Targeting Killings Outside the Traditional Battlefield: The Legality of Targeted Attacks on Transnational Armed Terrorists.

Marti Sleister
Targeting Killings Outside the Traditional Battlefield:
The Legality of Targeted Attacks on Transnational Armed Terrorists.

Contents
I. Introduction: Targeted killings: A matter of perspective, the retaliator’s v. the rest of the world… 2
II. Yesterday’s legal regimes cannot contend with today’s transnational armed terrorists. ………. 6
   A. The Geneva Conventions were designed to address traditional armed conflicts, but do not
directly address a conflict between a state and a transnational terrorist found outside that state’s
borders. ................................................................................................................................. 7
      1. Hague Regulations of 1899 addressed wars of 1899. ................................................. 7
      2. Geneva Conventions of 1929, and adapted in 1949 addressed the conflicts the World had just
         survived. ...................................................................................................................... 8
      3. Additional Protocols of the 1970s may apply as customary international law. …………... 10
      4. Unresolved questions arising in modern war methods. ............................................. 11
   B. The shortcomings of law enforcement under International Human Rights Law. …………... 11
      1. Due Process applies to the law enforcement paradigm, but is inconsistent with the laws of
         armed conflict ........................................................................................................... 13
   C. The Gaps in applying International Humanitarian Law to transnational non-state organizations.
      17
      1. International armed conflict ...................................................................................... 19
      2. Non-international armed conflict ............................................................................. 20
   D. Anticipatory self-defense allows a state to strike against an imminent threat. ……………. 21
      1. Anticipatory self-defense was a pre-existing customary right before the United Nations
         Charter was drafted, and has been used since ......................................................... 21
      2. Once it is established there is an imminent threat of armed attack, the conditions for lawful
         use of self-defense found in Article 51 must be met ................................................ 24
         a. Response: Aimed at the Attacking Party whether a state or non-state actor ………….. 25
         b. Limitations of the right of self-defense measured by what is necessary and proportionate. 27
      3. Consent from the government of the physical territory hosting, sponsoring, or tolerating
         terrorist is not required .......................................................................................... 27
      4. Application ............................................................................................................. 31
III. Evolving the laws of armed conflict to encompass targeting transnational armed terrorists
     wherever those groups are found. ................................................................................ 32
   A. Taking aim when the target hides in plain sight? ...................................................... 33
   B. Proposing solutions .................................................................................................. 34
      1. Direct participation in the hostilities as a means to identify who can be appropriately
         targeted .................................................................................................................... 34
      2. Direct v. Indirect participation in hostilities as a way to determine membership. ……. 35
      3. Military Membership as a means to identify appropriate targets ............................. 36
      4. Where the transnational terrorist organization “controls” the actions of the individual. … 38
IV. Conclusion .................................................................................................................. 39
V. Bibliography .............................................................................................................. 40
I. **Introduction: Targeted killings: A matter of perspective, the retaliator’s v. the rest of the world.**

Every week, images of the global ‘war on terror’ grab the world’s attention through computers, cellphones, and televisions. Those images show the aftermath of drone attacks, often piloted by civilians with the CIA (Central Intelligence Agency). The CIA launches Hellfire missiles from the drones, killing suspected terrorists that are possibly thousands of miles away with the tidiness of a video game.\(^1\) The United States has used drones to target transnational-armed groups, in countries where the U.S. is in a recognized armed conflict, as well as in countries where the U.S. is not in a recognized conflict.\(^2\) The drones are used for both reconnaissance as well as for targeting members of the Taliban and Al Qaeda who are directly participating in ongoing-armed attacks against United States nationals and military personnel.\(^3\) Some academics have argued that using drones to target non-state groups in countries the US is not at war with violate international law unless that country consents. Others argue that the principles of self-defense allow the defending country to cross borders in pursuit of terrorists.\(^4\)

How these attacks are evaluated depends on perspective. The United States citizens evaluate the targeted killings program based on whether it makes them safe. In the US, defining ‘safe’ means stopping the next attack, whether it is similar to the 9/11 attack—or worse. In contrast, the world’s citizens question whether the US Drone attacks make them safe. However, to the world’s citizens, ‘safe’ means not only from terrorist attacks, but from the drone response as well.

As time moves on from the events of 9/11, the ‘war on terror’ has also waged on, using a controversial method of attacking suspected terrorists with drones piloted by the CIA a world away. In evaluating this method, the perspective changes, depending on whether one is at risk of being a target of the terrorist—or at risk of being collateral damage from the retaliation. As the fears realized that day remain fresh to the US citizen, the rest of the world has changed focus to question: what is a war on terror? To answer that question, one must consider the difficulty in honoring traditional rules of war, when facing an enemy who

---

abuses those rules to gain strategic advantage. An advantage gained by purposefully exposing their own neighbors to harm in violation of everything the Geneva Conventions proposes to accomplish.

Drafters of the Geneva Conventions responded to a higher calling to implement humanity in war, also known as the art of killing one another. The Geneva Conventions were an attempt to civilize war by minimizing the slaughter of innocent civilians whose only sin was to be caught between two warring powers. The signatures of the Geneva Conventions considered shedding the blood of innocents an abomination of war. The traditional rules of war sought to limit civilian suffering. However, the goal of protecting civilians has not been realized under the current war methods practiced by transnational armed terrorists. A recent study of civilian causalities during armed conflicts shows the percentage of civilian deaths has steadily risen throughout the previous century. In World War I, the casualty rate was 19 percent; it arose to 40 percent in World War II, and was 90 percent during the armed conflicts of the 1990s. The further war methods evolve away from the presumptions inspiring The Hague and Geneva Conventions, the more civilian lives are at risk. Given this evidence, more must be done to accomplish the goal of minimizing civilian casualties during armed conflicts. The question of protecting civilians, then, becomes how to evolve the rules of war with the evolution of the methods of war.

This paper asks whether traditional laws can evolve to protect citizens in the face of targeted killings on transnational-armed groups. The resolution analyzes how the current war methods fail to fit into the old mold of war; suggests what modifications could be made; and briefly discusses the fate of the laws of war should changes not occur. First, this paper will discuss the legal treaties defining and controlling the current laws of war, specifically, the Geneva Conventions and their Additional Protocols. Second, this paper will analyze how International Human Rights Law (IHRL) applies, particularly in light of the limitations of applying law enforcement rules to the world of transnational terrorism by non-state actors. Third, this paper will analyze armed conflict, under International Humanitarian Law (IHL), including international and non-international armed conflict and its application to the current ‘war on terrorism.’ Finally, the paper will consider various compromises and proposed solutions to make the laws applicable to the way war is waged with the current technology.

It may be helpful to consider the rules discussed in this paper, with a specific factual pattern in mind. Imagine a non-state terrorist group is situated in Mexico, with no apparent ties to the Mexican government. The non-state group launches multiple rockets from Mexico, targeting a US military base in Texas. Suppose also, the attack involves not a single rocket attack, but multiple targets in Texas for a sustained period. Certainly, the US president would

---


6 Of interest, but beyond the scope of this article is the application of IHL and IHRL on the CIA drone operators. While a discussion is worthy concerning whether a civilian force should be analyzed as law enforcement officers or combatants, this is not a consideration of the transnational terrorists in deciding whom to target. Thus, this paper focuses on the application of international law to the transnational armed terrorists.

7 Id.

communicate as soon as possible with Mexico’s president, but no leader would wait for a formal response while rockets are raining down on his or her country. Nor would the leader of that government be required to warn the authorities in the host state before responding in self-defense against terrorists in the host country.

Drones are aerial vehicles that do not carry a human operator and can be flown either autonomously or with a remote pilot. They can be either expendable or recoverable and can carry video surveillance or weapons. Drones were invented right after the Second World War and were ready for use by the 1950s. By 2009, the two types of combat drones were in use: the Predator and the Reaper. Both are similar in design and function, but the Reaper is newer and capable of carrying heavier arms than the Predator. States and non-state groups other than the US are also acquiring drones, including Pakistan, Russia, Georgia, Brazil, China, Hamas, Iran, and Israel. In response to the attacks of 9/11, the US escalated the role of drones from mere reconnaissance mission to attack vehicles because of the drone’s ability to remain quietly in the air, undetected for long periods and respond immediately when a target is discovered. Of significance is whether to classify the drone operators as civilians, combatants, or something in between. Drone operators can be physically on the opposite side of the world from where the target is being observed. Pilots as far away as Nevada in the US have conducted attacks in Afghanistan.

The United States has used drones to target transnational-armed groups, in countries where the US is in a recognized armed conflict, as well as in countries where the US is not in a recognized conflict. The drones are used for both reconnaissance as well as for targeting members of the Taliban and Al Qaeda who are directly participating in ongoing-armed attacks against United States nationals and military personnel. Some academics have argued that using drones to target non-state groups in countries the US is not at war with

---

9 Id.
13 Id.
14 O’Connell, Unlawful Killing, supra note 4, at 3. Alex Rodriquez, Pakistan Turns to Drones of Its Own, latimes.com, (Oct. 9, 2009). See also, Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Execution: Study on Targeted Killings, delivered to the Human Rights Council, U.N. Doc. A/HRC 14/24/Add.6, para. 27 (May 28, 2010). (Finding that at least forty countries currently have drones).
15 O’Connell, Unlawful Killing, supra note 4, at 5.
16 Id.
17 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 237.
18 Id. On general use of drones and other unmanned systems and the requirement of selective and proportionate targeting during war, see generally Beard, supra note 3. For the history of the US drones program by the C.I.A., see, Melzer, TARGETED KILLINGS, supra note 3, 41–42 (2008).

Targeting killings outside the traditional battlefield:
violating international law unless that country consents. Others argue that the principles of self-defense allow the defending country to cross borders in pursuit of terrorists.19

Defining what actions and actors constitute terrorism is a source of controversy. In attempting to define terrorism, the international community considered including a specific crime of “terrorism” under the International Criminal Court’s jurisdiction.20 Proposals to include the crime of terrorism in the Rome Statute have repeatedly failed due to a lack of an agreed-upon definition of what would constitute the crime of terrorism.21 Although terrorism was acknowledged to be one of “the most serious crimes of international concern” according to Article 1 of the Rome Statute, customary international law did not recognize terrorism as a crime.22 Many drafters of the original Rome Statute and its revisions feared that including terrorism as a crime would unnecessarily politicize the International Criminal Court.23 Those same drafters opined that because there was domestic courts for the prosecution of terrorism, establishing international jurisdiction over any definition of terrorism would be both unnecessary and duplicative.24

International law theorists dispute how to analyze targeted killings by state-controlled drones on members of transnational terrorist organizations.25 Categorizing members of transnational organizations through the IHL scheme tends to be favored by those concerned with national security. In contrast, those who are more concerned with preserving civil liberties analyze the question through the criminal law scheme.26 On one hand, the situation can arguably be addressed by considering the domestic rules of law enforcement. On the other, the situation can be analyzed using the laws of armed conflict found in international law.

Under the paradigm of law enforcement, domestic laws limit the use of force only in self-defense, where a police officer has first identified himself as law enforcement to a suspect and has first attempted to detain the suspect. Where a suspect draws a weapon, the officer then can defend himself, regardless of whether or not the suspect is currently engaging in another illegal act.27 In contrast, the law of armed conflict would allow a state to use violent force against the combatant of another state; however, in the ‘law on terrorism’

---

19Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 237-38. Citing See, e.g., O’Connell, Unlawful Killing supra note 4. Professor O’Connell had stated: “US attacks violated fundamental law”; use of drones is “use of an unlawful . . . tactic”; and “[t]he only conclusion is there is no legal right to use drone attacks against Pakistan under the law of self-defense.” Id. (at 3, 21). Her book chapter is an important criticism of the US use of force in Pakistan without special Pakistani consent.

20 Antonio Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law, 12 EUR. J. INT’L L. 993, 994 (2001). This is an example of the problems of defining ‘terrorism’ in the international community. Because the United States has not ratified the Rome Statute, any adopted definition would not have binding effect on the U.S.


22 Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories, supra note 20 at 994.

23 Id.

24 Id.

25 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, 237 (concluding that drone strikes are a valid exercise of self-defense.)

26 Jens David Ohlin, Targeting Co-Belligerents in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD, 62 (Claire Finkelstein, Jens David Ohlin, Andrew Altman, eds., 2011).


Targeting killings outside the traditional battlefield:
the targets are often individuals acting independent of any state authority, and often, without the consent of the state they are in physically. Here, the application of IHL remains contested regarding whether it applies instead of domestic law enforcement and if so, which IHL scheme applies.\textsuperscript{28} Specifically, whether to apply the law of armed conflict between states, with a state and internal conflict, or another scheme.\textsuperscript{29} Under any analysis, the focus should remain on the minimizing how the dangers of war affect civilian lives. The current law of war has failed to minimize civilian casualties, and is actually exploited by members of transnational organizations to the detriment of both civilians and nations who seek to comply with the laws of war.

Under the existing rules of \textit{jus ad bellum} (otherwise known as ‘just war’ theories, or the right to wage war) and \textit{jus in bello} (the laws regulating armed conflict once it begins, regardless of the initial aggressor),\textsuperscript{30} the appropriate rules to analyze launching a drone strike on suspected terrorists is arguably either self-defense under Article 51 of the U.N. Charter,\textsuperscript{31} or under the rules of war found in IHL (either international or non-international armed conflict).\textsuperscript{32} The justification (Jus ad bellum) for the ‘war on terror’ in Yemen, Pakistan and Afghanistan is self-defense (according to the US).\textsuperscript{33}

\section*{II. Yesterday’s legal regimes cannot contend with today’s transnational armed terrorists.}

The focus of any successful government is to keep citizens (and voters) safe from future attacks. US voters demand those they elect protect them from transnational terrorists. Any international law undermining a state’s ability to protect itself, will be rejected by the voters, and thus, by their elected representatives. The question remains, then, how to respond to those future attacks in a way that first, protects the citizens of the victim country, and secondly, without compromising the first goal, adheres to existing ideas of appropriate responses found in international law. Deciding how to analyze the response has been debated by many scholars since the attacks of September 11, 2001. There is a fundamental disagreement in the attitude among scholars toward ‘targeted killings’ of transnational terrorists concerning which legal regime to apply.\textsuperscript{34} States using targeted killings advocate

\begin{itemize}
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Keiichioro Okimoto, \textit{The Distinction and Relationship between ‘Jus ad Bellum’ and ‘Jus in Bello.’} 12-36 (2011). (The fact that starting an armed conflict violates international law does not excuse the persons involved in the conflict of the obligation to conduct themselves in accordance with the general rules of warfare, and those rules include the right to wound and kill enemy combatants.)
  \item \textsuperscript{31} U.N. Charter art. 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
  \item \textsuperscript{34}David Kretzmer, \textit{Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?} 16 Eur. J. Int’l L. at 174 (2005). For debate on the legal and moral justification for targeted killings in "Targeting killings outside the traditional battlefield:'
they are a legitimate means of fighting the global ‘war on terror.’ Those states judge the legality of using drones on the basis of the laws of armed conflict. In contrast, those who label targeted killings as ‘extra-judicial executions’ use a law-enforcement model which uses the standards of IHRL to analyze the legality of targeted killings.35

Using a law enforcement model to prevent future attacks is ineffective in the world of transnational terrorism. The problems with using a law enforcement model to prevent future attacks of transnational terrorism include: the main theory would be conspiracy to commit an attack, which is a violation of a domestic law in the US. The government would have a difficult time proving personal jurisdiction over someone who has not yet stepped foot on US soil, and who may never actually step foot on US soil before completing their act of terror. It is possible for the planning and organization to all occur outside the physical territory of the US. For the perpetrator to board an airplane, also outside the physical territory of the US. And finally, for the perpetrator to complete their attack by overtaking the controls of the airplane and ending their attack on a target within the US and all without stepping foot on American soil—completely skirting any chance for law enforcement to stop the attack.

A. The Geneva Conventions were designed to address traditional armed conflicts, but do not directly address a conflict between a state and a transnational terrorist found outside that state’s borders.

Discussing how the old rules of war apply under current methods of war requires understanding the reasons behind the old rules. Under the old rules, the goal was to minimize civilian suffering as much as possible, while allowing armies to destroy legitimate targets. The definition of civilians and targets were limited based on how wars were fought at the time. A century ago, states typically fought other states. Thus, the rules were based on distinctions of civilian and combatants that were obvious in wars between states. In wars today, the old definitions are less obvious. Definitions of a civilian, a combatant, a legitimate target are now blurred, and sometimes purposely exploited. A brief understanding of the antiquated rules is critical to understanding how the old regulations fail to protect innocent civilians caught in the crossfire of current armed conflicts.


A pre-cursor to the Geneva Conventions, The Hague Regulations were one of the first attempts to create laws controlling war. These regulations were inspired by “the desire to diminish the evils of war so far as military necessities permit…to serve as general rules of conduct for belligerents in their relations with each other and with populations.”36 Thus, the Hague Regulations, from the very beginning, splits its protections into two categories: the population or civilians, and belligerents.

---

35 Id. at 174.
36 Hague Regulations of 1898, Introduction.
The Hague Convention broadly defined the term belligerents. Belligerents included not only armies, but also militia and volunteer corps, who fulfill four requirements: to be commanded; to have a fixed distinctive emblem recognizable from a distance; to carry arms openly; and to behave according to the customs and laws of war. The term belligerent also included anyone in the general population who spontaneously resisted invading troops, so long as they respected the four requirements. The term belligerent was broken down into combatants, and non-combatants, granting both groups prisoner of war (POW) protection upon capture. Combatants did the fighting, and in response, the opposing army could target them. However, the opposing military could only target a combatant if he was a member of a military force engaged in an armed conflict. In exchange for complying with these requirements, the combatant could kill members of the opposing armed forces, without fear of prosecution for what would be murder in peace times. Defining a combatant based on military membership was the most obvious way to define a combatant at the time. Today, however, military membership is not so obvious and is often used to gain advantage. Many who now participate in the hostilities purposefully ignore the requirements to qualify as combatants. Members of transnational organizations not only fail to comply with the requirements, but exploit them to gain advantage and to gain terror among the civilian population.

2. Geneva Conventions of 1929, and adapted in 1949 addressed the conflicts the World had just survived.

The Geneva Conventions were initially adopted in 1929 and updated in 1949, and remain the most recent codification of the rules of war. The Conventions apply in “all cases of declared war of any other armed conflict which may arise between two or more of the [signatory] Parties, even if the state of war is not recognized by one of them.”

Most of the four Geneva conventions are now international and binding upon all states. Thus, it is likely that most provisions of the convention would be regarded as declarations of customary international law. However, the additional protocols to the Geneva conventions have not yet received universal acceptance. The US and several others significant powers, including Iran, Israel, and India, have so far declined to become parties to

---

38 Hague Regulations of 1898, Annex, Article 2.
39 Hague Regulations of 1898, Annex, Article 3.
41 Ohlin, supra note 26, at 63. Dieter Fleck, The Handbook of International Humanitarian Law, 82 (2nd ed. 2008). Murphy, Due Process, supra note 1, at 408, See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (conflict with Al Qaeda is a non-international armed conflict falling under Common Article 3). For a discussion, see D. Glazier, Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure, 24 Boston Univ. Int’l L.J., 55, 60 (2006). (“Recognizing that the terrorism conflict does not fit particularly well with traditional classifications of either ‘international’ or ‘non-international’ armed conflict, it concludes that this war is instead best defined as ‘transnational’.”)
42 Ipsen, at 81-8.
43 Geneva Conventions 4.
44 Id. 28. Geneva Conventions I-IV; See Theodor Meron, Human Rights and Humanitarian Norms as Customary International Law, 3 – 78 (1989).
45 Meron., at 61-62. See also the Decision of the Kammergericht, Berlin, of 13 July 1967, 60 ILR. 208, Fontes Iuris Gentium, Series A. Section II,1 Tomus 6234.
AP I concerning the protection of victims of international armed conflicts.\textsuperscript{46} Many of the provisions in AP I are declarations of customary international law and therefore apply in all International Armed Conflicts.\textsuperscript{47} For instance, during the 1990-1991 Kuwait conflict, many of the provisions of AP I applied to the conflict even though several of the main actors, including Iraq, were not parties. The coalition announced targeting policies that were consistent with AP I, which was regarded as a declaration representing generally acceptable customary international law. Specifically the coalition announced they would only attack the military objectives in terms similar to the language found in Article 52 of edition for a call one. The coalition announced that it would make every effort to avoid excessive collateral damage and civilian casualties, also mimicking the language found in Article 51 in 57 of additional protocol one.\textsuperscript{48}

The Third Geneva Convention focuses primarily on the treatment and protection of prisoners of war (POWs). Thus, one must analyze the definitions discussed in light of how it relates to POWs and keep that in mind when extending the definitions outside the POW paradigm.\textsuperscript{49} It applies to any armed conflict between two or more signatory parties, as well as to occupations.\textsuperscript{50} The Third Geneva Convention defines POWs broadly. It includes both “members of the armed forces to a Party to the conflict”\textsuperscript{51} as well as organized resistance movements who fulfill the four conditions of having a command structure; wearing a distinctive sign recognizable at a distance (there are some limited exceptions under Protocol I); carrying arms openly, and conducting operations according to the laws and customs of war.\textsuperscript{52} POW protections are also extended to members of regular armed forces who give their allegiance to a government or authority not recognized by the detaining power. The Geneva Conventions also extends POW protections to civilians who have non-combat roles supporting a military.\textsuperscript{53} Also included in the definition of POW are inhabitants, who take up arms to resist invading forces, regardless of whether or not those inhabitants have had time to form regular armed units.\textsuperscript{54} Those inhabitants, are, however, still expected to carry arms openly and respect the laws and customs of war.\textsuperscript{55} While the majority of the Geneva Conventions were drafted to apply to wars between two contracting states, the drafters also addressed extending protections to those involved in a civil war, or an internal armed conflict.


\textsuperscript{48} Id. 30; See the US Department of Defense, Intermim Report to Congress

\textsuperscript{49} Geneva Conventions 3, Article 2.

\textsuperscript{50} Geneva Conventions 3, Article 2.

\textsuperscript{51} Geneva Conventions 3, Article 4(A)(1).

\textsuperscript{52} Geneva Conventions 3, Article 4(A)(2).

\textsuperscript{53} Geneva Conventions 3, Article 4(A)(3) and (4).

\textsuperscript{54} Geneva Conventions 3, Article 4(A)(6).

\textsuperscript{55} Geneva Conventions 3, Article 4(A)(6).
Article 3 of the Geneva Conventions is the only article that applies to “armed conflicts not of an international character.” It sets forth minimum protections for people (regardless of citizenship) found within a signatory’s territory during a non-international armed conflict. It protects both non-combatants and those combatants (who have laid down their arms, or who are hors de combat, by demanding their humane treatment,) regardless of whether or not they are deemed POWs. Article 3 regards humane treatment to prohibit “outrages upon personal dignity, in particular humiliating and degrading treatment… [passing sentences that are] pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The significance of Article 3 is that it recognizes and extends protections to non-state actors involved in non-international armed conflicts often in civil war scenarios. By doing so, it establishes precedence for recognizing non-state fighters and demanding compliance with the general principles of war. Article 3 applied even though those non-state fighters were not at the negotiation table when these terms were determined. Thus, Article 3 extends the requirement to protect civilians to non-state actors involved in non-international armed conflicts. While the Hague and later, the Geneva conventions provided guidelines for war, the events of the World Wars prompted nations to adjust the laws of war to react to the issues raised during the First, and Second World Wars, again, with the goal of protecting civilians.

3. Additional Protocols of the 1970s may apply as customary international law.

In 1977, the Geneva Conventions were amended to add Additional Protocol I. The goal of AP I was to protect victims in international armed conflicts in reaction to the developments since the Second World War. Thus, its goal was to minimize the dangers war tactics that civilians were increasingly exposed. Additional Protocol II is another 1977 amendment to the Geneva Conventions, relating to protection of victims of conflicts, which are not international armed conflicts. The goal of AP II was to provide protections for victims of internal armed conflicts that take place primarily within the borders of one country. Because of the need to respect the sovereign rights of the national countries, the protections extended under AP II were limited. Article 13 addresses the protection of the civilian population, “unless and for such time as they take direct part in hostilities.” The Protocols also elaborate the principles of distinction: “. . . 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.”

Although it has been ratified by 170 countries, Israel, Iran Pakistan, Turkey and the US have not ratified AP I, although Iran, Pakistan and the US signed it on 12 December.
1977, with the intention of ratifying it, the United States has not ratified it.\textsuperscript{63} Without ratification, the US has effectively not agreed to be bound by the treaty.\textsuperscript{64} According to the ICRC, several articles are recognized as customary international law and applicable to several states, regardless of their ratification.\textsuperscript{65} Newly added to the protocols include several articles that extend protections to civilians.\textsuperscript{66} Articles 43 and 44 in particular, seek to clarify the status of guerrilla forces. Under AP I, combatants and POW status is granted to members of a dissident force if they are under the command of a central authority, do not conceal their allegiance, and are recognizable as combatants while preparing for and during an attack.\textsuperscript{67} Thus, the protections normally reserved for combatants are extended to those who behave honorably by observing the four requirements.

4. Unresolved questions arising in modern war methods.

Not yet resolved, is whether International Humanitarian Law recognizes an armed conflict between a state and a trans-national, non-state actor found outside that state’s borders. Some argue that this is as an international armed conflict under the Geneva Conventions. Others argue it is a non-international armed conflict triggering Article 3. Still others argue it is neither.\textsuperscript{68}

Questions arise as to how the current participants involved in a modern war fit into past definitions of warfare. Governments could consider the terrorist as a civilian, a combatant, or something in between. Being unable to predict how the international community will categorize a terrorist raises a dispute regarding when it is appropriate to target him. When a terrorist is not identifiable by carrying weapons in the open, or in a uniform with a recognizable insignia, a government is left to predict when targeting him will be lawful. Some would argue the government is required to wait until he is on the plane with a bomb entering US air space. Others may push the timeline back to when he is at a foreign airport, waiting to board or when he is building the bomb. Also in dispute is how to consider other members of the terrorist group who participate in building the bomb, or train those who will carry out an attack. Disputes exist as to whether to think about these issues in terms of law enforcement, and when the issues invoke the laws of armed conflict.

B. The shortcomings of law enforcement under International Human Rights Law.

International Human Rights Law (IHRL) protects rights that are universal, inherent, and inalienable to all human beings by virtue of their humanity.\textsuperscript{69} IHRL controls law

\textsuperscript{63}Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

\textsuperscript{64}Alina Kaczorowska, Public International Law, 97 (2010), citing the 1969 Vienna Convention on the Law of Treaties.

\textsuperscript{65}Appeal by the International Committee of the Red Cross on the 20th anniversary of the adoption of the Additional Protocols of 1977

\textsuperscript{66}Commentary on the Additional Protocols to the Geneva Conventions. General Introduction, pg. xxvix.

\textsuperscript{67}Additional Protocol I, Article 43 and 44.

\textsuperscript{68}Ohlin, supra note 26, at 63; Fleck, supra note 41, at 82. Murphy, Due Process, supra note 1, at 416. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (conflict with Al Qaeda is a non-international armed conflict falling under Common Article 3).

\textsuperscript{69}International Covenant on Civil and Political Rights, Art. 6, § 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (recognizing “the inherent dignity and . . . equal and inalienable rights of all members of the human
enforcement’s conduct. It obligates law enforcement to respect civil and political rights,\textsuperscript{70} to respect, protect and fulfill economic social and cultural rights,\textsuperscript{71} to secure specific rights for children,\textsuperscript{72} women,\textsuperscript{73} racial minorities,\textsuperscript{74} migrant workers, and their families.\textsuperscript{75} It sets a minimum standard the state must respect when dealing with its citizens.\textsuperscript{76} IHRL permits the state to kill a person who is not in custody only where necessary to stop him from killing or causing serious injury to others.\textsuperscript{77}

Some obligations under IHRL are suspended during in times of war or other public emergencies that threaten the nation.\textsuperscript{78} An armed conflict displaces the human rights model and allows states broad authority to kill both opposing combatants and civilians who directly participate in the hostilities.\textsuperscript{79} Any suspension is limited ‘to the extent strictly required by the exigencies of the situation,’\textsuperscript{80} and must neither conflict with other international obligations nor discriminate.\textsuperscript{81} Suspending IHRL is allowed because the rules of IHRL are inconsistent with war. For instance, killing a combatant who could otherwise be arrested is prohibited under IHRL, but generally allowed in an armed conflict. Where there is no armed conflict, the rules of IHRL applies, which requires law enforcement to refrain from depriving life without due process.

---

\textsuperscript{70} ICCPR and its Optional Protocols; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Convention against Torture); International Convention for the Protection of All Persons from Enforced Disappearances 2006.

\textsuperscript{71} International Covenant on Economic Social and Cultural Rights 1966 (ICESCR).

\textsuperscript{72} Convention on the Rights of the Child 1989 (CRC) and its Optional Protocols.

\textsuperscript{73} Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW).

\textsuperscript{74} International Convention on the Elimination of all forms of Racial Discrimination 1965 (ICERD).

\textsuperscript{75} International Convention on the Protection of the Rights of All Migrant Workers and members of their Families 1990 (ICRMW).

\textsuperscript{76} Murphy, \textit{Due Process}, supra note 1, 409 (2009).

\textsuperscript{77} Melzer, \textit{TARGETED KILLINGS}, supra note 3, 59 (2008) (“It is generally found that, under human rights law, targeted killings are permitted only in the most extreme circumstances, such as to prevent a concrete and immediate danger of death or serious physical injury . . . .”); cf. \textit{Tennessee v. Garner}, 471 U.S. 1, 3 (1985) (“[Deadly] force . . . may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”); \textit{Scott v. Harris}, 550 U.S. 372, 385-386 (2007) (clarifying \textit{Garner} and holding that the use of deadly force, which is subject to a general “reasonableness” standard under the Fourth Amendment of the U.S. Constitution, was justified where a fleeing suspect in a high-speed chase “posed a substantial and immediate risk of serious physical injury to others”).


\textsuperscript{79} Murphy, \textit{Due Process}, supra note 1, 408-409.

\textsuperscript{80} ICCPR, Art. 4(1).

\textsuperscript{81} ICCPR, Arts 18, 19, 21, 22; ECHR, Art. 8-11; ACHR, Art. 13, 15, 16, 22; ACHPR, Arts 11 and 12.
1. **Due Process applies to the law enforcement paradigm, but is inconsistent with the laws of armed conflict**

The due process clause of the United States Constitution prohibits the government from depriving “any person” of “life… [without] due process of law.” The United States Supreme Court considers due process, typically limited to law enforcement, not to the laws of armed conflict. In *Hamdi v. Rumsfeld*, a bare majority held the due process clause should provide the analytical framework to justify detaining an American citizen as an ‘enemy combatant.”

*Hamdi v. Rumsfeld* involved a US citizen by birth, who the US military removed from the battlefield in Afghanistan. The US claimed he could be detain for the duration of the war because he was an enemy combatant. The US Supreme Court questioned what procedures the government must provide before detaining a US citizen as an enemy combatant. The Bush administration made two alternative arguments in favor of detention. First, the US Supreme Court should play no role in determining whether a person is an enemy combatant and thus, eligible for detention under the Geneva Conventions for the duration of the war. Second, in the alternative, the US Supreme Court should only considered whether there was “some evidence” minimally supporting the combatant status to support a basic presumption in favor. As to what process is due to a citizen detained as an enemy combatant, Justice O’Connor, writing for the controlling plurality, used the scheme of weighing the interests found in *Mathews v. Eldridge*.

In *Mathews v. Eldridge*, the US Supreme Court decided that granting social security benefits created a statutory property right, which required due process before terminating the benefit. The *Eldridge* court considered what process was due to the recipient before terminating the benefit. In determining the amount of process that was due, the court established three factors to be balanced: first, the interests of the individual in retaining their property and the injury that may be suffered by the action; second, the risk of error from the procedures actually used and what value was involved in different procedural safeguards; and third, the costs and administrative burden associated from the additional process in light of the government’s interests in an efficient adjudication. The *Mathews* decision is often criticized for being vague and providing little guidance as to how to weigh the three factors.
outlined where private and public interests compete. It does, however, set the stage for judicial policy making.

In applying Mathews to the Hamdi case, Justice O’Connor observed:

[t]he private interests included: (a) Hamdi’s strong interest in avoiding long-term, mistaken detention; and (b) a more broadly shared interest in preventing executive detention from becoming an engine of arbitrary oppression. On the other side, the government’s interests included: (a) preventing false negatives that would allow enemy combatants to return to the battlefield; and (b) preventing excessive procedures from interfering with the military’s ability to function properly.

In application, the court concluded that due process required Hamdi receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.” The government’s argument that the initial interrogator gave Hamdi all the process he was due was deemed insufficient to satisfy due process because the interrogator was not a neutral decision-maker. The alternate argument that the government had “some evidence” to detain Hamdi also did not succeed because Hamdi was not allowed to rebut the government’s allegations.

The Supreme Court did not address exactly what notice and opportunity in compliance with due process should entail. However, the court conceded that in light of military and security needs, due process did not entail a full-blown trial, but certainly an opportunity to respond.

[T]he exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.

89 Mathews, 424 U.S. at 323. See also, Lawson, “Oh Lord, Please Don’t Let Me Be Misunderstood!” Rediscovering the Mathews v. Eldridge and Penn Central Frameworks, 81 Notre Dame L. Rev. 1, 4-5 (2005) (observing that “the Mathews due process inquiry . . . is routinely assailed as unworkable, subjective [and] incomplete” but also aptly noting that it serves the useful function of “providing a framework or structure for discussion of the issues arising in . . . due process law”).

90 Hamdi, 542 U.S. at 529-32.
91 Id. at 533.
92 Id. at 537.
93 Id.
94 Id. at 537.
The guidance from this case on how enemy combatant proceedings should function in the future is murky at best. Relying on a case from administrative law, with a lower standard of evidence and minimal judicial review, does not provide a concrete manner to predict future judicial actions. There is no template of how proceedings defining enemy combatants should function in the future. Although the case concedes that hearsay evidence “may need to be accepted as the most reliable available evidence,” there are no parameters as to when hearsay evidence will be acceptable and what types of corroborating evidence—if any, are necessary.

Law enforcement does not typically address a systemic series of attacks by a transnational terrorist. Where the life of a nation is at stake, the state is required to respond quickly and on a scale of lethality more similar to armed conflict than law enforcement. The response includes intentional, purposeful, and sustained violence that is different from the violence law enforcement may encounter—or inflict, when conducting its commonplace police functions. Applying IHRL to the war on terror would “unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare,” which would make adhering to the rules of war effectively making it impossible to ultimately win the war. Thus the safeguards of IHRL are not applicable to the war on terror. Nor is it possible for law enforcement to enforce the law on a transnational terrorist in a foreign country.

A law enforcement officer’s duty is to enforce the law. However, they are deputized to enforce only the law from the home jurisdiction, which does not apply to transnational terrorists who are not physically in the US. Law enforcement in the US cannot enforce its own laws on transnational terrorists who do not physical enter the country until just before executing their attack. The law of the countries where the transnational terrorists live in is only enforceable by the courts of the country housing the terrorists, sometimes complicity. Critics of this method, using the law enforcement paradigm as an analysis, criticize the CIA’s targeting of transnational terrorists in other countries, as an extra-judicial execution.

Those who use the term extra-judicial execution’ rather than ‘war crimes’ or ‘grave breaches’ of IHL to categorize targeted killings imply a law-enforcement model as a proper way to analyze state action. Amnesty International defined an extrajudicial execution as: ‘[a]n extrajudicial execution is an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extrajudicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. This implies that an arrest is possible in a country hosting the terrorists. These killings take place outside any

---

95 Id.
judicial framework.”99 IHRL expects that when law enforcement receives credible evidence that individuals have been “involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial before a competent and independent court and, if convicted, sentenced by the court to a punishment provided by law.”100 Under this analysis, any use of lethal force by state actor that is not justified by IHRL is considered an extrajudicial execution.101 IHRL condemns the arbitrary deprivation of life,102 and limits the state’s law enforcement actions to permit “kill[ing] a person not in custody only if necessary to prevent him from posing a threat of death or serious injury to others.”103

Thus, under the law enforcement paradigm of IHRL, targeted killings are illegal unless done in self-defense. This is especially a problem when using unmanned drones, which offer no opportunity to arrest someone.104 A closer examination of the limitations of IHRL leads to the conclusion that because of the global nature of the problem, it is impossible to apply IHRL to the global war on terror.105 IHRL can only regulate the actions of a State within its own territory and among its

100 Kretzmer, supra note 34, at 178 (pointing out the conflict between these two models in the context of the war on terror and proposing instead a mixed model incorporating elements of each); see also Robert J. Delahunt & John C. Yoo, What is the Role of International Human Rights Law in the War on Terror?, 59 DEPAUL L. REV. 803, 844-45 (2010) (arguing that, under IHRL, “the U.S. military would have had an obligation to arrest al-Harethi [the principal target of the 2002 Yemen strike mentioned at the outset], even at some risk to its own personnel”); Johannes van Aggelen, The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims, 42 CASE W. RES. J. INT’L L. 21, 59 (2009) (emphasizing that IHRL dictates that individuals have access to a tribunal that is “independent of the executive and legislative branches of government”); Ralph Wilde, Legal ‘Black Hole’? Extraterritorial State Action and International Treaty Law on Civil and Political Rights, 26 MICH. J. INT’L L. 739, 776 (2005) (noting that the “right to a fair trial in Article 9 of the ICCPR is key as far as the prosecution of alleged terrorists”).
101 Kretzmer, supra note 34, at 176.
102 ICCPR, Art. 6, § 1.
103 Murphy, Due Process, supra note 1, 408 (2009), (primarily proposing post-strike intra-executive reviews and the creation of Bivens-type judicial actions). The framework proposed for post-deprivation analysis is similar to the approach taken to targeted killings in Israel. There, the Israeli Supreme Court patently endorsed targeted killing of Palestinian civilians actively engaged in terrorist activities, but “to ensure objectivity, added that judicial review of the ex post executive review should be allowed.” Afsheen John Radsan & Richard Murphy, Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing, 2011 U. ILL. L. REV. 1201, 1234 (2011); See, e.g., Orna Ben-Naftali & Keren R. Michaeli, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L.J. 233, 287 (2010) (“The targeting of non-combatants who took part in the hostilities, but are no longer thus engaged, that is, killing which is undertaken for past deeds, is forbidden and entails [instead] criminal responsibility.”).
104 Ben-Naftali & Michaeli, ‘We Must Not Make a Scarecrow of the Law’, at 286 (“[I]n a specific case where concrete information points to an operation aimed at attacking the civilian population that is already underway, and cannot be prevented by any other available means, it is reasonable to assume that the killing of the perpetrators of the operation would be justified [under HRL].”); Radsan & Murphy, Measure Twice, Shoot Once: supra note 103, at 1208 (“Human rights law would not, however, permit targeting this person if he were unarmed and far away from any armed hostilities.”). Mary Ellen O’Connell, To Kill or Capture Suspects in the Global War on Terror, 35 CASE W. RES. J. INT’L L. 325, 330 (2003).
105 Delahunt & Yoo, What is the Role... supra note 100, at 803, 846 (arguing that, under IHRL, “the U.S. military would have had an obligation to arrest al-Harethi [the principal target of the 2002 Yemen strike mentioned at the outset], even at some risk to its own personnel”).
own citizens.\textsuperscript{106} It is premised upon the notion that citizens hold individual rights. Under this perspective, IHRL cannot apply to drone strikes carried out on transnational terrorists operating outside the territory of the US.\textsuperscript{107} The domestic law enforced by local law enforcement does not apply to actors outside the US.

Another duty of law enforcement is deterrence. Deterrence in international terrorism cannot be effectively achieved by local law enforcement alone. Arresting a transnational terrorist after a failed terrorist attack is effective only in stopping that particular attack. The larger group learns from that failed attempt and tries again with better methods. In the alternative, if the transnational terrorist is successful, the main perpetrator is usually killed in the attack as planned. Gathering evidence at that point is difficult, because much of the evidence is destroyed—along with many lives. Prosecuting a dead terrorist if futile, as is trying to link the act to co-conspirators when most of the evidence, witnesses and main perpetrator is destroyed.

With law enforcement completely unable to stop an attack by a transnational terrorist, what other mechanisms exist for a government to protect its citizens? For centuries, governments have gone to war with each other to answer situations that cannot be addressed by law enforcement. A body of law has developed to address armed conflicts found in The Hague Regulations, as well as the Geneva Conventions and their Additional Protocols.

C. The Gaps in applying International Humanitarian Law to transnational non-state organizations.

International Humanitarian Law is the body of treaties, case law, and customary international law that attempts to minimize unjustified death, destruction, and suffering during times of war.\textsuperscript{108} During an armed conflict, states have “[b]road authority to kill opposing combatants as well as civilians who are directly taking part in the hostilities.”\textsuperscript{109}

\begin{flushleft}
\textsuperscript{106} W. Jason Fisher, Targeted Killing, Norms, and International Law, 45 COLUM. J. TRANSNAT’L L. 711, 717-19 (2007) (arguing that the divide between IHL and IHRL “is so splintered that . . . it is doubtful that current international law is in a position to guide the behavior of States with respect to targeted killing”).
\textsuperscript{107} Roy Schondorf, Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?, 37 N.Y.U. J. Int’l L. & Pol. 1, 59-60 (2004) (“Some states (and scholars) dispute the application of IHRL to situations of armed conflicts for various reasons. For instance, they reject the extraterritorial application of international human rights law, or they claim that IHRL applies only between a state and its citizens.”); David P. Stewart, Human Rights, Terrorism and International Law, 50 VILL. L. REV. 685, 696-97 (2005) (noting that IHRL is typically limited to controlling the relationship between “a government and the individuals it governs”). Kretzmer, supra note 34, at 179 (“The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected.”).
\textsuperscript{109} Crandall, supra, note 107, at 69; Radsan & Murphy, Measure Twice, Shoot Once: supra note 103, at 1209.
\end{flushleft}
IHL is limited by the laws of international armed conflict, which regulate the conduct of war through the principles of distinction, proportionality, and military necessity.\(^{110}\)

The Geneva Conventions of 1949 do not contain the term ‘international humanitarian law’. ‘International Humanitarian Law’ is a modern term that encompasses rules intended to regulate how an individual is treated in international armed conflicts, whether or not the parties have declared or recognized they are participating in an armed conflict.\(^{111}\) While human rights treaties typically require signatories to treat all people—citizen and non-citizen—within the signature party’s jurisdiction in accordance with the principles of the treaty, this is not so in humanitarian law treaties. Humanitarian law treaties are only binding between the states that are parties to them.\(^{112}\) For example, during the 1991 Gulf War, signatures to AP I were not obligated to apply its provisions (except for what was considered customary international law) because one of the parties to the conflict, Iraq, was not a signature to AP I.\(^{113}\)

The rules of IHL apply to all sides of a conflict, regardless of whomever is the aggressor. Thus, even if one side exploits the rules of armed conflict, the other remains required to follow them. At first blush, this seems unfair, where the initial aggressor acts in violation the rules, should the responding party be allowed to respond in kind?\(^{114}\) This argument was rejected in the diplomatic conference which adopted the two 1977 Additional Protocols to the Geneva Convention. The preamble to Additional Protocol I reaffirms that: “the provisions of the Geneva conventions of 12 August 1949 and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.”\(^{115}\) AP I applies to individuals insofar as it protects individuals.\(^{116}\) In practice, should the rules of armed conflict distinguish between who is the initial aggressor, and who is acting in self-defense, would encourage both parties to claim the other is the initial aggressor, and effectively lead to all parties disregarding humanitarian law.\(^{117}\) “[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them, and the other side would benefit from them without being bound by them.”\(^{118}\) After further discussion\(^{119}\) this reasoning lead to the application of the rules of armed conflict applying to non-state actors, such as a UN force, or international force acting under the

\(^{111}\) Greenwood, Historical Development, supra note 43, at 11.
\(^{112}\) Id. 11-12. An exception includes the Biological Weapons Convention, the Chemical Weapons Convention and the Landmines Convention, which require signature parties to strictly comply, regardless of the status as signatures of an opposing party to an armed conflict.
\(^{114}\) Greenwood, Historical Development, supra note 43, at 10.
\(^{115}\) Additional Protocol I, preamble.
\(^{117}\) Id. 10-11. During the Iran-Iraq war throughout 1980 – 1988, both parties claimed the other was the aggressor, and that it was acting in self-defense.
\(^{118}\) Elihu Lauterpacht, The Limits of the Operation of the Laws of War, 30 BYIL, 206, 212 (1953); see also Chris R. Greenwood, The Relationship Between Jus Ad Bellum and Jus In Bello, 9 REV. OF INT’L STUDIES, 221, 225 (1983).
\(^{119}\) Greenwood, Historical Development, supra note 43, at 11.
Security Council’s authority. By the same analysis, the rules of international armed conflict should apply to individual aggressors, wherever they are found. Thus, the rules of armed conflict should apply to non-state transnational actors, as well as the government they target. Deciding which rules applies, is another source of debate.

Under the Geneva conventions, the definitions of war is splintered into international armed conflicts and non-international, internal armed conflicts. Most of the provisions of the Geneva conventions deliberately exclude non-state actors. The conventions provide a scheme to regulate wars between states, except for the minimal protections for those involved in non-international or internal armed conflicts, which may include a non-state belligerent. Also, the criteria for the status of lawful combatant is defined based on the model of a state soldier. Requirements to be a lawful combatant include having in place a command structure, wearing a fixed insignia, carrying arms openly, and conducting operations in accordance with IHL. In exchange for meeting those conditions those soldiers gain full POW protections under the conventions, and cannot be prosecuted for acts, which would otherwise be considered crimes during times of peace. Non-state terrorist, by definition, cannot meet all of those conditions. Additionally, they are not motivated to do so.

1. International armed conflict

An armed conflict is required to trigger the application of the Geneva conventions. The conventions, however, do not directly define the term ‘armed conflict’. Although historically determining the existence of an armed conflict is not difficult where the use of armed forces against another state is clear. The requirement to distinguish on the battlefield between those in the fight and those who are not is one of the most fundamental principles of warfare. The people on the battlefield are divided into two broad categories: combatants, and civilians. Combatants are fairly targeted at any time. Of note, because this rule is defined in the POW section, there may have been motive to define POW broadly to extend the protections to as many people as possible. Civilians are not to be targeted, but some civilian casualties are tolerated during the time of war.

Distinguishing is easier on a traditional battlefield, where civilians and combatants are easily distinguished. As previously stated, a combatant is defined broadly in reference to POWs, which include: “members of the armed forces to a Party to the conflict,” as well as organized resistance movements who fulfill the four conditions of: having a command structure; wearing a distinctive sign recognizable at a distance (there are some limited exceptions under Protocol I); carrying arms openly, conducting operations according to the laws and customs of war. POW protections are also extended to members of regular armed forces whose allegiance is to an authority not recognized by the detaining power, as well as

120 Id.
121 Id.
122 Id.
123 Id.
124 Jensen, Direct Participation in Hostilities, supra note 5, at 10.
125 Id.
126 Geneva Conventions 3, Article 4(A)(1).
civilians who have non-combat rules supporting a military. Also, included in the definition of POW are inhabitants of territories not occupied, who take up arms to resist invading forces, regardless of whether or not those inhabitants have had time to form regular armed units. Those inhabitants, are, however, still expected to carry arms openly and respect the laws and customs of war. Those who do not fall into the definition of combatant are traditionally considered civilians. Now, in modern warfare, these distinctions are not as easily made where fighters purposefully dress and live among the civilians, but fight as combatants.

2. Non-international armed conflict

The International Committee of the Red Cross (ICRC), maintains that the law of war only applies to an internal conflict if it involves several requirements, specifically identification of parties, protected hostile acts, and a minimum level of organization within the armed forces. The US Supreme Court in 2006 decided that the US conflict with Al-Qaeda is a non-international armed conflict for purposes of fair trial rights to detainees and accused of war crimes. The US Supreme Court also held that the armed conflict with Al-Qaeda is a non-international armed conflict under which the humanitarian protections of Common Article 3 apply. Common Article 3 states that “[I]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions[.]” Of note, the requirements apply not only to the ‘High Contracting Parties’ but to each Party, presumably whether or not the party is a high contracting party. It is significant that Common Article 3 imposes requirements on all parties involved in a non-international crime.

128 Geneva Conventions 3, Article 4(A)(3) and (4).
130 Jensen, Direct Participation in Hostilities, supra note 5, at, 87.
131 Banks, supra note 110, at 7.
133 ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ’hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Targeting killings outside the traditional battlefield:
which would appear to include non-state terrorist groups, regardless of whether or not those groups were at the negotiating table.

The transnational, non-state terrorist gains the advantage by hiding his actions among civilians. He gains both the benefit of anonymity, and local outrage if targeting him results in civilian casualties.

D. Anticipatory self-defense allows a state to strike against an imminent threat.

States can use force on another state in two instances: when acting in self-defense, or as authorized by the UN Security Council. Specifically, Article 2(4) of the UN Charter states: “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.”

The Charter specifically uses the broader term ‘force’ rather than ‘war’, thus avoiding a debate about whether a particular conflict constitutes war.

Since the drafting of the UN Charter, there has been increasing demand for an evolution of Article 51 to meet the challenges of the current battlefield. As stated on the floor of the UN following the attacks of September 11, 2001. “The magnitude of yesterday’s acts goes beyond terrorism as we have known it so far… We therefore think that new definitions, terms, and strategies have to be developed for the new realities.”

In developing new definitions, terms and strategies to adapt to the new realities, one should start with where the right of anticipatory self-defense began—specifically with one government, entering the territory of another, to respond to non-state actors.

1. Anticipatory self-defense was a pre-existing customary right before the United Nations Charter was drafted, and has been used since.

Although Article 51 does not mention a right to anticipatory self-defense in the face of an imminent threat, such a right existed before it was drafted, and has been used since. Prior to the adoption of Article 51, a right of anticipatory self-defense in the face of an imminent armed attack was considered an inherent right in customary international law. States have exercised their right to anticipatory attack since the adoption of Article 51.

---

134 Article 51 UN Charter. Stating: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

135 Articles 43-48 UN Charter; Greenwood, Historical Development; at 1-43.2. In addition, to those two exceptions, there has been support for the right to use force in cases of extreme humanitarian need.

136 Article 2(4) of the UN Charter

137 Greenwood, Historical Development, supra note 43, at 9. Additionally there has been support for the creation of a right to use force in cases of extreme humanitarian need.

138 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 241.


140 Greenwood, Historical Development, supra note 43, at 7. See also, the Caroline dispute between Britain and the United States in 1837, Jennings, 32 A.J.L., 82 (1938).

141 Greenwood, Historical Development, supra note 43, at 7. For example, when Israel invoked the anticipatory right of self-defense in 1967 it was not condemned by either the Security Council nor the General Assembly.
a. Anticipatory self-defense is limited by the principles of necessity and proportionality.

Customary international law recognized anticipatory self-defense in the Caroline doctrine. The Caroline doctrine stems from an incident in 1837, where Canadians were rebelling against the British. The US had officially adopted a policy of neutrality. However, American sympathizers provided the Canadian rebels with soldiers and supplies via a steamboat named the Caroline. In response, British soldiers crossed into US territory, boarded the Caroline, and set it on fire. The British justified the action as one of anticipatory self-defense.\(^{142}\) After considerable negotiation, both the US and the United Kingdom agreed the anticipatory action was allowed only where the British could show:

The necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation ..., and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”\(^{143}\)

These words led to the Caroline test, requiring first, necessity. The state must demonstrate the attack was necessary and that all peaceful alternatives were exhausted. Secondly, proportionality, the force used must be proportional to the threat faced. Thus, the right of a state to defend itself against non-state actors in the territory of another country existed prior to drafting Article 51. In addition, states have relied upon self-defense since the adoption of the UN Charter.

b. Anticipatory self-defense has been relied on since the drafting of the UN Charter.

Following the adoption of Article 51, the International Court of Justice considered whether the article rejected the pre-existing right to anticipatory self-defense by not including it.\(^{144}\) In Nicaragua v. United States, the Republic of Nicaragua filed a complaint with the ICJ, alleging the US violated international law by using military force against Nicaragua.\(^{145}\) Nicaragua accused the US of violating Nicaragua’s “sovereignty, territorial integrity and political independence” by intervening in the country’s internal affairs. Specifically, the US had been supporting the Contras in rebelling against the Nicaraguan government. According

---

\(^{142}\) The Caroline (exchange of diplomatic notes between Great Britain, Ashburton, and the United States, Webster 1842), 2 J. Moore, Digest of International Law 409, 412 (1906).

\(^{143}\) The Caroline (exchange of diplomatic notes between Great Britain, Ashburton, and the United States, Webster 1842), 2 J. Moore, Digest of International Law 409, 412 (1906).


to the complaint, the US had installed more than 10,000 mercenaries in Honduras base camps along the border with Nicaragua, provided training, arms, food, and medical supplied, and then directed the attacks on human and economic targets in Nicaragua. The US argued its actions were “primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States claims to be exercising a right of collective self-defense.”

The ICJ Court considered the silence of Article 51 on well-established rules of self-defense in customary international law, as evidence that Article 51 does not independently regulate the right of self-defense. The ICJ reasoned that the Charter recognized the existence of self-defense, but did not regulate all aspects. For instance, the Charter does not address what measures are proportional to the initial armed attack nor what measures would be necessary in response—rules established in customary international law. In addition, defining the term ‘armed attack’ is not provided in the Charter, and is not part of treaty law. Affirming that a customary rule of self-defense continues to exist alongside the U.N. Charter rule, the ICJ stated:

It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.

In Nicaragua, although the ICJ found a customary right of self-defense governing situations slightly separate from the Charter, it did not detail how and when States could resort to self-defense in cases of an “imminent threat of armed attack” short of actual armed attack. It did, however, hold that the right to self-defense under Article 51 requires the occurrence of an armed attack when it held that “[i]n the case of individual self-defen[se], the exercise of this right is subject to the State concerned having been the victim of an armed attack.” Nevertheless, the Court clearly implied the availability of the right to self-defense in response to an imminent threat of an armed attack. Therefore, while Article 51 of the Charter allows self-defense only in response to an armed attack, the inherent right of States to resort to force against an “imminent threat of attack” under customary law remained unencumbered by the Charter.

149Id.
150Id.
151Pax, Nicaragua v. United States at 476.
152Id.
2. Once it is established there is an imminent threat of armed attack, the conditions for lawful use of self-defense found in Article 51 must be met.

Under Article 51, a lawful use of self-defense requires four conditions be met: 1) an [anticipated] significant armed attack;\textsuperscript{154} 2) where the response is aimed at the attacking party;\textsuperscript{155} 3) the response must adhere to the principles of necessity,\textsuperscript{156} and 4) the response must be equivalent under the principle of proportionality.\textsuperscript{157}

\textit{a. An anticipated significant armed attack.}

The U.N. Charter reserves the “inherent right of individual or collective self-defense if any armed attack occurs against a Member of the United Nations.” The use of the words ‘inherent’ and ‘armed attack’ have been defined by the ICJ.\textsuperscript{158} Use of the term ‘inherent’ reaffirms a State’s natural right to defend itself from an armed attack.\textsuperscript{159} This right existed under customary international law prior to the drafting of Article 51.\textsuperscript{160} As previously detailed, the ICJ in \textit{Nicaragua v. United States} reaffirmed the inherent right of self-defense, both collective and individual.\textsuperscript{161}

Because Article 51 does not define the term “armed attack,” that would authorize self-defense,\textsuperscript{162} a court must consider customary international law.\textsuperscript{163} The Court in \textit{Nicaragua} did posed by the reactors was not sufficiently close in time to their destruction. The Security Council concluded the timing was too remote to meet the requirement that an armed attack must be “imminent.” Greenwood, \textit{Historical Development, supra note 43, at 7. Debate of 12 June 1981, S/PV 2280, and Res. 487 (1981). Although the US has advanced the position that states may enjoy a right of pre-emptive military action even when no armed attack is imminent [see the National Security Strategy 2006, reviewed by Crook, 100 A.J.I.L. (2006) 690], this theory has attracted little support; see, e.g. the statement by Lord Goldsmith, the Attorney-General of England and Wales that the United Kingdom’s position was that ‘international law permits the use of force in self-defense against an imminent attack but does not authorize the use of force to mount a preemptive strike against the threat that is more remote… Those rules must be applied in the context of the particular facts of each case,’ House of Lords debate, 21 April 2004.\textsuperscript{165}

not give detailed parameters on when and how States could use self-defense in response to an “imminent threat of armed attack.”\footnote{Id. at 103, ¶ 194.} The Court did hold that “[i]n the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of the armed attack.”\footnote{Id. at 103, ¶ 195; See also id. at 27-28, ¶ 35 (‘‘W’hat is in issue is the purported exercise by the United States of a right of collective self-defense in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not been raised.’’).} Therefore, although Article 51 “allows self-defense in response to an armed attack, the inherent right of States to resort to force against an ‘imminent threat of attack’ under customary law remained unencumbered by the Charter.”\footnote{See id.; See also Armed Activities on the Territory of the Congo (Dom. Rep. Congo v. Uganda) 2005 I.C.J. 168, ¶ 144 (Dec. 19) [hereinafter Territory of the Congo].}

The IJC also defined a significant armed attack, ruling “a terrorist or irregular operation would constitute an armed attack only if the scale and effects of such an operation were such that it ‘would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.’”\footnote{Nicaragua v. United States, Jurisdiction and Admissibility, 1986 I.C.J. at 203} As a result, the concept of an ‘armed attack’ is narrower than the concept of the ‘use of force’ referred to in Article 2(4) of the UN Charter. Article 2(4) stated: ‘‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United States.’’\footnote{Article 2(4) UN Charter.}

Systematic terrorist attacks could constitute an armed attack, even though they are neither state-organized nor state-sponsored. Terrorist actions rising to the level of an armed would justify the injured state’s self-defense response.”\footnote{Allo, Ethiopia’s Armed Intervention in Somalia, supra note 159, at 143.} An armed attack also includes:

\[\text{N}ot\text{ merely action by regular armed forces across an international border… [but also]}\ldots\text{ the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [\textit{inter alia}]… an actual armed attack conducted by regular forces… or it’s substantial involvement therein.}\]

b. Response: Aimed at the Attacking Party whether a state or non-state actor.

Although the wording of Article 51 uses the term “state,” NATO did not require the 9/11 attack on the US be carried out by a “state” to justify collective self-defense in Afghanistan. Instead, NATO agreed that “if it is determined that this attack was directed from abroad against the US, it shall be regarded as an action covered by Article 5 of the Washington Treaty.”\footnote{Allo, Ethiopia’s Armed Intervention in Somalia, supra note 159, at 143.} The legality of NATO’s action was controlled by the Washington
Treaty. Additionally, the measures taken by the US in self-defense after the 9/11 attack was affirmed by the UN Security Council.

Most academics agree that when a non-state actor launches an armed attack on a state, the right of self-defense codified in Article 51 of the UN Charter is triggered, even if the victim states’ response against a non-state actor occurs while those actors are hiding/being hidden a foreign country. Article 51 expressly affirms the victim state’s right to respond defensively “if an armed attack occurs.” Nothing in the Charter’s language limits a state’s right to exercise their right of self-defense only to instances where they are attacked by a state. Common sense dictates that the Charter does not limit a state’s right

---

173 Id.
174 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 239. See, e.g., Thomas Buergenthal & Sean D. Murphy, Public International Law 336 (4th ed. 2007); Antonio Cassese, International Law 354-55 (2d ed. 2005); Lori F. Damrosch, et al, International Law Cases and Materials 1191 (5th ed. 2009) (“[s]elf-defense against [‘nonstate actor’] terrorist attacks is not in doubt . . . .”); Yoram Dinstein, War, Aggression and Self-Defense, 183-85, 204-06, 208 (4th ed. 2005); Judith Gardam, Necessity, Proportionality and the Use of Force by States, 150 (2004) (discussing the relevancy of “instancy” or “immediacy” as a requirement of responsive force “particularly in the context of sustained insurgent atrocities.”); Harold Hongju Koh, The Spirit of the Laws, 43 Harv. Int’l L.J. 23, 24-25, 27-28 (2002); Terry D. Gill, The Eleventh of September and the Right of Self-Defense in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS, 23, 25-29 (Wybo P. Heere ed. 2003) (there is no reason why self-defense cannot be permissible against non-state actor armed attacks despite a prior “ ‘Statist presumption’ ” among a minority of state-oriented positivists that was partly to the contrary); Ved P. Nanda, International Law Implications of the United States’ “War on Terror”, 37 Den. J. Int’l L. & Pol’y 513, 533 (2009) (“One could justify the targeted strikes by the US in Pakistan on the ground that the geographical region of conflict stretches from Afghanistan to Pakistan . . . . It is recommended that the Obama administration review its policy authorizing the killing of suspected terrorists outside the geographical region of armed conflict . . . . [A]nd if killings are sought outside the area of hostilities the ‘proportionality’ element be strictly adhered to, and that if terrorists can be apprehended killings should be a last resort.”); Myres S. McDougal & W. Michael Reisman, Entebbe, N.Y. TIMES, July 19, 1976, at A20, reprinted in MYRES S. MCDOUNGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 867-77 (1981) (regarding the propriety of the Israeli Entebbe raid into Uganda in 1976 in self-defense against non-state actor hostage-takers in order to protect nationals from imminent death); But see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (Advisory Opinion on the Wall) 2004 I.C.J. 136, 189, 194 (July 9) ¶¶ 139: “Article 51 . . . recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State,” adding that “Israel exercises control” of occupied territory from which “the threat . . . originates,” and that “[i]n the situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001),” concerning the US right of self-defense against non-state actor armed attacks that occurred on 9/11. Concerning an important insight into Professor O’Connell into the probable meaning of these seemingly inconsistent statements, see also infra note 39. The majority may have used a severely restrictive reading of Article 51 if it thought that attacks must be by a state. The phrase “attack by one State,” whether meant to be exclusive or most likely merely inclusive, was used in a sentence that was remarkably terse and set forth without citations).
to protect its citizens only within its own borders and only against armed attacks launched by recognized states.\footnote{Paust, \textit{Self-Defense Targeting of Non-State Actors}, supra note 2, at 247.}

Use of the word “state” does not appear to limit Article 51, although it appears elsewhere in the United Nations Charter. For example, in Article 2(4) the word ‘state’ restricts the member states from using armed forces against the territorial integrity or political independence of another state.\footnote{U.N. Charter Art. 2, para. 4.} Clearly, the drafters knew how to use the word “state” as a limitation on the actions of members, and chose not to do so in regards to armed attacks and the “inherent right” of self-defense in Article 51 of the Charter. Notably, despite a self-imposed blindness among some, there have been and are many actors in the international legal process other than the state.\footnote{Jordan J. Paust, \textit{The Reality of Private Rights, Duties, and Participation in the International Legal Process}, 25 \textit{Mich. J. Int’l L.} 1229 (2004).}

c. Limitations of the right of self-defense measured by what is necessary and proportionate.

Generally, any measure taken in self-defense is limited by what is necessary and proportionate. This requirement distinguishes the modern law of self-defense with the traditional concept of ‘just war. Under the traditional concept of a ‘just war’, there was no limit to the amount of force a state could use, once there was a valid reason for resorting to the use of force. The use of force under the concept of a ‘just war’ was limited by the humanitarian requirements of the law of armed conflict. In contrast, self-defense, limits the use of force that can be used to what is necessary to end to an armed attack, and to regain any territory that may be occupied. To be clear, under self-defense, a state is not limited to using no more force than what has been used against it.\footnote{Greenwood, Historical Development, supra note 43, at 8-9. Ian Brownlie, \textit{International Law and the Use of Force by States}, 434 (1963).} For example, when Argentina invaded the Falkland Islands in 1982, the United Kingdom could not have regained the Islands using only the degree of force that had been used by Argentina. In exercising their right of self-defense to remove Argentina’s forces from the Falkland Islands, Sir Humphrey Waldock proposed a specific test. He said that the use of force in self-defense must be ‘…strictly confined to the object of stopping or preventing the infringement [of the defending States’ rights] and reasonably proportionate to what is required for achieving this objective.’\footnote{Id. 1-43, 9.44 Waldock, 81 RdC (1952), 451. Quoting Sir Humphrey Waldock that the use of force in self-defense must be ‘… strictly confined to the object of stopping or preventing the infringement [of the defending state’s rights] and reasonably proportionate to what is required for achieving this objective’.} As applied to the Argentina invasion of the Falkland Islands, the United Kingdom was entitled to use not only such force as was reasonably necessary to retake the islands but also to use what force was necessary to guarantee their security against further attack.\footnote{Greenwood, Historical Development, supra note 43, at 1-43, 9.}

3. Consent from the government of the physical territory hosting, sponsoring, or tolerating terrorist is not required.

Neither Article 51 of the United Nations Charter nor customary international law requires consent of the host state where a non-state actor physically initiates, plans, or trains
for its armed attacks before a victim state exercises its right of self-defense against that non-state actor. Arguably, signatures to the UN Charter consented to a defending-state exercising self-defense against a non-state actor on their territory when they signed the charter. In contrast, law enforcement measures would require consent from the state hosting the non-state actors. Under a self-defense theory, the US would not need permission from Pakistan to target Al Qaeda and Taliban terrorists. Others argue the US should have requested Pakistan join the US to target terrorist groups within Pakistani borders. Those same critics also argue that without either consent or an express invitation, the US does not have a legal basis for conducting attacks inside Pakistan. Gaining permission is neither plausible nor required. Requiring special consent from the state housing the troops as well as state housing the transnational armed terrorists allows either state to veto a state’s right to self-defense. This would effectively cripple the right of self-defense. Where a state refuses to consent, any use of force in its territory the force will be considered an illegal use of force. Imposing this effectively requires a ‘duty to warn,’ which misses the point of preserving a right of self-defense. First, selective use of force against non-state actors is not actually directed against the territorial integrity of the state. The integrity of the state is not compromised by the selective use of force against a transnational non-state actor. Furthermore, the use of force is directed not against the host state, but at the terrorist organization operating within it, sometimes without the knowledge or consent of the host state. Targeted killings in a foreign state that is hosting terrorists, can be permissible where it is “not feasible” to arrest and any other means of preventing an attack are likely to fail.

The ICJ has laid out the traditional approach for acts of non-state actors attributable to their host states in that case is of Nicaragua. The Appeals Chamber of the ICTY reached a slightly different conclusion. These holdings determine when the actions of non-state actors are attributable to the host state in order to invoke international obligations that would govern the conduct of the host state. In short, once the host state is considered responsible for the actions of a non-state actor, those actions will be considered under international law as an act of the host state with all the resulting legal consequences. Of note, there is a significant

183 Paut, Self-Defense Targeting of Non-State Actors, supra note 2, at 249.
185 Id. But see O’Connell, Unlawful Killing, supra note 4, at 18.
186 O’Connell, Unlawful Killing, supra note 4, at 18-26.
187 Id.
188 Id.
189 Id.
191 Banks, supra note 110, at 66-67.
193 Kretzmer, supra note 34, at 171, 173, 179-83, 188 (2005)
195 Somer, supra note 189.

Targeting killings outside the traditional battlefield:
difference between legal consequences involved in attributing an action of a non-state actor to its host state versus a failure of the host state to meet its obligations of due diligence to prevent terrorism. Where a state ‘merely’ fails to exercise due diligence, it will bear the responsibility not for the actions of terrorists, but for the failure to exercise due diligence.¹⁹⁵

Under the rulings in Nicaragua, for an action of a non-state armed group to be attributed to the host state, the host state must have ‘effective control’ over the armed group. Under the holding in Nicaragua ‘effective control’ did not exist even where, ‘financing, organizing, training, supplying and equipping’ as well as ‘selection of its military or paramilitary targets and the planning of the whole of its operation’ was attributable to its host state.¹⁹⁶ The ICTY relaxed this standard in the Tadic decision slightly, but still required “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”¹⁹⁷ Another way conduct of non-state actors is attributed to a host state is where the host state acknowledges and adopts the terrorist actions after the fact. As where the Khomeini government in Iran endorsed the taking of Americans as hostages by students unaffiliated with the State. The International Law Commission’s Articles on State Responsibility, codifying customary law, recognize both the “control” and the “acknowledgment” bases for state responsibility.¹⁹⁸

Also, Article 51 allows the US to use drones in Pakistan to protect American troops from continuous Al Qaeda and Taliban attacks on troops in Afghanistan.¹⁹⁹ Thus, the US is able to carry out self-defense targeting from Afghanistan into Pakistan, without the express consent of Pakistan, who is a signatory to the UN Charter.²⁰⁰ The problem of categorizing the armed conflict occurs where attacks have occurred from the territory of Pakistan into Afghanistan, through porous borders between Afghanistan and Pakistan in an area that neither country has effective control over.²⁰¹

Alternatively, some scholars argue that attacks involving “armed cross border incursions” conducted by “militant groups … [who] remain active along a border for a considerable period of time” causing death and destruction from one state onto the troops in another state do not create a recognized right of self-defense. According to those scholars, troops in Afghanistan could not respond to repeated attacks emanating from Pakistan.²⁰²

¹⁹⁵ Id.
¹⁹⁶ Nicaragua, at para. 115.
¹⁹⁷ Prosecutor v. Tadic, ICTY Appeals Chamber, Case No. IT-94-1-A, para. 145. (The International Criminal Tribunal for the former Yugoslavia found Tadic guilty of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war, based on individual responsibility. Much of the analysis of the Appeals chamber focused on defining ‘overall control’ in terms of determining responsibility.
¹⁹⁸ Articles 8 and 11, in UN General Assembly Res. 56/83, Annex (2001), and see James Crawford, The International Law Commission’s Articles on State Responsibility, 110-113, 121-123 (2002).
¹⁹⁹ Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 250.
²⁰⁰ Id.
²⁰¹ Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 251.
²⁰² See O’Connell, Unlawful Killing, supra note 4, at 15). Arguing the ICJ Armed Activities on the Territory of the Congo case supports her view because the ICJ did not find imputation to the Congo of non-state acts of violence. See id. 15) (further arguing cross-border incursions “are not considered attacks under Article 51 . . . unless the state where the group is present is responsible for their actions”). This argument fails because the ICJ addressed involved use of force against a state, the ICJ expressly declared that it had “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces.” Armed Activities on the Congo, 2005 I.C.J. at 223, ¶ 147; see also Wilmshurst et al., at 970-71 n.25 (ICJ did “not answer the question as to . . . an armed
Under this theory, any responses involving significant force cannot be used on states housing terrorists, without that state’s consent.  

The argument erroneously proposes that troops being attacked by non-state actors have no right to defend themselves outside of the country they are in without one of the following: 1) consent from the country housing the trans-national terrorists; 2) attributing the actions of the trans-national terrorists to the host state where the state is in control of the trans-national terrorist making the host state track directly responsible for the armed attacks; or 3) if there is a recognized armed conflict of either an international or non-international nature. In spite of the series of the scholars, there is no expectation in the international community supporting this restrictive view of the right of Self-defense against armed attacks. Additionally such review would be inconsistent with the practices of customary international law prior to the signing of the UN charter.

attacking by irregular forces”). More importantly and compelling, the ICJ impliedly recognized that consent of the territorial state is not required and that such forms of self-defense can be permissible when it stated that Ugandan military operations on the territory of the Democratic Republic of the Congo (DRC) against a non-state actor allegedly “in self-defense in response to attacks that had occurred . . . cannot be classified as coming within the consent of the DRC, and their legality . . . must stand or fall by reference to self-defense as stated in Article 51 of the Charter.” Armed Activities on the Congo, 2005 I.C.J. at 222, ¶ 144.

203 O’Connell, Unlawful Killing, supra note 4, at 14 (stating that “[t]he reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack” and argues “a terrorist attack will almost never meet these parameters for the lawful exercise of self-defense. . . . [partially because they may not qualify as an attack and because they] are rarely the responsibility of the state where the perpetrators are located”); id. (manuscript at 21) (stating that “Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense”); id. at 26 (claiming that the United States does not “have a basis in the law of self-defense for attacking inside Pakistan”); O’CONNELL, at 319, But see O’Connell, at 450-51 (regarding permissible use of force on Afghan territory and Security Council recognition that “armed force in self-defense following terrorist attacks is lawful”). The result would be to place a greater value sovereign rights than of self-defense and, to encourage violence and safe havens for transnational terrorists where the home state has not provided special consent and non-state actor attacks are not imputed to the state. This would undermine peace and security when such armed attacks are occurring more regularly over time when transnational acts of terrorist violence are happening more regularly and without regard to peace, territorial boundaries, the dictates of humanity, or the dignity of their victims.

204 Id.

205 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 250; see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); see also O’CONNELL, at 320. Professor O’Connell argues in support of her position based on a 1988 incident involving an assassination, rather than self-defense. In that case, “Israel sent a commando team to Tunisia to kill” a high level member of the PLO, which was condemned by the Security Council as an impermissible “assassination” (see U.N. S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988), and the Advisory Opinion on the Wall, 2004 I.C.J. 136). Id. at 320. The 1988 Security Council resolution did not mention an Israeli claim of self-defense against an armed attack, and the US Ambassador at the time stated the Israeli conduct was not self-defense, but a “political assassination.” Id. Thus, the 1988 assassination is not an example of using self-defense against an armed attack by a non-state actor. With respect to the ICJ Advisory Opinion, Professor O’Connell recognized in an earlier writing that “the situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state’s own nationals within the state’s own territory” (or a law enforcement paradigm when attacks emanate from occupied territory under Israeli control and the attacks have “been treated as criminal” acts) than self-defense against armed attacks originating from abroad, “because of the measure of control Israel exercises over the occupied territories.” Mary Ellen O’Connell, Enhancing the Status of Non-State Actors Through a Global War on Terror?, 43 COLUM. J. TRANSNAT’L L. 435, 451 (2005). This characterization questions whether the Advisory Opinion addressed the right of self-defense against non-state actor attacks originating from another state where the victim state has no law enforcement authority, and whether the Advisory Opinion impliedly did so in a way that some textwriters have missed when it attempted to distinguish the permissibility of responses to the 9/11 attacks contemplated by Security Council resolutions 1368 and 1373 from targeting killings outside the traditional battlefield:
4. **Application.**

Thus, the United Nations Security Council and NATO both recognized in 2001 that the armed attacks on September 11, 2001 by non-state al Qaeda triggered both the right of individual as well as collective self-defense under the United Nations Charter and the North Atlantic Treaty. The use of force against Al Qaeda in Afghanistan the month after the attack was justified, as self-defense against an ongoing process of armed attack against the US, its embassies, its military, and other US nationals abroad. While the attack against Al Qaeda was considered self-defense, the use of force against the Taliban was considered “highly problematic.” To be a lawful use of self-defense, any force used against the Taliban, the US would have had to establish some form of direct involvement by the Taliban in controlling the Al Qaeda attacks, thus attributing to the 9/11 attacks (which has never been proven). This connection would have to be more than allegedly tolerating, harboring, endorsing, or financing Al Qaeda which would merely lead to “state responsibility.” In recognizing this right of self-defense, neither the UN Security Council, nor NATO anticipated the need for either geographic or time limits as a condition for the US and use of self-defense against Al Qaeda. Neither the UN Security Council, nor NATO, require the Afghanistan governments consent to the use of Self-defense by the US. Finally, neither the UN Security Council, NATO nor the Afghanistan government require the existence of an armed conflict between the US and Al Qaeda.

---

*Id.* See, e.g., Franck, supra note 157, at 840; Paust, *Use of Armed Force, supra note* 176, at 535 & nn.4-5 (citing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001)); Wilmshurst et al., at 970; O’Connell, *INTERNATIONAL LAW AND THE USE OF FORCE* at 450-51; *see also* U.N. S.C. Res. 1373, pmb., U.N. Doc. S/RES/1373 (2001) (“unequivocal condemnation of the terrorist attacks” that occurred on 9/11, “[r]eaffirming the inherent right of individual or collective self-defense,” and “[r]eaffirming the need to combat by all means . . . terrorist acts”); *id.* ¶ 3 (“Calls upon all States to . . . [c]ooperate . . . to prevent and suppress terrorist attacks and take action against perpetrators of such acts.”). The call to “suppress terrorist attacks,” to “combat by all means,” and to “take action” is close to creating a broader Security Council authorization to use armed force against terrorist attacks and perpetrators and is at least a significant recognition of the permissibility of suppression, combat, and responsive action when the right of self-defense is triggered by non-state actor “terrorist attacks.” *See, e.g.*, Paust, *Use of Armed Force, supra note* 176, at 544-45.

*Paust, Use of Armed Force, supra note* 176, at 533-36; *see also* Greenwood, *Historical Development, supra note* 43, at 21-23; Adam Roberts, *The Laws of War in the War on Terror, in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS*, at 65, 68 (“As regards the *ius ad bellum* issues raised after 11 September, my own views are in favour of the legality . . . of the military action in Afghanistan.”); O’Connell, *INTERNATIONAL LAW AND THE USE OF FORCE* at 450-51 (“[U]se of force in Afghanistan in 2001 was lawful self-defense. . . September 11 attacks were part of a series of terrorist actions” that began in 1993 “and would include future attacks,” and Security Council resolutions “reveal the Council’s consensus that armed force in self-defense following terrorist attacks is lawful.”); Jonathan Ulrich, *Note, The Gloves Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism, 45 VA. J. INT’L L.* 1029, 1047-49 (2005).

*Paust, Use of Armed Force, supra note* 176, at 540-43.

*Paust, Self-Defense Targeting of Non-State Actors, supra note* 2, at 249.

*Id.*

*Id.*

Targeting killings outside the traditional battlefield:
III. Evolving the laws of armed conflict to encompass targeting transnational armed terrorists wherever those groups are found.

Again, imagine a non-state terrorist group in Mexico, with no obvious ties to the Mexican government gaining control of rockets. The non-state group launches multiple rockets, targeting US military bases in Texas. Suppose also, the attack is not a single rocket, but involved multiple targets in Texas for a sustained period. As rockets rain down on Texas, the US is not required to obtain expressed consent from either the United Nations, or the Mexican government before responding in self-defense. No government would hold its response in the face of an ongoing attack. Certainly, the US president would communicate as soon as possible with Mexico’s president, but no leader would wait for formal permission while rockets are raining down on its country. Nor would the leader of the targeted government be required to warn the authorities in the host state before responding in self-defense against terrorists in the host country.

Also, a warning may not be practical, as it may undermine the self-defense response by endangering a responding special operations unit. This type of self-defense would interfere with Mexico’s sovereignty. The question, however, is not whether Mexico’s sovereignty has been interfered with when self-defense is used against non-state actors within its borders. Particularly when a state’s sovereignty is not considered absolute under international law. In contrast, the question is whether, under self-defense, a state’s territorial integrity is not absolute. This is further supported where signatories to the U.N. charter have agreed to the permissibility of self-defense under Article 51.

212 Paust, Self-Defense Targeting of Non-State Actors, supra note 2, at 255.
213 Id. at 256.
214 Id.
215 Id. See, e.g., Banks, supra note 110, at 93-94,0
216 Id. See, e.g., Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24-32 (Feb. 7); United States v. Von Leeb (The High Command Case), in 11 TRIALS OF WAR CRIMINALS BEFORE HE NUERNBERG MILITARY TRIBUNAS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 489 (1950) (“International law operates as a restriction and limitation on the sovereignty of nations.”); Lung-Chu Chen, An Introduction to Contemporary International Law, 314 – 17 (2d ed. 2000); Henry Wheaton, Elements of International Law, 95 (Da Capo Press 1972) (1846) (sovereignty is not an absolute barrier to military intervention and cannot be exercised in a manner “inconsistent with the equal rights of other States”); Abrahm D. Sofera, The Sixth Annual Waldemar A. Self Lecture in International Law: Terrorism, the Law, and National Defense, 126 MIL. L. REV. 89, 106 (1989) (“[T]erritorial integrity is not entitled to absolute deference.”); see also RESTATEMENT, § 905 cmt. g (1987) (“It is generally accepted that Article 2(4) [of the U.N. Charter] does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976.”); Koh, Obama Administration, pt. B (“[W]ether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including . . . the sovereignty of the other states involved.”). More specifically, the pretended cloak of state sovereignty ends where human rights begin (especially with respect to public, diplomatic, and juridic sanctions), although admittedly not all violations of international law by a state can lead to permissible use of force in response.
217 Id. See also recognitions of Ashburton and Webster during the Caroline incident; Letter of Letter from Daniel Webster, U.S. Sec’y of State, to Henry S. Fox, British Minister in Wash., D.C. (Apr. 24, 1841), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INT’L L. 454, 455 (1906)). (“Respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. And while it is admitted, on both sides, that there are exceptions to this rule . . . such exceptions must come within the limitations stated and the terms used in a former communication from this Department to the British Plenipotentiary here. Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’ ”). It is also of interest that intervention is not absolutely prohibited. For example, intervention into “the affairs of” a state is impermissible. See, e.g., U.N.
A. Taking aim when the target hides in plain sight?

Regardless of whether the US is involved in an international armed conflict, non-international armed conflict, or neither, the question remains of how to determine whether the individual is a member of a transnational terrorist group, and targetable. The initial targeting must first be justified under either self-defense, or jus ad bellum (just war) theories. Once targeting of a group is justified, there should be a link to the individual subjects of the drone attack and the targeted group. The US has justified drone strikes on terrorists in countries, it is not at war with, under the principle of self-defense. Under the principles of self-defense, the target of the defensive counter-attack must be a threat to the US, such that the use of defensive force is “necessary.” One individual, standing alone, is often not a sufficient threat to the US to warrant a drone attack. The individual’s threat comes from how his role in the greater organization affects the organization’s ability to threaten the US. Thus, the justification for the drone attack, as an act of self-defense, on an individual terrorist stems from that individual’s overall role in the terrorist organization. For instance, for targeting purposes, it does not matter whether he is transporting the detonator for a bomb, or the actual explosives because both are crucial to completing the explosive device for its later use. A government need not wait until the bomb is finished to act. If the government has waited a moment too long, the terrorist accomplishes their goal of detonating the device, causing loss of life that cannot be justified to the victims’ families using esoteric theories of outdated law. It is inexplicable, and unacceptable to the victims’ families to require that their government watch terrorists build a bomb for weeks, but wait to act until the last minute because of some outdated rules of warfare, that the transnationals ignore and exploit to gain advantage. Who

---

Charter art. 2(7); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. G.AOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121, (Oct. 24, 1970). But non-state actor armed attacks emanating from a state are not simplistically merely the “affairs of” that state. Within the Americas, self-defense “in accordance with existing treaties or in fulfillment thereof” is also permissible under Article 22 of the O.A.S. Charter. Charter of the Organization of American States, art. 22, Apr. 30, 1948, 2 U.S.T. 2394. Article 21 of the O.A.S. Charter declares that “territory of a State is inviolable” and “may not be the object . . . of . . . measures of force” (id. art. 21), but self-defense is an exception under the U.N. Charter and, therefore, Article 22, and in the hypothetical the territory of Mexico would not be “the object” of a selective self-defense strike against non-state attackers nor would the use of force be “against” its territory or its territorial “integrity” within the language of Article 2(4) of the U.N. Charter in view of its character, gravity, and scale.

210Ohlin, supra note 26, at 63; Fleck, supra note 41, at 46. Murphy, Due Process, supra note 1, at 405, 416. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (conflict with Al Qaeda is a non-international armed conflict falling under Common Article 3). For discussion, See D. Glazier, supra note 41, at 55, 60. (“Recognizing that the terrorism conflict does not fit particularly well with traditional classifications of either ‘international’ or ‘non-international’ armed conflict, it concludes that this war is instead best defined as ‘transnational.’”) Ohlin, supra note 26, at 62; Compare. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 189, 194 (July 9, 2004) (no international right of self-defense against non-state actors), with Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222–6 (December 19). See also O’Connell, The Legal Case Against, supra note 156, at 349.

then, are we fighting-- the terrorists, or the outdated ideas of warfare?\textsuperscript{222} There is nothing in Article 51 of the UN Charter limiting the concept of an armed attack to an attack done by a state actor, nor was there any limitation known in customary international law prior to the adoption of the UN Charter. In fact, the original case dealing with the right of self-defense was about military reaction to attacks by non-state actors.\textsuperscript{223} In general, the international community has rejected the idea of restricting the right of self-defense based on the attacker’s non-state status.\textsuperscript{224}

B. Proposing solutions.

The current participants in a modern war do not fit into past definitions of warfare. The transnational terrorist is neither a civilian nor a combatant, but more akin to something in between. In order to live up to the ideals aspiring the Hague and the Geneva Conventions, the laws of warfare must evolve with the technology. To fail to do so, to fail to evolve, exposes civilians to the very risks the Conventions sought to minimize. This evolution should take place not after the fact, but rather, in front of warfare’s evolution. Failing to evolve in pace with warfare leaves governments who find themselves attacked by a transnational organizations in the position of having to guess what will be judged in the future as an acceptable reaction, while at the same time protecting their citizens. It is difficult, then, to know when it is appropriate to target suspected terrorists where they are not identifiable by carrying weapons in the open, or in a uniform with a recognizable insignia.

1. Direct participation in the hostilities as a means to identify who can be appropriately targeted.

Further defining the term direct participation in the hostilities (DPH) may provide more guidance as to when a transnational terrorist member can lawfully be targeted. Civilians are generally protected from attack under the laws of war.\textsuperscript{225} This protection is exploited by those who actually participate in the hostilities, while hiding under the guise of being a civilian. For these covert attackers, identifying themselves as soldiers exposes them to the risk of reciprocal attack, and risks undermining their covert actions.\textsuperscript{226} Under the principles of \textit{jus in bello}, civilians who directly participate in the armed conflict are not granted the protected status of civilian ‘for such time as they directly participate in the hostilities.’\textsuperscript{227} However, the protection granted to a civilian is not instantly forfeited simply by holding a gun, there must be a quasi-causal link between the civilian and the larger armed conflict. The

\textsuperscript{222} Greenwood, Historical Development, \textit{supra} note 43, at 1-43, 6.
\textsuperscript{225} Contrast E.g. Randelzofer in Simma (Ed.), 802; ICJ Advisory Opinion on \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, ICJ Reports, 2004, 136 at para. 139.
extent of the quasi-causal link is largely undefined and there are few controlling sources available to shed light on its definition further. A working definition of what entails ‘direct participation in the hostilities’ from an authoritative source is crucial to determine who and when targeting a person is lawful under the principles of armed conflict.

Although not binding on the international court, the Inter-American Commission on Human Rights has attempted to define the term ‘direct participant in the hostilities’ as “acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material.” This definition provides a limited application. It reduces the definition of DPH to a causal link that cannot be objectively determined and leaves open the type of participation and the closeness to the participation to the intended harm.

The definition also fails to resolve how to evaluate evidence of direct participation, as well as who makes that evaluation. On a traditional battlefield, a private may have seconds to see the enemy combatant and fire before being fired upon. Any error may be reviewed internally—if at all. Any review would be based on the information available to the private, from the perspective of the private in those quick moments of decision. Should that decision later be wrong, and civilians were killed, those casualties would be considered unfortunate casualties of war, unless the private did something very wrong in that moment before firing. In contrast, the process of targeting those directly participating in hostilities should be a more careful one, where the target’s actions are more covert. The decision should be made more methodically, with more evidence of participation. The decision should also be made by someone with a higher rank, to reflect that the situation allows for more time to gather and analyze evidence.

2. Direct v. Indirect participation in hostilities as a way to determine membership.

Negligence theory provides another way to analyze how to think of the link between an actor and the injury—or, as in transnational terrorism, the contributor and the resulting act of terrorism. There, the key question is not whether any causal link exists, but whether there is ‘but-for’, or proximate cause linking the action of the direct participant and the resulting harm. In essence, but-for the action, the resulting harm would not have occurred. Likewise, applying the concept of causation to defining a combatant, considers the chain of actions and participants required leading to an armed attack. At one end of the spectrum, is the “non-combatant” firing a weapon at enemy forces. Shooting at enemy forces is clearly directly participating in the hostilities, and the shooter can clearly be targeted. Examples of actors that may not arise to direct participation in hostilities, but who should be legitimate targets under a but-for analysis, include the person building the bomb, the person bringing the necessary equipment to build the bomb, and the civilian who did participate in building a bomb yesterday, and will again tomorrow, but who is taking the day off. If this person were considered a combatant, this person would continue to be a combatant on his day off, subject to the principles of necessity and proportionality. If the same contribution of the person leads


229 Id.

230 Id. at 66-67; Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, 146 (3rd ed, 2000).
to the same ends under a but-for analysis, the person directly participating should also be targetable, subject to what is necessary and proportionate.

To understand who may be a targetable direct participant, contrast the person who is considered an ‘indirect participant’. The Inter-American Commission on Human Rights, as cited by the ICRC Commentary, proposes that ‘indirect participation’ should be limited to forms of participation that do not result in “acts of violence which pose an immediate threat of actual harm to the adverse party.” This would include actions that merely support the military effort, such as commercial sales. The ICRC points to the term directly participating in the hostilities as defined by the International Criminal Court to include scouting, spying and sabotage, but to exclude food deliveries and household domestic staff. In contrast, the ICRC defines the term ‘direct causation’ by implying the “harm in question must be brought about in one causal step.”

Using a but-for analysis provides a meaningful framework to analyze the contribution. Without action ‘x,’ would the result happen? A bomb cannot be built without the detonator, explosives, or trigger. Stopping any actor, stops the completion of a bomb intended to target civilians. Targeting any member in this chain accomplishes the end goals of the Geneva Convention, by protecting innocent civilians from the harm.

3. Military Membership as a means to identify appropriate targets.

   a. Form v. Function

Traditionally, it was justified to target individuals based on their membership in a military force. Criteria to be considered a member of the force include: wearing a military uniform, displaying a recognizable emblem, and carrying arms openly. Using membership to establish whether someone can be targeted is easier where membership is obvious. The

---


232 Id.


235 Id.

236 Id. see also *Interpretative Guidance*, at 1022. (but concluding that if recruitment and training are for a particular hostile act, these activities are considered “integral” to the hostile act and therefore stand in a one-step causal relation to the harm).

person who openly displays his membership subjects himself to being targeted at any time, whether he is actually engaging in combat.238

In contrast, a terroristic organization does not comply with the formalistic requirements to grant membership in a military organization. Terrorists may have a loose command structure, but they do not wear uniforms, display emblems, or carry arms openly. In fact, the terrorist purposefully hides his participation to gain advantage.239 This old formalistic approach worked with traditional methods of war. In fact, this method of defining combatants was likely adopted because it was the easiest and most obvious way to distinguish combatants from civilians based on the way wars were fought. When framing this distinction, the authors were defining civilians and combatant membership with the goal of extending POW protection to as many people as possible.

Rather than determine membership based on this formalist requirement it may be more practical to define membership based on function rather than form.240 A definition of membership that focuses on the functional definition of membership, would consider whether an individual received and carried out orders from another in the organization’s hierarchy.241 Under a functional definition of membership, an individual would be assigned membership based on his known relationship to the organization’s hierarchy, even if that hierarchy is irregular, or shifts constantly. This version of membership could be applied to terrorist organizations, even where they lack the structural organization that typically defines other military organizations.242

---

238 William Bradford, In the Minds of Men: A Theory of Compliance with the Laws of War, 36 ARIZ. ST. L.J. 1243, 1269 (2004) (identifying transparency as one factor that determines whether states comply with IHL specifically and legal regimes generally). But see Fleck, The Handbook, n. 12, 80 (concluding that members of the armed forces who do not take direct part in hostilities are non-combatants); Prosecutor v. Halilovic, ICTY Trial Chamber, No. IT-01-48-T, para. 34 (November 16, 2005).

239 Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) (membership in “command structure” is a sufficient but not necessary condition for legal determination that detainee is a member of Al Qaeda). For a discussion, see also John B. Bellinger III and Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 A.J.I.L. 201, 220 (2011) (discussing need for workable criteria for detention of unlawful combatants based on their status). Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to the sour Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities 42 NYU J. of INT’L L. & POLITICS, 831, 843 (2010) (distinguishing functional from formal concepts of membership). See Program on Humanitarian Policy and Conflict Research, Harvard University, “IHL and Civilian Participation in Hostilities in the OPT,” Policy Brief, October 2007, 10 (“The end of membership must be objectively communicated, posing the same intelligence problems as the affirmative disengagement approach above, especially given that many groups may not have official rosters of membership, uniforms, or centralized housing.”)

240 Ohlin, supra note 26, at 74. See Interpretive Guidance, at 1005 (concluding that membership in military organizations is based on “formal integration into permanent units distinguishable by uniforms, insignia and equipment” but that membership in irregular groups requires functional criteria). For an example, see Al Warafi v. Obama, 704 F. Supp. 2d 32, 38 (D.D.C. 2010) (functional approach requires determination that the individual “functioned or participated within or under the command structure of the Taliban—i.e. whether he received and executed orders or directions”); Hamilit, 616, F. Supp. 2d at 75.

241 Al Warafi v. Obama, 704 F. Supp. 2d 32, 38 (but noting that knowledge and intent is required and excluding those who “unwittingly become part of the apparatus”).

242 Ohlin, supra note 26, at 74
Targeting killings outside the traditional battlefield:

b. Membership as a defining principle

Many scholars and military practitioners have questioned the conventional laws of war as applied to modern warfare, because those who engage in hostilities against organized armed forces purposefully exploit these laws to gain advantage, which in turn, exposes civilians to increased dangers.243 The dangers are increased by terrorists who do not fit into the conventional definitions of ‘combatant’ nor of ‘civilian’ and who purposely blend into the civilian population. In so doing, the terrorist attempts to increase their effectiveness and survivability during military operations by exploiting their opponent’s obligation to protect the civilian population.244 Arguably, allowing non-state terrorists to qualify for POW status upon capture, will provide incentive for the non-state actor to comply with the remaining law of war requirements.

In contrast, a modernizing definition of “unlawful combatant” and “direct participant in hostilities” can address the problems for modern militaries where fighters purposely attack from within the civilian population, then hide behind the protected status of the civilians around them to escape legitimate targeting efforts.245 This new view must allow the targeting of organized group members who are engaged in hostilities with state militaries – including those who may not actually be pulling the trigger, or setting off the explosive, but who play a supporting role in the organization, such as the bomb makers and the trainers. In either scenario, the principle of distinction between lawful and unlawful combatant becomes unnecessary. The basis for targeting the trainers and bomb makers is based not on their actions, but by their membership in the terrorist organization.246 A broader definition of the term “direct participation in hostilities” is required to address the civilian who, by deciding to participate in the hostilities, has surrendered his immunity from attack either by conducting hostilities or by directly supporting those who do.247

4. Where the transnational terrorist organization “controls” the actions of the individual.

Another possible theory to connect between the individual with the larger terrorist organization, is to analyze whether the collective group “controls” the actions of the individual. A similar principle was discussed in the Nicaragua case by the ICJ in determining whether an armed group’s actions were attributable to a state in holding that state responsible for the group’s actions.248 The court held that the group’s actions were attributable where the state exercised “effective control” over the group’s actions. In applying the “effective control” test, the ICJ found the US was not in control of the contras in Nicaragua, even though the US was involved in the “planning, direction and support” of the paramilitary activities of the Contras. There was, however, insufficient evidence to support the conclusion

243 Jensen: Direct Participation in Hostilities, supra note 5, at 85; Richard D. Rosen, Targeting Enemy Forces in the War on Terror: preserving Civilian Immunity, VANDERBILT J. OF TRANSNAT’L L 42, 683(May 2009).
244 Jensen: Direct Participation in Hostilities, supra note 5, at 85. Contrast Crane and Reisner’s assertion that the traditional definitions of the law of war should be amended to allow non-state actors to gain combatant status if they follow the remaining requirements to be considered a combatant.
245 Id. at 86.
246 Id.
247 Id.
that the US directed or enforced the specific acts that were contrary to human rights and humanitarian law.249

The extent of control was also addressed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in Prosecutor v. Tadic.250 The ICTY rejected ICJ’s ‘effective control’ test and outlined a new standard based on the ‘overall control’ of the state. Under the ‘overall control’ test, a link between a state and a terrorist actor requires more than providing financing or military equipment. The ‘overall control’ standard is met by providing general military planning and supervision of a paramilitary organization, even where the state has not specifically directed the paramilitary organization’s military operations.251

There are several problems with applying either version of the ‘control’ test during an armed conflict with a non-state transnational organization. There is no international guidance as to how much evidence should be required before a state can consider the member of the transnational organization a legitimate target. There is also no recognized guidance as to the criteria used to evaluate the evidence. Certainly one factor would be the reliability and regency of the evidence, but without international consensus, those responding to terrorism, must use their best judgment.252 In many situations, Al Qaeda is reduced to a parent organization that provides merely ideological and rhetorical support, without giving direct operational support to the local terrorist organization.253 As a result of being so localized, some loosely affiliated organizations with Al Qaeda, may be so loosely affiliated, they cannot be part of any arguable armed conflict with the US—at least not through Al Qaeda.

IV. Conclusion

Leaders over the centuries have ventured to make warfare as humane as possible by agreeing to a code minimizing suffering of the civilians caught in war’s deadly grip. Those rules have evolved as new methods of war have been invented, each time with the goal of minimizing civilian suffering. The laws which intended to protect civilians are now being exploited to intentionally put civilians at risk. Leaders of those countries whose civilians are being targeted, must protect their own citizens. Guidance from the international community would be helpful, so long as it ensures protection of civilians in both the areas targeted by terrorist, as well as the areas where the terrorists hide. Demonizing the governments who respond to the increased trend of terrorism while they attempt to adhere to the principles of minimizing civilian damage, ultimately undermines the goal of creating laws of war.

If the international community requires governments to choose between protecting its citizens or adhering to outdated principles of warfare, any legitimate, surviving government must choose to protect its citizens. Therefore, insisting on the choice, effectively undermines and negates centuries of international law. In the end, the laws of war will find itself having gone the way of the dinosaurs and the do-do birds--- antiquated, extinct, and a fond, but distant memory.

251 Id.
252 Id.
253 Ohlin, supra note 26, at 75.
V. Bibliography

Cases:

*Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010).


*Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).


Books and Book Chapters:


Targeting killings outside the traditional battlefield:


**Journal Articles:**


Targeting killings outside the traditional battlefield:


Targeting killings outside the traditional battlefield:


**Commentaries:**


*RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432(2), 433(1)(a) (1987).*
United Nations Documents:

U.N. Charter art. 51


International Committee of the Red Cross Documents:

Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

Appeal by the International Committee of the Red Cross on the 20th anniversary of the adoption of the Additional Protocols of 1977.


International Criminal Opinions:

Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).


Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244 (July 8).


Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at 245, ¶ 41(July 8).


Targeting killings outside the traditional battlefield:


**International Treaties:**


Additional Protocol I; Art. 48.

Additional Protocol I, Article 43 and 44.


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.


International Covenant on Civil and Political Rights, Art. 6, § 1


International Convention on the Protection of the Rights of All Migrant Workers and members of their Families 1990.

UN Human Rights Committee General Comment No 29, States of Emergency.


**News Articles:**


**On Line Resources:**


Alex Rodriguez, *Pakistan Turns to Drones of Its Own*, latimes.com, (Oct. 9, 2009).


**Miscellaneous:**
