

## MISSING THE TARGET: WHERE THE GENEVA CONVENTIONS FALL SHORT IN THE CONTEXT OF TARGETED KILLING

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### I. INTRODUCTION

The Geneva Conventions are the core body of international law that regulates armed conflict.<sup>1</sup> Since 1864, when the First Geneva Convention was codified, the Conventions have been updated several times.<sup>2</sup> War is waged much differently today,<sup>3</sup> however, than it was in 1949—the last time the Conventions were updated in their entirety.<sup>4</sup> Even though Additional Protocols I and II were implemented in 1977 specifically to “deal with the changing nature of armed conflict and advances in weapons technology,”<sup>5</sup> their

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<sup>1</sup> Int'l Comm. of the Red Cross [ICRC], *Treaties and Customary Law: Overview* (Oct. 29, 2010) [hereinafter *ICRC Treaties and Customary Law*], <http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm>.

<sup>2</sup> *Id.* In their current form, the body of law is referred to as “the ‘four Geneva Conventions.’” *Id.*

<sup>3</sup> See Orna Ben-Naftali & Keren R. Michaeli, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L.J. 233, 255, 265 (2003). Prior to 1949, the outbreak of war resulted from territorial invasion and occupation of one country by another country’s armed forces, with armies lined up across battlefields. See generally *World War II*, HISTORY.COM (2012), <http://www.history.com/topics/world-war-ii> (describing Adolf Hitler’s strategy by invading Poland and lined up against several opponents). In contrast, “most modern hostilities involve non-state actors and the nature and intensity of conflicts vary greatly.” Ben-Naftali & Michaeli, *supra*, at 255. Likewise, “the War on Terror differs from ‘traditional’ wars in many other crucial ways. The enemy intermingles with civilians and attacks both civilian and military targets, and the geographic location of the ‘battlefield’ is indeterminate.” Lindsay Kwoka, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, 14 U. PA. J. CONST. L. 301, 308 (2011).

<sup>4</sup> ICRC, *War and International Humanitarian Law* (Oct. 29, 2010) [hereinafter *ICRC War and International Humanitarian Law*], <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>.

<sup>5</sup> ICRC, *Protocols I and II Additional to the Geneva Conventions* (Jan. 1, 2009) [hereinafter *ICRC Protocols I and II*], <http://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>. Additional Protocols I and II (“Protocols I and II”) in 1977, and Additional Protocol III (“Protocol III”) in 2005, supplemented the Geneva Conventions of 1949. *Id.*; Major John T. Rawcliffe, *Changes to the Department of Defense Law of War*

adoption was a retroactive response to the increase in internal State conflicts, civil wars, and national liberation movements (CARs),<sup>6</sup> rather than a prospective means of encompassing any future advances in warfare.<sup>7</sup> Over the last decade, the International Committee of the Red Cross (ICRC) has issued several reports to rectify areas of ambiguity in the Conventions and other areas of customary international law in general,<sup>8</sup> but gaps still remain.<sup>9</sup> This note explores those gaps by focusing on the issue of targeted killing and the current problems the international legal community faces in upholding International Humanitarian Law (IHL). Part II examines the emergence of targeted killing as part of the United States and Israeli policies to combat terrorism. Part III discusses the law of armed conflict as it is codified in the Conventions and how classification of an armed conflict affects the legality of targeted killing. Part IV contrasts the United States' position justifying targeted killing as preemptive self-defense with the international legal community's position of strict adherence to Article 51 of the U.N. Charter. Part V explores the recent targeted killings of Osama bin Laden and Anwar Al-Aulaqi, and the disparate treatment afforded to each under international law. The note concludes with a discussion on how the Geneva Conventions can be reformed to eliminate gaps in the future.

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*Program*, ARMY LAW. 23, 25 (2006) (citations omitted). Protocols I and II augmented protections afforded to victims of International and Non-International Armed Conflicts respectively, while Protocol III adopted an additional distinctive emblem. *ICRC Protocols I and II*, *supra*. Notably the United States is not a signatory to either Protocol I or II. Rawcliffe, *supra*, at 25 n.13.

<sup>6</sup> See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 123 (2010) (listing the national liberation situations covered in Protocol I—colonial domination, alien occupation, and racist regimes (“CARs”)).

<sup>7</sup> See Charli Carpenter, *Geneva 2.0*, 96 NAT'L INT. 60, 60–61 (2008).

<sup>8</sup> See generally ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, at 9–13 (May 2009) (prepared by Nils Melzer) [hereinafter *ICRC Interpretive Guidance*], available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (describing the purpose of Interpretive Guidance, which is “to provide recommendations concerning the interpretation of international humanitarian law”); see Hague Conference, Int'l Law Ass'n, *Use of Force Comm.*, *Final Report on the Meaning of Armed Conflict in International Law*, at 1–9 (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (follow “Conference Report The Hague (2010)” hyperlink) (reporting “on how international law defines and distinguishes situations of armed conflict and those situations in which peacetime law prevails”).

<sup>9</sup> See generally Thomas E. Ayres, “Six Floors” of Detainee Operations in the Post-9/11 World, 35 U.S. ARMY WAR C. Q. 33, 34, 39–40 (2005) (encouraging categorization of insurgents into six distinct classes); Jeremy Rabkin, *Not as Bad as You Think*, WKLY. STANDARD, Jul. 17, 2006, at 11, 13 (describing problems with classifying prisoners of war under the Geneva Conventions).

## II. EMERGENCE OF TARGETED KILLING

*[T]argeted killings are not a new phenomenon.*<sup>10</sup>

For centuries, States have eliminated individual enemies through the employ of targeted killings.<sup>11</sup> But only recently has any State openly acknowledged engaging in this tactic.<sup>12</sup> The United States unofficially adopted targeted killing as a counterterrorism tactic in 2001 in response to the September 11th terrorist attacks on the World Trade Center.<sup>13</sup> In the first five years after 9/11, the United States conducted more than a dozen targeted killings in Afghanistan, Pakistan, Iraq, and Yemen.<sup>14</sup>

In October 2001, the new version of the ‘Predator’ drone was employed jointly with jet fighters to kill Mohammed Atef, the suspected military chief of al Qaeda, in Afghanistan. After that, the ‘Predator’ continued to be used for the targeted killing of individuals suspected of assuming leading functions within al Qaeda, including, most notably, Ali Qaed Senyan al-Harithi (Yemen, 3 November 2002), Haitham al-Yemeni (Pakistan, approximately 10 May 2005), and Hamza Rabia (Pakistan, December 2005).<sup>15</sup>

While the international community has continuously condemned targeted killing since its emergence in 2000,<sup>16</sup> criticism has not

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<sup>10</sup> NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 9 (2008).

<sup>11</sup> *Id.* Sometimes incorrectly referred to as extra-judicial execution or assassination—which are both illegal under IHL—targeted killings are not per se unlawful. See Ben-Naftali & Michaeli, *supra* note 3, at 240–41; W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 713–14 (2007). No universally accepted definition of “targeted killing” exists, but “a reasonable definition is the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting [is] done at the direction of the state, [and is] in the context of an international or non-international armed conflict.” SOLIS, *supra* note 6, at 538.

<sup>12</sup> Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 151–52 (2010); Ben-Naftali & Michaeli, *supra* note 3, at 239–40. Israel adopted targeted killing as a deliberate State policy during the Second Intifada in 2000. Ben-Naftali & Michaeli, *supra* note 3, at 239; Blum & Heymann, *supra*, at 151.

<sup>13</sup> Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES L. 179, 180 (2004).

<sup>14</sup> Blum & Heymann, *supra* note 12, at 151; Tony Rock, *Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare*, 24 N.Y. INT'L L. REV. 39, 40 (2011) (citations omitted).

<sup>15</sup> MELZER, *supra* note 10, at 41 (citations omitted).

<sup>16</sup> Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1873 (2007) (citing HCJ 769/02 Pub. Comm. Against

deterred either the United States or Israel from continuing to conduct targeted killing operations.<sup>17</sup> In fact, under the Obama administration, the number of U.S. drone strikes has steadily increased<sup>18</sup>—122 were launched in Pakistan in 2010 alone<sup>19</sup>—and shows no sign of diminishing anytime soon.<sup>20</sup> Several high-ranking U.S. political figures have even called the applicability of the Conventions into question given the changing nature of warfare<sup>21</sup>—an ideology not shared by the international community.<sup>22</sup>

“The criticism of targeted killing is primarily based on the

Torture in *Isr. v. Gov't of Isr.* 57(6) lsrSC 285 [2006] (lsr) [hereinafter *PCATI v. Israel*]]. Currently the United States and Israel are the only two countries that openly engage in targeted killing. Eichensehr, *supra*, at 1876. Several other countries have acknowledged implementing targeted killings to combat terrorism in the past—Russia, Pakistan, Germany, Switzerland, and the United Kingdom—but only the United States and Israel have been subjected to widespread criticism. *See id.* at 1873 (citing Press Release, Office of the Spokesman for Sec'y-Gen. Kofi Annan, Secretary-General Urges Israeli Government to Cease Targeted Assassinations, U.N. Press Release SG/SM/7878 (July 5, 2011), available at <http://www.un.org/News/Press/docs/2001/sgsm7878.doc.htm>); MELZER, *supra* note 10, at 10; SOLIS, *supra* note 6, at 541.

<sup>17</sup> *See* Eichensehr, *supra* note 16, at 1873 (“[A]lmost 300 terrorist organization members and 150 civilian bystanders [have] been killed in targeted killings . . . .”); *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012*, NEW AM. FOUND. (Aug. 24, 2012), <http://counterterrorism.newamerica.net/drones>. As of February 15, 2012, between 1741 and 2712 total deaths resulted from U.S. drone strikes in northern Pakistan. *Id.*

<sup>18</sup> Blum & Heymann, *supra* note 12, at 151. “Reportedly, more drone strikes were carried out in President Barack Obama’s first year in office than in the previous eight years combined under George W. Bush . . . .” Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 105 (2010) (citing *Pakistan Denies U.S. Request to Expand Drone Access, Officials Say*, CNN.COM (Nov. 22, 2010), <http://www.cnn.com/2010/WORLD/asiapcf/11/22/pakistan.us.drones/index.html>).

<sup>19</sup> *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012*, *supra* note 17.

<sup>20</sup> *See* SOLIS, *supra* note 6, at 541 (citing Mark Mazzetti & David E. Sanger, *Obama Expands Missile Strikes Inside Pakistan*, N.Y. TIMES, Feb. 21, 2009, at A1).

<sup>21</sup> Ayres, *supra* note 9, at 33 (quoting Jim Garamone, *Geneva Convention Applies to Taliban, not Al Qaeda*, AM. FORCES PRESS SERVICE (Feb. 7, 2002), <http://www.defense.gov/news/newsarticle.aspx?id=43960>) (“According to Defense Secretary Donald Rumsfeld, [t]he reality is, the set of facts that exist today with al Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Conventions were fashioned.”); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror”*, 44 HARV. INT’L L. J. 301, 301 (2003) (quoting Duncan Campbell, *Washington Hints at Improving Legal Rights for Detainees in Guantonamo Bay*, GUARDIAN (United Kingdom), Jan. 29, 2002, at 12 (“White House Counsel Alberto Gonzale[s] has noted his belief that in the context of the ‘War on Terror,’ the Geneva Conventions of 1949 have been made obsolete . . . [while] Victoria Clarke, a senior Pentagon spokeswoman, . . . [believes] the Geneva Conventions ‘should be looked at with new eyes.’”)).

<sup>22</sup> *See Geneva Conventions Still Going Strong At 60*, ICRC (Jul. 8, 2009), <http://www.icrc.org/eng/resources/documents/interview/geneva-convention-interview-120809.htm> (containing an interview with Knut Dormann, head of the ICRC’s legal division).

premise that it constitutes either extra-judicial killing or assassination,”<sup>23</sup> both of which are illegal under customary and international humanitarian law.<sup>24</sup> Consequently, there is serious debate that targeted killing could ever be justified outside the framework of an armed conflict.<sup>25</sup> The United States has repeatedly asserted that it is in a non-international armed conflict with al Qaeda to justify its drone program.<sup>26</sup> Israel has taken an even more radical approach to legitimize its actions. In *Public Comm. Against Torture in Israel (PCATI) v. Israel*, the Israeli Supreme Court held that the conflicts between Israel and Palestinian terrorists constituted an international armed conflict,<sup>27</sup> and that the killings were lawful under the doctrine of anticipatory self-defense.<sup>28</sup> Under IHL, in an international armed conflict, Palestinian terrorists are lawfully subject to attack only so long as they are directly participating in hostilities.<sup>29</sup> According to *PCATI*, as long as it can be proven that “the target is an active terrorist organization

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<sup>23</sup> Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 329 (2004).

<sup>24</sup> MELZER, *supra* note 10, at 216 (extolling the prohibition of extra-judicial execution as a matter of international law); J. Nicholas Kendall, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069, 1074–75 (2002) (mentioning that assassination is proscribed by customary international law).

<sup>25</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Addendum, *Study on Targeted Killings*, ¶ 85, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (prepared by Philip Alston) [hereinafter *Alston Report*], available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>; see Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. CONFLICT & SEC. L. 385, 388 (2011).

<sup>26</sup> Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War’* 4 (Am. Univ. Wash. Coll. of Law, Research Paper No. 2011-16, 2011), available at <http://ssrn.com/abstract=1824783>; see also discussion *infra* Part IV.A (discussing the position of the United States on armed conflict).

<sup>27</sup> MELZER, *supra* note 10, at 32 (citing *PCATI v. Israel*, at ¶ 61).

<sup>28</sup> Kendall, *supra* note 24, at 1072 (citations omitted). Anticipatory self-defense is also known as “[p]reemption” or “preemptive self-defense.” Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT’L L. & POL’Y 150, 151 (2004). This article will henceforth refer to it as preemptive self-defense. A “preemptive attack” is “[a]n attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent.” *Id.* at 152 n.11 (quoting U.S. DEP’T OF DEFENSE DICTIONARY OF MILITARY & ASSOC. TERMS 415 (Apr. 12, 2001 as amended through Mar. 12, 2004), available at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf); see discussion *infra* Part IV.B (discussing preemptive self-defense). Note, however, that “preemptive attack” is no longer available within the current Department of Defense Dictionary. U.S. DEP’T OF DEFENSE DICTIONARY OF MILITARY & ASSOC. TERMS 415 (Nov. 8, 2010 as amended through Aug. 15, 2012).

<sup>29</sup> MELZER, *supra* note 10, at 32–33 (citing *PCATI v. Israel*, ¶¶ 26, 28, 30).

member, direct participation and an immediate threat are presumed.”<sup>30</sup> The Israeli interpretation means that terrorists, technically civilians, can be targeted at any time—no matter how far removed from the battlefield or how remote their connection is to an ongoing or imminent attack.<sup>31</sup> Even though the *PCATI* holding is not binding outside of Israel,<sup>32</sup> State practice is moving towards its acceptance.<sup>33</sup> As a result, many scholars believe that targeted killing is eventually headed towards legitimization as well.<sup>34</sup> But a trend toward legitimacy does not necessarily reflect legality under the law of armed conflict. So when is targeted killing lawful? The answer depends on how the conflict is classified.

### III. CLASSIFICATION OF THE LEGAL FRAMEWORK.

Classification of a conflict is integral in applying IHL.<sup>35</sup> “Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force.”<sup>36</sup> Determining what type of armed conflict—and therefore what level of IHL applies—can be a cumbersome task, however.<sup>37</sup> Because the law of armed conflict is not static, what might commence as an international armed conflict can quickly transform into a non-international armed conflict, or vice versa.<sup>38</sup> Ensuring compliance with IHL thus requires proper classification throughout the

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<sup>30</sup> Eichensehr, *supra* note 16, at 1877. See also MELZER, *supra* note 10, at 33 (discussing the State-sponsored targeted killings of civilians who are “directly participating in hostilities”).

<sup>31</sup> See Eichensehr, *supra* note 16, at 1877 (providing that there is no longer a need for the “temporal nexus between lawful attack and the threat posed by the target”). The ICRC recently conducted a seminar to discuss the definition of “direct participation in hostilities,” partly as a result of the Israeli Supreme Court ruling. See *ICRC Interpretive Guidance*, *supra* note 8, at 43–44.

<sup>32</sup> Eichensehr, *supra* note 16, at 1880.

<sup>33</sup> SOLIS, *supra* note 6, at 544.

<sup>34</sup> See MELZER, *supra* note 10, at 9–43 (identifying the movement towards legitimization of targeted killing); SOLIS, *supra* note 6, at 541; Fisher, *supra* note 11, at 731–51 (emphasizing the emergence and evolution of targeted killing).

<sup>35</sup> SOLIS, *supra* note 6, at 149–50.

<sup>36</sup> *Alston Report*, *supra* note 25, ¶ 28 (citing U.N. Secretary-General, *Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 33–45, U.N. Doc. A/61/311 (Sept. 5, 2006)).

<sup>37</sup> See Gertrude C. Chelimo, *Defining Armed Conflict in International Humanitarian Law*, STUDENT PULSE (Apr. 8, 2011), <http://www.studentpulse.com/a?id=508> (discussing the challenges of classifying armed conflicts).

<sup>38</sup> See SOLIS, *supra* note 6, at 154.

duration of the hostilities.<sup>39</sup> But who determines when and what level of armed conflict applies? The ICRC is the main proponent and guardian of IHL and the Geneva Conventions, but lacks authority to enforce any provision of the laws of armed conflict.<sup>40</sup> Rather, responsibility is left to individual States to ensure proper implementation of IHL.<sup>41</sup> While the ICRC encourages uniform standards of classification, in reality application is anything but consistent.<sup>42</sup> As a result, States can simply determine what level of protection they want to afford their enemy, and label the armed conflict to fit that distinction.<sup>43</sup> This is the context in which the controversy over targeted killing emerges. In order to understand the disparity between the United States and the international legal community's positions, it is necessary to first analyze each separate legal framework independently.

A. *International and Non-International Armed Conflict (NIAC).*

Customary international law recognizes two types of armed conflicts—those of an international nature and those of a non-international nature.<sup>44</sup> An international armed conflict occurs under Common Article 2 in “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>45</sup> World War II, the Cold War, the Korean War, and the Vietnam War are all examples of an international armed conflict.<sup>46</sup> With the passage of Additional Protocol I in 1977, several other categories of conflict were also recognized as international in

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<sup>39</sup> *See id.*

<sup>40</sup> Jakob Kellenberger, President, ICRC, Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future, Address at the Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Aug. 12, 2009) [hereinafter *ICRC Address*], <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm>.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* (lamenting the lack of regard for the current law of armed conflict).

<sup>43</sup> *See SOLIS, supra* note 6, at 102 (explaining that the State ultimately decides when and if Common Article 3 applies).

<sup>44</sup> Anderson, *supra* note 26, at 5.

<sup>45</sup> Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter *Geneva Convention Wounded, Sick and Shipwrecked Members*].

<sup>46</sup> SOLIS, *supra* note 6, at 150.

scope.<sup>47</sup> “[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” are transmuted into international armed conflicts through the application of Additional Protocol I.<sup>48</sup> The Philippine-American War, Israeli occupation of the West Bank, and South Africa’s regime of apartheid are all examples of conflicts that would fit within the CARs paradigm.<sup>49</sup>

Identifying an international armed conflict is relatively straightforward. Since an international armed conflict always involves two or more parties, its occurrence is easily recognizable.<sup>50</sup> “Any difference arising between two States and leading to the intervention of [sic] armed forces’ qualifies as armed conflict, regardless of its intensity, duration or scale.”<sup>51</sup> Even an isolated confrontation may be sufficient to qualify as an international armed conflict.<sup>52</sup> “[I]ndividual border incidents, the capture of a single prisoner or the figurative ‘one shot’ leading to a single wounded” can all produce an international armed conflict.<sup>53</sup> As long as two States are involved, an international armed conflict exists and the full scope of protections under the Geneva Conventions applies.<sup>54</sup> Determining when a non-international armed conflict arises, on the other hand, is much more convoluted.

Common Article 3 recognizes a distinct category of armed conflict—“armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>55</sup> The

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<sup>47</sup> MELZER, *supra* note 10, at 247. The United States is not a signatory of Additional Protocol I. *Id.* at 249. However, there is some debate on whether Additional Protocol I is customary international law, and thus enforceable against non-signatories. *See id.* at 249.

<sup>48</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, June 8, 1977, 1125 U.N.T.S. 7 [hereinafter Additional Protocol I to the Geneva Conventions].

<sup>49</sup> SOLIS, *supra* note 6, at 124–25.

<sup>50</sup> *Id.* at 151. In extraordinary circumstances, non-State actors may qualify as a ‘party’ and thus trigger an Article 2 conflict if the opposing State recognizes their belligerency. MELZER, *supra* note 10, at 248. The last such instance occurred in the American Civil War, however. *Id.* at 249.

<sup>51</sup> *Alston Report*, *supra* note 25, ¶ 51 (quoting ICRC, Commentary, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 32 (Jean S. Pictet ed., 1952)).

<sup>52</sup> MELZER, *supra* note 10, at 251.

<sup>53</sup> *Id.* (citing ICRC, Commentary, Relative to the Treatment of Prisoners of War, 23 (Jean de Preux ed., 1960)).

<sup>54</sup> SOLIS, *supra* note 6, at 98, 167.

<sup>55</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, [hereinafter Geneva Convention Protection of Civilian



statute itself does not expound upon this simple construct, but the drafting history makes clear that Article 3 was intended to apply to internal armed conflicts—namely, civil wars.<sup>56</sup> The projected applicability of Article 3 was thus limited “to domestic conflicts occurring within the territorial confines of a State”<sup>57</sup>—whether between two non-State armed groups, or between a State’s armed forces and dissident armed forces.<sup>58</sup> However, despite this proposed conceptual restriction, State practice affords a decisively broad interpretation to non-international armed conflict—encompassing any conflict that is not international in nature.<sup>59</sup> Such wide latitude for classification, coupled with the lack of a clear definition for what constitutes “armed conflict,” has created controversy in applying the laws of war.<sup>60</sup> In an effort to mitigate the resulting ambiguity, Additional Protocol II was ratified.<sup>61</sup>

Additional Protocol II applies to situations that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . . .”<sup>62</sup> This language excludes conflicts that occur *between* organized armed groups—governmental armed forces must be involved on one side to trigger Additional Protocol II.<sup>63</sup> Consequently, while Additional Protocol II outlines a more detailed set of provisions for when an armed conflict occurs, it has a more limited scope of application than Common Article 3.<sup>64</sup> However, this distinction is largely irrelevant, and often ignored, since Common Article 3 applies to *all* internal armed conflicts and is customary

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<sup>56</sup> ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 43–44 (2010).

<sup>57</sup> MELZER, *supra* note 10, at 257.

<sup>58</sup> *See id.* at 254.

<sup>59</sup> *See id.* at 259.

<sup>60</sup> SOLIS, *supra* note 6, at 129–30.

<sup>61</sup> *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 89 (James Crawford & John S. Bell, eds., 2002).

<sup>62</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II to the Geneva Conventions].

<sup>63</sup> FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 143 (4th ed. 2011).

<sup>64</sup> MOIR, *supra* note 61, at 101.

international law,<sup>65</sup> whereas there is controversy concerning whether non-signatories of Additional Protocol II are bound by its terms.<sup>66</sup> The intended purpose for ratification of Additional Protocol II was to clarify and eradicate inconsistencies in the definition and application of Common Article 3.<sup>67</sup> Nevertheless, by the time that Additional Protocol II was discussed, much of the fervor for its inclusion had dissipated.<sup>68</sup> As a result, Additional Protocol II “fails to provide guidance with respect to the main stumbling block of [C]ommon Article 3—namely, the determination of whether an armed conflict not of an international character actually exists.”<sup>69</sup> Protocol II did succeed in one aspect, however—establishing the minimum standard necessary for a conflict to qualify as non-international.<sup>70</sup> Non-international armed conflicts must meet a higher threshold of duration and intensity than mere internal disturbances or international armed conflicts.<sup>71</sup> Thus riots, isolated acts, or mere banditry do not rise to the level of armed conflict.<sup>72</sup> Rather, these types of conflicts fall within the law enforcement framework.<sup>73</sup>

Nevertheless, qualification of a non-international armed conflict remains problematic.<sup>74</sup> Questions remain about what level of “protracted and intense” fighting is necessary to transform a mere disturbance into an internal conflict.<sup>75</sup> In assessing current conflicts—the Israeli-Palestinian confrontation and the United States’ “War on Terror”—the “diverg[ent] conclusions reached . . . suggest[s] that the legal concept of ‘armed conflict’ requires further clarification.”<sup>76</sup> The ICRC provides few answers other than to

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<sup>65</sup> See SOLIS, *supra* note 6, at 129–30.

<sup>66</sup> MOIR, *supra* note 61, at 109. Instead, States invoke Common Article 3 in *all* levels of non-international armed conflict. SOLIS, *supra* note 6, at 130.

<sup>67</sup> See MOIR, *supra* note 61, at 91.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 101.

<sup>70</sup> See SOLIS, *supra* note 6, at 130.

<sup>71</sup> MELZER, *supra* note 10, at 256. “The touchstone for NIAC is hostilities at a level defined by customary law, not merely the existence of any hostilities whatsoever.” Anderson, *supra* note 26, at 7. Therefore, “the threshold for finding that a NIAC is under way is customarily thought to require violence that is sustained, intense, systematic, and organized.” *Id.* at 6.

<sup>72</sup> Additional Protocol II to the Geneva Conventions, *supra* note 62, at art. 1, 1125 U.N.T.S. 609.

<sup>73</sup> See discussion *infra* Part III.B (discussing the framework that applies to situations that do not meet the threshold requirement for armed conflict).

<sup>74</sup> See SOLIS, *supra* note 6, at 130.

<sup>75</sup> See *id.*

<sup>76</sup> MELZER, *supra* note 10, at 55. The Israeli-Palestinian confrontation refers to the

encourage broad application of Common Article 3.<sup>77</sup> Instead, discretion is left to the States to categorize armed conflict and apply IHL,<sup>78</sup> but States have traditionally been hesitant to declare the existence of a non-international armed conflict in order to avoid legitimizing rebel groups.<sup>79</sup>

Regardless of whether the conflict arises as an international or non-international armed conflict, the legality of targeted killing is the same under IHL—“[t]argeted killing is only lawful when the target is a ‘combatant’ or ‘fighter’ or, in the case of a civilian, only for such time as the person ‘directly participates in hostilities.’”<sup>80</sup>

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“ongoing dispute between the State of Israel and Arab Palestinians[]” over the creation of the state of Israel and usurpation of Palestinian territory. Captain Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by its Involvement in Terror Acts During the Second Intifada?*, ARMY LAW., July 2008, at 1, 3–4 (citation omitted). As a result of increased Palestinian violence toward Israeli civilians during the *intifada*, the Israeli government adopted a policy of targeted killing. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 172 (2005). “Since the beginning of the *intifada* some 750 Israelis . . . have been killed in Israel and the Occupied Territories by Palestinian armed groups. In the same period more than 2,000 Palestinians[] . . . have been killed by the Israeli army in the West Bank and Gaza Strip.” Amnesty Int’l, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, AI Index MDE 15/056/2003 (July 4, 2003), available at <http://www.amnesty.org/en/library/info/MDE15/056/2003/en>. Depending on who is making the determination, the Israeli-Palestinian conflict has been characterized as both an international and non-international armed conflict. See MELZER, *supra* note 10, at 55 n.59 (citations omitted). Similarly, some scholars view the United States’ ‘War on Terror’ as sufficiently protracted and intense enough to classify as a non-international armed conflict, while other scholars remain undecided on its proper classification. *Id.* at 55 n.60 (citations omitted); see discussion *infra* Part IV.A (discussing the classification of the United States “War on Terror”).

<sup>77</sup> See Anderson, *supra* note 26, at 6 (explaining that the ICRC often classifies conflicts as NIACs, whereas State practice is often more restrictive).

<sup>78</sup> KALSHOVEN & ZEGVELD, *supra* note 63, at 143.

<sup>79</sup> CULLEN, *supra* note 56, at 55; Anderson, *supra* note 26, at 6. States’ failure to apply IHL in the recent armed conflicts in Angola, Rwanda, Afghanistan, Chechnya, Bosnia-Herzegovina and Sri Lanka highlight the ineffectiveness and almost universal disregard of Common Article 3. MOIR, *supra* note 61, at 84 (citations omitted).

<sup>80</sup> *Alston Report*, *supra* note 25, ¶ 30 (quoting Int’l Inst. of Human. L. [IIHL], *The Manual on the Law of Non-International Armed Conflict with Commentary*, 4 (Mar. 2006), available at <http://www.ihl.org/Default.aspx?pageid=page12044>; INT’L HUMANITARIAN LAW RESEARCH INITIATIVE, HARVARD UNIVERSITY PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 86 (2010)), available at <http://www.ihlresearch.org/amw/manual>. Conversely, members of an organized non-State group may lawfully be targeted *at any time* during an armed conflict on the basis of their continuous combat function. Cheri Kramer, Note, *The Legality of Targeted Drone Attacks as U.S. Policy*, 9 SANTA CLARA J. INT’L L. 375, 385 (2011). To maintain a “[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.” *Id.* (quoting *ICRC Interpretive Guidance*, *supra* note 8, at 34).

Because there is no commonly accepted definition of direct participation in hostilities, there are several issues with its application.<sup>81</sup> States disagree over what conduct comprises direct participation, the extent to which mere membership in an armed group qualifies as direct participation, and for what duration direct participation lasts.<sup>82</sup>

Responding to this controversy in May of 2009, the ICRC released its interpretive guidance on what constitutes direct participation in hostilities.<sup>83</sup> According to the ICRC's interpretation, direct participation is generally limited to specific solitary acts, but can include any preparatory measures taken in furtherance of the act.<sup>84</sup> While the ICRC's guidance creates a relevant starting point for clarifying the law, the exact scope of interaction necessary to trigger "direct participation" is still unclear.<sup>85</sup> In the end, "the final resolution was so narrow that a dozen nations withdrew rather than be associated with the legal conclusion that [the ICRC] reached."<sup>86</sup> Several of those nations support a countervailing position—one that expands the interpretation of direct participation to include "mere membership in a terrorist organization [as] a basis for military targeting."<sup>87</sup> Currently, neither definition of "direct participation" in hostilities is recognized as binding legal authority, meaning States are ultimately free to choose whichever definition they prefer.<sup>88</sup> Such disparity in classifying armed conflict leaves the legality of targeted killing in a shadowy realm of uncertainty.

### *B. Non-Armed Conflict*

For situations that do not meet the threshold requirement for

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<sup>81</sup> *Alston Report*, *supra* note 25, at 19.

<sup>82</sup> *Id.*

<sup>83</sup> *ICRC Interpretive Guidance*, *supra* note 8.

<sup>84</sup> *See generally id.* at 43–68 (explaining the notion that direct hostilities often refer to specific acts, though "[w]here preparatory measures . . . constitute an integral part of a specific act, . . . they extend the . . . operation beyond the phase of its immediate execution"). Concerned that State practice would broaden the intended application of this definition, the council specifically limited "direct participation" to "recognizable and proximate preparations, such as the loading of a gun, [or] during deployments in the framework of a specific military operation." *Id.* at 67 n.182 (citation omitted).

<sup>85</sup> *See Alston Report*, *supra* note 25, ¶ 65.

<sup>86</sup> Timothy Lynch, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5073, 5080 (2010). The United States was one of those nations that withdrew as a result of the ICRC's definition of 'direct participation in hostilities.' *Id.*

<sup>87</sup> SOLIS, *supra* note 6, at 544; Eichensehr, *supra* note 16, at 1877.

<sup>88</sup> *ICRC Interpretive Guidance*, *supra* note 8, at 6.

armed conflict, a different framework applies.<sup>89</sup> Commonly referred to as the law enforcement paradigm, these disturbances fall under the purview of both the State's domestic law *and* international law.<sup>90</sup> The United States' use of lethal force "is governed domestically by two principal authorities: the United States Constitution and the 2001" Authorization for Use of Military Force (AUMF), a "joint resolution of Congress authorizing the use of force to combat terrorism."<sup>91</sup>

Article II of the U.S. Constitution confers upon the President power as Commander-in-Chief of the nation's military forces.<sup>92</sup> In the past, the inherent presidential power embodied in Article II provided the foundation to justify missile strikes against both Qadhafi and bin Laden, and has likewise been relied upon by the Bush Administration to validate targeted killing.<sup>93</sup> Established Supreme Court jurisprudence places limits on presidential power when the President either acts alone or in contradiction of Congress,<sup>94</sup> but in this situation, the President is not simply relying on his inherent powers.<sup>95</sup> While Congress did not make a formal declaration of war,

[i]n passing the AUMF, Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>96</sup>

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<sup>89</sup> *Alston Report*, *supra* note 25, ¶ 31.

<sup>90</sup> See Kretzmer, *supra* note 76, at 176.

<sup>91</sup> Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1044–45 (2005); see Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1363 (2011).

<sup>92</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>93</sup> Ulrich, *supra* note 91, at 1045.

<sup>94</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>95</sup> See McKelvey, *supra* note 91, at 1363 (referencing the DOJ's argument that the President's authority comes from two sources: (1) AUMF and (2) the authority granted in Article II to use defensive force).

<sup>96</sup> Kwoka, *supra* note 3, at 309 (citing Authorization for Use of Military Force, Pub. L. No.

According to the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”<sup>97</sup> This is especially true where the United States’ national security is at issue.<sup>98</sup> As Justice Jackson so eloquently stated, the President enjoys the “widest latitude of interpretation to sustain his exclusive function to command the instruments of national force . . . when turned against the outside world for the security of our society.”<sup>99</sup> But just how far does that latitude stretch in terms of targeting? Does it permit military force against any terrorist organization, or only those directly linked to 9/11? President Obama believes the Constitution and AUMF grant him broad license to use lethal force worldwide against al Qaeda,<sup>100</sup> and the White House administration continuously cites the AUMF as justification for its targeting program<sup>101</sup>—which includes individuals with no association to 9/11.<sup>102</sup> Other commentators are not as persuaded that the breadth of the AUMF includes force against terrorists without a connection to 9/11, or even to targeted killing in general.<sup>103</sup> Provided, however, that targeted killing is lawful under U.S. domestic law, resorting to lethal force must still coincide with international law.

IHL does not govern incidents that occur outside the context of armed conflict.<sup>104</sup> Instead, International Human Rights Law (IHRL) controls in these circumstances.<sup>105</sup> Accordingly, a State can resort to lethal force against an individual only if it is “absolutely

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107-40 § 2(a), 115 Stat. 224, 224 (2001)).

<sup>97</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>98</sup> See McKelvey, *supra* note 91, at 1366; Ulrich, *supra* note 91, at 1045.

<sup>99</sup> *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

<sup>100</sup> Kwoka, *supra* note 3, at 309.

<sup>101</sup> Harold Hongju Koh, *The Obama Administration and International Law*, U.S. DEP’T OF ST. (Mar. 25, 2010), <http://www.state.gov/s//releases/remarks/139119.htm>.

<sup>102</sup> See Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POLY REV. 525, 534 (2010).

<sup>103</sup> “By its terms, AUMF only authorizes the use of military force against those who were somehow connected to the September 11, 2001 attacks.” Kwoka, *supra* note 3, at 310 n.57. The AUMF was “predicated upon involvement in the attacks of September 11—thus excluding from its reach terrorists who were not involved . . . .” Ulrich, *supra* note 91, at 1045. Likewise, there has been no determination that targeted killing is authorized by the AUMF. Kwoka, *supra* note 3, at 310.

<sup>104</sup> See John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 183 (2011) (Heller, rebuttal), available at <http://www.pennumbra.com/debates/pdfs/TargetedKilling.pdf>.

<sup>105</sup> *Id.*

necessary” to protect life.<sup>106</sup> Targeted killing will almost never be legal in this context.<sup>107</sup> “The necessity requirement imposes an obligation to minimize the level of force used,”<sup>108</sup> but the primary objective of targeted killing is the maximization of force through the intentional and premeditated killing of an individual.<sup>109</sup> When States adopt a kill-first policy, instead of resorting to lethal targeting only *after* all other measures are exhausted, IHRL is violated.<sup>110</sup> Instead, less-than-lethal measures, including capture and conviction through the judicial process, are advocated under the law enforcement paradigm.<sup>111</sup> For actors within a State’s own province, this might not present a problem, but how does a State respond when the target is not within their geographical reach? “Terrorists operate in countries all over the world; . . . in failed states, states that are unable [or unwilling] to adequately secure their borders, or states with insufficient resources to combat terrorists.”<sup>112</sup> Countries can attempt to extradite a suspected terrorist for prosecution,<sup>113</sup> but what happens when that proves unsuccessful? In those situations, any resort to targeted killing in another State’s territory requires compliance with inter-State use of force.

### C. *Inter-State Force*

“Targeted killings conducted in the territory of other States raise sovereignty concerns.”<sup>114</sup> Article 2(4) of the UN Charter prohibits the use of force within the territory of another State, absent two circumstances—where a State gives consent to the use of force, or where the targeting State invokes its right to self-defense.<sup>115</sup> The right of self-defense under Article 51 of the UN Charter may be

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<sup>106</sup> *Id.* (citing JAN ROMER, KILLING IN A GRAY AREA BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS 102 (2010)).

<sup>107</sup> See *Alston Report*, *supra* note 25, ¶ 33.

<sup>108</sup> *Id.* ¶ 32.

<sup>109</sup> *Id.* ¶ 9.

<sup>110</sup> *Id.* ¶ 33.

<sup>111</sup> See *id.* ¶¶ 74, 75.

<sup>112</sup> Rock, *supra* note 14, at 69.

<sup>113</sup> See generally *A Primer on US Extradition Law*, FREEEXISTENCE.ORG, [http://www.freeexistence.org/us\\_extradition.html](http://www.freeexistence.org/us_extradition.html) (last updated Apr. 2009) (defining extradition and explaining under what circumstances a country may seek extradition).

<sup>114</sup> *Alston Report*, *supra* note 25, ¶ 34 (citations omitted).

<sup>115</sup> *Id.* ¶ 35; MELZER, *supra* note 10, at 51.

summoned in response to an armed attack, or in a situation where a “State is unwilling or unable to stop armed attacks” that are emanating from its territory.<sup>116</sup> In the event that a State gives permission for targeted killing to occur on its soil, any action taken must still comport with IHL—or, depending on the level of conflict, IHRL.<sup>117</sup> Therefore, targeted killing would be lawful only insofar as the force used was “necessary and proportionate.”<sup>118</sup>

In a circumstance where permission to use force on foreign soil is not granted, a State may invoke its right to self-defense in accordance with Article 51 of the UN Charter.<sup>119</sup> When a State engages in this form of self-help, it “retains that right . . . until the Security Council takes ‘measures necessary to maintain international peace and security.’”<sup>120</sup> In addition, the Security Council must be notified of any State’s intention to pursue self-defense as a remedy.<sup>121</sup> Failure to abide by either of these provisions will result in a violation of the UN Charter’s prohibition against the use of force contained in Article 2(4).<sup>122</sup> However, observance of these requirements is not the only concern. To comply with international law, any use of lethal force must still

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<sup>116</sup> *Alston Report*, *supra* note 25, ¶ 35; see Robert Chesney, *Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 3, 24 (M.N. Schmitt et al. eds., 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1754223](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223); see also discussion *infra* Part IV.B (discussing the right of self-defense).

<sup>117</sup> *Alston Report*, *supra* note 25, ¶ 37.

<sup>118</sup> *Id.* ¶ 39 (citing U.N. Charter art. 51; Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–34 (1984)). “The concept of necessity limits the use of force to situations in which forcible ‘measures . . . are . . . necessary to respond to’ the armed attack or to otherwise repel aggression.” Chris Bordelon, *The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law*, 9 CHAP. L. REV. 111, 135 (2005) (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27)). Under the doctrine of necessity, “[b]efore resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.” MELZER, *supra* note 10, at 31 (quoting U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003)). Similarly, proportionality requires a balancing test such that any loss of civilian life or property is not excessive when compared with the anticipated military advantage to be gained. SOLIS, *supra* note 6, at 273. The standard for proportionality, however, differs depending on the level of conflict. *Id.* at 281. In a law enforcement framework, “[l]ethal force is only permissible in very narrow circumstances.” *Id.* (quoting Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 280–81 (2006)).

<sup>119</sup> *Alston Report*, *supra* note 25, ¶ 35.

<sup>120</sup> Ulrich, *supra* note 91, at 1047 (quoting U.N. Charter art. 51).

<sup>121</sup> Bordelon, *supra* note 118, at 116.

<sup>122</sup> See *id.* at 117.



adhere with the principles of necessity and proportionality.<sup>123</sup>

Whether the right of self-defense is argued in conjunction with another State's consent, or in the absence of consent, there are several areas of ambiguity in regards to its application.<sup>124</sup>

Controversy has arisen . . . in three main areas: whether the self-defence justification applies to the use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to "anticipatory" or "pre-emptive" self-defence.<sup>125</sup>

There are two competing arguments as to whether self-defense is permitted against non-State actors.<sup>126</sup> State practice supports the contention that the inherent right of self-defense is not limited with respect to who may be targeted.<sup>127</sup> "[T]he International Court of Justice [ICJ] has nevertheless held that States have no right to self-defense in the face of armed attack by nonstate actors."<sup>128</sup> Proponents of the expansive viewpoint counter that international law never contemplated the participation of non-State actors in armed conflicts—thus, the law is not reflective of current methods of warfare.<sup>129</sup> However, even if a State can exercise its right of self-defense against non-State actors, that privilege must be in response to an "armed attack."<sup>130</sup> International scholars question whether attacks by non-State actors can ever be intense enough to qualify as

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<sup>123</sup> *Alston Report*, *supra* note 25, ¶ 39.

<sup>124</sup> *See id.* ¶¶ 37, 38.

<sup>125</sup> *Id.* ¶ 39; *see also* discussion *infra* Part IV.B (discussing the controversy surrounding anticipatory or preemptive self-defense).

<sup>126</sup> *See id.* ¶ 40.

<sup>127</sup> *Id.*

<sup>128</sup> Gregory Rose, *Preventive Detention of Individuals Engaged in Transnational Hostilities: Do We Need a Fourth Protocol Additional to the 1949 Geneva Conventions?*, in *NEW BATTLEFIELDS OLD LAWS* 45, 54 (William C. Banks ed., 2011).

<sup>129</sup> Guiora, *supra* note 23, at 323.

<sup>130</sup> *Alston Report*, *supra* note 25, ¶ 40. This is the viewpoint of "restrictionists"—that the right of self-defense contained in Article 51 is applicable in limited circumstances and only *after* an armed attack takes place. *See* John-Alex Romano, Note, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 *GEO. L. J.* 1023, 1035 (1999) (citing IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 273–78 (1963); ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 154–55 (1993); Quincy Wright, *The Cuban Quarantine*, 57 *AM. J. INT'L L.* 546, 560 (1963)). The positions of both the "restrictionists" and "counterrestrictionists" are contained in the next section. *See* discussion *infra* Part IV.B.

an “armed attack,” while countries such as Israel and the United States argue for an aggregation of *all* attacks by a terrorist organization to determine if they are sufficiently protracted and intense.<sup>131</sup>

More vigorous debate surrounds the perspective that self-defense *alone* justifies the use of lethal force.<sup>132</sup> Under this view, States’ use of force is not restricted by any other provision of international law.<sup>133</sup> “This approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is ‘just.’”<sup>134</sup> Nevertheless, States in favor of the expansionist viewpoint mention the ICJ’s Nuclear Weapons Advisory Opinion of 1997 to justify their stance.<sup>135</sup> The ICJ’s Opinion refused to categorize the use of force as lawful or unlawful, as a measure of self-defense, when used in circumstances involving “the very survival of a State.”<sup>136</sup> Consequently, States urge that the decision creates an exception wherein only the right of self-defense governs targeted killing.<sup>137</sup> But “States may not invoke self-defence as justification for their violations of IHL.”<sup>138</sup> The Advisory Opinion only pardoned a contravention of IHL in the most dire of circumstances, not *any* situation whatsoever.<sup>139</sup>

#### IV. CLASSIFICATION OF U.S. DRONE STRIKES

While classification of an armed conflict remains paramount in the proper application of international law, the foregoing discussion demonstrates the lack of clarity in not only how the law is currently applied, but in how the law is defined. A subtle change in the characterization of the legal rule completely changes the legality of a State’s actions within the law of armed conflict. So where does that leave the United States’ drone program and under what

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<sup>131</sup> See *Alston Report*, *supra* note 25, ¶ 41.

<sup>132</sup> See *id.* ¶¶ 41–42.

<sup>133</sup> *Id.* ¶ 42.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Rep. 226, 266, (July 8, 1996), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>).

<sup>137</sup> *Alston Report*, *supra* note 25, ¶ 42.

<sup>138</sup> *Id.* ¶ 43 (citation omitted).

<sup>139</sup> See *id.* ¶ 42.

paradigm does the United States' "War on Terror" fit?

The presence of non-State actors as a party to the conflict immediately precludes an international armed conflict,<sup>140</sup> but whether the conflict then falls within the definition for non-international armed conflict or the law enforcement framework is hotly contested.<sup>141</sup> As a secondary consideration, some States argue the inherent right of self-defense—which is authorized regardless of what legal framework the conflict is classified under—as justification for targeted killing.<sup>142</sup> The United States' position is essentially that "lethal force against a valid military objective, in an armed conflict, is consistent with the law of war and does not, by definition, constitute an 'assassination.'"<sup>143</sup> But is the United States in an armed conflict with al Qaeda or al Qaeda in the Arabian Peninsula (AQAP)? International legal scholars do not support that contention.<sup>144</sup>

Likewise, "[t]he issue of self-defense and the breadth of its definition is under extensive debate amongst international law experts and policy-makers."<sup>145</sup> Article 51 of the UN Charter guarantees a State's right to self-defense in response to an "armed attack."<sup>146</sup> Some scholars read this provision to authorize self-defense purely as a defensive measure—only after an attack occurs.<sup>147</sup> Other commentators argue for the customary right of self-defense, urging a broad interpretation that includes the right to preemptive self-defense.<sup>148</sup> This section addresses the issues

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<sup>140</sup> Chris Downes, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277, 283 (2004).

<sup>141</sup> See Dehn & Heller, *supra* note 104, at 183, 190. (including Dehn's and Heller's debate about whether the United States is involved in a non-international armed conflict with al Qaeda in Afghanistan and elsewhere around the world).

<sup>142</sup> *Alston Report*, *supra* note 25, ¶ 39.

<sup>143</sup> Pam Benson, *Obama admin defends killing American terrorists*, CNN.COM (Feb. 23, 2012), <http://security.blogs.cnn.com/2012/02/23/obama-admin-defends-killing-american-terrorists>.

<sup>144</sup> See Anderson, *supra* note 26, at 4.

<sup>145</sup> Guiora, *supra* note 23, at 323.

<sup>146</sup> U.N. Charter art. 51.

<sup>147</sup> See Bordelon, *supra* note 118, at 121; Guiora, *supra* note 23, at 323; Pierson, *supra* note 28, at 156–57; David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 471–72 (2005).

<sup>148</sup> Downes, *supra* note 140, at 287; Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 658 (2009); Pierson, *supra* note 28, at 157; see Rock, *supra* note 14, at 60 (suggesting the drone attacks in Palestine by the United States "are likely legal").

inherent in both positions and the effect this disparity has in determining the legality of targeted killing and applying the Geneva Conventions.

### A. NIAC versus Non-Armed Conflict

In response to 9/11, the U.S. Congress passed the Authorization for the Use of Military Force (AUMF).<sup>149</sup> The AUMF gave the President broad discretion to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”<sup>150</sup> Under the auspice of this provision, the United States posits that it is justified in using force against members of al Qaeda as a legitimate method of warfare—as part of a global non-international armed conflict.<sup>151</sup> No non-American international legal scholar holds the same view.<sup>152</sup>

According to the test established in *Prosecutor v. Tadic*,<sup>153</sup> “a NIAC exists only insofar as there is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’”<sup>154</sup> While the United States maintains that al Qaeda’s continuous terrorist attacks are sufficient to meet the durational or organizational aspects of *Tadic* when taken in their totality, that assertion is not prevailing authority.<sup>155</sup>

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<sup>149</sup> Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH L. REV. 843, 843 (2010).

<sup>150</sup> *Id.* at 845 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001)).

<sup>151</sup> Ramsden, *supra* note 25, at 388.

<sup>152</sup> Dehn & Heller, *supra* note 104, at 197 (Heller, closing statement).

<sup>153</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>154</sup> Dehn & Heller, *supra* note 104, at 197 (quoting *Prosecutor v. Tadic*, IT-94-1-I, ¶ 70) (Heller, closing statement).

Determining the existence and scope of a NIAC thus requires a factual analysis of (1) the organization of the armed groups involved in the hostilities and (2) the duration and intensity of the conflict. A NIAC exists only if the armed groups are sufficiently organized and the hostilities are of a sufficient duration and intensity.

*Id.* (citing Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT’L REV. RED CROSS 95, 106 (2009)).

<sup>155</sup> See Downes, *supra* note 140, at 282. Terrorist attacks are generally isolated incidents of aggression, not sustained or concentrated acts of violence. See TARGETING OPERATIONS WITH DRONE TECHNOLOGY: HUMANITARIAN LAW IMPLICATIONS, BACKGROUND NOTE FOR THE AM. SOC’Y OF INT’L L. ANN. MEETING 12 (Human Rights Inst. & Colum. L. Sch., eds., 2011) [hereinafter *Background Note*], available at [http://www.law.columbia.edu/ipimages/Human\\_Rights\\_Institute/BackgroundNoteASILColum](http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColum)

However, there is some acceptance in the international community that the United States is engaged in a localized NIAC with al Qaeda in Afghanistan, and even Pakistan.<sup>156</sup> But serious doubt remains that those conflicts can be expanded to include AQAP.<sup>157</sup> Thus, controversy remains as to whether the United States is involved in an armed conflict with al Qaeda as to make targeted killing lawful under IHL.<sup>158</sup>

Even in the event that the United States is not in a non-international armed conflict with al Qaeda or AQAP, the legality of targeted killing is not automatically precluded. There is a secondary justification for the targeted killings conducted by the United States—self-defense according to Article 51 of the UN Charter.<sup>159</sup>

### B. Preemptive Self-Defense

The United States rationalizes its drone strike program by claiming the right of preemptive self-defense.<sup>160</sup> “Supporters of [preemptive] self-defence essentially claim that the UN Charter has not restricted the pre-existing customary right of self-defence.”<sup>161</sup> The customary right of self-defense alluded to in that position, refers to the Caroline doctrine.<sup>162</sup> The Caroline doctrine was

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<sup>156</sup> Ramsden, *supra* note 25, at 390. For targeted killing of those al Qaeda members to be lawful, they must either maintain a continuous combat function as members of an organized non-State entity, or directly participate in the hostilities. Kramer, *supra* note 80, at 385.

<sup>157</sup> Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement). Because the AUMF only permits the use of force against those terrorists associated with the September 11th, 2001 attacks, Gonzales, *supra* note 149, at 843, AQAP would have to be associated with al Qaeda in Afghanistan or Pakistan—those groups being recognized as in a localized non-international armed conflict with the United States—for targeting of those individuals to be lawful. *Id.* at 191 (Dehn, closing statement).

<sup>158</sup> Even if the international legal community is unwilling to recognize the legitimacy of their position, the United States certainly has an ulterior motive in broadening the classification of “armed conflict.” See Rock, *supra* note 14, at 52. “[T]he right[s] to kill without warning and detain without trial are far more limited in peacetime than during fighting amounting to armed conflict.” *Id.* at 53 (quoting Mary Ellen O’Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SEC. L. 393, 395 (2008) (citing Richard Murphy & Afsheen Radsan, *Due Process and Targeted Killing of Terrorists*, 32 CARDOZO L. REV. 405, 409 (2009)).

<sup>159</sup> Ramsden, *supra* note 25, at 388; see U.N. Charter art. 51.

<sup>160</sup> *Alston Report*, *supra* note 25, ¶ 45; see Sikhander Ahmad Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of the U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 115–16 (2010).

<sup>161</sup> MELZER, *supra* note 10, at 53.

<sup>162</sup> Downes, *supra* note 140, at 287–88.

introduced in 1841 in response to the British's sinking of an American steamboat—the *Caroline*—within United States territory.<sup>163</sup> In the diplomatic dispute that ensued, Daniel Webster—the U.S. Secretary of State—put forth the proposition that a country may only anticipate an armed attack when “the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>164</sup> Its subsequent endorsement by the Nuremburg Tribunal firmly embedded the *Caroline* doctrine into customary international law.<sup>165</sup> Proponents of preemptive self-defense argue that when the UN Charter was adopted, it necessarily incorporated the customary international law definition of self-defense contained within the *Caroline* doctrine.<sup>166</sup> The United States, under the Bush administration, expanded its practice under preemptive self-defense to authorize lethal force in situations where the threat is uncertain and its imminence questionable<sup>167</sup>—arguing that the “enormous destructive potential of modern terrorism” requires the right of self-defense to include anticipatory action in the prevention of hostile acts, even though their imminence is presently remote.<sup>168</sup> Within

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<sup>163</sup> OLAOLUWA OLUSANYA, IDENTIFYING THE AGGRESSOR UNDER INTERNATIONAL LAW: A PRINCIPLES APPROACH 105 (2006).

The *Caroline* incident arose after a British-Canadian use of armed force in the United States in self-defense against prior and ongoing armed attacks against British rule by local insurgents who initially tried to capture Toronto . . . had taken control of Navy Island in Canada and proclaimed a government, were carrying out armed attacks in Canada at least since early December, were operating partly from within the United States and from Navy Island in Canadian territory, and were being supported by certain persons and supplies from the United States, including by the vessel *Caroline* . . . . The British use of force against the *Caroline* during the evening of December 29, 1837 “resulted in the death of [at least] one U.S. citizen, the wounding of several others, one person being missing, and loss of the burning vessel [*Caroline*] over Niagara Falls.” Jordan J. Paust, *Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 242 (2010) (quoting JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 1099 (3d ed. 2009) (citing Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 494–95 (1990); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82–84 (1938)).

<sup>164</sup> Downes, *supra* note 140, at 288, 288 n.93 (internal quotation marks omitted) (citation omitted); Joshua Raines, Note, *Osama, Augustine, and Assassination: The Just War Doctrine and Targeted Killings*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 217, 237–38 (2002).

<sup>165</sup> OLUSANYA, *supra* note 163, at 105.

<sup>166</sup> Raines, *supra* note 164, at 238.

<sup>167</sup> *Alston Report*, *supra* note 25, ¶ 45.

<sup>168</sup> MELZER, *supra* note 10, at 53; see Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16 PACE INT'L L. REV. 193, 206 (2004) (arguing for an expansion of the inherent right of self-defense in light of current conflicts).

Legal scholars and international jurists often conditioned the *legitimacy of preemption*

this framework, targeted killing would be permissible as a preventive measure so long as it comports with the requirements of the Caroline doctrine—in other words, with the principle of necessity.<sup>169</sup>

“[T]hose rejecting [preemptive] self-defence contend that, according to the clear wording of Article 51 [of the] UN Charter, any use of interstate force is unlawful prior to the moment where a concrete ‘armed attack’ actually occurs or is obviously imminent.”<sup>170</sup> Any other interpretation encourages discretionary use of force based on inaccurate or unsubstantiated information, which places the entire structure and purpose of IHL in peril.<sup>171</sup> This concern was realized with the United States’ invasion of Iraq in 2003, which was predicated on the theory that Iraq possessed weapons of mass destruction (WMD).<sup>172</sup> There have been close to thirty-five thousand U.S. casualties<sup>173</sup> and over 114,000 civilians killed in the Iraq war,<sup>174</sup> yet no WMD were ever found.<sup>175</sup> Likewise, “restrictionists” do not support the theory that State practice may cause the UN Charter to lose its force.<sup>176</sup> “[W]hen states depart from the Charter rules these departures are not state practice supporting new legal norms—they are violations of international law.”<sup>177</sup> Although the terrorist acts of 9/11 are generally recognized

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*on the existence of an imminent threat*—most often a visible mobilization of armies, navies, and air forces preparing to attack. *We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.* Rogue states and terrorists do not seek to attack us using conventional means . . . Instead they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning . . . To forestall or prevent such hostile acts by our adversaries, *the United States will, if necessary, act preemptively.*

*Id.* (quoting President’s Letter to Congress on the National Security Strategy of the United States of America 6 (Sept. 14, 2002)).

<sup>169</sup> Raines, *supra* note 164, at 238.

<sup>170</sup> MELZER, *supra* note 10, at 53.

<sup>171</sup> *Id.* (citing Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES L. 111, 116 (2004)) (other citations omitted).

<sup>172</sup> MELTZER, *supra* note 10, at 53.

<sup>173</sup> *U.S. Casualties in Iraq*, GLOBALSECURITY.ORG (last modified Mar. 22, 2012), [http://www.globalsecurity.org/military/ops/iraq\\_casualties.htm](http://www.globalsecurity.org/military/ops/iraq_casualties.htm).

<sup>174</sup> Dan Murphy, *The Iraq War Death Toll? At Least 162,000 and Counting*, CHRISTIAN SCI. MONITOR (Jan. 2, 2012), <http://www.csmonitor.com/World/Backchannels/2012/0102/The-Iraq-war-death-toll-At-least-162-000-and-counting>.

<sup>175</sup> Rivkin et al., *supra* note 147, at 496.

<sup>176</sup> Pierson, *supra* note 28, at 173.

<sup>177</sup> *Id.* (citing *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27)).

as an “armed attack” that justified the U.S. mobilization of troops in Afghanistan,<sup>178</sup> the U.S. drone program extends beyond the reach of the Afghani battlefield.<sup>179</sup> Because the United States is not engaged in an armed conflict outside of Afghanistan, according to the international legal community, targeted killing is only lawful under a theory of self-defense if States have a right of preemption.<sup>180</sup> But the law remains unsettled. So the operative question persists: who decides, and what effect does that have on the legality of targeted killing?

#### V. RECENT TARGETED KILLINGS.

The recent targeted killings of Osama bin Laden and Anwar Al-Aulaqi have served to amplify just how much disparity exists in applying IHL under the current Geneva Conventions.<sup>181</sup> Upon Osama bin Laden’s death earlier this year, world leaders rejoiced it as a significant milestone in the fight against terrorism.<sup>182</sup>

Australian Prime Minister Julia Gillard . . . congratulated the U.S. on the operation . . . .

. . . .

European Commission President Barroso and European Council President Van Rompuy . . . [stated] “[h]is death makes the world a safer place and shows that such crimes do not remain unpunished.”

. . . .

French President Nicolas Sarkozy . . . [called it] a “remarkable U.S. commando” operation.

. . . .

German Chancellor Angela Merkel . . . [applauded it as] “a decisive strike against al Qaeda.”

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<sup>178</sup> See Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, AM. SOC’Y INT’L L. TASK FORCE ON TERRORISM, Aug. 2002, at 3, 10–11; Shah, *supra* note 160, at 88.

<sup>179</sup> Shah, *supra* note 160, at 114 (explaining that the United States expanded its drone program to include Pakistan).

<sup>180</sup> See O’Connell, *supra* note 178, at 2–3 (arguing that the right to self-defense only applies *after* an armed attack).

<sup>181</sup> See discussion *infra* Parts V.A–B (highlighting the disparity that exists in the application of IHL as it is applied to the targeted killings of Osama bin Laden and Anwar Al-Aulaqi).

<sup>182</sup> See generally *World Leaders React to News of bin Laden’s Death*, CNN.COM (May 3, 2011), <http://www.cnn.com/2011/WORLD/asiapcf/05/02/bin.laden.world.react/index.html> (noting various countries rejoicing the death of bin Laden).



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Israeli Prime Minister Benjamin Netanyahu . . . [called it] “a resounding victory for justice, freedom and for the joint values of all the countries that fight side by side determinedly against terror.”<sup>183</sup>

In contrast, even before Anwar Al-Aulaqi was killed by a drone strike in September 2011, human rights proponents condemned his targeting as murder<sup>184</sup>—a lawsuit was even initiated on his behalf to challenge his presence on a list of individuals marked for lethal targeting.<sup>185</sup> The disparate treatment between the two cases highlights the discrepancies in the understanding and application of the Geneva Conventions and IHL.

#### A. *Osama bin Laden*

Osama bin Laden was born in 1957, son to a wealthy Saudi construction mogul.<sup>186</sup> As part of a CIA-funded program to defend against the Soviet invasion of Afghanistan, bin Laden trained a group of Islamic jihadists.<sup>187</sup> It was this program that formed the beginning of bin Laden’s secret network of extremists, al Qaeda.<sup>188</sup> Long before bin Laden orchestrated the September 11, 2001 attacks on the United States, he gained notoriety for planning numerous assaults against American soldiers and citizens.<sup>189</sup> As al Qaeda’s acts became increasingly violent, the Saudi government distanced itself from bin Laden, finally exiling him in 1996.<sup>190</sup> Unable to return to his homeland, bin Laden sought protection from the

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<sup>183</sup> *Id.*

<sup>184</sup> See Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen: Fiery al-Qaeda Leader Hit by Drone After a Series of Near Misses*, N.Y. TIMES, Oct. 1, 2011, at A1 (questioning the legality of placing an American citizen on a targeting list).

<sup>185</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9–10 (D.D.C. 2010).

<sup>186</sup> *Osama bin Laden Biography*, BIOGRAPHY.COM (Aug. 24, 2012), <http://www.biography.com/people/osama-bin-laden-37172>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Osama bin Laden (1957–2011)*, N.Y. TIMES TOPICS (May 3, 2012), [http://topics.nytimes.com/top/reference/timestopics/people/b/osama\\_bin\\_laden/index.html](http://topics.nytimes.com/top/reference/timestopics/people/b/osama_bin_laden/index.html). “In 1996 . . . al Qaeda detonated truck bombs against U.S. occupied forces in Saudi Arabia. The next year, they claimed responsibility for killing tourists in Egypt, and in 1998 they bombed the U.S. embassies in Nairobi, Kenya, and Tanzania, killing nearly 300 people in the process.” *Osama bin Laden Biography*, *supra* note 186.

<sup>190</sup> *Id.*

Taliban in Afghanistan,<sup>191</sup> and in return, he provided the foundation for the Taliban's rise to power.<sup>192</sup> As retribution for the September 11, 2001 attacks, the United States overthrew the Taliban and forced bin Laden into hiding.<sup>193</sup> After a ten-year manhunt, a group of U.S. military and CIA operatives killed bin Laden at a compound in Pakistan in May 2011.<sup>194</sup>

The official report of the 9/11 Commission states that in the years immediately following the attack on the World Trade Center, the CIA's goal was to capture bin Laden, or in the alternative "kill him with a precision-guided missile."<sup>195</sup> In the months following bin Laden's death, however, whether the U.S. forces intended anything other than to kill bin Laden has come into question,<sup>196</sup> especially given recent reports that bin Laden was unarmed.<sup>197</sup> The international community has since labeled it an "extrajudicial execution."<sup>198</sup> However, whether bin Laden's death was a lawful targeted killing, or an illegal assassination, depends on what legal framework applies.

Some individuals in the international human rights community do not acknowledge that bin Laden, or al Qaeda, are lawful military targets—no matter what paradigm applies.<sup>199</sup> The international legal community, however, recognizes that the United States is, at the very least, engaged in a non-international armed conflict against al Qaeda within Afghanistan.<sup>200</sup> "Individuals who exercise a continuous combat function in *those groups* and civilians who directly participate in *those conflicts* are clearly legitimate military targets under IHL—even if they are located outside of the traditional battlefield."<sup>201</sup> The pertinent question then becomes whether Osama bin Laden maintained a continuous combat

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<sup>191</sup> *Id.*

<sup>192</sup> *Osama bin Laden (1957–2011)*, *supra* note 189.

<sup>193</sup> *Osama bin Laden Biography*, *supra* note 186.

<sup>194</sup> *Osama bin Laden (1957–2011)*, *supra* note 189.

<sup>195</sup> *Id.*

<sup>196</sup> See Jed Rubenfeld, Op-Ed., *His Killing Was Lawful*, L.A. TIMES, May 16, 2011, at A13, available at, <http://articles.latimes.com/print/2011/may/16/opinion/la-oe-rubenfeld-bin-laden-20110516>.

<sup>197</sup> *Osama bin Laden (1957–2011)*, *supra* note 189.

<sup>198</sup> Rubenfeld, *supra* note 196.

<sup>199</sup> *Id.*

<sup>200</sup> SOLIS, *supra* note 6, at 153; Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement); see Tom Ruys, *License to Kill? State-Sponsored Assassination Under International Law* (Inst. for Int'l L., Working Paper No. 76, 2005), available at <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP76e.pdf>.

<sup>201</sup> Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement).

function or directly participated in hostilities.<sup>202</sup> According to documents retrieved during the raid that killed him, up until the time of his death, bin Laden retained relations with his terrorist network, and may have been planning another attack against the United States.<sup>203</sup> In addition, bin Laden was the unquestionable leader of al Qaeda, which was inextricably intertwined with the ruling Taliban party in Afghanistan.<sup>204</sup> Therefore within a NIAC framework, bin Laden—maintaining a continuous combat function as a member of the non-State Taliban party—could lawfully be targeted *at any time*.<sup>205</sup>

Within a self-defense paradigm, the legality is more contestable. There are several issues that suggest the killing of bin Laden might not have comported with IHL. Bin Laden's death occurred in Abbottabad, Pakistan—outside the realm of the U.S. war in Afghanistan.<sup>206</sup> According to Article 2(4) of the UN Charter, a State is prohibited from using force within the territory of another State without permission.<sup>207</sup> In order to maintain secrecy, the United States did not inform Pakistan of the raid until after bin Laden was already dead.<sup>208</sup> Pakistani and U.S. relations have been fractured ever since.<sup>209</sup> The Pakistani government has repeatedly called for an end to the U.S. drone strikes, claiming they infringe State sovereignty,<sup>210</sup> and recently staged a walkout in Parliament to

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<sup>202</sup> “Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.” *ICRC Interpretive Guidance*, *supra* note 8, at 34.

<sup>203</sup> *Osama bin Laden (1957–2001)*, *supra* note 189.

<sup>204</sup> *See id.*

<sup>205</sup> *See Kramer*, *supra* note 80, at 382.

<sup>206</sup> *See Mark Mazzetti & Helene Cooper, Detective Work on Courier Led to Breakthrough on Bin Laden*, N.Y. TIMES (May 2, 2011), <http://www.nytimes.com/2011/05/02/world/asia/02reconstruct-capture-osama-bin-laden.html>.

<sup>207</sup> MELZER, *supra* note 10, at 51 (requiring that a State receive permission either from the “territorial State, or the UN Security Council”).

<sup>208</sup> Telephone Press Briefing, Office of the Press Sec’y, Press Briefing with Senior Admin. Officials on the Killing of Osama bin Laden (May 2, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden>; Mark Memmott, *Report: U.S., Pakistan Agree to Work Together Against ‘High Value Targets’*, NPR’S NEWS BLOG (May 16, 2011), <http://www.npr.org/blogs/thetwo-way/2011/136356187/report-u-s-pakistan-agree-to-work-together-against-high-value-targets>.

<sup>209</sup> Richard Leiby & Karen DeYoung, *Pakistani Panel Seeks U.S. Apology: Drone Strike on Soldiers Condemned*, WASH. POST, Mar. 20, 2012, at A10; Declan Walsh et al., *Drones at Issue as U.S. Rebuilds Ties to Pakistan*, N.Y. TIMES, Mar. 19, 2012, at A1.

<sup>210</sup> Leiby & DeYoung, *supra* note 209, at A10. “Officially, publicly and consistently,

emphasize that point.<sup>211</sup> However, Article 51 of the UN Charter may have authorized the U.S. response even without Pakistan's consent.<sup>212</sup> Where a State is unwilling or unable to deter an armed attack that emanates from its territory, the inherent right of self-defense overrides that State's sovereignty and permits the use of force.<sup>213</sup> There was serious speculation on the part of the U.S. that Pakistan was unaware of bin Laden's presence within its borders.<sup>214</sup>

Still, any use of force under a self-defense theory requires absolute necessity to remain lawful.<sup>215</sup> Initial reports suggested that bin Laden resisted the assault by fighting back, but were later amended to reflect the presence of a weapon solely within arm's reach.<sup>216</sup> "The official U.S. position is that if [the] commandos had been completely assured of their safety, the U.S. would have accepted bin Laden's surrender."<sup>217</sup> While we will likely never know whether bin Laden's death was absolutely necessary, there is not a large push for the United States to further justify its actions.<sup>218</sup> The case of Anwar Al-Aulaqi is much different.

### B. Anwar Al-Aulaqi

Anwar Al-Aulaqi was born in New Mexico to Yemeni parents.<sup>219</sup> As a student, Al-Aulaqi started preaching in U.S. mosques, and continued that practice overseas upon immigrating to Yemen in 2004.<sup>220</sup> Mostly known as a militant cleric who encouraged and incited violence against the United States, Al-Aulaqi "became the

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Pakistan has stated that the U.S. drone attacks in Pakistan are illegal." Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, 10 J. INT'L BUS. & L. 1, 12 (2011) (citing Press Release, Ministry of Foreign Affairs Pakistan, Drone Attacks Are [a] Violation of Pakistan's Sovereignty (Mar. 27, 2009), available at [http://www.mofa.gov.pk/press\\_releases/2009/March/PR\\_128\\_09.htm](http://www.mofa.gov.pk/press_releases/2009/March/PR_128_09.htm)).

<sup>211</sup> Joshua Foust, *The Political Consequences of a Drones-First Policy*, THE ATLANTIC (Jan. 27, 2012), <http://www.theatlantic.com/international/archive/2012/01/the-political-consequences-of-a-drones-first-policy/252129>.

<sup>212</sup> Paust, *supra* note 163, at 250–51.

<sup>213</sup> U.N. Charter, art. 51; Rock, *supra* note 14, at 69.

<sup>214</sup> *Pakistan*, N.Y. TIMES TOPICS (Aug. 16, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/pakistan/index.html>; see Mazzetti & Cooper, *supra* note 206.

<sup>215</sup> See *Alston Report*, *supra* note 25, ¶ 39.

<sup>216</sup> *Osama bin Laden (1957–2011)*, *supra* note 189.

<sup>217</sup> Rubinfeld, *supra* note 196.

<sup>218</sup> See Ramsden, *supra* note 25, at 386 (arguing that the only concern in the legality of bin Laden's targeted killing is whether he attempted to surrender before being killed).

<sup>219</sup> Mazzetti et al., *supra* note 184, at A1.

<sup>220</sup> *Id.*

focus of intense scrutiny after he was linked” to several attempted assaults on U.S. soil.<sup>221</sup> Consequently, Al-Aulaqi was officially added to the kill-or-capture list in 2009.<sup>222</sup> His addition to the list sparked outrage from civil liberties unions and other groups who were uneasy at the notion that the U.S. government could systematically target and eradicate a citizen without some form of judicial process.<sup>223</sup> The United States justified Al-Aulaqi’s inclusion on the list as a result of his role as the leader of AQAP, and as orchestrator of numerous attacks aimed at the United States<sup>224</sup>—citing both non-international armed conflict and self-defense as the appropriate legal paradigms.<sup>225</sup> But international legal scholars categorically disagree with the contention that the United States is in a global NIAC with AQAP.<sup>226</sup> The AUMF only authorizes the use of force against those terrorist groups that were directly connected to the September 11, 2001 attacks.<sup>227</sup> For the United States to legally target Al-Aulaqi then, AQAP must have some association with the al Qaeda groups operating in either Afghanistan or Pakistan.<sup>228</sup> While, international scholars are not foreclosed to the

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<sup>221</sup> *Anwar al-Awlaki*, N.Y. TIMES TOPICS (July 18, 2012), [http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar\\_al\\_awlaki/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html).

[H]e was linked through e-mails with Maj. Nidal Malik Hasan, the Army psychiatrist accused of killing 13 people at Fort Hood, Tex., in November 2009 and then to Umar Farouk Abdulmutallab, the Nigerian man charged with trying to blow up a Detroit-bound airliner in December 2010. He also had ties to two of the 9/11 hijackers.

*Id.*

<sup>222</sup> Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

<sup>223</sup> See generally Michael Epstein, Note, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation when the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT’L L. 723, 724 (2011) (discussing whether the targeting of U.S. citizens violates due process rights); see McKelvey, *supra* note 91, at 1359; *Anwar al-Awlaki*, *supra* note 221.

<sup>224</sup> Epstein, *supra* note 223, at 724–25; Savage, *supra* note 222, at A1.

<sup>225</sup> Savage, *supra* note 222, at A1.

<sup>226</sup> Dehn & Heller, *supra* note 104, at 183, 198 (discussing Heller’s view on whether there is a NIAC with AQAP, in his rebuttal and closing statement). The Council of Foreign Relations and National Counterterrorism Center provides further information on the emergence of AQAP. See Jonathan Masters, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN REL. (May 24, 2012), <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369>; *Al-Qa’ida in the Arabian Peninsula (AQAP)*, NAT’L COUNTERTERRORISM CTR. (2012), <http://www.nctc.gov/site/groups/aqap.html>

<sup>227</sup> Kwoka, *supra* note 3, at 310 n.57 (citing William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 737 (2003)); McKelvey, *supra* note 91, at 1364; Ulrich, *supra* note 91, at 1045.

<sup>228</sup> Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement). For the United States to lawfully target Al-Aulaqi, Article 51 requires not only that AQAP be involved with

possibility that Al-Aulaqi may be connected to al Qaeda, the United States has never made that assertion.<sup>229</sup> The United States has argued that Al-Aulaqi was associated with terrorist acts in Saudi Arabia, Yemen, Korea, and the United States,<sup>230</sup> but has never extended that contention to include Afghanistan or Pakistan.<sup>231</sup> Provided that a nexus did exist between AQAP and the al Qaeda forces in conflict with the United States in Afghanistan, Al-Aulaqi's targeting would have been justified if he assumed a continuous combat function within AQAP (if he was a member of AQAP) or was directly participating in hostilities (if he was a civilian).<sup>232</sup> The distinction in Al-Aulaqi's combat status is integral in determining whether his killing was lawful. During an armed conflict, members of an organized non-State armed group can be targeted at any time, whereas civilians may only be targeted during the preparation or execution of an attack in which they are directly participating.<sup>233</sup> At the time Al-Aulaqi was killed, he was not directly participating in hostilities.<sup>234</sup> Therefore, if the United States is not in an armed conflict with AQAP, and Al-Aulaqi was a civilian, his death was not legal under international law—unless it can be justified under a theory of self-defense.

Similar to the United States' use of force in Pakistan against Osama bin Laden, resort to force against Al-Aulaqi in Yemen must have been in accordance with Article 2(4) of the UN Charter.<sup>235</sup> While Yemen's State sovereignty right was not violated—since the President of Yemen authorized the U.S. strike<sup>236</sup>—the force initiated by the United States must still have complied with IHRL, meaning it must have been absolutely necessary to kill Al-Aulaqi.<sup>237</sup>

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al Qaeda, but also that Al-Aulaqi be involved with AQAP. *See* Chesney, *supra* note 116, at 21. Al-Aulaqi was widely known as an extremist and fervent propagandist of jihad. *Id.* at 9. Only after Al-Aulaqi was killed did the United States take the stance that he was “the leader of external operations for Al Qaeda in the Arabian Peninsula.” Mazzetti et al., *supra* note 184, at A1 (internal quotation marks omitted).

<sup>229</sup> Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement).

<sup>230</sup> *Id.*

<sup>231</sup> Ramsden, *supra* note 25, at 391 (citing Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement)).

<sup>232</sup> Ramsden, *supra* note 25, at 390–91.

<sup>233</sup> *See* Kramer, *supra* note 80, at 382, 385.

<sup>234</sup> *See* Mazzetti et al, *supra* note 184, at A1 (mentioning that Al-Aulaqi was killed while traveling with several other high-ranking targets, but giving no indication that the group was engaged in any sort of concerted military effort, preparatory or otherwise).

<sup>235</sup> MELZER, *supra* note 10, at 51.

<sup>236</sup> Savage, *supra* note 222, at A1.

<sup>237</sup> *See Alston Report, supra* note 25, ¶¶ 37, 39.

Whether the United States complied with the principle of necessity is difficult to determine. The details surrounding the attack remain relatively unclear.<sup>238</sup> A previous attempt at detaining Al-Aulaqi failed to result in his capture<sup>239</sup>—likely part of the analysis in escalating to a targeted drone strike—yet the United States still has not been forthcoming in its justification for the attack.<sup>240</sup> As a result, uncertainty remains as to the legal justification for the targeted killing of Al-Aulaqi within this framework.

*C. Collating the Killing of bin Laden with that of Al-Aulaqi*

Neither the targeted killing of Osama bin Laden<sup>241</sup> nor that of Anwar Al-Aulaqi is uncontested under international law.<sup>242</sup> Yet very little outrage ensued after bin Laden was killed,<sup>243</sup> while civil rights groups rallied to the cause of Al-Aulaqi even before his death.<sup>244</sup> In an armed conflict framework, the targeted killing of bin Laden is more justifiable given his involvement in the September 11th attacks and his role as the leader of Taliban,<sup>245</sup> whereas Al-Aulaqi's status as a member of AQAP is questionable.<sup>246</sup> In contrast, within the law enforcement paradigm, lethal force by the United States in Pakistan should be much more controversial than that used in Yemen because the Pakistani government has consistently condemned the U.S. drone strike program within its territory,<sup>247</sup> while the Yemeni President granted authority for the use of lethal force on its soil.<sup>248</sup> The international response has not

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<sup>238</sup> See *Anwar al-Awlaki*, *supra* note 221 (noting that the U.S. government was unwilling to even admit that the operation was carried out).

<sup>239</sup> Ahmed Al-Haj, *U.S.-Born Terror Leader Killed*, DETROIT PRESS, Oct. 1, 2011, at A10 (describing previous attempts to detain Al-Aulaqi to no avail).

<sup>240</sup> Richard A. Serrano & Andy Grimm, *Holder Defends Strikes on U.S. Citizens*, L.A. TIMES, Mar. 6, 2012, at A1. "Many have called for releasing the White House legal opinion that authorized the strike on Awlaki." *Id.*

<sup>241</sup> See Rubinfeld, *supra* note 196.

<sup>242</sup> See *Anwar al-Awlaki*, *supra* note 221.

<sup>243</sup> See generally *World Leaders React to News of Bin Laden's Death*, *supra* note 182 (discussing the reaction of various countries after the death of Osama bin Laden).

<sup>244</sup> Mazzetti et al., *supra* note 184, at A1.

<sup>245</sup> *Osama bin Laden (1957–2011)*, *supra* note 189.

<sup>246</sup> See Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement); Kramer, *supra* note 80, at 382.

<sup>247</sup> Leiby & DeYoung, *supra* note 209, at A10.

<sup>248</sup> Savage, *supra* note 222, at A1.

mirrored that position.<sup>249</sup> Even though the legality of both strikes remains questionable, bin Laden's death was heralded as a successful blow in the "War on Terror,"<sup>250</sup> while Al-Aulaqi's killing was condemned.<sup>251</sup> The gaps present in defining and applying international law permit such disparate results to occur, and undermine IHL. Unless international laws of armed conflict are applied uniformly, such disparate results will continue to occur.

## VI. REFORM

There is little doubt that certain aspects of the Geneva Conventions and IHL are undefined and imprecise.<sup>252</sup> Only a small section of those discrepancies were even mentioned in this article.<sup>253</sup> So where does the law of armed conflict go from here in order to ensure the greatest protection possible is afforded under the law? There are three possible solutions to the problem: update the Conventions in whole or in part, retain the status quo and provide interpretive guidance as the need arises, or begin actively enforcing the provisions of the Conventions in their current form.

There is an undercurrent within the international community calling for a revision of the Geneva Conventions.<sup>254</sup> Particularly in the United States and Israel, there is concern that the law of armed conflict must be updated to reflect the vast changes in warfare present in the twenty-first century, or run the risk of losing acceptance and recognition.<sup>255</sup> "[S]ocial-science research shows that international rule-sets generally weaken when historical trends outpace the treaty provisions to which states have agreed."<sup>256</sup> The last time the entire Geneva Conventions were modified was 1949.<sup>257</sup>

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<sup>249</sup> See Dehn & Heller, *supra* note 104, at 198 (Heller, closing statement); Ramsden, *supra* note 25, at 391.

<sup>250</sup> *World Leaders React to News of Bin Laden's Death*, *supra* note 182.

<sup>251</sup> Mazzetti et al., *supra* note 184, at A1.

<sup>252</sup> See *ICRC Address*, *supra* note 40. "Differences exist over the interpretation of other key notions such as 'military objective', the 'principle of proportionality' and 'precaution'" to name a few. *Id.*

<sup>253</sup> This article points out the ambiguities in defining armed conflict, continuous combat function, direct participation in hostilities, and self-defense. See discussion *supra* Parts III–IV.

<sup>254</sup> McDonald & Sullivan, *supra* note 21, at 301; see Ayres, *supra* note 9, at 33.

<sup>255</sup> Nungesser, *supra* note 168, at 206 (noting that the laws do not adequately address the dangers inherent in the current capabilities of warfare); see MELZER, *supra* note 10, at 53 (discussing the possibility that State practice will outpace international law).

<sup>256</sup> Carpenter, *supra* note 7, at 61.

<sup>257</sup> *ICRC Treaties and Customary Law*, *supra* note 1.



Additional Protocols I and II were added in 1977 and Additional Protocol III in 2005.<sup>258</sup> In all the years that have followed, the ICRC has only sparingly issued interpretive guidance.<sup>259</sup> Undertaking the task of updating the Geneva Conventions, however, is not only unduly burdensome, but also entirely unrealistic.<sup>260</sup> Currently, there are 194 States party to the Geneva Conventions.<sup>261</sup> Trying to get every one of them in the same room, let alone to agree to the same terms, would be almost impossible. No matter how many proponents clamor for a change to the Geneva Conventions, this result is highly unlikely to occur.

A second option is to continue to apply the Geneva Conventions as they have been since 1949 when they were adopted.<sup>262</sup> Ambiguity is a necessary evil of any legal framework. The law will never be able to account for every fact scenario that might arise in the future. Trying to anticipate and react to the changing tactics of warfare would require the Conventions to be updated every few years. Regardless, there is very little justification for updating the law. Currently most non-American international legal scholars universally agree on the definition of NIAC and that preemptive self-defense, if it exists at all, is strictly limited to situations where the threat of attack is imminent and overwhelming.<sup>263</sup> Acknowledging that the law requires review has the appearance of justifying the position held by a minority of States within the international community. It would be much less burdensome and just as beneficial to continue addressing issues within the law by publishing interpretive guidance when necessary, in order to meet advances in technology and military tactics.

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<sup>258</sup> *ICRC Protocols I and II*, *supra* note 5.

<sup>259</sup> *See ICRC Address*, *supra* note 40 (highlighting that experts, academics, and those with governmental and non-governmental backgrounds worked for nearly six years to compile guidance on the Convention, which was published in 2009).

<sup>260</sup> *See ICRC, The Geneva Conventions of 1949 and Their Additional Protocols* (Oct. 29, 2010) [hereinafter *ICRC Geneva Conventions of 1949*], <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (noting that it took over fifty years for 194 States to ratify the Conventions). Likewise, reassessing the law opens the door for the detracting of rights currently afforded under IHL, meaning less protection for civilians. *See generally* SOLIS, *supra* note 6, at 104–07 (discussing provisions of the Geneva Conventions that may require change in light of modern warfare).

<sup>261</sup> *ICRC Geneva Conventions of 1949*, *supra* note 260.

<sup>262</sup> *See ICRC War and International Humanitarian Law*, *supra* note 4.

<sup>263</sup> Bordelon, *supra* note 118, at 134; Nungesser, *supra* note 168, at 200; Pierson, *supra* note 28, at 156–57.

The last option makes the most sense, but is hardest to apply. The main weakness in IHL is the lack of an international mechanism of enforcement.<sup>264</sup> “There are significant problems in imposing an external regulatory regime, however cursory, on any state. Not the least is that . . . [there is] no enforcement or supervisory mechanism.”<sup>265</sup> The international community condemned the targeted killing of Anwar Al-Aulaqi as an extrajudicial assassination.<sup>266</sup> Yet the United States continues to engage in targeted killing.<sup>267</sup> In fact, “[t]he U.S. campaign of targeted killings of AQAP members is likely to expand with the construction of several secret drone bases in the Arabian Peninsula and the Horn of Africa.”<sup>268</sup> The problem remains how to exercise authority to enforce the provisions of IHL. The ICRC is not a regulatory body capable of holding States accountable for their actions.<sup>269</sup> The International Criminal Court (ICC) has authority to hear cases involving grave breaches and other war crimes,<sup>270</sup> but some argue that its jurisdiction should be based on recommendations from the United Nations as opposed to maintaining independent jurisdiction to hear cases.<sup>271</sup> In addition, the court may be hesitant to infringe upon State sovereignty by hailing individuals into court to answer for crimes that occur during armed conflict.<sup>272</sup> Despite these obstacles, enforcement of the laws of armed conflict remains the only measure to ensure that States are *truly* complying with the protections guaranteed within the Geneva Conventions.

## VII. CONCLUSION

The purpose of the law of international armed conflict, and

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<sup>264</sup> SOLIS, *supra* note 6, at 97.

<sup>265</sup> *Id.*

<sup>266</sup> Mazzetti et al., *supra* note 184, at A1; Serrano & Grimm, *supra* note 240, at A1.

<sup>267</sup> See Rock, *supra* note 14, at 58.

<sup>268</sup> Masters, *supra* note 226.

<sup>269</sup> See SOLIS, *supra* note 6, at 102–03 (“[T]he ICRC standard enjoys greater acceptance . . . [though] there is no ‘correct’ or binding standard.”).

<sup>270</sup> International Criminal Court, *Jurisdiction and Admissibility*, ICC.INT (last visited Sept. 29, 2012), <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm>; see SOLIS, *supra* note 6, at 95 (defining grave breaches and war crimes).

<sup>271</sup> See Hans Peter Kaul, *Special Note: The Struggle for the International Criminal Court’s Jurisdiction*, 6 EUR. J. CRIME CRIM. L. & CRIM. JUST. 364, 365–66 (1998).

<sup>272</sup> See MELZER, *supra* note 10, at 135–36 (discussing when individual States are presumed to have jurisdiction over people in their territories).

specifically that of the Geneva Conventions, is to “protect [those individuals] who are not taking part in the hostilities.”<sup>273</sup> The changing nature of armed conflict has made it increasingly difficult to determine who requires protection, and who is actually engaged in the conflict.<sup>274</sup> The days of two armies lining up across an open battlefield disappeared long before the ink on the Geneva Conventions even dried. Due in part to advances in technology and increased global relations, the threat of imminent attack is ever-present. Consequently, today’s threat is just as real from seven thousand miles away as it is from ten feet away.

In order to meet this growing concern, the law of armed conflict should account for the elasticity of warfare rather than attempt to strictly confine its application; thus broad definitions are more desirable than a narrow construction that simply reflects the state of war as it is currently being waged. It is incontrovertible that there are gaps in the Geneva Conventions and IHL.<sup>275</sup> For example, the exact definition and scope of “armed conflict,” “direct participation in hostilities,” “self-defense,” and many other provisions of the law remain uncertain.<sup>276</sup> But even if all ambiguity is removed from the law of armed conflict, one major problem still remains. The Geneva Conventions “provide[] absolutely no international mechanism for authoritatively interpreting or enforcing [their] rules.”<sup>277</sup> Regardless of the United States’ position that the Geneva Conventions are “quaint” and outmoded, it does little good to tediously update the law to ensure that every potential problem is accounted for, if States can simply refuse to follow the guidelines without fear of retribution. In order to truly ensure the protection of individuals under the Geneva Convention, the international legal community needs to take steps to ensure that States not only know and understand the laws, but that States are actually held accountable for breaking those laws.

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<sup>273</sup> *ICRC Geneva Conventions of 1949*, *supra* note 260.

<sup>274</sup> *See ICRC Address*, *supra* note 40.

<sup>275</sup> *See Ayres*, *supra* note 9, at 33 (observing that several nations have chosen not to apply Geneva Convention standards in the past, by refusing to offer detained unlawful combatants certain protections afforded other prisoners of war); Rabkin, *supra* note 9, at 12 (identifying interpretive problems with Common Article 3 of the Geneva Convention).

<sup>276</sup> *See discussion supra* Parts III–IV (examining issues with the definitions of “armed conflict,” “direct participation in hostilities,” and “self-defense”).

<sup>277</sup> Carpenter, *supra* note 7, at 62.