



6-1-2012

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Recommended Citation

Joshua Bennett, *Exploring the Legal and Moral Bases for Conducting Targeted Strikes outside of the Defined Combat Zone*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 549 (2012).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol26/iss2/8>

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NOTES

EXPLORING THE LEGAL AND MORAL BASES FOR CONDUCTING TARGETED STRIKES OUTSIDE OF THE DEFINED COMBAT ZONE

JOSHUA BENNETT*

Since 2001 the President has been authorized “to use all necessary and appropriate force” against the al Qaeda network and the insurgent Taliban regime that provided al Qaeda with safe haven in Afghanistan while the Taliban regime was in power.¹ As a result, Afghanistan has been the site of an active “combat zone” since October 2001. But U.S.-led targeted strikes have increasingly expanded across international borders as U.S. forces have sought to capture or kill key individuals in the al Qaeda network and the deposed Taliban regime who continue to plan and perpetuate terrorist operations from locations beyond Afghanistan.²

This Note explores the legal and moral bases for conducting targeted strikes beyond the defined combat zone against individ-

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1. See Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

2. For a snapshot of the increasing frequency of recent targeted strike operations, see, for example, *Drones and the Law*, ECONOMIST, Oct 8, 2011, at 17, 18; Adam Entous, Julian E. Barnes & Siobhan Gorman, *CIA Escalates in Pakistan: Pentagon Diverts Drones From Afghanistan to Bolster U.S. Campaign Next Door*, WALL ST. J., Oct. 2–3, 2010, at A1 (discussing the rationale for the increase in drone attacks in Northern Pakistan against al Qaeda and the Haqqani network in order to eliminate terrorist “sanctuaries” and “militant havens”); Siobhan Gorman, *Drones Target Terror Plot: CIA Strikes Intensify in Pakistan Amid Heightened Threats in Europe*, WALL ST. J., Sept. 28, 2010, at A1 (noting the recent spike in drone attacks in Northern Pakistan against the Haqqani network, an affiliate of al Qaeda, and increased intelligence regarding the network’s planning of terrorist attacks across Europe); Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, at 36 (providing an in-depth description of the CIA’s covert drone program); Hala Gorani, *U.S. Drones Operating in Yemen, Foreign Minister Says*, CNN.COM (Nov. 7, 2010, 3:10 PM), <http://www.cnn.com/2010/WORLD/meast/11/07/yemen.drones/index.html?hpt=T2> (reporting on the use of U.S. drones in Yemen against al Qaeda in the Arabian Peninsula).

uals leading the insurgent and terrorist forces within the combat zone and elsewhere. In other words, the question explored in this Note is not “if” but “when” and under what circumstances are targeted strikes outside the combat zone legally and morally permissible. This Note explores the principles associated with the traditional just war doctrine, the modern law of armed conflict, and the practical realities and necessary constraints of war against a non-state enemy. This topic straddles the line between what the law *is* and what the law *should be*. As a practical matter, however, protests against the United States’ strikes have been fairly muted and, therefore, targeted strikes in certain terrorist hotbeds outside of the combat zone are not likely to subside. Therefore, the more relevant question seems to be, as this Note attempts to explore, under what conditions are targeted strikes beyond the defined combat zone legally and morally permissible.

Implicit throughout this Note are the themes of an individual’s right to life and due process of law versus the practical necessity of a state to combat the threat posed by transnational terrorist organizations. The implications of the question about targeted strikes against individuals beyond the combat zone cannot be understated: at stake are fundamental rights of the targeted individual such as the rights to life and due process. And hanging in the balance is the safety and security of the citizens that the targeting state seeks to protect.

I. BACKGROUND

Al Qaeda is a transnational non-state organization responsible for planning and executing scores of high-profile terrorist attacks. Some of al Qaeda’s most notorious attacks include the 1998 simultaneous bombings on the U.S. embassies in Kenya and Tanzania;³ the bombing of the USS Cole while in Aden, Yemen in October 2000;⁴ the coordinated attacks of September 11, 2001 on the World Trade Center, the Pentagon, and the failed attack that ended in Shanksville, Pennsylvania;⁵ and through affiliated organizations, the 2004 Madrid train bombings and the 2005 bombings in London,⁶ among others.

3. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 115–16 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

4. *Id.* at 190–91.

5. See generally *id.*, at 1–14 (describing in minute-by-minute detail the sequence of events that occurred during the attacks on Sept. 11, 2001).

6. *Al-Qaeda Attacks: Killing in the Name of Islam*, ECONOMIST (May 6, 2011, 3:12 PM), http://www.economist.com/blogs/dailychart/2011/05/al-qaeda_attacks.

Al Qaeda's organizational structure is complex and fragmented. The al Qaeda network is comprised of a hierarchical central core that provides command and control for the organization.⁷ This inner leadership circle was based in Afghanistan prior to the attacks on September 11, 2001 but has since sought refuge from U.S. air strikes across the border in locations throughout Pakistan.⁸ Indeed, while most of al Qaeda's operations are conducted by a network of affiliated organizations, the intelligence gathered before and following the killing of Osama bin Laden suggests that the top echelons of al Qaeda's leadership still retained operational control of the organization from Pakistan.⁹ This network is comprised of franchise cells operating in locations geographically remote from the al Qaeda headquarters element. These franchise cells include al Qaeda in the Arabian Peninsula ("AQAP"), al Qaeda in East Africa ("AQEA"), al Qaeda in the Islamic Maghreb ("AQIM"), and other associated organizations, such as al Shabab in Somalia.¹⁰ Franchise cells report to al Qaeda's central command element for general policy, guidance, funding, and permission to execute a proposed operation under the al Qaeda banner.¹¹ Indeed, al Qaeda's command and control model is one where "dispersed small groups . . . communicate, coordinate, and conduct their campaigns in a networked manner, without a precise central command."¹² As early as 1995, a U.S. State Department Report assessed that

[m]any of these terrorists—some loosely organized and some representing groups— . . . operate[], increasingly,

7. See THE 9/11 COMMISSION REPORT, *supra* note 3, at 56.

8. See Entous, Barnes & Gorman, *supra* note 2, at A1.

9. See AVERY PLAW, TARGETING TERRORISTS: A LICENSE TO KILL? 23 (2008); Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength*, 90 FOREIGN AFF. 128, 133–36 (Mar./Apr. 2011); Barbara Starr & Charley Keyes, *U.S. Officials Unveil Videos of bin Laden*, CNN.COM (May 8, 2011, 6:40 AM), <http://www.cnn.com/2011/WORLD/asiapcf/05/07/pakistan.bin.laden.intelligence/index.html?hpt=T1> (reporting on the intelligence gathered from bin Laden's compound).

10. See Farrall, *supra* note 9, at 128–29, 136; see also Ofeibea Quist-Arcton, *Kidnappings Highlight Al-Qaida's Rise in the Sahara*, NPR.ORG (Dec. 31, 2010), <http://www.npr.org/2010/12/31/132489882/kidnappings-highlight-al-qaidas-rise-in-the-sahara> (describing the increase of al Qaeda's presence in "lawless region[s]" of the Sahara Desert that are "poorly policed").

11. See Farrall, *supra* note 9, at 135; see also U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-26: COUNTERTERRORISM, at II-11 to II-13 (2009) [hereinafter COUNTERTERRORISM].

12. PLAW, *supra* note 9, at 23 (quoting Kevin O'Brien, *Networks, Network and Information Age Terrorism*, in THE NEW TERRORISM (Andrew Tan & Kumar Ramakrishna eds., 2002)).

on a global scale. These trans-national terrorists benefit from modern communications and transportation, have global sources of funding, are knowledgeable about modern explosives and weapons, and are much more difficult to track and apprehend than members of the old established groups¹³

This horizontal organizational structure¹⁴ enables the federation of operational cells to seek safe haven in remote regions that are (1) lawless, and thus lack effective governmental control to police the region;¹⁵ or (2) friendly to terrorist cells, enabling those elements to safely seek refuge under the protection of the host nation's sovereignty;¹⁶ or (3) both.¹⁷ Al Qaeda continues to plan and execute attacks in Afghanistan and abroad, despite the U.S. armed forces' presence in Afghanistan. By relying on its nebulous—and, by design, geographically dispersed—organizational structure, al Qaeda continues to orchestrate and carry out attacks from locations beyond Afghanistan's borders¹⁸—locations specifically calculated to fall within one of the three types of locations described above.

A. *What is Terrorism?*

A threshold question that therefore arises is “what is terrorism”? The inability to give terrorism a definitive meaning has left a key question unanswered: is terrorism a crime, an act of war, or something in between? Complicating this problem is the adage

13. JASON BURKE, *AL QAEDA: CASTING A SHADOW OF TERROR* 10 (2003) (quoting U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *PATTERNS OF GLOBAL TERRORISM* 1995 (1996)).

14. See PLAW, *supra* note 9, at 23.

15. See, e.g., Entous, Barnes & Gorman, *supra* note 2.

16. See, e.g., THE 9/11 COMMISSION REPORT, *supra* note 3, at 57 (describing the symbiotic relationship between the government of Sudan and al Qaeda thereby allowing bin Laden to locate his organization in Sudan).

17. The mountainous region straddling Afghanistan and Pakistan provided an ideal combination of autonomy for al Qaeda due to the lack of effective governmental control as well as a regime—or at least a key figure in the regime, Mullah Omar—that permitted (or at least tolerated) al Qaeda's presence. See THE 9/11 COMMISSION REPORT, *supra* note 3, at 66; see also PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 63 (2005) (listing states, such as Yemen, Pakistan, and Sudan, that lack “effective control” and other states, such as Syria and Iran, that have governments that are hostile towards the U.S. and, thus, willing to provide safe haven).

18. See, e.g., Catherine Herridge, *Awlaki Allegedly Tied to British Terror Plot*, FOXNEWS.COM (Dec. 28, 2010), <http://www.foxnews.com/politics/2010/12/28/awlaki-allegedly-tied-british-terror-plot/> (reporting that Awlaki's AQAP organization sought to target Big Ben and the U.S. embassy in London).

that “one man’s terrorist is another man’s freedom fighter.”¹⁹ There is no single authoritative definition of terrorism, but several definitions have been posed. While arriving at a single definition is beyond the scope of this Note, posing various definitions may illustrate themes that are generally thought to exist in acts of terrorism. For example, the U.S. Department of Defense defines terrorism as “[t]he calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”²⁰ The U.S. State Department defines terrorism as the “[p]remeditated, politically motivated violence perpetrated against noncombatant [and military] targets by subnational groups or clandestine agents, usually intended to influence an audience.”²¹ Finally, a UN Panel defined terrorism as

any action . . . intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organization to carry out or abstain from any act.²²

This sampling of definitions illustrates that terrorists seek to accomplish state or national²³ objectives through indirect uses of force. That is, terrorist organizations do not conduct head-on attacks against state-backed military forces. Instead, terrorist organizations accomplish their objectives by attacking “soft

19. See, e.g., PLAW, *supra* note 9, at 7.

20. COUNTERTERRORISM, *supra* note 11, at GL-10.

21. PLAW, *supra* note 9, at 14 (quoting U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1995, vi (1996) (adding subsequently, as indicated, to its definition that military installations are also targets that terrorist organizations attack)).

22. *Id.* at 10 (quoting U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 51–2 (2004)); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, art. 51, para. 2 (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”) [hereinafter Additional Protocol I]; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/Res/54/109, at art. 2, para. 1(b) (Feb. 25, 2000) (defining terrorism as including any act causing death or harm to those “not taking an active part in . . . hostilities” and “when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”).

23. “National” as in a group of people sharing a similar identity or ideology.

targets” that are typically not valid military objectives. Therefore, intense, sustained combat between opposing forces—the type of force historically seen in combat zones—is unlikely to be found in a modern conflict with non-state terrorist actors.

To defeat this type of transnational, amorphous enemy, the United States has engaged in a policy of targeting terrorist actors.²⁴ The policy of targeted strikes on individuals is controversial but, in the main, likely legal when conducted within the territorial bounds of the combat zone and against legitimate targets that are subject to military force in times of armed conflict.²⁵ Legal and moral questions arise, however, when some of the preceding criteria are not present or additional variables are introduced. Factors that complicate the analysis of the legality of targeted strikes include (1) whether the terrorist target is characterized as a combatant or civilian,²⁶ (2) whether the attacker is an authorized belligerent,²⁷ (3) the nature of the target in light of his geographic location,²⁸ (4) the degree of conflict, if any, pre-

24. See OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM 1 (2011) (“We are bringing targeted force to bear on al-Qa’ida at a time when its ideology is also under extreme pressure.”) [hereinafter NATIONAL STRATEGY FOR COUNTERTERRORISM]; see also Ken Dilanian, *U.S. Outlines New Anti-Terror Focus: Obama Sees Special Operations and Aerial Drones, Not Wars on Land, as Key to Defeating Al Qaeda*, L.A. TIMES, June 30, 2011, at 7.

25. See, e.g., *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the H. Subcomm. on Nat’l Sec. & Foreign Affairs*, 111th Cong. para. 6 (Mar. 23, 2010) (statement of Prof. Kenneth Anderson), available at http://democrats.oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/3.23.10_Drones/Anderson.pdf (“[I]n Afghanistan, for example, the use of drones is functionally identical to the use of [a] missile fired from a standoff fighter plane that is many miles from the target and frequently over-the-horizon.”); *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the H. Subcomm. on Nat’l Sec. & Foreign Affairs*, 111th Cong. 1, 4 (Apr. 28, 2010) (statement of Prof. Mary Ellen O’Connell), available at <http://oversight.house.gov/wp-content/uploads/2012/01/20100428OConnell.pdf> (stating that “[w]e are still using drones lawfully in the on-going combat in Afghanistan”; defining the “combat zone” as the place where actual “fighting or hostilities of an armed conflict occurs”).

26. See Nils Melzer, Int’l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 20 (May 2009) [hereinafter ICRC, *Direct Participation in Hostilities*].

27. This raises the question, which is beyond the scope of this Note, of whether use of CIA drones falls within the scope of the combatant’s privilege. See Additional Protocol I, *supra* note 22, at art. 43(1). For purposes of confining this Note to its scope, it is assumed that there is no distinction between CIA- and military-led operations.

28. See, e.g., KENNETH ANDERSON, HOOVER INST., TARGETED KILLING AND DRONE WARFARE: HOW WE CAME TO DEBATE WHETHER THERE IS A ‘LEGAL GEOGRAPHY OF WAR’ (2011), available at http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf. The geographic location

sent in the target's location, and (5) perhaps the citizenship status of the individual targeted.²⁹ For the purposes of this Note, the first two factors are assumed to comply with international and human rights law and the analysis will focus solely on the third and fourth variables.

B. *Historical Use of Targeted Killings*

Targeted killings are lawful under certain prescribed conditions. A United Nations study has defined "targeted killings" as the use of intentional and deliberate lethal force against a specific individual (or specific individuals) identified in advance by the targeting force.³⁰ The study distinguishes valid exercises of targeted strikes from other terms that "ha[ve] sometimes been interchangeably used, such as 'extrajudicial execution', 'summary execution', and 'assassination', all of which are, by definition, illegal."³¹ Other commentators have referred to the practice using other charged language.³² But the practice described—irrespective of its label—has been deemed valid under certain prescribed conditions.

Targeting non-state actors who plan and perpetuate acts of terror is, however, more controversial. The traditional notions of terrorism, guerilla tactics, and asymmetric warfare recognized insurgent actors as "farmers by day and fighters by night" subject to a "revolving door" of Geneva protections whereby the actors were valid military targets only during their "direct participation in hostilities."³³ When not directly participating in hostilities, however, a state's police force would likely be the appropriate means to capture such actors.³⁴ But the al Qaeda network is illus-

analysis requires also an additional consideration of whether the use of military force is authorized in such a location—the next point.

29. This variable is also beyond the scope of this Note but presented here for context.

30. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, paras. 7–10, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (describing the United Nation's definitions of and policy on targeted killings).

31. *Id.* para. 10 (citation omitted).

32. See PLAW, *supra* note 9, at 3 (quoting Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS & INT'L AFF. 111, 112 (2003) (defining targeted killing as the "intentional *slaying* of a specific individual or group of individuals undertaken with explicit governmental approval") (emphasis added)).

33. ICRC, *Direct Participation in Hostilities*, *supra* note 26, at 72.

34. Eighth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Sept. 7, 1990), <http://www2.ohchr.org/english/law/pdf/firearms.pdf> [hereinafter Use of Force and Firearms].

trative of a “new terrorism” that has taken root in the latter part of the 1980s.³⁵ These are not the farmers moonlighting as freedom fighters to expel a foreign occupying force in the name of national liberation, for example. On the contrary, these terrorists are full-time operatives that seek to inflict “massive, indiscriminate civilian carnage, and their powerful new means to accomplish this objective is the *dispersed international underground network capable of exploiting the political spaces opened by failed and rogue states* to plan, train, and acquire the most destructive available weapons.”³⁶ This new form of terrorism is especially difficult to combat because communications technology allows for coordinated planning and execution to effectively occur from geographically remote cells.³⁷ The individual components of modern terrorism—indiscriminate attacks on civilians, a transnational footprint that “exploit[s] bases in rogue and failed states,” and a loose federation of “semi-independent cells”—are not themselves novel; rather, it is the systematic combination of these attributes that have given rise to this new breed of terrorism that makes this modern threat unique.³⁸

Moreover, the notion of targeted killing using military force is not a novel concept. The U.S. military has combined intelligence with military operations to track down and “surgically kill [the enemy’s] leadership” since at least the early twentieth cen-

35. See THE 9/11 COMMISSION REPORT, *supra* note 3, at 72; PLAW, *supra* note 9, at 19.

36. PLAW, *supra* note 9, at 19 (emphasis added); see generally THE 9/11 COMMISSION REPORT, *supra* note 3, at 47–70 (describing the events and conditions that enabled al Qaeda to flourish and the basis for al Qaeda’s radical breed of terrorism); *id.* at 72 (stating, as an example of this radical breed of terrorism, Ramzi Yousef’s desire to kill 250,000 people during the 1993 World Trade Center bombing).

37. BURKE, *supra* note 13, at 10–11. But see Leah M. Campbell, Note, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1072–73 (2000) (quoting Wallace F. Wariner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 76–77 (1988)) (explaining that in 1976, a terrorist operation might have been “planned in West Germany by Palestinian Arabs, executed in Israel by terrorists recruited in Japan with weapons acquired in Italy but manufactured in Russia, supplied by an Algerian diplomat, and financed with Libyan money”). But a major premise of this Note is that modern terrorist actors, unlike the West Germany hypothetical quoted, seek geographic dispersal in certain, specific states that are unable or unwilling to capture the non-state terrorist actors.

38. See PLAW, *supra* note 9, at 20 (describing further that the synergy resulting from the three previously existing, but separately implemented, attributes has given rise to a fourth attribute: access to more destructive weaponry).

ture.³⁹ But a series of failed assassination attempts eventually led to Executive Order 12,333 prohibiting U.S. government involvement in assassination attempts.⁴⁰ Following al Qaeda's 1998 bombing of the U.S. embassies in Kenya and Tanzania, however, President Clinton expressed his rationale for implementing the use of targeted military strikes against al Qaeda in Afghanistan:

America has battled terrorism for many years. *Where possible*, we've used law enforcement and diplomatic tools to wage the fight. The long arm of American law has reached out around the world and brought to trial those guilty of attacks

But there have and will be times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must take extraordinary steps to protect the safety of our citizens. With compelling evidence that the bin Laden network of terrorist groups was planning to mount further attacks against Americans and other freedom-loving people, I decided America must act.⁴¹

The targeted strike that killed Anwar al Awlaki, an American-born cleric, is an illustration of the complex nature of the legal and moral issues present when targeting transnational terrorist actors. Prior to the strike that killed Al Awlaki, he was believed to be somewhere in Yemen and was leading one of al Qaeda's most active franchise cells in the Arabian Peninsula: al Qaeda in Yemen.⁴² He had been tied to various terrorist plots including the 2009 Fort Hood shootings, the attempted "underwear bombing" on Christmas Day 2009, and the foiled cargo

39. *See id.*, at 94–96 (describing military operations against specific individuals including a 1916 expedition to hunt down "Pancho" Villa in Mexico, Admiral Yamamoto in the South Pacific during World War II, and Cuban leader Fidel Castro in the 1960s).

40. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (1981) ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.").

41. Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1643 (Aug. 20, 1998). *But see* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 347 (2010) (citing Ronald Reagan, *Letter of Transmittal*, The White House (Jan. 29, 1987) ("[To] grant combatant status to irregular forces even if they do not satisfy the traditional requirements . . . would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."); Campbell, *supra* note 37, at 1096 (arguing that the 1998 strikes were a violation of international law)).

42. *See* Herridge, *supra* note 18.

plane bomb plot.⁴³ As such, al Awlaki was being targeted.⁴⁴ But the United States was not conducting sustained combat operations in Yemen, nor is Yemen geographically situated adjacent to a recognized combat zone, like Pakistan, where a valid target might flee across the border with U.S. forces in hot pursuit that began within the heart of the combat zone in Afghanistan.⁴⁵ Therefore, the al Awlaki scenario provides factual context to consider when exploring the extent of the legal and moral authority to conduct targeted strikes in a location beyond the recognized combat zone.

II. FRAMING THE ISSUES

Thus, the following question arises: what are the legal and moral criteria that must be present to justify an expansion of targeted strikes against transnational non-state actors who plan and perpetuate terrorist attacks from beyond the defined combat area?

As with other fields of law, when the nature of warfare evolves, so too has the law.⁴⁶ Warfare has evolved in response to a new breed of terrorism. As a result, war is an increasingly sophisticated and nuanced endeavor. With increased sophistica-

43. See, e.g., CNN Wire Staff, *Yemen-based al Qaeda Group Claims Responsibility for Parcel Bomb Plot*, CNN (Nov. 5, 2010), <http://www.cnn.com/2010/WORLD/meast/11/05/yemen.security.concern/index.html>; Gorani, *supra* note 2. But see Declaration of Prof. Barnard Haykel, at paras. 7–9, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10–1469 (JDB)), available at http://www.aclu.org/files/assets/Haykel_Declaration.100810.PDF (stating the AQAP is a “fragmented group numbering no more than a couple of hundred men at most,” that the “movement is not sufficiently coherent to be organized in a stable fashion,” and that there is a mistaken appearance that AQAP is larger than it actually is).

44. See Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1, A8.

45. Which is, itself, also a complex and controversial legal problem. See Mary Ellen O’Connell, *The International Law of Drones*, ASIL INSIGHTS (Nov. 12, 2010), http://asil.org/files/2010/insights/insights_101112.pdf. But it is clear that if a strike on an individual in Yemen can be legally justified, then the case for a strike in Pakistan’s lawless border region will involve less complex legal analysis. But that is not to say that if a strike is permissible in Yemen it is, therefore, automatically permissible in Pakistan. The relevant calculus of factors must be reassessed in each case, as described in Section II, *infra*. Another potential complicating factor to the targeting analysis, which is beyond the scope of this Note, was Anwar al Awlaki’s status as an American citizen.

46. See Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 Nov. 1945–1 Oct. 1946, in MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 152 (2d ed. 2009) (“This law [referring to the law of war] is not static, but by continual adaptation follows the needs of a changing world.”).

tion comes increased complexity that does not fit neatly into previously defined categories: armed conflict versus criminal activity, international versus non-international conflict, lawful combatant versus criminal perpetrator, and, possibly, combat zone versus neutral (or perhaps “safe haven”) states. It is insufficient to simply capture and occupy territory in the combat zone.⁴⁷ Now, an effective war strategy requires a multi-faceted approach, especially in the context of a non-state enemy, while staying true to the overarching principles of the law of armed conflict and the just war tradition. Defeating non-state actors involves rooting out deeply entrenched and widely scattered enemy actors and decision makers. To allow those participants to seek safe haven outside the combat zone would create an undesirable requirement for full-scale expansion of the war through invasion and occupation of safe haven states in order to accomplish the narrower military objective of rooting out the planners of large-scale terrorist attacks that the domestic authorities in those locations are unable or unwilling to undertake.⁴⁸ Therefore, in modern warfare against non-state actors, the military must consider and understand the inter-relationships between “political, military, economic, social, information[al] and infrastructure” systems in

47. U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-24: COUNTERINSURGENCY OPERATIONS, at x, (2009) [hereinafter COUNTERINSURGENCY OPERATIONS].

48. HEYMANN & KAYEM, *supra* note 17, at 63. *But see* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, Comm’n on Hum. Rts., para. 41, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston).

[I]t is increasingly common to read arguments along the lines that “targeting and eliminating known terrorists is more efficient and costs fewer lives than waging conventional war.” While there are a great many empirical arguments that might be made in order to show that such strategies will be counterproductive, the point is that such proposals directly undermine the essential foundations of human rights law. Empowering Governments to identify and kill “known terrorists” places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited “exception” to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State

Id. (footnote omitted). But as this Note argues, and as supported by the traditional notions of the just war doctrine, limiting principles can and do exist. *See* Augustinian philosophy of the just war doctrine, JOINT TARGETING, and statement of Prof. Anderson, *infra* notes 78–79, 87, and 110, respectively. *See also* section III.B, *infra*, for legal and moral safeguards to mitigate the risk of arbitrary uses of targeted strikes.

the non-state actor's operational environment, "*without regard to geographic boundaries*" in order to identify the key operational nodes and the circumstances present on the ground in the enemy actor's location, and *then* prioritize those nodes in terms of military objectives in light of the realities of political borders.⁴⁹ Based on that prioritized list of potential targets, an informed decision can then be made about the necessity to conduct a targeted strike operation. A combat zone defined by metes and bounds may be effective for the traditional notion of armed conflict, but is ineffective when organizations exploit political boundaries to carry out their operations from safe haven states. Instead, to define the limits of the battlespace, one must identify the functional nodes (i.e., key actors and facilities), understand how those nodes interrelate, analyze the full range of options to address the threat, and then prioritize those nodes according to the principles of military necessity, proportionality, humanity, and discrimination when making a decision to strike (or not to strike) a target in a location beyond the geographic location of the identifiable armed forces.

That said, the combat zone is not boundless. Options other than resort to military force are available to capture a terrorist cell in, say, Hamburg, Germany that are not available in certain areas of Yemen or certain "lawless" regions of Africa.⁵⁰ The legal and moral legitimacy of combat operations decreases as the contemplated strike strays from the critical mass of hostile fighting. In other words, the decision to target should be viewed as a calculus—and not a categorical geographic decision—based on the previously identified factors derived from the just war doctrine, including necessity (i.e., importance to military objectives), proximity to actual combat, and reliable alternative courses of action in light of the location of the targeted individual.⁵¹

49. COUNTERINSURGENCY OPERATIONS, *supra* note 47, at VIII-2 (emphasis added); U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING, at II-5, (2007) [hereinafter JOINT TARGETING].

50. See, e.g., Quist-Arcton, *supra* note 10. But see Anthony Dworkin, *Law and the Campaign Against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT (Dec. 16, 2002), <http://web.archive.org/web/20101121092443/http://crimesofwar.org/onnews/news-pentagon.html> ("According to these rules of engagement, an al-Qaeda member on the streets of a European city like Hamburg could lawfully be targeted.").

51. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Speech Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm> ("[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the

If the principle of military necessity tolerates civilian death as the unintentional (but inevitable) by-product of military necessity,⁵² why should it not tolerate a similar cost-benefit calculus of intruding upon sovereign countries by targeting transnational belligerents who exploit political boundaries to seek safe haven in states unable or unwilling to capture them under the traditional law enforcement power of the state? To be sure, the toleration for collateral damage should diminish as the distance of the contemplated targeted strike increases from the area of actual hostilities. But the factors should nevertheless be weighed and not summarily dismissed because the individual was simply in one location and not another. Indeed, this balancing approach appears to have been the methodology employed when deciding to target Osama bin Laden in his suburban hideout in Pakistan by opting for a special forces raid and not by resorting to heavier firepower with stand-off weapons.

III. THE LEGAL AND MORAL LANDSCAPE

The morality of war and the methods employed in the course of armed conflict are based, in large part, on the principles stemming from the just war doctrine.⁵³ Principles such as necessity, proportionality, distinction, and humanity provide the moral precepts for resort to and conduct in armed conflict. Using these principles as its foundation, the modern legal framework for the law of armed conflict developed in the nineteenth and twentieth centuries and is codified in a series of almost universally accepted treaties. The United Nations Charter—specifically, the provisions restricting the use of force and authorizing

threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”). The controversy surrounding Dean Koh’s statement, from a doctrinal perspective, is that it implies that there are degrees of sovereignty, which is inconsistent with the doctrine of sovereign equality. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 5, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). But sovereignty includes both the right to be free from outside interference along with the obligation to police matters within one’s borders. It is apparent, at least from a practical point of view, that such policing is not equal among all sovereign states. See *Drones II: Hearing Before the H. Subcomm. on Nat’l Sec. & Foreign Affairs*, 111th Cong. 7 (2010) (statement of Prof. Kenneth Anderson), available at <http://oversight.house.gov/wp-content/uploads/2012/01/20100428Anderson.pdf> (“The diplomatic fiction of the ‘sovereign equality’ of states makes it difficult to say, as a matter of international law that, yes, Yemen is different from France, but of course that is true.”).

52. LARRY MAY, ERIC ROVIE & STEVE VINER, *THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY READINGS* 160 (2006) (discussing the philosophical doctrine of double effects).

53. O’CONNELL, *supra* note 46, at 118.

the use of self-defense, and the Security Council's power to authorize force—provides the criteria for resorting to force.⁵⁴ The Geneva Conventions regime governs the conduct of wars occurring in international and non-international settings, categorizes the actors, and provides protections to the various classes of people, including combatants, non-combatants, and civilians.

The Geneva Conventions', and more broadly, the law of armed conflict's desire for clarity of definitions in order to minimize confusion as to the status of the various actors located within a combat zone, however, is anything but clear in the context of conflict with a transnational terrorist organization.⁵⁵ The analysis of whether a targeted strike on a terrorist operative is permissible is fraught with legal ambiguity. The legal analysis contains many decision points which can affect the outcome: (1) whether a particular act of terrorism is a crime or an act of war; (2) whether actors who carry out such attacks are combatants or some other category of person within the Geneva paradigm; (3) if considered acts of war, whether a transnational terrorist organization's attacks are international or non-international in nature, thereby invoking the relevant rules in the corresponding Additional Protocol to the Geneva Conventions; and (4) if in the non-international conflict setting, whether the structure of a transnational terrorist organization such as al Qaeda provides the requisite degree of organization, along with the necessary amount of intensity and duration in fighting, to be classified as an armed conflict. Throughout this process, if there is doubt as to whether the targeted individual is a valid target, the individual is to be considered a civilian, and therefore protected under the law of armed conflict.⁵⁶

If the analysis survives the preceding gauntlet of ambiguity, then the proposed targeted strike must undergo additional scrutiny—if not outright denial—if either the target is beyond the recognized combat zone or if the target, under the domestic law of the state proposing the targeted strike, happens to be a citizen of that state.

A. *Doctrinal Framework for the Use of Military Force*

The law of armed conflict, in the context of a traditional state conflict, requires a series of categorical determinations in order to arrive at the final analysis of whether military force is

54. See U.N. Charter art. 2, para. 4; art. 51 & art. 42; *infra* notes 72–74.

55. ICRC, *Direct Participation in Hostilities*, *supra* note 26, at 5.

56. Additional Protocol I, *supra* note 22, at art. 50, para. 1.

appropriate in a given situation. One method of navigating the doctrinal framework might proceed as follows:

- **Military Force versus Law Enforcement Force:** The first determination required is whether the proposed force is that of a military or law enforcement nature.
- ***Jus ad Bellum* versus *Jus in Bello*:** If the force is of a military degree, the next question is to determine whether such action is a resort to force or whether the force proposed is to be applied in an ongoing armed conflict. Implicit in this dichotomy is the analysis of geography and the location(s) of the combat zone if the analysis proceeds as an *in bello* inquiry.
- **Necessity and Proportionality:** If the action is an *initial* resort to force, follow-up analysis will be required as to whether such force is necessary (i.e., is it a last resort) and whether the proposed action is a proportional response. That is, is the proponent of military force responding to an act of war or merely a crime, and where does an act of terrorism fit along that spectrum (assuming it is a spectrum, and not a categorically different classification paradigm)?⁵⁷ If the proposed strike is to occur in an *in bello* situation, the necessity and proportionality analysis must accomplish a “concrete and direct military objective.”⁵⁸
- **International versus Non-International Armed Conflict:** On the other hand, if the proposed use of force is in the context of an *ongoing* armed conflict, questions of whether the conflict is one of an international or non-international variant may determine the degree of intensity and organization required by the non-state actor to show that armed conflict exists in the location of the proposed strike.
- **Target’s “Geneva Status”:** In either case—international or non-international armed conflict—another step is required; a determination must be made on whether the individual is a combatant, and therefore a valid target, or is a civilian, or otherwise.⁵⁹
- **Target’s “Citizenship Status”:** Finally, if the individual is a valid target pursuant to the Geneva’s classification paradigm, a final step is required in order to determine what protections, if any, one’s citizenship provides in situations where a

57. See *supra* notes 19–22 and accompanying text.

58. See Additional Protocol I, *supra* note 22, at art. 51 para. 5(b).

59. This step is included in the analysis for context and will not be analyzed in this Note; it is assumed, for purposes of this Note, that the individual targeted is a valid target at the time of targeting.

citizen takes up arms in a location beyond the targeting country's borders.⁶⁰

1. The Permissibility of Force in the Military versus Law Enforcement Contexts.

The threshold question in considering whether a proposed targeted strike is permissible is to first determine whether the proposed action has a military or civilian law enforcement quality to it. The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* recognizes that civilian law enforcement officers may use lethal force when such action is "unavoidable"⁶¹ and that such force must be used with "weapons and ammunition that would allow for a differentiated use of force."⁶² Conversely, with the use of military force, there is a presumption that deadly force may be used, but in a discretionary manner limited strictly by the necessity to accomplish a military objective, proportional to the objective desired to be accomplished, and discriminating between lawful targets and civilians. In other words, in the context of the *lex specialis* of the law of armed conflict, permissible use of military force does not have a default presumption in favor of the rights to life and due process during valid exercises of such force in times of, or resort to, armed conflict.⁶³

The distinction between military and law enforcement uses of force is premised, however, upon the assumption that there is a difference between the effects of the force used by military and law enforcement authorities. In practice, however, there is no *necessary* difference with the death toll stemming from a military operation employing precision strike technology as compared to a police raid upon a *fortified* hideout. Both, targeted strikes and law enforcement raids can be equally deadly to innocent bystanders. Certainly, military operations that involve the use of unguided weapons⁶⁴ dropped on targets have a higher likelihood

60. This step is likewise in the analysis for context and will not be addressed in depth in this Note.

61. Use of Force and Firearms, *supra* note 34, ¶ 5.

62. *Id.* ¶ 2.

63. *But see* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) A, art. 6, U.N. Doc. A/RES/2200(XXI)A (Dec. 16, 1966) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3, U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948) ("Everyone has the right to life, liberty and the security of person."); *id.* at art. 11 (guaranteeing those charged with a "penal offence" the right to due process).

64. Unguided weapons, or "dumb bombs," are those types of bombs and projectiles that lack onboard navigation systems to actively steer itself to a spe-

for an increased death toll. But the use of guided missile technology with hyper-precise targeting and techniques used to mitigate the size and direction of the weapon's blast radius have made for increasingly precise strikes with minimal collateral damage thus providing at least some differentiated scale of force. Two well-known police raid episodes in the United States illustrate the point that a targeted strike using armed force is not necessarily more lethal to third parties as compared to a law enforcement raid. Consider the deaths stemming from the sieges at Ruby Ridge and Waco in 1992 and 1993, respectively. The Ruby Ridge incident involved an attempt by U.S. Marshalls and, later, the Federal Bureau of Investigation ("FBI") to apprehend Randall Weaver for trafficking illegal weapons.⁶⁵ After Weaver shot and killed two U.S. Marshalls, an FBI sniper team responded to the escalating situation. The sniper team received specialized rules of engagement that "before a surrender announcement was made [the sniper team] could and should shoot all armed adult males appearing outside the cabin."⁶⁶ During the ordeal, a federal agent, Weaver's wife, and his son were killed. Additionally, Weaver and his partner, Kevin Harris, were injured. In the incident that occurred in Waco, Texas, four federal agents were killed and sixteen agents were wounded after the Bureau of Alcohol, Tobacco, and Firearms sought to execute a search warrant for a stockpile of illegal weapons.⁶⁷ During the ensuing fifty-one day standoff, seventy-five of the people holed up in the compound were killed when David Koresh, the group's leader, ignited the compound during an attempt by the FBI to raid the compound.⁶⁸

To be sure, while law enforcement raids seek to apprehend a suspect, when possible, the goal of a targeted military strike is to *kill* the individual being targeted while minimizing, if not eliminating altogether, the death toll of bystanders not targeted. Moreover, the Waco and Ruby Ridge episodes have been viewed

cific point. See Tom Harris, *How Smart Bombs Work*, HOWSTUFFWORKS (Mar. 20, 2003), <http://science.howstuffworks.com/smart-bomb.htm>.

65. U.S. DEP'T OF JUSTICE, REPORT OF THE RUBY RIDGE TASK FORCE TO THE OFFICE OF PROFESSIONAL RESPONSIBILITY OF INVESTIGATION OF ALLEGATIONS OF IMPROPER GOVERNMENTAL CONDUCT IN THE INVESTIGATION, APPREHENSION AND PROSECUTION OF RANDALL C. WEAVER AND KEVIN L. HARRIS 2 (1994), *available at* http://www.justice.gov/opr/readingroom/rubyreportcover_39.pdf [hereinafter RUBY RIDGE REPORT].

66. *Id.* at 4.

67. U.S. DEP'T OF JUSTICE, REPORT TO THE DEPUTY ATTORNEY GENERAL ON THE EVENTS AT WACO, TEXAS, at II (1993) (redacted version), *available at* <http://www.justice.gov/publications/waco/wacotocpg.htm>.

68. *Id.*

as instances where law enforcement exercised excessive uses of force.⁶⁹ But if a major terrorist operative were holed up in a fortified location with an armed security detail, is it not reasonable to expect a result similar to Waco or Ruby Ridge at the hands of the state's police authority, especially considering that terrorists seek safe haven in locations that either permit or cannot restrict their presence?⁷⁰ Proper use of precision-strike technology—given its short response time after receipt of reliable intelligence, its element of surprise, and therefore, its ability to strike before a shootout ensues—when combined with techniques to mitigate the blast radius of the weapon, allows military forces to accomplish the desired objectives on terms designed to minimize the loss of life to those surrounding the target. To be sure, drones and other precision weapons have unintentionally killed innocent civilians. But so has the use of law enforcement authority, even at the hands of highly trained police organizations. As the precision of “surgical strike” weapons increase, when coupled with reliable intelligence prompting the strike, the gap between the traditional notions of military and law enforcement operations against transnational terrorist actors will continue to close,⁷¹ thereby making the decision on whether to conduct a targeted strike dependent upon the factors present in the proposed strike and not a binary decision based on geographic location. Such factors might include the location of the target relative to innocent civilians, the likelihood of a shootout from the target's security detail (if present) if a police raid were executed, the reliability of the state's police force to apprehend the individual, the nature of the underlying reason for capturing or killing this person, and whether such a reason is consistent with the doctrines of military necessity and proportionality.

69. See *id.* (navigate to “Closing”) (“The events at the Branch Davidian compound outside Waco, Texas were exceptional and required an-exceptional response by law enforcement.”); RUBY RIDGE REPORT, *supra* note 65, at 7.

70. See *supra* notes 15–17.

71. See Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, 90 FOREIGN AFF. 12, 13 (July/Aug. 2011) (stating that “over the life of the [drone] program, the percentage of fatalities who were militants has been around 80 percent; in 2010, that figure rose to 95 percent” and that the “increase in accuracy is likely [or at least was] the result of better coordination between Pakistani and U.S. intelligence agencies, the smaller missiles now fired by the drones, and the drones’ increasing ability to linger many hours over a target, which better allows their U.S. pilots to distinguish militants from civilians.”); see also NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 24, at 5 (respecting fundamental civil rights by “ensuring that [counterterrorism] policies and tools are narrowly tailored and applied to achieve specific, concrete security gains”).

2. Necessity and Proportionality of Military Force in *Jus ad Bellum* and *Jus in Bello*.

Use of military force is permitted when in a state of armed conflict, in circumstances of self-defense, or when otherwise authorized by the UN Security Council. The resort to armed conflict is limited by UN Charter Article 2(4),⁷² prohibiting the “threat or use of force,” Article 51,⁷³ recognizing the “inherent right of individual or collective self-defense,” and Article 42,⁷⁴ granting the UN Security Council the power to authorize the use of armed force.

The law of armed conflict is divided into two fields that share some degree of overlap. The first field concerns the criteria required in order to resort to the use of force (*jus ad bellum*) and the second field focuses on the conduct and humanitarian concerns during the course of the war (*jus in bello*).⁷⁵ The traditional requirements of necessity and proportionality apply to both *jus ad bellum* and *jus in bello* but take on slightly different—but increasingly convergent—meanings depending on the context used.⁷⁶ Use of military force is legally permissible if it lies within the scope of self-defense, as defined in the UN Charter, or is otherwise authorized by the UN Security Council.⁷⁷ The

72. See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”).

73. See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”); see also *Rise of the Drones: Unmanned Systems and the Future of War*, *supra* note 25, at 2 (statement of Prof. Anderson) (describing the two categories of authorization for use of military force as “the customary international law doctrine of self-defense . . . [and] the narrower law of armed conflict”); *Drones II* (statement of Prof. Anderson), *supra* note 51, at para. 8.

74. See U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”).

75. JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 1 (2004).

76. Indeed, necessity and proportionality have different meanings not only when used in the *jus ad bellum* versus *jus in bello* context but also when used in the context of before and after the ratification of the U.N. Charter as well. See *id.* at 1–27 (describing the development of the necessity and proportionality principles).

77. See U.N. Charter art. 2, para. 4 & art. 51, *supra* notes 72–73; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) [hereinafter *Wall Case*] (stating that self-defense is a term of art under Article 51 meaning “the right of

exceptions to the twin goals of peace and diplomacy carved out in the UN Charter are premised on the moral principles of the just war doctrine, as developed through the ages by philosophers such as Augustine, Aquinas, and Grotius, among others.⁷⁸ To reconcile the conflict of Christianity's pacifist philosophy with the practical necessity of deterring foreign aggression, the moral principles advanced in the just war doctrine "not only permitted Christians to protect themselves against marauding bandits, but also opened the way to justifying force in response to a broad array of provocations."⁷⁹

In *jus ad bellum*, necessity is established "after all peaceful means [of resolution] have failed."⁸⁰ Necessity in the *jus in bello* context is "reflected in the doctrine of military necessity,"⁸¹ which provides that

[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁸²

The provision goes on to state that "[i]n case of doubt whether an object . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used."⁸³

Proportionality also takes on different meanings depending on whether it is used in the *jus ad bellum* or *jus in bello* context. In determining whether to use military force, proportionality first considers whether military force is an appropriate response in the first instance.⁸⁴ If that determination is affirmatively made, then the extent of the response must be assessed in the *jus in bello*

the victim state to use significant offensive military force on the territory of a state legally responsible for the attack").

78. See generally MAY, ROVIE & VINER, *supra* note 52 (describing the development of the just war doctrine through the writings of major philosophers).

79. O'CONNELL, *supra* note 46, at 118.

80. See GARDAM, *supra* note 75, at 5. Necessity, in the *jus ad bellum* context, was an empty requirement prior to the existence of the U.N. Charter because states were presumed to possess a sovereign right to wage war. The Charter limited that presumption to instances of self-defense, as defined in Article 51, and authorized actions by the U.N. Security Council, as specified in Article 42.

81. *Id.* at 7.

82. Additional Protocol I, *supra* note 22, at art. 52, para. 2; see also JOINT TARGETING, *supra* note 49, at E-1.

83. Additional Protocol I, *supra* note 22, at art. 52, para. 3.

84. GARDAM, *supra* note 75, at 11.

context. The “authoritative statement on proportionality”⁸⁵ in this latter context can be found in Additional Protocol I to the Geneva Convention, prohibiting “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”⁸⁶ and to “[r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁷

The law of armed conflict also incorporates the principles of humanity, which prohibit “employment of arms, projectiles, or material calculated to cause unnecessary suffering,”⁸⁸ and distinction, “requir[ing] both attacker and defender to distinguish between combatants and noncombatants, as well as between military objectives and protected property, locations, or objects.”⁸⁹ Together, these four principles, under the law of armed conflict, are required in order to exercise the use of force legitimately.

The two legal bases for resort to use of military force—state of armed conflict and self-defense—will be analyzed in turn.

a. Is the “War on Terror” an Armed Conflict?

On December 20, 2001, after the U.S.-led forces toppled the Taliban regime, the UN Security Council resolved to “[s]upport[] international efforts to root out terrorism, in keeping with the Charter of the United Nations” and “[a]uthorize[d] the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate.”⁹⁰ Using this as its basis, one theory for justifying the use of

85. Eric T. Jensen, *Targeting of Persons and Property*, in *THE WAR ON TERROR AND THE LAWS OF WAR* 37, 52 (Michael W. Lewis ed., 2009).

86. Additional Protocol I, *supra* note 22, at art. 51 para. 5(b).

87. *Id.* at art. 57 para. 2(iii). The U.S. military specifically incorporates these doctrines into its targeting process. See, e.g., JOINT TARGETING, *supra* note 49, at ix (“[T]he focus [of targeting] should be on creating the desired effects that support the [military] objectives rather than simply servicing a list of customary targets . . .”); *id.* at I-8 (“Every target nominated [for a strike] should in some way contribute to attaining the [military] objectives.”); *id.* at II-5 (requiring “[d]etailed analysis” of each proposed target “linking targets back to targeting objectives”); *id.* at E-1 (defining necessity, proportionality, humanity (unnecessary suffering), and distinction (discrimination)).

88. JOINT TARGETING, *supra* note 49, at E-1.

89. *Id.* at E-2.

90. S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (emphasis removed).

force against terrorist actors is that the UN Security Council affirmatively authorized military action against terrorist and insurgent Taliban actors in Afghanistan. An alternative theory for the United States' military action, to be analyzed in the next subsection, centers on the argument that the United States is in an ongoing self-defense action.

The first major determination on whether targeted strikes against non-state terrorist actors are legally and morally sanctioned is to consider whether an actual state of war exists between the United States and the transnational terrorist actors. Armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."⁹¹ One must look to objective criteria for this determination and not mere declarations of war in order to legally resort to the use of force.⁹² If a state of war does not exist then the authorization to resort to force must reside either under the doctrine of self-defense or under the state's law enforcement power in order to satisfy the legal requirements for the use of force.⁹³ Thus, the distinction between a crime and an act of war is a question of degree and not a categorical decision,⁹⁴ and the presumption of the type of force authorized is determined by the initial determination of police versus military force.

It stands, therefore, that an objective determination of whether armed conflict exists must be made in order to determine the type of force authorized. One approach might be a strict *quantitative* method to measure the number of attacks to gauge whether a certain minimum threshold of sustained intensity exists within a certain geographic location in order to find that a state of war exists beyond the capacity of the civilian law enforcement's power to control. This method fails to capture, however, strategies employed by insurgent forces and terrorist organizations that are perpetuating attacks on "soft targets" and

91. Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

92. INT'L LAW ASS'N, USE OF FORCE COMMITTEE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010).

93. Use of Force and Firearms, *supra* note 34, ¶ 9.

94. See, e.g., Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 1, 3 (2005) (quoting Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 39, 42 (Dieter Fleck ed., 1995)) ("[O]nly when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.").

are not interested in combating the regular military force head-on or holding a specific geographic area. Rather, such forces seek to achieve objectives other than defeating the opposing military force. Therefore, an alternative basis for measuring whether a certain minimum threshold of intensity exists might be to use a *qualitative* analysis. This form of analysis takes into account the frequency of attacks and the magnitude of each attack. In other words, frequent smaller-scale coordinated attacks or non-periodic larger scale attacks might each provide objective evidence that a state of war exists, and justification to resort to military force under a qualitative approach.

To the extent that a certain minimum threshold of intensity must be shown to exist, one view is that such intensity is inherently limited to a certain geographic location.⁹⁵ Beyond such locations, this methodology will likely find that the intensity of conflict is too sporadic and does not satisfy the intense concentration of conflict for establishing, objectively, that a state of armed conflict exists. As a result, the sporadic, geographically diffused acts are insufficient to depart from the default law enforcement power into the realm of authority that permits the use of military force. The practical significance of restricting the use of military force lies in the presumption of how force may be utilized. In a normal state of affairs, that is, when not in a state of armed conflict, the use of deadly force is permitted by law enforcement officers only in

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁹⁶

In the context of military force, however, there is no default presumption against the use of deadly force against valid targets, subject to the constraints of the just war doctrine as established in the modern law of armed conflict.

But the geographic limitation to where the armed conflict is occurring misses the mark in the context of conflict with non-state terrorist actors. Non-state actors who participate in the

95. See, e.g., Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 854–55 (2009).

96. Use of Force and Firearms, *supra* note 34, ¶ 9.

planning and leadership roles of terrorist organizations exploit the sovereign protection of weak or complicit states to continue to perpetuate their attacks from locations known to be beyond the reach of the local law enforcement power. These non-state actors are not confined to any geographic region where their collaborators may be located. Instead, they are free to disperse and perpetuate their attacks from geographically remote locations. The *Tadić* court recognized that the “temporal and geographical scope of both internal and international armed conflicts extend[] beyond the exact time and place of hostilities.”⁹⁷ Rather than applying an arbitrarily defined boundary to the combat zone, the sounder and more practical approach, consistent with the doctrines of military necessity, proportionality, distinction, and humanity, is the approach adopted in the current U.S. military targeting analysis. Consideration of the “political, military, economic, social, informational, and infrastructure” systems that factor into the non-state terrorist actor’s capability to plan and perpetuate attacks from safe haven states must be evaluated “without regard to geographic boundaries” and prioritized in terms of the desired military objectives sought to be accomplished.⁹⁸ If, and only if, the objective to be gained outweighs (perhaps, significantly, which is a policy decision that probably ought to be made by civilian officials) the potential risks associated with the operation, then the discussion of the contemplated operation’s legality and morality should at least be open to debate based on the merits of the particular strike and not foreclosed outright as categorically illegal or immoral.

b. *Whether Targeted Strikes Against Terrorist Actors Using Third-Party States as Safe Havens Can Be in Self-Defense?*

Article 51 of the UN Charter provides the basis for a state to use armed force in individual or collective self-defense.⁹⁹ The “inherent right” of self-defense stems from the underlying just war principles of necessity and proportionality—and in the case of preemptive attacks, imminence—and requires additionally that the use of force in self-defense be waged in a defensive manner, against the responsible party, and in response to a signifi-

97. Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 67 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

98. See COUNTERINSURGENCY OPERATIONS, *supra* note 47, at VIII-2; JOINT TARGETING, *supra* note 49, at II-5.

99. See U.N. Charter art. 51.

cant armed attack.¹⁰⁰ Failure to satisfy these criteria eliminates the self-defense doctrine as a basis for the use of force.

The *Caroline Incident* provides an early and enduring formulation of the self-defense principles of necessity and proportionality.¹⁰¹ In 1837, rebels in British-controlled Canada, including some American citizens, were staging attacks against British forces stationed in Canada. The rebels had outposts on both the Canadian and American sides of the riverbanks and were transporting supplies and people from the American to the Canadian side. British forces learned of this supply line and dispatched troops to end it. Under cover of night, and at an hour chosen to minimize the likelihood that people may be injured or killed, British forces crossed the river into U.S. territory, boarded the vessel, and unmoored it from the riverbank setting the *Caroline* adrift.¹⁰² The river's current sent the vessel over Niagara Falls killing two American citizens who were onboard. The resulting exchange between the U.S. Secretary of State, Daniel Webster, and his British counterpart, Lord Ashburton, provided the formulation for the use of force in self-defense. Specifically, both parties to the correspondence agreed that there must be a showing of "necessity of self-defence, [that was] instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁰³

This formulation is relevant in the context of combating transnational terrorist organizations whose leaders are highly mobile and can continue to plan and perpetuate attacks from remote locations. To protect itself, a state that is the victim of a significant armed attack (or an imminent attack) may, under the theory discussed in this Note, conduct a targeted strike (1) if the conditions dictate that military force is the *only* plausible option¹⁰⁴ and (2) when the intelligence is still timely and relevant, thereby "leaving no time for deliberation" to seek authori-

100. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, para. 194 (June 27); O'CONNELL, *supra* note 46, at 280. *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) (separate opinion of Higgins, J.) (criticizing the I.C.J.-created formalistic requirement that the armed attack be "by one State against another").

101. GARDAM, *supra* note 75, at 40.

102. *Id.*

103. *Id.* at 40–41 (quoting Letter from Lord Ashburton to Mr. Webster (July 28, 1842), in 30 BRITISH AND FOREIGN STATE PAPERS 1881–1882, 195, 201 (1858)).

104. See *supra* Section II for this Note's formulation of how the targeting calculus ought to be determined and under what circumstances it should be applied.

zation under Article 42 of the Charter. Professor Anderson argues that “[s]uch self-defense operations are not governed by the full panoply of treaty laws that attach to armed conflict.”¹⁰⁵ He argues that limited uses of force, such as precision drone strikes, triggers neither the application of the “full range of armed conflict law that applies [in] conflicts between states, nor the limited Common Article 3 rules that apply to conflict[s] with a non-state actor.”¹⁰⁶ That said, while the full doctrinal rigor of the Geneva regime might not apply, the “customary standards” arising out of the just war doctrine—necessity, proportionality, and distinction—always do, maintaining the legal and moral validity of the actions.¹⁰⁷ On the other hand, Professor O’Connell argues that “[s]tates may not use military force against individuals on their territory when law enforcement measures are *appropriate*.”¹⁰⁸ In situations like the 2002 drone strikes in Yemen against a terrorist operative and the 2011 strike against al Awlaki in Yemen, (1) there was no armed conflict occurring in the vicinity of the strike and therefore the only legal authority was the state’s law enforcement power and (2) even if Yemen provided the U.S. with tacit consent to conduct such operations, a state “cannot . . . give consent to a right they do not have.”¹⁰⁹

But a blanket determination of appropriateness of the use of military force does not take into account practical realities present in a particular circumstance. Webster’s formulation in the *Caroline Incident* speaks in terms of “no moment for deliberation.” In a scenario where key figures of transnational terrorist organizations deliberately seek safe haven in states that are unable or unwilling to capture such actors under the default law enforcement authority thereby allowing for the planning and perpetuation of attacks abroad, the determinative criteria should not be solely and initially whether the use of force is *appropriate*, but, more importantly, whether alternative courses of action are *reliably available*. The “reliably available” determination—along with the doctrines of necessity, proportionality, and defensive action against the responsible party in response to a significant attack—

105. *Drones II*, *supra* note 51, at para. 14 (statement of Prof. Anderson).

106. *Compare id.*, with INT’L LAW ASS’N, *supra* note 92 (discussing the minimum showing of force required to trigger the law of armed conflict); *see also* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3 *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I].

107. *Drones II*, *supra* note 51, at para. 14 (statement of Prof. Anderson).

108. *Rise of the Drones II*, *supra* note 25, at 2 (statement of Prof. O’Connell) (emphasis added).

109. *Id.*

would *then* inform the appropriateness of the use of military force in self-defense in the particular instance. Such an analysis would likely support the use of targeted strikes against the operational leader of a terrorist cell in a state like Somalia, for example, where there is no law enforcement authority, but not in Hamburg, Germany where use of the law enforcement authority is a reliable course of action.¹¹⁰

3. International versus Non-international Armed Conflict.

The Geneva Conventions recognize armed conflict as either international conflicts between states or non-international conflicts between an incumbent government and domestic insurgent groups.¹¹¹ The current paradigm, however, does not adequately address armed attacks from transnational actors operating outside of the nation-state framework. But by nevertheless applying the current paradigm, the most direct and logical route for a state that is the victim of a significant terrorist attack to exercise its right of self-defense against a transnational terrorist entity is through the principles of state attribution and due diligence under the international armed conflict framework.

If a host-state under the “due diligence” doctrine “failed to maintain the required level of vigilance,” then that state may be held accountable for failing to meet its internal obligations “irrespective of whether the conduct of irregular forces may be attributed to the state itself.”¹¹² This principle was captured in the UN Global Counter-Terrorism Strategy, which required States

[t]o refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens.¹¹³

110. See Dworkin, *supra* note 50.

111. Geneva I, *supra* note 106, at arts. 2–3 (applying to international and non-international conflicts, respectively); Additional Protocol I, *supra* note 22 (applying to international conflicts); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609.

112. See James Gathii, *Irregular Forces and Self-Defense Under the UN Charter*, excerpt in MARY ELLEN O’CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 791 (6th ed. 2010).

113. United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, at 5, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

But in the *Congo* case, the International Court of Justice noted that “while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the [Congo].”¹¹⁴ Judge Simma noted, however, in a separate opinion that the strict standard for attribution set out in *Nicaragua* “might well have reflected the state . . . of the international law of self-defence for a long time . . . [but] in light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered.”¹¹⁵ The doctrine of due diligence as an avenue to state attribution, combined with the required objective level of intensity, as set out in *Tadić*, therefore might provide a legal basis for an international armed conflict to exist within the Geneva paradigm when one state is combating transnational terrorist actors who have sought safe haven in another state.¹¹⁶

B. *Procedural Safeguards to Prevent Unchecked Targeting of Individuals.*

In implementing a case-by-case analysis methodology for determining the permissibility of conducting targeted strikes against transnational terrorist operatives, certain procedural safeguards ought to be instituted to ensure that the targeting state does not have an unfettered ability to arbitrarily deny targeted individuals life and due process. In *The Public Committee Against Torture in Israel* (“*Targeted Killing*”) case, the Supreme Court of Israel delineated certain legal safeguards to ensure, or at least mitigate, the likelihood of illegal or immoral targeted strikes. First, the strike must occur while in armed conflict.¹¹⁷ The *Targeted Killing* case was decided in the context of the “constant, continual, and murderous wave of terrorist attacks, directed at

114. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, paras. 146–47 (Dec. 19). This references the international law doctrine of attribution. As a pre-requisite to using force against a state that allegedly attacked another state by using non-state actors or entities, the act must be attributed to the state alleged to have committed the act. Judge Simma questioned the continuing wisdom of the traditionally high level of attribution as declared by the International Court of Justice in the *Nicaragua* case in 1986, *id.* 336–37 (separate opinion of Simma, J.).

115. *Id.* at paras. 9–11 (separate opinion of Simma, J.).

116. See Geneva I, *supra* note 106, at art. 2.

117. HCJ 769/02, Pub. Comm. Against Torture in Israel v. Gov’t of Israel, 57(6) IsrSC 285, para. 16 [2006] [hereinafter *Targeted Killing* case], translation available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf; see also PLAW, *supra* note 9, at 237–49 (summarizing the legal, moral, and political safeguards).

Israelis” by terrorist organizations.¹¹⁸ The attacks on Israel were geographically concentrated. In the context of al Qaeda and other transnational terrorist organizations that export their attacks from geographically remote cells, however, it will be difficult to show the same concentration of attacks that were experienced in Israel. Perhaps an alternate approach should be considered to account for the U.S. military’s targeting methodology, which determines and prioritizes the military necessity of the target and then weighs the legal merits of conducting such a strike.¹¹⁹ The second legal safeguard that the *Targeted Killing* court implemented was to place a heavy burden on the targeting state to ensure that “sufficient indications [are present] to warrant an attack.”¹²⁰ The Israeli court did not require that the targeting state, in the heat of armed conflict, receive authorization by a court or neutral party. Instead, the *Targeted Killing* court implemented a third safeguard: a post hoc review mechanism by requiring “a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack.”¹²¹ Such a review would enable transparency and foster political accountability for states that employ targeting policies. Related to this safeguard, the *Targeted Killing* court required a post hoc objective investigation when a targeted strike resulted in the deaths of either the target or innocent bystanders to allow for judicial review, when necessary.¹²² The Israeli court’s next safeguard, which has already been discussed in this Note, restricts the use of targeted strikes if “less harmful means can be employed.”¹²³ As this Note argues, the state’s law enforcement authority ought to be employed when it is a reliable course of action and only in the absence thereof should a targeted strike be considered. Finally, the *Targeted Killing* case reaffirmed the proportionality requirement and affirmatively placed the burden on the targeting state to balance the competing interests of “protect[ing] the lives of its soldiers and civilians” against the “duty to protect the lives of innocent civilians harmed during attacks on terrorists.”¹²⁴

118. *Targeted Killing* case, para. 16 (citation omitted).

119. See *supra* notes 51 (describing the criteria to conduct a targeted strike) & 86 (discussing the targeting methodology employed by the U.S. military).

120. *Targeted Killing* case, para. 40 (citing 1 J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW 24 (2005)).

121. *Id.*

122. *Id.* at para. 54.

123. *Id.* at para. 40; see also O’Connell, *supra* note 25, at 2 (discussing the availability of law enforcement as a reliable, less harmful means).

124. *Targeted Killing* case, para. 46.

Additionally, certain moral safeguards might also be appropriate and help enhance the authority upon which the targeting state acts. One such proposal takes one of the *Targeted Killing* court's recommendations—the targeting state's burden of proof—and requires prior approval from an “independent oversight authority” to ensure that such strikes are consistent with the military objectives, are proportional, and mitigate the perception that such strikes are done arbitrarily.¹²⁵ Such a process is likely workable for individuals on pre-designated classified target lists. A panel can review, in advance, the merits of a proposed strike in light of the presumed general location of the individual. If the factors present indicate that the individual is cleared as a target, then the use of force may be employed when the target has been located and the general location corresponds with the criteria presented before the panel.

Moreover, with respect to the principles of proportionality and discriminating between the target and innocent civilians, a targeting state's moral authority for a targeted strike is greater if it exposes its own forces to “considerable risk” in order to mitigate the risk to innocent civilians, even if alternative weapons, such as unmanned drones, are capable of accomplishing the mission at less risk to the targeting state's military but at greater risk to innocent bystanders.¹²⁶ The U.S. special operations raid into Osama bin Laden's compound in a Pakistani suburban neighborhood in May 2011 illustrates this point.¹²⁷ By internalizing as much of the risk as possible, the targeting state bolsters its case that it sought to ensure the response was proportional and discriminated the target from innocent bystanders to the maximum extent possible. That said, the continued development in weapons precision and effects have minimized the collateral risk to bystanders and to military forces alike.¹²⁸

Finally, when employing force, the leader of a sovereign state must act within the constraints of the law. But sometimes those constraints are untenable in the face of certain novel and grave threats to national security. In other words, the law might, in certain circumstances, bar a leader from exercising his or her moral duty to defend against an attack. In those scenarios, leaders have a moral duty to act, consistent with the just war doctrine, in self-defense to prevent or mitigate such danger—within the

125. See PLAW, *supra* note 9, at 248.

126. *Id.* at 249.

127. Peter Baker & Helene Cooper, *Qaeda Leader Reported Dead in 'Targeted Assault'*, N.Y. TIMES, May 2, 2011, at A1.

128. Bergen & Tiedemann, *supra* note 71, at 13.

constraints of practical wisdom.¹²⁹ The rule of law must prevail, but probably not at the expense of a morally justified action to preserve the safety and security of a nation. The law of armed conflict is the product of an evolution of moral and legal thought that has sought to strike a balance between the necessity for the use of force in certain prescribed situations and the fundamental right to life.¹³⁰ In the common law tradition, when statutory law fails to address an ambiguity in a legal problem, courts have relied upon the common law to fill the gaps. Likewise, when the nature of the threat has fundamentally changed and the treaty and customary law currently in place fails to address such a threat, universal moral principles—the driving force behind the treaty and customary law—ought to be relied upon to fill those gaps.

IV. CONCLUSION

The law of armed conflict has limited, and should continue to limit, the use of armed force to only certain instances when no reliable alternative is available. All things being equal, the use of armed force to capture or kill transnational terrorist actors should be secondary to the default use of the state's law enforcement power. But such a principle presumes that the law enforcement power of a state is willing and able to seek out such actors. Transnational terrorist organizations have the capability and flexibility to plan and perpetuate devastating attacks from geographically remote locations—locations specifically calculated to provide the most autonomy from the state's law enforcement authority. In such circumstances, a fact-specific determination ought to be used when determining whether to employ a targeted strike against a terrorist operative. Factors to be considered include: (1) the necessity for conducting such a strike in terms of (a) whether reliable alternative measures are available, (b) the value of the direct military objectives to be achieved, and

129. See ARISTOTLE, *NICOMACHEAN ETHICS* bk II, at 1106b35–1107a1 (Christopher Rowe trans., Oxford Univ. Press ed. 2002) (c. 384 B.C.E.) (describing the “excellence” of practical virtue as the virtue of issuing decisions “depending on intermediacy of the kind relative to us, this being determined by rational prescription and in the way in which the wise person would determine it”). But see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 84 (H. J. Paton, trans., Harper Perennial Modern Thought 2009) (describing the “categorical imperative” as the “imperative of morality” requiring unconditional adherence to laws and norms that are universally recognized).

130. GARDAM, *supra* note 75, at 2 (“IHL is commonly described as a balance between the demands of military necessity and considerations of humanity.”).

(c) the risk of inaction on the part of the targeting state in hopes that the host-state's police force can adequately address the situation; (2) the proportionality of conducting a targeted strike relative to the underlying reasons for doing so; (3) the magnitude of the risk for collateral damage and the ability to mitigate or eliminate the risk of unintended casualties under the principle of distinction; and (4) the proximity to actual combat when considering the preceding criteria.

In a world where states are the predominant unit of analysis in international law, such an approach may intrude upon sovereignty and may, therefore, be doctrinally imperfect—but it is a solution that provides a workable framework for those decision-makers in positions of authority and accountability who must address, in short and unpredictable order, the threat of transnational terrorist organizations in a legal and moral manner, given the highly mobile and amorphous nature of these actors. The just war doctrine was fashioned out of practical necessity to combat foreign groups threatening the domestic peace. Such practical necessity should continue to animate the modern law of armed conflict with respect to targeted strikes of individuals seeking safe haven to plan and perpetuate further attacks while outside the combat zone.