

**OPERATIONALIZING USE OF DRONES
AGAINST NON-STATE TERRORISTS UNDER
THE INTERNATIONAL LAW OF SELF-
DEFENSE**

Jordan J. Paust

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As the war in Afghanistan dies down, some within the Government of the United States and lawyers within the U.S. Armed Forces will most likely reconsider whether a law of war paradigm would be relevant with respect to future drone targetings of members of al Qaeda, its associates, and other non-state terrorist groups that operate in Afghanistan and in other parts of the world. With respect to an alternative legal basis for drone targetings under the international law of self-defense, they will also most likely reconsider how the international law of self-defense should be implemented in case of non-state terrorist attacks emanating from within a foreign state. In particular, detailed attention is likely to continue regarding who and what can be targeted in response to new and ongoing terroristic non-state actor armed attacks on U.S. embassies, U.S. military and other U.S. nationals abroad and across our borders and what criteria and features of context should be considered when making a targeting decision. This article addresses whether the laws of war apply to use of measures of armed force against members of al Qaeda, the propriety of self-defense targetings of non-state actors in a foreign state, who and what can be targeted under the law of self-defense, criteria for operationalizing choice with respect to when and how to target, and certain future types of drones that might be utilized. Also addressed are reasons why human rights law and the U.S. Constitution do not prohibit legitimate self-defense targetings. A final section addresses limitations that exist under a law enforcement paradigm and why measures of self and collective self-defense are not simplistically measures of domestic law enforcement.

I. THE LAW OF WAR PARADIGM

The Obama Administration attempted to justify drone targetings of some members of al Qaeda and their associates in part by claiming that the United States and al Qaeda are engaged in an ongoing armed conflict to which at least part of the laws of war apply.¹ If there had been an armed conflict with al

¹ See, e.g., Barack Obama, Remarks by the President on the Middle East and North Africa (May 19, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa%20>; Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-President-on-National-Security-5-21-09; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address at the

Qaeda, the laws of war would have allowed the targeting of members of al Qaeda who had not surrendered² and who had been direct participants in hostilities (i.e., as civilians who were DPH)³ or who had been members of an organized armed group engaged in the conflict and who had a continuous combat function (i.e., as fighters who were CCF).⁴ One problem with the Obama Administration's claim is that under the customary laws of war the United States cannot be and has never been in an armed

Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (claiming that "the United States is in an armed conflict with al-Qaeda . . . [they] continue[] to attack us . . . [during] this ongoing armed conflict . . ."); Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1 (reporting that the U.S. Executive has a secret June 2010 memo that had sanctified the killing of Anwar al-Awlaki as a law of war measure because he allegedly played a direct part in an alleged war between the United States and al Qaeda and its associates). The Bush Administration had also claimed that the U.S. had been engaged in an armed conflict with al Qaeda. See, e.g., Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001) (President Bush claimed that the 9/11 attacks, and various other events, had "created a state of armed conflict").

² See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 23(c), 36 Stat. 2277; T.S. No. 539 (Oct. 18, 1907) (claiming that it is especially unlawful "[t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion"); Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 7 BROOK. L. REV. 437, 439–40 (2012); Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 538–39 (2013); Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293, 309–10 (2012); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 582 (2011); Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 EUR. J. INT'L L. 855, 860–61 (2013). But see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 819–20, 830, 839 (2013).

³ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(3) ("Civilians shall enjoy . . . protection . . . unless and for such time as they take a direct part in hostilities.") (June 8, 1977), 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; Lewis, *supra* note 2, at 310–11; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 271–72, 275 (2010) [hereinafter *U.S. Use of Drones in Pakistan*]; Paust, *supra* note 2, at 571, 575, 580.

⁴ See, e.g., JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 719–20 (4th ed. 2013) [hereinafter INTERNATIONAL CRIMINAL LAW]; Lewis, *supra* note 2, at 311; Paust, *supra* note 2, at 571, 575–76, 579–80; *U.S. Use of Drones in Pakistan*, *supra* note 3, at 271–72.

conflict with al Qaeda,⁵ although the United States has been in a real war with the Taliban in Afghanistan for some thirteen years and the laws of war have been applicable in Afghanistan and a de facto theatre of war that has expanded into parts of Pakistan.⁶ The existence of an international armed conflict with the Taliban in Afghanistan has allowed the targeting of members of al Qaeda who were DPH and/or CCF in connection with that armed conflict, but the law of war competence that exists to target members of al Qaeda who directly participate in that war will end when the war in Afghanistan ends.

In the future, it is possible that some non-state terrorist group

⁵ See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 685, 690; Jordan J. Paust, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule: Propriety of Self-Defense Targetings of Members of al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L & COMP. L. 565, 566–72 (2012) [hereinafter *Civilian Casualties in Modern Warfare*]. At least thirty writers have recognized that the U.S. simply cannot be at war with al Qaeda. See e.g., ANTONIO CASSESE, INTERNATIONAL LAW 410 (2d ed. 2005); INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 690; *Civilian Casualties in Modern Warfare*, *supra* at 567, 569 n.10. As noted, al Qaeda never met the traditional customary criteria for an insurgent status and an insurgency is the lowest level of armed conflict under the customary laws of war. *Civilian Casualties in Modern Warfare*, *supra* at 567–70 (noting in particular that al Qaeda never (1) had the semblance of a government, (2) had an organized military force with a responsible command, (3) fielded military units in sustained, concerted, protracted, and open hostilities, and (4) controlled significant portions of territory as its own). See also *Civilian Casualties in Modern Warfare*, *supra* at 570 (al Qaeda did not even meet the criteria set forth in Article 1(1) of Geneva Protocol II). It would be doubly wrong to consider that the U.S. and al Qaeda have been engaged in an insurgency or armed conflict not of an international character (NIAC) because (1) al Qaeda never met the customary criteria for insurgent status, and (2) if it had, the conflict would have been internationalized by U.S. engagement in armed hostilities as well as the fact that al Qaeda's violence has occurred outside of a single state. See INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 698; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, art. 3, 75 U.N.T.S. 287 (“[A]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .”) (emphasis added).

⁶ See, e.g., Paust, *supra* note 2, at 571, 579–80; U.S. *Use of Drones in Pakistan*, *supra* note 3, at 254–55 n. 44; Katharine Q. Seelye, *A Nation Challenged: Captives; In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A6. The armed conflict has been an armed conflict of an international character to which all of the customary laws of war have been applicable as well as relevant treaty-based laws of war. See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 690; Jordan J. Paust, *The Legal Implications of the Response to September 11, 2001: Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 539 n.19 (2002) [hereinafter *Legal Implications*]; U.S. *Use of Drones in Pakistan*, *supra* note 3, at 261.

will have the legal status of an insurgent⁷ or a belligerent⁸ operating in a foreign country and that the United States will engage in fighting members of such a group. If so, the law of war paradigm will apply. Importantly, whenever U.S. military personnel engage in fighting during hostilities abroad the U.S. Government should recognize that such direct U.S. participation in hostilities has internationalized the armed conflict if it had not previously been an armed conflict of an international character so that U.S. military personnel will have combatant status and combatant immunity for lawful acts of war.⁹ Otherwise, U.S. soldiers could be prosecuted under relevant domestic law for murder or other domestic crimes for what would have been privileged acts of war during an international armed conflict.¹⁰

⁷ See *Civilian Casualties in Modern Warfare*, *supra* note 5, at 568 (concerning criteria that must be met for insurgent status under the customary laws of war). It is doubted that ISIS (the self-proclaimed Islamic State of Iraq and Syria), which has engaged in open and protracted fighting in Syria and Iraq in 2014 and controls territory as its own, has had outside recognition as a “belligerent.” However, it seems clear that ISIS is an insurgent. Yet, U.S. use of force against ISIS in collective self-defense with Iraq in Iraq and parts of Syria has internationalized the armed conflict in Iraq. See *infra* discussion at note 9 (“[W]henver U.S. military personnel engage in fighting during hostilities abroad the U.S. Government should recognize that such direct U.S. participation in hostilities has internationalized the armed conflict if it had not previously been an armed conflict of an international character . . .”).

⁸ The same criteria needed for insurgent status must be met for belligerent status plus there must be recognition by some members of the international community that the party engaged in armed hostilities is a belligerent, nation, people, or state. See *The Prize Cases: Brig Amy Warwick*, 67 U.S. 635, 666–67, 669 (1863) (“When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents . . . Foreign nations acknowledge it as war by a declaration of neutrality. . . . ‘recognizing hostilities as existing’ . . .”); *The Santissima Trinidad*, 20 U.S. 283, 337 (1822) (“The government of the United States has recognized the existence of a civil war between Spain and her colonies . . . Each party is, therefore, deemed by us a belligerent nation . . .”); U.S. DEPT’ *ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE*, para. 11(a) (July 1956) (“Customary Law. The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.”) [hereinafter *FM 27-10*]; *INTERNATIONAL CRIMINAL LAW*, *supra* note 4, at 678, 682, 685, 709; *Civilian Casualties in Modern Warfare*, *supra* note 5, at 567–68.

⁹ See, e.g., *INTERNATIONAL CRIMINAL LAW*, *supra* note 4, at 685–86, 697–98; Lewis, *supra* note 2, at 309 n.96; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 683–85 & n.35 (2002) [hereinafter *Antiterrorism Military Commissions*]; Paust, *supra* note 2, at 580 n.57; *U.S. Use of Drones in Pakistan*, *supra* note 3, at 261.

¹⁰ See *Antiterrorism Military Commissions*, *supra* note 9, at 683–85 & n.35;

II. THE SELF-DEFENSE PARADIGM

The Obama Administration has also rightly recognized that the international law of self-defense provides an alternative competence to target members of al Qaeda and its associates who have directly participated in continuous armed attacks against the United States, its embassies, its military personnel, and its other nationals abroad.¹¹ The right to engage in legitimate measures of self-defense and use of the self-defense paradigm have been operative alongside the law of war paradigm with respect to the armed conflict in Afghanistan and its expanded theatre of war¹² and the President has a constitutionally-based power to use military force that is permissible under the international law of self-defense,¹³ but governmental policy

e.g., *U.S. Use of Drones in Pakistan*, *supra* note 3, at 278–80 (Importantly, under the self-defense paradigm customary international law based on actual general patterns of practice and *opinio juris* apparently allows a form of self-defense immunity for those engaged in permissible measures of self-defense).

¹¹ See, *e.g.*, John O. Brennan, Ass't to the President for Homeland Sec. & Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* <http://www.lawfareblog.com/2012/04/brennanspeech>; Koh, *supra* note 1 (rightly noting that certain targetings of members of al Qaeda can be lawful measures of self-defense); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 270–72, 275; *Legal Implications*, *supra* note 6, at 533–36; *infra* text accompanying notes 12–13, 16–18, 21, 23.

¹² Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) [hereinafter AUMF] (The preamble to the AUMF expressly affirmed that it was “both necessary and appropriate that the United States exercise its rights to *self-defense*” in response to al Qaeda’s 9/11 attacks “and to protect United States citizens both at home and abroad.” *Id.* prmb. (emphasis added). Clearly therefore, the authorizations in the AUMF are not limited to a circumstance when the laws of war apply. The AUMF also stated “[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” *Id.* § 2(a). The meaning of the word “appropriate” includes that which is appropriate under international law, thereby providing an authorization and a limitation measured in part by international law. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004). More specifically, the phrase “appropriate force” can include lawful measures of self-defense and collective self-defense. *E.g.*, Brennan, *supra* note 11.

¹³ See, *e.g.*, AUMF, 115 Stat. 224, prmb. (“Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States[.]”); Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT’L L. REV. 43, 46–51, 50 n.29, 54 (2012) (addressing the constitutionally-based power and duty of the President to faithfully execute the laws, including international law); see AUMF, 115 Stat. 224 (Even though the war in Afghanistan is winding down and the U.S. cannot be at war with al

makers and those who will operationalize future drone targetings as an exercise of the right of self-defense against non-state actor attacks will need to pay more detailed attention to the law of self-defense as the primary legal basis for continued targetings of members of al Qaeda and its associates when U.S. participation in the Afghan war ends. As noted in Part II B and C below, what is a permissible or impermissible use of force under the laws of war can provide general guidance and detail that is useful by analogy for inquiry into the full meaning and for refined application in particular contexts of general principles that are part of the law of self-defense.

A. Propriety of Self-Defense Targetings in a Foreign State

After the non-state armed attacks by al Qaeda on the World Trade Center and the Pentagon on 9/11,¹⁴ the United Nations Security Council and NATO recognized the right of the United States to engage in responsive measures of self-defense under the United Nations Charter.¹⁵ As noted in another article, writings of the vast majority of textwriters¹⁶ affirm that use of measures of

Qaeda, the AUMF continues to be a relevant recognition of constitutional authority and a grant of statutory authority with respect to use of all necessary and appropriate force in the exercise of U.S. rights to use measures of self-defense against al Qaeda and other listed organizations and persons that were connected to the 9/11 attacks).

¹⁴ See *Legal Implications*, *supra* note 6, at 533–35.

¹⁵ See, e.g., U.N. S.C. Res. 1368, para. 3–5, U.N. Doc. S/RES/1368 (Sept. 12, 2001); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 248; *Legal Implications*, *supra* note 6, at 544–46. See also U.N.S.C. Res. 1373, prmb., U.N. Doc. S/RES/1373 (Sept. 28, 2001) (providing “unequivocal condemnation of the terrorist attacks” that occurred on 9/11 and “[r]eaffirming the inherent right of individual or collective self-defence . . . [.]”); United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, ¶¶ 58–59 (May 1980) (non-state “militants” engaged in an “attack” on the U.S. Embassy and personnel in Tehran, Iran); *Id.* ¶ 91 (“the armed attack by the militants” occurred prior to state endorsement of the Embassy takeover and the hostage-taking); I.C.J. opinion *infra* note 22.

¹⁶ See *U.S. Use of Drones in Pakistan*, *supra* note 3, at 239–41 & n.3 (identifying over fifty-three writers); Michael N. Schmitt, *Extraterritorial Lethal Targeting*, 52 COLUM. J. TRANSNAT'L L. 77, 86–87 (2013) [hereinafter *Extraterritorial*]; Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 51 VA. J. INT'L L. 483, 493 (2012); Gordon Modarai et al., *The Seizure of Abu Anas Al-Libi: An International Law Assessment*, 89 INT'L L. STUD. 817, 822 (2013) (four authors on the faculty of the U.S. Naval War College agree); COMMITTEE ON INTERNATIONAL LAW, NEW YORK CITY BAR ASSOCIATION, THE LEGALITY UNDER INTERNATIONAL LAW OF TARGETED KILLINGS BY DRONES LAUNCHED BY THE UNITED STATES 9, 11, 63–64 (June 16, 2014) [hereinafter NYC BAR REPORT]; other writers cited *infra* notes 18, 21 (also

self-defense against armed attacks by non-state actors is permissible under Article 51 of the United Nations Charter¹⁷ and relevant customary international law even though it is well-known that the direct effects of responsive force will most often occur in a foreign country.¹⁸ Moreover, as treaty law operative

noting relevant state practice), 23; *but see* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 358 (2010) [hereinafter O'Connell, *Choice*] (curiously claiming that there is "virtually no support in international law" for use of self-defense against armed attacks by non-state groups, that "[t]he right to use force in self-defense applies to interstate uses of force" and "[t]he law of self-defense was designed to allow . . . [self-defense] against another state responsible for attacking the defending state"); *but see supra* text accompanying note 15; *infra* text accompanying notes 18, 21–25; O'Connell, *Choice, supra* at 359 (claiming that "self-defense may only be carried out on the territory of a state responsible"); Mary Ellen O'Connell, *Why U.S. Raid in Libya is a Sign of Hope*, CNN (June 19, 2014, 8:03 AM), <http://www.cnn.com/2014/06/18/opinion/oconnell-khattalah-arrest-benghazi/> (claiming that "where we have a right of self-defense . . . has only been in Afghanistan post 9/11. In other countries where the United States is using drone attacks – Pakistan, Yemen, and Somalia – the United States has not been attacked in a way that can trigger our international right of self-defense. The law requires that the state using military force in self-defense counterattack only when it has been the victim of a significant attack by a state responsible for the attack."). Earlier, Professor O'Connell had been seemingly in agreement with the vast majority of writers. *See* Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 450–51 (2003) ("[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.").

¹⁷ *See* U.N. Charter, art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"). With respect to the critical issue regarding when an armed attack has begun or is underway, *see, e.g.*, Jordan J. Paust, *Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?*, 45 GEO. J. INT'L L. 411, 414–17, 437–38, 440 n.74 (2014) [hereinafter *Armed Attacks*]. The article also demonstrates why preemptive self-defense would be unlawful. *See id.* at 419–21. *See also* NYC BAR REPORT, *supra* note 16, at 94.

¹⁸ *See, e.g.*, CASSESE, *supra* note 5, at 354–55; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 183–85, 187, 204–06, 208, 271 (4th ed. 2005); *U.S. Use of Drones in Pakistan, supra* note 3, at 238–49, 279; NYC BAR REPORT, *supra* note 16, at 9, 70–72; *infra* text accompanying notes 21, 24, 102. If responsive force is directed merely against the non-state actors who are perpetrating ongoing armed attacks, the use of force against them in a foreign state in compliance with Article 51 of the U.N. Charter is not a use of force against the foreign state, against its territory, or in violation of its territorial "integrity" within the meaning of Article 2(4) of the U.N. Charter. *See, e.g., U.S. Use of Drones in Pakistan, supra* note 3, at 279. Importantly, there are no geographic limits with respect to armed attacks that trigger the inherent right of self-defense. *See also* THOMAS BUERGENTHAL & SEAN D. MURPHY, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 401 (5th ed. 2013) ("'Proportionality' does

among the parties to the Charter, Article 51 provides general treaty-based consent among the members of the United Nations to use permissible measures of self-defense when a new armed attack is underway or armed attacks are continuous.¹⁹ My prior article also demonstrates that nothing in Article 51 of the U.N. Charter or in general patterns of pre- and post-Charter state practice and *opinio juris* (which are relevant to the formation of customary international law as well as proper interpretation of treaties)²⁰ requires that a state being attacked by non-state actors can only defend itself within its own borders or that a new special express consent is necessary from the state from which non-state actor armed attacks emanate and on whose territory a self-defense action takes place against the non-state actor.²¹ It would

not require that . . . defensive actions be restricted to a particular geographic zone.”). For example, an armed attack by a group that initiates a war between a nation or people and a state, a belligerency, or an insurgency within a single state can justify use of responsive armed force in self-defense. *See also Legal Implications, supra* note 6, at 534 (“[N]othing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors.”). In a given case, the U.S. might be acting in collective self-defense with a state, nation, people, or belligerent against a non-state actor located in a third state. Each of these actors has had a formal participatory role in international law and international law has never been merely state-to-state. *See, e.g.,* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977, 978–83 *passim* (2011). Attacks by non-state actors without formal participatory roles had also previously triggered rights of self-defense. *See, e.g., supra* text accompanying notes 14, 15; *infra* text accompanying note 21.

¹⁹ *See* U.N. Charter art. 51; TOM RUYLS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE U.N. CHARTER 55–60 (2010); *Use of Drones in Pakistan, supra* note 3, at 249.

²⁰ It is well recognized that patterns of practice and expectation need only be general for the existence of a customary international legal norm. *See, e.g.,* JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 93–95, 100, 105–07 (3d ed. 2009). Additionally, the evolving meaning or content of a treaty is based partly in the ordinary meaning of terms as supplemented by the object and purpose of the treaty and general patterns of practice and *opinio juris* over time. *See, e.g., id.* at 68–69, 71; Vienna Convention on the Law of Treaties, art. 31(1), (3)(b)–(c), Jan. 27, 1980, 1155 U.N.T.S. 331, *available at* https://www.oas.org/dil/Vienna_convention_on_the_Law_of_Treaties.pdf.

²¹ *See, e.g.,* DINSTEIN, *supra* note 18, at 245; Deeks, *supra* note 16, at 486 (“More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.”); *U.S. Use of Drones in Pakistan, supra* note 3, at 241–44 (noting the 1837 *Caroline* incident); *Id.* at 244–45 (noting the 1817 attacks from Amelia Island, 1814–1818 attacks from Spanish Florida, and the 1854 attacks in Nicaragua); *Id.* at 246 (noting the attacks by Pancho Villa from Mexico); *Id.* at

be incorrect to claim that a state has no right to defend itself outside its own territory absent (1) special express foreign state consent,²² (2) attribution or imputation of non-state actor attacks to the foreign state when the foreign state is substantially involved in the non-state actor attacks,²³ (3) the existence or

247 (noting the 1998 U.S. use of self-defense measures against al Qaeda in Afghanistan); *Id.* at 248 (noting the U.S. responsive force after 9/11 attacks); *Id.* at 249–58, 279; Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING TO FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN* 167–68, 176–77 (Michael N. Schmitt & Jelena Pejic eds., 2007); Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, U.N. H.R. Council, *Study on Targeted Killings*, ¶ 35, U.N. Doc. A/HRC/1424/Add.6 (May 28, 2010) (“A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if . . . [the] targeting . . . State has a right under international law to use force in self-defence under Article 51 of the UN Charter”); NYC BAR REPORT, *supra* note 16, at 9 (“[a]bsent consent”), 48 & n.190, 71 & n.258, 72 & n.262. With respect to self-defense and sovereignty, *see also U.S. Use of Drones in Pakistan*, *supra* note 3, at 256–57 & nn.47–48.

²² *See, e.g., supra* text accompanying note 21. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 144 (Dec. 19) (the I.C.J. impliedly recognized that consent of the territorial state is not required when it stated that Ugandan military operations in 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 [and, therefore, can] stand or fall by reference to self-defense as stated in Article 51 of the Charter.”).

²³ *See, e.g.,* DINSTEIN, *supra* note 18, at 206; *U.S. Use of Drones in Pakistan*, *supra* note 3, at 241 n.3, 244, 249–57; NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE* 41–42 (quoting Albrecht Randelzhofer, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 799 (Bruno Simma ed., 2d ed. 2002) (“For the purpose of responding to an ‘armed attack’, the state acting in self-defence is allowed to trespass on foreign territory, even when the attack cannot be attributed to the state from whose territory it is proceeding.”)) [hereinafter *CHARTER COMMENTARY*]; Kimberly N. Trapp, *The Use of Force Against Terrorists: A Reply to Christian J. Tams*, 20 *EUR. J. INT’L L.* 1049, 1051 (2009); NYC BAR REPORT, *supra* note 16, at 9 (“even if the territorial State is not responsible”); *Id.* at 63 (“without attributing”); *Id.* at 68 (when conduct is “not attributable”); *Id.* at 72 (when no control or “direct involvement” by a State exists and conduct is not “imputed” to the State). *But see*, Mary Ellen O’Connell, *The Resort to Drones Under International Law*, 39 *DENV. J. INT’L L. & POL’Y* 585, 590–91 (2011) (“[T]he ICJ has said that the armed attack must be attributable to a state for the exercise of self-defense on that state’s territory to be lawful.”) [hereinafter O’Connell, *Drones*]; Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 *U. PITT. L. REV.* 889, 899–900 (2002) (“[T]he need for taking defensive action can only justify fighting on the territory of another state if that state is responsible for the on-going attacks. It may well be that . . . a group launching significant, on-going armed attacks has no link to a state In those cases, measures other than self-defense on the territory of a state must be taken [When] a state is held responsible . . . [is] when the defending state may take the fight to

creation of a relevant international or non-international armed conflict,²⁴ or (4) a circumstance where the foreign state is unwilling or unable to stop non-state actor armed attacks that are emanating from its territory.²⁵ There is no evidence of a consistent pattern of generally shared legal expectation in the international community that directly supports any such restriction of the inherent right of self-defense. Further, adoption of any such restriction would be unrealistic in view of actual state practice and would be inconsistent with pre-Charter practice and patterns of expectation that were undoubtedly known to the drafters of the U.N. Charter.²⁶ The 1837 *Caroline* incident and the exchange between the United States and the United Kingdom concerning permissible measures of self-defense under customary international law against non-state actors are particularly

its territory.”) [hereinafter O’Connell, *Lawful*]; O’Connell, *Choice*, *supra* note 16, at 359 (“[I]t is clear that force in self-defense may only be carried out on the territory of a state responsible for a significant armed attack ordered by the state or by a state-controlled group that carried it out.”). Concerning the substantial involvement test with respect to attribution or imputation of non-state actor armed attacks to a state for purposes of self-defense against the state (a test that does not require state control of the non-state actor), *see, e.g., Armed Attacks*, *supra* note 17, at 424–34. *See also* O’Connell, *Lawful*, *supra* at 900 (“[W]ill be responsible where it . . . has developed sufficiently close links with the group even if it does not control them.”).

²⁴ *See, e.g., U.S. Use of Drones in Pakistan*, *supra* note 3, at 242–46, 248–58, 279–80. *But see* Mary Ellen O’Connell, *Dangerous Departures*, 107 AM. J. INT’L L. 380, 383 (2013) (“Attacking NSAs [non-state actors] on the territory of another state is attacking that state”). One difference between the law of war paradigm and the self-defense paradigm is that permissible measures of self-defense can take place in times of relative peace without transforming peace to war.

²⁵ *See, e.g., Paust*, *supra* note 2, at 580–81. *But see* Deeks, *supra* note 16, at 501–07; NYC BAR REPORT, *supra* note 16, at 10 (claiming that necessity requires that the state be unwilling or unable); *Id.* at 71, 79–80, 84 (missing the point that when an attack is underway the general principle of necessity has been met—perhaps because the report prefers a minority viewpoint that anticipatory self-defense prior to initiation of an attack should also be valid). An unwilling or unable restraint that is tied to necessity would only be relevant if a state could engage in anticipatory self-defense prior to when an armed attack has begun. However, the language of Article 51 of the Charter and the majority view require that an armed attack be underway. *See, e.g., Armed Attacks*, *supra* note 17, at 414–15, 424, 437–40. Importantly, if missiles are being fired by a non-state actor located in a foreign country and the missiles are entering the U.S. and killing and injuring persons every sixty seconds, necessity has been reached and the foreign state for such time and during a process of armed attacks would be manifestly “unable” to stop the missile attacks. *See also U.S. Use of Drones in Pakistan*, *supra* note 3, at 255–57 (regarding a hypothetical involving non-state actor rocket attacks emanating from Mexico into the U.S.).

²⁶ *See U.S. Use of Drones in Pakistan*, *supra* note 3, at 241–49.

instructive.²⁷ As noted in another writing, the incident and exchange involved

a claimed [British] right of “self-defense” and “self-preservation” against prior and ongoing armed attacks by insurgents against British rule in Canada and complicit conduct of the U.S. vessel *Caroline* that had also already occurred. The United States had claimed that there was a very strict limitation on particular methods of responsive force as opposed to when the right of self-defense pertains. No one disagreed that non-state actor armed attacks trigger the right to engage in certain measures of self-defense or that armed attacks had already occurred, but the United States claimed that use of a particular means of self-defense when the right of self-defense had been triggered should only be permissible when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation;” and when it can be shown that the authorities responding to an attack “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.” The United States had claimed that under the circumstances the British could have waited until daylight and seized the vessel *Caroline* when it re-entered Canadian waters and, therefore, that the choice of means and the responsive act were not necessary, although a general right of self-defense pertained.²⁸

Britain’s Lord John Campbell, who had written a justification for the British act of self-defense that was used by the Foreign Secretary, subsequently wrote that “the *Caroline* had been engaged, and when seized by us was still engaged, in carrying supplies and military stores from the American side of the river to the rebels in Navy Island, part of the British territory,” and

although she lay on the American side of the river when she was seized, we had a clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which were fired against the Queen’s troops in Navy Island.²⁹

²⁷ *Id.* at 224.

²⁸ *Armed Attacks*, *supra* note 17, at 422–23 (noting that the focus was on self-defense in the context of ongoing non-state actor armed attacks and not on so-called anticipatory self-defense and that no one expected that the U.S. would have had to consent to legitimate measures of self-defense by the U.K., that the attacks were or had to be attributable to the U.S., or that the U.S. and U.K. were or had to be at war).

²⁹ 2 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 414 (1906).

In a letter from Britain's Lord Alexander Baring Ashburton to U.S. Secretary of State Daniel Webster during the exchange, Ashburton had asked rhetorically: "[I]f canon are moving and setting up in a battery . . . and are actually destroying life and property by their fire, . . . when begins your right to defend yourself . . . ?"³⁰

B. Operationalizing Who and What Can Be Targeted

Under the law of self-defense, because measures of self-defense can be used in response to an armed attack and to prevent continuing attacks,³¹ it is lawful to target those who are direct participants in armed attacks (i.e., those who are DPAA).³² If direct participation in armed attacks occurs over time with occasional interruption, one wants to use a process approach to inquiry and decision in order to identify whether direct participation occurs over a period of time, for example, by using a movie camera instead of a rigid snap shot approach to inquiry that would merely focus on whether an attack has occurred and the next attack might be imminent instead of focusing on the fact that a process of direct participation in attacks realistically has never stopped. One might even consider that those who directly participate in armed attacks over time are those who demonstrate a continual armed attack function (CAAF).³³

³⁰ Letter from Lord Alexander Baring Ashburton, to Daniel Webster, Secretary of State (July 28, 1842), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

³¹ See, e.g., *U.S. Use of Drones in Pakistan*, supra note 3, at 261–62; *Civilian Casualties in Modern Warfare*, supra note 5, at 573–74 & n.24.

³² See, e.g., Paust, supra note 2, at 571–72, 580; *U.S. Use of Drones in Pakistan*, supra note 3, at 261–62, 280; *Civilian Casualties in Modern Warfare*, supra note 5, at 274–75; see also Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 775 (2012) (suggesting that those targetable in self-defense should include those acting in concert with the armed attacks, which would “include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks, such that they can be said to be taking a direct part in those attacks[.]” and that “[a]rmed action in self-defense may be directed against those actively planning, threatening, or perpetrating armed attacks. It may also be directed against those in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.”).

³³ By analogy regarding those who are CCF under the laws of war, see, e.g., NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW

Logically, those who directly participate in armed attacks over time are persons who have a continuous armed attack function (CAAF) and they are targetable at least while the general process of armed attacks continues.

With respect to the laws of war, there is general agreement concerning specific categories of conduct or forms of participation that allow one to recognize whether persons are directly participating in hostilities³⁴ and, therefore, are targetable,

41–42 (2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

³⁴ See, e.g., Prosecutor v. Strugar, Case No. IT-01-42-A, Decision on Appeal, ¶ 177 (Int'l Trib. For the Former Yugoslavia July 17, 2008) (identifying relevant conduct, including: “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.”); MELZER, *supra* note 33; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 15–16, Rule 29 (2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf> (“Subject to the circumstances ruling at the time, the following activities are examples of what may constitute taking a direct part in hostilities: (i) Defending of military objectives against enemy attacks. (ii) Issuing orders and directives to forces engaged in hostilities; making decisions on operational/tactical deployments; and participating in targeting decision-making. (iii) Engaging in electronic warfare or computer network attacks targeting military objectives, combatants or civilians directly participating in hostilities, or which is intended to cause death or injury to civilians or damage to or destruction of civilian objects. (iv) Participation in target acquisition. (v) Engaging in mission planning of an air or missile attack. (vi) Operating or controlling weapon systems or weapons in air or missile combat operations, including remote control of UAVs and UCAVs. (vii) Employing military communications networks and facilities to support specific air or missile combat operations. (viii) Refueling, be it on the ground or in the air, of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations. (ix) Loading ordnance or mission-essential equipment onto a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations. (x) Servicing or repairing of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations. (xi) Loading mission control data to military aircraft/missile software systems. (xii) Combat training of aircrews, air technicians and others for specific requirements of a particular air or missile combat operation.”); INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 719–20; Michael W. Lewis & Emily Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, 44 GEO. J. INT'L L. 1127, 1143–48 (2013); Lewis, *supra* note 2, at 310–11; Jordan J. Paust, *The 2009 Air and Missile Warfare Manual: A Critical Appraisal of the Air and Missile Warfare Manual*, 47 TEX. INT'L L.J. 277, 282–83 & n.30 (2012); *Extraterritorial*, *supra* note 16, at 103–04; Rachel E. VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 109–11 (2013); Geneva Protocol I, *supra* note

although there are notable gray areas where conclusions about direct participation have to be made in context and without advance consensus.³⁵ Although not determinative, it would be useful to consider the consensus that does exist concerning examples of direct participation under the laws of war when engaging in necessary choice concerning who is directly participating in armed attacks and, therefore, who is DPAA and targetable. Applying the detailed consensus that exists from the laws of war would also be practical with respect to self-defense targetings engaged in by members of the armed forces because they are trained to make distinctions between persons who are DPH and ordinary civilians who are not targetable and military personnel participating in measures of self-defense can follow relevant law of war training, familiar directives, and similar rules of engagement tailored for measures of self-defense in order to serve related general principles of distinction and proportionality under the law of self-defense.³⁶

3, at art. 51(3) (“Civilians shall enjoy protection . . . unless and for such time as they take a direct part in hostilities.”); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 271–72, 275 (2010); Letter from Lord Alexander Baring Ashburton, *supra* note 30; Paust, *supra* note 2, at 571, 575, 580.

³⁵ MELZER, *supra* note 33, at 42–45; Int’l Comm. Of the Red Cross, *Direct Participation in Hostilities: Questions and Answers*, ICRC, <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> (last visited Nov. 18, 2014).

³⁶ See, e.g., Paust, *supra* note 2, at 571–72, 574, 577; *U.S. Use of Drones in Pakistan*, *supra* note 3, at 270–71, 275–77; *Civilian Casualties in Modern Warfare*, *supra* note 5, at 577–78. See generally CASSESE, *supra* note 5, at 355 (A responding state “may only attack ‘legitimate military targets’ . . . in keeping with principles and rules of international humanitarian law[.]”); Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT’L L.J. 337, 342, 344–45, 350–57, 361–66 (2012) (addressing the need for “operationalizing” international law by synchronizing law and principles of military operations) (concerning interrelationships between law and “operational art”) (concerning laws of war regarding targetings); Charles J. Dunlap, Jr., *Law of War Manuals and Warfighting: A Perspective*, 47 TEX. INT’L L.J. 265, 274–76 (2012) (concerning the need for military lawyers to know more than the law and to know “the systems utilized . . . , as well as a vast body of information concerning weapons, munitions, and the strategies for their use.” – to learn their “clients’ ‘business.’”). A 2006 Department of Defense Directive required “[m]embers of the DoD components [to] comply with the law of war during all armed conflicts . . . and in all other military operations.” U.S. DEP’T OF DEF., Directive No. 2311.01E ¶ 4.1 (May 9, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>. In 2010, this same policy preference appeared in the Joint Chiefs of Staff, Instruction 5810.01D, Implementation of the DOD Law of War Program. U.S. DEP’T OF DEF., No. 5810.01D ¶ 4 (Apr. 30, 2010).

With respect to choice concerning what objects are targetable while engaging in permissible measures of self-defense in response to non-state actor armed attacks, it would be similarly useful to apply the general and detailed normative guidance that is already operative under the laws of war. Policy choices and consensus exist that provide general principles and manageable specificity with respect to violence directed against military objects³⁷ as well as relevant lawful methods and means of warfare³⁸ that can serve related general principles of reasonable necessity, distinction, and proportionality under the law of self-defense. When military units engage in permissible measures of self-defense against targetable objects, it would also be practical for them to comply with their law of war training, familiar directives, and similar rules of engagement.

Particularly useful by analogy would be attention to the details contained in Articles 54 and 56 of Geneva Protocol I. Article 54 addresses “[p]rotection of objects indispensable to the survival of the civilian population[:.]”

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(a) as sustenance solely for the members of its armed forces; or

(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the

³⁷ See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 714, 721, 735, 739; Geneva Protocol I, *supra* note 3, arts. 48, 52–57; FM 27–10, *supra* note 8, at 19–23, paras. 23, 40–42, 45–46, 56–58.

³⁸ See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 700, 713–18, 721–22, 730, 735–40; Corn & Corn, *supra* note 36, at 370–74; FM 27–10, *supra* note 8, at 16–19, paras. 25, 28–39, 41.

conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.³⁹

Article 56 addresses “[p]rotection of works and installations containing dangerous forces[:]”

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided in paragraph 1 shall cease:

(a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.⁴⁰

As noted above, the law of self-defense contains a general principle of proportionality.⁴¹ Its application requires that

³⁹ Geneva Protocol I, *supra* note 3, art. 54.

⁴⁰ *Id.* at art. 56.

⁴¹ *See, e.g.*, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19) (“exercised . . . in a manner that was proportionate.”); Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 43, 77 (Nov. 6) (U.S. conduct cannot “be regarded . . . as a proportionate use of force in self-defence.”); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, 226, 245 (July 8) (“there is a ‘specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’”) (quoting Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v.

responsive measures of self-defense against non-state actor attacks be proportionate under the circumstances and, necessarily, that those who engage in selective measures of self-defense distinguish between targetable and non-targetable persons and objects, *i.e.*, that they apply a general principle of distinction. As noted also, because similar general principles of proportionality and distinction exist under the laws of war and can provide general as well as specific guidance with respect to permissible and impermissible forms of violence, it is recommended that those involved in training and operationalizing the international law of self-defense use related laws of war for guidance.

Under the laws of war, attacks or targetings that do not comply with the principles of proportionality and distinction can be unlawful “indiscriminate” attacks. Guidance with respect to prohibited indiscriminate attacks is set forth in paragraphs 4 and 5 of Article 51 of Protocol I to the Geneva Conventions:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the

U.S.), 1986 I.C.J. 14, 94, ¶ 176 (June 27)); BUERGENTHAL & MURPHY, *supra* note 18, at 399–401 (“defensive force must be necessary and proportionate[.] . . . [but] proportionality will be assessed based on the result to be achieved by the defensive action, and not on the forms, substance and strength of the action itself.”); CHARTER COMMENTARY, *supra* note 23, at 805 (adding that “[c]onsequently, lawful self-defence . . . must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for the defence have to be strictly necessary for repelling the attack. The principle of proportionality does not, however, require that the weapons used in self-defence must be on exactly the same level as those used of the attack.”); DINSTEIN, *supra* note 18, at 237–42, 249; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 155–87 (2004); MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 321–25 (2d ed. 2009); PAUST, VAN DYKE & MALONE, *supra* note 20, at 1099, 1121; Ved P. Nanda, *International Law Implications of the United States’ “War on Terror,”* 37 DENV. J. INT’L L. & POL’Y 513, 533 (2009) (“It is recommended that . . . 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.”); O’Connell, *Drones*, *supra* note 23, at 591–92; *Extraterritorial*, *supra* note 16, at 88 (“Proportionality requires that the state engaging in self-defense use no more force than required in terms of scale, scope, duration, and intensity to end the situation justifying defensive action.”); *supra* note 36 and accompanying text.

effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁴²

Related to this type of prohibition is a more general customary prohibition of unnecessary death, injury, or suffering during war,⁴³ one that is also partly reflected in the duty set forth in Geneva Protocol I to avoid attacks “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴⁴ Some “incidental” loss of civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met.⁴⁵

C. Operationalizing Choice Regarding When and How to Target

As noted in another writing with respect to nuanced and contextually attentive application of the principles of reasonable necessity, proportionality, and distinction during use of drones for self-defense targetings, one should consider all relevant features of context, including

⁴² Geneva Protocol I, *supra* note 3, at art. 51(4)–(5). *See also* Corn, *supra* note 2, at 446–48, 454–59.

⁴³ *See, e.g.*, INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 639, 679.

⁴⁴ *See* Geneva Protocol I, *supra* note 3, at arts. 51(5)(b), 57(2)(a)(iii).

⁴⁵ *See, e.g., id.* at arts. 51(5)(b), 57(2)(a)(ii); United States v. List et al., 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1253 (1950) (“Military necessity . . . permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable”); MELZER, *supra* note 33, at 37 (noting that civilians might risk “incidental death or injury” because of “[t]heir activities or location[.]”).

[1] identification of the target (e.g., as a DPAA, combatant, fighter with a continuous combat function, or DPH as opposed to a non-targetable civilian); [2] the importance of the target; [3] whether equally effective alternative methods of targeting or capture exist; [4] the presence, proximity, and number of civilians who are not targetable; [5] whether some civilians are voluntary or coerced human shields; [6] the precision in targeting that can obtain; and [7] foreseeable consequences with respect to civilian death, injury, or suffering.⁴⁶

With respect to self-defense targetings of non-state attackers who are located in a foreign state that is not at war with the United States, an additional concern will involve the need to avoid any unnecessary spill over violence against foreign state military personnel or military objects or other foreign state assets that would be considered to constitute an attack on the foreign state.

One set of operationalizing criteria adopted by the Obama Administration in a 2011 White Paper for lethal targeting has been publicly disclosed, that concerning “the circumstances in which the U.S. government can use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of Al-Qa’ida or an associated force”⁴⁷ The 2011 White Paper identified three required circumstances:

- (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses and imminent threat of violent attack against the United States;

⁴⁶ Paust, *supra* note 2, at 576; see *U.S. Use of Drones in Pakistan*, *supra* note 3, at 275–77. Concerning other suggested criteria and features of context, see also Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision-Maker*, 47 *TEX. INT’L L.J.* 315, 330–36 (2012) [hereinafter Guiora, *Determining a Legitimate Target*]; Amos N. Guiora, *Responses to the Ten Questions*, 37 *WM. MITCHELL L. REV.* 5034, 5042–47 (2011); Amos N. Guiora, *Not “By All Means Necessary”: A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 *CASE W. RES. J. INT’L L.* 273, 280–82 (2009); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 11 *U. ILL. L. REV.* 1201, 1207, 1219–20, 1224, 1228–38 (2011) (addressing a U.S. Joint Chiefs of Staff six-step decisional and review process (see *infra* text accompanying note 52) and suggesting somewhat similar criteria and considerations with respect to targetings by CIA personnel, but use of a strict “very high level of certainty” and “beyond reasonable doubt” standard as well as ultimate review by the Inspector General of the C.I.A.).

⁴⁷ U.S. DEP’T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1* (2011), available at <http://www.justice.gov/oip/docs/dept-white-paper.pdf>.

- (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
- (3) the operation would be conducted in a manner consistent with applicable law of war principles.⁴⁸

The first circumstance has an obvious relation to claims of self-defense under international law and the targeting of persons who are DPAA or CAAF, although use of an “imminent threat” standard is not acceptable under the law of self-defense because an attack or process of attack must be underway and, logically, an imminent threat is not even a present threat of attack.⁴⁹ If an individual is directly participating in an ongoing process of armed attacks or in one that is underway, that person is targetable under the law of self-defense as a person who is DPAA, and the targeting of that person would comply with general principles of reasonable necessity and distinction.⁵⁰ The second circumstance is related to the principle of proportionality because, if it becomes very easy to capture a person, killing the person might become a disproportionate response under certain circumstances.⁵¹ The third circumstance is close to one recommended here whether or not the laws of war are applicable, that general and detailed law of war principles and requirements be followed for practical and policy-serving operationalizing of the law of self-defense.

A 2007 U.S. Joint Chiefs of Staff publication on targeting had offered a six-step decisional and review process in general language: “(1) identification of the military objective of an operation, (2) target development and prioritization, (3) capabilities analysis . . . , (4) commander’s decision and force assignment, (5) mission planning and force execution, and (6) assessment.”⁵²

⁴⁸ *Id.*

⁴⁹ See, e.g., *Armed Attacks*, *supra* note 17, at 414–16, 419–20.

⁵⁰ See *Civilian Casualties in Modern Warfare*, *supra* note 5, at 571, 576, 580; see, e.g., *supra* text accompanying note 32.

⁵¹ Concerning the propriety of captures under the law of self-defense, see, e.g., PAUST, VAN DYKE & MALONE, *supra* note 20, at 689 (regarding the claim of President Clinton in 1992 that the U.S. had a right to engage in limited self-defense captures); Modarai et al., *supra* note 16, at 820, 820 n.13; *U.S. Use of Drones in Pakistan*, *supra* note 3, at 262–63; Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 107 (1989); see also Nanda, *supra* note 41, at 533. However, under the laws of war an enemy combatant or civilian who is DPH or CCF can be killed if they have not surrendered. See Paust, *supra* note 2, at 581–82.

⁵² See, e.g., Corn & Corn, *supra* note 36, at 342, 344–45, 350–53; Radsan & Murphy, *supra* note 46, at 1219–20; see also Joint Chiefs of Staff, *Joint Pub. 3-*

With respect to U.S. “procedures and practices for identifying lawful targets,” former Legal Adviser Harold H. Koh had remarked more generally in 2010: “[i]n my experience, the principles of distinction and proportionality that the United States applies . . . are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”⁵³

Application of the law of self-defense in the context of some, if not many, non-state terrorist attacks will not be difficult. For example, assume that one month ago Pablo de Pablo, the infamous leader of a narco-terrorist group in northern Mexico known as the PPM, threatened to kill President Obama in response to F.B.I. arrests of three members of the PPM in El Paso, Texas for drug smuggling, human trafficking, bribery, and money laundering. Pablo is a dual national of Mexico and the U.S. Recent satellite surveillance used to photograph and monitor communications from a large PPM compound located approximately four miles southwest of Juarez, Mexico has confirmed that approximately ten hours ago Pablo had ordered members of the PPM to use shoulder-held rockets near the border to kill U.S. Border Patrol agents in El Paso. Two rockets were later fired and seven Border Patrol agents were killed. Newer surveillance has disclosed that Pablo has ordered members of the PPM to cross into the U.S. and assassinate the police chief of El Paso and any other police officers in El Paso they can kill or, if that would not be easy, to open fire on shoppers so that the PPM “sends a clear message to President Obama and anyone else who tries to interfere with our operations.”

News media report that numerous gun shots are being heard in a mall in El Paso and at a local police station and that a shooter confessed to being part of the PPM while wounded before he died. Having been briefed by the C.I.A. and F.B.I., President Obama

60, *Joint Targeting II-3* (2007), available at [http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60\(07\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp3_60(07).pdf); Aaron M. Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law – An Overview*, 39 *DENV. J. INT’L L. & POL’Y* 629, 636–39, 642–45 (2011) (concerning typical U.S. Air Force drone targeting operations).

⁵³ Koh, *supra* note 1 (adding that “great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.”); concerning examples of care used in selection of weapons and their use, *see, e.g.*, Dunlap, *supra* note 36, at 274.

has just issued an order that a special U.S. Army unit from Fort Bliss, Texas be used to drone target Pablo and his followers in the compound. The U.S. Army unit has human piloted drones of several sizes, some of which are small and have weaponry that will allow very precise targetings.⁵⁴ Intelligence gathered discloses that no Mexican military or police units appear to be headed to the compound, which is in a walled fortification that has military-type vehicles stationed at its northern and southern entrances. Surveillance has shown that Pablo is in his house with his wife and sister, which is located at the southern end of the compound and is surrounded by eight guards. Some of the armed members of the PPM have barracks-type housing at the northern end of the compound where there is also a large building used to store rifles, rockets, ammunition, and explosives. In that sector, members of the PPM have been seen loading rockets onto a truck. A school full of young children, including Pablo's two sons, is at the eastern end, and what seem to be unarmed persons are mingling in the middle and at the western end where there are several small houses, some shops, and a large building containing trucks and apparently a great deal of cocaine. Is the PPM engaged in a process of armed attacks on the U.S. and its nationals? Does President Obama need special ad hoc consent from the Government of Mexico to engage in immediate self-defense targeting in Mexico? Who and what should be targeted by the special U.S. Army unit and how?

Some claim that for armed violence to constitute an armed attack and allow responsive force in self-defense the armed attack should be of a certain high gravity,⁵⁵ but there is nothing in the language of Article 51 of the U.N. Charter that requires such an outcome.⁵⁶ I agree with the U.S. Executive and others that there should be no gravity limitation of the inherent right of self-defense.⁵⁷ As noted with respect to the 1837 *Caroline* incident,

⁵⁴ See Chris Cole, *What's Wrong With Drones?*, DRONE WARS UK (Mar. 20, 2014), <http://droneswars.net/2014/03/20/whats-wrong-with-drones/> (discussing drone precision); Jasmine Henriques, *Unmanned Aerial Vehicles (UAV): Drones for Military and Civilian Use*, GLOBAL RESEARCH (Mar. 21, 2014), <http://www.globalresearch.ca/unmanned-aerial-vehicles-uav-drones-for-military-and-civilian-use/5374666> (discussing drone size and piloting); *infra* note 80.

⁵⁵ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 191 (June 27) (containing dictum claiming a need to distinguish "less grave forms" of force); *id.* ¶ 195 (noting that acts should be "of such gravity"); CASSESE, *supra* note 5, at 354.

⁵⁶ See U.N. Charter art. 51.

⁵⁷ See, e.g., Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks

the United Kingdom had affirmed that if a battery of cannon that was set up in the U.S. was firing and destroying life and property in Canada, the British could rightly use selective force under the customary international law of self-defense against the battery.⁵⁸ Moreover, an alleged gravity limitation of the inherent right of self-defense would be unrealistic. No state is likely to tolerate continuous non-state actor sniper fire from across its border that is killing and wounding its citizens.

Others claim that human rights law prohibits drone targetings during war or in self-defense.⁵⁹ General human rights law applies during war⁶⁰ and in all other social contexts, including during lawful measures of self-defense.⁶¹ Under the United Nations

at USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012) (“[T]he United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an ‘armed attack’ But that is not to say that any illegal use of force triggers the right to use any and all force in response – such responses must still be . . . *proportionate*.”), available at <http://www.state.gov/s/l/releases/remarks/197924.htm>. Another former Legal Adviser had rightly noted that “[t]he gravity of an attack may affect the proper scope of the defensive use of force . . . but it is not relevant to determining whether there is a right of self-defense”; William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300 (2004); see also Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 966 (2006) (“An armed attack means any use of armed force, and does not need to cross some threshold of intensity.”). The Principles were adopted by consensus among Franklin Berman, James Gow, Christopher Greenwood, Vaughan Lowe, Adam Roberts, Phillippe Sands, Malcolm Shaw, Gerry Simpson, Colin Warbrick, Nicholas Wheeler, Elizabeth Wilmshurst, and Michael Wood. *Id.* at 966 n.13 (“There are statements by the International Court of Justice which suggest that there may be instances of the use of force which are not of sufficient gravity But these statements are not generally accepted.”); DINSTEIN, *supra* note 18, at 195–96 (quoting Taft and noting that “small-scale” attacks are covered); *id.* at 202 (noting that “a series of pin-prick assaults” may potentially be covered); Sofaer, *supra* note 51, at 93 (noting that “any illegal use of force” may potentially be covered); GARDAM, *supra* note 41, at 143, 161; *supra* text accompanying note 22 (noting pre-Charter practice). See generally *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 195, ¶ 72 (Nov. 6) (The I.C.J. had at least come close to reality by noting that, among attacks that would be of sufficient gravity, the I.C.J. “does not exclude the possibility that the mining of a single military vessel might be sufficient”); *infra* notes 101, 103–105 and accompanying text (concerning attacks on vessels).

⁵⁸ See *U.S. Use of Drones in Pakistan*, *supra* note 3, at 241–46; *supra* notes 29–30 and accompanying text.

⁵⁹ See, e.g., *U.S. Use of Drones in Pakistan*, *supra* note 3, at 265–66; see also Paust, *supra* note 2, at 573.

⁶⁰ See, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 674, 687–88.

⁶¹ See, e.g., Paust, *supra* note 2, at 573, 581–82; see also Legality of the

Charter, states that are members of the U.N. have a duty to take action in order to achieve “universal respect for, and observance of, human rights,”⁶² and the reach of the International Covenant on Civil and Political Rights⁶³ is decidedly also extraterritorial and global.⁶⁴ Yet, the global human right to freedom from arbitrary deprivation of life under the International Covenant⁶⁵ will only apply to persons who are either within the territorial jurisdiction of the United States (including U.S. occupied territory) or within its actual power or effective control.⁶⁶ It is evident, therefore, that persons being targeted by a high-flying drone in a foreign country will not be entitled to protection with respect to the human right to life that is otherwise guaranteed in

Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, ¶ 39 (July 8); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 264–66.

⁶² U.N. Charter arts. 55(c), 56. This obligation under the Charter has primacy over obligations under other international agreements, including law of war treaties. *See id.* at art. 103. If the human right to freedom from arbitrary deprivation of life is part of customary human rights law it is incorporated by reference through the U.N. Charter without a limitation to persons who are within the actual power or effective control of the state. The issue would shift, therefore, to whether or not a particular targeting was “arbitrary.” *See infra* note 65.

⁶³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]. The relative right to life is considered to be customary human rights *jus cogens*. *See, e.g., U.S. Use of Drones in Pakistan*, *supra* note 3, at 263 n.65. Therefore, under the Charter the issue shifts to whether a loss of life is arbitrary. *See infra* notes 65, 68.

⁶⁴ *See, e.g., ICCPR, supra* note 63, prml. (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights . . . [.]”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108–11 (July 9) (“[T]he International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”); *U.S. Use of Drones in Pakistan, supra* note 3, at 265–66, 268.

⁶⁵ *See, e.g., ICCPR, supra* note 63, art. 6 (“No one shall be arbitrarily deprived of his life.”).

⁶⁶ *See, e.g., U.N. Human Rights Comm., The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 18th Sess., (May 26, 2004)* (Rights apply “to all persons subject to [its] jurisdiction. This means . . . anyone within the power or effective control of that State party . . . [and] those within the power or effective control of the forces of a State Party acting outside its territory . . .”); ICCPR, *supra* note 63, at art. 2(1) (stating “all individuals within its territory and subject to its jurisdiction . . .”); Paust, *supra* note 2, at 573, 581; *U.S. Use of Drones in Pakistan, supra* note 3, at 264–66. The word “jurisdiction” is a limitation that precludes a reach to those outside a state’s territory or its equivalent (*e.g., its vessels and aircraft*), occupied territory, or its actual power or effective control. Therefore, the ICCPR does not reach those who are merely affected by a state’s conduct abroad.

the International Covenant.⁶⁷ Moreover, if they were, their targeting in compliance with the principles of reasonable necessity, distinction, and proportionality would be reasonably necessary, rational, and not “arbitrary” within the meaning of the human right to life.⁶⁸ For both reasons, the International Covenant will not limit the operational effectiveness of lawful self-defense targeting by drones.

Still others might wonder whether the U.S. Constitution provides U.S. citizens a special immunity from being lawfully targeted under the laws of war or the international law of self-defense or requires the Executive to provide a special notice to the persons who are targetable before they can be captured, wounded, or killed under international law. In the context of war, it is clearly irrelevant whether a targetable enemy of the United States is a national of the United States.⁶⁹ As the Supreme Court recognized in *Hamdi v. Rumsfeld*,⁷⁰

[w]e held that “citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction . . . [are] bent on hostile acts, are enemy belligerents within the meaning of the law of war. . . .” A citizen, no less than an alien, can be “part of or supporting forces hostile to the United States . . .” and “engaged in an armed conflict against the United States”⁷¹

⁶⁷ See *U.S. Use of Drones in Pakistan*, *supra* note 3, at 264–65. But see *supra* note 62 (as customary law incorporated through the U.N. Charter, the right to life is not so limited).

⁶⁸ See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, ¶ 25 (July 8).

⁶⁹ See, e.g., *Colepaugh v. Looney*, 235 F.2d 429, 430–33 (10th Cir. 1956) (holding that a U.S. citizen captured in the U.S. while on a hostile mission for Germany during World War II was not denied any constitutional right) (“[P]etitioner’s citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.”) (“*Ex parte Quirin* . . . removes any doubt of the inapplicability of the Fifth or Sixth Amendments to trials before military commissions.”); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (a U.S. citizen captured in the theatre of war who had been a member of the Italian army during World War II was subject to the laws of war and could be detained without trial as a prisoner of war); Jonathan L. Hafetz, *The Supreme Court’s “Enemy Combatant” Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 421 (2005); Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 148 (2012); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1388–89 (2007); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 262.

⁷⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

⁷¹ *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942)). During the Civil

With respect to due process under the U.S. Constitution, it should be apparent that if an U.S. national is lawfully targetable abroad under the international laws of war or the international law of self-defense, the process that is due is met by compliance with international legal standards.⁷² Additionally, individuals who participate in armed conflicts or armed attacks against the United States in ways that make them targetable under international law must know that they are directly participating in hostilities (“DPH”) or are directly participating in armed attacks (“DPAA”), and they are at least on constructive notice that they can be lawfully targeted under international law. More generally, international law has been used as an aid for interpreting provisions of the Constitution, including due process under the Fifth Amendment.⁷³

War, U.S. citizenship was not lost for those who joined the armed forces of the Confederate States of America. *See Texas v. White*, 74 U.S. 700, 726 (1869) (Texas remained in the United States and “the ordinance of secession, . . . and all of the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations . . . of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. . . . [H]er citizens [did not cease] to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners.”); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (available in the Yale Law School Library) (attempts at secession were “legally void.”). Further, in 1868 there was a presidential pardon of those who could be prosecuted for treason because of their conduct during the Civil War, which implied U.S. recognition of continued U.S. citizenship. *See Gerhard Peters & John T. Woolley, Andrew Johnson*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=72360> (last visited Dec. 28, 2014). Not surprisingly, no claim is known to have been made that the U.S. Constitution prevented the capture, wounding, and killing of enemy soldiers on the many battlefields within the United States during the Civil War or a special notice that they were targetable, and the deaths of Confederate soldiers had been in the hundreds of thousands. That the U.S. Civil War was a belligerency to which all of the customary laws of war applied. *See, e.g., Brig Amy Warwick*, 67 U.S. 635, 666 (1862).

⁷² That citizens can be targeted under international law as well as the Constitution does not mean that a citizen should not be able to challenge an Executive decision to put that person’s name on a list of targetable persons if that fact is made public or known to the person and there is adequate time to challenge the Executive’s determination of, for example, DPAA or CAAF status. Even in times of war, the judiciary has the power to second-guess Executive decisions regarding the status and rights of persons under international law. *See, e.g., Jordan J. Paust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 518–24 (2003).

⁷³ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 555–56, 578 (2005) (human rights precepts used as an aid for interpreting the Eighth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 341, 344 (2003) (Ginsburg, J., concurring) (regarding

D. Future Choice Regarding Types of Drones

It is expected that there will be an increased use of drones and other robotics during armed conflicts and measures of self-defense within or outside the context of war. Already there has been use of remotely piloted land-based, naval, and air and space

the Fourteenth Amendment in accordance with international understanding of affirmative action); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (use of international law to interpret the Eighteenth Amendment); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (international legal principles support interpretation of congressional power regarding exclusion and deportation of aliens); *United States v. Tinoco*, 304 F.3d 1088, 1110 n.21 (11th Cir. 2002) (protective jurisdiction under international law and due process); *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (“Principles of international law are ‘useful as a rough guide’ in determining . . . due process. The First, Second, Fourth, Fifth and Eleventh Circuits agree that the United States may exercise jurisdiction consistent with international law”) (quoting *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990)); *United States v. Peterson*, 812 F.2d 486, 493–94 (9th Cir. 1987) (use of extraterritorial protective jurisdiction accords with due process); *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986) (regarding the First Amendment and international law); *United States v. Gonzalez*, 776 F.2d 931, 938–41 (11th Cir. 1985) (regarding due process and international principles); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) (“if the extraterritorial application of a statute is justified by the protective principle[] [of customary international law regarding jurisdiction] such application accords with due process.”); *see also Hamdi*, 542 U.S. at 531 (“the law of war and the realities of combat may render . . . [conduct] both necessary and appropriate, and our due process analysis need not blink at those realities.”); *Brown v. United States*, 12 U.S. 110, 125 (1814) (“In expounding . . . [the] constitution, a construction ought not lightly to be admitted which would . . . [not be in conformity with or] fetter . . . discretion . . . [under customary international laws of war] which may enable the government to apply to the enemy the rule that he applies to us.”); *United States v. Toscanino*, 500 F.2d 267, 275–76 (2d Cir. 1974) (due process inquiry was “guided by” the government’s “illegal conduct,” which included violations of two treaties); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 52–54 (D.D.C. 2000) (rejecting a due process-minimum contacts claim by Iraq with respect to alleged acts of state sponsored terrorism “condemned by the international community” and implicating universal jurisdiction, especially since international law provides adequate warning of possible U.S. sanctions) (quoting *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.D.C. 1998)); *Ex parte Toscano*, 208 F. 938, 942–44 (S.D. Cal. 1913) (executive detention of persons from Mexico was appropriate under a treaty and the treaty-based “duty devolves upon the President[.]” and “the President has full authority, and it was and is his duty to execute said treaty provisions.”); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 205, 212, 218–22, 275–76 & nn.389–93 (2d ed., Carolina Academic Press 2003) (documenting judicial references to human rights in connection with the 1st, 4th, 5th, 6th, 8th, 9th, 13th, 14th, and 15th Amendments). PAUST, VAN DYKE & MALONE, *supra* note 20, at 251–67 (cases regarding international law’s enhancement of congressional power); *id.* at 272–73 (cases regarding international law’s enhancement of presidential power faithfully to execute the laws).

robotics. For example, remote controlled robots are used during war and domestic law enforcement to find and dismantle explosives and some can sniff for chemical, bacteriological, or biological weaponry.⁷⁴ Some fully autonomous vehicles, mines, and other mechanisms are not “piloted.”⁷⁵ One publication notes that “[a]utonomous systems are also part of the projected ground forces” and that there will be “a reconfigurable skirmishing vehicle[,]” a “stealth tank[,]” “unmanned supply lorries and mine-clearing vehicles,” “a small, tracked robot vehicle that can undertake missions normally done by a single soldier[,]” and “aerial robots dropping ground robots and using a few special forces to guide them[.]”⁷⁶

Drones can come in various sizes and with varying capabilities, and in the future some drones will predictably be the size of a dragonfly.⁷⁷ Some drones and other robotics are also likely to use increasingly sophisticated computerized forms of intelligence gathering and analysis for decision making with respect to identification and engagement of targets during war and self-defense, perhaps even with a completely autonomous decisional, learning, and operational capability. Presently, it is not generally expected that use of drones for targeting will require a change in relevant international law. However, there are at least two predictable developments in drone technology that raise concerns whether drones will be sufficiently controlled and permit compliance with general principles of necessity, distinction, and proportionality. First, there is concern that some drones will

⁷⁴ See *Army to get Bomb-Sniffing Robots for Chemical, Biological and Dirty Bomb Threats*, CANADIAN BUS. (Sept. 8, 2014), <http://www.canadianbusiness.com/business-news/army-to-get-bomb-sniffing-robots-for-chemical-biological-and-dirty-bomb-threats/>; *tEODor Explosive Ordinance (EOD) Robot, Germany*, ARMY-TECH.COM, <http://www.army-technology.com/projects/teodor-explosive-ordnance-eod-robot/> (last visited Nov. 9, 2014) (for a description of remotely controlled robots that can dismantle bombs).

⁷⁵ Adrienne Jeffries, *Should a Robot Decide When to Kill?*, VERGE (Jan. 28, 2014, 10:30 AM), <http://www.theverge.com/2014/1/28/5339246/war-machines-ethics-of-robots-on-the-battlefield>; Stuart Nathan, *Developing Autonomous Fighting Machines*, ENGINEER (June 6, 2011), <http://www.theengineer.co.uk/in-depth/the-big-story/developing-autonomous-fighting-machines/1008888.article>.

⁷⁶ Nathan, *supra* note 75.

⁷⁷ See generally John W. Whitehead, *Roaches, Mosquitos, and Birds: The Coming Micro-Drone Revolution*, HUFF. POST (last updated June 17, 2013, 5:12 AM), http://www.huffingtonpost.com/john-w-whitehead/microdrones_b_3084965.html (comparing drone sizes to insects and birds).

become completely autonomous and will be used to hunt and quickly eliminate human beings and objects within the matrix of programmed targets.⁷⁸ Presently, drones used for targeting during war and self-defense are operated by human beings, and there are often others who can participate in decisions concerning target identification and whether to engage a particular target.⁷⁹ Drones often have the capability to fly over an area for hours, allowing nuanced human choice with respect to all features of context, including those concerning identification of the target; the importance of the target; whether equally effective alternative methods of targeting or capture exist; the presence, proximity, and number of civilians who are not targetable; whether some civilians are voluntary or coerced human shields; the precision in targeting that can obtain; and foreseeable consequences with respect to civilian death, injury, or suffering.⁸⁰

Some foresee a growing use of on-board computers to locate targets, provide valuable contextual input, and coordinate with other drones and aircraft, but assume that human beings will still make needed choices concerning proper application of the principles of distinction and proportionality and whether a target should even be engaged under the circumstances.⁸¹ Others

⁷⁸ Jeffries, *supra* note 75.

⁷⁹ Chris Cole and Jim Wright, *What are Drones?*, DRONE WARS, <http://dronewars.net/aboutdrone/> (last visited Dec. 28, 2014).

⁸⁰ See generally Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339 (2010); Laurie R. Blank, *After Top Gun: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 692–96 (2012); Drake, *supra* note 52, at 636–39, 642–45; Chris Jenks, *Law From Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649 (2009); Lewis, *supra* note 2, at 296–98; Lewis & Crawford, *supra* note 34, at 1154; Michael A. Newton, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 601 (2011); O'Connell, *Drones*, *supra* note 23, at 586, 588; Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law,"* 13 Y.B. INT'L HUMANITARIAN L. 311 (2010); Markus Wagner, *Taking Humans Out of the Loop: Implications for International Humanitarian Law*, 21 J. L., INFO. & SCI. 155 (2011).

⁸¹ See, e.g., Corn & Corn, *supra* note 36, at 342–43, 349–53, 362–66, 370–71, 380 (often emphasizing the need for use of human “operational art” and adequate awareness of many contextual variables during targetings); Guiora (2012), *supra* note 46, at 322–23, 331–36; Paust, *supra* note 3, at 576; Paust, *supra* note 4, at 275–77; Radsan & Murphy, *supra* note 46; Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 459, 461–62 (2012) (warning that choice cannot be made “with mathematical certainty – in part because such judgments implicate contestable facts and competing values”); see also Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, 12

foresee a problematic future use of drones that are completely autonomous and, if they do not kill and destroy needlessly because of computer glitches,⁸² they might kill and destroy without adequate consideration of all relevant features of context despite possible increased sophistication in their programming.⁸³ In fact, some systems can be placed in an autonomous mode by a human decision maker and then hunt for human or material targets in a defensive or offensive manner.⁸⁴ Depending on their capabilities, smart autonomous hunting drones and other hunting robots might be blind with respect to the need to comply with customary principles of distinction and proportionality.

Second, it has been reported that research “is heading - away from single drones and towards a co-ordinated team or swarm of vehicles with a specified mission and location[,] . . . ‘a swarm of robots[,]’” and that “‘inevitably there will be more autonomy; the robots will be required to make more decisions.’”⁸⁵ It is also foreseeable that with respect to swarms, a human can provide the initial order to a swarm, but drones in the armed swarm would work out between them which element would enact an attack order. Quite possibly, use of a swarm might pose greater danger with respect to computer glitches and the need for nuanced decision making with respect to identification and engagement of particular targets. Nonetheless, the swarm can prove to be valuable with respect to some forms of lawful uses of offensive and defensive force. In any event, efforts should be made to assure the existence of adequate computerized and human controls and the development of rules of engagement to restrain their actual operation. Wanton and reckless disregard of consequences can lead to criminal and civil sanctions,⁸⁶ but these

COLUM. SCI. & TECH. L. REV. 272, 285 (2011) (doubts exist whether autonomous robots will be capable of making appropriate choices and avoid indiscriminate killing and wounding).

⁸² Past failures have been noted. See, e.g., PATRICK LIN, GEORGE BEKEY & KEITH ABNEY, AUTONOMOUS MILITARY ROBOTICS: RISK, ETHICS, AND DESIGN 7, 14 (2008), available at http://www.ethics.calpoly.edu/ONR_report.pdf.

⁸³ See *id.* at 1, 11–12, 14, 19–20.

⁸⁴ See Drake, *supra* note 52, at 651–52; LIN, BEKEY & ABNEY, *supra* note 82, at 1, 7, 19.

⁸⁵ Stuart Nathan, *Autonomous Vehicles: Robot Wars*, ENGINEER (June 6, 2011), available at 2011 WLNR 11266195.

⁸⁶ Cf. LIN, BEKEY & ABNEY, *supra* note 82, at 67 (explaining how civilian noncombatants remain uninformed in this risk assessment discussion); see, e.g., INTERNATIONAL CRIMINAL LAW, *supra* note 4, at 696–98; see also Corn, *supra* note 2, at 450; Drake, *supra* note 52, at 652–53, 657–59.

can occur with respect to misuse of any weapons system.⁸⁷

III. THE LAW ENFORCEMENT PARADIGM

It is important to note that measures of self-defense and collective self-defense under international law are not measures of “law enforcement” as that phrase is understood in international law. Unlike measures of self-defense against non-state actors, permissible measures of law enforcement or police power occurring in the territory of a foreign state must rest on consent from the highest level of the government of the foreign state.⁸⁸ Consent can be in advance by treaty or other agreement⁸⁹ or ad hoc, as is often done concerning law enforcement searches and arrests on foreign flag vessels because the vessels are the equivalent of foreign state territory under international law, and consent is needed for such forms of police activity.⁹⁰ Engaging in any form of police, law enforcement, or related sovereign functions without consent is prohibited.⁹¹ Specific examples recognized by the *Restatement* include investigations, making reports, interrogations, arrests, trans-border abductions, and

⁸⁷ See Drake, *supra* note 52, at 653.

⁸⁸ See, e.g., Corfu Channel (United Kingdom v. Albania), 1949 I.C.J. 4, 34–35 (Apr. 9) (holding a state cannot enter foreign territorial waters in order to police dangerous mines or to obtain evidence without foreign state consent); S.S. Lotus (France v. Turkey), 1927 P.C.I.J. No. 9, at 18 (1927) (“failing the existence of a permissive rule to the contrary . . . [a State] may not exercise its power in any form in the territory of another State.”); Cook v. United States, 288 U.S. 102, 118–22 (1933) (arrest and other acts of law enforcement on a foreign vessel in violation of treaty law was without consent and voids jurisdiction); Tucker v. Alexandroff, 183 U.S. 424, 433 (1902); The Apollon, 22 U.S. (9 Wheat.) 362, 370–71 (1824); Teodoro Garcia & M.A. Garza (United Mexican States) v. United States, 4 Int’l Arbitral Awards 119, 119 (1926) (U.S. patrol shot bullets into Mexican territory at fleeing persons); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432(2), 433 (1987) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”); Hernan De J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833, 838–39, 843 (1993); S.C. Res. 579, U.N. Doc. S/RES/579 (1985) (U.N. Security Council “[c]ondemns unequivocally all acts of . . . abduction[.]”); United States v. Toscanino, 500 F.2d 267, 277–78 (2d Cir. 1974) (citing S.C. Res. 138, U.N. Doc. S/4349 (1960)).

⁸⁹ See, e.g., Cook, 288 U.S. at 116–18.

⁹⁰ See, e.g., United States v. Bent-Santana, 774 F.2d 1545, 1547 (11th Cir. 1985); see also United States v. Loalza-Vasquez, 735 F.2d 153, 157 (5th Cir. 1984).

⁹¹ Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 NOTRE DAME J. INT’L & COMP. L. 6, 16–17 (2013).

even the sending into and service of process in a foreign state.⁹²

A separate issue is raised by the Posse Comitatus Act,⁹³ which criminalizes conduct of anyone who “willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws”⁹⁴ What appears self-evident is that use of the armed forces within the United States for self-defense against non-state actor armed attacks from within or abroad, would not simplistically be law enforcement (i.e., to execute the laws) or a use of the armed forces as a posse comitatus.⁹⁵ An example of a

⁹² See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432, cmt. b, Reporters’ Notes 1, 3 (“[L]aw enforcement officers cannot arrest . . . in another state, and can engage in criminal investigation in that state only with that state’s consent.”). Examples include an inspector “making inquiries[.]” officials entering “to interrogate . . . with a view to gaining information[.]” “working with . . . [local] police in an effort to arrest,” use of a gun, and abduction, examples of forcible arrest and kidnapping. *Id.* See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 307 (4th ed. 1990); 1 LASSA F. OPPENHEIM, INTERNATIONAL LAW 295 & n.1 (H. Lauterpacht ed., 8th ed. 1955) (“A State is not allowed to send its . . . police forces . . . into . . . foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission It is therefore a breach of international law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime”); *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 491–95 (D.C. Cir. 1984) (sending and service abroad of compulsory process by mail voided); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927); *Dominguez v. State*, 90 Tex. Crim. 92, 97, 234 S.W. 79, 83 (Tex. Crim. App. 1921) (entry into Mexico for law enforcement would be “a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican Government” and violate a U.S.-Mexico extradition treaty, which obviated jurisdiction).

⁹³ See generally 18 U.S.C. § 1385 (2006).

⁹⁴ *Id.* Other statutes provide exceptions, for example, in case of rebellions, insurrections, terrorist attacks or incidents, or an emergency involving use of chemical or biological weapons of mass destruction. However, not all non-state actor armed attacks from within the U.S. will be part of a rebellion, insurrection, terrorist attack, or use of a chemical or biological weapon of mass destruction. See 10 U.S.C. §§ 331–35, 382 (2000); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 953–59 (4th ed. 2007).

⁹⁵ If there is any inconsistency between the Posse Comitatus Act and the AUMF, the AUMF is last-in-time and will prevail. Since the AUMF addresses the right of the United States to engage in self-defense, there is no evident inconsistency and, in any event, the AUMF expressly recognizes the right to use measures of self-defense “to protect United States citizens both at home and abroad.” See *supra* note 13 and accompanying text. It is logical, therefore, that under the AUMF relevant measures of self-defense can be taken at home, as they had been during the Civil War against a belligerent and at other times when other non-state actors had engaged in armed attacks within the United States. See, e.g., *U.S. Use of Drones in Pakistan*, *supra* note 3, at 244–47. For this reason, it is evident that the AUMF also provides a statutory exception to the Posse Comitatus Act. See DYCUS ET AL., *supra* note 94, at 957. With respect to measures of self-defense, it is important to recognize that there have been

measure of self-defense would be use of military aircraft or a missile to destroy a civilian aircraft that has been hijacked by homegrown terrorists and is headed toward and is too near the White House.⁹⁶ Another example would be the engagement by a small navy vessel of a speedboat that is headed toward a U.S. aircraft carrier in U.S. internal waters in San Diego.⁹⁷ Importantly, because there are no geographic boundaries set forth in Article 51 of the U.N. Charter, and there have been several actors other than the state that have had formal roles under international law, and that can engage in armed violence,⁹⁸ a realistic and policy-serving interpretation of Article 51 will affirm that measures of self-defense can be directed against non-state actor armed attacks occurring within a state's own territory.⁹⁹ In certain circumstances, aircraft flying in a state's

actors with formal roles in international law other than the state, including nations, peoples, tribes, and belligerents. *See supra* note 19 and accompanying text. The United States had also been at war with several of those types of non-state actors within the United States. *See, e.g., Paust, supra* note 18, at 979–82 & nn.4–8.

⁹⁶ *See* 18 Op. O.L.C. 148, 164 (1994) (concluding that the Aircraft Sabotage Act, 18 U.S.C. § 32(b)(2), should not “be construed to have the surprising and almost certainly unintended effect of criminalizing action[] by military personnel that are lawful under international law and the laws of armed conflict.”).

⁹⁷ *See* Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 17–18 (2007) (discussing how a state has jurisdiction to protect its territorial waters in the context of piracy).

⁹⁸ *See supra* text accompanying notes 14–29 (for a discussion of roles of non-state actors).

⁹⁹ *See, e.g., Brig Amy Warwick*, 67 U.S. 635, 665–66, 671 (1863) (after the non-state actor Confederate States of America attacked the U.S. from within, the President had “a right to institute a blockade . . . on the principles of international law,” and as “governed and adjudicated under the law of nations” and to exercise rights *jure belli*.); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 215, ¶ 34 (July 9) (Higgins, J., separate opinion) (“I fail to understand the Court’s view that an occupying Power loses the right to defend its own . . . citizens at home if the attacks emanate from the occupied territory . . .”); *Extraterritorial*, *supra* note 16, at 84 (self-defense “in one’s own territory”); *see also Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 242, 243, ¶ 6 (Buergenthal, J., declaration) (Article 51 “does not make its exercise dependent upon an armed attack by another State,” and “it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory . . . or that the attacks do not originate from outside the territory. . . [and] the territory from which the attacks originate is not part of Israel proper.”); DINSTEN, *supra* note 18, at 196 (“[An] attack [by another state] . . . may commence from within . . .”); *id.* at 197 (“An armed attack need not even be cross-border in nature[.]”); *id.* at 244. *But see id.* at 205 (claiming without

airspace can be shot down in self-defense.¹⁰⁰ Moreover, in certain circumstances measures of self-defense can be taken against

citation that “[n]on-State actors must strike at a State from the outside.”); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 75, 75 n.99 (2005) (stating that the I.C.J. should have declared that Israel’s construction of a wall “in occupied territory . . . might be justified as a matter of self-defense” under *jus ad bellum*); *U.S. Use of Drones in Pakistan*, *supra* note 3, at 244–47 (addressing past examples of attacks that occurred within the United States to which the United States responded in self-defense); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 87–88 & n.264 (2009) (the contrary view of the majority in the Advisory Opinion of the I.C.J. on the Wall is “doubtful”). *But see Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 194, ¶ 139 (“The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat . . . originates within, and not outside, that territory. The situation is thus different from that contemplated by the Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.”); Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council’s Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT’L L. 1, 48 (1994) (claiming that the “right of self-defense . . . [includes] the right of a state to take defensive measures within its own territory[,] . . . [but that only] measures . . . against the territory of an aggressor state . . . fall[] within Article 51” because it is assumed in error that there must be a violation of Article 2(4) by a state before self-defense under Article 51 can arise); Wilmshurst, *supra* note 57, at 966 (claiming that the Advisory Opinion on the Wall “may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending State the question of self-defence . . . does not normally arise.”). By referring to the 9/11 Security Council resolutions, the I.C.J.’s majority advisory opinion impliedly recognized that non-state actor armed attacks originating outside a state can trigger a right of self-defense. *See Legal Consequences of the Construction of a Wall*, 2004 I.C.J. at 138. Further, it did not reject the Court’s recognition in *United States v. Iran* that non-state terrorist militants had engaged in “armed attacks.” *See supra* note 15.

¹⁰⁰ *See, e.g.*, DINSTEIN, *supra* note 18, at 199 (intrusions of military aircraft as an “incipient armed attack”); Eric Edward Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. INT’L LEGAL STUD. 187, 208, 212, 214–15 (1998); Robin Geiss, *Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3Bis of the Chicago Convention, and the Newly Adopted German “Luftsicherheitsgesetz,”* 27 MICH. J. INT’L L. 227 (2005); Margaret K. Lewis, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404, 1428 n.142 (2002) (self-defense can pertain against aerial trespass in certain circumstances); Paust, *supra* note 31, at 286 & n.50; Tom Ruys, *The Meaning of “Force” and the Boundaries of Jus ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 183–85, 189 (2014); Emory C. Smith, *Air Space Control*, JAG J. 3, 4 (Jun. 1949); Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT’L & COMP. L.J. 513, 516 (1994) (downing of aircraft can be permissible self-defense if absolutely necessary).

vessels within a state's territorial sea or internal waters.¹⁰¹

If a U.S. military force is in a foreign state with the latter's consent to participate in law enforcement and the U.S. military force comes under armed attack from non-state actors, the inherent right of the United States under Article 51 of the U.N. Charter to respond with selective measures of self-defense when an armed attack occurs is not lost¹⁰² and responsive measures of self-defense do not become measures of law enforcement subject to foreign domestic legal restraints.¹⁰³ Relatedly, if the U.S.S. Cole had successfully defended itself from the attack in 2000 by al Qaeda while it was in internal waters in Yemen, the responsive force would have been in self-defense and not law enforcement

¹⁰¹ See, e.g., Jordan J. Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 787 (1976) (also addressing the 1873 seizure of *The Virginius* by Spain and an admission by U.S. Secretary of State Fish that seizure of a vessel "on its way to land troops and arms for aid in a civil war" on the high seas or within its waters can rightly occur in self-defense); George K. Walker, *Self-Defense, the Law of Armed Conflict and Port Security*, 5 S.C. J. INT'L L. & BUS. 347, 367 (2009) (considering the U.S. response to Japanese attacks on Pearl Harbor in 1941 as self-defense when Hawaii was considered to be a territory of the United States); DINSTEIN, *supra* note 18, at 198 (intrusion of a submerged foreign submarine into internal waters or the territorial sea).

¹⁰² See SHERROD LEWIS BUMGARDNER ET AL., NATO LEGAL DESKBOOK 259 (2d ed. 2010) ("Individuals and units have an inherent right to defend themselves against attack . . ."); Hans Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-Defence*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 420 (Terry D. Gill & Dieter Fleck eds., 2010); Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 366 (1998) ("Military units . . . abroad may use self-defense when attacked by forces of the territorial state . . ."); Dale Stephens, *Rules of Engagement and the Concept of Unit Self-Defence*, 45 NAVAL L. REV. 126, 136 (1998) (unit self-defense for military forces, vessels, and aircraft is part of customary international law and related to the inherent right of self-defense under Article 51 of the Charter); CHARTER COMMENTARY, *supra* note 23, at 797 ("[A]ttacks . . . on the land, sea, or air forces or on the civilian marine and air fleets of another State . . . [can constitute] an 'armed attack[.]'" and "an armed attack may be found when military units of a State abroad are assailed by forces of the territorial State or a third State."); DINSTEIN, *supra* note 18, at 271 (troops stationed within another state that are attacked within that state by a third state can respond in self-defense to the attacks without the consent of the state in which they are stationed); NYC BAR REPORT, *supra* note 16, at 97 ("[I]t is sufficient under international law that United States armed forces stationed abroad are the objects of armed attacks.") (emphasis omitted).

¹⁰³ See CHARTER COMMENTARY, *supra* note 23, at 797 (illustrating that responsive measures in these situations are justified under Art. 51 and affirming that "an armed attack may be found when military units of a State are assailed by forces of the territorial State or a third State.").

despite the consent of Yemen to enter its internal waters.¹⁰⁴ Moreover, “it is undisputed . . . that warships and combat aircraft, when assaulted by foreign forces on the high seas or in international airspace respectively, do have the right to defend themselves by means of military force.”¹⁰⁵ Additionally, if a U.S. military force is participating in collective self-defense within and with the consent of a foreign state, as in the case of U.S. use of armed force against ISIS in Iraq, the legal nature of U.S. measures of self or collective self-defense under Article 51 of the Charter will not shift to and be restricted as measures of law enforcement because the foreign state has provided consent to U.S. participation in collective self-defense.¹⁰⁶ Similarly, if a

¹⁰⁴ Sean P. Henseler, *Self-Defense in the Maritime Environment Under the New Standing Rules of Engagement/Standing Rules for the Use of Force (SROE/SRUF)*, 53 NAVAL L. REV. 211, 216 (2006); Kinga Tibori-Szabó, *Remarks on Henderson & Cavanagh Guest Post on Unit Self-Defence – Perspectives from the Courtroom*, OPINIO JURIS, <http://opiniojuris.org/2014/07/11/guest-post-remarks-henderson-cavanagh-guest-unit-self-defence-perspectives-courtroom> (last visited Nov. 13, 2014) (regarding attacks on a military vessel, “the inherent right of national self-defence can be invoked”); see also *The Anne*, 16 U.S. 435, 447 (1818) (Story, J.) (“While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self defence. The privateer had an equal title”); Walker, *supra* note 101, at 367 (explaining that in view of “the attack on the *U.S.S. Cole* . . . the *Cole* had the right of self-defense.”).

¹⁰⁵ CHARTER COMMENTARY, *supra* note 23, at 797; see also *Case Concerning Oil Platforms (Iran v. U.S.)*, *supra* note 41, at 195, ¶ 72; *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 46 (right of U.S. naval vessel existed “to oppose force to force”), 50 (“acts were a just defence” when the vessel had been fired upon) (1825) (Story, J.); *id.* at 12 (argument of counsel) (“The right of freely navigating the ocean, and of self-defence, or repelling force by force, was common to both vessels”); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 287–90 (1807) (Johnson, J., concurring) (self-defense at sea is “in conformity with the law of nations”); *Haven v. Holland*, 11 F. Cas. 846, 847 (C.C.D. Mass. 1820) (No. 6,229) (Story, J., on circuit) (“capture was made solely in self-defence”); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 305 (1963) (“vessels on the open sea”); Walker, *supra* note 101, at 367 (warships and military aircraft in or over internal waters, ports, or the territorial sea have a right of self-defense). *But see* O’Connell, *Drones*, *supra* note 23, at 598–99 (claiming that “[o]utside of an armed conflict, there is no legal basis for” unit self-defense for a unit of naval vessels when one vessel is attacked).

¹⁰⁶ Recall that nothing in Article 51 of the U.N. Charter creates a geographic limitation on the inherent right of self-defense or collective self-defense when an armed attack occurs. See *supra* notes 17, 18, 94–105 and accompanying text; see also DINSTEIN, *supra* note 18, at 270 (measures of collective self-defense within a state can occur if there has been consent to collective self-defense), 274–76 (regarding collective self-defense within and consented to by Kuwait in 1991). *But see* O’Connell, *Drones*, *supra* note 23, at 597 (claiming that the foreign “state may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities.”); O’Connell, *supra* note 24, at 384 (missing the point that a foreign state can consent to measures of collective

foreign state consents to U.S. use of measures of self-defense against non-state actors in its territory, it would be remarkably unreal to expect that foreign state consent has transformed U.S. conduct from measures of self-defense to measures of law enforcement.

IV. CONCLUSION

The legality of future drone targetings of non-state terrorists that engage in armed attacks on the United States, its embassies, and its military and other citizens abroad will most likely rest on proper use of measures of self-defense under international law. Legitimate measures of self-defense can occur against such non-state actors located in a foreign country from which the armed attacks emanate even though there is no special consent of the foreign state, no imputation of the non-state actor attacks to the foreign state, no armed conflict between the foreign state and the United States, and the foreign state is not unwilling or unable to stop the attacks.¹⁰⁷ Human rights law and the U.S. Constitution do not prohibit targetings that are legitimate measures of self-defense.

Operationalizing permissible measures of self-defense will require more detailed attention to who and what can be targeted and the need for nuanced and contextually aware choice of when and how to target. This article identifies sets of operationalizing criteria that have previously been disclosed and offers a hypothetical regarding attacks from non-state actors in Mexico that can be considered. The article also notes that drones can come in various sizes with varying capabilities. Future problems may arise regarding use of completely autonomous drones and other robotics and those that are sent forth in swarms to make their own choices concerning who and what to target, when, where, and how. Human controls should be retained.

self-defense within its territory against non-state actors that have not achieved the status of insurgents and claiming that “[e]ven where appropriate authorities provide valid consent, they can only grant the authority that the state possesses. Governments must restrict the use of lethal force to peacetime policing rules when dealing with criminal groups not waging armed conflict.”).

¹⁰⁷ See *supra* notes 21–25.