# 1AC

## plan

The United States federal government should limit the war power authority of the president for self-defense targeted killings to outside an armed conflict.

## drones adv

Conflation of self-defense and the laws of war disrupts effective TK

Geoffrey Corn, South Texas College of Law, Professor of Law and Presidential Research Professor, J.D., 10/22/11, Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1947838

At the core of the self-defense targeting theory is the assumption that the jus ad bellum provides sufficient authority to both justify and regulate the application of combat power.71 This assumption ignores an axiom of jus belli development: the compartmentalization of the jus ad bellum and the jus in bello.72 As Colonel G.I.A.D. Draper noted in 1971, “equal application of the Law governing the conduct of armed conflicts to those illegally resorting to armed forces and those lawfully resorting thereto is accepted as axiomatic in modern International Law.”73 This compartmentalization is the historic response to the practice of defining jus in bello obligations by reference to the jus ad bellum legality of conflict.74 As the jus in bello evolved to focus on the humanitarian protection of victims of war, to include the armed forces themselves,75 the practice of denying LOAC applicability based on assertions of conflict illegality became indefensible.76 Instead, the de facto nature of hostilities would dictate jus in bello applicability, and the jus ad bellum legal basis for hostilities would be irrelevant to this determination.77

This compartmentalization lies at the core of the Geneva Convention lawtriggering equation.78 Adoption of the term “armed conflict” as the primary triggering consideration for jus in bello applicability was a deliberate response to the more formalistic jus in bello applicability that predated the 1949 revision of the Geneva Conventions.79 Prior to these revisions, in bello applicability often turned on the existence of a state of war in the international legal sense, which in turn led to assertions of inapplicability as the result of assertions of unlawful aggression.80 Determined to prevent the denial of humanitarian regulation to situations necessitating such regulation—any de facto armed conflict—the 1949 Conventions sought to neutralize the impact of ad bellum legality in law applicability analysis.81

This effort rapidly became the norm of international law.82 Armed conflict analysis simply did not include conflict legality considerations.83 National military manuals, international jurisprudence and expert commentary all reflect this development.84 This division is today a fundamental LOAC tenet—and is beyond dispute.85 In fact, for many years the United States has gone even farther, extending application of LOAC principles beyond situations of armed conflict altogether so as to regulate any military operation.86 This is just another manifestation of the fact that States, or perhaps more importantly the armed forces that do their bidding, view the cause or purported justification for such operations as irrelevant when deciding what rules apply to regulate operational and tactical execution.

This aspect of ad bellum/in bello compartmentalization is not called into question by the self-defense targeting concept.87 Nothing in the assertion that combat operations directed against transnational non-State belligerent groups qualifies as armed conflict suggests the inapplicability of LOAC regulatory norms on the basis of the relative illegitimacy of al Qaeda’s efforts to inflict harm on the United States and other victim States (although as noted earlier, this was implicit in the original Bush administration approach to the war on terror).88 Instead, the self-defense targeting concept reflects an odd inversion of the concern that motivated the armed conflict law trigger. The concept does not assert the illegitimacy of the terrorist cause to deny LOAC principles to operations directed against them.89 Instead, it relies on the legality of the U.S. cause to dispense with the need for applying LOAC principles to regulate these operations.90 This might not be explicit, but it is clear that an exclusive focus on ad bellum principles indicates that these principles subsume in bello conflict regulation norms.91

There are two fundamental flaws with this conflation. First, by contradicting the traditional compartmentalization between the two branches of the jus belli,92 it creates a dangerous precedent. Although there is no express resurrection of the just war concept of LOAC applicability, by focusing exclusively on jus ad bellum legality and principles, the concept suggests the inapplicability of jus in bello regulation as the result of the legality of the U.S. cause. To be clear, I believe U.S. counterterror operations are legally justified actions in self-defense. However, this should not be even implicitly relied on to deny jus in bello applicability to operations directed against terrorist opponents, precisely because it may be viewed as suggesting the invalidity of the opponent’s cause deprives them of the protections of that law, or that the operations are somehow exempted from LOAC regulation. Second, even discounting this detrimental precedential effect, the conflation of ad bellum and in bello principles to regulate the execution of operations is extremely troubling.93 This is because the meaning of these principles is distinct within each branch of the jus belli.94

Furthermore, because the scope of authority derived from jus ad bellum principles purportedly invoked to regulate operational execution is more restrictive than that derived from their jus in bello counterparts,95 this conflation produces a potential windfall for terrorist operatives. Thus, the ad bellum/in bello conflation is ironically self-contradictory. In one sense, it suggests the inapplicability of jus in bello protections to the illegitimate terrorist enemy because of the legitimacy of the U.S. cause.96 In another sense, the more restrictive nature of the jus ad bellum principles it substitutes for the jus in bello variants to regulate operational execution provides the enemy with increased protection from attack.97 Neither of these consequences is beneficial, nor necessary. Instead, compliance with the traditional jus ad bellum/jus in bello compartmentalization methodology averts these consequences and offers a more rational approach to counterterrorism conflict regulation.98

That makes future terrorist attacks inevitable

Geoffrey Corn, South Texas College of Law, 6/2/13, Corn Comments on the Costs of Shifting to a Pure Self-Defense Model, www.lawfareblog.com/2013/06/corn-comments-on-the-prospect-of-a-shift-to-a-pure-self-defense-model/

The President’s speech – like prior statements of other administration officials – certainly suggests that the inherent right of self-defense is defining the permissible scope of kinetic attacks against terrorists. I wonder, however, if this is more rhetoric than reality? I think only time will tell whether actual operational practice confirms that “we are using force within boundaries that will be no different postwar”. More significantly, if practice does confirm this de facto abandonment of AUMF targeting authority, I believe it will result in a loss of the type of operational and tactical flexibility that has been, according to the President, decisive in the degradation of al Qaeda to date. The inherent right of self-defense is undoubtedly a critical source of authority to disable imminent threats to the nation, but it simply fails to provide the scope of legal authority to employ military force against the al Qaeda (and associated force) threat that will provide an analogous decisive effect in the future.

It strikes me (no pun intended) that arguments – or policy choices – in favor of abandoning the armed conflict model because the inherent right of self-defense will provide sufficient counter-terrorism response authority may not fully consider the operational impact of such a shift. From an operational perspective, the scope of authority to employ military force against the al Qaeda belligerent threat pursuant to the inherent right of self-defense is in no way analogous to the authority to do so within an armed conflict framework. This seems especially significant in relation to counter-terror operations. According to the President, the strategic vision for the “next generation” counter-terror military operations is not a “boundless ‘global war on terror’ – but rather a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.”

Relying exclusively on the inherent right of self-defense would, I suggest, potentially undermine implementing this strategic vision. It seems to me that disruption, and not necessarily destruction, is the logical operational “effect” commanders routinely seek to achieve to implement this strategy. Destruction, when feasible, would obviously contribute to this strategy. It is, however, doubtful that a group like al Qaeda and its affiliates can be completely destroyed – at least to the point that they are brought into complete submission – through the use of military power. Instead, military force can effectively be used to disrupt this opponent, thereby seizing and retaining the initiative and keeping the opponent off balance. Indeed, President Obama signaled the benefit of using military force to achieve this effect when he noted that al Qaeda’s “remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghazi or Boston. They have not carried out a successful attack on our homeland since 9/11.”

A key advantage of the armed conflict framework is that it provides the legal maneuver space to employ military force in a manner that will effectively produce this disruptive and degrading effect. In contrast, under a pure self-defense framework, use of military force directed against such networks would necessarily require a determination of imminent threat of attack against the nation. Unlike the armed conflict model, this would arguably make conducting operations to “disrupt” terrorist networks more difficult to justify. I believe this is borne out by the reference to the pre-9/11 self-defense model. While it is true that military force was periodically employed as an act of self-defense during this era, such use seems to have been quite limited and only in response to attacks that already occurred, or at best were imminent in a restrictive interpretation of that term. In short, the range of legally permissible options to use military power to achieve this disruptive effect is inevitably broader in the context of an existing armed conflict than in isolated self-defense actions.

It may, of course, be possible to adopt an interpretation of imminence expansive enough to facilitate the range of operational flexibility needed to achieve this disruptive effect against al Qaeda networks. But this would just shift the legality debate from the legitimacy of continuing an armed conflict model to the legitimacy of the imminence interpretation. Even this would not, however, provide analogous authority to address the al Qaeda belligerent threat. Even if an expanded definition of imminence undergirded a pure self-defense model, it would inevitably result in hesitancy to employ force to disrupt, as opposed to disable, terrorist threats, because of concerns of perceived overreach.

It may be that a shift to this use of force framework is not only inevitable, but likely to come sooner than later. It may also be that such a shift might produce positive second and third order effects, such as improving the perception of legitimacy and mitigating the perception of a boundless war. It will not be without cost, and it is not self-evident that the scope of attack authority will be functionally analogous to that provided by the armed conflict model. Policy may in fact routinely limit the exercise of authority under this model today, but once the legal box is constricted, operationally flexibility will inevitably be degraded. It is for this reason that I believe the administration is unlikely to be too quick to abandon reliance on the AUMF.

High risk of attacks

Stephen F. Hayes 2-10, The Weekly Standard, Rumors of al Qaeda’s Demise, <http://www.weeklystandard.com/articles/rumors-al-qaeda-s-demise_776000.html?page=2>

For five years, the Obama administration has touted its success in the war against al Qaeda. In formal addresses, daily press briefings, and campaign speeches top administration officials have celebrated the “decimation” of al Qaeda and predicted its imminent extinction.

John Brennan, the president’s top adviser on these matters, even took the bold step of putting a timeframe on the end of al Qaeda. “If the decade before 9/11 was the time of al Qaeda’s rise and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise,” he said in a speech at the Woodrow Wilson Center in the spring of 2012, not long before he was named CIA director.

We were skeptical of Brennan’s claims at the time. Almost nobody believes them now. The growth of the al Qaeda network and the persistence of the threat it presents is no longer in serious dispute. Experts disagree about the precise shape of al Qaeda and its capabilities. But even those who not long ago were echoing the administration’s line are now worried that al Qaeda currently controls “more territory in the Arab world than it has done at any time in its history,” in the words of CNN’s Peter Bergen.

This puts the Obama administration in a difficult position. Despite its many hopeful claims, al Qaeda is nowhere near defeat. And with Obama’s withdrawal from Iraq, his drawdown in Afghanistan, and his eagerness to end even wars that are not won, the prospect of the demise of al Qaeda grows more distant every day.

In response to this grim reality, or at least in a tacit acknowledgment of it, the rhetoric of the Obama administration has increasingly focused on redefining al Qaeda. No longer is it the vast network described by the Bush administration prosecuting a “global war on terror.” Instead, al Qaeda in the Obama administration’s public descriptions is like a Russian matryoshka doll, growing ever smaller with each iteration.

And now we’ve reached the end. We’ve gone from a global network, to something called “core al Qaeda,” to one man incapable even of effective propaganda. Last week, State Department spokeswoman Marie Harf claimed that Ayman al Zawahiri is “the only one left” of “core al Qaeda.”

It’s an absurd claim. And the context makes it worse.

At a State Department briefing on January 23, reporters asked Harf about a new message from Zawahiri to his followers. Her initial response? “I haven’t seen it.” But moments later, after promising to “take a look or a listen,” she claimed to know enough about its contents to dismiss their significance, saying “this is not new rhetoric we’ve heard from Zawahiri.”

How can you offer assurances about the substance and meaning of a message if you have not heard it? You can’t.

This was the context for her claim that Zawahiri is the only core al Qaeda member still standing. “Look, this is not new rhetoric we’ve heard from Zawahiri. He’s—core al Qaeda in Afghanistan and Pakistan, besides Zawahiri, has essentially the entire leadership been decimated by the U.S. counterterrorism efforts. He’s the only one left. I think he spends, at this point, probably more time worrying about his own personal security than propaganda, but still is interested in putting out this kind of propaganda to remain relevant.”

A day after the briefing, Thomas Joscelyn and Bill Roggio, the indispensable team from the Long War Journal, highlighted Harf’s claims and debunked them. The story might have ended there, but in a decision she probably now regrets, Harf responded. Here is the relevant section of her argument:

I was making the point that of the high-value core al-Qaeda leadership targets the United States has had in our sights, Zawahiri is the only senior AQ leader left from the group that planned 9/11—from core al-Qaeda as we’ve known it. Of course, al-Qaeda core does replace leaders that get taken off the battlefield, but they are replaced in general with younger, less experienced fighters who don’t have the same kind of operational background and who don’t have the same ability to plan external attacks. They are obviously still very dangerous—especially in Pakistan and Afghanistan, and when they partner with other local terrorist groups—but they are by any definition a shadow of what the group used to be. You would be hard-pressed to name another senior AQ leader in the Af-Pak region at -Zawahiri’s, or Abu Yayha al Libi’s, or Atiyah Abdul Rahman’s level (I could go on and on .  .  . ).

And when you read my full statement there, it’s clear that I’m talking about the core al-Qaeda leadership being decimated, not the entire group. It defies logic to argue that I think Zawahiri is literally the only core AQ fighter left.

If Harf believes it defies logic to argue that she thinks Zawahiri is the only core al Qaeda fighter left, she might have done more to explain why she said that Zawahiri is the only core Al Qaeda fighter left.

As the Long War Journal points out, in trying to explain what she meant by her claim that Zawahiri was the “only one left” of “core al Qaeda,” Harf offers several different definitions of that group. There’s senior leadership from “the group that planned 9/11” and “core al Qaeda as we’ve known it” and even new “al Qaeda core leadership” that includes those who replace the ones who have died.

It may seem unfair to pick on Harf. Perhaps she just misspoke in making her claim about Zawahiri. But she’s hardly unqualified to speak on these issues, and there’s no question that her views are representative of Barack Obama’s national security leadership. As Harf pointed out herself, she has “spent six years at the CIA—including three as our spokesperson talking about exactly these issues.” And indeed, the problem isn’t the messenger, it’s the message.

From the earliest days of the Obama presidency, the administration has downplayed threats posed by al Qaeda and its affiliates. On his first day in office, Obama pledged again to close the detention facility at Guantánamo Bay. Three days after the attempted bombing of an airplane over Detroit on Christmas Day in 2009, the president claimed Umar Farouk Abdulmutallab was an “isolated extremist,” despite the fact that the bomber had already detailed for authorities his ties to Al Qaeda in the Arabian Peninsula. When Faisal Shahzad attempted to detonate an SUV packed with explosives in Times Square six months later, Janet Napolitano, secretary of Homeland Security, dismissed it as a “one-off” attempt and prematurely dismissed suggestions that the bomber, who was trained and funded by the Pakistani Taliban, had ties to international terrorists. And for two weeks, despite abundant evidence to the contrary, the fatal attacks in Benghazi were misleadingly portrayed as the result of an angry mob spun up by a YouTube video. When the New York Times tried unsuccessfully to resurrect that discredited line last month, Obama administration officials quietly whispered their approval to reporters who asked about the story.

Attacks will be nuclear

Bunn 13 (Matthew, Valentin Kuznetsov, Martin B. Malin, Yuri Morozov, Simon Saradzhyan, William H. Tobey, Viktor I. Yesin, and Pavel S. Zolotarev. "Steps to Prevent Nuclear Terrorism." Paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, October 2, 2013, Matthew Bunn. Professor of the Practice of Public Policy at Harvard Kennedy School andCo-Principal Investigator of Project on Managing the Atom at Harvard University’s Belfer Center for Science and International Affairs. • Vice Admiral Valentin Kuznetsov (retired Russian Navy). Senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, Senior Military Representative of the Russian Ministry of Defense to NATO from 2002 to 2008. • Martin Malin. Executive Director of the Project on Managing the Atom at the Belfer Center for Science and International Affairs. • Colonel Yuri Morozov (retired Russian Armed Forces). Professor of the Russian Academy of Military Sciences and senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, chief of department at the Center for Military-Strategic Studies at the General Staff of the Russian Armed Forces from 1995 to 2000. • Simon Saradzhyan. Fellow at Harvard University’s Belfer Center for Science and International Affairs, Moscow-based defense and security expert and writer from 1993 to 2008. • William Tobey. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs and director of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, deputy administrator for Defense Nuclear Nonproliferation at the U.S. National Nuclear Security Administration from 2006 to 2009. • Colonel General Viktor Yesin (retired Russian Armed Forces). Leading research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences and advisor to commander of the Strategic Missile Forces of Russia, chief of staff of the Strategic Missile Forces from 1994 to 1996. • Major General Pavel Zolotarev (retired Russian Armed Forces). Deputy director of the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, head of the Information and Analysis Center of the Russian Ministry of Defense from1993 to 1997, section head - deputy chief of staff of the Defense Council of Russia from 1997 to 1998., 10/2/2013, “Steps to Prevent Nuclear Terrorism: Recommendations Based on the U.S.-Russia Joint Threat Assessment”, <http://belfercenter.ksg.harvard.edu/publication/23430/steps_to_prevent_nuclear_terrorism.html>)

I. Introduction In 2011, Harvard’s Belfer Center for Science and International Affairs and the Russian Academy of Sciences’ Institute for U.S. and Canadian Studies published “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism.” The assessment analyzed the means, motives, and access of would-be nuclear terrorists, and concluded that the threat of nuclear terrorism is urgent and real. The Washington and Seoul Nuclear Security Summits in 2010 and 2012 established and demonstrated a consensus among political leaders from around the world that nuclear terrorism poses a serious threat to the peace, security, and prosperity of our planet. For any country, a terrorist attack with a nuclear device would be an immediate and catastrophic disaster, and the negative effects would reverberate around the world far beyond the location and moment of the detonation. Preventing a nuclear terrorist attack requires international cooperation to secure nuclear materials, especially among those states producing nuclear materials and weapons. As the world’s two greatest nuclear powers, the United States and Russia have the greatest experience and capabilities in securing nuclear materials and plants and, therefore, share a special responsibility to lead international efforts to prevent terrorists from seizing such materials and plants. The depth of convergence between U.S. and Russian vital national interests on the issue of nuclear security is best illustrated by the fact that bilateral cooperation on this issue has continued uninterrupted for more than two decades, even when relations between the two countries occasionally became frosty, as in the aftermath of the August 2008 war in Georgia. Russia and the United States have strong incentives to forge a close and trusting partnership to prevent nuclear terrorism and have made enormous progress in securing fissile material both at home and in partnership with other countries. However, to meet the evolving threat posed by those individuals intent upon using nuclear weapons for terrorist purposes, the United States and Russia need to deepen and broaden their cooperation. The 2011 “U.S. - Russia Joint Threat Assessment” offered both specific conclusions about the nature of the threat and general observations about how it might be addressed. This report builds on that foundation and analyzes the existing framework for action, cites gaps and deficiencies, and makes specific recommendations for improvement. “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism” (The 2011 report executive summary): • Nuclear terrorism is a real and urgent threat. Urgent actions are required to reduce the risk. The risk is driven by the rise of terrorists who seek to inflict unlimited damage, many of whom have sought justification for their plans in radical interpretations of Islam**;** by the spread of information about the decades-old technology of nuclear weapons; by the increased availability of weapons-usable nuclear materials; and by globalization, which makes it easier to move people, technologies, and materials across the world. • Making a crude nuclear bomb would not be easy, but is potentially within the capabilities of a technically sophisticated terrorist group, as numerous government studies have confirmed. Detonating a stolen nuclear weapon would likely be difficult for terrorists to accomplish, if the weapon was equipped with modern technical safeguards (such as the electronic locks known as Permissive Action Links, or PALs). Terrorists could, however, cut open a stolen nuclear weapon and make use of its nuclear material for a bomb of their own. • The nuclear material for a bomb is small and difficult to detect, making it a major challenge to stop nuclear smuggling or to recover nuclear material after it has been stolen. Hence, a primary focus in reducing the risk must be to keep nuclear material and nuclear weapons from being stolen by continually improving their security, as agreed at the Nuclear Security Summit in Washington in April 2010. • Al-Qaeda has sought nuclear weapons for almost two decades. The group has repeatedly attempted to purchase stolen nuclear material or nuclear weapons, and has repeatedly attempted to recruit nuclear expertise. Al-Qaeda reportedly conducted tests of conventional explosives for its nuclear program in the desert in Afghanistan. The group’s nuclear ambitions continued after its dispersal following the fall of the Taliban regime in Afghanistan. Recent writings from top al-Qaeda leadership are focused on justifying the mass slaughter of civilians, including the use of weapons of mass destruction, and are in all likelihood intended to provide a formal religious justification for nuclear use. While there are significant gaps in coverage of the group’s activities, al-Qaeda appears to have been frustrated thus far in acquiring a nuclear capability; it is unclear whether the the group has acquired weapons-usable nuclear material or the expertise needed to make such material into a bomb. Furthermore, pressure from a broad range of counter-terrorist actions probably has reduced the group’s ability to manage large, complex projects, but has not eliminated the danger. However, there is no sign the group has abandoned its nuclear ambitions. On the contrary, leadership statements as recently as 2008 indicate that the intention to acquire and use nuclear weapons is as strong as ever.

Extinction

Hellman 8 (Martin E. Hellman, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING 2008 THE BENT OF TAU BETA PI, <http://www.nuclearrisk.org/paper.pdf>)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engi- neering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

## legal regimes adv

The administration has asserted TK is legally justified under armed conflict AND self-defense authority

Naz K. Modirzadeh 14, Senior Fellow at Harvard Law School-Brookings Project on Law and Security, Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, <http://harvardnsj.org/wp-content/uploads/2014/01/Modirzadeh-Final.pdf>

As to the jus ad bellum, 124 the government based its authority to attack 125 targets outside of the armed conflicts in Iraq and Afghanistan on three concepts.126 The government has not articulated which of these principles it relied upon or how the three concepts legally interacted.127 First, the U.S. is engaged in an ongoing non-international armed conflict with al Qaeda, the Taliban, and associated forces around the world, authorized by the AUMF.128 Second, the U.S. may be operating within a given territorial state, such as Yemen or Pakistan, with that state’s consent. That consent may take the form of inviting the U.S. to support that nation in its own preexisting NIAC with a particular purported branch or associated force of al Qaeda or the Taliban.129 Such a framework tracks the same logic as the multinational/transnational NIACs of Iraq and Afghanistan, where the sovereign territorial states have invited the U.S. to remain on their territory. Alternatively, that consent may be given simply to allow the U.S. to intervene on the sovereign territory of the state in order to pursue the U.S.’s armed conflict with al Qaeda, the Taliban, and/or associated forces in that particular instance. This consent need not be public; it need not be officially or formally articulated; it may be construed by silence; and it may indeed be gleaned from lack of objection after the attack has occurred.130 Third, the U.S. maintains a seemingly separate legal justification for attacks against al Qaeda, the Taliban, and/or associated forces targets in any country based on self-defense. Such self-defense would allow the United States to attack if the territorial state is “unable or unwilling” to obviate the threat from terrorists on its territory. Furthermore, a self-defense claim may be legally sound if a state cannot control its own territory, or is a “failed state.”131 Meanwhile, some American academics began to argue for a theory—reportedly developed by Koh132—of “elongated imminence” based on “battered spouse syndrome.”133

• As to jus in bello rules applicable to the geographically unbounded NIAC against al Qaeda, the Taliban, and/or associated forces, and associated targeting operations, including against U.S. citizens, the government “takes great care to adhere to the principles” of distinction and proportionality, as defined in IHL.134 While the CIA and any military agencies acting under its orders or authority are to act in accordance with IHL “principles” in their targeting, it is not clear whether the CIA can or will be held accountable for any violations of IHL, or whether, particularly when acting in “covert operations,” they would be subject to criminal liability under the Uniform Code of Military Justice or the War Crimes Act.135

• In February 2013, an unsigned and undated Department of Justice White Paper on “The Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force" publicly surfaced.136 While the While Paper does not provide the DOJ's comprehensive legal analysis, it does serve as a sort of "folk international law" primer, conflating concepts, rules, and principles from IHL, IHRL, and jus ad bellum. For instance, the White Paper invokes a concept of imminence that appears to be unrecognizable under longstanding IHRL and jus ad bellum11 It also seems to take an extraordinarily narrow view under international law of the Administration's obligation to seek the capture of terrorists away from "hot" battlefields before using lethal force.138 Finally, it argues for territorially unbounded NIAC by way of analogy.139

Combined, this remarkably opaque collection of purported international legal bases for the CIA and, perhaps less so, the military to target members of al Qaeda, the Taliban, and associated forces in any country at any time may make some nostalgic for the days when the government simply rejected the applicability of international law to the war on terror. These legal arguments and positions indicate that while the Bush Administration coined and regularly used the term "war on terror," the Obama Administration much more actively pursues an armed conflict with al Qaeda, the Taliban, and associated forces in & global context}40 That is, it extends the conduct of hostilities, as opposed to detention operations or CIA capture operations, to multiple sites around the world, and explicitly states that it is doing so pursuant to an armed conflict with a terrorist organization and its associates. In doing so, the Obama Administration purportedly expands the scope of the applicability of IHL to any place that the United States targets these individuals, typically with only a passing reference to the “sovereignty” of the state on which the terrorist is being targeted.141 It then states that certain IHL principles are being applied—or at least considered—by a clandestine branch of the government whose accountability to the rules of IHL is unclear.142

Whether or not it is meaningfully different, and whether or not Obama Administration officials lament the condition in which they found the country and the government, it is certainly the case that President Obama made the “war against al Qaeda” much more than a rhetorical flourish or a tool that is mainly used to capture individuals abroad and bring them into secretive prisons or Guantánamo. The upshot is that the Obama Administration treats the war against al Qaeda and associated forces much more as a war in the sense of actual armed attacks against targets all over the world than did the Bush Administration. While there had been several instances of such treatment during the Bush Administration, perhaps most infamously the 2002 attack in Yemen, the scale and speed of the attacks under President Obama is far greater than anything carried out by his predecessor.

The Obama Administration’s policy shift occurs within an entirely different rhetorical environment and in a context in which this approach— which one could reasonably call “global war”—is articulated through the language of IHL. After the profound dismay felt by many in the legal profession and academia over the legal memoranda provided to President Bush, the Obama Administration appoints some of the country’s finest international lawyers, many of them well known to the IHL and human rights lawyers who have been fighting against the war on terror throughout this story.143 Indeed, many of the international lawyers who join the Obama Administration have been involved in legal or scholarly efforts to curtail the Bush Administration’s pursuit of the global war on terror. In this sense, as we head into the reactions by IHL and IHRL to these positions, there seems to be far more benefit of the doubt granted to this Administration’s approach to the conflict.144

In a strange coda to the arguments and positions taken by the government throughout these debates, a number of officials suggest by the end of this phase that killing suspected terrorists has become legally and logistically easier than detaining them. Indeed, many have argued that this is precisely what is happening in various situations around the world— whether in Iraq and Afghanistan, as troop drawdown is contemplated in earnest, or in Somalia,145 Yemen,146 and Pakistan 147— with members of the armed forces and drone operators reportedly finding it easier to kill targets148 than to take them into U.S. custody.149

That erodes international norm development for both humanitarian and human rights law

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

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

III. BLURRING THE LINES

The nature of the terrorist threat the United States and other states face does indeed raise the possibility that both the armed conflict and the self-defense paradigms are relevant to the use of targeted strikes overall. The United States has maintained for the past ten years that it is engaged in an armed conflict with al Qaeda66 and, notwithstanding continued resistance to the notion of an armed conflict between a state and a transnational terrorist group in certain quarters, there is general acceptance that the scope of armed conflict can indeed encompass such a state versus non-state conflict. Not all U.S. counterterrorism measures fit within the confines of this armed conflict, however, with the result that many of the U.S. targeted strikes over the past several years may well fit more appropriately within the self-defense paradigm. The existence of both paradigms as relevant to targeted strikes is not inherently problematic. It is the United States’ insistence on using reference to both paradigms as justification for individual attacks and the broader program of targeted strikes that raises significant concerns for the use of international law and the protection of individuals by blurring the lines between the key parameters of the two paradigms.

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

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

Traditionally, the law of neutrality provided the guiding framework for the parameters of the battlespace in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality.71 The law of neutrality is based on the fundamental principle that neutral territory is inviolable72 and focuses on three main goals: (1) contain the spread of hostilities, particularly by keeping down the number of participants; (2) define the legal rights of parties and nonparties to the conflict; and (3) limit the impact of war on nonparticipants, especially with regard to commerce.73 In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory. In essence, the battlespace in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.74 The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in “all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties.”75 In Common Article 3, noninternational armed conflicts include conflicts between a state and non-state armed groups that are “occurring in the territory of one of the High Contracting Parties.”76 Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties.

The neutrality framework as a geographic parameter is left wanting in today’s conflicts with terrorist groups, however. First, as a formal matter, the law of neutrality technically only applies in cases of international armed conflict.77 Even analogizing to the situations we face today is highly problematic, however, because today’s conflicts not only pit states against non-state actors, but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and non-state actors have often shifted unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime[, t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries.78

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

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

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

The current U.S. approach of using both the armed conflict paradigm and the self-defense paradigm as justifications for targeted strikes without further clarification serves to exacerbate the legal challenges posed by the geography of the conflict, at both a theoretical and a practical level. First, at the most fundamental level, uncertainty regarding the parameters of the battlefield has significant consequences for the safety and security of individuals. During armed conflict, the LOAC authorizes the use of force as a first resort against those identified as the enemy, whether insurgents, terrorists or the armed forces of another state. In contrast, human rights law, which would be the dominant legal framework in areas where there is no armed conflict, authorizes the use of force only as a last resort.87 Apart from questions regarding the application of human rights law during times of war, which are outside the scope of this article, the distinction between the two regimes is nonetheless starkest in this regard. The former permits targeting of individuals based on their status as members of a hostile force; the latter—human rights law—permits lethal force against individuals only on the basis of their conduct posing a direct threat at that time. The LOAC also accepts the incidental loss of civilian lives as collateral damage, within the bounds of the principle of proportionality;88 human rights law contemplates no such casualties. These contrasts can literally mean the difference between life and death in many situations. Indeed, “If it is often permissible to deliberately kill large numbers of humans in times of armed conflict, even though such an act would be considered mass murder in times of peace, then it is essential that politicians and courts be able to distinguish readily between conflict and nonconflict, between war and peace.”89 However, the overreliance on flexibility at present means that U.S. officials do not distinguish between conflict and non-conflict areas but rather simply use the broad sweep of armed conflict and/or self-defense to cover all areas without further delineation.

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

The impact is unrestrained use of force in conflict

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The central purpose of the convergence of IHL and IHRL is to increase the protection of individuals in armed conflict. The notion behind the insistence that IHL and IHRL are part of the same discipline suggests that IHL is part of the far larger and more broadly applicable legal realm of IHRL. Indeed, the very idea of the “humanization of humanitarian law”159 is that the cold, brutal balancing of IHL, its perceived deference to the military and the needs of the state is opened up and mitigated by a body of law that protects the individual’s human rights against the state. Yet here the story flips: It is IHRL that seems to become part of IHL. It is IHRL that, by the end of our narrative, seems to be brought into the service of conflict, to act not as a powerful check on the brute force of the sovereign, not as the voice of the international community against those who wish to prioritize national security over individual liberties, but rather as a means to regulate the use of lethal violence. Having argued vociferously that IHRL applies in all situations of armed conflict at all times in order to protect individuals, the argument suddenly turns in the other direction. It becomes possible to say that IHRL can be utilized to allow for one state to invade another state’s territory in order to murder individuals without an attempt to arrest, detain, charge, and try these individuals. What is so striking in this view is how well—if that is the right word—the convergence argument worked, or at least how much work convergence ended up doing. Remarkably, many who wish to justify a far broader and even more aggressive CIA drone program cite convergence as a basis for doing so.160

For the application of IHL, on the other hand, the dominant assumption of convergence—that human rights law and IHL are part of the same general field, that they apply simultaneously, and that they are part of the same conversation—may have had the effect of loosening the boundaries around the field of application of IHL. As the two bodies of law began to be used interchangeably—as an attack utilizing a five hundred pound bomb is analogized to a police officer using a weapon when faced with the imminent danger of a hostage situation—one effect on the perception of IHL may be that it is no longer seen as a tightly controlled body of law. As many leading IHL lawyers warned in 2001 and 2002, once IHL is applied, many ugly things that we generally see as illegal, as outside the realm of rule of law, suddenly become lawful. Those IHRL lawyers who argued that IHRL applies simultaneously to IHL during armed conflict may have contributed to the blurring of the line between war and not-war.

That causes global war

Ryan Goodman, Anne and Joel Ehrenkranz Professor of Law, New York University School of Law, December 2009, CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO, Yearbook of International Humanitarian Law / Volume 12

A substantial literature exists on the conflation of jus ad bellum and jus in bello. However, the consequences for the former side of the equation – the resort to war – is generally under-examined. Instead, academic commentary has focused on the effects of compliance with humanitarian rules in armed conflict and, in particular, the equality of application principle. In this section, I attempt to help correct that imbalance.

In the following analysis, I use the (admittedly provocative) short-hand labels of ‘desirable’ and ‘undesirable’ wars. The former consists of efforts that aim to promote the general welfare of foreign populations such as humanitarian interventions and, on some accounts, peacekeeping operations. The latter – undesirable wars – include conflicts that result from security spirals that serve neither state’s interest and also include predatory acts of aggression.

4.1.1 Decreased likelihood of ‘desirable wars’

A central question in debates about humanitarian intervention is whether the international community should be more concerned about the prospect of future Kosovos – ambitious military actions without clear legal authority – or future Rwandas – inaction and deadlock at the Security Council. Indeed, various institutional designs will tend to favor one of those outcomes over the other. In 1999, Kofi Annan delivered a powerful statement that appeared to consider the prospect of repeat Rwandas the greater concern; and he issued a call to arms to support the ‘developing international norm in favor of intervention to protect civilians from wholesale slaughter’.95 Ifoneassumesthatthereis,indeed,aneedforcontinuedorgreatersupport for humanitarian uses of force, Type I erosions of the separation principle pose a serious threat to that vision. And the threat is not limited to unilateral uses of force. It also applies to military operations authorized by the Security Council. In short, all ‘interventions to protect civilians from wholesale slaughter’ are affected.

Two developments render desirable interventions less likely. First, consider implications of the Kosovo Commission/ICISS approach. The scheme imposes greater requirements on armed forces engaged in a humanitarian mission with respect to safeguarding civilian ives.96 If that scheme is intended to smoke out illicit intent,97 it is likely to have perverse effects: suppressing sincere humanitarian efforts at least on the margins. Actors engaged in a bona fide humanitarian intervention generally tend to be more protective of their own armed forces than in other conflicts. It is instructive to consider, for instance, the precipitous US withdrawal from the UN mission in Somalia – code-named Operation Restore Hope – after the loss of eighteen American soldiers in the Battle of Mogadishu in 1993, and the ‘lesson’ that policymakers drew from that conflict.98 Additionally, the Kosovoc ampaign – code-named Operation Noble Anvil – was designed to be a ‘zero-casualty war’ for US soldiers, because domestic public support for the campaign was shallow and unstable. The important point is that the Kosovo Commission/ICISS approach would impose additional costs on genuine humanitarian efforts, for which it is already difficult to build and sustain popular support. As a result, we can expect to see fewer bona fide interventions to protect civilians from atrocities.99 Notably, such results are more likely to affect two types of states: states with robust, democratic institutions that effectively reflect public opinion and states that highly value compliance with jus in bello. Both of those are the very states that one would most want to incentivize to initiate and participate in humanitarian interventions.

The second development shares many of these same consequences. Consider the implications of the British House of Lords decision in Al-Jedda which cast doubt on the validity of derogations taken in peacekeeping operations as well as other military efforts in which the homeland is not directly at stake and the state could similarly withdraw. The scheme imposes a tax on such interventions by precluding the government from adopting measures that would otherwise be considered lawful and necessary to meet exigent circumstances related to the conflict. Such extraordinary constraints in wartime may very well temper the resolve to engage in altruistic intervention and military efforts that involve similar forms of voluntarism on the part of the state. Such a legal scheme may thus yield fewer such operations and the participation of fewer states in such multilateral efforts. And, the impact of the scheme should disproportionately affect the very states that take international human rights obligations most seriously.

Notably, in these cases, the disincentives might weigh most heavily on third parties: states that decide whether and to what degree to participate in a coalition with the principal intervener. It is to be expected that the commitment on the part of the principal intervener will be stronger, and thus not as easily shifted by the erosion of the separation principle. The ability, however, to hold together a coalition of states is made much more difficult by these added burdens. Indeed, as the United States learned in the Kosovo campaign, important European allies were wary about the intervention, in part due to its lack of an international legal pedigree. And the weakness of the alliance, including German and Italian calls for an early suspension of the bombing campaign, impeded the ability to wage war in the first place. It may be these third party states and their decision whether to join a humanitarian intervention where the international legal regime matters most. Without such backing of important allies, the intervention itself is less likely to occur. It is also those states – the more democratic, the more rights respecting, and the more law abiding – that the international regime should prefer to be involved in these kinds of interventions.

The developments regulating jus ad bellum through jus in bello also threaten to make ‘undesirable wars’ more likely. In previous writing, I argue that encouraging states to frame their resort to force through humanitarian objectives rather than other rationales would, in the aggregate, reduce the overall level of disputes that result in uncontrolled escalation and war.100 A reverse relationship also holds true. That is, encouraging states to forego humanitarian rationales in favor of other justifications for using force may culminate in more international disputes ending in uncontrolled escalation and war. This outcome is especially likely to result from the pressures created by Type I erosions of the separation principle.

First, increasing the tax on humanitarian interventions (the Kosovo Commission/ICISS approach) and ‘wars of choice’ (the Al-Jedda approach) would encourage states to justify their resort to force on alternative grounds. For example, states would be incentivized to invoke other legitimated frameworks – such as security rationales involving the right to self-defense, collective self-defense, anticipatory self-defense, and traditional threats to international peace and security. And, even if military action is pursued through the Security Council, states may be reluctant to adopt language (in resolutions and the like) espousing or emphasizing humanitarian objectives.

Second, the elevation of self-regarding – security and strategic – frameworks over humanitarian ones is more likely to lead to uncontrolled escalation and war. A growing body of social science scholarship demonstrates that the type of issue in dispute can constitute an important variable in shaping the course of interstate hostilities. The first generation of empirical scholarship on the origins of war did not consider this dimension. Political scientists instead concentrated on features of the international system (for example, the distribution of power among states) and on the characteristics of states (for example, forms of domestic governance structures) as the key explanatory variables. Research agendas broadened considerably, however, in subsequent years. More recently, ‘[s]everal studies have identified substantial differences in conflict behavior over different types of issues’.101 The available evidence shows that states are significantly more inclined to fight over particular types of issues that are elevated in a dispute, despite likely overall material and strategic losses.102 Academic studies have also illuminated possible causal explanations for these empirical patterns. Specifically, domestic (popular and elite) constituencies more readily support bellicose behavior by their government when certain salient cultural or ideological issues are in contention. Particular issue areas may also determine the expert communities (humanitarian versus security mindsets) that gain influence in governmental circles – a development that can shape the hard-line or soft-line strategies adopted in the course of the dispute. In short, these links between domestic political processes and the framing of international disputes exert significant influence on whether conflicts will eventually culminate in war.

Third, a large body of empirical research demonstrates that states will routinely engage in interstate disputes with rivals and that those disputes which are framed through security and strategic rationales are more likely to escalate to war. Indeed, the inclusion of a humanitarian rationale provides windows of opportunity to control and deescalate a conflict. Thus, eliminating or demoting a humanitarian rationale from a mix of justifications (even if it is not replaced by another rationale) can be independently destabilizing. Espousing or promoting security rationales, on the other hand, is more likely to culminate in public demands for increased bellicosity, unintended security spirals, and military violence.103

Importantly, these effects may result even if one is skeptical about the power of international law to influence state behavior directly. It is reasonable to assume that international law is unlikely to alter the determination of a state to wage war, and that international law is far more likely to influence only the justificatory discourse states employ while proceeding down the warpath. However, as I argue in my earlier work, leaders (of democratic and nondemocratic) states become caught in their official justifications for military campaigns. Consequently, framing the resort to force as a pursuit of security objectives, or adding such issues to an ongoing conflict, can reshape domestic political arrangements, which narrows the subsequent range of policy options. Issues that initially enter a conflict due to disingenuous representations by political leaders can become an authentic part of the dispute over time. Indeed, the available social science research, primarily qualitative case studies, is even more relevant here. A range of empirical studies demonstrate such unintended consequences primarily in the case of leaders employing security-based and strategic rationales to justify bellicose behavior.104 A central finding is that pretextual and superficial justifications can meaningfully influence later stages of the process that shape popular and elite conceptions of the international dispute. And it is those understandings that affect national security strategies and the ladder of escalation to war. Indeed, one set of studies – of empires – suggests these are mechanisms for powerful states entering into disastrous military campaigns that their leaders did not initially intend.

TK self-defense norms modeled globally --- causes global war

Fisk & Ramos 13 (Kerstin Fisk --- PhD in Political Science focusing on interstate war @ Claremont Graduate University, Jennifer M. Ramos-- PhD in Polisci and Professor @ Loyola Marymount focusing on norms and foreign policy, including drone warfare and preventative use of force, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm” 15 APR 2013, International Studies Perspectives (2013), 1–23)

Conclusion

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.

Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that **a preventive self-defense norm is emerging and cascading following the example set by the U**nited **S**tates. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.

With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future**, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm**. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet **a global norm of preventive self-defense is likely to be** destabilizing**,** leading to more war **in the international system**, not less. It clearly violates notions of just war principles—jus ad bellum. **The U**nited **S**tates **has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.**

Self-defense regime collapse causes every hot spot to escalate

William Bradford, Assistant Professor of Law, Indiana University School of Law, July 2004, SYMPOSIUM: THE CHANGING LAWS OF WAR: DO WE NEED A NEW LEGAL REGIME AFTER SEPTEMBER 11?: "THE DUTY TO DEFEND THEM": n1 A NATURAL LAW JUSTIFICATION FOR THE BUSH DOCTRINE OF PREVENTIVE WAR, 79 Notre Dame L. Rev. 1365

For restrictivists, n67 anticipatory self-defense, despite its pedigree, is "fertile ground for torturing the self-defense concept" n68 and a dangerous warrant for manipulative, self-serving states to engage in prima facie illegal aggression while cloaking their actions under the guise of anticipatory self-defense and claiming legal legitimacy. n69 Analysis of the legitimacy of an act of anticipatory self-defense requires replacing the objectively verifiable prerequisite of an "armed attack" under Article 51 with the subjective perception of a "threat" of such an attack as perceived by the state believing itself a target, and thus determination of whether a state has demonstrated imminence before engaging in anticipatory self-defense lends itself to post hoc judgments of an infinite number of potential scenarios, spanning a continuum from the most innocuous of putatively civilian acts, including building roads and performing scientific research, to the most threatening, including the overt marshaling of thousands of combat troops in offensive dispositions along a contested border. Establishing the necessity of anticipatory self-defense in response to a pattern of isolated incidents over a period of time is an equally subjective task susceptible to multiple determinations and without empirical standards to guide judgment. n70 History is replete with examples of aggression masquerading as anticipatory self-defense, n71 including the Japanese invasion of Manchuria in [\*1385] 1931 n72 and the German invasion of Poland in 1939, n73 and by simply recharacterizing their actions as anticipatory self-defense rather than aggression dedicated to territorial revanchism or fulfillment of religious obligations, **self-interested states such as China, North Korea, Pakistan, or members of the Arab League,** restrictivists warn, **might claim the legal entitlement to attack**, respectively, **Taiwan, South Korea, India, and Israel**. n74 Moreover, taken to its logical extreme the doctrine of anticipatory self-defense might be interpreted as authorizing a state under the leadership of a paranoid decisionmaker to attack the entire world on the false suspicion of threats emanating from every corner. n75

**A strong, adaptive LOAC regime is key to regulate inevitable autonomous weapons – the impact is global war**

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Since the first lethal drone strike in 2001, the US use of remotely operated robotic weapons has dramatically expanded. Along with the broader use of robots for surveillance, ordnance disposal, logistics, and other military tasks, robotic weapons have spread rapidly to many nations, captured public attention, and sparked protest and debate. Meanwhile, every dimension of the technology is being vigorously explored. From stealthy, unmanned jets like the X-47B and its Chinese and European counterparts, to intelligent missiles, sub-hunting robot ships, and machine gun-wielding micro-tanks, robotics is now the most dynamic and destabilizing component of the global arms race.

Drones and robots are enabled by embedded autonomous subsystems that keep engines in tune and antennas pointed at satellites, and some can navigate, walk, and maneuver in complex environments autonomously. But with few exceptions, the targeting and firing decisions of armed robotic systems remain tightly under the control of human operators. This may soon change.

Autonomous weapons are robotic systems that, once activated, can select and engage targets without further intervention by a human operator (Defense Department, 2012). Examples include drones or missiles that hunt for their targets, using their onboard sensors and computers. Based on a computer’s decision that an appropriate target has been located, that target will then be engaged. Sentry systems may have the capability to detect intruders, order them to halt, and fire if the order is not followed. Future robot soldiers may patrol occupied cities. Swarms of autonomous weapons may enable a preemptive attack on an adversary’s strategic forces. Autonomous weapons may fight each other.

Just as the emergence of low-cost, high-performance information technology has been the most important driver of technological advance over the past half-century—including the revolution in military affairs already seen in the 1980s and displayed to the world during the 1991 Gulf War—so the emergence of artificial intelligence and autonomous robotics will likely be the most important development in both civilian and military technology to unfold over the next few decades.

Proponents of autonomous weapons argue that technology will gradually take over combat decision making: “Detecting, analyzing and firing on targets will become increasingly automated, and the contexts of when such force is used will expand. As the machines become increasingly adept, the role of humans will gradually shift from full command, to partial command, to oversight and so on” (Anderson and Waxman, 2013). Automated systems are already used to plan campaigns and logistics, and to assemble intelligence and disseminate lethal commands; in some cases, humans march to orders generated by machines. If, in the future, machines are to act with superhuman speed and perhaps even superhuman intelligence, how can humans remain in control? As former Army Lt. Colonel T. K. Adams observed more than a decade ago (2001), “Humans may retain symbolic authority, but automated systems move too fast, and the factors involved are too complex for real human comprehension.”

Almost nobody favors a future in which humans have lost control over war machines. But proponents of autonomous weapons argue that effective arms control would be unattainable. Many of the same claims that propelled the Cold War are being recycled to argue that autonomous weapons are inevitable, that international law will remain weak, and that there is no point in seeking restraint since adversaries will not agree—or would cheat on agreements. This is the ideology of any arms race.

Is autonomous warfare inevitable?

Challenging the assumption of the inevitability of autonomous weapons and building on the work of earlier activists, the Campaign to Stop Killer Robots, a coalition of nongovernmental organizations, was launched in April 2013. This effort has made remarkable progress in its first year. In May, the United Nations Special Rapporteur on extrajudicial killings, Christof Heyns, recommended that nations immediately declare moratoriums on their own development of lethal autonomous robotics (Heyns, 2013). Heyns also called for a high-level study of the issue, a recommendation seconded in July by the UN Advisory Board on Disarmament Matters. At the UN General Assembly’s First Committee meeting in October, a flood of countries began to express interest or concern, including China, Russia, Japan, the United Kingdom, and the United States. France called for a mandate to discuss the issue under the Convention on Certain Conventional Weapons, a global treaty that restricts excessively injurious or indiscriminate weapons. Meeting in Geneva in November, the state parties to the Convention agreed to formal discussions on autonomous weapons, with a first round in May 2014. The issue has been placed firmly on the global public and diplomatic agenda.

Despite this impressive record of progress on an issue that was until recently virtually unknown—or scorned as a mixture of science fiction and paranoia—there seems little chance that a strong arms control regime banning autonomous weapons will soon emerge from Geneva. Unlike glass shrapnel, blinding lasers, or even landmines and cluster munitions, autonomous weapon systems are not niche armaments of negligible strategic importance and unarguable cost to humanity. Instead of the haunting eyes of children with missing limbs, autonomous weapons present an abstract, unrealized horror, one that some might hope will simply go away.

Unless there is a strong push from civil society and from governments that have decided against pursuing autonomous weapons, those that have decided in favor of them—including the United States (Gubrud, 2013)—will seek to manage the issue as a public relations problem. They will likely offer assurances that humans will remain in control, while continually updating what they mean by control as technology advances. Proponents already argue that humans are never really out of the loop because humans will have programmed a robot and set the parameters of its mission (Schmitt and Thurnher, 2013). But autonomy removes humans from decision making, and even the assumption that autonomous weapons will be programmed by humans is ultimately in doubt.

Diplomats and public spokesmen may speak in one voice; warriors, engineers, and their creations will speak in another. The development and acquisition of autonomous weapons will push ahead if there is no well-defined, immovable, no-go red line. The clearest and most natural place to draw that line is at the point when a machine pulls the trigger, making the decision on whether, when, and against whom or what to use violent force. Invoking a well-established tenet of international humanitarian law, opponents can argue that this is already contrary to principles of humanity, and thus inherently unlawful. Equally important, opponents must point out the threat to peace and security posed by the prospect of a global arms race toward robotic arsenals that are increasingly out of human control.

Humanitarian law vs. killer robots

The public discussion launched by the Campaign to Stop Killer Robots has mostly centered on questions of legality under international humanitarian law, also called the law of war. “Losing Humanity,” a report released by Human Rights Watch in November 2012—coincidentally just days before the Pentagon made public the world’s first open policy directive for developing, acquiring, and using autonomous weapons—laid out arguments that fully autonomous weapons could not satisfy basic requirements of the law, largely on the basis of assumed limitations of artificial intelligence (Human Rights Watch and International Human Rights Clinic at Harvard Law School, 2012).

The principle of distinction, as enshrined in Additional Protocol I of the Geneva Conventions—and viewed as customary international law, thus binding even on states that have not ratified the treaty—demands that parties to a conflict distinguish between civilians and combatants, and between civilian objects and military objectives. Attacks must be directed against combatants and military objectives only; weapons not capable of being so directed are considered to be indiscriminate and therefore prohibited. Furthermore, those who make attack decisions must not allow attacks that may be expected to cause excessive harm to civilians, in comparison with the military gains expected from the attack. This is known as the principle of proportionality.

“Losing Humanity” argues that technical limitations mean robots could not reliably distinguish civilians from combatants, particularly in irregular warfare, and could not fulfill the requirement to judge proportionality.1 Distinction is clearly a challenge for current technology; face-recognition technology can rapidly identify individuals from a limited list of potential targets, but more general classification of persons as combatants or noncombatants based on observation is well beyond the state of the art. How long this may remain so is less clear. The capabilities to be expected of artificial intelligence systems 10, 20, or 40 years from now are unknown and highly controversial within both expert and lay communities.

While it may not satisfy the reified principle of distinction, proponents of autonomous weapons argue that some capability for discrimination is better than none at all. This assumes that an indiscriminate weapon would be used if a less indiscriminate one were not available; for example, it is often argued that drone strikes are better than carpet bombing. Yet at some point autonomous discrimination capabilities may be good enough to persuade many people that their use in weapons is a net benefit.

Judgment of proportionality seems at first an even greater challenge, and some argue that it is beyond technology in principle (Asaro, 2012). However, the military already uses an algorithmic “collateral damage estimation methodology” (Defense Department, 2009) to estimate incidental harm to civilians that may be expected from missile and drone strikes. A similar scheme could be developed to formalize the value of military gains expected from attacks, allowing two numbers to be compared. Human commanders applying such protocols could defend their decisions, if later questioned, by citing such calculations. But the cost of this would be to degrade human judgment almost to the level of machines.

On the other hand, IBM’s Watson computer (Ferruci et al., 2010) has demonstrated the ability to sift through millions of pages of natural language and weigh hundreds of hypotheses to answer ambiguous questions. While some of Watson’s responses suggest it is not yet a trustworthy model, it seems likely that similar systems, given semantic information about combat situations, including uncertainties, might be capable of making military decisions that most people would judge as reasonable, most of the time.

“Losing Humanity” also argues that robots, necessarily lacking emotion,2 would be unable to empathize and thus unable to accurately interpret human behavior or be affected by compassion. An important case of the latter is when soldiers refuse orders to put down rebellions. Robots would be ideal tools of repression and dictatorship.

If robot soldiers become available on the world market, it is likely that repressive regimes will acquire them, either by purchase or indigenous production. While it is theoretically possible for such systems to be safeguarded with tamper-proof programming against human rights abuses, in the event that the world fails to prohibit robot soldiers, unsafeguarded or poorly safeguarded versions will likely be available. A strong prohibition has the best chance of keeping killer robots out of the hands of dictators, both by restricting their availability and stigmatizing their use.

Accountability is another much-discussed issue. Clearly, a robot cannot be held responsible for its actions, but human commanders and operators—or even manufacturers, programmers, and engineers—might be held responsible for negligence or malfeasance. In practice, however, the robot is likely to be a convenient scapegoat in case of an unintended atrocity—a technical failure occurred, it was unintended and unforeseen, so nobody is to blame. Going further, David Akerson (2013) argues that since a robot cannot be punished, it cannot be a legal combatant.

These are some of the issues most likely to be discussed within the Convention on Certain Conventional Weapons. However, US Defense Department policy (2012) preemptively addresses many of these issues by directing that “[a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”

Under the US policy, commanders and operators are responsible for using autonomous weapons in accordance with the laws of war and relevant treaties, safety rules, and rules of engagement. For example, an autonomous weapon may be sent on a hunt-and-kill mission if tactics, techniques, and procedures ensure that the area in which it is directed to search contains no objects, other than the intended targets, that the weapon might decide to attack. In this case, the policy regards the targets as having been selected by humans and the weapon as merely semi-autonomous, even if the weapon is operating fully autonomously when it decides that a given radar return or warm object is its intended target. The policy pre-approves the immediate development, acquisition, and use of such weapons.

Although the policy does not define “appropriate levels,” it applies this rubric even in the case of fully autonomous lethal weapons targeting human beings without immediate human supervision. This makes it clear that appropriate levels, as understood within the policy, do not necessarily require direct human involvement in the decision to kill a human being (Gubrud, 2013). It seems likely that the United States will press other states to accept this paradigm as the basis for international regulation of autonomous weapons, leaving it to individual states to determine what levels of human judgment are appropriate.

Demanding human control and responsibility

As diplomatic discussions about killer robot regulation get under way, a good deal of time is apt to be lost in confusion about terms, definitions, and scope. “Losing Humanity” seeks to ban “fully autonomous weapons,” and Heyns’s report used the term “lethal autonomous robotics.” The US policy directive speaks of “autonomous and semi-autonomous weapon systems,” and the distinction between these is ambiguous (Gubrud, 2013). The Geneva mandate is to discuss “lethal autonomous weapon systems.”

Substantive questions include whether non-lethal weapons and those that target only matériel are within the scope of discussion. Legacy weapons such as simple mines may be regarded as autonomous, or distinguished as merely automatic, on grounds that their behavior is fully predictable by designers.3 Human-supervised autonomous and semi-autonomous weapon systems, as defined by the United States, raise issues that, like fractal shapes, appear more complex the more closely they are examined.

Instead of arguing about how to define what weapons should be banned, it may be better to agree on basic principles. One is that any use of violent force, lethal or non-lethal, must be by human decision and must at all times be under human control. Implementing this principle as strictly as possible implies that the command to engage an individual target (person or object) must be given by a human being, and only after the target is being reliably tracked by a targeting system and a human has determined that it is an appropriate and legal target.

A second principle is that a human commander must be responsible and accountable for the decision, and if the commander acts through another person who operates a weapon system, that person must be responsible and accountable for maintaining control of the system. “Responsible” refers here to a moral and legal obligation, and “accountable” refers to a formal system for accounting of actions. Both elements are essential to the approach.

Responsibility implies that commanders and operators may not blame inadequacies of technological systems for any failure to exercise judgment and control over the use of violent force. A commander must ensure compliance with the law and rules of engagement independently of any machine decision, either as to the identity of a target or the appropriateness of an attack, or else must not authorize the attack. Similarly, if a system does not give an operator sufficient control over the weapon to prevent unintended engagements, the operator must refuse to operate the system.

Accountability can be demonstrated by states that comply with this principle. They need only maintain records showing that each engagement was properly authorized and executed. If a violation is alleged, selected records can be unsealed in a closed inquiry conducted by an international body (Gubrud and Altmann, 2013).4

This framing, which focuses on human control and responsibility for the decision to use violent force, is both conceptually simple and morally compelling. What remains then is to set standards for adequate information to be presented to commanders, and to require positive action by operators of a weapon system. Those standards should also address any circumstances under which other parties—designers and manufacturers, for instance—might be held responsible for an unintended engagement.

There is at least one exceptional circumstance in which human control may be applied less strictly. Fully autonomous systems are already used to engage incoming missiles and artillery rounds; examples include the Israeli Iron Dome and the US Patriot and Aegis missile defense systems, as well as the Counter Rocket, Artillery, and Mortar system. The timeline for response in such systems is often so short that the requirement for positive human decision might impose an unacceptable risk of failure. Another principle—the protection of life from immediate threats—comes into play here. An allowance seems reasonable, if it is strictly limited. In particular, autonomous return fire should not be permitted, but only engagement of unmanned munitions directed against human-occupied territory or vehicles. Each such system should have an accountable human operator, and autonomous response should be delayed as long as possible to allow time for an override decision.

The strategic need for robot arms control

Principles of humanity may be the strongest foundation for an effective ban of autonomous weapons, but they are not necessarily the most compelling reason why a ban must be sought. The perceived military advantages of autonomy are so great that major powers are likely to strongly resist prohibition, but by the same token, autonomous weapons pose a severe threat to global peace and security.

Although humans have (for now) superior capabilities for perception in complex environments and for interpretation of ambiguous information, machines have the edge in speed and precision. If allowed to return fire or initiate it, they would undoubtedly prevail over humans in many combat situations. Humans have a limited tolerance of the physical extremes of acceleration, temperature, and radiation, are vulnerable to biological and chemical weapons, and require rest, food, breathable air, and drinkable water. Machines are expendable; their loss does not cause emotional pain or political backlash. Humans are expensive, and their replacement by robots is expected to yield cost savings.

While today’s relatively sparse use of drones, in undefended airspace, to target irregular forces can be carried out by remote control, large-scale use of robotic weapons to attack modern military forces would require greater autonomy, due to the burdens and vulnerabilities of communications links, the need for stealth, and the sheer numbers of robots likely to be involved. The US Navy is particularly interested in autonomy for undersea systems, where communications are especially problematic. Civilians are sparse on the high seas and absent on submarines, casting doubt on the relevance of humanitarian law. As the Navy contemplates future conflict with a peer competitor, it projects drone-versus-drone warfare in the skies above and waters below, and the use of sea-based drones to attack targets inland as well.

In a cold war, small robots could be used for covert infiltration, surveillance, sabotage, or assassination. In an open attack, they could find ways of getting into underground bunkers or attacking bases and ships in swarms. Because robots can be sent on one-way missions, they are potential enablers of aggression or preemption. Because they can be more precise and less destructive than nuclear weapons, they may be more likely to be used. In fact, the US Air Force’s Long Range Strike Bomber is planned to be both nuclear-capable and potentially unmanned, which would almost certainly mean autonomous.

There can be no real game-changers in the nuclear stalemate. Yet the new wave of robotics and artificial intelligence-enabled systems threatens to drive a new strategic competition between the United States and other major powers—and lesser powers, too. Unlike the specialized technologies of high-performance military systems at the end of the Cold War, robotics, information technology, and even advanced sensors are today globally available, driven as much by civilian as military uses. An autonomous weapons arms race would be global in scope, as the drone race already is.

Since robots are regarded as expendable, they may be risked in provocative adventures. Recently, China has warned that if Japan makes good on threats to shoot down Chinese drones that approach disputed islands, it could be regarded as an act of war. Similarly, forward-basing of missile interceptors (Lewis and Postol, 2010) or other strategic weapons on unmanned platforms would risk misinterpretation as a signal of imminent attack, and could invite preemption.

Engineering the stability of a robot confrontation would be a wickedly hard problem even for a single team working together in trust and cooperation, let alone hostile teams of competing and imperfectly coordinated sub-teams. Complex, interacting systems-of-systems are prone to sudden unexpected behavior and breakdowns, such as the May 6, 2010 stock market crash caused by interacting exchanges with slightly different rules (Nanex, 2010). Even assuming that limiting escalation would be a design objective, avoiding defeat by preemption would be an imperative, and this implies a constant tuning to the edge of instability. The history of the Cold War contains many well-known examples in which military response was interrupted by the judgment of human beings. But when tactical decisions are made with inhuman speed, the potential for events to spiral out of control is obvious.

The way out

Given the military significance of autonomous weapons, substantial pressure from civil society will be needed before the major powers will seriously consider accepting hard limits, let alone prohibition. The goal is as radical as, and no less necessary than, the control and abolition of nuclear weapons.

The principle of humanity is an old concept in the law of war. It is often cited as forbidding the infliction of needless suffering, but at its deepest level it is a demand that even in conflict, people should not lose sight of their shared humanity. There is something inhumane about allowing technology to decide the fate of human lives, whether through individual targeting decisions or through a conflagration initiated by the unexpected interactions of machines. The recognition of this is already deeply rooted. A scientific poll (Carpenter, 2013) found that Americans opposed to autonomous weapons outnumbered supporters two to one, in contrast to an equally strong consensus in the United States supporting the use of drones. The rest of the world leans heavily against the drone strikes (Pew Research Center, 2012), making it seem likely that global public opinion will be strongly against autonomous weapons, both on humanitarian grounds and out of concern for the dangers of a new arms race.

In the diplomatic discussions now under way, opponents of autonomous weapons should emphasize a well-established principle of international humanitarian law. Seeking to resolve a diplomatic impasse at the Hague Conference in 1899, Russian diplomat Friedrich Martens proposed that for issues not yet formally resolved, conduct in war was still subject to “principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.” Known as the Martens Clause, it reappeared in the second Hague Convention (1907), the Tehran Conference on Human Rights (1968), and the Geneva Convention additional protocols (1977). It has been invoked as the source of authority for retroactive liability in war crimes and for preemptive bans on inhumane weapons, implying that a strong public consensus has legal force in anticipation of an explicit law (Meron, 2000).

Autonomous weapons are a threat to global peace and therefore a matter of concern under the UN Charter. They are contrary to established custom, principles of humanity, and dictates of public conscience, and so should be considered as preemptively banned by the Martens Clause. These considerations establish the legal basis for formal international action to prohibit machine decision in the use of force. But for such action to occur, global civil society will need to present major-power governments with an irresistible demand: Stop killer robots.

## solvency

Only restricting self-defense prevents collapse of norms

Beau Barnes, J.D., Boston University School of Law, Spring 2012, REAUTHORIZING THE “WAR ON TERROR”: THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF’S COMING OBSOLESCENCE, https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/b7396120928e9d5e85257a700042abb5/$FILE/By%20Beau%20D.%20Barnes.pdf

Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.121 Thus, the Obama Administration will soon be forced to rationalize ongoing operations under existing legal authorities, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is “starting with a result and finding the legal and policy justifications for it,” which often leads to poor policy formulation.122 Potential legal rationales would perforce rest on exceedingly strained legal arguments based on the AUMF itself, the President’s Commander in Chief powers, or the international law of selfdefense.123 Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both.

1. Effect on Domestic Law and Policy

Congress’s failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda’s “co-belligerents” and “associated forces.”124 But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.125 The policy of the United States should not be to continue to rely on the September 18, 2001, AUMF.

Second, basing U.S. counterterrorism efforts on the President’s constitutional authority as Commander in Chief is legally unstable, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul of the courts and risk destabilizing judicial intervention,126 because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.127 Politically, using an overly robust theory of the Commander in Chief’s powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made “politically toxic” by the writings of John Yoo.128 Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive’s national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability—confounding cooperation with allies and hindering negotiations with adversaries.

There are, of course, many situations where the president’s position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.129 Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.130 To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress’s and the president’s “war powers,” few would disagree with the proposition that the president needs no authorization to act in selfdefense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus the on terror,”137 further distancing counterterrorism operations from democratic oversight would exacerbate this problem.138 Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.139 By operating entirely on a covert basis, “the Executive can initiate more conflict than the public might otherwise [be] willing to support.”140

In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on “a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of problems.”141 Only then can the President’s efforts be sustained and legitimate.

2. Effect on the International Law of Self-Defense

A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of selfdefense—the jus ad bellum.142 Finding sufficient legal authority for the United States’s ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress’s role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert “self-defense against a continuing threat” to target and detain terrorists worldwide, it will almost always be able to find such a threat.143 Indeed, the Obama Administration’s broad understanding of the concept of “imminence” illustrates the danger of allowing the executive to rely on a self-defense authorization alone.144

This approach also would inevitably lead to dangerous “slippery slopes.” Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of “imminence,”145 there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF “does not authorize military force against anyone the Executive labels a ‘terrorist,’”146 relying solely on the international law of self defense would likely lead to precisely such a result.

The slippery slope problem, however, is not just limited to the United States’s military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration’s “expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . .”147 Indeed, “[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.”148

Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration’s national security policy, sapping U.S. credibility. The Administration’s National Security Strategy emphasizes U.S. “moral leadership,” basing its approach to U.S. security in large part on “pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests.”149 Defense Department General Counsel Jeh Johnson has argued that “[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.”150 Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States “must not make [legal authority] up to suit the moment.”151 The Obama Administration’s global counterterrorism strategy is to “adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy” of “turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation.”152

Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States’ European allies, who have been wary of expansive U.S. legal interpretations.153 Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.154 The United States is an international “standard-bearer” that “sets norms that are mimicked by others,”155 and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.156 Risking the obsolescence of the AUMF would force the United States into an “aggressive interpretation” of international legal authority,157 not just discrediting its own rationale, but facilitating that rationale’s destabilizing adoption by nations around the world.158

Congress is key

Mark David Maxwell, Colonel, Judge Advocate with the U.S. Army, Winter 2012, TARGETED KILLING, THE LAW, AND TERRORISTS, Joint Force Quarterly, http://www.ndu.edu/press/targeted-killing.html

In the wake of the attacks by al Qaeda on September 11, 2001, an analogous phenomenon of feeling safe has occurred in a recent U.S. national security policy: America’s explicit use of targeted killings to eliminate terrorists, under the legal doctrines of selfdefense and the law of war. Legal scholars define targeted killing as the use of lethal force by a state4 or its agents with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.5 In layman’s terms, targeted killing is used by the United States to eliminate individuals it views as a threat.6 Targeted killings, for better or for worse, have become “a defining doctrine of American strategic policy.”7 Although many U.S. Presidents have reserved the right to use targeted killings in unique circumstances, making this option a formal part of American foreign policy incurs risks that, unless adroitly controlled and defined in concert with Congress, could drive our practices in the use of force in a direction that is not wise for the long-term health of the rule of law.

This article traces the history of targeted killing from a U.S. perspective. It next explains how terrorism has traditionally been handled as a domestic law enforcement action within the United States and why this departure in policy to handle terrorists like al Qaeda under the law of war—that is, declaring war against a terrorist organization—is novel. While this policy is not an ill-conceived course of action given the global nature of al Qaeda, there are practical limitations on how this war against terrorism can be conducted under the orders of the President. Within the authority to target individuals who are terrorists, there are two facets of Presidential power that the United States must grapple with: first, how narrow and tailored the President’s authority should be when ordering a targeted killing under the rubric of self-defense; and second, whether the President must adhere to concepts within the law of war, specifically the targeting of individuals who do not don a uniform. The gatekeeper of these Presidential powers and the prevention of their overreach is Congress. The Constitution demands nothing less, but thus far, Congress’s silence is deafening.

History of Targeted Killing During the Cold War, the United States used covert operations to target certain political leaders with deadly force.8 These covert operations, such as assassination plots against Fidel Castro of Cuba and Ngo Dinh Diem of South Vietnam, came to light in the waning days of the Richard Nixon administration in 1974. In response to the public outrage at this tactic, the Senate created a select committee in 1975, chaired by Senator Frank Church of Idaho, to “Study Government Operations with Respect to Intelligence Activities.”9 This committee, which took the name of its chairman, harshly condemned such targeting, which is referred to in the report as assassination: “We condemn assassination and reject it as an instrument of American policy.”10 In response to the Church Committee’s findings, President Gerald R. Ford issued an Executive order in 1976 prohibiting assassinations: “No employee of the United States Government shall engage in, or conspire to engage in political assassination.”11 The order, which is still in force today as Executive Order 12333, “was issued primarily to preempt pending congressional legislation banning political assassination.”12 President Ford did not want legislation that would impinge upon his unilateral ability as Commander in Chief to decide on the measures that were necessary for national security. 13 In the end, no legislation on assassinations was passed; national security remained under the President’s purview. Congress did mandate, however, that the President submit findings to select Members of Congress before a covert operation commences or in a timely fashion afterward.14 This requirement remains to this day. Targeted killings have again come to center stage with the Barack Obama administration’s extraordinary step of acknowledging the targeting of the radical Muslim cleric Anwar al-Awlaki, a U.S. citizen who lived in Yemen and was a member of an Islamic terrorist organization, al Qaeda in the Arabian Peninsula.15 Al-Awlaki played a significant role in an attack conducted by Umar Farouk Abdulmutallab, the Nigerian Muslim who attempted to blow up a Northwest Airlines flight bound for Detroit on Christmas Day 2009.16 According to U.S. officials, al-Awlaki was no longer merely encouraging terrorist activities against the United States; he was “acting for or on behalf of al-Qaeda in the Arabian Peninsula . . . and providing financial, material or technological support for . . . acts of terrorism.”17 Al-Awlaki’s involvement in these activities, according to the United States, made him a belligerent and therefore a legitimate target. The context of the fierce debates in the 1970s is different from the al-Awlaki debate. The targeted killing of an individual for a political purpose, as investigated by the Church Committee, was the use of lethal force during peacetime, not during an armed conflict. During armed conflict, the use of targeted killing is quite expansive.18 But in peacetime, the use of any lethal force is highly governed and limited by both domestic law and international legal norms. The presumption is that, in peacetime, all use of force by the state, especially lethal force, must be necessary. The Law Enforcement Paradigm Before 9/11, the United States treated terrorists under the law enforcement paradigm—that is, as suspected criminals.19 This meant that a terrorist was protected from lethal force so long as his or her conduct did not require the state to respond to a threat or the indication of one. The law enforcement paradigm assumes that the preference is not to use lethal force but rather to arrest the terrorist and then to investigate and try him before a court of law.20 The presumption during peacetime is that the use of lethal force by a state is not justified unless necessary. Necessity assumes that “only the amount of force required to meet the threat and restore the status quo ante may be employed against [the] source of the threat, thereby limiting the force that may be lawfully applied by the state actor.”21 The taking of life in peacetime is only justified “when lesser means for reducing the threat were ineffective.”22 Under both domestic and international law, the civilian population has the right to be free from arbitrary deprivation of life. Geoff Corn makes this point by highlighting that a law enforcement officer could not use deadly force “against suspected criminals based solely on a determination an individual was a member of a criminal group.”23 Under the law enforcement paradigm, “a country cannot target any individual in its own territory unless there is no other way to avert a great danger.”24 It is the individual’s conduct at the time of the threat that gives the state the right to respond with lethal force. The state’s responding force must be reasonable given the situation known at the time. This reasonableness standard is a “commonsense evaluation of what an objectively reasonable officer might have done in the same circumstances.”25 The U.S. Supreme Court has opined that this reasonableness is subjective: “[t]he calculus of reasonableness must embody allowances for the fact that police officers often are forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation.”26 The law enforcement paradigm attempts to “minimize the use of lethal force to the extent feasible in the circumstances.”27 This approach is the starting point for many commentators when discussing targeted killing: “It may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.”28 The presumption is that intentional killing by the state is unlawful unless it is necessary for self-defense or defense of others.29 Like the soldier who acts under the authority of self-defense, if one acts reasonably based on the nature of the threat, the action is justified and legal. What the law enforcement paradigm never contemplates is a terrorist who works outside the state and cannot be arrested. These terrorists hide in areas of the world where law enforcement is weak or nonexistent. The terrorists behind 9/11 were lethal and lived in ungovernable areas; these factors compelled the United States to rethink its law enforcement paradigm. The Law of War Paradigm The damage wrought by the 9/11 terrorists gave President George W. Bush the political capital to ask Congress for authorization to go to war with these architects of terror, namely al Qaeda. Seven days later, Congress gave the President the Authorization for the Use of Military Force (AUMF) against those “nations, organizations, or persons [the President] 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.”30 For the first time in modern U.S. history, the country was engaged in an armed conflict with members of an organization, al Qaeda, versus a state. The legal justification to use force, which includes targeted killings, against al Qaeda, the Taliban, and associated forces is twofold: self-defense and the law of war.31 In armed conflict, the rules governing when an individual can be killed are starkly different than in peacetime. The law enforcement paradigm does not apply in armed conflict. Rather, designated terrorists may be targeted and killed because of their status as enemy belligerents. That status is determined solely by the President under the AUMF. Unlike the law enforcement paradigm, the law of war requires neither a certain conduct nor an analysis of the reasonable amount of force to engage belligerents. In armed conflict, it is wholly permissible to inflict “death on enemy personnel irrespective of the actual risk they present.”32 Killing enemy belligerents is legal unless specifically prohibited—for example, enemy personnel out of combat like the wounded, the sick, or the shipwrecked.33 Armed conflict also negates the law enforcement presumption that lethal force against an individual is justified only when necessary. If an individual is an enemy, then “soldiers are not constrained by the law of war from applying the full range of lawful weapons.”34 Now the soldier is told by the state that an enemy is hostile and he may engage that individual without any consideration of the threat currently posed. The enemy is declared hostile; the enemy is now targetable. Anticipatory Self-defense

This paradigm shift is novel for the United States. The President’s authority to order targeted killings is clear under domestic law; it stems from the AUMF. Legal ambiguity of the U.S. authority to order targeted killings emerges, however, when it is required to interpret international legal norms like self-defense and the law of war. The United States has been a historic champion of these international norms, but now they are hampering its desires to target and kill terrorists.

Skeptics of targeted killing admit that “[t]he decision to target specific individuals with lethal force after September 11 was neither unprecedented nor surprising.”35 Mary Ellen O’Connell has conceded, for example, that targeted killing against enemy combatants in Afghanistan is not an issue because “[t]he United States is currently engaged in an armed conflict” there.36 But when the United States targets individuals outside a zone of conflict, as it did with alAwlaki in Yemen,37 it runs into turbulence because a state of war does not exist between the United States and Yemen.38 A formidable fault line that is emerging between the Obama administration’s position and many academics, international organizations,39 and even some foreign governments40 is where these targeted killings can be conducted.41

According to the U.S. critics, if armed conflict between the states is not present at a location, then the law of war is never triggered, and the state reverts to a peacetime paradigm. In other words, the targeted individual cannot be killed merely because of his or her status as an enemy, since there is no armed conflict. Instead, the United States, as in peacetime, must look to the threat the individual possesses at the time of the targeting. There is a profound shift of the burden upon the state: the presumption now is that the targeted killing must be necessary. When, for example, the United States targeted and killed six al Qaeda members in Yemen in 2002, the international reaction was extremely negative: the strike constituted “a clear case of extrajudicial killing.”42

The Obama administration, like its predecessor, disagrees. Its legal justification for targeted killings outside a current zone of armed conflict is anticipatory self-defense. The administration cites the inherent and unilateral right every nation has to engage in anticipatory self-defense. This right is codified in the United Nations charter43 and is also part of the U.S. interpretation of customary international law stemming from the Caroline case in 1837. A British warship entered U.S. territory and destroyed an American steamboat, the Caroline. In response, U.S. Secretary of State Daniel Webster articulated the lasting acid test for anticipatory self-defense: “[N]ecessity of self defense [must be] instant, overwhelming, leaving no choice of means and no moment for deliberation . . . [and] the necessity of self defense, must be limited by that necessity and kept clearly within it.”44

A state can act under the guise of anticipatory self-defense. This truism, however, leaves domestic policymakers to struggle with two critical quandaries: first, the factual predicate required by the state to invoke anticipatory self-defense, on the one hand; and second, the protections the state’s soldiers possess when they act under this authority, on the other. As to the first issue, there is simply no guidance from Congress to the President; the threshold for triggering anticipatory self-defense is ad hoc. As to the second issue, under the law of war, a soldier who kills an enemy has immunity for these precapture or warlike acts.45 This “combatant immunity” attaches only when the law of war has been triggered. Does combatant immunity attach when the stated legal authority is self-defense? There is no clear answer.

The administration is blurring the contours of the right of the state to act in Yemen under self-defense and the law of war protections afforded its soldiers when so acting. Therefore, what protections do U.S. Airmen enjoy when operating the drone that killed an individual in Yemen, Somalia, or Libya?

If they are indicted by a Spanish court for murder, what is the defense? Under the law of war, it is combatant immunity. But if the law of war is not triggered because the killing occurred outside the zone of armed conflict, the policy could expose Airmen to prosecution for murder. In order to alleviate both of these quandaries, Congress must step in with legislative guidance. Congress has the constitutional obligation to fund and oversee military operations.46 The goal of congressional action must not be to thwart the President from protecting the United States from the dangers of a very hostile world. As the debates of the Church Committee demonstrated, however, the President’s unfettered authority in the realm of national security is a cause for concern. Clarification is required because the AUMF gave the President a blank check to use targeted killing under domestic law, but it never set parameters on the President’s authority when international legal norms intersect and potentially conflict with measures stemming from domestic law.

But there’s no uniqueness for their DA’s – TK operational policy is already restricted more than the plan mandates

Robert Chesney 14, law prof at UT, “Postwar”, <http://harvardnsj.org/wp-content/uploads/2014/01/Chesney-Final.pdf>

Would shifting to a postwar framework impact the status quo regarding the use of lethal force more so than it does detention? Surprisingly, no.

That some amount of targeting authority would remain even under the postwar rubric is not in doubt. Jeh Johnson said as much, after all, when he indicated that military options would remain available in the postwar period for “continuing and imminent threats.” 35 But that is not the interesting question. The interesting question is whether postwar targeting authority would be narrower than the scope of authority currently asserted by the government even under the armed-conflict model, such that drone strikes—and other exercises of lethal force—in the postwar world would have to be eliminated or at least curtailed substantially as compared to the status quo.

A. Policy Constraints on Attacks Outside the Hot Battlefield

It is tempting to assume that the answer must be yes, that the postwar model surely would be a narrower affair—a much narrower affair —than the status quo when it comes to lethal force. On close inspection, however, that proves not to be the case. Why? For two seemingly contradictory reasons. First, **the government** for reasons of policy **already embraces an approach** that is more restrictive **than the armed-conflict model** arguably **would require**. Second, **the legal framework the government** most likely **would apply in the absence of** the **armed-conflict** model **is** considerably less restrictive than one might expect. Indeed, it is the same **framework that applies already as a matter of policy**.

There’s also link uq – Obama’s openly called for restrictions on authority

Christopher Preble 13, vice president for Defense and Foreign Policy Studies at the Cato Institute, How to End the War on Terrorism Properly, June 10, <http://www.cato.org/publications/commentary/how-end-war-terrorism-properly?utm_source=Cato+Institute+Emails&utm_campaign=d7856100b8-Cato_Today&utm_medium=email&utm_term=0_395878584c-d7856100b8-141711634&mc_cid=d7856100b8&mc_eid=719812f23e>

In his speech on counterterrorism last month, President Barack Obama said something both profound and overdue — the war underway since 2001 **should** **end, not just factually but also legally**. Outlining his views, the president said he **wanted to** “refine, and ultimately repeal,” the Authorization for Use of Military Force (AUMF), the main legislative vehicle governing U.S. counterterrorism operations around the world. **He also** pledged not to sign **laws designed to expand this mandate further.**

“The most successful counterterrorism operations involve timely intelligence collection and analysis, not open-ended military operations involving large deployments of U.S. troops.”

But to make that goal a concrete reality, the president should have called for legislation repealing the administration’s authority for war — sunsetting the AUMF, which provides the legal authorization for our troops in Afghanistan, once combat operations there conclude at the end of 2014. Future counterterrorism operations can rely on the plentiful authorities the executive branch already has, including some that have been added since 9/11. And if this president — or any other in the future — needs greater war powers to deal with a threat, they can return to Congress and ask for specific, limited authorities tailored to address the future challenge.

Executive “clarification” fails

Laurie Blank, Emory International Humanitarian Law Clinic Director, Professor, 10/10/13, “Raid Watching” and Trying to Discern Law from Policy, today.law.utah.edu/projects/raid-watching-and-trying-to-discern-law-from-policy/

Trying to identify and understand the legal framework the United States believes is applicable to counterterrorism operations abroad sometimes seems quite similar to “Fed watching,” the predictive game of trying to figure out what the Federal Reserve is likely to do based on the hidden meaning behind even the shortest or most cryptic of comments from the Chairman of the Federal Reserve. With whom exactly does the United States consider itself to be in an armed conflict? Al Qaeda, certainly, but what groups fall within that umbrella and what are associated forces? And to where does the United States believe its authority derived from this conflict reaches?

On Saturday, U.S. Special Forces came ashore in Somalia and engaged in a firefight with militants at the home of a senior leader of al Shabaab; it is unknown whether the target of the raid was killed. I must admit, my initial reaction was to wonder whether official information about the raid would give us any hints — who was the target and why was he the target? What were the rules of engagement (ROE) for the raid (in broad strokes, because anything specific is classified, of course)? And can we make any conclusions about whether the United States considers that its armed conflict with al Qaeda extends to Somalia or whether it believes that al Shabaab is a party to that armed conflict or another independent armed conflict?

The reality, however, is that this latest counterterrorism operation highlights once again the conflation of law and policy that exemplifies the entire discourse about the United States conflict with al Qaeda and other U.S. counterterrorism operations as well. And that using policy to discern law is a highly risky venture.

The remarkable series of public speeches by top Obama Administration legal advisors and national security advisors, the Department of Justice White Paper, and the May 2013 White House fact sheet on U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities all appear to offer extensive explanations of the international legal principles governing the use of drone strikes against al-Qaeda operatives in various locations around the globe, as well as related counterterrorism measures. In actuality, they offer an excellent example of the conflation of law and policy and the consequences of that conflation.

Policy and strategic considerations are without a doubt an essential component of understanding contemporary military operations and the application of international law. However, it is equally important to distinguish between law and policy, and to recognize when one is driving analysis versus the other.

The law regarding the use of force against an individual or group outside the borders of the state relies on one of two legal frameworks: the law of armed conflict (LOAC) and the international law of self-defense (jus ad bellum). During armed conflict, LOAC applies and lethal force can be used as a first resort against legitimate targets, a category that includes all members of the enemy forces (the regular military of a state or members of an organized armed group) and civilians who are directly participating in hostilities. Outside of armed conflict, lethal force can be used in self-defense against an individual or group who has engaged in an armed attack – or poses an imminent threat of such an attack, where the use of force is necessary and proportionate to repel or deter the attack or threat.

The United States has consistently blurred these two legal justifications for the use of force, regularly stating that it has the authority to use force either as part of an ongoing armed conflict or under self-defense, without differentiating between the two or delineating when one or the other justification applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances. From the perspective of careful legal analysis, however, it can prove problematic.

In effect, it is U.S. policy to eliminate “bad guys” — whether by use of lethal force or detention — who are attacking or posing a threat to the United States or U.S. interests. Some of these “bad guys” are part of a group with whom we are in an armed conflict (such as al Qaeda); some pose an imminent threat irrespective of the armed conflict; some are part of a group that shares an ideology with al Qaeda or is linked in some more comprehensive way. Drone strikes, Special Forces raids, capture — each situation involves its own tactical plans and twists.

But do any of these specific tactical choices tell us anything in particular about whether LOAC applies to a specific operation? Whether the United States believes it applies? Unfortunately, not really. Take Saturday’s raid in Somalia, for example. Some would take the use of lethal force by the United States against a member of al Shabaab in Somalia to suggest that the United States views al Shabaab as part of the conflict with al Qaeda, or that the United States views the geographical arena of the conflict as extending at least into Somalia. Others analyze it through the lens of self-defense, because news reports suggest that U.S. forces sought to capture the militant leader and used deadly force in the process of trying to effectuate that capture.

Ultimately, however, the only certain information is that the United States viewed this senior leader of al Shabaab as a threat – but whether that threat is due to participation in an armed conflict or due to ongoing or imminent attacks on the United States is not possible to discern. Why? Because more than law guides the planning and execution of the mission. Rules of engagement (ROE) are based on law, strategy and policy: the law forms the outer parameters for any action; ROE operate within that framework to set the rules for the use of force in the circumstances of the particular military mission at hand, the operational imperatives and national command policy.

The fact that the operation may have had capture as its goal, if feasible, does not mean that it could only have occurred outside the framework of LOAC. Although LOAC does not include an obligation to capture rather than kill an enemy operative — it is the law enforcement paradigm applicable outside of armed conflict that mandates that the use of force must be a last resort — ROE during an armed conflict may require attempt to capture for any number of reasons, including the desire to interrogate the target of the raid for intelligence information. Likewise, the use of military personnel and the fact that the raid resulted in a lengthy firefight does not automatically mean that armed conflict is the applicable framework — law enforcement in the self-defense context does narrowly prescribe the use of lethal force, but that use of force may nonetheless be robust when necessary.

“Raid-watching” — trying to predict the applicable legal framework from reports of United States strikes and raids on targets abroad — highlights the challenges of the conflation of law and policy and the concomitant risks of trying to sift the law out from the policy conversation. First, determining the applicable legal framework when two alternate, and even opposing, frameworks are presented as the governing paradigm at all times is extraordinarily complicated. This means that assessing the legality of any particular action or operation can be difficult at best and likely infeasible, hampering efforts to ensure compliance with the rule of law. Second, conflating law and policy risks either diluting or unnecessarily constraining the legal regimes. The former undermines the law’s ability to protect persons in the course of military operations; the latter places undue limits on the lawful strategic options for defending U.S. interests and degrading or eliminating enemy threats. Policy can and should be debated and law must be interpreted and applied, but substituting policy for legal analysis ultimately substitutes policy’s flexibility for the law’s normative foundations.

**Simulation of national security law debates is the best pedagogical approach—inculcates agency and decision-making skills**

Laura K. **Donohue**, Associate Professor of Law, Georgetown Law, 4/11/**13**, National Security Law Pedagogy and the Role of Simulations, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations.

The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material.

The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos.

The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166

A. Course Design

The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and **creating an alternative reality in which students would be forced to act upon legal concerns**.167 The exercise itself is a form of problem-based learning, wherein **students are given both agency and responsibility** for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking).

Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168

Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting.

NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux.

A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise.

In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0.

The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law.

Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media).

A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers.

The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed.

The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session.

To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain.

Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced.

Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals.

Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient.

The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future.

B. Substantive Areas: Interstices and Threats

As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on **specific authorities** that may be brought to bear in the course of a crisis. **The decision of which areas to explore is made well in advance of the course**. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course.

The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life.

For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like.

The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression.

C. How It Works

As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play.

Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site.

For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis.

The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication.

As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities.

At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively.

Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172

Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests.

CONCLUSION

The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same.

The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the **specific demands** of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach.

With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field.

The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court.

It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a **starting point for moving forward**. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which **they are given agency and responsibility for their decision making**, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

**Simulating the plan creates unique pedagogical benefits by forcing us to build expertise on the details of national security policy—the simulation iself activates agency and enables change—it also builds problem-solving and decision-making skills**

Laura K. **Donohue**, Associate Professor of Law, Georgetown Law, 4/11/**13**, National Security Law Pedagogy and the Role of Simulations, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

2. Factual Chaos and Uncertainty

One of the most important skills for students going into national security law is the ability to deal with factual chaos. The presentation of factual chaos significantly differs from the traditional model of legal education, in which students are provided a set of facts which they must analyze. Lawyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determine which information is reliable and relevant, and proceed with analysis and recommendations. Their recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances, and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis alters.

a. Chaos. Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of intelligence gathering and analysis in a manner that yielded an optimal result.132 But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis, and the volume of information available. The number of sources of information – not least in the online world – is staggering.

Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidential Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean that national security law itself is rapidly changing. Lawyers inside and outside of government must keep abreast of constantly evolving authorities.

The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G-7/G-8, and other countries, introduce new instruments whose reach includes U.S. interests. Rapid geopolitical changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug cartels, North Korea, the former Soviet Union, China, and other issues require lawyers to keep up on what is happening globally as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself.133

In sum, the sheer amount of information the national security lawyer needs to assimilate is significant. The basic skills required in the 1970s thus may be similar – such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the volume of information, the diversity of information sources, and the heavy reliance on technology requires lawyers to develop new skills. They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions – i.e., a broadening of knowledge and a narrowing of focus.

A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of stare decisis appears particularly inapposite for this rapidly-changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns in an information-rich world in a manner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand.

Staying ahead of the curve requires developing a sense of timing – when to respond to important legal and factual shifts – and identifying the best means of doing so. Again, this applies to government and non-government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overload.

b. Uncertainty. National security law proves an information-rich, factuallydriven environment. The ability to deal with such chaos may be hampered by gaps in the information available and the difficulty of engaging in complex fact-finding – a skill often under-taught in law school. Investigation of relevant information may need to reach far afield in order to generate careful legal analysis. Uncertainty here plays a key role.

In determining, for instance, the contours of quarantine authority, lawyers may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state-level, and internationally, and the like. Lawyers in non-profit organizations, legal academics, in-house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiatives, agreeing to contractual terms, or advising clients on the best course of action. For both government and non-government lawyers, the secrecy inherent in the field is of great consequence. The key here is learning to ask intelligent questions to generate the best legal analysis possible.

It may be the case that national security lawyers are not aware of the facts they are missing – facts that would be central to legal analysis. This phenomenon front-loads the type of advice and discussions in which national security lawyers must engage. It means that analysis must be given in a transparent manner, contingent on a set of facts currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests with the caveat that the legal analysis of the situation might change if the facts change, provides for more robust consideration of critically important issues.

c. Creative Problem Solving. Part of dealing with factual uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admittedly, much has been made in the academy about the importance of problem-based learning as a method in developing students’ critical thinking skills.134 Problem-solving, however, is not merely a method of teaching. It is itself a goal for the type of activities in which lawyers will be engaged. The means-ends distinction is an important one to make here. Problemsolving in a classroom environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem-solving as an end suggests the accumulation of a broader set of tools, such as familiarity with multidisciplinary approaches, creativity and originality, sequencing, collaboration, identification of contributors’ expertise, and how to leverage each skill set.

This goal presents itself in the context of fact-finding, but it draws equally on strong understanding of legal authorities and practices, the Washington context, and policy considerations. Similarly, like the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must operate. Time may not be a commodity in surplus. This means that national security legal education must not only develop students’ complex fact-finding skills and their ability to provide contingent analysis, but it must teach them how to swiftly and efficiently engage in these activities.

3. Critical Distance

As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession.135 Critical thinking provides the necessary distance from the law that is required in order to move the legal system forward. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such constructs as well.

Scholars and educators disagree, of course, on what exactly critical thinking entails.136 For purposes of our present discussion, I understand it as the metaconversation in the law. Whereas legal analysis and substantive knowledge focus on the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective.

For the purpose of practicing national security law, critical thought is paramount. This is true partly because of the unique conditions that tend to accompany the introduction of national security provisions: these are often introduced in the midst of an emergency. Their creation of new powers frequently has significant implications for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights.137 Constitutional implications demand careful scrutiny.

Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be seen to act to respond.138 With the impact on rights, in particular, foremost in legislators’ minds, the first recourse often is to make any new powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built.139 In order to withdraw them, legislators must demonstrate either that the provisions are not effective or that no violence will ensue upon their withdrawal (either way, a demanding proof). Alternatively, legislators would have to acknowledge that some level of violence may be tolerated – a step no politician is willing to take.

Any new powers, introduced in the heat of the moment, may become a permanent part of the statutory and regulatory regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner. They may have unintended and detrimental consequences. Therefore, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through them outside of the contemporary context.

There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that **it is the goal of higher education to build the capacity to engage in critical thought**. Deeply humanistic theories underlie this approach. The ability to develop discerning judgment – the very meaning of the Greek term, 􏰀􏰁􏰂􏰃􏰄􏰅􏰆 – provides the basis for advancing the human condition through reason and intellectual engagement.

Critical thought as used in practicing national security law may seem somewhat antithetical to the general legal enterprise in certain particulars. For government lawyers and consultants, there may be times in which not providing legal advice, when asked for it, may be as important as providing it. That is, it may be important not to put certain options on the table, with legal justifications behind them. Questions whether to advise or not to advise are bound up in considerations of policy, professional responsibility, and ethics. They may also relate to questions as to who one’s client is in the world of national security law.140 It may be unclear whether and at what point one’s client is a supervisor, the legal (or political) head of an agency, a cross-agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. Alternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance.

4. Nontraditional Written and Oral Communication Skills

Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard fare. What is perhaps unique about the way communication skills are used in the national security world is the importance of non-traditional modes of legal communication such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting changed circumstances, and communications built on swiftly evolving and uncertain information.

For many of these types of communications speed may be of the essence – and unlike the significant amounts of time that accompany preparation of lengthy legal documents (and the painstaking preparation for oral argument that marks moot court preparations.) Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closest to the issues have exceedingly short amounts of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Supreme Court oral argument and witness crossexamination – although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve to address the myriad legal questions involved.

Facts on which the legal analysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains,

If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then national security process would become dysfunctional. The delay alone would cause the policymaker to avoid, and perhaps evade, legal review.141

Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in response.”142 The lawyer providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in light of rapidly-changing facts and conditions, the potential for nuance to be lost is considerable.

The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it may be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to provide an external check on the pressures that have been internalized, by allowing the lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t say.”143

Written and oral communication may occur at highly irregular moments – yet it is at these moments (in the elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized nature of legal writing and research. Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves.

5. Leadership, Integrity and Good Judgment

National security law often takes place in a high stakes environment. There is tremendous pressure on attorneys operating in the field – not least because of the coercive nature of the authorities in question. The classified environment also plays a key role: many of the decisions made will never be known publicly, nor will they be examined outside of a small group of individuals – much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount.

The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which this situation places attorneys is of a higher magnitude than many other areas of the law. Added to this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision-making, power relations, and institutional authorities compete. Policy concerns similarly dominate the landscape. It is not enough for national security attorneys to claim that they simply deal in legal advice. Their analyses carry consequences for those exercising power, for those who are the targets of such power, and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances.

Equally critical in the national security realm is the classified nature of so much of what is done in national security law. All data, for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth.144 NSI, the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “information which pertains to the national defense and foreign relations (National Security) of the United States and is classified in accordance with an Executive Order.” Nine primary Executive Orders and two subsidiary orders have been issued in this realm.145

The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the numbers are still high: in fiscal year 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification decisions.146

The classification realm, moreover, in which national security lawyers are most active, is expanding. Derivative classification decisions – classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form – is increasing. In FY 2010, there were more than seventy-six million such decisions made.147 This number is triple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions.

The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, lawyers are limited in their opportunity for outside appraisal and review.

Even within the executive branch, stove-piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals – much less lawyers – may be read into a program. This diminishes the opportunity to identify and correct errors or to engage in debate and discussion over the law. Once a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted. The effect may be felt for decades, as successive Administrations reference prior legal decisions within certain agencies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous decisions. They are prevented by classification authorities from revealing these decisions. This results in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunities to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come.

The problem extends beyond the executive branch. There are limited opportunities, for instance, for external judicial review. Two elements are at work here: first, very few cases involving national security concerns make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing – a persistent problem with regard to challenging, for instance, surveillance programs. Second, courts have historically proved particularly reluctant to intervene in national security matters. Judicially-created devices such as political question doctrine and state secrets underscore the reluctance of the judiciary to second-guess the executive in this realm. The exercise of these doctrines is increasing in the post-9/11 environment. Consider state secrets. While much was made of some five to seven state secrets cases that came to court during the Bush administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts accepted.148 Many times judges did not even bother to look at the evidence in question before blocking it and/or dismissing the suit. In numerous additional cases, the courts treated the claims as though state secrets had been asserted – even where the doctrine had not been formally invoked.149

In light of these pressures – the profound consequences of many national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review – the practice of national security law requires a particularly rigorous and committed adherence to ethical standards and professional responsibility. This is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordance with high standards. It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that national security attorneys may face, and to address the types of questions related to professional responsibility that will confront them in the course of their careers.

Good judgment and leadership similarly stand paramount. These skills, like many of those discussed, may also be relevant to other areas of the law; however, the way in which they become manifest in national security law may be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney’s position within the political hierarchy. Policymaking positions will be considerably different from the provision of legal advice to policymakers. Leadership, too, may mean something different in this field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, or resigning when faced by unethical situations. It may mean creating new bureaucratic structures to more effectively respond to threats. It may mean holding off clients until the attorneys within one’s group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such situations may be political, either through public statements and use of the media, or by going to different branches of government for a solution.

6. Creating Opportunities for Learning

In addition to the above skills, national security lawyers must be able to engage in continuous self-learning in order to improve their performance. They must be able to identify new and emerging legal and political authorities and processes, systems for handling factual chaos and uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet it is vital for their future success to give students the ability to create conditions of learning.

**Debating the law teaches us how to make it better – rejection is worse**

Todd **Hedrick**, Assistant Professor of Philosophy at Michigan State University, Sept 20**12**, Democratic Constitutionalism as Mediation: The Decline and Recovery of an Idea in Critical Social Theory, Constellations Volume 19, Issue 3, pages 382–400

Habermas’ alleged abandonment of immanent critique, however, is belied by the role that the democratic legal system comes to play in his theory. While in some sense just one system among others, it has a special capacity to shape the environments of other systems by regulating their interaction. Of course, the legal system is not the only one capable of affecting the environments of other systems, but law is uniquely open to inputs from ordinary language and thus potentially more pliant and responsive to democratic will formation: “Normatively substantive messages can circulate throughout society only in the language of law … . Law thus functions as the ‘transformer’ that guarantees that the socially integrating network of communication stretched across society as a whole holds together.”55 This allows for the possibility of consensual social regulation of domains ranging from the economy to the family, where actors are presumed to be motivated by their private interests instead of respect for the law, while allowing persons directed toward such interests to be cognizant that their privately oriented behavior is compatible with respect for generally valid laws. While we should be cautious about automatically viewing the constitution as the fulcrum of the legal order, its status as basic law is significant in this respect. For, recalling Hegel's broader conception of constitutionalism, political constitutions not only define the structure of government and “the relationship between citizens and the state” (as in Hegel's narrower “political” constitution); they also “implicitly prefigure a comprehensive legal order,” that is, “the totality comprised of an administrative state, capitalist economy, and civil society.”56 So, while these social spheres can be conceived of as autonomous functional subsystems, their boundaries are legally defined in a way that affects the manner and degree of their interaction: “The political constitution is geared to shaping each of these systems by means of the medium of law and to harmonizing them so that they can fulfill their functions as measured by a presumed ‘common good’.”57 Thus, constitutional discourses should be seen less as interpretations of a positive legal text, and more as attempts to articulate legal norms that could shift the balance between these spheres in a manner more reflective of generalizable interests, occurring amidst class stratification and cultural pluralism.

A constitution's status as positive law is also of importance for fundamentally Hegelian reasons relating to his narrower sense of political constitutionalism: its norms must be public and concrete, such that differently positioned citizens have at least an initial sense of what the shared hermeneutic starting points for constitutional discourse might be. But these concrete formulations must also be understood to embody principles in the interest of all citizens, so that constitutional discourse can be the site of effective democratic will formation concerning the basic norms that mediate between particular individuals and the general interests of free and equal citizens. This recalls Hegel's point that constitutions fulfill their mediational function by being sufficiently positive so as to be publicly recognizable, yet are not exhausted by this positivity – the content of the constitution is instead filled in over time through ongoing legislation. In order to avoid Hegel's foreshortened conception of public participation in this process and his consequent authoritarian tendencies, Habermas and, later, Benhabib highlight the importance of being able to conceive of basic constitutional norms as themselves being the products of public contestation and discourse. In order to articulate this idea, they draw on legal theorists like Robert Cover and Frank Michelman who characterize this process of legal rearticulation as “jurisgenesis”58: a community's production of legal meaning by way of continuous rearticulation, through reflection and contestation, of its constitutional project.

Habermas explicitly conceives of the democratic legal order in this way when, in the context of considering the question of how a constitution that confers legitimacy on ordinary legislation could itself be thought to be democratically legitimate, he writes:

I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic – not just in its content but also according to its source of legitimation – is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights.59

A constitutional order and its interpretive history represent a community's attempt to render the terms under which they can give themselves the law that shapes their society's basic structure and secure the law's integrity through assigning basic liberties. Although philosophical reflection can give us some grasp of the presuppositions of a practice of legitimate lawmaking, this framework of presuppositions (“the system of rights”) is “unsaturated.”60 In Hegelian fashion, it must, to be meaningful, be concretized through discourse, and not in an one-off way during a founding moment that fixes the terms of political association once and for all, but continuously, as new persons enter the community and as new circumstances, problems, and perspectives emerge.

The stakes involved in sustaining a broad and inclusive constitutional discourse turn out to be significant. Habermas has recently invoked the concept of dignity in this regard, linking it to the process through which society politically constitutes itself as a reciprocal order of free and equal citizens. As a status rather than an inherent property, “dignity that accrues to all persons equally preserves the connotation of a self-respect that depends on social recognition.”61 Rather than being understood as a quality possessed by some persons by virtue of their proximity to something like the divine, the modern universalistic conception of dignity is a social status dependent upon ongoing practices of mutual recognition. Such practices, Habermas posits, are most fully instantiated in the role of citizens as legislators of the order to which they are subject.

[Dignity] can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be created by the citizens themselves using the means of positive law and must be protected and developed under historically changing conditions. As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order.62

Although the implications of invoking dignity (as opposed to, say, autonomy) as the normative core of democratic constitutionalism are unclear,63 plainly Habermas remains committed to strongly intersubjective conceptions of democratic constitutionalism, to an intersubjectivity that continues to be legally and politically mediated (a dimension largely absent from Honneth's successor theory of intersubectivity).

What all of this suggests is a constitutional politics in which citizens are empowered to take part and meaningfully impact the terms of their cultural, economic, and political relations to each other. Such politics would need to be considerably less legalistic and precedent bound, less focused on the democracy-constraining aspects of constitutionalism emphasized in most liberal rule of law models. The sense of incompleteness and revisability that marks this critical theory approach to constitutionalism represents a point where critical theories of democracy may claim to be more radical and revisionary than most liberal and deliberative counterparts. It implies a sharp critique of more familiar models of bourgeois constitutionalism: whether they conceive of constitutional order as having a foundation in moral rights or natural law, or in an originary founding moment, such models a) tend to be backward-looking in their justifications, seeing the legal order as founded on some exogenously determined vision of moral order; b) tend to represent the law as an already-determined container within which legitimate ordinary politics takes place; and c) find the content of law to be ascertainable through the specialized reasoning of legal professionals. On the critical theory conception of constitutionalism, this presumption of completeness and technicity amounts to the reification of a constitutional project, where a dynamic social relation is misperceived as something fixed and objective.64 We can see why this would be immensely problematic for someone like Habermas, for whom constitutional norms are supposed to concern the generalizable interests of free and equal citizens. If it is overall the case for him that generalizable interests are at least partially constituted through discourse and are therefore not given in any pre-political, pre-discursive sense,65 this is especially so in a society like ours with an unreconciled class structure sustained by pseudo-compromises. Therefore, discursive rearticulation of basic norms is necessary for the very emergence of generalizable interests.

Despite offering an admirably systematic synthesis of radical democracy and the constitutional rule of law, Habermas’ theory is hobbled by the hesitant way he embraces these ideas. Given his strong commitment to proceduralism, the view that actual discourses among those affected must take place during the production of legitimate law if constitutionalism is to perform its mediational function, as well as his opposition to foundational or backward-looking models of political justification, we might expect Habermas to advocate the continuous circulation in civil society of constitutional discourses that consistently have appreciable impact on the way constitutional projects develop through ongoing legislation such that citizens can see the links between their political constitution (narrowly construed), the effects that democratic discourse has on the shape that it takes, and the role of the political constitution in regulating and transforming the broader institutional backbone of society in accordance with the common good. And indeed, at least in the abstract, this is what the “two track” conception of democracy in Between Facts and Norms, with its model of discourses circulating between the informal public sphere and more formal legislative institutions, seeks to capture.66 As such, Habermas’ version of constitutionalism seems a natural ally of theories of “popular constitutionalism”67 emerging from the American legal academy or of those who, like Jeremy Waldron,68 are skeptical of the merits of legalistic constitutionalism and press for democratic participation in the ongoing rearticulation of constitutional norms. Indeed, I would submit that the preceding pages demonstrate that the Left Hegelian social theoretic backdrop of Habermas’ theory supplies a deeper normative justification for more democratic conceptions of constitutionalism than have heretofore been supplied by their proponents (who are, to be fair, primarily legal theorists seeking to uncover the basic commitments of American constitutionalism, a project more interpretive than normative.69) Given that such theories have very revisionary views on the appropriate method and scope of judicial review and the role of the constitution in public life, it is surprising that Habermas evinces at most a mild critique of the constitutional practices and institutions of actually existing democracies, never really confronting the possibility that institutions of constitutional review administered by legal elites could be paternalistic or extinguish the public impetus for discourse he so prizes.70 In fact, institutional questions concerning where constitutional discourse ought to take place and how the power to make authoritative determinations of constitutional meaning should be shared among civil society, legislative, and judiciary are mostly abstracted away in Habermas’ post-Between Facts and Norms writings, while that work is mostly content with the professional of administration of constitutional issues as it exists in the United States and Germany.

This is evident in Habermas’ embrace of figures from liberal constitutional theory. He does not present an independent theory of judicial decision-making, but warmly receives Dworkin's well-known model of “law as integrity.” To a certain extent, this allegiance makes sense, given Dworkin's sensitivity to the hermeneutic dimension of interpretation and the fact that his concept of integrity mirrors discourse theory in holding that legal decisions must be justifiable to those affected in terms of publicly recognizable principles. Habermas does, however, follow Michelman in criticizing the “monological” form of reasoning that Dworkin's exemplary Judge Hercules employs,71 replacing it with the interpretive activities of a specialized legal public sphere, presumably more responsive to the public than Hercules. But this substitution does nothing to alleviate other aspects of Dworkin's theory that make a match between him and Habermas quite awkward: Dworkin's standard of integrity compels judges to regard the law as a complete, coherent whole that rests on a foundation of moral rights.72 Because Dworkin regards deontic rights in a strongly realistic manner and as an unwritten part of the law, there is a finished, retrospective, “already there” quality to his picture of it. Thinking of moral rights as existing independently of their social articulation is what moves Dworkin to conceive of them as, at least in principle, accessible to the right reason of individual moral subjects.73 Legal correctness can be achieved when lawyers and judges combine their specialized knowledge of precedent with their potentially objective insights into deontic rights. Fashioning the law in accordance with the demands of integrity thereby becomes the province of legal elites, rendering public discourse and the construction of generalizable interests in principle unnecessary. This helps explain Dworkin's highly un-participatory conception of democracy and his comfort with placing vast decision-making powers in the hands of the judiciary.7

There is more than a little here that should make Habermas uncomfortable. Firstly, on his account, legitimate law is the product of actual discourses, which include the full spate of discourse types (pragmatic, ethical-political, and moral). If the task of judicial decision-making is to reconstruct the types of discourse that went into the production of law, Dworkin's vision of filling in the gaps between legal rules exclusively with considerations of individual moral rights (other considerations are collected under the heading of “policy”75) makes little sense.76 While Habermas distances himself from Dworkin's moral realism, calling it “hard to defend,”77 he appears not to appreciate the extent to which Dworkin links his account of legal correctness to this very possibility of individual insight into the objective moral order. If Habermas wishes to maintain his long held position that constitutional projects involve the ongoing construction of generalizable interests through the democratic process – which in my view is really the heart of his program – he needs an account of legal correctness that puts some distance between this vision and Dworkin's picture of legal elites discovering the content of law through technical interpretation and rational intuition into a fixed moral order.

Also puzzling is the degree of influence exercised by civil society in the development of constitutional projects that Habermas appears willing to countenance. While we might expect professional adjudicative institutions to play a sort of yeoman's role vis-à-vis the public, Habermas actually puts forth something akin to Bruce Ackerman's picture of infrequent constitutional revolutions, where the basic meaning of a constitutional project is transformed during swelling periods of national ferment, only to resettle for decades at a time, during which it is administered by legal professionals.78 According to this position, American civil society has not generated new understandings of constitutional order that overcome group divisions since the New Deal, or possibly the Civil Rights era. Now, this may actually be the case, and perhaps Habermas’ apparent acquiescence to this view of once-every-few-generations national conversations is a nod to realism, i.e., a realistic conception of how much broad based, ongoing constitutional discourse it is reasonable to expect the public to conduct. But while a theory with a Left Hegelian pedigree should avoid “the impotence of the ought” and utopian speculation, and therefore ought not develop critical conceptions of legal practice utterly divorced from present ones, such concessions to realism are unnecessary. After all, critical theory conceptions of constitutionalism will aim to be appreciably different from the more authoritarian ones currently in circulation, which more often than not fail to stimulate and sustain public discourse on the basic constitution of society. Instead, their point would be to suggest how a more dynamic, expansive, and mediational conception of constitutionalism could unlock greater democratic freedom and rationally integrated social identities.

Given these problems in Habermas’ theory, the innovations that Benhabib makes to his conception of constitutionalism are most welcome. While operating within a discourse theoretic framework, her recent work more unabashedly recalls Hegel's broader conception of the constitution as the basic norms through which a community understands and relates to itself (of which a founding legal document is but a part): a constitution is a way of life through which individuals seek to connect themselves to each other, and in which the very identity and membership of a community is constantly at stake.79 Benhabib's concept of “democratic iterations,” which draws on meaning-as-use theories, emphasizes how meaning is inevitably transformed through repetition:

 In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, very repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there is really no ‘originary’ source of meaning, or an ‘original’ to which all subsequent forms must conform … . Every iteration involves making sense of an authoritative original in a new and different context … . Iteration is the reappropriation of the ‘origin’; it is at the same time its dissolution as the original and its preservation through its continuous deployment.80

Recalling the reciprocal relationship that Hegel hints at between the narrow “political” constitution and the broader constitution of society's backbone of interrelated institutions, Benhabib here seems to envision a circular process whereby groups take up the conceptions of social relations instantiated in the legal order and transform them in their more everyday attempts to live with others in accordance with these norms. Like Cover and Michelman, she stresses that the transformation of legal meaning takes place primarily in informal settings, where different groups try (and sometimes fail) to live together and to understand themselves in their relation to others according to the terms they inherit from the constitutional tradition they find themselves subject to.81 Her main example of such democratic iteration is the challenge Muslim girls in France raised against the head scarf prohibition in public schools (“L’Affaire du Foulard”), which, while undoubtedly antagonistic, she contends has the potential to felicitously transform the meaning of secularity and inclusion in the French state and to create new forms of togetherness and understanding. But although Benhabib illustrates the concept of democratic iterations through an exemplary episode, this iterative process is a constant and pervasive one, which is punctuated by events and has the tendency to have a destabilizing effect on authority.82

It is telling, however, that Benhabib's examples of democratic iterations are exclusively centered on what Habermas would call ethical-political discourses.83 While otherwise not guilty of the charge,84 Benhabib, in her constitutional theory, runs afoul of Nancy Fraser's critical diagnosis of the trend in current political philosophy to subordinate class and distributional conflicts to struggles for cultural inclusion and recognition.85 Perhaps this is due to the fact that “hot” constitutional issues are so often ones with cultural dimensions in the foreground, rarely touching visibly on distributional conflicts between groups. This nonetheless is problematic since much court business clearly affects – often subtly and invisibly – the outcomes of these conflicts, frequently with bad results.86 For another reason why centering constitutional discourse on inclusion and cultural issues is problematic, it is useful to remind ourselves of Habermas’ critique of civic republicanism, according to which the main deficit in republican models of democracy is its “ethical overburdening” of the political process.87 To some extent, republicanism's emphasis on ethical discourse is understandable: given the level of cooperativeness and public spirit that republicans view as the font of legitimate law, political discourses need to engage the motivations and identities of citizens. Arguably, issues of ethical self-understanding do this better than more abstract or arid forms of politics. But it is not clear that this is intrinsically so, and it can have distorting effects on politics. In the American media, for example, this amplification of the cultural facets of issues is very common; conflicts over everything from guns to taxes are often reduced to conflicts over who is a good, real American and who is not. It is hard to say that this proves edifying; substantive issues of rights and social justice are elided, politics becomes more fraudulent and conflictual. None of this is to deny a legitimate place for ethical-political discourse. However, we do see something of a two-steps-forward-one-step-back movement in Benhabib's advancement of Habermas’ discourse theory of law: although her concept of democratic iterations takes center stage, she develops the notion solely along an ethical-political track. Going forward, critical theorists developing conceptions of constitutional discourse should work to see it as a way of integrating questions of distributional justice with questions of moral rights and collective identities without subordinating or conflating them.

4. Conclusion

Some readers may find the general notion of reinvigorating a politics of constitutionalism quixotic. Certainly, it has not been not my intention to overstate the importance or positive contributions of constitutions in actually existing democracies, where they can serve to entrench political systems experiencing paralysis in the face of long term fiscal and environmental problems, and where public appeals to them more often than not invoke visions of society that are more nostalgic, ethno-nationalistic, authoritarian, and reactionary than what Habermas and Benhabib presumably have in mind. Instead, I take the basic Hegelian point I started this paper with to be this: modern persons ought to be able to comprehend their social order as the work of reason; the spine of institutions through which their relations to differently abled and positioned others are mediated ought to be responsive to their interests as fully-rounded persons; and comprehending this system of mediation ought to be able to reconcile them to the partiality of their roles within the universal state. Though modern life is differentiated, it can be understood, when seen through the lens of the constitutional order, as a result of citizens’ jointly exercised rationality as long as certain conditions are met. These conditions are, however, more stringent than Hegel realized. In light of this point, that so many issues deeply impacting citizens’ social and economic relations to one another are rendered marginal – and even invisible – in terms of the airing they receive in the public sphere, that they are treated as mostly settled or non-questions in the legal system consitutues a strikingly deficient aspect of modern politics. Examples include the intrusion of market logic and technology into everyday life, the commodification of public goods, the legal standing of consumers and residents, the role of shareholders and public interests in corporate governance, and the status of collective bargaining arrangements. Surely a contributing factor here is the absence of a shared sense of possibility that the basic terms of our social union could be responsive to the force that discursive reason can exert. Such a sense is what I am contending jurisgenerative theories ought to aim at recapturing while critiquing more legalistic and authoritarian models of law.

This is not to deny the possibility that democratic iterations themselves may be regressive or authoritarian, populist in the pejorative sense. But the denial of their legitimacy or possibility moves us in the direction of authoritarian conceptions of law and political power and the isolation of individuals and social groups wrought by a political order of machine-like administration that Horkheimer and Adorno describe as a main feature of modern political domination. Recapturing some sense of how human activity makes reason actual in the ongoing organization of society

need not amount to the claim that reason culminates in some centralized form, as in the Hegelian state, or in some end state, as in Marx. It can, however, move us to envision the possibility of an ongoing practice of communication, lawmaking, and revision that seeks to reconcile and overcome positivity and division, without the triumphalist pretension of ever being able to fully do so.

# 2AC

## t – authority

Their restrict evidence begs the question of what we have to restrict--Authority is a question of jurisdiction

Random House Dictionary, 2013, http://dictionary.reference.com/browse/authority

au·thor·i·ty [uh-thawr-i-tee, uh-thor-] Show IPA noun, plural au·thor·i·ties. 1. the power to determine, adjudicate, or otherwise settle issues or disputes; jurisdiction; the right to control, command, or determine. 2. a power or right delegated or given; authorization: Who has the authority to grant permission?

Restricting jurisdiction of self-defense authority restricts war powers authority

Manget, law professor at Florida State and formerly in the Office of the General Counsel at the CIA, No Date

(Fred, “Presidential War Powers,” <http://media.nara.gov/dc-metro/rg-263/6922330/Box-10-114-7/263-a1-27-box-10-114-7.pdf>)

**The President has constitutional authority to order defensive military action in response to aggression without congressional approval**. This theory of self-defense has justified many military actions, from the Barbary Coast to the Mexican-American War to the Tonkin Gul£. 29 The Supreme Court has agreed. In The Prize Cases, it found that President Lincoln had the right to blockade southern states without a congressional declaration of war: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. " 30 In a case arising out of the Vietnam war, the defendant claimed that draft law was unconstitutionally applied to him because Congress had not declared war. The court rejected that claim, stating that on the basis of the Commander in Chief power, "Unquestionably the President can start the gun at home or abroad to meet force with force. " 3 1 **When the President acts in defense of the nation, he acts under war powers authority**.

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Prioritization claims are counter-productive and illogical – you should evaluate the veracity of the 1ac’s claims about the world while embracing a plurality of (methods / ontologies / theories)

Andrew Bennett 13, government prof at Georgetown, The mother of all isms: Causal mechanisms and structured pluralism in International Relations theory, European Journal of International Relations 2013 19:459

The political science subfield of International Relations (IR) continues to undergo debates on whether and in what sense it is a 'science,1 how it should organize its inquiry into international politics, and how it should build and justify its theories. On one level, an 'inter-paradigm' debate, while less prominent than during the 1990s, has continued to limp along among researchers who identify their work as fitting within the research agenda of a grand school of thought, or 'ism,' and the scholar most closely associated with it, including neorealism (Waltz, 1979), neoliberalism (Keohane, 1984), constructivism (Wendt, 1992), or occasionally Marxism (Wallerstein, 1974) or feminism (Tickner, 1992). Scholars participating in this debate have often acted as if their preferred 4 ism' and its competitors were either "paradigms" (following Kuhn, 1962) or "research programs' (as defined by Lakatos, 19701. and some have explicitly framed their approach as paradigmatic or programmatic (Hopf, 1998).

A second level of the debate involves post-positivist critiques of IR as a "scientific' enterprise (Lapid, 1989). While the vague label "post-positivist, encompasses a diverse group of scholars, frequent post-positivist themes include arguments that observation is theory-laden (Kuhn, 1962), that knowledge claims are always part of mechanisms of power and that meaning is always social (Foucault, 1978), and that individual agents and social structures are mutually constitutive (Wendt, 1992). Taken together, these arguments indicate that the social sciences face even more daunting challenges than the physical sciences.

A third axis of contestation has been methodological, involving claims regarding the strengths and limits of statistical, formal, experimental, qualitative case study, narrative, and other methods. In the last two decades the argument that there is 'one logic of inference1 and that this logic is 'explicated and formalized clearly in discussions of quantitative research methods' (King et al., 1994: 3) has generated a useful debate that has clarified the similarities, differences, uses, and limits of alternative methods ( Brady and Collier, 2010; George and Bennett, 2005; Goertz and Mahoney, 2006).

These debates have each in their own way proved fruitful, increasing the theoretical, epistemological, and methodological diversity of the field (Jordan el al., 2009). The IR subfield has also achieved considerable progress in the last few decades in its theoretical and empirical understanding of important policy-relevant issues, including the inter-democratic peace, terrorism, peacekeeping, international trade, human rights, international law, international organizations, global environmental politics, economic sanctions, nuclear proliteration, military intervention, civil and ethnic conflicts, and many other topics.

Yet there is a widespread sense that this progress has arisen in spite of interparadigmatic debates rather than because of them. Several prominent scholars, including Rudra Sil and Peter Katzenstein, have argued that although research cast within the framework of paradigmatic debates has contributed useful concepts and findings, framing the IR field around inter-paradigmatic debates is ultimately distracting and even counterproductive (Sil and Katzenstein, 2010; see also David Lake, 2011, and in this special issue, and Patrick Thaddeus Jackson and Daniel Nexon, 2009, and in this special issue). These scholars agree that IR researchers have misapplied Kuhn's notion of paradigms in ways that imply that grand theories of tightly connected ideas — the isms — are the central focus of IR theorizing, and that such isms should compete until one wins general consensus. Sil and Katzenstein argue that the remedy for this is to draw on pragmatist philosophers and build upon an 'eclectic' mix of theories and methods to better understand the world (Sil and Katzenstein, 2010). In this view, no single grand theory can capture the complexities of political life, and the real explanatory weight is carried by more fine-grained theories about 'causal mechanisms."

In this article I argue that those urging a pragmatic turn in IR are correct in their diagnosis of the drawbacks of paradigms and their prescription tor using theories about causal mechanisms as the basis for explanatory progress in IR. Yet scholars are understandably reluctant to jettison the "isms' and the inter-paradigmatic debate not only because they fear losing the theoretical and empirical contributions made in the name of the isms, but because framing the field around the isms has proven a useful shorthand for classroom teaching and field-wide discourse. The 'eclectic' label that Sil and Katzenstein propose can easily be misinterpreted in this regard, as the Merriam-Webster online dictionary defines 'eclectic\* as 'selecting what appears to be best in various doctrines, methods, or styles,' as Sil and Katzenstein clearly intend, but it also includes as synonyms "indiscriminate" and 'ragtag.'1 By using the term 'eclecticism' and eschewing any analytic structure for situating and translating among different examples of IR research, Sil and Katzenstein miss an opportunity to enable a discourse that is structured as well as pluralistic, and that reaches beyond IR to the rest of the social sciences.

I maintain that in order to sustain the genuine contributions made under the guise of the inter-paradigmatic debate and at the same time get beyond it to focus on causal mechanisms rather than grand theoretical isms, four additional moves are necessary. First, given that mechanism-based approaches are generally embedded within a scientific realist philosophy of science, it is essential to clarify the philosophical and definitional issues associated with scientific realism, as well as the benefits — and costs — of making hypothesized causal mechanisms the locus of explanatory theories. As Christian Reus-Smit argues in this special issue, IR theory cannot sidestep metatheoretical debates. Second, it is important to take post-positivist critiques seriously and to articulate standards for theoretical progress, other than paradigmatic revolutions, that are defensible even if they are fallible. Third, achieving a shift toward mechanismic explanations requires outlining the contributions that diverse methods can make to the study of causal mechanisms. Finally, it is vital to demonstrate that a focus on mechanisms can serve two key functional roles that paradigms played for the IR subfield: first, providing a framework for cumulative theoretical progress; and, second, constituting a useful, vivid, and structured vocabulary for communicating findings to fellow scholars, students, political actors, and the public (see also Stefano Guzzini's article in this special issue). I argue that the term 'structured pluralism' best captures this last move, as it conveys the sense that IR scholars can borrow the best ideas from different theoretical traditions and social science disciplines in ways that allow both intelligible discourse and cumulative progress.

Alter briefly outlining the problems associated with organizing the IR field around the "isms/ this article addresses each of these four tasks in turn. First, it takes on the challenges of defining "causal mechanisms' and using them as the basis of theoretical explanations. Second, it acknowledges the relevance and importance of post-positivist critiques of causal explanation, yet it argues that scientific realism and some approaches to interpretivism are compatible, and that there are standards upon which they can agree forjudging explanatory progress. Third, it very briefly clarifies the complementary roles that alternative methods can play in elucidating theories about causal mechanisms. Finally, the article presents a taxonomy of theories about social mechanisms to provide a pluralistic but structured framework for cumulative theorizing about politics. This taxonomy provides a platform for developing typological theories — or what others in this special issue, following Robert Merton, have called middle-range theories — on the ways in which combinations of mechanisms interact to produce outcomes. Here, I join Lake in this special issue in urging that IR theorizing be centered around middle-range theories, and I take issue with Jackson and Nexon's suggestion herein that such theorizing privileges correlational evidence, and their assertion that statistical evidence is inherently associated with Humean notions of causation. I argue that my taxonomy of mechanisms offers a conceptual bridge to the paradigmatic isms in IR. adopting and organizing their theoretical insights while leaving behind their paradigmatic pretensions. The article concludes that, among its other virtues, this taxonomy can help reinvigorate dialogues between IR theory and the fields of comparative and American politics, economics, sociology, psychology, and history, stimulating cross-disciplinary discourses that have been inhibited by the scholasticism of IR's ingrown 'isms.'

**Wrong**

**Etzioni 13** (Amitai Etzioni is a professor of international relations at George Washington University and author of Hot Spots: American Foreign Policy in a Post-Human-Rigid World., March-April 2013, "The Great Drone Debate", aladinrc.wrlc.org/bitstream/handle/1961/14729/Etzioni\_DroneDebate.pdf?sequence=1,)

Mary Dudziak of the University of Southern California’s Gould School of Law opines that “[d]rones are a technological step that further isolates the American people from military action, undermining political checks on . . . endless war.” Similarly, Noel Sharkey, in The Guardian, worries that drones represent “the ﬁnal step in the industrial revolution of war—a clean factory of slaughter with no physical blood on our hands and none of our own side killed.” This kind of cocktail-party sociology **does not stand up to even the most minimal critical examination**. Would the people of the United States, Afghanistan, and Pakistan be better off if terrorists were killed in “hot” blood—say, knifed by Special Forces, blood and brain matter splashing in their faces? Would they be better off if our troops, in order to reach the terrorists, had to go through improvised explosive devices blowing up their legs and arms and gauntlets of machinegun ﬁre and rocket-propelled grenades—traumatic experiences that turn some of them into psychopath-like killers? Perhaps if all or most ﬁghting were done in a cold-blooded, push-button way, it might well have the effects suggested above. However, as long as what we are talking about are a few hundred drone drivers, what they do or do not feel has no discernible effects on the nation or the leaders who declare war. Indeed, there is **no evidence** that the introduction of drones (and before that, high-level bombing and cruise missiles that were criticized on the same grounds) made going to war more likely or its extension more acceptable. Anybody who followed the American disengagement in Vietnam after the introduction of high-level bombing, or the U.S. withdrawal from Afghanistan (and Iraq)—despite the considerable increases in drone strikes—knows better. In effect, the **opposite argument may well hold**: if the United States could not draw on drones in Yemen and the other new theaters of the counterterrorism campaign, the nation might well have been forced to rely more on conventional troops and prolong our involvement in those areas, a choice which would **greatly increase our casualties and zones of warfare**. This line of criticism also neglects a potential upside of drones. As philosopher Bradley Strawser notes, this ability to deploy force abroad with minimal United States casualties may allow America to intervene in emerging humanitarian crises across the world with a greater degree of ﬂexibility and effectiveness.61 Rather than reliving another “Blackhawk down” scenario, the United States can follow the model of the Libya intervention, where drones were used by NATO forces to eliminate enemy armor and air defenses, paving the way for the highly successful air campaign which followed, as reported by The Guardian’s Nick Hopkins. As I see it, however, the main point of moral judgment comes earlier in the chain of action, well before we come to the question of which means are to be used to kill the enemy. The main turning point concerns the question of whether we should go to war at all. This is the crucial decision because once we engage in war, we must assume that there are going to be a large number of casualties on all sides—casualties that may well include innocent civilians. Often, discussions of targeted killings strike me as being written by people who yearn for a nice clean war, one in which only bad people will be killed using surgical strikes that inﬂict no collateral damage. Very few armed confrontations unfold in this way. Hence, when we deliberate whether or not to ﬁght, we should assume that once we step on this train, it is very likely to carry us to places we would rather not go. Drones are merely a new stepping stone on this woeful journey. Thus, we should carefully deliberate before we join or initiate any new armed ﬁghts, but draw on drones extensively, if ﬁght we must. They are more easily scrutinized and reviewed, and are more morally justiﬁed, than any other means of warfare available.

**Patriarchy’s not the root cause**

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(Duncan, “Beware of false prophets: biology, human nature and the future of International Relations theory,” *International Affairs* 82, 3 p. 493–510)

Writing in *Foreign Aff airs* in 1998, Francis Fukuyama, tireless promulgator of the ‘end of history’ and now a member of the President’s Council on Bioethics, employed EP reasoning to argue for the central role in world politics of ‘masculine values’, which are ‘rooted in biology’. His argument starts with the claim that male and female chimps display asymmetric behaviour, with the males far more prone to violence and domination. ‘Female chimps have relationships; male chimps practice realpolitik.’ Moreover, the ‘line from chimp to modern man is continuous’ and this has signifi cant consequences for international politics.46 He argues that the world can be divided into two spheres, an increasingly peaceful and cooperative ‘feminized’ zone, centred on the advanced democracies, and the brutal world outside this insulated space, where the stark realities of power politics remain largely masculine. This bifurcation heralds dangers, as ‘masculine policies’ are essential in dealing with a masculine world: ‘In anything but a totally feminized world, feminized policies could be a liability.’ Fukuyama concludes the essay with the assertion that the form of politics best suited to human nature is—surprise, surprise—free-market capitalist democracy, and that other political forms, especially those promoted by feminists and socialists, do not correspond with our biological inheritance.47 Once again **the authority of science is invoked in order to naturalize a** particular **political objective.** This is a pattern that has been repeated across the history of modern biology and remains potent to this day.48 It is worth noting in brief that Fukuyama’s argument is badly flawed even in its own terms. As anthropologist R. Brian Ferguson states, Fukuyama’s claims about the animal world display ‘a breathtaking leap over a mountain of contrary evidence’.49 Furthermore, Joshua Goldstein concludes in **the most detailed analysis of the data on war and gender** that although biological differences do play a **minor role,** focusing so heavily on them is **profoundly misleading**.50 The simplistic claims, crude stereotyping and casual use of evidence that characterize Fukuyama’s essay unfortunately recur throughout the growing literature on the biology of international politics.

**Their reliance on gender binaries to explain violence is essentialist and wrong**

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(Darryl, “Feminist revisions of international relations,” International Relations and the Challenge of Postmodernism, p. 162-3)

Critical research agendas of this type, however, are not found easily in International Relations. Critics of feminist perspectives run the risk of denouncement as either a misogynist malcontent or an androcentric keeper of the gate. At work in much of this discourse is an unstated political correctness, where the historical marginalization of women bestows intellectual autonomy, excluding those outside the identity group from legitimate participation in its discourse. Only feminist women can do real, legitimate, feminist theory since, in the mantra of identity politics, discourse must emanate from a positional (personal) ontology. Those sensitive or sympathetic to the identity politics of particular groups are, of course, welcome to lend support and encouragement, but only on terms delineated by the groups themselves. In this way, they enjoy an uncontested sovereign hegemony oyer their own self-identification, insuring the group discourse is self constituted and that its parameters, operative methodology, ,uu\ standards of argument, appraisal, and evidentiary provisions are self defined. Thus, for example, when Sylvester calls lor a "home.steading" does so "by [a] repetitive feminist insistence that we be included on our terms" (my emphasis). Rather than an invitation to engage in dialogue, this is an ultimatum that a sovereign intellectual space be provided and insulated from critics who question the merits of identity-based political discourse. Instead, Sylvester calls upon International Relations to "share space, respect, and trust in a re-formed endeavor," but one otherwise proscribed as committed to demonstrating not only "that the secure homes constructed by IR's many debaters are chimerical," but, as a consequence, to ending International Relations and remaking it along lines grounded in feminist postmodernism.93 Such stipulative provisions might be likened to a form of negotiated sovereign territoriality where, as part of the settlement for the historically aggrieved, border incursions are to be allowed but may not be met with resistance or reciprocity. Demands for entry to the discipline are thus predicated on conditions that insure two sets of rules, cocooning postmodern feminist spaces from systematic analyses while "respecting" this discourse as it hastens about the project of deconstructing International Relations as a "male space." Sylvester's impassioned plea for tolerance and "emphatic cooperation" is thus confined to like-minded individuals, those who do not challenge feminist epistemologies but accept them as a necessary means of reinventing the discipline as a discourse between postmodern identities—the most important of which is gender.94 Intolerance or misogyny thus become the ironic epithets attached to those who question the wisdom of this reinvention or the merits of the return of identity in international theory.'"' Most strategic of all, however, demands for entry to the discipline and calls for intellectual spaces betray a self-imposed, politically motivated marginality. After all, where are such calls issued from other than the discipline and the intellectual—and well established—spaces of feminist International Relations? Much like the strategies employed by male dissidents, then, feminist postmodernists too deflect as illegitimate any criticism that derives from skeptics whose vantage points are labeled privileged. And privilege is variously interpreted historically, especially along lines of race, color, and sex where the denotations white and male, to name but two, serve as generational mediums to assess the injustices of past histories. White males, for example, become generic signifiers for historical oppression, indicating an ontologicallv privileged group by which the historical experiences of the "other" can then be reclaimed in the context of their related oppression, exploitation, AND exclusion. Legitimacy, in this context, can then be claimed in terms of one's group identity and the extent to which the history of that particular group has been “silenced.” In this same way, self-identification or “self-situation” establishes one’s credentials, allowing admittance to the group and legitimating the “authoritative” vantage point from which one speaks and writes. Thus, for example, Jan Jindy Pettman includes among the introductory pages to her most recent book, *Worlding Women*, a section titled “A (personal) politics of location,” in which her identity as a woman, a feminist, and an academic, makes apparent her particular (marginal) identities and group loyalties.96 Similarly, Christine Sylvester, in the introduction to her book, insists, “It is important to provide a context for one’s work in the often-denied politics of the personal.” Accordingly, self-declaration revelas to the reader that she is a feminist, went to a Catholic girls school where she was schooled to “develop your brains and confess something called “sins” to always male forever priests,” and that these provide some pieces to her dynamic objectivity.97 Like territorial markers, self-identification permits entry to intellectual spaces whose sovereign authority is “policed” as much by marginal subjectivies as hey allege of the oppressors who “police” the discourse of realism, or who are said to walk the corridors of the discipline insuring the replication of patriarchy, hierarchical agendas, and “malestream” theory. If Sylvester’s version of feminist postmodernism is projected as tolerant, perspectivist, and encompassing of a multiplicity of approaches, in reality it is as selective, exclusionary, and dismissive of alternative perspectives as mainstream approaches are accused of being. Skillful theoretical moves of this nature underscore the adroitness of postmodern feminist theory at emasculating many of its logical inconsistencies. In arguing for a feminist postmodernism, for example, Sylvester employs a double theoretical move that, on the one hand, invokes a kind of epistemological deconstructive anarchy cum relativism in an attempt to decenter or make insecure fixed research gazes, identities, and concepts (men, women, security, and nation-state), while on the other hand turning to the lived experiences of women as if ontologically given and assuming their experiences to be authentic, real, substantive, and authoritative interpretations of the realities of international relations. Women at the peace camps of Greenham Common or in the cooperatives of Harare, represent, for Sylvester, the real coal face of international politics, their experiences and strategies the real politics of “relations international.” But why should we take the experiences of these women to be ontologically superior or more insightful than the experiences of other women or other men? As Sylvester admits elsewhere, “Experience … is at once always already an interpretation and in need of interpretation.” Why, then are experience-based modes of knowledge more insightful than knowledges derived through other modes of inquiry?98 Such espistemologies are surely crudely positivistic in their singular reliance on osmotic perception of the facts as they impact upon the personal. If, as Sylvester writes, “sceptical inlining draws on substantive everydayness as a time and site of knowledge, much as does everyday feminist theorizing,” and if, as she further notes, “it understands experience…as mobile, indeterminate, hyphenated, [and] homeless,” why should this knowledge be valued as anything other than fleeting subjective perceptions of multiple environmental stimuli whose meaning is beyond explanation other than as a personal narrative?99 Is this what Sylvester means when she calls for a re-visioning and a repainting of the “canvases of IR,” that we dissipate knowledge into an infinitesimal number of disparate sites, all equally valid, and let loose with a mélange of visceral perceptions; stories of how each of us perceive we experience international politics? If this is the case, then Sylvester’s version of feminist postmodernity does not advance our understanding of international politics, leaving untheorized and unexplained the causes of international relations. Personal narratives do not constitute theoretical discourse, nor indeed an explanation of the systemic factors that procure international events, process, or the actions of certain actors. We might also extend a contextualist lens to analyze Sylvester’s formulations, much as she insists her epistemogical approach does. Sylvester, for example, is adamant that we can not really know who “women” are, since to do so would be to invoke an essentialist concept, concealing the diversity inherent in this category. “Women” don’t really exist in Sylvester’s estimation since there are black women, white women, Hispanic, disabled, lesbin, poor, rich, middle class, and illiterate women, to name but a few. The point, for Sylvester, is that to speak of “women” is to do violence to the diversity encapsulated in this category and, in its own way, to silence those women who remain unnamed. Well and good. Yet this same analytical respect for diversity seems lost with men. Politics and international relations become the “places of men.” But which men? All men? Or just white men, or rich, educated, elite, upper class, hetero-sexual men? To speak of political places as the places of men ignores the fact that most men, in fact the overwhelming majority of men, are not in these political places at all, are not decision makers, elite, affluent, or powerful. Much as with Sylvester’s categories, there are poor, lower class, illiterate, gay, black, and white men, many of whom suffer the vestiges of hunger, poverty, despair, and disenfranchisement just as much as women. So why invoke the category “men” in such essentialist and ubiquitous ways while cognizant only of the diversity of in the category “women.” These are double standards, not erudite theoretical formulations, betraying, dare one say, sexism toward men by invoking male gender generalizations and crude caricatures. Problems of this nature, however, are really manifestations of a deeper, underlying ailment endemic to discourses derived from identity politics. At base, the most elemental question for identity discourse, as Zalewski and Enloe note, is “Who am I?”100 The personal becomes the political, evolving a discourse where self-identification, but also one’s identification by others, presupposes multiple identities that are fleeting, overlapping, and changing at any particular moment in time or place. “We have multiple identities,” argues V. Spike Peterson, “e.g., Canadian, homemaker, Jewish, Hispanic, socialist.”101 And these identities are variously depicted as transient, polymorphic, interactive, discursive, and never fixed. As Richard Brown notes, “Identity is given neither institutionally nor biologically. It evolves as one orders continuities on one’s conception of oneself.”102 Yet, if we accept this, the analytical utility of identity politics seems problematic at best. Which identity, for example, do we choose from the many that any one subject might display affinity for? Are we to assume that all identities are of equal importance or that some are more important than others? How do we know which of these identities might be transient and less consequential to one’s sense of self and, in turn, politically significant to understanding international politics? Why, for example, should we place gender identity ontologically prior to class, sexual orientation, ethnic origin, ideological perspective, or national identity?103 As Zalewski and Enloe ask, “Why do we consider states to be a major referent? Why not men? Or women?”104 But by the same token, why not dogs, shipping magnates, movie stars, or trade regimes? Why is gender more constitutive of global politics than, say, class, or an identity as a cancer survivor, laborer, or social worker? Most of all, why is gender essentialized in feminist discourse, reified into the most preeminent of all identities as the primary lens through which international relations must be viewed? Perhaps, for example, people understand difference in the context of identities outside of gender. As Jane Martin notes, “How do we know that difference…does not turn on being fat or religious or in an abusive relationship?”105 The point, perhaps flippantly made, is that identity is such a nebulous concept, its meaning so obtuse and so inherently subjective, that it is near **meaningless** as a conduit for understanding global politics if only because it can mean anything to anybody.

**The alt’s militant pacificism lets injustice go unstopped – we can acknowledge that all violence is tragic while still recognizing that it’s necessary in some instances**

Debra **Bergoffen**, Professor of Philosophy and a member of the Women's Studies and Cultural Studies programs at George Mason University, Spring 200**8**, The Just War Tradition: Translating the Ethics of Human Dignity into Political Practices, Hypatia Volume 23, Number 2

The just war tradition is riddled with ambiguities. It speaks of a single human community bounded by universal moral laws, as it recognizes and, under certain conditions, legitimates the division of that community into enemy factions in violation of those laws. It recognizes the inevitability of war while speaking of the demands of peace. It sets up reason as the arbiter of wartime strategies, while noting that armed conflicts, once begun, may not be amenable to the rule of reason. Given these ambiguities, a result of the ways in which just war theory attempts to negotiate the competing demands of justice and the politics of power, it is no accident that the just war tradition has been ridiculed by power "realists" for its utopian naïveté and dismissed by pacifists for sacrificing the principles of peace to the demands of war.

Twentiethand twenty-first-century war waging has bolstered "realist" and pacifist critiques of the just war doctrine. The trench warfare strategy of World War I, the Allied bombing strategies of World War II, the genocidal evil of Nazi Germany, and the nuclear capacities of the United States and the USSR mocked the just war premise that war could be morally and rationally [End Page 72] constrained. Ironically, the cold-war policy of mutual assured destruction, with its acronym MAD, made the case for the pacifist argument that a just war in a world of nuclear weapons was impossible. MAD did not, however, create the conditions for peace envisioned by just war advocates.

The twenty-first century, young as it is, has managed to establish itself as an heir to the twentieth century's mockery of the idea of a just war. Erasing the "never again" post–World War II just war promise with multiple spectacles of genocides, betraying the promise of a post–cold-war world of peaceful coexistence with the reality of a world dominated by ideological wars of terror, a U.S.–declared war on terrorism, and the proliferation of nuclear and biological weapons, **this century has made it increasingly difficult for the just war tradition to establish itself as a counterweight to the politics of violence**.

Given the destructive powers of modern weaponry and the absolutist ideologies of contemporary conflicts, and given the fact that the just war tradition is historically tied to the idea of the sovereign state as the sole legitimate source of war and to Western notions of natural law and rights, it might seem time to declare the very idea of a just war a relic of more manageable and naïve times, and a symptom of Eurocentric ideology. It might seem time to face the fact that politically motivated violence is more chaotic than envisioned by just war advocates, and less amenable to the rule of reason required by just war restrictions.

Before writing the just war obituary, however, we need to note the ways in which institutional responses to the evils of unbridled violence—war crimes tribunals, a body of international laws and treaties delineating the particulars of war crimes and crimes against humanity, the development of human rights laws—speak the language of just war theory. For these institutions and laws insist that political and military officials are bound by just war morality and hold military and political actors punishably responsible for failing to adhere to the moral obligations of the just war code. These developments suggest that despite the antipathy between current technologies and ideologies of war and the principles of just war doctrines, **the just war insistence that the political and moral worlds are tethered remains relevant**.

To see whether just war theory can meet the challenges of its origins and of our times we need to see how it fares against the criticisms of power-politics advocates, such as Carl von Clausewitz (1780–1831), and how it stands up to pacifist and nonviolent rejections of all forms of political violence.

In his classic text, On War, Clausewitz argued that even when/if the original objectives of war are limited, war, once begun, cannot escape its absolutist logic.1 According to Clausewitz, as an act of force intended to compel an enemy to surrender, war is subject to the rules of unintended consequences and escalation that no rule of justice can counter (Shaw 2003, 19). In advancing his thesis of reality politics, Clausewitz analyzed the very idea of the just war, the thesis [End Page 73] that war could and should be limited both in its objectives and in its conduct. He made it clear that it is the logic of war, not the technologies of warfare, that constitute its inherent peril. He anticipated Rwanda. Machetes were all the Hutu needed to perpetuate genocide.

Clausewitz's argument against the just war premise of rule-governed war has been joined by two other arguments that point to serious loopholes in just war theory. The first of these arguments demonstrates the ways in which the logic of just war itself can become a justification for unlimited war waging. The point of just war doctrine is to distinguish morally justifiable from morally unjustifiable political violence. Thus, just war doctrine can be invoked to establish the righteousness of certain types of war (for example, holy wars, wars to make the world safe for democracy, wars to liberate the proletariat from the exploitations of capitalism, or wars to create democratic states). Once appealed to in this way, however, just war principles, far from limiting or preventing war, become a war-enhancing tool, a (self-) righteous justification of unlimited war (Coates 1997, 2–3). The second objection concerns the authority to declare war. Just war thinking assumes that war is the province of legitimate states. It presumes that legitimate states have some interest in limiting wars. The logic of this link among legitimate states, war making, and limited war is less than compelling. It is, however, thoroughly undermined in our postmodern world of international conglomerates, paramilitary armies, and "rogue" states, where legitimate states no longer monopolize the power of war making (Coates 1997, 6; Shaw 2003, 63).

Arguments against the just war premise that war can be contained both in its objectives and its conduct do not necessarily make the "realist" case for unrestrained power politics, however. Instead of linking the failed logic of just war thinking to the inevitable amorality of politics, pacifists, among whom we may include such eighteenth-century advocates of perpetual peace as Immanuel Kant, and those who would limit the fight against injustice to nonviolent methods argue that the failures of just war theory alert us to our moral obligation to reject the very idea of war. They see the fact of the inevitability of unlimited war as requiring us to reject of all forms of politically sanctioned violence. Sara Ruddick, for example, recommends a suspicion of the "rhetoric and reason of deliberate collective violence" and advocates developing nonviolent methods of resistance to violence (Ruddick 1990, 232).

Power-politics advocates, nonviolence proponents, and perpetual-peace defenders agree that once political violence begins it cannot be controlled. Their differences concern how to deal with this absolute trajectory of war. Power-politics realists argue that it renders all talk of war and justice superfluous. Pacificists argue that it renders all recourse to war unjustifiable. Just war theorists reject the idea that political violence is always either self-interested or unjust. **They find that rules of war have and can be observed, and that our desires and** [End Page 74] **behaviors are better accounted for by the ambiguous logic of justice and war than the clear-cut justice or war logic of power-politics and pacifist advocates**.

Between the ambiguous agenda of the just war tradition and its realist and pacifist critics, we are confronted with the violence of war, the realities of injustice, the moral demand of peace with justice, and the question of how to counter the violence of injustice without unleashing the absolute logic of war. **Different as they are in their prescriptions for international order, political realists and nonviolent pacifists find the demands of power politics radically incompatible with the demands of morality**. Whether it is the realists accusing nonviolence proponents of a naïve utopianism, or the pacifists finding the realists lacking in moral courage and imagination, both agree that the just war tradition is fundamentally misguided in its attempt to tether a politics that accepts the legitimacy of violence to the moral demands of justice. It seems to me, however, that it is precisely this ambiguity of the just war tradition that constitutes its value for the feminist pursuit of global justice; for in invoking the utopian imagination and yoking the realities of violence to the demands for justice, **it puts injustice on trial within the context of the dialectics of power politics**. **The ambiguity of the just war tradition signals its commitment to the intersection of the ethical and the political**. Its strength lies in the ways in which it looks to the moral imagination to set the political agenda. Rather than severing the political from the moral, or finding current visions of politics morally impossible, **it looks for ways to translate moral discourses into** (imperfect) **political strategies**.

My sympathy for the project of the just war tradition owes much to Simone de Beauvoir and her principle of ambiguity, which, in part at least, requires that we tie our "impossible" visions of justice to the concrete realities of human existence. Specifically, Beauvoir reminds us that violence and evil are part of the horizon of our world. The complexity of our condition and tragedy of our situation is such that violence, though never morally justified, is sometimes morally necessary (Beauvoir 1947/1991). Violence is never moral because it is an assault on our humanity. Invoking it, however, is sometimes necessary to preserve our humanity. **When injustice cannot be rectified in any other way, the resort to violence is justified**. As justified, however, it remains tragic. Beauvoir's concept of the tragic here is crucial; for it stops the logic of justified war from sliding into a doctrine of (self-) righteous, absolute war. Though The Second Sex is notable for its refusal to include violent revolution in the arsenal of liberatory strategies to be taken up by women, it nowhere calls upon women to renounce violence. Further, when Beauvoir discusses the liberatory meanings of violence available to patriarchal men but not women and calls women's exclusion from certain violent practices a curse, she makes it clear that, although she is not renouncing her Ethics of Ambiguity assessment of the tragic relationship between violence and justice, she finds the turn to violence, under certain circumstances, an affirmation of one's dignity. [End Page 75]

Between her discussions of what must be done when confronted by the Nazi soldier in The Ethics of Ambiguity and her invocation of the power of the imagination in her defense of the slave and the harem women who do not rebel in The Second Sex, we find Beauvoir validating the utopian imagination as an antidote to passivity in the face of injustice and accepting the idea of legitimate war/violence. By joining the utopian demands for justice with the acceptance of violence through the idea of the tragic, however, she rejects the legitimacy of unrestrained violence. **However legitimate the cause, absolute war is never legitimated**. Here, she and just war advocates share common ground. Both find that the intersecting demands of politics and ethics require a logic of ambiguity rather than a logic of the either/or. In posing the question of feminist justice in the context of the question of war, peace, and human rights, I take up the ambiguities of this common ground.

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Only congressional statute become a durable part of LOAC

Kenneth Anderson, Professor of Law, Washington College of Law, American University, and Research Fellow, The Hoover Institution, Stanford University and Member of its Task Force on National Security and the Law, 5/11/2009, Targeted Killing in U.S. Counterterrorism Strategy and Law, http://www.brookings.edu/~/media/research/files/papers/2009/5/11%20counterterrorism%20anderson/0511\_counterterrorism\_anderson.pdf

What Should Congress Do?

Does this analysis offer any practical policy prescriptions for Congress and the administration? The problem is not so much a need for new legislation to create new structures or new policies. The legislative category in which many instances of targeted killing might take place in the future already exists. The task for Congress and the administration, rather, is instead to preserve a category that is likely to be put under pressure in the future and, indeed, is already seen by many as a legal non-starter under international law.

Before addressing what Congress should do in this regard, we might ask from a strictly strategic political standpoint whether, given that the Obama Administration is committed to this policy anyway, whether it is politically prudent to draw public attention to the issue at all. Israeli officials might be threatened with legal action in Spain; but so far no important actor has shown an appetite for taking on the Obama Administration. Perhaps it is better to let sleeping political dogs lie.

These questions require difficult political calculations. However, the sources cited above suggest that even if no one is quite prepared at this moment to take on the Obama Administration on targeted killing, the intellectual and legal pieces of the challenge are already set up and on the table. Having asserted certain positions concerning human rights law and its application and the United States having unthinkingly abandoned its self-defense rationale for its policy, the play can be made at any time—at some later time in the Obama Administration or in the next Republican administration, prying apart the “American” position to create a de facto alliance among Democrats **and Europeans and thereby undermining the ability of the United States to craft a unified American security strateg**y.101 **The U**nited **S**tates **would be best served if the Obama Administration did that exceedingly rare thing in international law and diplomacy: Getting the U**nited **S**tates **out in front of the issue by making plain the American position**, **rather than merely reacting** in surprise when its sovereign prerogatives are challenged by the international soft-law community.

The deeper issue here is not merely a strategic and political one about targeted killing and drones but goes to the very grave policy question of whether it is time to move beyond the careful ambiguity of the CIA’s authorizing statute in referring to covert uses of force under the doctrines of vital national interest and self-defense. Is it time to abandon strategic ambiguity with regards to the Fifth Function and assert the right to use force in self-defense and yet in “peacetime”—that is, outside of the specific context of an armed conflict within the meaning of international humanitarian law? Quite possibly, the strategic ambiguity, in a world in which secrecy is more and more difficult, and in the general fragmentation of voice and ownership of international law, has lost its raison d’etre. This is a larger question than the one undertaken here, but on a range of issues including covert action, interrogation techniques, detention policy, and others, **a general approach of overt legislation that removes ambiguity is to be preferred**.

**The single most important role for Congress to play** in addressing targeted killings, **therefore, is the open, unapologetic, plain insistence that the American understanding of international law on this issue of self-defense is legitimate**. The assertion, that is, that the United States sees its conduct as permissible for itself and for others. **And it is the** putting of congressional strength behind the official statements of the executive branch as the opinio juris of the United States, **its authoritative view of what international law is on this subject**. If this statement seems peculiar, that is because the task—as fundamental as it is—remains unfortunately poorly understood.

Yet if it is really a matter of political consensus between Left and Right that targeted killing is a tool of choice for the United States in confronting its non-state enemies, then this **is an essential task for Congress to play in support of** the **Obama** Administration **as it seeks to** speak with a single voice **for the United States** to the rest of the world. The Congress needs to backstop the administration in asserting to the rest of the world— including to its own judiciary—how the United States understands international law regarding targeted killing. And it needs to make an unapologetic assertion that its views, while not dispositive or binding on others, carry international authority to an extent that relatively few others do—even in our emerging multi-polar world. International law traditionally, after all, accepts that states with particular interests, power, and impact in the world, carry more weight in particular matters than other states. The American view of maritime law matters more than does landlocked Bolivia’s. American views on international security law, as the core global provider of security, matter more than do those of Argentina, Germany or, for that matter, NGOs or academic commentators. But it has to speak—and speak loudly—if it wishes to be heard. It is an enormously important instance of the need for the United States to re-take “ownership” of international law— not as its arbiter, nor as the superpower alone, but as a very powerful, very important, and very legitimate sovereign state.

Intellectually, **continuing to squeeze** all forms and instances of targeted killing **by standoff platform** under the law of IHL armed conflict **is** probably **not** the most analytically **compelling** way to proceed. **It is certainly not a practical long-term approach.** Not everyone who is an intuitively legitimate target from the standpoint of self-defense or vital national security, after all, will be already part of an armed conflict or combatant in the strict IHL sense. Requiring that we use such IHL concepts for a quite different category is likely to have the deleterious effect of deforming the laws of war, over the long term—**starting**, for example, **with the idea of a “global war**,” which **is** itself **a** certain **deformation of** the IHL **concept of hostilities** and armed conflict.

CR triggers the link

Jacob Gerson, U. Chicago Ast. Professor Law, Eric Posner, U. Chicago Law Professor, December 2008, Article: Soft Law: Lessons from Congressional Practice, 61 Stan. L. Rev. 573

But why is Congress's statement credible? Maybe Congress does not really mean that it disapproves of the Iraq war, but is trying to obtain some short-term political advantage by pandering to temporary passions. Perhaps the legislature is exploiting a transient public mood in the hope of pressuring the President to yield in some other political disputes between the two branches.¶ [\*589] A standard insight of the signaling theory literature in economics is that as a general matter, a statement is credible when it is accompanied by a costly action in particular, an action that is more costly for a dishonest speaker to engage in**.** n66 Passing resolutions is costly: it takes time that could be used for other things passing legislation, engaging in constituent service, meeting supporters, enjoying leisure. These other activities benefit members of Congress either directly or by improving their chances for reelection. If Congress spends resources to enact a resolution disapproving the Iraq war, observers will rationally infer that Congress cares more about this issue than it cares about other issues for which it does not enact resolutions. In turn, people who are taking actions with an eye toward how Congress might, in the future, regulate the Iraq intervention or other military interventions would do well to take note of the resolution.

## politics

Expansive self-defense regime enables Israel strike on Iran --- escalates and causes World War 3

Slager 12 (Katherine, J.D. Candidate 2013, University of North Carolina School of Law, “Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program” Fall, 2012, 38 N.C.J. Int'l L. & Com. Reg. 267)

I. Introduction

World War III **is an event the world universally wishes to avoid**. n3 **Threats of preemptive strikes**, retaliations, **and nuclear weapons development bring speculation to the foreground about whether tensions today between Israel and Iran might result in an escalation of hostilities leading to a third World War**. n4 Iran has long professed hatred for the Jewish state, n5 and, according to the International Atomic Energy Agency (IAEA), may be developing nuclear weapons. n6 Israeli leaders say that if necessary, they will preemptively strike Iran to prevent it from developing nuclear attack capability. n7

 [\*269] While a strike might forestall a nuclear Iran, at least for the time being, the international community may not view this preemptive measure as legal or legitimate. **Using force in** self-defense must be subject to clear boundaries **in order to prevent rampant violence**. While war is never desired, "a legal war is more human than an illegal war." n8 But the rules of using force must be generally known and accepted in order to be effective. n9 This comment attempts to clarify the field of international law regarding use of force in anticipatory self-defense, and recommends that clear standards be widely established to better guide both nations considering such use of force and the international community, which must respond to this use of force.

This comment assesses the legality of a potential Israeli preemptive strike against Iran's nuclear program. There is no recognized and accepted analytical framework to assess this legality. n10 Therefore, this comment employs two methods of analysis and considers them both: first, it will employ the time-tested analytical methodology of analogy by comparing the state of the current Israeli-Iran conflict to incidents of anticipatory self-defense. Second, it will apply an analytical framework, proposed by David A. Sadoff, that offers a clear, practicable standard to govern evaluation of anticipatory use of force. n11 Part I discusses [\*270] the backdrop of international law regarding the use of force in self-defense. Part II defines the terms used and discusses both the traditional and proposed analytical frameworks used to assess the legality of anticipatory acts of self-defense. Part III describes and analyzes generally recognized incidents of anticipatory self-defense. Part IV assesses the current situation between Israel and Iran using analogies to past incidents and Sadoff's proposed analytical framework. Part V concludes that while the traditional framework under customary international law would condemn an Israeli strike, a clearer standard encompassing legitimacy as well as legality would better guide the international community in evaluating anticipatory uses of force in the modern era. II. International Law and the Use of Force in Self-Defense Self-defense has been described as "nature's eldest law." n12 Today, this right to self-defense has been codified in Article 51 of the U.N. Charter. n13 In order to analyze the legality of an Israeli preemptive strike on Iran's nuclear program, it is first necessary to understand the state of international law concerning the use of force in preemptive or anticipatory self-defense. A. The Road to Modern International Law and the Use of Force Before aspiring to describe the modern intricacies of international law, it is helpful to first understand the origins of international law and regulation of the use of force between nations. Person to person, community to community, and state to state, the use of force is a salient aspect of humankind's history. n14 As one scholar puts it, "force has been a consistent feature of the global system since the beginning of time." n15 War has been so prevalent in human history that it has been considered a "perennial [\*271] fact of life ... tantamount to ... plague or flood or fire." n16 It would "appear every once in a while, leave death and devastation in its wake, and temporarily pass away to return at a later date." n17 Over time, the need to restrict and regulate wars between nations developed, and war assumed a "legal status." n18 The attempt to restrict is first characterized by the "just war-unjust war" dichotomy of Ancient Greece and Ancient Rome, n19 which classical jurists and scholars of the sixteenth and seventeenth centuries advanced with their writings. n20 By the nineteenth century, however, this dichotomy was abandoned. n21 The accepted view of this period was that international law had nothing to do with attempting to distinguish just and unjust wars. n22 War was viewed as "a right inherent in sovereignty itself." n23 Through the nineteenth century, there was a widespread acceptance of a sovereign nation's right to go to war. n24 Perhaps in reaction to this widespread acceptance, bilateral treaties between nations began to arise at the end of the nineteenth century. n25 These treaties were formed to create contractual obligations between states to not go to war with each other. n26 Bilateral treaties eventually led to the creation of multilateral [\*272] treaties in an effort to "curtail somewhat the freedom of war in general international law." n27 After a few multilateral attempts to restrict inter-state use of force, n28 war finally became "illegal in principle" in 1928 with the General Treaty for Renunciation of War as an Instrument of National Policy (otherwise known as the Kellogg-Briand Pact). n29 Though flawed, the Kellogg-Briand Pact was a "watershed date in the history of the legal regulation of the use of inter-state force." n30 These early developments in establishing the illegality of war led to the Charter of the United Nations, signed in 1945 in San Francisco. n31 In response to the Second World War, the United Nations was created "to establish a universal international organization charged with the management of international conflict." n32 Delegates of forty-nine states were determined "to save succeeding generations from the scourge of war." n33 To this end, Article 2(4) of the U.N. Charter proscribes both the use and threat of force. n34 Two major exceptions exist, however, to this general prohibition against use of force. n35 Nations may use force [\*273] if they are acting either in individual or collective self-defense or if force has been authorized by the U.N. Security Council. n36 B. Self-Defense Even before the creation of the U.N. Charter, self-defense has been historically recognized as an inherent right of both individuals and sovereign nations. n37 As one scholar notes, self-defense "has long been founded on the simple notion that every rational being ... must conclude that it is permissible to defend himself when his life is threatened with immediate danger." n38 In addition to an individual's right to self-defense, the right of nations to use force in self-defense has also traditionally been recognized. n39 The right of a nation to defend its sovereignty is "embedded" in the "fundamental right of states to survival." n40 This being the case, there is no dispute over the legality of a state defending itself against attacks on its sovereignty. n41 What remains unsettled in modern legal scholarship, however, is when a nation [\*274] may invoke this right. n42 Traditionally, self-defense may only be used when necessary to repel an "overt armed attack," and is impermissible as a form of retaliation. n43 The notion behind self-defense in anticipation of an armed attack, however, is that "states faced with a perceived immediate attack cannot be expected to await the attack like "sitting ducks' but should be allowed to take the appropriate measures for their defense." n44 1. Customary International Law Under customary international law, nations may use force in anticipatory self-defense in order to "thwart discernible impending attacks." n45 The established doctrine arises from an incident known as the "Caroline incident." n46 In 1837, the United States and Great Britain were at peace and Canada was under British colonial rule. n47 However, factions of Canadians were engaged in an "armed insurrection" against the British. n48 The Caroline, a privately-owned American steamship owned and operated by Americans, was used to transport men and supplies across the Niagara River to support the Canadian rebels. n49 On the night of December 29, 1837, British soldiers seized the Caroline while it was docked on the American side of the river, dragged the boat into the current, set it afire, and let it loose to drift over the Niagara Falls. n50 Two Americans were killed in the incident. n51 In response, a series of letters were exchanged between Henry [\*275] Fox, the British Minister in Washington, and the U.S. Secretary of State. n52 The British claimed that the destruction of the Caroline was justified as "necessity of self-defense and self-preservation." n53 The response of Secretary of State Daniel Webster has become immortalized as the factors necessary to justify an act of self-defense. n54 Webster stated that the act would not be justifiable unless the British could show: necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to [show], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. n55 This response has become known as the Caroline doctrine, and asserts that for a use of force in anticipatory self-defense to be justified, it must be necessary, proportionate, and in response to an imminent threat of armed attack where no other means of redress are available. n56 These factors have become generally accepted and incorporated into customary international law. n57 [\*276] 2. The U.N. Charter and Article 51 The Charter of the United Nations was adopted in 1945. n58 As discussed above, Article 2(4) of the Charter prohibits the use of force between nations, except in the case of two major exceptions. First, Article 51 articulates a nation's right to use force in self-defense. n59 Second, Chapter VII of the Charter allows the use of force "as may be necessary to maintain or restore international peace and security" under authorization of the U.N. Security Council. n60 This analysis focuses on Article 51, as it is "the focal point" in discussing the permissibility of self-defense. n61 Under Article 51 of the Charter, a nation has the right to use force in individual or collective self-defense. n62 The Article provides: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in [\*277] order to maintain or restore international peace and security. n63 While "the right of self-defence pursuant to the U.N. Charter has its origins in customary international law," Article 51 appears to limit uses of force in self-defense only to situations where an "armed attack" has occurred. n64 As Professor Dinstein succinctly observes, this limitation presents a "material difference in the range of operation of the right [of self-defense] between these two sources [of international law]." n65 Many scholars have very divergent views on the implications of this difference. 3. The Debate The debate surrounding the legality of anticipatory defense in modern international law is extensive and seemingly unlimited. Scholars can generally be divided into two camps: restrictionist and expansionist. n66 First, however, it is necessary to clarify the terminology used in the debate on self-defense. n67 While a plethora of scholars seem to offer as many definitions and distinctions as there are authors, n68 this article will use the terminology as categorized by David Sadoff. n69 First, there are two general types of self-defense: reactive and non-reactive. n70 Reactive strikes occur "when a State responds to an attack after it [\*278] has occurred." n71 Non-reactive strikes, otherwise referred to as "defensive first strikes," occur "when a State takes military action before being hit." n72 Defensive first strikes can be further sub-divided into three categories: interceptive, anticipatory, and preemptive. n73 These three categories can be viewed as the rough points on a spectrum of "real or perceived timing of the threat posed by an aggressor State." n74 Interceptive self-defense encompasses the most immediate threats, while preemptive encompasses the least immediate. n75 Interceptive self-defense, as first articulated by Professor Dinstein, "takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way." n76 This refers to scenarios with the shortest amount of time between the self-defensive act and the perceived threat. n77 As Sir Humphrey Waldock describes, "where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier." n78 Dinstein asserts that not only is interceptive self-defense legitimate under customary international law, it is also legitimate under Article 51. n79 Anticipatory self-defense, by contrast, is "the use of force in [\*279] "anticipation' of an attack when a State has manifested its capability and intent to attack imminently." n80 The Caroline doctrine is generally considered to reflect assertions of anticipatory self-defense. n81 This refers to scenarios where an attack may be imminent but not yet underway. n82 The temporal definition of what constitutes "imminence" is not well-established or even well-articulated. n83 Many scholars assert that Article 51 of the U.N. Charter recognizes anticipatory self-defense through its preservation of states' "inherent right of ... self-defense." n84 Preemptive self-defense, which is used in this comment to encompass the concept of "preventive" self-defense, n85 refers to the use of force "to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred." n86 This scenario refers to defensive first strikes that are temporally the most removed from the perceived threat. n87 While the majority of [\*280] scholars reject the legality of preemptive self-defense under international law, n88 it has been argued that use of preemptive force may still be legitimate. n89 The restrictionist and expansivist schools of interpreting the legality of self-defense focus their debate on the "middle-ground" of defensive first-strikes, that of anticipatory self-defense. Professor Ronzitti aligns the two camps in terms of a geographical divergence. n90 The restrictionist camp is referred to as the "continental doctrine," while the expansivist doctrine is attributed to common law countries and Israel. n91 The question that divides the two camps is "whether the words "if an armed attack occurs' introduces ... a rigid test of legitimate self-defense." n92 The restrictionist camp asserts that "self-defense [can] lawfully be exercised only if the State is the object of an actual attack." n93 Under this view, "use of force under the Charter is expressly limited to situations where an armed attack has already commenced or occurred." n94 The restrictionist camp recognizes the right to use force in anticipatory self-defense under customary international law, but asserts that the adoption of the Charter in 1945 limited "the scope of that right." n95 As Professor Dinstein emphasizes, "the use of the phrase "armed attack' in Article 51 is [\*281] not inadvertent ... [it] is deliberately restrictive." n96 Dinstein concludes that "self-defence consistent with Article 51 implies resort to counter-force ... in reaction to the use of force by the other party." n97 By contrast, the expansivist camp asserts that "the right of self-defence can be exercised not only when the State has been the object of an armed attack but also when the attack is imminent." n98 Three reasons have been cited to support this theory. First, expansivists cite that the actual reading of "if an armed attack occurs" does not necessarily mean "after an armed attack has occurred." n99 Professor Waldock elaborates that this "goes beyond the necessary meaning of the words," and cites the French text: "dans un cas ou un Membre des Nations Unies est l'objet d'une agression armee." n100 Second, expansivists note that the Article 51's preservation of the "inherent right" of self-defense was "a comparatively late addition to the Charter, for most States initially assumed that "the right of self-defense was inherent in the proposals and did not need explicit mention in the Charter.'" n101 Lastly, and most persuasively, the expansivist camp notes that Article 51 preserves the "inherent right" of self-defense. n102 D. W. Bowettt remarks that "the reference to an "inherent' right suggests something of the philosophy of natural law." n103 Professor Dinstein himself points out that "the right of self-defence pursuant to the U.N. Charter has its origins in customary international law." n104 As customary international law permits an act of [\*282] anticipatory self-defence "when the threat of an armed attack is "imminent'," n105 it is therefore "not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter." n106 As Professor Shah articulates, "the intention of article 51 seems to be to make anticipatory self-defence a statutory right, not to limit it," n107 strongly evidenced by "the inclusion of the word "inherent' and the absence of any objection to it by states." n108 With such a dispute over the ambiguity of Article 51, many scholars would turn to the International Court of Justice (ICJ) for a judicial ruling on whether anticipatory self-defense is legal under Article 51. n109 Yet the ICJ has not ruled on the matter. In Nicaragua v. United States, n110 while the ICJ "based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack," the Court explicitly refrained from pronouncing a judgment on the legality of anticipatory self-defense. n111 Without a judicial pronouncement on the matter, [\*283] scholars will continue to battle over the legality of anticipatory self-defense. 4. The State of the Law and Implications Today, there is no accepted state of international law regarding the use of force as anticipatory self-defense against an imminent armed attack. n112 However, as numerous scholars have noted, the world has changed in many significant ways since the drafting of the U.N. Charter in 1945. n113 At that time, drafters were primarily concerned with "overt acts of conventional aggression." n114 Since 1945, however, most conflicts have been in the form of civil conflicts, covert actions, or acts of terrorism. n115 The "ever-present threat of the use of nuclear and other weapons of mass destruction" is changing our traditional notions of warfare. n116 While nuclear weapons physically existed at the time the U.N. Charter was drafted, "the delegates at San Francisco knew nothing of the nature and effects of nuclear weapons" and thus "could not have addressed the threat, proliferation, and potential use of these weapons of mass destruction." n117 One delegate specifically referred to the Charter as a "pre-atomic age charter." n118 Many scholars of the expansivist view point out this seemingly obvious observation: "no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence." n119 The ICJ itself, in its advisory opinion in the Nuclear [\*284] Weapons Case, n120 recognizes the "right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake." n121 It seems that there is room for a preemptive use of force under the U.N. Charter if and only if a state's very survival is at stake. Lastly, one could argue against even considering the legality of using preemptive force. n122 Abraham Sofaer notes that despite the "illegality" of using force for "preventive purposes," states have engaged in such force in over 100 instances since the signing of the U.N. Charter in 1945. n123 He argues that rather than being concerned over the legality of a preemptive use of force, states should be concerned over the legitimacy of such an act. n124 Sofaer advocates adopting a proposal from the 2004 report of the Secretary General's High-Level Panel on Threats, Challenges and Change: n125 the U.N. Security Council should "adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be." n126 According to Sofaer, the benefits of "using legitimacy as a guide ... would allow states to take into account a broader range of considerations than current international law typically dictates." n127 [\*285] The state of the law concerning the legality of using force in preemptive or anticipatory self-defense is convoluted, to say the least. However, this does not mean that it is impossible to evaluate the legality of an Israel preemptive attack on the Iranian nuclear program. III. The Legality of Anticipatory Self-Defense and Preemptive Force Though the state of modern international law is unclear, there are many arguments to support the legality of using force in anticipatory self-defense. Under the Caroline doctrine of customary international law, n128 the traditional framework to evaluate use of force in anticipatory self-defense addresses three elements: necessity, proportionality, and imminence of a threat such that no other recourse is available. n129 Alternative frameworks have also been proposed to expand the customary Caroline framework. n130 Using both the traditional and alternative analytical frameworks to analyze several modern incidents where the use of anticipatory self-defense was evidenced or claimed, it is possible to evaluate the legality of a potential Israeli strike on Iran's nuclear reactor. A. Framework under Customary International Law Regardless of legality under strict interpretation of Article 51 of the U.N. Charter, n131 the Caroline-based elements of necessity, proportionality, and imminence must be fulfilled for an anticipatory use of force to be legal under customary international law. n132 While some commentators include imminence in their analysis of necessity, n133 most commentators include imminence as [\*286] a separate element. n134 1. Necessity and Proportionality The principles of necessity and proportionality are "part of the basic core of self-defence [upon which] all states agree." n135 The requirements of necessity and proportionality in self-defense are not expressly included in the U.N. Charter, but rather, are tenets of customary international law that have been reaffirmed by the ICJ in the Nicaragua case and in the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. n136 As Gray succinctly describes, the "basic, uncontroversial principles" of necessity and proportionality are that self-defense "must not be retaliatory or punitive; the aim should be to halt and repel an attack." n137 Necessity and proportionality "constitute a minimum test" that is determinative of the legality of using force in self-defense. n138 Thus, if a nation's use of force is lacking in either necessity or proportionality, the use of force is not justified under the doctrine of self-defense, and may in fact be unlawfully retaliatory or punitive. n139 [\*287] Necessity, by itself, is not a controversial proposition. n140 States need to demonstrate that "such forceful action was necessary to defend itself against an impending attack." n141 However, applying necessity to a particular scenario "calls for assessments of intentions and conditions bearing upon the likelihood of attack." n142 The nature of necessity is that it is often interposed with the "imminence" factor. n143 One scholar explains the logical relation between necessity and legal use of force in self-defense by describing necessity to mean that "there must have been no other feasible means of dealing with a particular threat." n144 Notably, this means that "force should not be considered necessary until peaceful measures have been found wanting." n145 As this comment assesses a preemptive strike in defense of a potential nuclear attack, the element of necessity - as separate from an analysis of imminence - will primarily address whether "peaceful measures" are still available to Israel. Proportionality assesses the appropriateness of a nation's action in response to a perceived threat. n146 Thus, an ex ante analysis of proportionality is not immediately relevant when attempting to predict the legality of a future act of self-defense. However, as proportionality is an integral component to the legality of inter-state uses of force, understanding the role proportionality plays in lawful acts of anticipatory self-defense is still pertinent to this comment's analysis. The requirement of proportionality means that "acts done in self-defense must not exceed in manner or aim the necessity provoking them." n147 Another scholar notes that "a forcible response must be limited to removing that threat, and cannot extend beyond this defensive [\*288] objective to encompass the pursuit of broader offensive or strategic goals." n148 An act in self-defense that exceeds the bare minimum necessary to respond to the threat risks becoming a retaliatory act, and thus unlawful under customary international law. n149 Simply put, a nation's "counter-attack" must not amount to a reprisal for the purpose of revenge or as a penalty. n150 Proportionality is also relevant to the theoretical implications of anticipatory self-defense. In its pure form, proportionality dictates that "harm returned should not exceed harm received." n151 Inherent in this concept is that an attack as deterrence is actually at odds with this precept of proportionality, as the purpose of an attack meant to deter is that "the greater the disproportionality, the greater the chance of avoiding harm to either party by avoiding conflict altogether." n152 Thus, the element of proportionality serves as the essential limit on the acts that nations may engage in when using force in anticipatory self-defense. For the purposes of this comment's analysis, "necessity" is limited to assessing whether Israel has exhausted all available peaceful means n153 and "proportionality" is limited to exploring the limits of any acts Israel would be permitted to take in defending itself against a nuclear strike. 2. Imminence Imminence is "the most problematic variable of anticipatory self-defense ... that has no precise definition in international law." n154 However, the importance that imminence plays in the legitimacy of using force in anticipatory self-defense is clear. As one scholar recognizes: It is important that the right of self-defense should not freely [\*289] allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear ... that defensive action is essential for self-preservation. n155 Illustrating its role in customary international law, the absence of imminence was indeed determinative when the International Military Tribunals at Nuremberg applied the Caroline test following World War II, rejecting Germany's proffered justification that their "invasion of Norway had been an act of anticipatory self-defense." n156 Today, however, the doctrinal debate surrounding the legality of states using force in anticipatory self-defense stems primarily from the varying definitions and meanings of "imminence." n157 Thus, imminence becomes the most essential factor to define when determining whether a use of force in self-defense is permissible, n158 and is therefore the primary question in analyzing whether Israel would be presently justified to strike Iran's nuclear program. The notion of imminence in customary international law reaches back to the Caroline incident. n159 Under the Caroline doctrine, "an attack must be apparent in certain terms, and the impending harm must be of such an immediate nature that instant armed force is the only way to ward off the blow." n160 This standard for imminence focuses on the temporal aspect and is strictly measured. n161 An imminent attack, strictly measured, is one that is "just about to occur or, in other words, when "an attack is in evidence.'" n162 Scholars have suggested that the imminence of an attack can rise to such urgency that use of force in anticipatory self-defense would fall within the stricture of Article 51. n163 [\*290] Many scholars are now arguing that a relevant measurement of imminence, however, should no longer be strictly temporal. n164 The strict requirement is out of touch with "the realities of modern military conditions." n165 The nature of imminence has been affected in two significant ways since the development of the Caroline doctrine. n166 First, the "gravity of the threat" has changed significantly. n167 Today we face nuclear weapons and other weapons of mass destruction that have the capacity to destroy a nation before it ever has a chance to defend itself. n168 This is vastly different from the "cross-border raids conducted by men armed only with rifles" that were the predominant form of international uses of force at the time of the Caroline incident. n169 Second, the method of delivering an attack has changed. n170 With increased rapidity of an attack reaching its target once launched, it is now "far more difficult to determine the time scale within which a threat of attack ... would materialize." n171 Within this framework, Professor Greenwood asserts that in order to justify the existence of an "imminent threat," there must be sufficient evidence that "the threat of attack exists ... [requiring] evidence not only of the possession of weapons but also of an intention to use them." n172 Customary international law is, by its very nature, an important groundwork for establishing the bounds on inter-state actions. n173 Nevertheless, it has many shortcomings as a framework [\*291] to assess the legality of using force in self-defense. While strict interpretation of the U.N. Charter's restriction on using force in self-defense is often too restrictive, n174 customary international law suffers from being too vague to serve as a guide for state actors. n175 Additionally, it may be "out of sync" with the realities of a state's reasoning and behavior when facing threats to their very survival. n176 Thus, scholars began to look for, or propose, alternatives. B. Alternative Framework The scholarly landscape concerned with anticipatory self-defense is consumed with widespread disagreement, from expansivist-restrictionist doctrinal dichotomies n177 to inconsistent definitions of prevention, preemption, anticipatory self-defense, n178 and the very factors of necessity, proportionality and imminence n179 that are essential to this vast doctrinal theory of international law. However, there is one observation on which all scholars can perhaps agree: at present, the international arena does not have a practicable framework to consistently evaluate the legality or legitimacy of a nation's use of force in anticipatory self-defense. As a result, several scholars have proffered a variety of proposals to compensate for the vagueness of customary international law and the unrealistic restrictiveness of the U.N. Charter in assessing anticipatory self-defense. Though several proposals have been offered by numerous scholars, n180 this comment limits its [\*292] consideration to the framework proposed by David Sadoff, which focuses its proposal specifically to assessing use of force in anticipatory, rather than preventive, self-defense. 1. David Sadoff, "Striking a Sensible Balance" Sadoff proposes an alternative legal framework to assess the legality of "proactive defense," which encompasses interceptive, anticipatory and preemptive self-defense. n181 His analysis, while derived from customary international law, seeks to expand on this doctrine to produce a "clear, practicable legal standard to govern the use of first strikes." n182 The substantive components of the proposed framework include (1) properly gauging the threat, (2) exhausting peaceful alternatives, and (3) taking responsive action. n183 As the second and third components tend to follow the same considerations as under a traditional customary international law analysis, this comment describes only the first component in depth. In order to gauge the threat of attack, Sadoff proposes analyzing the (i) nature and scale, (ii) likelihood, and (iii) timing of the threat. n184 With a state gauging the threat of attack, Sadoff calls for establishing an evidentiary standard to "address[] the nature, quality, and reliability of a state's information about the underlying facts and circumstances that have led it to decide to act against a given threat." n185 He proposes that the evidentiary standard requires a state to show "with clear and compelling evidence the existence of a serious and urgent need with respect to [\*293] a given threat." n186 The first two prongs of a state's assessment using Sadoff's framework appear to go to the necessity element of the Caroline doctrine. When assessing the nature and scale of a potential attack, a state will need to consider (1) "the character and magnitude" of the threatened attack (including (a) the type of weapons the enemy may use, (b) the size of an army, or (c) whether it would be an invasion or an isolated attack); (2) whether or not there would be warning; (3) what the likely targets of an attack would be; and (4) what the impact of an attack would be on the state's capacity to defend itself. n187 In assessing the likelihood of an attack, Sadoff explains that a state would assess the probability of whether the attack would in fact occur if there were no "proactive defense" measures taken. n188 The analysis by the target state would be subjective, in that it considers the state-actor's perceptions of the "intent and capabilities of the presumed aggressor state." n189 The author recommends using an "operational assessment" of likelihood (e.g., when the attacking state's "decision to attack has become "effectively irrevocable'"), rather than a probability-based assessment (e.g., ""reasonable certainty' or "highly probable'"). n190 An operational-based standard would be a higher threshold than a probability-based standard, so that defensive actions are [\*294] appropriate when the question of attack is not if an attack will occur, but when - "the uncertainty lies in whether the attack will occur sooner rather than later." n191 Such a high threshold would surely satisfy the "necessity" prong of the Caroline doctrine. n192 An assessment of "timing" is an important consideration because it addresses the urgency of a potential defensive action. n193 This factor appears to go to the imminence prong of the Caroline doctrine. Sadoff advocates mandating a "last window of opportunity" approach in the timing analysis, meaning that a defensive action would be appropriate when "a present danger ... is known and ... [when] any additional delay in acting would "seriously compromise security.'" n194 He advocates this approach over requiring "temporal imminence" because "the underlying rationale of the imminence requirement is to ensure military action is truly necessary." n195 Sadoff brings a "realist" approach to the matter of assessing when using force in anticipatory self-defense would be appropriate. n196 He appropriately notes that the standards currently employed under customary international law and the Caroline doctrine are "too limited in scope to be of general use" and lack the details needed for utility purposes. n197 Furthermore, his suggested framework provides numerous questions and factors that would provide practical guidance to nations considering using [\*295] force in "proactive defense." n198 This guidance would also enable the international community to consistently evaluate the legitimacy of a nation's use of force. n199 As Sadoff remarks, this would enable third parties to "cast their military and diplomatic support accordingly behind the state whose conduct more closely conformed to international law." n200 2. Considering Legitimacy Legitimacy is vital to the success of any legal order. n201 In the present context, legitimacy refers to the "the anticipated reaction of the relevant international community to a State's decision to use force." n202 In 2004, the U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change n203 observed that "the effectiveness of the global collective security system ... depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy." n204 The panel notes that if either "common global understanding" or "acceptance" of when use of force is both legal and legitimate is lacking, the result will be a weaker international legal order. n205 In realist terms, however, legitimacy and legality are often separate considerations. n206 An act that is considered legitimate [\*296] may not always be deemed legal, and an act that is legal may not always be considered legitimate. n207 Legitimacy differs from legality on several points. First, legitimacy is established by the "actual views and values of states and other relevant parties" rather than by the academic or professional opinions of international legal scholars on the meaning of the U.N. Charter. n208 Second, legitimacy differs from legality in that it is usually a "relative judgment, rather than a definitively positive or negative one." n209 The very nature of legitimacy is that it turns on numerous factors, rather than requiring that "certain standards be met" as with legality. n210 Third, an assessment of legitimacy should consider not only the views of other nation states, but the views of non-state entities such as international agencies, non-governmental groups, the press and the public. n211 The U.N. High-Level Panel, however, has demonstrated a recognition of the vital importance of legitimacy by citing five criteria that the Security Council should always address when deciding whether to authorize or endorse the use of force: (1) "seriousness of threat," (2) "proper purpose," (3) "last resort," (4) "proportional means," and (5) "balance of consequences." n212 For the first criterion, "seriousness of threat," the question to pose is, "Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force?" n213 Inquiry regarding "proper purpose" begs the question "Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question?" n214 "Last resort" is relatively straight-forward, and asks whether "every non- [\*297] military option for meeting the threat in question [has] been explored, with reasonable grounds for believing that other measures will not succeed." n215 This criterion can be viewed as synonymous with an analysis of "necessity." n216 "Proportional means" predictably refers to proportionality: "Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?" n217 The final criterion recommended by the Panel, "balance of consequences," goes to the heart of the legitimacy inquiry. n218 The Panel illustrates this inquiry by posing whether "there [is] a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction." n219 This is essentially the age-old question, "Will the proposed action do more harm than good?" n220 Sofaer recommends that when answering this question, one "should go beyond the immediate, physical effects of a particular action and take into account the long-term, ethical consequences." n221 The Caroline doctrine has been a pillar in the development of customary international law's analysis of anticipatory self-defense. However, widespread debate on the relationship between this doctrine and Article 51 of the U.N. Charter has created a vague understanding of what constitutes the strict bounds of legality when using force in self-defense. While alternative frameworks effectively address the doctrinal weaknesses of the Caroline doctrine and customary international law, understanding [\*298] international reactions to past incidents of anticipatory self-defense is essential. Analysis of these incidents will illustrate the bounds of legality and legitimacy within the international community and provide insight on how an alternative framework would be applied to future incidents. IV. Anticipatory Self-Defense: Examples and Incidents Without a clear legal framework to guide an evaluation of using force in anticipatory self-defense, modern day incidents of "non-reactive force" used in anticipatory self-defense are crucial to answering two essential questions: First, are there instances in which the use of anticipatory self-defense would be recognized as legitimate, and secondly, where would the line be drawn to distinguish acceptable and unacceptable uses of force? Four examples of nations using force in anticipatory self-defense have been generally recognized and analyzed as such since the adoption of the U.N. Charter. n222 These examples shed light on the current acceptance or rejection of the doctrine of anticipatory self-defense and provide a baseline to examine whether the current situation between Israel and Iran might give rise to a legitimate use of anticipatory self-defense. A. 1962 Cuban Missile Crisis In 1962, the U.S.S.R. sent "over 100 shiploads of armaments" [\*299] to Cuba, which included numerous launch missile sites. n223 The United States responded by creating a naval quarantine around Cuba, so that all ships going to Cuba would be inspected and no ships with weapons would be allowed to pass through. n224 In the course of the quarantine, no ships tried to get around the quarantine, no ships were seized, and only one ship was boarded without incident. n225 One day after announcing the quarantine, the United States asked for and received regional support from the Organization of American States (OAS). n226 The United States did not seek to justify the act on the basis of Article 51. n227 Nor did the United States claim that the U.S.S.R.'s posturing with Cuba's cooperation was unlawful. n228 Instead, the United States relied on Article 52 to justify its actions, citing its use of "regional arrangements ... relating to the maintenance of international peace and security." n229 International reactions to the legality of the quarantine reflected "ideological lines," with Chile, China, France, Ireland, the United Kingdom, and Venezuela supporting the quarantine, and Ghana, Romania, the Soviet Union, and Egypt opposing it. n230 As this incident involved a non-reactive use of force, a brief Caroline analysis is relevant. n231 The element of necessity may have been present, as the gravity of the threat (proximity of nuclear missiles) was immense. n232 Nevertheless, all peaceful measures may not have been exhausted. The proportionality element seems to be met, in that almost no force was actually used. n233 Satisfying the imminence requirement is more difficult because it is not clear that using force was the only way "to ward [\*300] off the blow." n234 The possession of weapons and a clear intention to use them, at least as a threat against the United States, however, were clearly present. n235 Regarding the reaction of the international community, "very few [states] ... relied on a strict interpretation of Articles 2(4), 51, and 53." n236 Thus, even though this incident does not suggest either "clear acceptance or rejection" of anticipatory self-defense, it demonstrates that in 1962, states were not interpreting the U.N. Charter in a clearly "restrictive" way. n237 B. 1967 Six Day War n238 Scholars have described the Six Day War between Israel and Egypt as a "classic case of military preemption." n239 In 1967, tensions were rising between Israel and its Arab neighbors. n240 Leading up to the incident of June 5, 1967, five overt acts indicated that Egypt would launch an attack on Israel. n241 First, Egypt mobilized troops along Israel's Sinai border "to an unprecedented extent." n242 Second, Egypt began cementing ties with Jordan, Syria and Iraq. n243 Third, the Egyptian president ordered U.N. Emergency Force troops to leave Sinai, where they had been deployed as a buffer between Egypt and Israel. n244 Fourth, Egypt imposed a blockade of the Straits of Tiran, a waterway vital to Israeli shipping. n245 Lastly, the Egyptian [\*301] president proclaimed that in any war with Israel, Egypt's goal would be "the destruction of the Jewish state." n246 The final result of this buildup was that on June 5, Israel launched a "surprise" air attack on Egypt's forces that resulted in a "decisive victory" in a matter of days. n247 In the ensuing period, Israel first claimed that Egypt had made the first move. n248 Shortly thereafter, however, this argument lost weight and Israel made the alternative claim that the blockade represented an "act of war" and the deployments of troops appeared to be an imminent attack. n249 Thus, though Israel's attack on Egypt was an act of anticipatory self-defense in substance, Israel did not rely on this doctrine to justify its actions. n250 International reaction was generally supportive of Israel, though some states viewed the incident as an act of aggression by Israel. n251 Despite the fact that the "primary facts" demonstrated a clear example of anticipatory self-defense, n252 no state cited the principle [\*302] of anticipatory self-defense in its support. n253 In a Caroline analysis of this incident, necessity, proportionality and imminence all appear to be present. For the necessity requirement, Israel was facing the possibility of invasion, as evidenced by the amassing of the troops along its Sinai border. n254 The proportionality of the response also seems appropriate, as the duration of the armed engagement was only six days and the attack was limited to Egypt's military forces. n255 Furthermore, the mobilization of troops, the blockade, the removal of U.N. troops, and the accompanying threatening remarks by the Egyptian president all strongly indicate the imminence of an invasion. Though there was a lack of consensus in the international community regarding the legitimacy of anticipatory self-defense, Israel's actions were widely viewed as legitimate when the customary international law elements of necessity, proportionality and imminence were all present. n256 C. 1981 Israeli Attack on Osirak n257 Nuclear Reactor The Osirak incident has been described as an example of "preemptive" force. n258 In early 1981, Iraq was constructing a nuclear reactor near Baghdad, "code-named Osirak." n259 Israel viewed the Osirak reactor as "a threat to Israel's survival." n260 The type of reactor used and the type of fuel purchased could both be [\*303] used in weapons manufacture. n261 Additionally, Israel noticed that Iraq was buying more uranium than it would need for scientific research. n262 Iraqi leaders were expressing "vehement hostility" to Israel. n263 This last factor was augmented by the history of three wars between Israel and Iraq and the fact that Iraq continued to deny Israel's legal existence. n264 Lastly, the nature of the threat and Israel's vulnerability to an initial strike were factors in Israel's decision to act. n265 On June 7, 1981, Israel attacked and destroyed the Iraqi nuclear reactor. n266 Israel said it acted to "remove a nuclear threat to its existence." n267 To justify its actions, Israel claimed anticipatory self-defense. n268 Though citing scholars' expansive interpretation of Article 51, Israel was unable to cite any examples of state practice of anticipatory self-defense. n269 The U.N. Security Council, while not reaching a consensus on the matter of anticipatory self-defense, did unanimously condemn the act as a "clear violation" of the U.N. Charter and "the norms of international conduct." n270 Individual states had varied reactions to Israel's actions. Some states agreed with the doctrine of anticipatory defense, but condemned the incident for lack of imminence: there was no "instant and overwhelming need for self-defense." n271 Other states simply rejected the principle of anticipatory self-defense. n272 The United States condemned the incident, citing the fact that peaceful means were not pursued, given that the International Atomic Energy Agency (IAEA) did not have evidence that the reactor would be used to develop [\*304] nuclear weapons. n273 Under a Caroline analysis, it can be argued that both necessity and proportionality were present. The possibility of nuclear armament and the state of hostilities between Israel and Iraq suggest there could have been a grave threat to Israel, satisfying the necessity prong of the Caroline doctrine. The action taken, a targeted destruction of the "threat" (the nuclear reactor), seems to meet the proportionality requirement. n274 Imminence, however, was clearly not present. n275 The threat to Israel had not been "of such an immediate nature that instant armed force [was] the only way to ward off the blow." n276 From this incident, we have a possible recognition of the principle of anticipatory self-defense, though it was not in fact viewed to be present here. n277 D. 2007 Israeli Attack on a Syrian Nuclear Facility In the early hours of September 6, 2007, Israeli jets launched an attack on an undisclosed target near Al-Kibar in north-eastern Syria. n278 While the Syrian government has never admitted it, the general consensus of the international community is that the target of the attack was a secret Syrian nuclear reactor, and that it was destroyed in the attack. n279 The first official intelligence report regarding the target was released by the United States in April 2008. n280 This report stated that there was evidence as early as spring 2007 that the Syrian target "was a nearly completed nuclear reactor intended to produce plutonium for a weapons programme." n281 The report also indicated that the complex was [\*305] "weeks and possibly months from operational capacity." n282 To support the intelligence conclusions of the United States, IAEA investigators did discover plutonium particles at the Al-Kibar site. n283 The IAEA all but officially concluded that the Al-Kibar site was a nuclear reactor when the IAEA Director General Yukiya Amono "explicitly confirmed" that the destroyed facility was "a nuclear reactor under construction." n284 Interestingly, Syria's immediate reaction to the attack was rather muted. On September 9, 2007, Syria registered an official complaint with the U.N. Security Council and General Assembly, asserting only that "Israel had committed a breach of the airspace of the Syrian Arab Republic." n285 The complaint also asserted that during the attack, Israel "dropped some munitions but without managing to cause any human casualties or material damage." n286 [\*306] More interestingly, the international reaction to the incident was also muted. Israel itself, while eventually admitting that they were responsible for the attack, n287 did not provide any legal justifications for the attack. n288 While the United States issued "tentative support" for the attack, no states other than Syria condemned the incident. n289 Professor Garwood-Gowers asserts that even under the customary international law doctrine of anticipatory self-defense, this attack on Syria is clearly unlawful under current international law by failing to meet the requirements of necessity and imminence. n290 Specifically, he cites Israel's failure to "exhaust peaceful means of resolving its concerns over Syria's nuclear intentions" through either the IAEA or the U.N. Security Council. n291 In analyzing this incident, Garwood-Gowers seeks to evaluate whether the state of modern international law regarding the use of preventive force has changed. n292 "If the international community's response ... indicates general acceptance of a new practice or interpretation, then it can be said that a change to customary international law has taken place." n293 Garwood-Gowers explains that any "significant opposition" would be enough to disrupt any [\*307] display of "general acceptance," indicating that international law remains unchanged. n294 He concludes that while there is still no "general acceptance" sufficient to mark a shift in international law, the incident does reflect a shift in state practice that "indicates a broader lack of concern over the legality of relatively minor uses of force." n295 The muted reaction by the international community may demonstrate that even though such an attack may be illegal under current international law, it may be that the international community does not view the incident as illegitimate. These incidents do not clearly demonstrate that using of force in anticipatory self-defense is definitively legal, or even legitimate, under modern international law. Yet they provide guidance as to what situations do and do not warrant use of non-reactive force in the eyes of this same international community. n296 The Six Day War strongly suggests that there are situations in which "non-reactive" uses of force would be widely seen as legitimate. n297 Overt preparations for attack, as in the Cuban Missile Crisis and the Six Day War, appear to warrant acts bordering on "unlawful" under the restrictive interpretation of Article 2(4)'s prohibition on the use of force. n298 These situations are thus more likely to warrant acceptance of using force in anticipatory self-defense. Nevertheless, overt hostility with the mere possibility of nuclear weapon development, such as in the Osirak incident, n299 does not appear to automatically warrant the use of force. These various incidents thus provide real world examples of what the international community would consider necessary, proportionate, and imminent. The most controversial element seems to be imminence. These incidents provide the baseline to which the three prongs of the Caroline doctrine can be applied in evaluating whether the present conflict between Israel and Iran constitutes such imminence as would justify a preemptive strike. [\*308] V. Today: Israel and Iran A. History While it may be hard to believe in today's era of hostility and threat, history reveals that Israel and Iran have not always been enemies. In World War II, Iranian diplomats helped save "thousands of Jews" from the Holocaust. n300 Iran was one of the first Muslim nations to establish economic and trade ties with Israel. n301 Indeed, Iran has a long history of "Jews [being] welcome members of Iranian society." n302 The two states were allies for a period spanning almost three decades, united by the common "enemy" of Sunni Arabs. n303 The friendly economic ties between the two nations changed in 1979 with Iran's Islamic Revolution. n304 The Ayatollah that ousted the Shah in the revolution preached strong anti-Israeli rhetoric, setting the stage for the severe decline of Iran-Israel relations in modern Iran. n305 This history of cooperation is a far cry from today's state of affairs, where Iran proclaims a strong anti-Israeli stance. Iran's support of Hamas and Hezbollah, two militant groups that seek the destruction of Israel, exemplifies the current view of Iran towards Israel and has often been cited by Israel in their reasons to need to take defensive measures against Iran. n306 B. Current Events For Iran to be a threat to Israel, it has to have both the capability to attack Israel with nuclear weapons and the intention to do so. n307

 [\*309]

1. Capability: Iran's Nuclear Development

Towards the end of 2011 and into the early part of 2012, world tensions concerning Iran's nuclear program mounted quite dramatically. n308 Iran's nuclear program has been a controversial issue since the program's "re-birth" in the 1990s. n309 Though Iran is a signatory to the Nuclear Non-Proliferation Treaty, n310 members of the international community have long been suspicious of the purposes underlying Iran's clandestine nuclear research. n311 Many worry that Iran is seeking to develop nuclear weapons. n312 Yet Iran has consistently asserted that its nuclear program is purely for peaceful purposes. n313

The most recent round of mounting tensions was marked by a November 2011 IAEA report n314 indicating Iran may be "carrying out activities relevant to the development of a nuclear device." n315 The report was "the harshest judgment that United Nations weapons inspectors had ever issued" against Iran's program. n316 It reports that Iran is employing a variety of "research, development and testing activities ... that would be useful in designing a nuclear weapon." n317 It does not, however, provide an estimate on [\*310] how long it will be before Iran develops nuclear weapons. n318 Yet should Iran enrich its uranium to 90%, it would have enough enriched uranium for four nuclear weapons. n319 A separate report estimates that Iran could develop nuclear weapons in sixty-two days or less. n320

Following the release of the November IAEA report, the United States and Europe began a series of economic sanctions intending to derail Iran's nuclear development. n321 The sanctions target both Iran's access to foreign banks and financial institutions, as well as companies involved in Iran's nuclear, oil, and petrochemical industries. n322 These sanctions appear to have an effect on Iran's economy. n323 Iranian leaders, in response to the strains on the economy resulting from the sanctions, have been making public statements encouraging "Iranian self-reliance and resentment toward the West." n324 Iran also threatened to close the Strait of Hormuz, "a vital artery for transporting about one-fifth of the world's oil supply." n325 Some commentators believe that these "aggressive gestures" may demonstrate that Iranian leaders are responding "frantically, and with increasing unpredictability" to the sanctions. n326

In February 2012, the IAEA released another report. n327 This [\*311] report indicates Iran may not be cooperating sufficiently with IAEA, as Iran refused to grant the IAEA inspectors access to one of their nuclear sites and dismissed IAEA's November concerns because "Iran considered them to be based on unfounded allegations." n328 Most significantly, however, the report shows a dramatic increase in Iran's production of enriched uranium: a nearly 50% increase in Iran's stockpile since the IAEA's November report. n329 Iran already has enough enriched uranium to build four nuclear weapons, should it attempt to build them. n330 The report concludes by stating that the IAEA "is unable ... to conclude that all nuclear material in Iran is in peaceful activities" and "continues to have serious concerns regarding possible military dimensions to Iran's nuclear programme." n331

The summer of **2012 saw an increase in concerns over the volatility of the Israel-Iran situation**. An August 2012 IAEA report revealed that Iran has indeed completed installation of three-quarters of the centrifuges it would need to develop "nuclear fuel" in a deep underground site. n332 Further, Iran has "cleansed" a site that IAEA inspectors suspect was used to conduct "explosive experiments that could be relevant to the production of a nuclear weapon" - such a cleanup impedes the ability of IAEA inspectors to determine what work exactly had been conducted at the site. n333 These IAEA concerns have culminated in an official IAEA resolution, passed on September 13, 2012, that rebukes Iran for the continued development of its nuclear program. n334 The jump in enriched uranium production, coupled with Iran's [\*312] lack of transparency, quite rightly exacerbates international concern about "Iran's march toward nuclear-weapons capability." n335 2. Intention: Iran-Israel Tensions For almost twenty years, **Israel has asserted that Iran poses** an "existential threat" **to Israel**. n336 In 2005, President Mahmoud Ahmadinejad, at a conference entitled "The World without Zionism," made the following statement: Our dear Imam [Ayatollah Ruhollah Khomeini] said that the occupying regime must be wiped off the map and this was a very wise statement. We cannot compromise over the issue of Palestine. Is it possible to create a new front in the heart of an old front. This would be a defeat and whoever accepts the legitimacy of [Israel] has in fact, signed the defeat of the Islamic world. n337 It should be noted, however, that shortly after this speech was posted, it was removed from its original website and Iran's foreign ministry "insisted [Iran] had no intention of attacking Israel." n338 Yet the President himself insisted that his remarks were "just." n339 Ayatollah Khomeini, Iran's supreme religious leader, referred to Israel as a "cancerous tumor." n340 One scholar noted in 1996 that "Israel faces serious and unprecedented danger from Iran" stemming from "that revolutionary Islamic regime's ... unalterable commitment to destruction of the Jewish State." n341 **In Israel, top officials are openly considering** conducting **a** [\*313] preemptive strike **on Iran's nuclear program**. n342 In early November, Israel simulated a "mass-casualty attack," which prompted speculations that Israel was simulating an attack on Iran. n343 In the past, Israeli Prime Minister Benjamin **Netanyahu has asserted** that if the United States does not prevent Iran from acquiring nuclear weapons, "**Israel may be forced to attack Iran's nuclear facilities itself**." n344 More recently, Prime Minister Netanyahu and Ehud Barak, Israel's defense minister, have publicly supported an Israeli preemptive strike against Iran's nuclear program. n345 Barak has outlined three questions that Israel would have to answer in the affirmative to order to preemptively strike Iran: 1. Does Israel have the ability to cause severe damage to Iran's nuclear sites and bring about a major delay in the Iranian nuclear project? And can the military and the Israeli people withstand the inevitable counterattack? 2. Does Israel have overt or tacit support, particularly from America, for carrying out an attack? 3. Have all other possibilities for the containment of Iran's nuclear threat been exhausted, bringing Israel to the point of last resort? If so, is this the last opportunity for an attack? n346 [\*314] While Israeli leaders assert that there is no deadline to make the final decision of whether to strike and assure the public that such a decision is not imminent, Barak warned in January 2012 that "no more than one year remains to stop Iran from obtaining nuclear weaponry." n347 If Israel is to conduct a preemptive strike to take out Iran's nuclear program, they must do so before "Iran's accumulated know-how, raw materials, experience and equipment ... will be such that an attack could not derail the nuclear project." n348 This point in the Iranian nuclear program, when the program enters its "immunity zone," may be reached as early as the fall of 2012. n349 In response to these threats of preemptive strike, **Iran has in turn made threats of its own**. n350 The day after the IAEA released its February report, which indicated extensive developments in Iran's nuclear program, n351 Iran stated that any Israeli attacks on Iranian nuclear installations "will undoubtedly lead to the collapse of the [Zionist] regime." n352 **Iran has threatened retaliation through its long-range missile program**. n353 In November, **Iran also asserted it would attack NATO bases in Turkey if either Israel or the U**nited **S**tates **launched an attack against Iran**. n354 Overall, it appears that Iran does not presently have the capability to employ nuclear weapons, but the prospect of attaining this capability is growing increasingly - and worryingly - likely. Iran's intention to use these weapons against Israel is not definite or transparent, but it is still a possibility. n355 Strikingly, **the clearest Iranian threats against Israel are** seen primarily **in the context of warning Israel of the possibility of** [\*315] **retaliation against an Israeli preemptive strike**. n356 It is in this convoluted history of threat-and-reaction that it is necessary to anticipate whether an Israeli preemptive strike on Iran's nuclear program would be legal or legitimate under modern international law.

C. Analysis

Under a restrictive interpretation of the U.N. Charter, Israel would not be justified in attacking Iran's nuclear program because Iran has not yet conducted an "armed attack." n357 Yet most authorities agree that Israel would be justified in a preemptive strike against Iran if the imminence of an Iranian attack were "clear." n358 An analysis under customary international law's Caroline doctrine provides the foundation to determine whether the possibility of an Iranian nuclear attack on Israel is sufficiently imminent to justify an Israeli preemptive strike. However, as discussed in Part II.A, the present analytical framework under customary international law is vague and difficult to apply. n359 To supplement the traditional Caroline analysis, this comment will also apply the analytical framework proposed by David Sadoff, which offers clear factors to guide an analysis of whether an Israeli preemptive strike would be acceptable under modern international law. n360

1. Customary International Law

The Caroline doctrine, which underlies the customary international law analysis of anticipatory self-defense, has three prongs: necessity, proportionality, and imminence. n361 Assessing the necessity and proportionality prongs of the Caroline doctrine is straightforward for the purposes of this comment. Necessity requires that an action be "necessary to defend ... against an impending attack" and occur only after peaceful measures have [\*316] been exhausted. n362 Successfully defending against a nuclear attack requires, by its very nature, a preemptive strike because an attack would decimate a nation instantly. n363 In addition, it might be argued that peaceful measures have been exhausted if Iran continues its present course of action: non-cooperation with U.N. inspectors and apparent development of nuclear weapons, in contravention of the Non-Proliferation Treaty n364 and in spite of the international pressure of multilateral economic sanctions. Thus, for the purposes of this comment, a preemptive strike to deter the threat of nuclear attack would meet the "necessity" requirement of the Caroline doctrine.

Proportionality requires that action should not exceed what is minimally necessary to respond to a threat. n365 It would be in Israel's diplomatic interests to respond with only the minimum required to avert the threat of nuclear attack. A preemptive strike that neutralizes Iran's nuclear program and does not exceed the immediate threat to Israel to pursue "broader offensive or strategic goals" would satisfy the requirement of proportionality. n366

With the assumption that an Israeli preemptive strike would meet both the necessity and proportionality prongs of a customary international law analysis, this comment focuses on whether the threat posed by Iran is sufficiently imminent to allow an Israeli preemptive strike. As imminence is implicitly fact-based, this comment will compare the present situation to the two incidents that provide the most guidance on whether an act of anticipatory self-defense is justified: the 1967 Six Day War, in which Israel was considered justified in its defensive actions, n367 and the 1981 Israeli attack on Osirak, which was uniformly condemned. n368

As discussed in Part III.B, several threats were present in the [\*317] period leading up to the Six Day War that support the conclusion that the threat of an Egyptian armed attack on Israel was "imminent:" (1) Egypt's troops were mobilized at Israel's border, (2) Egypt was forming military ties with Israel's enemies, (3) Egypt ordered the removal of the U.N. troops who were present for conflict-diffusing purposes, (4) Egypt invoked a blockade on Israel's trade, and (5) the leader of Egypt proclaimed a goal of "destroying" Israel. As Israel's strike on Egypt's troops was generally considered to be legitimate by the international community, it is these factors, taken together, that seem to meet the "imminence" requirement of customary international law.

Israel, taken in the light most favorable to an argument for legitimacy, may face two of these Six Day War factors in the present situation with Iran. First, it is widely reported that Iranian leaders believe that Israel should be "wiped off the map." n369 This is somewhat similar to the threats by Egypt's leader that preceded the Six Day War. n370 However, other than a few well-publicized statements from public leaders, there does not appear to be any further corroborations of an intention to attack Israel. n371

Developing nuclear weapons, because of their first-strike capabilities, may be tantamount to a mobilization of troops. With nuclear capability, Iran would be able to attack Israel as swiftly as if it had a legion of troops on Israel's border. However, the mobilization of troops in the Six Day War was a threat that was unique to Israel, due to the geographical nature of the region. n372 Comparatively, there is no strong tie between Iran's nuclear program and Israel that would indicate that such a "mobilization," if it were to be considered such, would be specifically targeting Israel. The only tie that could conceivably serve as such a link is Iran's professed hatred of the Jewish state. n373 However, the remaining three factors from the Six Day War - developing [\*318] regional military ties, a blockade, and the removal of U.N. troops - are not present. The absence of these factors indicates that the threat currently posed by Iran only moderately resembles the threat posed by Egypt preceding the Six Day War.

The present situation between Israel and Iran more closely resembles Israel's attack on the Osirak reactor in 1981, which was widely regarded as an unacceptable use of force under customary international law. n374 Several factors that were considered to be insufficient to justify an act of anticipatory self-defense are present here: the development of nuclear weapons and the attendant risk of a nuclear first strike; IAEA reports indicating that Iran's nuclear program are quite possibly directed towards the development of nuclear weapons; and a high production of enriched uranium that could be intended for use in nuclear weapons. n375 However, the IAEA reports and the vast quantities of enriched uranium indicate that there may an even stronger argument for an "imminent attack" by Iran today.

The presence of these factors, without more, does not rise to the "imminence" seen in the Six Day War. First, two factors articulated by Professor Greenwood are not definitively present: n376 possession of weapons and an intention to use these weapons. The IAEA has not reported that Iran actually has, or will soon have, nuclear weapons; it merely suggests that there may be military dimensions to the nuclear program. n377 Second, though it seems clear that Iranian leaders would prefer that Israel not exist, this does not necessarily equate to an "intention" to use nuclear weapons - should they come into Iran's possession - against the Israeli state.

While Israel may have a stronger argument for imminence today than it did in 1981, the present situation bears much stronger resemblance to the 1981 Osirak incident, where imminence was clearly not found, than to the 1967 Six Day War. As the Iranian threat against Israel does not rise to the imminence required by the Caroline doctrine, an Israeli preemptive strike against Iran would not be legal under customary international law.

 [\*319]

2. Sadoff's Framework

The analytical framework proposed by David Sadoff offers an analysis of anticipatory self-defense that is significanltly less vague than analysis available under customary international law. The first component of Sadoff's framework, properly gauging the threat, is precisely the task undertaken by this comment. Sadoff's framework breaks down this component in a way that reflects and clarifies the "imminence" analysis of the Caroline doctrine. This framework analyzes the factors of (a) the nature and scale, (b) the likelihood, and (c) the timing of the threat to determine whether a threat would be sufficiently imminent to justify an act of anticipatory self-defense. n378

First, assessing the nature and scale of an Iranian nuclear attack is fairly straightforward. Israel fears facing the threat of "first strike" nuclear attack, which would leave little or no time for Israel to respond defensively once launched. n379 Israel would likely receive little to no warning of a nuclear launch. Such an attack could decimate the entirety of the Israeli state. The nature and scale of the threat is likely the gravest threat imaginable.

The "likelihood" of the attack, however, is much more ambiguous. First, the statements by Iranian leaders that demonstrate a desire to see Israel "wiped off the map," n380 though troubling, do not seem to effectively constitute a "public expression" of a "will to attack." n381 The intent of the attacker here is couched in public rhetoric. Though there are strong ideological tensions embodied in Israeli-Arab conflict that engulf the entirety of the Middle East. n382 There is little doubt that Iranian leaders would be happy to have a world without the Israeli state, this does not indicate a clear intention to launch an attack. Second, Iran does not presently have the capacity to mount the attack. n383 Though Iran is possibly on the path to achieving this capacity, n384 it [\*320] is not synonymous with being on the path to actually using nuclear weapons against Israel. There does not seem to be any certainty that a nuclear attack on Israel will occur. Thus, the present situation is not a matter of when, but of if. n385 Third, Sadoff's framework considers the international community's reaction to a nuclear attack on Israel. n386 Such a reaction would be extremely condemnatory, and would likely deter such an attack. Though Iran expresses strong anti-Israel sentiments, it has not outwardly expressed any intention to attack and does not presently have the capacity to attack.

The third factor in gauging the threat, timing, is interspersed with the likelihood factor. Sadoff suggests similar questions for the assessment of these two components. n387 This seems appropriate. If an attack is not very likely to occur, then it is moot to consider whether the timing of an attack is sufficiently immediate to justify a pre-emptive strike.

3. Considerations

Under the analyses of both the customary international law and Sadoff's frameworks, an Israeli preemptive strike on Iran would be neither legitimate nor legal. The legality afforded by the Caroline doctrine is restricted to situations where the threat of attack is imminent and the use of force employed to defend is necessary and proportionate to the threat posed. n388 Though a threat of nuclear attack would be very serious, such a threat from Iran is not presently imminent. Yet if a nuclear threat were to become "imminent" under the Caroline doctrine or "likely" under the Sadoff framework, using preemptive force to deter an attack would be justified.

Also significant to the Caroline doctrine's approach is that there are more options available to Israel than just using force. First, Israel has the option of appealing to the U.N. Security [\*321] Council, which may authorize the preemptive use of force through its Chapter VII authority. n389 Second, **the use of diplomatic pressure and international sanctions by Israel's allies** n390 **has not been exhausted, and may yet** prove successful **in subduing Iran as a nuclear threat**. **The evidence that the economic sanctions are having an effect on Ira**n, though sparking worry in some due to concerns the leaders may be acting more erratically, n391 **is actually a strong indicator that** alternatives to using force are working. VI. Conclusion There are several problems in the traditional customary international law framework of analyzing necessity, proportionality, and imminence to evaluate uses of force in anticipatory self-defense. First, the rules that govern use of force must be generally known. n392 The expansivist-restrictionist doctrinal debate concerning the strict legality of anticipatory self-defense under Article 51 creates ambiguity inunderstandings of the law. This ambiguity **undermines the ability of the international community to reach consensus in condemning or endorsing uses of force in anticipation of an armed attack**. Yet the solution cannot be found in choosing one side over the other. On one hand, adopting the restrictivist approach to Article 51 of the U.N. Charter and precluding the legality of using force in any instance not first preceded by an "armed attack" would leave nations vulnerable to first strikes that threaten state survival. n393 On the other hand, **adopting** the expansivist approach can leave too much room for using force in self-defense **where there is no actual imminence of a threatened attack**. n394

 [\*322] Second, the rules that govern use of force must be generally accepted. The current legal framework is unsuited to the realities of modern warfare, where weapons of mass destruction carry first-strike capabilities that leave no opportunity for self-defense. Modern international law must have the flexibility to recognize the right of a state to use preemptive force when it is the only defense available against an attack threatening the state's very existence. Without this flexibility, the legal order loses legitimacy. Without general acceptance of the laws that should bind, these laws lose their normative and prescriptive value. n395

Expansive overhaul of the modern international legal order is not the solution. Customary international law is established by the general practices of states, which in turn generates a collective sense of legal obligation. n396 If changes to modern international law occur too quickly and in too high a degree, it will be even more difficult for laws to be generally known. Another risk is that any large overhaul may favor the large, powerful states at the expense of states with less influence. n397 The solution should be incremental changes to the existing legal framework. This would allow the law to retain its normative value that would favor all states as equal entities under the law. Incremental changes would also allow the law to develop at a pace with which international consensus can keep up.

Incorporating legitimacy into modern international law is a priority. Legitimacy ensures the general acceptance necessary to sustain a legal order. The criteria suggested by the U.N. High-Level Panel on Threats, Challenges and Change is a good starting point. n398 The Panel encourages the U.N. Security Council to address these criteria when deciding whether to authorize or endorse the use of military force in anticipatory self-defense. n399 However, the U.N. should affirmatively endorse consideration of these criteria to member-states and to intergovernmental [\*323] organizations charged with moderating international use of force. n400 In addition, modern law should formally incorporate consideration of the normative views of both state actors and non-state actors, including the nongovernmental organizations and the press.

Furthermore, the international community needs predictability and transparency in modern international law to assure legitimacy. A clear, practicable framework for the evaluation of uses of force must be adopted. The framework proposed by David Sadoff would be a good candidate. His proposal incorporates the traditional Caroline model of analysis while also including a mode of assessment of modern day considerations, such as nuclear threats. n401 The framework lists numerous factors to consider when gauging the severity of a threat. Factors such as these will help create a clear method to evaluate use of force, which will result in predictability and transparency in future evaluations.

Under both traditional and alternative analyses, Israel would not be **presently justified** to preemptively strike Iran's nuclear program. Under the customary international law analysis, Israel would not be justified because the threat is not yet imminent: Iran has not demonstrated a clear intent to attack Israel and does not yet have the capability to carry out a nuclear attack. Under Sadoff's proposed framework, Israel would not be justified for many of the same reasons: there is not a sufficient likelihood that an attack would occur. There is room**, however,** for Israel to justify a preemptive strike **under the "preventive" self-defense approach, in which a preemptive strike may occur though the threat is more temporally removed.** n402 This demonstrates the danger inherent in adopting such an approach, which discounts the importance of anticipatory force being used only as a "last resort." An approach that strays too far from existing modern law norms runs the risk of endorsing actions that would be widely viewed as illegitimate. n403 [\*324] An additional consideration is that under a legitimacy argument, the danger that a nuclear Iran poses to global peace and security may be enough to justify a preemptive strike in order to ensure global security. Many nations have indeed spoken out against Iran's development of nuclear weapons. By several accounts, a nuclear-capable Iran would be a serious threat to the entire Middle East region and the world. n404 For example, Algerian ministers claim that once Iran achieves nuclear capability, they will share the technology with "its fellow Muslim nations." n405 **However**, this danger should not be addressed by the unilateral assessment of a paternalistic nation, such as the United States. If the threat Iran poses to global security warrants a preemptive strike, then multilateral action by the U.N. Security Council should be taken. n406 In conclusion, though it is tempting to simply "rewrite the rules" to adapt the traditional international laws to address modern day threats, **doing so would disrupt the international legal order.** **Deficiencies in the modern legal framework should be addressed** incrementally, **with** a priority given to **incorporating legitimacy and creating clear, practicable standards to evaluate use of force in anticipatory self-defense**. Such a framework would clarify the [\*325] present illegitimacy and illegality of an Israeli strike on Iran's nuclear program. Wide recognition of the illegitimacy of a strike would lead to international condemnation, thus foiling the trigger that would lead the world into World War III.

No Israeli strike regardless of deal collapse

Keck 11/28/13

Zachary, associate editor of The Diplomat, “Five Reasons Israel Won't Attack Iran,” http://nationalinterest.org/print/commentary/five-reasons-israel-wont-attack-iran-9469

Although not a member of the P5+1 itself, Israel has always loomed large over the negotiations concerning Iran’s nuclear program. For example, in explaining French opposition to a possible nuclear deal earlier this month, French Foreign Minister Laurent Fabius [3]stated [3]: “The security concerns of Israel and all the countries of the region have to be taken into account.” Part of Fabius’ concern derives from the long-held fear that Israel will launch a preventive strike against Iran to prevent it from obtaining nuclear weapons. For some, this possibility remains all too real despite the important interim agreement the P5+1 and Iran reached this weekend. For example, when asked on ABC’s This Week whether Israel would attack Iran while the interim deal is in place, [4]William Kristol responded [4]: “I don't think the prime minister will think he is constrained by the U.S. deciding to have a six-month deal. […] six months, one year, I mean, if they're going to break out, they're going to break out.” Israeli prime minister Benjamin Netanyahu has done little to dispel this notion. Besides blasting the deal as a “historic mistake,” Netanyahu said [5] Israel “is not obliged to the agreement” and warned “the regime in Iran is dedicated to destroying Israel and Israel has the right and obligation to defend itself with its own forces against every threat.” **Many dismiss this talk as bluster, however**. Over at Bloomberg View, for instance, Jeffrey Goldberg [6]argues that the [6] nuclear deal has “boxed-in Israeli Prime Minister Benjamin Netanyahu so comprehensively that it's unimaginable Israel will strike Iran in the foreseeable future.” Eurasia Group's Cliff Kupchan similarly argued: “The chance of Israeli strikes during the period of the interim agreement drops to virtually zero.” Although the interim deal does further reduce Israel’s propensity to attack, the truth is that the likelihood of an Israeli strike on Iran’s nuclear facilities has always been greatly exaggerated. There are at least five reasons why Israel isn’t likely to attack Iran. 1. You Snooze, You Lose First, if Israel was going to strike Iran’s nuclear facilities, **it would have done so a long time ago.** Since getting caught off-guard at the beginning of the Yom Kippur War in 1973, Israel has generally acted proactively to thwart security threats. On no issue has this been truer than with **nuclear-weapon programs**. For example, Israel bombed Saddam Hussein’s program when it consisted of just a single nuclear reactor. [7]According to [7]ABC News [7], Israel struck Syria’s lone nuclear reactor just months after discovering it. The IAEA had been completely in the dark about the reactor, and took years to confirm the building was in fact housing one. Contrast this with Israel’s policy toward Iran’s nuclear program. The uranium-enrichment facility in Natanz and the heavy-water reactor at Arak first became public knowledge in 2002. For more than a decade now, Tel Aviv has watched as the program has expanded into two fully operational nuclear facilities, a budding nuclear-research reactor, and countless other well-protected and -dispersed sites. Furthermore, America’s [8]**extreme reluctance to** [8] **initiate strikes** on Iran was made clear to Israel at least as far back as 2008. It would be **completely at odds** with how Israel operates for it to standby until the last minute when faced with what it views as an existential threat. 2. Bombing Iran Makes an Iranian Bomb More Likely Much like a U.S. strike, only with much less tactical impact, an Israeli air strike against Iran’s nuclear facilities would only increase the likelihood that Iran would build the bomb. At home, Supreme Leader Ali Khamenei could use the attack to justify rescinding his fatwa against possessing a nuclear-weapons program, while using the greater domestic support for the regime and the nuclear program to mobilize greater resources for the country’s nuclear efforts. Israel’s attack would also give the Iranian regime a legitimate (in much of the world’s eyes) reason to withdraw from the Nuclear Non-Proliferation Treaty (NPT) and kick out international inspectors. If Tehran’s membership didn’t even prevent it from being attacked, how could it justify staying in the regime? Finally, support for international sanctions will crumble in the aftermath of an Israeli attack, giving Iran more resources with which to rebuild its nuclear facilities. 3. Helps Iran, Hurts Israel Relatedly, an Israeli strike on Iran’s nuclear program would be a net gain for Iran and a huge loss for Tel Aviv. Iran could use the strike to regain its popularity with the Arab street and increase the pressure against Arab rulers. As noted above, it would also lead to international sanctions collapsing, and an outpouring of sympathy for Iran in many countries around the world. Meanwhile, a strike on Iran’s nuclear facilities would leave Israel in a far worse-off position. Were Iran to respond by attacking U.S. regional assets, this could greatly hurt Israel’s ties with the United States at both the elite and mass levels. Indeed, a war-weary American public is adamantly opposed to its own leaders dragging it into another conflict in the Middle East. Americans would be even more hostile to an ally taking actions that they fully understood would put the U.S. in danger. Furthermore, the quiet but growing cooperation Israel is enjoying with Sunni Arab nations against Iran would **evaporate overnight**. Even though many of the political elites in these countries would secretly support Israel’s action, their explosive domestic situations would force them to distance themselves from Tel Aviv for an extended period of time. Israel’s reputation would also take a further blow in Europe and Asia, neither of which would soon forgive Tel Aviv. 4. Israel’s Veto Players Although Netanyahu may be ready to attack Iran’s nuclear facilities, he operates **within a democracy** **with a strong elite structure,** particularly in the field of national security. It seems unlikely that he would **have enough elite support for him to** seriously consider such a daring and risky operation. For one thing, Israel has **strong institutional checks on using military force**. As then vice prime minister and current defense minister Moshe Yaalon [9]explained last year [9]: “In the State of Israel, any process of a military operation, and any military move, undergoes the approval of the security cabinet and in certain cases, the full cabinet… the decision is not made by two people, nor three, nor eight**.” It’s far from clear Netanyahu,** a fairly divisive figure in Israeli politics, **could gain this support**. In fact, Menachem Begin struggled to gain sufficient support for the 1981 attack on Iraq even though Baghdad presented a more clear and present danger to Israel than Iran does today. What is clearer is that **Netanyahu lacks** the **support of much of Israel’s highly respected national security establishment**. Many former top intelligence and military officials [10]have spoken [10] out publicly against Netanyahu’s hardline Iran policy, with at least one of them questioning whether Iran is actually seeking a nuclear weapon. Another former chief of staff of the Israeli Defense Forces told [11] The Independent that, “It is quite clear that much if not all of the IDF [Israeli Defence Forces] leadership **do not support military action** at this point…. **In the past the advice of the head of the IDF and the head of Mossad had led to military action being stopped**.”

The fight is over—only deal failure could cause sanctions, and PC isn’t key

Peter Weber, The Week, 1/30/14, What sank the Senate's Iran sanctions bill?, theweek.com/article/index/255771/what-sank-the-senates-iran-sanctions-bill

With the list of Democratic cosponsors willing to vote for the bill shrinking by five, the dream of a veto-proof majority in the next six months appears to be dead**. Even Republican supporters of the legislation are pessimistic** of its chances: "Is there support to override a veto?" Sen. Jim Inhofe (R-Okla.), the top Republican on the Senate Armed Services Committee, told National Journal on Wednesday. "I say, 'No.'"

So, what happened to the Iran sanctions bill? The short version: Time, pressure, and journalism.

The journalism category encompasses two points: First, reporters actually read the legislation, and it doesn't quite match up with the claims of lead sponsors Sen. Robert Menendez (D-N.J.) and Sen. Mark Kirk (R-Ill.), who say the sanctions would only take effect if Iran was found to be negotiating in bad faith. A much-cited analysis by Edward Levine at the Center for Arms Control and Non-Proliferation showed that the Iran sanctions would kick in unless Obama certified a list of impossible or deal-breaking conditions.

Journalists also started asking the cosponsors about their intentions. It's possible there were never 59 votes for the bill, but the legislation was filed right before Christmas and many reporters (not unreasonably) conflated cosponsorship with support for the bill, regardless of what was happening with the negotiations. They only asked on Tuesday night and Wednesday because Obama brought up the issue in his State of the Union speech.

Time without action always saps momentum, but with the Iran sanctions bill it also allowed events to catch up with the proponents of new sanctions. When they filed the bill Dec. 20, the interim Iran deal was just a talking point; a month later it was reality. The Obama administration, U.S. intelligence community, and outside analysts agree that new sanctions would scuttle the deal, and its harder to take that risk when that deal is in effect.

Finally, critics of the bill — including the White House and J Street, the liberal pro-Israel lobbying group — had time to mount a counterattack. Starting Jan. 6, J Street and other groups opposed to the legislation "reached out to senators who were on the fence and senators who'd cosponsored on day one," says Slate's David Weigel. "The message was the same: Have you guys read this thing?" Dylan William, J Street's director of government relations, describes the strategy in more depth:

We made especially prodigious use of our grass tops activists. These are people who have longstanding relationships with members of Congress to express two things. One: The bill is bad policy. Two: There was no political reason that these senators should feel they need to support the bill. There is deep political support in communities for members of Congress and senators who want to reserve this peaceably. [Slate]

So take a bow, J Street — for now, the David of the Israel lobby has slain its Goliath, the American Israel Public Affairs Committee (AIPAC), which is pushing for the legislation. **That could** all change if the interim Iran deal falls apart or some other event intercedes to change the equation for lawmakers. But momentum is hard to un-stall, **and lawmakers are now considering** changing the bill **into a non-binding resolution**.

Obama exerting capital on Iran ensures the sanction bill passes

Patrick Clawson, Washington Institute for Near East Research Director, 1/17/14, Why are congressional Democrats considering new Iran sanctions?, www.bbc.co.uk/news/world-us-canada-25749219

This week President Barack Obama met congressional Democrats, asking them to vote against sanctions on Iran and support continued negotiation.

But the administration's overtures may be too little, too late.

In a highly partisan atmosphere and with mid-term elections coming later this year, it would be very difficult for Democrats to go against a president of their own party, especially on foreign policy - an area where Congress mostly defers to the president.

That is particularly true when the president speaks repeatedly and publicly about the inappropriateness of the action Congress is considering.

But Mr **Obama's team is doing an impressive job of encouraging congressional Democrats to hand the president a stinging defeat**: namely, to pass legislation about the Iran nuclear negotiations which Mr Obama has described as sure to torpedo those talks.

'War'

The Obama team accuses those with whom they disagree of wanting war, posing the issue as: negotiate, or pass the legislation and leave war as the only option.

That enrages many in Congress who point out that the administration repeatedly opposed past congressional sanction initiatives and then, after those sanctions were enacted, went on to describe those sanctions as key elements in persuading Iran to come to the negotiating table.

Some in Congress suspect that the same dynamic seen over the last several years would apply to this new bill: the administration would strongly oppose it while it was under debate, and then once it was passed, would shift position 180 degrees to describe the new congressionally mandated pressure on Iran as central to persuading Iran to become more accommodating.

Bad cop?

In other words, most if not all of the congressional supporters of the proposed legislation see what they are doing as adding to US leverage in the negotiations.

Many of them think that they are playing the bad cop to the Obama administration's good cop in a way very similar to how Iranian Foreign Minister Javad Zarif and Iranian President Hassan Rouhani play the good cop to Supreme Leader Ayatollah Ali Khamenei's bad cop.

Each side can say to the other: "You have to help me do a deal I can sell to the hardliners who have much power in my country."

Perhaps this time, unlike the previous several times when Congress adopted sanctions legislation over the objections of the White House, the new measures would actually hurt the negotiations.

But Congress is not well-disposed to believe the administration's protestations that this is the case.

Personal relations

It does not help that **this comes against a background of congressional Democrats often being unhappy about** a perceived **lack of co-ordination and co-operation with the White House on a wide range of issues**, such as how to respond when the healthcare rollout had so many problems.

Mr Obama does not have the strong personal relations with Congress members that some past presidents had, nor has he established consistently effective means for working out deals with Congress.

Further **infuriating** some of the congressional sponsors has been the Obama team's strong public stance about how Iran is sure to react to the bill if passed. This seems like a self-fulfilling prophecy.

After all, if President Obama predicts Iran will strenuously object if the bill becomes law, that puts Zarif and Rouhani in a position where they must react strongly or else they will attract domestic criticism.

In fact, they must show that they are taking an even tougher stance than Mr Obama predicts they will.

This dynamic has been seen before in Obama Middle East policy.

Criticism

When President Obama said that Palestinian-Israeli peace talks could continue only if Israel froze settlement activities, that put Palestinian Authority Chairman Mahmoud Abbas into a position where he had to be firmer than Obama on the issue of settlements, even though many analysts have suggested that prior to Obama's statement he was willing to proceed even if settlement activity continued.

He had seemed to care at least as much or more about Israeli release of Palestinian prisoners.

Many in Congress have been highly critical in private of President Obama's stance on the settlement issue - which did not in fact bring an end to settlements and which long impeded the resumption of Palestinian-Israeli talks - and they see the president's stance on the Iran sanctions legislation as repeating the same mistake.

Tough sell

Compounding the problem, the Obama team has not engaged with Congress about how to craft a more acceptable bill, instead gambling on killing the bill.

Having put so much energy into the issue, congressional supporters of the legislation want to be able to show they accomplished something: they need to be able to vote in favour of a bill that they can claim preserves their core objectives.

If the Obama team insists that instead these members of Congress fall on their sword for the president, **that is a tough sell**.

Obama will use unilateral sanctions relief—solves

Adam Kredo, 1/21/14, White House Seeks to Bypass Congress on Iran Deal, freebeacon.com/white-house-seeks-to-bypass-congress-on-iran-deal/

The White House has been exploring ways to circumvent Congress and unilaterally lift sanctions on Iran once a final nuclear agreement is reached, according to sources with knowledge of White House conversations and congressional insiders familiar with its strategy.

The issue of sanctions relief has become one of the key sticking points in the Iran debate, with lawmakers pushing for increased economic penalties and the White House fighting to roll back regulations.

While many in Congress insist that only the legislative branch can legally repeal sanctions, senior White House officials have been examining strategies to skirt Congress, according to those familiar with internal conversations.

Sen. Mark Kirk (R., Ill.), who is leading the charge on new sanctions legislation, said that it is unacceptable for the White House to try to bypass Congress on such a critical global issue.

“The American people must get a say in any final nuclear agreement with Iran to ensure the mullahs never get the bomb,” Kirk told the Washington Free Beacon. “The administration cannot just ignore U.S. law and lift sanctions unilaterally.”

Congressional insiders say that the White House is worried Congress will exert oversight of the deal and demand tougher nuclear restrictions on Tehran in exchange for sanctions relief.

Top White House aides have been “talking about ways to do that [lift sanctions] without Congress and we have no idea yet what that means,” said one senior congressional aide who works on sanctions. “They’re looking for a way to lift them by fiat, overrule U.S. law, drive over the sanctions, and declare that they are lifted.”

Under the interim nuclear deal with Iran that began on Monday, Tehran will receive more than $4 billion in cash, according to the White House.

President Barack Obama could unilaterally unravel sanctions through several executive channels, according to former government officials and legal experts.

Executive orders grant the president significant leverage in the how sanctions are implemented, meaning that Obama could choose to stop enforcing many of the laws on the books, according to government insiders.

Those familiar with the ins and outs of sanctions enforcement say that the White House has long been lax with its enforcement of sanctions regulations already on the books.

“It’s no secret that the president, with executive power, can determine sanctions implementation, particularly with waivers and the decision not to sanction certain entities,” said Jonathan Schanzer, a former terrorism finance analyst at the Treasury Department, which is responsible for enforcing sanctions.

“The financial pressure has always been about closing loopholes and identifying new ones to close,” Schanzer added. “If you stop that process of constant gardening, you leave a backdoor open.”

Obama could also use executive waivers to “bypass restrictions imposed by the law,” according to a report by Patrick Clawson, director of research at the Washington Institute for Near East Policy (WINEP).

The president has a lot of leverage when it comes to sanctions and could effectively “turn a blind eye” to Iranian infractions.

“In the case of Iran, such an approach could allow Washington to reach a nuclear accord without Congress having to vote on rescinding, even temporarily or conditionally, certain sanctions,” Clawson wrote. “No matter how stiff and far-reaching sanctions may be as embodied in U.S. law, they would have less bite if the administration stopped enforcing them.”

One former senior government official said that President Obama’s legal team has likely been investigating the issue for quite some time.

“I’d be shocked if they weren’t putting the various sanctions laws under a microscope to see how they can waive them or work around them in order to deliver to Iran sanctions relief without having to worry about Congress standing in their way,” said Stephen Rademaker, who served as deputy legal adviser to former President George H.W. Bush’s National Security Council (NSC).

Executive branch lawyers are often tasked with finding ways to get around existing legislation, Rademaker said.

“I’m sure pretty early in the negotiating process they developed a roadmap” to ensure the president has the authority to promise Iran significant relief from sanctions, said Rademaker, who also served as chief council for the House Committee on International Relations. “I’m sure they’ve come up with an in depth analysis of what they can do relying exclusively on the president’s legal authority.”

The White House has been known to disregard portions of the sanctions laws that it disagrees with, according to Schanzer.

Obama is losing on everything

Burgess Everett, Politico, 2/2/14, Senate Democrats break from Obama, dyn.politico.com/printstory.cfm?uuid=1BC854A8-79FC-43EE-BA31-4380D15841E4

President Barack Obama is counting on Senate Democrats to help approve his legislative agenda during his final years in office. And though they are his staunchest allies on most economic issues, many Democratic senators are breaking with him on key issues in very public ways. From trade to Iran sanctions, the Keystone XL pipeline, Obamacare, the National Security Agency and energy policy, Senate Democrats seem unusually comfortable criticizing the president, with only minimal concerns about repercussions from the White House. Even Obama’s steadfast ally, Senate Majority Leader Harry Reid of Nevada, didn’t mince words last week when he rejected a bill to fast-track trade deals that is strongly backed by the White House, working against Senate Finance Committee Chairman Max Baucus of Montana, a Senate colleague who has been tapped to be the president’s ambassador to China. Even some Republicans are noticing. “You had two or three Democrats in the Senate who made statements after the president’s State of the Union speech that wouldn’t have been written any different if they had been written by the [National] Republican Senatorial Committee,” said Sen. Roy Blunt (R-Mo.), referring to the Senate GOP campaign arm’s aggressive anti-Obama messaging. Blunt was referring to discontented Democrats like Sen. Joe Manchin of West Virginia, who insists that Obama misspoke during his State of the Union speech when he told Congress that he will work with lawmakers when he can — and go around them if he can’t. “I don’t think that’s what he meant. I swear to God I don’t,” Manchin said in an interview. “Could he have picked these words better? I would have thought he could have, I would have hoped he would have. But it came out offensive to a lot of people.” For some lawmakers, the criticism is predictable: Democrats from energy-producing states are likely to whack the administration’s energy policies and red-state Democrats up for reelection in 2014 are worried about Obamacare fallout. In some instances, the contrasts between vulnerable Senate Democrats and the White House appear to be orchestrated to counter Obama’s low approval rates in red states where incumbents will face voters this fall, congressional aides in both parties suggest. But not all the criticism is coming from expected quarters. Liberal Democrats have decried NSA surveillance programs, and Democrats not up for reelection for years seem perfectly at ease clashing with the White House. “I think the framers did an incredible job of finding the right balance, so, we’ve gotten away from that. And when we get back to that, my outspokenness will diminish,” said freshman Sen. Martin Heinrich (D-N.M.), a persistent critic of the White House on NSA policy. The rifts might represent nothing more than bad message coordination and a White House that doesn’t do enough to keep Capitol Hill in the loop. President Barack Obama does not have terribly close personal relationships with most Democratic lawmakers, and his legislative affairs shop was riddled with Capitol Hill criticism until the recent addition of longtime Hill staffer Katie Beirne Fallon. “This White House has been very, how shall I say, it’s not their strong suit to give anybody a heads-up on anything,” said Sen. Mary Landrieu (D-La.) of Obama’s outreach to Democratic senators. Landrieu — who is up for reelection this year — was angered recently by a surprise Statement of Administration Policy ripping her flood insurance bill, which would ease rate increases that would disproportionately hit flood-prone Louisiana. Obama’s aides indicated the bill is not sound fiscal policy, though they notably did not threaten a veto of her bill. “I believe in many of the principles of the Democratic Party. But I stay focused on the issues that are important to Louisiana. And when the president is for Louisiana, I’m for the president. When he’s not, I’m not,” Landrieu said. “That statement from them was unsolicited, it was unexpected and it was misguided.” The Senate-White House fractures don’t yet extend to the key 2014 issues of income inequality and the economy. Democrats and the White House are united on raising the minimum wage, extending expired unemployment benefits and lifting the debt ceiling, items their party hopes to make bedrock issues during a campaign year. But beneath the surface of party unity, Democratic critics appear not to think twice before criticizing Obama nearly everywhere else he turns.

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**War turns it**

**Goldstein 2k2** (Joshua S., Professor Emeritus of International Relations, American University (Washington, DC) Research Scholar, University of Massachusetts and Nonresident Sadat Senior Fellow, CIDCM, University of Maryland, War and Gender , P. 412 2k2)

First, peace activists face a dilemma in thinking about causes of war and working for peace. Many peace scholars and activists support the approach, “if you want peace, work for justice”. Then if one believes that sexism contributes to war, one can work for gender justice specifically (perhaps among others) in order to pursue peace. This approach brings strategic allies to the peace movement (women, labor, minorities), but rests on the assumption that injustices cause war. The evidence in this book suggests that causality runs at least as strongly the other way. War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influences wars’ outbreaks and outcomes. Rather, war has in part fueled and sustained these and other injustices. So, “if you want peace, work for peace.” Indeed, if you want justice (gener and others), work for peace. Causality does not run just upward through the levels of analysis from types of individuals, societies, and governments up to war. It runs downward too. Enloe suggests that changes in attitudes toward war and the military may be the most important way to “reverse women’s oppression/” The dilemma is that peace work focused on justice brings to the peace movement energy, allies and moral grounding, yet, in light of this book’s evidence, the emphasis on injustice as the main cause of war seems to be empirically inadequate.

## CP

CP doesn’t resolve clarity in the law—Congress will make decisions on an ad hoc basis-no global signal and destroys operations

Druck, JD – Cornell Law, ‘12

(Judah, 98 Cornell L. Rev. 209)

Of course, despite these various suits, Congress has received much of the blame for the WPR's treatment and failures. For example, Congress has been criticized for doing little to enforce the WPR in using other Article I tools, such as the "power of the purse," n76 or by closing the loopholes frequently used by presidents to avoid the WPR [\*221] in the first place. n77 Furthermore, in those situations where Congress has decided to act, it has done so in such a disjointed manner as to render any possible check on the President useless. For example, during President Reagan's invasion of Grenada, Congress failed to reach an agreement to declare the WPR's sixty-day clock operative, n78 and later faced similar "dead-lock" in deciding how best to respond to President Reagan's actions in the Persian Gulf, eventually settling for a bill that reflected congressional "ambivalence." n79 Thus, between the lack of a "backbone" to check rogue presidential action and general ineptitude when it actually decides to act, n80 Congress has demonstrated its inability to remedy WPR violations. Worse yet, much of Congress's interest in the WPR is politically motivated, leading to inconsistent review of presi-dential military decisions filled with post-hoc rationalizations. Given the political risk associated with wartime deci-sions, n81 Congress lacks any incentive to act unless and until it can gauge public reaction - a process that often occurs after the fact. n82 As a result, missions deemed successful by the public will rarely provoke "serious congressional con-cern" about presidential compliance with the WPR, while failures will draw scrutiny. n83 For example, in the case of the Mayaguez, "liberals in the Congress generally praised [President Gerald Ford's] performance" despite the constitutional questions surrounding the conflict, simply because the [\*222] public deemed it a success. n84 Thus, even if Congress was effective at checking potentially unconstitutional presidential action, it would only act when politically safe to do so. This result should be unsurprising: making a wartime decision provides little advantage for politicians, especially if the resulting action succeeds. n85 Consequently, Congress itself has taken a role in the continued disregard for WPR enforcement. The current WPR framework is broken: presidents avoid it, courts will not rule on it, and Congress will not enforce it. This cycle has culminated in President Obama's recent use of force in Libya, which created little, if any, controversy, n86 and it provides a clear pass to future presidents, judges, and congresspersons looking to continue the system of pas-sivity and deferment.

Clarity key to law of war

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2/25/13, Learning to Live with (a Little) Uncertainty: The Operational Aspects and Consequences of the Geography of Conflict Debate, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2224088&download=yes

A central focus of debate for more than a decade has been how to apply LOAC to conflicts with terrorist groups—from how to define the conflict to how to implement the principle of distinction to the content of law of war detention. The very application of LOAC to military operations against terrorist operatives or groups depends, as the essential preliminary consideration, on the existence of an armed conflict.19 Notwithstanding the complexities of these determinations in the context of efforts to combat transnational terrorist groups, **LOAC continues to rely on** clear **and objective standards to assess when the law applies**. **Effective implementation of LOAC depends on** the clarity of the legal principles, their application during the heat of battle, and their credible application post hoc in investigations and prosecutions. Moreover, commanders and their troops can best adhere to the law and carry out its central tenets when the law and the obligations it imposes are predictable and operationally logical.

## iran

Dem support collapsing

Justin Sink, 2/3/14, High anxiety for Obama and Democrats , thehill.com/homenews/administration/197336-high-anxiety-as-dems-obama-plot-14-strategy

A mood of anxiety hangs over President Obama and congressional Democrats as they conduct a series of meetings this week to coordinate their 2014 political and legislative agendas.

While their outlook has improved since last fall, Democrats on Capitol Hill are worried the party is in danger of repeating its disastrous midterm performance of 2010 — and that this time, it could cost them the Senate.

 “Let’s face it, not everyone is on the same page,” said one senior Democratic aide.

While the White House and congressional Democrats have sought to present a unified front on raising the minimum wage and extending federal unemployment benefits, divisions over an array of issues including trade, the Keystone XL oil pipeline and how to contain Iran have repeatedly burst to the surface.

That’s made it difficult to calm tempers still hot over the bumbled rollout of ObamaCare.

“Some people are still furious about what went down in [the fall] with healthcare and some of the NSA elements,” said the senior Democratic aide, referring to the National Security Agency.

Obama will have his work cut out for him when he meets House Democrats on Tuesday and Senate Democrats on Wednesday, other aides said.

“I think the president is going to need to do some things to ease the fears of the 2014ers,” another Democratic aide said. “He’s going to have to say some things that get rid of some of the consternation there. I think the State of the Union address was a good start, but it’s not enough.”

The differences go beyond policies too.

Democrats resent Obama’s lack of engagement with Capitol Hill and the amount of time he has spent fundraising for party committees ahead of a difficult 2014 cycle.

Sinks the entire agenda

Jason Pye, 1/21/14, Gallup: Obama’s approval rating hit second-lowest mark of presidency, www.unitedliberty.org/articles/16290-gallup-obamas-approval-rating-hit-second-lowest-mark-of-presidency

Barack Obama’s average yearly approval rating fell to the second-lowest point in his fifth year in office, according to a report released this morning by Gallup, and the final quarter of 2013 nearly matched the lowest of his presidency. Consumed by scandal and controversy, the first year of President Obama second-term in office was a quite a struggle, to say the least, with the White House frequently playing defense. In May, for example, it was revealed that the Internal Revenue Service (IRS) had improperly targets conservative groups seeking nonprofit status. The following month, in June, the public learned that the National Security Agency (NSA) was collecting phone records of virtually every Americans for domestic surveillance purposes. In the fall, controversy arose over the disastrous Obamacare rollout and millions of health plan cancellations caused by the law, despite frequent assurances from President Obama that Americans could keep their current coverage. In his fifth year in office, President Obama averaged an approval rating of 45.8%, according to Gallup, the second-lowest point of his presidency. Gallup based the results on more than 175,000 interviews conducted between January 20, 2013 through January 19, 2014. His third year in office remains President Obama’s worst, when his approval rating averaged 44.4%. Looking at the fifth-year numbers compared to past two-term presidents, Obama ranks near the bottom, barely surpassing the 45.7% average approval rating of George W. Bush. Richard Nixon has the lowest fifth-year approval rating, at 41.1%. Dwight Eisenhower and Ronald Reagan had the best numbers, averaging 62.8% and 60.4%, respectively, in their fifth years in office. Bill Clinton averaged 57.9%. In the final quarter of 2013, President Obama’s approval rating averaged 41.2%. This is not far off from the average 41% approval rating recorded the third-quarter of 2011, the worst mark of his presidency. President Obama actually matches Bush on average 20th quarter approval ratings, both with 41.2%. But Gallup notes that President Obama’s numbers fell “to a more extreme degree.” Though they’re near the bottom of recent presidents, they don’t come close to Nixon, who averaged the 28% approval rating in the final quarter of his fifth year in office, recorded during the midst of the Watergate scandal. “There is no guarantee that Obama will suffer a similar fate. In the short term, however, all recent elected presidents except Clinton saw at least some decline in their 21st quarter in office, and only Clinton had a sixth-year approval average higher than his fifth-year average,” wrote Jeffrey Jones of Gallup. “From a historical perspective, then, the prospects for Obama’s approval rating to improve are not great, although improvement would not be unprecedented,” he added. Though President Obama has time to rebound, **the sixth year of a presidency is usually one of the** most difficult

**politically**. Known as the “six-year itch,” voters are more likely to reject candidates from a president’s party in a mid-term election, typically translating into losses in Congress.

Sanctions bill is dead. Only negotiation collapse would revive sanctions.

Mark Landler, NYTimes, 2/5/14, Iran is rare setback for Israel lobby; Failure to win sanctions calls dominant position of Aipac into question, Lexis

The last time the nation’s most potent pro-Israel lobbying group lost a major showdown with the White House was when President Ronald Reagan agreed to sell Awacs surveillance planes to Saudi Arabia over the group’s bitter objections.

Since then, the group, the American Israel Public Affairs Committee, has run up an impressive record of legislative victories in its quest to rally American support for Israel, using a robust network of grass-roots supporters and a rich donor base to push a raft of bills through Congress. Typically, they pass by unanimous votes.

But now Aipac, as the group is known, once again finds itself in a very public standoff with the White House. Its top priority, a Senate bill to impose new sanctions on Iran, has **stalled after stiff resistance from** President **Obama**, **and in** what amounts to **a tacit retreat, Aipac has** stopped pressuring Senate Democrats to vote for the bill.

Officials at the group insist it never called for an immediate vote and say the legislation may yet pass if Mr. Obama’s effort to negotiate a nuclear agreement with Iran fails or if Iran reneges on its interim deal with the West. But for the moment, Mr. Obama has successfully made the case that passing new sanctions against Tehran now could scuttle the nuclear talks and put America on the road to another war.

In doing so, the president has raised questions about the effectiveness of Aipac’s tactics and even its role as the unchallenged voice of the pro-Israel lobby in Washington. Jewish leaders say that pro-Israel groups disagreed on how aggressively to push the legislation, even if all the groups favor additional sanctions.

“Some of us see the object as being to target Iran,” said Abraham H. Foxman, the national director of the Anti-Defamation League. “We’re not out there to target the president; we’re out there to target Iran.”

With neither side spoiling for a fight or ready to back down, Mr. Foxman said, the sanctions campaign is stalled. Lawmakers confirm that the political climate on Capitol Hill has changed since the bill’s sponsors and Aipac made their push in December.

Senator Richard Blumenthal of Connecticut, a staunch supporter of Israel, is one of 16 Democrats who signed on to the bill, along with 43 of the Senate’s 45 Republicans, bringing it to within a few votes of a veto-proof majority. Now Mr. Blumenthal says the Senate should hold off on a vote to give Mr. Obama breathing room for diplomacy.

“There’s been an unquestionable, undeniable shift in the perception of national security,” Mr. Blumenthal said. “I’m sensitive to the feelings, the resistance, the aversion of the general public to any kind of American military engagement.”

On Monday, 70 House Democrats sent Mr. Obama a letter backing his diplomatic efforts and opposing new sanctions. Former Secretary of State Hillary Rodham Clinton added her voice to those urging no legislation.

No escalation

Yadlin October ‘13

Amos Yadlin Maj. Gen. (ret.) is the Director of INSS, From 2006-2010, Maj. Gen. (ret.) Yadlin served as the IDF’s chief of Defense Intelligence. From 2004-2006, he served as the IDF attaché to the United States. In February 2002, he earned the rank of major general and was named commander of the IDF Military Colleges and the National Defense College, and Avner Golov, research

assistant to the Director of INSS, “If Attacked, How Would Iran Respond?,” Strategic Assessment

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Assessment of the Iranian Response Strategy

There are two signiﬁcant parameters for assessing an Iranian response. The ﬁrst concerns the identity of the attacker: is it an American attack, an Israeli attack without US backing, or a combined attack (American backing for an Israeli strike would almost certainly be perceived as such a scenario by the regime in Tehran). **The main Iranian interest is** in regime survival, and therefore the regime would consider whether its response would enhance the threat against it. If the scope of the ﬁrst attack had already threatened the regime, there would be fewer inhibitions about a response. Thus with an Israeli strike, for example, the danger is that an Iranian response would drag the United States into involvement **that would threaten the regime**, while in an American attack limited to nuclear targets, the concern is that a response would lead to a counter-response that would threaten the regime. If in Tehran’s assessment the United States had decided to use its full power in order to topple the regime, this would reduce Iran’s inhibitions, and the scope of the Iranian response could be expected to increase. If Tehran’s assessment is that the United States is limiting its attack to Iran’s nuclear infrastructure and that it is likely to broaden its attack against the regime only in response to an Iranian response, the chances would increase of Iran’s exercising restraint in order to avoid escalation that would threaten the survival of the regime. The second parameter concerns the nature of the attack. The greater the force and scope of the Western strike – if it included economic assets such as the oil and gas industry or government and military assets such as government and religious buildings, headquarters, and strategic military forces – the more pressure Tehran would face to respond with signiﬁcant force in order to deter its enemies from future strikes and restore its honor. The two parameters are connected, since an American response in the event of escalation would include a broader and more powerful attack on regime assets as well. For this reason, it would be a more credible and effective threat that would encourage Iranian restraint in response to a Western attack. Against this background a scale of ﬁve possible Iranian strategies can be posited (from the limited and measured to the very massive): a. **Total military restraint**: This is an extreme scenario in which the Iranian regime chooses not to respond immediately after an attack on its facilities. Two examples of this strategy are the lack of immediate Iraqi response following the Israel Air Force attack on the Osirak nuclear reactor in 1981, and the absence of a Syrian response to the attack on the Deir ez-Zor nuclear reactor in 2007.13 However, there is little likelihood of Iran adopting such a strategy. In contrast to Iraq and Syria, Iran is aware that the West knows about its nuclear program, and an attack would not be a strategic surprise. Even if the timing and nature of the attack are a surprise, Tehran has likely prepared a response in the event of a strike. Tehran would presumably decide to use this plan, even if it were partial and restrained, to show the strength of the regime, deter Iran’s enemies from additional actions in the future, and restore the country’s honor after the attack on its nuclear project. In other words, there is a high level of certainty that there would be an Iranian response, and the question is about its scope. b. **Tit for tat**:14 This is the classic reactive strategy because it mimics the strategy of the attacker. Iran’s response to a strike against the country’s nuclear facilities would be an attack on Israel’s nuclear facilities. In this scenario, a signiﬁcant number of missiles would be launched from Iran and Lebanon in the direction of Dimona or any other target in Israel perceived as “nuclear associated,” in order to convey a message of parity between Iran and Israel, and perhaps even to damage Israel’s facilities. There is a high likelihood that this method of operation would be chosen, independently or as part of a broader Iranian response. c. A response that is limited in scope but more signiﬁcant: A broader Iranian response would include the use of terrorist cells and a restrained launch of missiles – one or two missiles volleys at Israel’s cities, and perhaps also Saudi and Western targets in the Gulf. Suicide missions from the air and the sea are also possible in this limited response scenario. If the Western strike damages Iran’s nuclear infrastructure but does not harm other regime assets, there is a **high likelihood of such an Iranian response,** because the regime in Tehran will seek to balance the need to respond to an attack with the fear of escalation that would threaten regime assets not directly connected to Iran’s military nuclear program. Again, **the main interest of the regime of the ayatollahs is to preserve their power**. Therefore, it seems that they would not carry out an action that is perceived as likely to threaten the stability of the regime. Thus, in a scenario involving a pinpoint strike on the Iranian nuclear program, **the regime would seek to respond without causing escalation and signiﬁcant American intervention in the crisis.** d. The maximalist response against Israeli targets: Despite what has been noted thus far, it is possible that Iran would seek an aggressive, maximalist response to a strike against its military nuclear project and its national honor, while attempting to isolate Israel from the United States. It could launch dozens of missiles a day against Israeli cities in a number of volleys spread throughout the day. The strategic purpose would be to punish Israel for the attack, paralyze life in Israel, exact as heavy a price as possible from Israel, and increase the psychological effect of the attack on the Israeli populace. Iran would attempt to achieve the maximum deterrent effect and deter Israel regarding a future conﬂict. The regime in Tehran likely assumes that such a response would lead to a signiﬁcant Israeli response and could lead to escalation of the conﬂict between the two countries – which in turn could allow another strike against the nuclear infrastructure and a broad and comprehensive attack on Iranian economic and government assets. Such escalation could spiral out of control and encourage American military intervention, which could threaten the continued survival of the regime. Given this, the Iranian regime will likely **refrain from such a response** against Israel as long as a Western strike focuses on the nuclear program. If the Iranian regime feels that the attack reﬂects an effort to threaten its survival or that Israel and the United States are less willing to respond with force, it is liable to believe that it has less to lose from possible escalation. This scenario, in an extreme conﬁguration, could also include Iranian use of nonconventional weapons. However, the operational limitations of Iranian weapons, together with Tehran’s ambition to prevent a massive Israeli response and American intervention, would serve as deterrents regarding use of this type of weapon. Accordingly, there seems to be limited probability that Tehran would use nonconventional weapons at the start of a future crisis resulting from an attack on Iran, or in a scenario of conﬂict with Israel that does not develop into an all-out clash that clearly threatens the survival of the regime. e. Regional escalation: Iran responds to a Western attack with full force and against all its enemies – the United States, the Gulf states, and Israel. In such a scenario, Iran could attack Israeli and American targets in the Gulf with all of its (limited) capabilities, including threatening to close or actually closing the Strait of Hormuz. However, an assessment that an attack on Iran’s military nuclear facilities would necessarily lead to a large scale, prolonged regional war is highly questionable.15 A scenario of regional escalation would require the United States to intervene and would signiﬁcantly change the regional balance of power. Therefore, Tehran would choose such a response **only** if it did not fear that such a move would lead to further signiﬁcant harm to regime assets, because it would already feel a real threat to the survival of the regime, or as a last resort in an attempt to set the entire region ablaze in order to press for international intervention (apparently led by Russia) to achieve a ceaseﬁre as quickly as possible, and before the regime loses a large portion of its assets. Since this would be a **dangerous gamble**, the assessment is that Iran would seek to avoid such a response, and hence at the start of the crisis this is a scenario with very low probability.

Security establishment guarantees no strike.

Larison 12/2/13

Daniel, a senior editor at TAC, where he also keeps a solo blog. He has been published in the New York Times Book Review, Dallas Morning News, Orthodox Life, Front Porch Republic, The American Scene, and Culture11, and is a columnist for The Week. He holds a PhD in history from the University of Chicago, http://www.theamericanconservative.com/larison/why-israel-wont-attack-iran/

That may help to explain why Netanyahu has so little support within the Israeli national security establishment for attacking Iran. Keck continues: Many former top intelligence and military officials have spoken out publicly against Netanyahu’s hardline Iran policy, with at least one of them questioning whether Iran is actually seeking a nuclear weapon. This may be the most important reason why an Israeli attack is so very unlikely: too many of the people tasked with the responsibility for carrying it out **don’t believe that it is worth doing**. Unless that changes dramatically in the next year or so, it seems very unlikely that **Israel would assume all the risks of starting a war with Iran.**

US coop and Israel cabinet change

Raviv 13

Dan Raviv of CBS News and Yossi Melman, who covers security issues for the Israeli website Walla, are co-authors of Spies Against Armageddon: Inside Israel's Secret Wars. They blog at IsraelSpy.com., 3/18/2013, "Good News for Obama Before His Trip -- Israel Unlikely to Bomb Iran in 2013", www.huffingtonpost.com/dan-raviv/obama-israel-trip\_b\_2894109.html)

Any serious analysis of the new cabinet line-up will lead to the conclusion that Israel will not bomb Iran this year: not on its own, and clearly Obama has no intention of having the United States do so before 2014 at the earliest. He told Israeli TV, after all, that it will be more than a year before Iran is able to arm itself with a nuclear weapon. Israel is likely, once again, to restrain itself -- reluctantly depending on Obama to strike Iran, while the United States and other major powers attempt to avoid a Middle East war by negotiating a deal with Iran. In addition to the Iran issue, Obama will spend some time on the flagging prospects for an Israeli-Palestinian peace accord. He will make a short visit to the Palestinian Authority on Thursday, but it does not seem that Obama will put his reputation on the line by pushing any particular plan for renewing talks between the two skeptical sides. Yet, after returning to Jerusalem from Ramallah on Thursday, Obama may have some visionary ambitions in a highly anticipated speech -- at a large convention center, rather than to Israel's parliament, signaling that he wishes to address the people directly rather than through their politicians. Israelis expect to hear that Obama truly cares about the country remaining a democratic and Jewish nation. His priority in the Middle East now matches that of Prime Minister Netanyahu. They are both highly concerned about Iran's stubborn continuation of its uranium enrichment and clear defiance of international sanctions. The time for a bold step seems near, and Obama will have to conjure up some strong alternatives if he does not want that step to be an Israeli military strike. His chances of restraining Israel have increased greatly with the installation of a new governing coalition, being sworn in on Monday. Cabinet posts have been divvied out, and the line-up of ministers reflects the reality that Netanyahu's right-wing Likud party lost 25 per cent of the seats it had in the last Knesset. The post of foreign minister is again held by Avigdor Lieberman, whose party partnered with Likud in the January election. That normally would indicate an uncompromising refusal to make concessions to the Palestinians or allow Iran to get any closer to creating a nuclear bomb, but Lieberman's authority is diminished by the fact that he is on trial on corruption charges. The new coalition partners are moderates. Most notable are the new kids on the bloc: a former TV anchor, Yair Lapid, and a wealthy software entrepreneur who happens to be religious, Naftali Bennett. Both have powerfully turned Israel's focus onto domestic reforms, and neither shows any appetite for war with Iran. The most significant factor is the departure from politics of Ehud Barak, who as defense minister was enthusiastically saber-rattling with Netanyahu against Iran. The defense post will now be held by Moshe ("Boogie") Yaalon, who is in the prime minister's Likud party. As a former chief of staff of Israel's military who served in recent years as minister for strategic affairs, Yaalon is intimately familiar with all of his country's capabilities and choices. On most issues he is a hawk. Yaalon is unabashedly proud of being the senior officer in the army's elite Sayeret Matkal commandoes when they assassinated Yasser Arafat's deputy, Abu Jihad, in far-off Tunisia in 1988. Yaalon continues to believe in an uncompromising battle against terrorists. He also says that the Palestinian Authority in Ramallah, led by Arafat's successor, Mahmoud Abbas, is not ready for a peace deal. Despite his hard-line views, Yaalon has displayed surprising caution when it comes to Iran. Together with other members of the inner security cabinet, he disdained pressure on the military by Netanyahu and Barak to prepare an immediate attack on Iran. We can expect Yaalon to show the same restraint in his new job, only this time with a voice that is louder and more authoritative. He is joined now by other moderate ministers who oppose Netanyahu's verbally adventurous approach toward Iran, including a former foreign minister who launched her own political party, Tzipi Livni. The faction which opposes a military strike mentions three key reasons: An attack likely would not delay Iran's nuclear work for long; it would give Iran a moral and perhaps legal justification to rush toward a nuclear bomb; and Iranian-backed retaliation against Israel could be highly disruptive to normal life. The new ministers counseling caution enjoy some tail wind from the top military brass. The chief of staff, Major General Benny Gantz, and the commander of the air force, Lt.-General Amir Eshel both firmly oppose a unilateral strike on Iran by Israel. They do, however, advocate a coordinated effort with the United States - including the use of force as a last resort, to be led by America's awesome forces. Although no one in Israel is leaking any details, it's understood that intelligence agencies -- led by the foreign operations agency, the Mossad -- are highly active in covert operations against Iran's nuclear work. There, too, sources say there is unprecedented cooperation with the United States.