</sup> The Court declared in the latter case that the Ugandan operations capturing "airports and towns many hundreds of kilometres from Uganda's

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border would \*1690 not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence.”<sup>113</sup> Thus, a violation of jus ad bellum proportionality only occurs when “the defender [does] more than reasonably required in the circumstances to deter a threatened attack or defeat an ongoing one.”<sup>114</sup>

The LOAC principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. Proportionality in the LOAC is a prospective analysis, viewed from the perspective of the commander at the time of the attack. Merely adding up the resulting civilian casualties and injuries and assessing the actual value gained from a military operation may be the simpler approach, because “the results of an attack are often tangible and measurable, whereas expectations are not.”<sup>115</sup> However, it does not do justice to the complexities inherent in combat; instead, the proportionality of any attack must be viewed from the perspective of the military commander on the ground, taking into account the information he or she had at the time. As the ICTY declared in *Prosecutor v. Galic*, for example, “In determining whether an attack was proportionate it is necessary to examine 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.”<sup>116</sup>

Finally, proportionality in human rights law refers to the measure of force directed at the intended target of the attack. Law enforcement authorities can use no more force than is absolutely necessary to effectuate an arrest, defend themselves, or defend others from attack. “In the domestic context, the force used must be strictly proportionate to the aim to be achieved.”<sup>117</sup> United \*1691 Nations General Assembly Resolution 34/169 adopted a Code of Conduct for Law Enforcement Officials, which states that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”<sup>118</sup> The commentary to that provision states that the principle of proportionality restricts the use of force by such officials. In particular, in human rights law and law enforcement, “the principle of proportionality operates to protect the object of state violence by allowing only that amount of force necessary to subdue a hostile actor.”<sup>119</sup>

These three forms of proportionality differ substantially from each other. “[P]roportionality in law enforcement is a strikingly different concept from its meaning and function under the law of armed conflict.”<sup>120</sup> The former focuses on the object of state violence--the target of the deadly force--while the latter focuses on the unintended victims of the use of force, which is directed at legitimate targets of attack. In addition, jus ad bellum proportionality is unconcerned with the extent of civilian casualties and instead focuses on the extent of the force a state uses to counter or deter an attack or threat of attack. Each serves a key purpose in international law, but when they become conflated or the lines between them become blurred, their force will be diminished.

When the U.S. continually offers both armed conflict and self-defense as the justification for targeted strikes, the result is that one or more of these different forms of proportionality may be applied when it is not relevant or, perhaps more troubling, will not be applied when it should. Imagine, for example, a scenario in which the United States targets an individual in what should be a self-defense--i.e., outside of armed conflict--situation but that distinction is lost because of the general use of both justifications in all situations. That scenario is one in which the force used must be absolutely necessary and proportional to the need to deter the terrorist's planned attack. And yet, because no differentiation is made between that situation and another that rightly falls within an armed conflict paradigm, the focus of policy and academic \*1692 discourse is on whether the attack comported with the LOAC principle of proportionality--that is, whether the incidental civilian casualties from the attack were excessive. Two sets of rights lose protection in this scenario: the right of the individual being targeted to not be targeted with deadly force as a first resort, and the right of those persons who fall within the category of “incidental casualties,” whose death is not a violation of the LOAC but would likely be a violation of human rights law.<sup>121</sup>

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In the opposite scenario, soldiers fighting in an armed conflict would no longer be able to use lethal force as a first resort absent a showing of individualized threat and necessity in every case, a situation in which the LOAC's acceptance of targeting on the basis of status (for certain categories of persons) would be eliminated. On first glance, such a development seems more protective of rights, without a doubt. However, it undoes the inherent delicate balance between military necessity and humanity that lies at the heart of the LOAC, likely trending too far in the direction of the latter. "There is no treaty language regarding 'proportionate force' applied against military units or other military objectives, and State practice historically has emphasized application of 'overwhelming force' against enemy forces."<sup>122</sup> More important, "Conflating these disparate principles into a singular regulatory norm substantially degrades the scope of lawful targeting authority and confuses those charged with executing combat operations."<sup>123</sup> In addition, when \*1693 soldiers can no longer use force in a manner appropriate to fulfill their mission to defend against and defeat the relevant threat, the state fails to protect its own citizens from ongoing or future attacks.

#### D. Imminent Threat, Status, and Direct Participation in Hostilities

One final area in which the dual use of the armed conflict and self-defense justifications raises concerns is in the identification of targets. As noted above, legitimate targets within an armed conflict include combatants, members of organized armed groups, and civilians directly participating in hostilities.<sup>124</sup> Notably, targeting authority in the LOAC "in no way requires manifestation of actual threat to the attacking force."<sup>125</sup> Outside of armed conflict, persons targeted must pose an imminent threat. The existence of an obligation to capture or use non-forceful means as a first resort is, of course, a significant difference between the two regimes, as the two previous subsections discuss. Beyond the conduct of hostilities against an identified target, however, the precise contours of who is a legitimate target differ between the two regimes.

First, one large category of persons who can be targeted within an armed conflict--even an armed conflict against terrorist groups--is the category of persons who can be targeted on the basis of their status.<sup>126</sup> That is, individuals who are combatants (in an international armed conflict) or fighters for an organized armed group (in either international or non-international armed conflict) are liable to attack at all times. It does not matter if they pose a threat or are asleep at the time of the attack; they are legitimate targets at all times.<sup>127</sup> Some individuals who are members of a \*1694 terrorist group engaged in an armed conflict with a state may well qualify as legitimate targets at all times because of their status as operational leaders or otherwise "full-time" fighters for the group. In this way, Osama bin Laden was a lawful target of attack at all times as the leader of al Qaeda, even though he was not likely engaged in any hostilities at the time of the raid that killed him in Pakistan on May 1, 2011. This status-based targeting authority is a central feature of the LOAC--membership in the enemy forces makes one a presumptive hostile threat at all times.

In contrast, an individual targeted with lethal force outside of armed conflict, by a state acting in self-defense, can only be targeted on the grounds that he or she poses an imminent threat by dint of involvement in ongoing or future attacks. The law of self-defense does not include any concept of targeting on the basis of status; it is solely conduct-based and threat-based. As an example, one definition of a legitimate target within the framework of self-defense through operational counterterrorism is: "An individual who, according to intelligence information . . . intends in the future to either commit or facilitate an act of terrorism that endangers national security."<sup>128</sup> Like other conceptions of lawful targets of attack within the framework of self-defense, this definition focuses on individualized threat determinations, imminence, and necessity, and does not include any reference to membership, status, or function. The solely conduct-based nature of targeting in self-defense situations is central to the need for strict parameters based on necessity and imminence in order to maximize protection for both innocent persons and suspected terrorists who may be the target of attack. The more generalized status-based targeting used in armed conflict

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(for persons who rightly fall within designated categories) simply cannot--and need not, given the circumstances and nature of armed conflict-- meet these more exacting standards.

When no differentiation is made between the armed conflict and self-defense justifications and the two paradigms are potentially conflated, serious concerns regarding the legal parameters for targeting may arise. The greatest risk is that the status-based targeting regime relevant to armed conflict could bleed over into self-defense targeting. Suddenly, imminence and individualized \*1695 threat determinations begin to give way to more amorphous and seemingly simplistic designations of membership and affiliation or association. In fact, even beyond that danger, one might argue that it is easier to group more groups or individuals within the category of "enemy" because of the greater ease in reaching them with the superior capability and decreased riskiness of drones.<sup>129</sup> The use of so-called "signature strikes"<sup>130</sup> outside of Afghanistan and Pakistan--the "hot battlefields"--surely raises the prospect of status-based targeting in areas where the existence of an armed conflict is uncertain. The category of persons who can be targeted outside of armed conflict thus becomes significantly broader than that contemplated by international law and that normally demonstrated through state practice in situations in which self-defense is not conflated with armed conflict.

The risks of non-differentiation extend beyond the distinction between status-based and conduct- or threat-based targeting, however. Another category of legitimate targets within armed conflict consists of civilians who are directly participating in hostilities. Such persons are targetable during and for such time as they are directly participating in hostilities.<sup>131</sup> The notion of direct participation in hostilities is much closer in concept to imminent threat as a standard for targeting in self-defense. Here, however, the risk lies in the other direction, in the effect of conflation on the armed conflict targeting framework. Notwithstanding continued debate over the particular precise definition of direct participation in hostilities and the meaning of the various components of such a definition,<sup>132</sup> one aspect of the definition is certain--the acts in \*1696 which an individual is engaged must have some link to an ongoing armed conflict.<sup>133</sup> Thus, "To rise to the level of direct participation, an act must also be related to the conflict."<sup>134</sup> As the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities states, an "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 . . . ."<sup>135</sup> Therefore, ordinary crime, which remains common and often more prevalent during armed conflict, would not qualify as direct participation, even if it involved the use of firearms or other violent means.<sup>136</sup> In Afghanistan, for example, mere involvement in drug activities, without more, would not be sufficient to label someone as a direct participant in hostilities.

In contrast, targeting in the context of self-defense inherently does not involve a link to armed conflict because it takes place outside of an armed conflict from the start. Although the overall parameters for targeting in self-defense must, by nature, be stricter than those for targeting in armed conflict (i.e., no status-based targeting), there is no requirement for a belligerent nexus because such a factor simply would not make sense. Instead, the narrow \*1697 strictures for imminence and necessity operate to protect against an undue broadening of the class of legitimate targets. The risk, therefore, is that the lack of nexus requirement in self-defense will transfer over to the armed conflict paradigm, leading to a weakening or elimination of the belligerent nexus requirement for targeting in armed conflict. Allowing targeting--with lethal force--of persons who engage in violence regardless of whether they have any link to the conflict significantly diminishes the protective purposes of both the LOAC and human rights law during armed conflict and results in many more people being caught up in the dangers of conflict.

#### IV. Consequences and Concerns

Using both the armed conflict and self-defense justifications for all targeted strikes, whether in Pakistan, Yemen, Somalia, or elsewhere, may be an easy way to communicate to the public that the state is using force to eliminate "bad guys." It certainly adds



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a great degree of flexibility to policy-making and decision-making, which is highly valuable from the perspective of political leaders. The costs of allowing the lines between legal regimes and paradigms to become blurred, however, are far too great.

### A. Fulfillment of the Core Purposes of the Law

One core purpose of the LOAC is the protection of innocent civilians by minimizing harm to civilians and civilian objects during wartime. Another is to enable effective military operations within the boundaries of the law. A central purpose of human rights law is the protection of individuals from violation of their rights and overreaching, even--and especially--during times of national emergency. Blurring the lines between armed conflict and self-defense and the targeting authority relevant to each legal regime directly affects all three of these critical goals. First, the hard-to-define parameters of an ongoing armed conflict with terrorist groups raise serious concerns about too many areas being subsumed within an area of armed conflict and the use of lethal force as a first resort. As more and more areas are viewed as part of the "zone of combat," more innocent civilians will face the consequences of hostilities, whether unintended death, injury, or property damage. This result runs counter to both the LOAC and human rights law. The potential spillover between status-based \*1698 targeting and direct participation in the armed conflict framework and imminence and necessity (but without belligerent nexus) in the self-defense framework provoke similar consternation with regard to the protective and discriminating purposes of both bodies of law.

At the same time, the blending of proportionalities and rules regarding obligations to capture, rather than kill, risk importing too much of the law enforcement and human rights paradigm into the battlefield. Imagine the consequences for units on patrol if, after coming upon recognized hostile enemy forces, they were required to wait for those forces to fire first before opening fire. Mission accomplishment would become significantly more difficult and force protection considerations could reach a problematic level.

The ability to deliberately attack enemy belligerents with the full force of combat power available for mission accomplishment--an authority that implicitly allows the use of deadly force as a measure of first resort--is an essential aspect of armed hostilities between organized belligerent groups. Indeed, the ability to mass the effects of combat power at the decisive place and time often contributes to accelerating enemy capitulation, thereby sparing many enemy belligerents who might otherwise be subject to a loss of life even if a minimum necessary force obligation were applied.<sup>137</sup>

Such developments simply do not comport with the basic tenet of the LOAC that a belligerent has the right to use any and all measures necessary to bring about the complete submission of the enemy as soon as possible and which are not forbidden by the laws of war.<sup>138</sup>

### B. Development and Implementation of the Law Going Forward

Blurring the lines between legal paradigms has longer-term consequences as well for the development and implementation of the law in the future. For example, one fundamental aspect of the LOAC is how it defines categories of individuals.<sup>139</sup> How the law \*1699 categorizes persons within an armed conflict is critical to the protections and rights such persons enjoy, giving this definitional aspect of the law great reach. Revisiting the substantive debate about whether suspected terrorist operatives are criminals or belligerents (whether entitled to prisoner of war status or not) is beyond the scope of this article. However, it is particularly interesting to note that in the course of nearly ten years of debate, conversation, legislation, and judicial opinions attempting to create and set the parameters of the category of enemy combatant, nearly all of that debate has focused on which legal paradigm to apply, not on the fact that these are individuals with basic rights. As the legal paradigms are now blurred--at least with regard to targeting--with the continual use of both paradigms to justify all strikes, further careful development and

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delineation between the armed conflict and self-defense framework will unfortunately remain stalled and pragmatic concerns about basic rights lost in the shuffle.

Beyond these ground-level concerns, the conflation of legal regimes also creates numerous missed opportunities to explore and engage the complex issues that arise on the hard-to-identify lines between armed conflict and self-defense. The past year or two has brought growing discussion about the geographic parameters of an armed conflict between a state and terrorist groups, from the question of whether any such parameters do exist to the follow-on questions of what those boundaries might be and from where to draw guiding principles for such analysis.<sup>140</sup> This discussion is important not just for the sake of finding “answers” to these hard questions but—perhaps more—for the purpose of understanding the key issues and principles inherent in the analysis and the competing rights and values at stake. The LOAC has traditionally balanced a variety of interests, such as military necessity and humanity, and has developed over the years in response to the needs and changes of those in combat and those suffering from the deliberate and incidental effects of combat. Failure to engage directly with the tough issues that lie at the heart of the distinction \*1700 between where a state is acting as part of an armed conflict and where it is acting solely in legitimate self-defense against a terrorist or other threat is, ultimately, a wasted opportunity to promote greater development in the law going forward. Non-answers to hard questions may be easy, but they are rarely productive in the end.

### C. Enforcement Through Both Formal and Informal Means

Finally, effective implementation of and compliance with the law, whether the LOAC, the law of self-defense, or human rights law, depends on regular and respected mechanisms for enforcement. In the arena of international law, both formal (courts and tribunals) and informal (public opinion, response from other states) enforcement have value and effect. Any judicial body determining the lawfulness of state action or the criminal responsibility of individuals must first determine the applicable law in order to reach an appropriate result.<sup>141</sup> When the legal regimes become blurred through repeated conflation, application of the law and thus enforcement will be hampered. The resulting consequence, of course, is that a lack of effective enforcement then undermines effective implementation of the law and protection of persons in the future. These problems often are highlighted in the more informal enforcement arena of media reporting, public opinion, advocacy reports, and other responses, where disputes over applicable law and appropriate analyses abound. When international or nongovernmental organization reports produce primarily disputes over which law is applied—rather than how the law is applied to the facts on the ground—the debate becomes centered on the law and legal disputes rather than on the victims, the perpetrators, and how to prevent legal violations in the future. The blurring of lines between armed conflict and self-defense takes these challenges to another level as well, however, creating a situation in which independent analysts may have difficulty identifying the key pieces of information necessary to an effective examination of the legality of the state's policies and actions.

#### Footnotes

d1 Director, International Humanitarian Law Clinic, Emory Law School.

1 Sources: U.S. Kills Cole Suspect, CNN.com/World (Nov. 5, 2002), <http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>; see also Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report], available at <http://www.extrajudicialexecutions.org/application/media/14%20HRC%20Targeted%20Killings%20Report%20%28A.HRC.14.24.Add6%#.pdf> (describing the new targeted killing policies and addressing the main legal issues that have arisen).

2 Year of the Drone, New Am. Found. (Apr. 4, 2012), <http://counterterrorism.newamerica.net/drones>.

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- 3 US "Targets al-Qaeda" in Somalia, BBC News (Jan. 9, 2007), [http:// news.bbc.co.uk/2/hi/africa/6245943.stm](http://news.bbc.co.uk/2/hi/africa/6245943.stm) ("White House spokesman Tony Snow said the U.S. action was a reminder that there was no safe haven for Islamic militants. 'This administration continues to go after al-Qaeda.'").
- 4 Jeffrey Gettleman & Eric Schmitt, U.S. Kills Top Qaeda Militant in Southern Somalia, N.Y. Times.com (Sept. 14, 2009), [http:// www.nytimes.com/2009/09/15/world/africa/15raid.html](http://www.nytimes.com/2009/09/15/world/africa/15raid.html); see also Jeffrey Gettleman & Eric Schmitt, U.S. Forces Fire Missiles Into Somalia at a Kenyan, N.Y. Times.com (Mar. 4, 2008), [http:// www.nytimes.com/2008/03/04/world/africa/04somalia.html](http://www.nytimes.com/2008/03/04/world/africa/04somalia.html) (detailing an unsuccessful missile strike aimed at Nabhan launched from Kenya into Somalia).
- 5 For a discussion of Israel's policy of targeted killings and examples of several targeted strikes, see Daniel Byman, Do Targeted Killings Work?, Foreign Affairs.com (Mar./Apr. 2006), [http:// www.foreignaffairs.com/articles/61513/daniel-byman/do-targeted-killings-work](http://www.foreignaffairs.com/articles/61513/daniel-byman/do-targeted-killings-work).
- 6 Nils Melzer, Targeted Killing in International Law 5 (2008).
- 7 See, e.g., Kenneth Anderson, Targeted Killing in U.S. Counterterrorism Strategy and Law, Brookings (May 11, 2009), [http:// www.brookings.edu/papers/2009/0511=\\_counterterrorism\\_anderson.aspx](http://www.brookings.edu/papers/2009/0511=_counterterrorism_anderson.aspx) (detailing the recent use of targeted killings in U.S. counterterrorism strikes, as well as the legal threats to targeted killing); Chris Jenks, [Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict](#), 85 N.D. L. Rev. 649 (2009) (assessing the legality of armed unmanned aircraft systems in Pakistan); Mary Ellen O'Connell, Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009, in *Shooting to Kill: The Law Governing Lethal Force in Context* (Simon Bronitt ed. forthcoming); Jordan J. Paust, [Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan](#), 19 J. Transnat'l L. & Pol'y 237 (2010) (arguing that self-defense is permissible against non-state actors who commit armed attacks and that actions of self-defense can be made in another state without that state's consent); Michael N. Schmitt, Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law,' 13 Y.B. Int'l Humanitarian L. 311 (2010) (assessing drone attacks under jus ad bellum and jus in bello).
- 8 See, e.g., Gregory E. Maggs, Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action, (George Wash. U. Law Sch. Pub. L. Research, Working Paper No. 257, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=965433](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965433) ("[G]overnments now have a great deal of discretion, after terrorist acts have occurred, to determine what law will apply to the government's anti-terrorism responses .... If governments believe that rules governing law enforcement offer them an advantage, they will treat the matter as a criminal incident. But if they think that the law pertaining to military force will yield more favorable results, they will label the terrorists involved as enemy combatants and proceed accordingly.").
- 9 See, e.g., USA v. Altstotter et al., in *Law Reports of Trials of War Criminals*, Vol. VI, United Nations War Crimes Commission, London 52 (1947-49) ("If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer."); USA v. Wilhelm List et al., in *Trials of War Criminals before the Nuernberg Military Tribunals*, Vol. XI 1247-48 (1950) (citing Oppenheim's *International Law*, II Lauterpacht, at 174) ("[W]hatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.").
- 10 Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment, §§ 529-30, 534 (May 28, 2008) (noting that the "basic distinction and historical separation between jus ad bellum and jus in bello [is] a bedrock principle" of the LOAC and holding that "[a]llowing mitigation for a convicted person's political motives, even where they are considered ... meritorious ... provides implicit legitimacy to conduct that unequivocally violates the law-- the precise conduct this Special Court was established to punish.").
- 11 See, e.g., Geoffrey S. Corn, Self Defense Targeting: Conflict Classification or Willful Blindness?, in 88 Naval War C. Int'l L. Stud., at 12 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1947838](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947838) (highlighting the dangers of conflating jus ad bellum and jus in bello in the framework of counter-terror operations).
- 12 Peter Bergen & Katherine Tiedemann, Washington's Phantom War, Foreign Aff. 12 (July/Aug. 2011), [http:// www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war](http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war) (arguing for "[a] more

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transparent drone-strike program”); Jesse Solomon, New York Times Files Lawsuit Seeking Info on Targeted Killings, CNN.com, <http://www.cnn.com/2011/12/21/us/new-york-times-lawsuit/index.html> (last updated Dec. 21, 2011, 7:11 PM EST) (noting a “re-energized ... national debate over the legal and moral quandaries of a government deliberately killing one of its own citizens”).

- 13 Special Rapporteur on Extrajudicial Executions, Use of Force During Armed Conflict, in UN Special Rapporteur on Extrajudicial Executions Handbook 11 (2010) (quoting the response of the government of the United States to the letter from the Special Rapporteur, Asma Jahangir, to the Secretary of State dated November 15, 2002), available at <http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter%201%20Use%20of%20Force%20During%20Armed%20Conflicts5.pdf>.
- 14 Note, however, that the exchange in response to the 2002 al-Harethi strike did not discuss the international law of self-defense, now a major component of any legal justification for targeted strikes.
- 15 Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Soc'y of Int'l Law: The Obama Administration and International Law (Mar. 25, 2010).
- 16 Opposition to Plaintiff's Motion for Preliminary Injunction & Memorandum in Support of Defendants' Motion to Dismiss at 4-5, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010)(No.10-cv-1469(JDB)), 2010 WL 3863135.
- 17 The United Nations Charter prohibits the use of force with two exceptions: the right to self-defense and the multilateral use of force authorized by the Security Council under article 42. U.N. Charter art. 2, para. 4 (prohibiting the use of force); id. art. 51 (recognizing the inherent right of self-defense); id. art. 42 (providing for the authorization of multilateral use of force).
- 18 Malcolm N. Shaw, *International Law* 780-81 (4th ed. 1997).
- 19 U.N. Charter art. 2, para. 4.
- 20 U.N. Charter pmb1.
- 21 U.N. Charter art. 51.
- 22 Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, Special British Minister (Aug. 6, 1842), in 2 John Bassett Moore, *A Digest of International Law* § 217, at 412 (1906).
- 23 Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 29 *British & Foreign States Papers 1840-1841*, 1138 (1857).
- 24 See, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* 175-82 (2d ed. 1994) (discussing the concept of and the right of self-defense); David Kretzmer, [Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?](#), 16 *Eur. J. Int'l L.* 171, 173 (2005) (noting that some states argue that targeted killings are within the “state's inherent right to self-defence”); Craig Martin, *Going Medieval: Targeted Killing, Self-Defence, and the Jus ad Bellum Regime*, in *Targeted Killings: Law & Morality in an Asymmetrical World* (Claire Finkelstein, Jens David Ohlin, Andrew Altman eds., forthcoming) (discussing the validity of a self-defense claim regarding targeted killing of suspected terrorists); Paust, *supra* note 7, at 238 (“Self-Defense Is Permissible Against Armed Attacks by Non-State Actors.”); Michael N. Schmitt, [Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework](#), 56 *Naval L. Rev.* 1 (2008) (“[The] United States claim[ed] self-defense as a right in forcefully countering terrorism.”).
- 25 See, e.g., Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, 38 *Int'l & Comp. L. Q.* 589, 597 (1989) (discussing the criticisms of the legal response to terrorism); Eric Myjer & Nigel White, *The Twin Towers Attack: An Unlimited Right to Self-Defense*, 7 *J. Conflict & Security L.* 5, 7 (2002) (“Self-defense, traditionally speaking, applies to an armed response to an attack by a state.”).
- 26 See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334 (Nov. 6); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 215 (July 9).

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- 27 See, e.g., Dinstein, *supra* note 24, at 214; Christopher Greenwood, [International Law and the Preemptive Use of Force: Afghanistan, al Qaeda, and Iraq](#), 4 *San Diego Int'l L.J.* 7, 17 (2003) (discussing the effects of attacks made by non-state actors); Sean D. Murphy, The International Legality of US Military Cross-Border Operations, 85 *Int'l L. Stud.* 109, 126 (“While this area of the law remains somewhat uncertain, the dominant trend in contemporary interstate relations seems to favor the view that States accept or at least tolerate acts of self-defense against a non-State actor.”); Raphaël Van Steenberghe, Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?, 23 *Leiden J. Int'l L.* 183, 184 (2010) (concluding that recent state practice suggests that attacks committed by non-state actors alone constitute armed attacks under article 51).
- 28 S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).
- 29 North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001); Inter-American Treaty of Reciprocal Assistance, art. 3.1, Sept. 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001). Similarly, Australia activated the collective self-defense provision of the ANZUS Pact. Security Treaty, U.S.-Aust.-N.Z., art. IV, [Sept. 1, 1951](#), 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Brendan Pearson, PM Commits to Mutual Defence, *Austl. Fin. Rev.*, Sept. 15, 2001, at 9.
- 30 For an extensive treatment and discussion of the use of force in self-defense and the unwilling or unable test with regard to state consent to the use of force, see Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 *Va. J. Int'l L.* (forthcoming 2012).
- 31 See generally *id.* (examining in depth the “unwilling or unable” test).
- 32 [Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246 \(July 8\)](#); [Military and Paramilitary Activities \(Nicar. v. U.S.\), 1986 I.C.J. 14 \(June 27\)](#); *Jus Ad Bellum*, (Ethiopia v. Eritrea), Ethiopia’s Claims 1-8, Partial Award (Eritrea Ethiopia Claims Commission 2005), <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>.
- 33 Oscar Schachter, In [Defense of International Rules on the Use of Force](#), 53 *U. Chi. L. Rev.* 113, 132 (1986).
- 34 Amos N. Guiora, Targeted Killing--A Proposal for Criteria-Based Decision-Making, in *Targeted Killings: Law & Morality in an Symmetrical World* (Claire Finkelstein et al. eds., forthcoming 2012).
- 35 Robert Chesney, Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, in 13 *Y.B. Int'l Humanitarian L.* 3, 27 (M.N. Schmitt et al. eds., 2010).
- 36 Jane E. Stromseth, [New Paradigms for the Jus Ad Bellum?](#), 38 *Geo. Wash. Int'l L. Rev.* 561, 568 (2006).
- 37 Kretzmer, *supra* note 24, at 203; see also Schmitt, *supra* note 24, at 15 (“If law-enforcement measures (or other measures short of self-defense) will assuredly foil a terrorist attack on their own, forceful measures in self-defense may not be taken. The issue is not whether law enforcement officials are likely to bring the terrorists to justice, but instead whether, with a reasonable degree of certainty, law enforcement actions alone will protect the target(s) of the terrorism. For instance, if members of a terrorist cell can confidently be arrested, that action must be taken in lieu of a military attack designed to kill its members.”).
- 38 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, art. 6, (Dec. 16, 1966).
- 39 Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).
- 40 Kretzmer, *supra* note 24, at 176; see also [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, G.A. Res. 45/166, U.N. Doc. A/CONF.144/28/Rev.1](#), at 112 (Dec. 18, 1990) (stating that force can only be used “in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person

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presenting such a danger and resisting their authority, or to prevent his or her escape, and only when the less extreme means are insufficient to achieve these objectives”).

- 41 See, e.g., Alston Report, *supra* note 1; Kretzmer, *supra* note 24, at 173; Paust, *supra* note 7; Schmitt, *supra* note 24.
- 42 See Kenneth Anderson, Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War,’ in *Future Challenges in National Security and Law* (Peter Berkowitz ed. 2010); Corn, *supra* note 11 (describing the theory of self-defense targeting and arguing that it poses significant dangers in conflating the LOAC and the law of self-defense); Paust, *supra* note 7.
- 43 See Int’l Comm. of the Red Cross, What is international humanitarian law? (2004), available at <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>. The law of armed conflict is codified primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in **Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114**, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, **6 U.S.T. 3217**, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, **6 U.S.T. 3316**, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, **6 U.S.T. 3516**, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by Conference June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted by Conference June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].
- 44 **Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8)** (Higgins, J., dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of international humanitarian law).
- 45 AP I, *supra* note 43, at art. 48. Article 48 is considered customary international law. See Jean-Marie Henckaerts & Louise Doswald-Beck, *1 Customary International Humanitarian Law 3-8* (2005) [hereinafter CIHL].
- 46 Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 110 (Oct. 2, 1995) (“Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [... the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: ... [i]n the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.” (quoting G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Dec. 9, 1970))); see also **Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8)** (distinction is one of the “intransgressible principles of international customary law”); CIHL, *supra* note 45, at 3-8 (discussing the distinction between civilians and combatants); *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 177-178 (1997) (consisting of a dispute over the treatment by Argentine officials of armed attackers who surrendered).
- 47 AP I, *supra* note 43, at art. 51(2).
- 48 AP I, *supra* note 43, at art. 85.
- 49 See **Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998)**, at arts. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(v), 8(2)(b)(vi), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iv), available at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).
- 50 GC III, *supra* note 43, at art. 4(A)(2).
- 51 *Id.* at arts. 4(A)(3), 4(A)(6).

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- 52 See Jimmy Gurulé & Geoffrey S. Corn, *Principles of Counter-Terrorism Law* 70-76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting that (1) “a member of an enemy force ... is presumed hostile and therefore presumptively subject to attack” in international armed conflict and (2) “subjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts”); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 *Int'l Rev. Red Cross* 872, 995 (2008) [hereinafter *Interpretive Guidance*], available at <http://www.cicr.org/eng/assets/files/other/irrc-872-reports-documents.pdf> (stating that organized armed groups are targetable based on status in non-international armed conflict).
- 53 AP I, *supra* note 43, at art. 51(3).
- 54 Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 *Harv. Nat'l Security J.* 5, 12 (2010).
- 55 See, e.g., H CJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 26 [2005] (Isr.); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶ 616 (July 15, 1999). See generally CIHL, *supra* note 45 at 2-9 (discussing the distinction between civilians and combatants); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 *Va. J. Int'l L.* 1025 (2004) (discussing unlawful combatants); Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime after September 11?: Protective Parity and the Laws of War*, 79 *Notre Dame L. Rev.* 1493, 1495-1501 (2004) (discussing the legal situation of unlawful combatants); 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 (2007) (discussing the status of the definition of “belligerents” in the modern world); Melzer, *Interpretive Guidance*, *supra* note 52 (stating that organized armed groups are targetable based on status in non-international armed conflict); W. Hays Parks, *Air War and the Law of War*, 32 *A.F. L. Rev.* 1 (1990) (discussing the law of war with regard to aerial bombardment); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *Chi. J. Int'l L.* 519, 522-36 (2005) (discussing civilian participation in war to the extent that the civilians become lawful targets); K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21<sup>st</sup> Century*, 1 *Isr. Def. Forces L. Rev.* 69 (2003) (discussing the capacity of international humanitarian law to adequately address conflict in its modern form).
- 56 Judith Gardham, *Necessity and Proportionality in Jus Ad Bellum and Jus In Bello*, in *International Law, The International Court of Justice and Nuclear Weapons* 283-84 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).
- 57 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 587 (July 8) (dissenting opinion of Judge Higgins).
- 58 The term “collateral damage” is often used in the media and by the public to refer to the incidental (meaning not deliberate) civilian casualties from an attack on a military target.
- 59 AP I, *supra* note 43, at art. 51(5)(b).
- 60 *Id.* art. 57(2)(a)(iii) (“With respect to attacks, the following precautions shall be taken: [t]hose who plan or decide upon an attack shall: ... [r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated ....”).
- 61 *Id.* art. 57(2)(b) (“An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated ....”).
- 62 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 587 (July 8); CIHL, *supra* note 45, at 46; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *Testing the Boundaries of International Humanitarian Law* 277, 292 (Susan Breau & Agnieszka Jachec-Neale eds., 2006); Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, 27 *Isr. Y.B. Hum.*

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Rts. 1, 7 (1997) (citing Christopher Greenwood, Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict, in *The Gulf War 1990-91 in International and English Law* 63, 77 (P. Rowe ed., Sweet & Maxwell 1993)).

63 AP I, *supra* note 43, art. 57(1).

64 Jean-François Quéguiner, Precautions Under the Law Governing the Conduct of Hostilities, 88 *Int'l Rev. Red Cross* 793, 801 (2006) (citing Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 *Am. J. Int'l L.* 481 (2003)) (noting that this angle of attack “also means that damage would tend to be in the middle of the bridge and thus easier to repair”).

65 See AP I, *supra* note 43, at art. 57(1).

66 All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. See Authorization to Use Military Force (“AUMF”), *Pub. L. No. 107-40, 115 Stat. 224(a)* (2001); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 *Fed. Reg.* 57833 (Nov. 13, 2001) (stating that the 9/11 attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); Dept of Def. Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (Mar. 21, 2002); see also Harold Koh, Legal Adviser, Dept. of State, *The Obama Administration and International Law*, Keynote Address at the Annual Meeting of the American Soc’y of Int’l Law (Mar. 25, 2010) (stating that the United States is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces”); Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> (“[T]he United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.”).

67 Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 *Ga. J. Int'l & Comp. L.* 1 (2010).

68 For example, President Bush announced that “[o]ur war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.” Kenneth Roth, *The Law of War in the War on Terror*, *Foreign Aff.*, Jan-Feb 2004; see, e.g., Eric Schmitt & Mark Mazzetti, *Classified Order Allows U.S. to Attack al Qaeda Worldwide*, *Int'l Herald Trib.*, Nov. 10, 2008 (describing a secret order signed by then-Secretary of Defense Donald Rumsfeld giving the U.S. military authority to strike at al Qaeda targets anywhere in the world); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 *Duke J. Comp. & Int'l L.* 429, 444 (2010) (citing Anthony Dworkin, *Beyond the War on Terror: Towards a New Transatlantic Framework for Counterterrorism*, 13 *Eur. Council on Foreign Rel.* 5 (2009)) (noting that this view “‘extend[s] the boundaries of the conflict to take in al-Qaeda’s operations around the world’”); Interview with Condoleeza Rice (Fox News Sunday, Nov. 11, 2002), available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,69783,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,69783,00.html) (Secretary of State Rice explained that “we are in a new kind of war. And we’ve made very clear that it is important that this new kind of war be fought on different battlefields”).

69 Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs, H. Comm. on Oversight and Govt. Reform, 111th Cong. 2-5 (2010) (statement of Mary Ellen O’Connell); see also Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs, H. Comm. on Oversight and Govt. Reform, 111th Cong. (2010) (submission of Michael W. Lewis) (discussing the argument for a limited geographical scope to the battlefield in the conflict with al Qaeda).

70 In 2006, then State Department Legal Adviser John Bellinger stated in a speech at the London School of Economics:  
I am not suggesting that, because we remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London. As a practical matter, though, a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.

John B. Bellinger, III, *Legal Issues in the War on Terrorism*, Public Lecture at the London School of Economics (October 31, 2006), [http://www2.lse.ac.uk/publicEvents/pdf/20061031\\_JohnBellinger.pdf](http://www2.lse.ac.uk/publicEvents/pdf/20061031_JohnBellinger.pdf). As the quote suggests, there are geographical parameters of



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some sort guiding the U.S. determinations to use force; however, it is not clear what those parameters are or what factors drive the determinations.

- 71 Dinstein, *supra* note 24, at 25-26 (“The laws of neutrality are operative only as long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the laws of warfare take their place. However, if the neutral State is not drawn into the war, the laws of neutrality are activated from the onset of the war until its conclusion.”).
- 72 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540, art. 1 [hereinafter Hague V]; see also Gerhard von Glahn, *Law Among Nations* 844 (Bruce Nichols ed., 6th rev. ed. 1992) (“The basic right beyond any question is the inviolability of neutral territory ... and ... all other neutral rights really are mere corollaries to that fundamental principle.”); Morris Greenspan, *The Modern Law of Land Warfare* 534 (1959) (“The chief and most vital right of a neutral state is that of the inviolability of its territory.”); Georg Schwarzenberger, *A Manual of International Law* 177 (6th ed. 1976) (explaining that the rights and duties of neutral powers under international customary law can be summarized in three basic rules: “(1) A neutral State must abstain from taking sides in the war and from assisting either belligerent. (2) A neutral State has the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations. (3) A neutral State must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations on the freedom of the seas”).
- 73 John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 *A.F. L. Rev.* 119, 139 (1997).
- 74 Dinstein, *supra* note 24, at 26 (“[T]he region of war does not include the territories of neutral States, and no hostilities are permissible within neutral boundaries.”).
- 75 GC I, *supra* note 43, at art. 2.
- 76 *Id.* at art. 3.
- 77 See, e.g., Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 *Am. U. Int'l L. Rev.* 83, 90 (1998) (“The traditional law of neutrality takes hold in [internal conflicts] only in the event that the contending force attains a level of power that causes other nations to recognize it as a belligerent.”).
- 78 Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 *Colum. J. Transnat'l L.* 1, 7 (2004).
- 79 Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *Yale J. Int'l L.* 369, 369 (2008).
- 80 *United States ex rel. Wessels v. McDonald*, 265 F. 754, 763 (E.D.N.Y. 1920).
- 81 *Ex parte Lincoln Seiichi Kanai*, 46 F. Supp. 286, 288 (E.D. Wis. 1942).
- 82 *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003).
- 83 *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting).
- 84 *Boumediene v. Bush*, 553 U.S. 723, 770 (2008); see *Al-Marri v. Wright*, 487 F.3d 160, 196 (4th Cir. 2007) (quoting *Ex parte Quirin*, 317 U.S. 1, 38 (1942)).
- 85 *Al Maqaleh v. Gates*, 605 F.3d 84, 88 (D.C. Cir. 2010).
- 86 *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 220-21, 229 (D.D.C. 2009) (emphasis added) (holding that certain individuals captured in Afghanistan and detained at Bagram are not entitled to habeas corpus and specifically distinguishing between detained battlefield enemy belligerents and individuals apprehended outside the zone of combat operations).

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- 87 See Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. Int'l Hum. Legal Stud. 74, 74-75 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1511954](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511954).
- 88 See AP I, *supra* note 43, at arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).
- 89 Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 702 (2004).
- 90 Anderson, *supra* note 42, at 2.
- 91 Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J.L. Info. & Sci. (forthcoming 2011).
- 92 See, e.g., Michael Crowley, *If bin Laden Was Unarmed, Why Was He Shot?*, TIME (May 3, 2011), <http://swampland.time.com/2011/05/03/why-was-bin-laden-shot>; Ken Dilanian and Brian Bennett, *Osama bin Laden's Surrender Wasn't a Likely Outcome in Raid, Officials Say*, L.A. Times (May 3, 2011), <http://articles.latimes.com/2011/may/03/world/la-fg-bin-laden-us-20110504>; Stephanie Nebehay, *U.N. Rights Investigators Seek Facts on bin Laden Death*, Reuters (May 6, 2011), <http://www.reuters.com/article/2011/05/06/us-binladen-un-experts-idUSTRE74545Q20110506>.
- 93 See AP I, *supra* note 43, at art. 41 (“1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack. 2. A person is hors de combat if: ... (b) he clearly expresses an intention to surrender.”).
- 94 AP I, *supra* note 43, at art. 40; Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, at art. 23(d), Oct. 18, 1907, 36 Stat. 2277, T.S. 539.
- 95 Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (July 17, 1998), at 95 (Art. 8(2)(b)(vi)), available at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).
- 96 Michael N. Schmitt, *Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law*, 12 Y.B. Int'l Human. L. 1, 14 (2009) (italics in original); see Geoffrey S. Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 U. Pa. J. Int'l L. 313, 343 (2011) (describing affirmative steps members of armed belligerent groups must take to rebut the presumption that they pose a threat by virtue of their belligerent status determination).
- 97 See Jan Romer, *Killing in a Gray Area Between Humanitarian Law and Human Rights: How Can the National Police of Columbia Overcome the Uncertainty of Which Branch of International Law to Apply?* 113-14 (2010); David Glazier, *Assessing the Legality of Osama bin Laden's Killing*, Miller-McCune.com (May 20, 2011), <http://www.miller-mccune.com/legal-affairs/assessing-the-legality-of-osama-bin-ladens-killing-31441/>.
- 98 Kretzmer, *supra* note 24, at 191; see also Marko Milanovic, *When to Kill and When to Capture?*, EJIL: Talk (May 6, 2011), <http://www.ejiltalk.org/when-to-kill-and-when-to-capture/> (“In other words, there is under IHL no obligation to first employ non-lethal means against a lawful target, or to capture or detain before trying to kill. Shooting first is perfectly proper.”).
- 99 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 145 (2004) (noting that combatants need to manifest an intent to surrender in order to exempt themselves from being targeted); Schmitt, *supra* note 54, at 42 (“The crucial issue is not whether the individual in question can feasibly be captured but instead whether he or she has clearly expressed his or her intention to surrender.”).
- 100 CIA Chief Panetta: Obama Made “Gutsy” Decision on Bin Laden Raid, PBS Newshour (May 3, 2011), [http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta\\_05-03.html](http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html).
- 101 Romer, *supra* note 98, at 116; see also Schmitt, *supra* note 54, at 42 (“A requirement does exist in human rights law to capture rather than kill when possible. It applies primarily during peacetime as well as in certain circumstances when occupying forces are acting to maintain order.”); Major Shane Reeves and Lt. Col. Jeremy Marsh, *Bin Laden and Awlaki: Lawful Targets*, Harv. Int'l Rev., Oct. 26, 2011, available at <http://hir.harvard.edu/bin-laden-and-awlaki-lawful-targets?page=0,0> (arguing that both bin Laden and Anwar

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al-Awlaki were lawfully targeted within the context of an armed conflict, but noting that “[i]f al-Qaeda is a transnational criminal organization, akin to the American-Sicilian mafia, then domestic criminal law controls and capturing members is required save in extreme cases of individual self-defense”).

102 See *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1995) (noting that lethal force is disproportionate whenever non-lethal alternatives are available).

103 Milanovic, *supra* note 99, at 451.

104 William Abresch, Book Review: [Targeted Killing in International Law](#), 20 *Eur. J. Int'l L.* 449, 451 (2009).

105 HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 40 [2005] (Isr.). The court first held that (1) the conflict between Israel and the relevant Palestinian armed groups is an international armed conflict; (2) terrorists are not combatants but are civilians taking a direct part in hostilities; and (3) such terrorists can be lawfully targeted during and for such time as they are taking a direct part in hostilities.

106 Michael N. Schmitt, Targeted Killings and International Law: Law Enforcement, Self-Defense, and Armed Conflict, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* 525, 552 (2008).

107 Marko Milanovic, Norm Conflicts, International Humanitarian Law, and Human Rights Law, in *Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law, Vol. XIX/1*, at 30 (Orna Ben-Naftali ed., 2010).

108 As the Court explained,

Arrest, investigation, and trial are not means which can always be used. At 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. However, it is a possibility which should always be considered. It might actually be particularly practical 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.

HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 40 [2005] (Isr.); see also Gurulé & Corn, *supra* note 52, at 86 (suggesting that the mixing of the LOAC and law enforcement paradigms “may be explained by the unique occupation relationship between the two parties to the conflict, a relationship that implicitly implicates law enforcement type authorities and constraints. Or perhaps the Court was tempering the effect of its broad interpretation of direct participation in hostilities, attempting to ensure that individuals not actually causing immediate harm to the [army] be subdued by less than lethal means when feasible. Ultimately, that aspect of the opinion, like the international armed conflict aspect, is arguably limited to the unique situation in the West Bank and Gaza”). Note, however, that since the time this case was decided, Israel has disengaged from the Gaza Strip, altering the nature of the legal regime applicable to targeted strikes in that area.

109 See Amichai Cohen & Yuval Shany, A Development of Modest Proportions: The Application of the Principle of Proportionality in the Israeli Supreme Court Judgment on the Lawfulness of Targeted Killings 8 (Hebrew Univ. of Jerusalem Research Paper No. 5-07, 2007), available at [www.ssrn.com/abstractid=979071](http://www.ssrn.com/abstractid=979071) (noting that the Court’s “conclusion ... appears to contradict [Justice] Barak’s own statement that ‘unlawful combatants’ are ‘subject to the risks of attack just like a combatant’”); Corn & Jenks, *supra* note 97, at 348 (stating the less harmful means approach “is unsupported by any positive or customary LOAC obligation”); *id.* at 351 (“No analogous protection [from being made the object of attack with deadly force in the first resort] applies to lawful combatants, who by virtue of that status are subject to such risk so long as they are capable of acting as agents of enemy leadership.”).

110 Dinstein, *supra* note 24, at 225; see also Michael N. Schmitt, ‘Change Direction’ 2006: Israeli Operations in Lebanon and the [International Law of Self-Defense](#), 29 *Mich. J. Int'l L.* 127 (2008) (discussing Israel’s use of force in response to Hezbollah attacks).

111 Roberto Ago, Addendum - Eighth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility, [1980] 2 *Y.B. Int'l L. Comm'n* 13, 69, U.N. Doc. A/CN.4/318/ADD.5-7.

112 [Military and Paramilitary Activities \(Nicar. v. U.S.\)](#), 1986 *I.C.J.* 14 (June 27), at 112; [Armed Activities on the Territory of the Congo \(Dem. Rep. Congo v. Uganda\)](#), 2005 *I.C.J.* 168 (Dec. 19), ¶ 147; see also Judith Gail Gardam, Necessity, Proportionality and the Use of Force by States 158 (2004) (explaining that in the Nicaragua case, the Court held that “the approach is not to focus on the nature

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of the attack itself and ask what is a proportionate response but rather to determine what is proportionate to achieving the legitimate goal under the Charter, the repulsion of the attack”).

- 113 [Armed Activities on the Territory of the Congo \(Dem. Rep. Congo v. Uganda\)](#), 2005 I.C.J. 168 (Dec. 19), ¶ 147.
- 114 Schmitt, *supra* note 111, at 154 (emphasizing that assessments of the Israeli response to Hezbollah rocket attacks must be on the basis of the force needed to end the attacks, not on the relation between the attacks and the force used).
- 115 Schmitt, *supra* note 62, at 294.
- 116 *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment, ¶ 58 (Dec. 5, 2003).
- 117 Kenneth M. Watkin, [Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict](#), 98 *Am. J. Int'l L.* 1, 32-33 (2004) (citing *McCann v. United Kingdom*, 21 *Eur. Ct. H.R.* 97, 160-61, para. 149 (1995)).
- 118 Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 3 (Dec. 17, 1979).
- 119 Gurulé & Corn, *supra* note 52, at 80.
- 120 Dale Stephens, *Military Involvement in Law Enforcement*, 92 *Int'l Rev. Red Cross* 453, 462 (2010).
- 121 Although “the justification of so-called collateral damage ... is not illegal per se under international human rights law, [it] would be far more difficult than it is under IHL.” Robin Geiß & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 *Int'l Rev. of the Red Cross* 11, 24 n.69 (2011).
- 122 W. Hays Parks, Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect, 42 *J. Int'l L. Pol.* 769, 806-07 n.103 (2010); see *id.* at 815 (noting that the use of a law enforcement paradigm subjects wartime military operations to an unrealistic “use-of-force continuum ... beginning with the least-injurious action before resorting to ‘grave injury’ in attack of an enemy combatant or a civilian taking a direct part in hostilities”). In addition, the application of human rights law as a governing paradigm for armed conflict “is still widely perceived as battlefield-inadequate, risky to implement, and therefore unrealistic.” Geiß & Siegrist, *supra* note 122, at 25; see also Corn & Jenks, *supra* note 97, at 347 (“[I]t is common practice to use overwhelming force against ... enemy objectives in order to influence the subsequent behavior of enemy leadership and other enemy forces.”).
- 123 Corn, *supra* note 11, at 16, 20 (“Collectively, all of these considerations indicate that extending jus ad bellum proportionality to jus in bello decision-making produces at worst a significant distortion of legitimate operational authority, and at best confusion as to the scope of targeting authority. Are forces executing jus ad bellum self-defense missions obligated to employ minimum force to subdue the object of attack? Is the object of attack protected by the principle? Must proportionality be assessed based on an exclusive consideration of reducing the threat presented by the immediate object of attack, or may the broader impact on enemy forces be considered? These questions are nullified by maintaining the traditional division between jus ad bellum authority and jus in bello regulation.”).
- 124 See *supra* Part I.
- 125 Corn, *supra* note 11, at 15.
- 126 Corn & Jenks, *supra* note 97, at 341 (“All battlefield targeting authority falls into two broad categories: status and conduct based. Status based targeting authority is ... triggered by the determination that a proposed object of attack is a member of an opposition belligerent force. In contrast, conduct based targeting is based on the determination that an individual presumed inoffensive is engaged in conduct hostile to the friendly force.”).
- 127 Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* 188 (2010) (“A combatant remains a combatant when he/she is not actually fighting.”).

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- 128 Amos N. Guiora, Determining a Legitimate Target: The Dilemma of the Decision Maker, 47 *Tex. Int'l L.J.* 1, 13 (2011) (italics omitted).
- 129 See, e.g., Robert Chesney, Is AQAP Part-and-Parcel of al Qaeda? Some New Evidence, *Lawfareblog.com* (Aug. 28, 2011 2:56 PM), <http://www.lawfareblog.com/2011/08/is-aqap-part-and-parcel-of-al-qaeda-some-new-evidence/>.
- 130 Adam Entous et al., U.S. Tightens Drone Rules, *Wall St. J.*, Nov. 4, 2011, at A1 (“Signature strikes target groups of men believed to be militants associated with terrorist groups, but whose identities aren’t always known. The bulk of CIA’s drone strikes are signature strikes.”), available at <http://online.wsj.com/article/SB10001424052970204621904577013982672973>.
- 131 AP I, *supra* note 43, at art. 51(3). The only judicial decision as of yet on targeted killing is the 2005 Israeli targeted killings case that analyzed the direct participation in the context of targeting terrorists within the framework of an armed conflict. H.C.J. 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2005] (Isr.).
- 132 The International Committee of the Red Cross (ICRC) embarked on a five-year process of expert meetings and consultation to define direct participation in hostilities. The end result, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities*, was published in December 2008. See *Interpretive Guidance*, *supra* note 52. However, the meaning of direct participation remains contested and subject to further controversy and analysis. Many of the experts who participated in the process have taken issue with a number of the definitional elements and factors presented in the ICRC publication. See, e.g., 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); Parks, *supra* note 123; Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 *N.Y.U. J. Int’l L. & Pol.* 697 (2010); 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 (2010).
- 133 “All the experts [in the ICRC process] agreed, for instance, that mere criminal activity which takes advantage of the instability typically incident to hostilities does not meet the third constitutive element, belligerent nexus.” Schmitt, *supra* note 97, at 17. Although disputes remain regarding the exact nature of the belligerent nexus, some link to armed conflict is essential to the notion of direct participation in hostilities.
- 134 *Id.*
- 135 *Interpretive Guidance*, *supra* note 52, at 27.
- 136 See Beth Van Schaack, *The Killing of Osama Bin Laden & Anwar al-Awlaki: The Journey to Legality Through Uncharted Territory*, 14 *Y.B. Int’l Hum. L.* (forthcoming 2011) (“[T]he existence of an armed conflict does not mean that every law enforcement exercise is governed by IHL; a nexus to the conflict is required.” (citing Robin Geiß, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 *Int’l Rev. Red Cross* 127, 139 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-873-geiss.pdf>)).
- 137 Corn & Jenks, *supra* note 97, at 355.
- 138 See United States Dep’t of the Army, *The Law of Land Warfare Field Manual 27-10*, 3-4 (1956).
- 139 Fionnuala Ni Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, 40 *Isr. L. Rev.* (Special Issue) 563, 585 (2007) (“[D]eployment of the term [war] is not without legal significance in so far as it seeks to reshape legal categorizations and suggests that the hegemonic state has the implicit power to re-make legal categorizations by virtue of their ‘naming it so.’”).
- 140 See, e.g., Anderson, *supra* note 42; Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 *Y.B. Int’l Humanitarian L.* 157 (2009); Blank, *supra* note 68 (discussing the struggle to define a zone of combat in modern combat); O’Connell, *supra* note 7.
- 141 For example, in *Abella v. Argentina*, the Inter-American Commission on Human Rights first assessed whether there was an armed conflict that triggered the application of the law of armed conflict in order to then determine how to analyze the actions of the

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Argentine military and government and the rights of the petitioners. See *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 177-78 (1997).

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