## \*\*1AC

## Plan

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

## 1AC Drones

#### Advantage one is Drones

#### Conflation of legal regimes for targeted killing results in overly constrained operations—undermines counterterrorism

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.

#### Drones solve safe havens – prevents a terror attack

Johnston 12 (Patrick B. Johnston is an associate political scientist at the RAND Corporation, a nonprofit, nonpartisan research institution. He is the author of "Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns," published in International Security (Spring 2012)., 8/22/2012, "Drone Strikes Keep Pressure on al-Qaida", www.rand.org/blog/2012/08/drone-strikes-keep-pressure-on-al-qaida.html)

Should the U.S. continue to strike at al-Qaida's leadership with drone attacks? A recent poll shows that while most Americans approve of drone strikes, in 17 out of 20 countries, more than half of those surveyed disapprove of them. My study of leadership decapitation in 90 counter-insurgencies since the 1970s shows that when militant leaders are captured or killed militant attacks decrease, terrorist campaigns end sooner, and their outcomes tend to favor the government or third-party country, not the militants. Those opposed to drone strikes often cite the June 2009 one that targeted Pakistani Taliban leader Baitullah Mehsud at a funeral in the Tribal Areas. That strike reportedly killed 60 civilians attending the funeral, but not Mehsud. He was killed later by another drone strike in August 2009. His successor, Hakimullah Mehsud, developed a relationship with the foiled Times Square bomber Faisal Shahzad, who cited drone strikes as a key motivation for his May 2010 attempted attack. Compared to manned aircraft, drones have some advantages as counter-insurgency tools, such as lower costs, longer endurance and the lack of a pilot to place in harm's way and risk of capture. These characteristics can enable a more deliberative targeting process that serves to minimize unintentional casualties. But the weapons employed by drones are usually identical to those used via manned aircraft and can still kill civilians—creating enmity that breeds more terrorists. Yet many insurgents and terrorists have been taken off the battlefield by U.S. drones and special-operations forces. Besides Mehsud, the list includes Anwar al-Awlaki of al-Qaida in the Arabian Peninsula; al-Qaida deputy leader Abu Yahya al-Li-bi; and, of course, al-Qaida leader Osama bin Laden. Given that list, it is possible that the drone program has prevented numerous attacks by their potential followers, like Shazad. What does the removal of al-Qaida leadership mean for U.S. national security? Though many in al-Qaida's senior leadership cadre remain, the historical record suggests that "decapitation" will likely weaken the organization and could cripple its ability to conduct major attacks on the U.S. homeland. Killing terrorist leaders is not necessarily a knockout blow, but can make it harder for terrorists to attack the U.S. Members of al-Qaida's central leadership, once safely amassed in northwestern Pakistan while America shifted its focus to Iraq, have been killed, captured, forced underground or scattered to various locations with little ability to communicate or move securely. Recently declassified correspondence seized in the bin Laden raid shows that the relentless pressure from the drone campaign on al-Qaida in Pakistan led bin Laden to advise al-Qaida operatives to leave Pakistan's Tribal Areas as no longer safe. Bin Laden's letters show that U.S. counterterrorism actions, which had forced him into self-imposed exile, had made running the organization not only more risky, but also more difficult. As al-Qaida members trickle out of Pakistan and seek sanctuary elsewhere, the U.S. military is ramping up its counterterrorism operations in Somalia and Yemen, while continuing its drone campaign in Pakistan. Despite its controversial nature, the U.S. counter-terrorism strategy has demonstrated a degree of effectiveness. The Obama administration is committed to reducing the size of the U.S. military's footprint overseas by relying on drones, special operations forces, and other intelligence capabilities. These methods have made it more difficult for al-Qaida remnants to reconstitute a new safe haven, as Osama bin Laden did in Afghanistan in 1996, after his ouster from Sudan.

#### Drones are operationally effective and alternatives are worse—establishing a clear strike policy solves criticism.

Byman 13 (Daniel Byman, Brookings Institute Saban Center for Middle East Policy, Research Director, and Foreign Policy, Senior Fellow, July/Aug 2013, “Why Drones Work: The Case for the Washington's Weapon of Choice”, www.brookings.edu/research/articles/2013/06/17-drones-obama-weapon-choice-us-counterterrorism-byman)

Despite President Barack Obama’s recent call to reduce the United States’ reliance on drones, they will likely remain his administration’s weapon of choice. Whereas President George W. Bush oversaw fewer than 50 drone strikes during his tenure, Obama has signed off on over 400 of them in the last four years, making the program the centerpiece of U.S. counterterrorism strategy. The drones have done their job remarkably well: by killing key leaders and denying terrorists sanctuaries in Pakistan, Yemen, and, to a lesser degree, Somalia, drones have **devastated** al Qaeda and associated anti-American militant groups. And they have done so at little financial cost, at no risk to U.S. forces, and with fewer civilian casualties than many alternative methods would have caused. Critics, however, remain skeptical. They claim that drones kill thousands of innocent civilians, alienate allied governments, anger foreign publics, illegally target Americans, and set a dangerous precedent that irresponsible governments will abuse. Some of these criticisms are valid; others, less so. In the end, drone strikes remain a necessary instrument of counterterrorism. The United States simply cannot tolerate terrorist safe havens in remote parts of Pakistan and elsewhere, and drones offer a comparatively low-risk way of targeting these areas while minimizing collateral damage. So drone warfare is here to stay, and it is likely to expand in the years to come as other countries’ capabilities catch up with those of the United States. But Washington must continue to improve its drone policy, spelling out clearer rules for extrajudicial and extraterritorial killings so that tyrannical regimes will have a harder time pointing to the U.S. drone program to justify attacks against political opponents. At the same time, even as it solidifies the drone program, Washington must remain mindful of the built-in limits of low-cost, unmanned interventions, since the very convenience of drone warfare risks dragging the United States into conflicts it could otherwise avoid. NOBODY DOES IT BETTER The Obama administration relies on drones for one simple reason: they work. According to data compiled by the New America Foundation, since Obama has been in the White House, U.S. drones have killed an estimated 3,300 al Qaeda, Taliban, and other jihadist operatives in Pakistan and Yemen. That number includes over 50 senior leaders of al Qaeda and the Taliban—top figures who are not easily replaced. In 2010, Osama bin Laden warned his chief aide, Atiyah Abd al-Rahman, who was later killed by a drone strike in the Waziristan region of Pakistan in 2011, that when experienced leaders are eliminated, the result is “the rise of lower leaders who are not as experienced as the former leaders” and who are prone to errors and miscalculations. And drones also hurt terrorist organizations when they eliminate operatives who are lower down on the food chain but who boast special skills: passport forgers, bomb makers, recruiters, and fundraisers. Drones have also undercut terrorists’ ability to communicate and to train new recruits. In order to avoid attracting drones, al Qaeda and Taliban operatives try to avoid using electronic devices or gathering in large numbers. A tip sheet found among jihadists in Mali advised militants to “maintain complete silence of all wireless contacts” and “avoid gathering in open areas.” Leaders, however, cannot give orders when they are incommunicado, and training on a large scale is nearly impossible when a drone strike could wipe out an entire group of new recruits. Drones have turned al Qaeda’s command and training structures into a liability, forcing the group to choose between having no leaders and risking dead leaders. Critics of drone strikes often fail to take into account the fact that the alternatives are either too risky or unrealistic. To be sure, in an ideal world, militants would be captured alive, allowing authorities to question them and search their compounds for useful information. Raids, arrests, and interrogations can produce vital intelligence and can be less controversial than lethal operations. That is why they should be, and indeed already are, used in stable countries where the United States enjoys the support of the host government. But in war zones or unstable countries, such as Pakistan, Yemen, and Somalia, arresting militants is highly dangerous and, even if successful, often inefficient. In those three countries, the government exerts little or no control over remote areas, which means that it is highly dangerous to go after militants hiding out there. Worse yet, in Pakistan and Yemen, the governments have at times cooperated with militants. If the United States regularly sent in special operations forces to hunt down terrorists there, sympathetic officials could easily tip off the jihadists, likely leading to firefights, U.S. casualties, and possibly the deaths of the suspects and innocent civilians. Of course, it was a Navy SEAL team and not a drone strike that finally got bin Laden, but in many cases in which the United States needs to capture or eliminate an enemy, raids are too risky and costly. And even if a raid results in a successful capture, it begets another problem: what to do with the detainee. Prosecuting detainees in a federal or military court is difficult because often the intelligence against terrorists is inadmissible or using it risks jeopardizing sources and methods. And given the fact that the United States is trying to close, rather than expand, the detention facility at Guantánamo Bay, Cuba, it has become much harder to justify holding suspects indefinitely. It has become more politically palatable for the United States to kill rather than detain suspected terrorists. Furthermore, although a drone strike may violate the local state’s sovereignty, it does so to a lesser degree than would putting U.S. boots on the ground or conducting a large-scale air campaign. And compared with a 500-pound bomb dropped from an F-16, the grenade like warheads carried by most drones create smaller, more precise blast zones that decrease the risk of unexpected structural damage and casualties. Even more important, drones, unlike traditional airplanes, can loiter above a target for hours, waiting for the ideal moment to strike and thus reducing the odds that civilians will be caught in the kill zone. Finally, using drones is also far less bloody than asking allies to hunt down terrorists on the United States’ behalf. The Pakistani and Yemeni militaries, for example, are known to regularly torture and execute detainees, and they often indiscriminately bomb civilian areas or use scorched-earth tactics against militant groups.

#### No defense

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.

## 1AC Legal Regimes

#### Advantage two is legal regimes

#### US targeted killing derives authority from both armed conflict (jus in bello) and self-defense (jus ad bellum) legal regimes—that authority overlap conflates the legal regimes

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

For the past several years, the United States has relied on both armed conflict and self-defense as legal justifications for targeted strikes outside of the zone of active combat in Afghanistan. A host of interesting questions arise from both the use of targeted strikes and the expansive U.S. justifications for such strikes, including the use of force in self-defense against non-state actors, the use of force across state boundaries, the nature and content of state consent to such operations, the use of targeted killing as a lawful and effective counterterrorism measure, and others.7 Furthermore, each of the justifications—armed conflict and self-defense—raises its own challenging questions regarding the appropriate application of the law and the parameters of the legal paradigm at issue. For example, if the existence of an armed conflict is the justification for certain targeted strikes, the immediate follow-on questions include the determination of a legitimate target within an armed conflict with a terrorist group and the geography of the battlefield. Within the self-defense paradigm, key questions include the very contours of the right to use force in self-defense against individuals and the implementation of the concepts of necessity and imminence, among many others.

However, equally fundamental questions arise from the use of both justifications at the same time, without careful distinction delimiting the boundaries between when one applies and when the other 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.8 To the extent such flexibility does not impact the implementation of the relevant law or hinder the development and enforcement of that law in the future, it may well be an acceptable goal. In the case of targeted strikes in the current international environment of armed conflict and counterterrorism operations occurring at the same time, however, the mixing of legal justifications raises significant concerns about both current implementation and future development of the law.

One overarching concern is the conflation in general of jus ad bellum and jus in bello. The former is the law governing the resort to force—sometimes called the law of self-defense—and the latter is the law regulating the conduct of hostilities and the protection of persons in conflict—generally called the law of war, the law of armed conflict, or international humanitarian law. International law reinforces a strict separation between the two bodies of law, ensuring that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany’s crime of aggression neither rendered all German acts unlawful nor prevented German soldiers from benefitting from the protections of the jus in bello.9 More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters on the grounds that they fought in a “legitimate war” to protect the government against the rebels.10 The basic principle that the rights and obligations of jus in bello apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched. Indeed, if the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons hors de combat, states would justify all departures from jus in bello with reference to the purported justness of their cause. The result: an invitation to unregulated warfare.11

#### Authority overlap destroys both the self-defense and armed conflict legal regimes

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

In contrast, human rights law’s requirement that force only be used as a last resort when absolutely necessary for the protection of innocent victims of an attack creates an obligation to attempt to capture a suspected terrorist before any lethal targeting.101 A state using force in self-defense against a terrorist cannot therefore target him or her as a first resort but can only do so if there are no alternatives—meaning that an offer of surrender or an attempt at capture has been made or is entirely unfeasible in the circumstances. Thus, if non-forceful measures can foil the terrorist attack without the use of deadly force, then the state may not use force in self-defense.102 The supremacy of the right to life means that “even the most dangerous individual must be captured, rather than killed, so long as it is practically feasible to do so, bearing in mind all of the circumstances.”103 No more, this obligation to capture first rather than kill is not dependent on the target’s efforts to surrender; the obligation actually works the other way: the forces may not use deadly force except if absolutely necessary to protect themselves or innocent persons from immediate danger, that is, self-defense or defense of others. As with any law enforcement operation, “the intended result . . . is the arrest of the suspect,”104 and therefore every attempt must be made to capture before resorting to lethal force.

In the abstract, the differences in the obligations regarding surrender and capture seem straightforward. The use of both armed conflict and self-defense justifications for all targeted strikes without differentiation runs the risk of conflating the two very different approaches to capture in the course of a targeting operation. This conflation, in turn, is likely to either emasculate human rights law’s greater protections or undermine the LOAC’s greater permissiveness in the use of force, either of which is a problematic result. An oft-cited example of the conflation of the LOAC and human rights principles appears in the 2006 targeted killings case before the Israeli Supreme Court. In analyzing the lawfulness of the Israeli government’s policy of “targeted frustration,” the Court held, inter alia, that [a] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. . . . Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.105

The Israeli Supreme Court’s finding that targeting is only lawful if no less harmful means are available—even in the context of an armed conflict—“impose[s] a requirement not based in [the LOAC].”106 Indeed, the Israeli Supreme Court “used the kernel of a human rights rule—that necessity must be shown for any intentional deprivation of life, to restrict the application of [a LOAC] rule—that in armed conflict no necessity need be shown for the killing of combatants or civilians taking a direct part in hostilities.”107 Although the holding is specific to Israel and likely influenced greatly by the added layer of belligerent occupation relevant to the targeted strikes at issue in the case,108 it demonstrates some of the challenges of conflating the two paradigms.

First, if this added obligation of less harmful means was understood to form part of the law applicable to targeted strikes in armed conflict, the result would be to disrupt the delicate balance of military necessity and humanity and the equality of arms at the heart of the LOAC. Civilians taking direct part in hostilities—who are legitimate targets at least for the time they do so—would suddenly merit a greater level of protection than persons who are lawful combatants, a result not contemplated in the LOAC.109

Second, soldiers faced with an obligation to always use less harmful means may well either refrain from attacking the target—leaving the innocent victims of the terrorist’s planned attack unprotected—or disregard the law as unrealistic and ineffective. Neither option is appealing. The former undermines the protection of innocent civilians from unlawful attack, one of the core purposes of the LOAC. The latter weakens respect for the value and role of the LOAC altogether during conflict, a central component of the protection of all persons in wartime.

From the opposing perspective, if the armed conflict rules for capture and surrender were to bleed into the human rights and law enforcement paradigm, the restrictions on the use of force in selfdefense would diminish. Persons suspected of terrorist attacks and planning future terrorist attacks are entitled to the same set of rights as other persons under human rights law and a relaxed set of standards will only minimize and infringe on those rights. Although there is no evidence that targeted strikes using drones are being used in situations where there is an obligation to seek capture and arrest, it is not hard to imagine a scenario in which the combination of the extraordinary capabilities of drones and the conflation of standards can lead to exactly that scenario. If states begin to use lethal force as a first resort against individuals outside of armed conflict, the established framework for the protection of the right to life would begin to unravel. Not only would targeted individuals suffer from reduced rights, but innocent individuals in the vicinity would be subject to significantly greater risk of injury and death as a consequence of the broadening use of force outside of armed conflict.

#### This degrades the entire collective security structure resulting in widespread interstate war

Craig Martin, Associate Professor of Law at Washburn University School of Law, 2011, GOING MEDIEVAL: TARGETED KILLING, SELFDEFENSE AND THE JUS AD BELLUM REGIME, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1956141

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002.98 An increasing number of countries are developing drone capabilities, and other countries have employed different methods of targeted killing that constitute a use of force under jus ad bellum.99 The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification andin accordance with the rationales developed to support it**.**

Some of the implications of such an adjustment in the jus ad bellum regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted jus ad bellum regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves.100 This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded.

In addition, however, the targeted killing policy threatens to create other holes in the jus ad bellum regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,101 has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.102 If customary international law evolved along such lines, reverting to gradations in the types of use of force, the change would destroy the unity of the system comprised of the jus ad bellum and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime.

The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between jus ad bellum and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on either basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move, not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),103 but because it also suggests that there need be no jus ad bellum justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the jus ad bellum regime.

This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion.104 The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications.105 The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating.

While the initial use of force in jus ad bellum terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the jus ad bellum regime. This would not only radically erode the jus ad bellum regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that triggers the operation of special laws that govern the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal institution characterized by a coherent system of laws designed to govern and constrain all aspects of its operation.

There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law.106 In short, the advocated changes to the jus ad bellum regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole,107 would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.108

The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kind of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.109

The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the jus ad bellum regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all jus ad bellum purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between jus ad bellum and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the jus ad bellum regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally.

We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume,110 more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

#### Robust support for the impact—legal regime conflation results in uncontrollable conflict escalation

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.

#### Self-defense regime collapse causes global war—US TK legal regime key—only Congress solves international norm development

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

#### Law of armed conflict controls deterrence—collapse causes global WMD conflict

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(Robert and John, 59 DePaul L. Rev. 803)

Finally, the extension of IHRL to armed conflict may have significant consequences for the success of international law in advancing global welfare. Rules of the LOAC represent the delicate balancing between the imperatives of combat and the humanitarian goals in wartime. The LOAC has been remarkably successful in achieving compliance from warring nations in obeying these rules. This is most likely due to the reciprocal nature of the obligations involved. Nations treat prisoners of war well in order to guarantee that their own captive soldiers will be treated well by the enemy; nations will refrain from usingweapons of mass destruction because they are deterred by their enemy's possession of the same weapons. It has been one of the triumphs of international law to increase the restrictions on the use of unnecessarily destructive and cruel weapons, and to advance the norms of distinction and the humane treatment of combatants and civilians in wartime.

IHRL norms, on the other hand, may suffer from much lower rates of compliance. This may be due, in part, to the non-reciprocal nature of the obligations. One nation's refusal to observe freedom of speech, for example, will not cause another country to respond by depriving its own citizens of their rights. If IHRL norms--which were developed without much, if any, consideration of the imperatives of combat--merge into the LOAC, it will be likely that compliance with international law will decline. If nations must balance their security [\*849] needs against ever more restrictive and out-of-place international rules supplied by IHRL, we hazard to guess that the latter will give way. Rather than attempt to superimpose rules for peacetime civilian affairs on the unique circumstances of the "war on terror," a better strategy for encouraging compliance with international law would be to adapt the legal system already specifically designed for armed conflict.

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.**

#### 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.

#### Russia models US self-defense precedent --- causes regional escalation

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)

Russia

In January 2000, Russia updated its National Security Concept from the previous 1997 version. The Concept detailed the future direction of ensuring Russia's national security, given its perception that international relations were undergoing a period of “transformation” (Russia's National Security Concept 2000). Russia was referring to heightened tensions with the West, exacerbated by the NATO-led intervention in Kosovo (Wallander 2000). One of the most important differences between the previous blueprint for national security under President Yeltsin and the one signed into effect by acting President Vladimir Putin is that the National Security Concept of 2000 allows first use of nuclear weapons—not only against existential threats, but also “in the event of need to repulse armed aggression, if all other measures of resolving the crisis situation have been exhausted and have proven ineffective” (Permanent Representation of the Russian Federation to the Council of Europe 2000). This Concept was reaffirmed in a new military doctrine released in April 2000, in which the right to use nuclear weapons against aggression is clearly articulated.41 What is particularly noteworthy is that an earlier draft of the doctrine made an explicit commitment to non-use of preemptive or preventive attacks,42 whereas the final version of the doctrine omits this idea. This suggests that Russian military leaders and political elites were torn about making a definitive statement either way.

In 2003, within the context of the US-led intervention in Iraq, Russia officially called the action an “error.”43 However, Russia never ruled out the use of force in such cases. At one point, Foreign Minister Igor Ivanov and President Putin both suggested that armed force was an option if the Iraqi government did not comply with UN resolutions, but maintained that any such action must be accompanied by UN Security Council approval (Jasinski 2003). Though Russia joined together with France and Germany against any automatic military action in Iraq, Russia was still considered a swing vote in the UNSC; President Putin “hasn't ruled anything in, and he hasn't ruled anything out.’’44 Russia ultimately condemned the US action in Iraq, yet by mid-May of that same year, Russia and the United States were back on relatively good terms, proclaiming that their “recent differences” had been resolved.45 Our preliminary evidence suggests Russia's agreement with the principle of the intervention—one of preventive self-defense—though not with the Iraq case in particular. Rather, **Russia views such action as appropriate within the context of the war on terrorism. Because of its own strategy in its internal conflict with Chechnya, Russia has been relatively supportive of the use of preventive strikes by the U**nited **S**tates (Westphal 2003). Furthermore, Russian military forces had the authority to strike terrorists preemptively abroad, as the case of Georgia showed (Oldberg 2006:7–8).

In 2010, Russia again updated its military doctrine under President Dmitry Medvedev. Although there had been much discussion about Russia's right to use preventive and preemptive nuclear strikes leading up to the release of the doctrine, there are no explicit references to this in it (Blank 2011). Given the buildup to the release of the new doctrine, this comes as quite a surprise. In 2008, Russian military Chief of Staff General Yuri Baluyevsky remarked: “We have no plans to attack anyone, but… to defend the sovereignty and territorial integrity of Russia and its allies, military forces will be used, including preventively, **including with the** use of nuclear weapons.”46 This was the first time nuclear weapons had been referenced publically by Russia as a first-strike option. Russia had previously asserted that it would use preventive strikes as a defense strategy, though such strikes had not been tied to nuclear weapons. **Putin** had **argued that if other countries had the first-strike option, then so did Russia**.46 Among those countries, in Russia's view, is the United States. **Russian perceptions of US actions in this regard support the use of preventive strikes**: “The United States was ready to use nuclear weapons against Iraq in 2003, and then against Iran in 2008. This was clearly demonstrated through statements of high-profile military and political officials. So, saying the U.S. doctrine does not directly include the use of preventive nuclear strikes is not correct.”47

Although the 2010 doctrine does not specify the use of nuclear weapons in first-strike considerations, Russia clearly has supported the idea of preventive attacks. The re-election of Putin has also brought with it a renewed emphasis on military modernization. This can be seen in the country's heavy investment and interest in drones, reflected in deals with Israel and in recent domestic contracts.48 During his recent campaign, Putin advocated modernization as a means to prevent others from seizing Russia's resources. Putin has pledged $770 billion to the modernization effort in the next decade as “ever new regional wars break out in the world.”49 In particular, **Putin points out that “There also are attempts to** provoke such conflicts **even** close to Russia's and its allies’ borders. The basic principles of international law are being degraded and eroded, especially in terms of international security” (Putin 2012). Russia's Chief of General Staff and Deputy Defense Minister Nikolai Makarov has expressed his admiration for US ability to adapt to a new threat environment, saying that the revolution in military affairs achieved “new heights” through US efforts (McDermott 2011). Prominent military theorist Makhmut Gareev emphasizes that Russia must also focus on the changing nature of warfare, and precision weapons aside from nuclear weapons—the type needed for “no contact” network-centric warfare (McDermott 2011, 2012). Finally, Leonid Ivashov, President of the Academy on Geopolitical Affairs, recently stated that Russia has learned a lesson from the cases of Yugoslavia, Iraq, and Libya, and warned that the same thing can happen to Russia if it does not have offensive capabilities.50 And just a short time ago, Russia proposed to Israel a joint combat unmanned aerial vehicle program.51 **President Putin declared**, “Experts agree that **drones will play a key role in our future…You know drones are widely used in armed conflict today, and they proved to be quite effective**.”52 Similar to the case of India, **we find evidence that Russia, too, is committed to the norm of preventive self-defense.**

#### Extinction

**Blank 2k** [Stephen J. - Expert on the Soviet Bloc for the Strategic Studies Institute, “American Grand Strategy and the Transcaspian Region”, World Affairs. 9-22]

Thus many structural conditions for conventional war or protracted ethnic conflict where third parties intervene now exist in the Transcaucasus and Central Asia. The outbreak of violence by disaffected Islamic elements, the drug trade, the Chechen wars, and the unresolved ethnopolitical conflicts that dot the region, not to mention the undemocratic and unbalanced distribution of income across corrupt governments, provide plenty of tinder for future fires. Many Third World conflicts generated by local structural factors also have great potential for unintended escalation. Big powers often feel obliged to rescue their proxies and proteges. One or another big power may fail to grasp the stakes for the other side since interests here are not as clear as in Europe. Hence commitments involving the use of nuclear weapons or perhaps even conventional war to prevent defeat of a client are not well established or clear as in Europe. For instance, in 1993 Turkish noises about intervening on behalf of Azerbaijan induced Russian leaders to threaten a nuclear war in that case. Precisely because Turkey is a NATO ally but probably could not prevail in a long war against Russia, or if it could, would conceivably trigger a potential nuclear blow (not a small possibility given the erratic nature of Russia's declared nuclear strategies), the danger of major war is higher here than almost everywhere else in the CIS or the "arc of crisis" from the Balkans to China. As Richard Betts has observed, The greatest danger lies in areas where (1) the potential for serious instability is high; (2) both superpowers perceive vital interests; (3) neither recognizes that the other's perceived interest or commitment is as great as its own; (4) both have the capability to inject conventional forces; and (5) neither has willing proxies capable of settling the situation.(77)

## 1AC Solvency

#### Congressional limits of self-defense authority within armed conflict is necessary to resolve legal ambiguity

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.

#### That clarity over legal authority is necessary to solve

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.

#### Executive “clarification” is insufficient

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.

## \*\*2AC

## 2AC circumvention

#### Obama complies with war power statutes

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

Unsurprisingly, this article embraces an interpretation of the Constitution that is at odds with the Vesting Clause thesis, and instead hews closer to the view expressed in Justice Robert Jackson’s concurrence in the 1952 Steel Seizure case.13 The Constitution explicitly empowers Congress in the area of foreign affairs to, among other actions, approve treaties,14 declare war,15 and regulate the armed forces.16 These textual grants of authority would be vitiated if Congress were unable, in the exercise of these powers, to “wage a limited war; limited in place, in objects, and in time.”17 A full exposition of this oft-addressed topic is beyond the scope of this article, however, and it suffices for present purposes to merely align it with the overwhelming majority of scholars who conceive of a Constitution where Congress may authorize limited military force in a manner which is binding on the Executive Branch.18

Furthermore, the Vesting Clause thesis and all-powerful views of the Commander in Chief Clause have been rejected in large part by the judiciary and the current administration.20 Indeed, **one significant reason for considering the AUMF to be an actual limit on Presidential power, and a relevant subject for legal analysis, is because that is how the Obama Administration understands the statute**. State Department Legal Adviser Harold Koh, in his March 25, 2010, speech to the American Society of International Law, clarified that “as a matter of domestic law” the Obama Administration relies on the AUMF for its authority to detain and use force against terrorist organizations.21 Furthermore, Koh specifically disclaimed the previous administration’s reliance on an expansive reading of the Constitution’s Commander in Chief Clause.22 Roughly stated, the AUMF matters, at least in part, because the Obama Administration says it matters.

The scope of the AUMF is also important for any future judicial opinion that might rely in part on Justice Jackson’s Steel Seizure concurrence.23 Support from Congress places the President’s actions in Jackson’s first zone, where executive power is at its zenith, because it “includes all that he possesses in his own right plus all that Congress can delegate.”24 Express or implied congressional disapproval, discernible by identifying the outer limits of the AUMF’s authorization, would place the President’s “power . . . at its lowest ebb.”25 In this third zone, executive claims “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”26 Indeed, Jackson specifically rejected an overly powerful executive, observing that the Framers did not intend to fashion the President into an American monarch.27

Jackson’s concurrence has become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.28 Indeed, some have argued that it was given “the status of law”29 by then-Associate Justice William Rehnquist in Dames & Moore v. Regan.30 Speaking for the Court, Rehnquist applied Jackson’s tripartite framework to an executive order settling pending U.S. claims against Iran, noting that “[t]he parties and the lower courts . . . have all agreed that much relevant analysis is contained in [Youngstown].”31 More recently, Chief Justice John Roberts declared that “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of foreign relations law].”32 Should a future court adjudicate the nature or extent of the President’s authority to engage in military actions against terrorists, an applicable statute would confer upon such executive action “the strongest of presumptions and the widest latitude of judicial interpretation.”33 The AUMF therefore exercises a profound legal influence on the future of the United States’ struggle against terrorism, and its precise scope, authorization, and continuing vitality matter a great deal.

## K

#### Their terror K is wrong – our method is good and reflexive

Boyle 8 (Michael J., School of International Relations, University of St. Andrews, and John Horgan, International Center for the Study of Terrorism, Department of Psychology, Pennsylvania State University, April 2008, “A Case Against Critical Terrorism Studies,” Critical Studies On Terrorism, Vol. 1, No. 1, p. 51-64)

One of the tensions within CTS concerns the issue of ‘policy relevance’. At the most basic level, **there are some sweeping generalizations made by CTS scholars, often with little evidence**. For example, Jackson (2007c) describes ‘the core terrorism scholars’ (without explicitly saying who he is referring to) as ‘intimately connected – institutionally, financially, politically, and ideologically – with a state hegemonic project’ (p. 245). **Without giving any details of who these ‘core’ scholars are, where they are, what they do, and exactly who funds them, his arguments are tantamount to conjecture at best. We do not deny that governments fund terrorism research and terrorism researchers, and that this can influence the direction** (and even the findings) of the research. But **we are suspicious of over-generalizations of this count on two grounds: (1) accepting government funding or information does not necessarily obviate one’s independent scholarly judgment in a particular project; and (2) having policy relevance is not always a sin**. On the first point, we are in agreement with some CTS scholars. Gunning provides a sensitive analysis of this problem, and calls on CTS advocates to come to terms with how they can engage policy-makers without losing their critical distance. He recognizes that CTS can (and should) aim to be policy-relevant, but perhaps to a different audience, including non-governmental organizations (NGOs), civil society than just governments and security services. In other words, CTS aims to whisper into the ear of the prince, but it is just a different prince.

Gunning (2007a) also argues that **research should be assessed on its own merits, for ‘just because a piece of research comes from RAND does not invalidate it; conversely, a “critical” study is not inherently good’** (p. 240). We agree entirely with this. Not all sponsored or contract research is made to ‘toe a party line’, and **much of the work coming out of** official **government agencies** or affiliated government agencies **has little agenda and can be** analytically **useful. The task of the scholar is to retain one’s sense of critical judgment and integrity, and we believe that there is no prima facie reason to assume that this cannot be done in sponsored research projects**. What matters here are the details of the research – what is the purpose of the work, how will it be done, how might the work be used in policy – and for these questions the scholar must be self-critical and insistent on their intellectual autonomy. The scholar must also be mindful of the responsibility they bear for shaping a government’s response to the problem of terrorism. **Nothing – not the source of the funding, purpose of the research or prior empirical or theoretical commitment – obviates the need of the scholar to consider his or her own conscience carefully when engaging in work with any external actor. But simply engaging with governments on discrete projects does not make one an ‘embedded expert’ nor does it imply sanction to their actions**. But we also believe that the **study of political violence lends itself to policy relevance and** that **those who seek to produce research that might help policy-makers reduce the rates of terrorist attack are committing no sin**, provided that they retain their independent judgment and report their findings candidly and honestly. In the case of terrorism, we would go further to argue that being policy relevant is in some instances an entirely justifiable moral choice. For example, neither of us has any problem producing research with a morally defensible but policy relevant goal (for example, helping the British government to prevent suicide bombers from attacking the London Underground) and we do not believe that engaging in such work tarnishes one’s stature as an independent scholar. **Implicit in the CTS literature is a deep suspicion about the state** and those who engage with it. **Such a suspicion may blind some CTS scholars to good work** done by those associated with the state. But to assume that being ‘embedded’ in an institution linked to the ‘establishment’ consists of being captured by a state hegemonic project is too simple. We do not believe that scholars studying terrorism must all be policy-relevant, but equally we do not believe that being policy relevant should always be interpreted as writing a blank cheque for governments or as necessarily implicating the scholar in the behaviour of that government on issues unrelated to one’s work. Working for the US government, for instance, does not imply that the scholar sanctions or approves of the abuses at Abu Ghraib prison. **The assumption that those who do not practice CTS are all ‘embedded’ with the ‘establishment’ and that this somehow gives the green light for states to engage in illegal activity is in our view unwarranted, to say the very least.**

## 2AC Russia

#### Russia models US self-defense precedent --- causes regional escalation

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)

Russia

In January 2000, Russia updated its National Security Concept from the previous 1997 version. The Concept detailed the future direction of ensuring Russia's national security, given its perception that international relations were undergoing a period of “transformation” (Russia's National Security Concept 2000). Russia was referring to heightened tensions with the West, exacerbated by the NATO-led intervention in Kosovo (Wallander 2000). One of the most important differences between the previous blueprint for national security under President Yeltsin and the one signed into effect by acting President Vladimir Putin is that the National Security Concept of 2000 allows first use of nuclear weapons—not only against existential threats, but also “in the event of need to repulse armed aggression, if all other measures of resolving the crisis situation have been exhausted and have proven ineffective” (Permanent Representation of the Russian Federation to the Council of Europe 2000). This Concept was reaffirmed in a new military doctrine released in April 2000, in which the right to use nuclear weapons against aggression is clearly articulated.41 What is particularly noteworthy is that an earlier draft of the doctrine made an explicit commitment to non-use of preemptive or preventive attacks,42 whereas the final version of the doctrine omits this idea. This suggests that Russian military leaders and political elites were torn about making a definitive statement either way.

In 2003, within the context of the US-led intervention in Iraq, Russia officially called the action an “error.”43 However, Russia never ruled out the use of force in such cases. At one point, Foreign Minister Igor Ivanov and President Putin both suggested that armed force was an option if the Iraqi government did not comply with UN resolutions, but maintained that any such action must be accompanied by UN Security Council approval (Jasinski 2003). Though Russia joined together with France and Germany against any automatic military action in Iraq, Russia was still considered a swing vote in the UNSC; President Putin “hasn't ruled anything in, and he hasn't ruled anything out.’’44 Russia ultimately condemned the US action in Iraq, yet by mid-May of that same year, Russia and the United States were back on relatively good terms, proclaiming that their “recent differences” had been resolved.45 Our preliminary evidence suggests Russia's agreement with the principle of the intervention—one of preventive self-defense—though not with the Iraq case in particular. Rather, **Russia views such action as appropriate within the context of the war on terrorism. Because of its own strategy in its internal conflict with Chechnya, Russia has been relatively supportive of the use of preventive strikes by the U**nited **S**tates (Westphal 2003). Furthermore, Russian military forces had the authority to strike terrorists preemptively abroad, as the case of Georgia showed (Oldberg 2006:7–8).

In 2010, Russia again updated its military doctrine under President Dmitry Medvedev. Although there had been much discussion about Russia's right to use preventive and preemptive nuclear strikes leading up to the release of the doctrine, there are no explicit references to this in it (Blank 2011). Given the buildup to the release of the new doctrine, this comes as quite a surprise. In 2008, Russian military Chief of Staff General Yuri Baluyevsky remarked: “We have no plans to attack anyone, but… to defend the sovereignty and territorial integrity of Russia and its allies, military forces will be used, including preventively, **including with the** use of nuclear weapons.”46 This was the first time nuclear weapons had been referenced publically by Russia as a first-strike option. Russia had previously asserted that it would use preventive strikes as a defense strategy, though such strikes had not been tied to nuclear weapons. **Putin** had **argued that if other countries had the first-strike option, then so did Russia**.46 Among those countries, in Russia's view, is the United States. **Russian perceptions of US actions in this regard support the use of preventive strikes**: “The United States was ready to use nuclear weapons against Iraq in 2003, and then against Iran in 2008. This was clearly demonstrated through statements of high-profile military and political officials. So, saying the U.S. doctrine does not directly include the use of preventive nuclear strikes is not correct.”47

Although the 2010 doctrine does not specify the use of nuclear weapons in first-strike considerations, Russia clearly has supported the idea of preventive attacks. The re-election of Putin has also brought with it a renewed emphasis on military modernization. This can be seen in the country's heavy investment and interest in drones, reflected in deals with Israel and in recent domestic contracts.48 During his recent campaign, Putin advocated modernization as a means to prevent others from seizing Russia's resources. Putin has pledged $770 billion to the modernization effort in the next decade as “ever new regional wars break out in the world.”49 In particular, **Putin points out that “There also are attempts to** provoke such conflicts **even** close to Russia's and its allies’ borders. The basic principles of international law are being degraded and eroded, especially in terms of international security” (Putin 2012). Russia's Chief of General Staff and Deputy Defense Minister Nikolai Makarov has expressed his admiration for US ability to adapt to a new threat environment, saying that the revolution in military affairs achieved “new heights” through US efforts (McDermott 2011). Prominent military theorist Makhmut Gareev emphasizes that Russia must also focus on the changing nature of warfare, and precision weapons aside from nuclear weapons—the type needed for “no contact” network-centric warfare (McDermott 2011, 2012). Finally, Leonid Ivashov, President of the Academy on Geopolitical Affairs, recently stated that Russia has learned a lesson from the cases of Yugoslavia, Iraq, and Libya, and warned that the same thing can happen to Russia if it does not have offensive capabilities.50 And just a short time ago, Russia proposed to Israel a joint combat unmanned aerial vehicle program.51 **President Putin declared**, “Experts agree that **drones will play a key role in our future…You know drones are widely used in armed conflict today, and they proved to be quite effective**.”52 Similar to the case of India, **we find evidence that Russia, too, is committed to the norm of preventive self-defense.**

#### Extinction

**Blank 2k** [Stephen J. - Expert on the Soviet Bloc for the Strategic Studies Institute, “American Grand Strategy and the Transcaspian Region”, World Affairs. 9-22]

Thus many structural conditions for conventional war or protracted ethnic conflict where third parties intervene now exist in the Transcaucasus and Central Asia. The outbreak of violence by disaffected Islamic elements, the drug trade, the Chechen wars, and the unresolved ethnopolitical conflicts that dot the region, not to mention the undemocratic and unbalanced distribution of income across corrupt governments, provide plenty of tinder for future fires. Many Third World conflicts generated by local structural factors also have great potential for unintended escalation. Big powers often feel obliged to rescue their proxies and proteges. One or another big power may fail to grasp the stakes for the other side since interests here are not as clear as in Europe. Hence commitments involving the use of nuclear weapons or perhaps even conventional war to prevent defeat of a client are not well established or clear as in Europe. For instance, in 1993 Turkish noises about intervening on behalf of Azerbaijan induced Russian leaders to threaten a nuclear war in that case. Precisely because Turkey is a NATO ally but probably could not prevail in a long war against Russia, or if it could, would conceivably trigger a potential nuclear blow (not a small possibility given the erratic nature of Russia's declared nuclear strategies), the danger of major war is higher here than almost everywhere else in the CIS or the "arc of crisis" from the Balkans to China. As Richard Betts has observed, The greatest danger lies in areas where (1) the potential for serious instability is high; (2) both superpowers perceive vital interests; (3) neither recognizes that the other's perceived interest or commitment is as great as its own; (4) both have the capability to inject conventional forces; and (5) neither has willing proxies capable of settling the situation.(77)

## 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**.

## 2AC K

#### The ballot should simulate the effects of the 1AC—key to fairness and relevant decision making

Donohue 13 [2013 Nation al Security Pedagogy: The Role of Simulations, Associate Professor of Law, Georgetown Law, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2172&context=facpub>]

C ONCLUDING R EMARKS The legal academy has, of late, been swept up in concern about the econom ic conditions that affect the placement of law school graduates. The image being conveyed , however, does not resonate in every legal field. I t is particularly inapposite to the burgeoning opportunities presented to students in national security. That th e 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 this realm. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselv es. This does not mean that the goals identified are exclusive to, for instance, national security law , but it does suggest a greater nuance with regard to how the pedagogical skills present. With this approach in mind, I have here suggested six pedagogical goals for national security . For following graduation, s tudents must be able to perform in each of the areas identified — i.e., (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, ensuring that they will be most effective when they enter the field. The problem with the current structures in l egal education is that they fall short, in important ways, from helping students to obtain 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 exercises49 These are important devices to introduce into the classroom. T he 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 allows 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, here may provide an important way forward. Such simulations also help to address 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 The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within it . I t 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 t he years to come.model above. NSL Sim 2.0 ce rtainly is not the only solution, but it does provide a starting point for moving forward.

#### No risk of endless warfare

Gray 7—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, [http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf](http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf" \t "_blank))

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

#### No impact to threat con

Eric A. **Posner and** Adrian **Vermeule 3**, law profs at Chicago and Harvard, Accommodating Emergencies, September, <http://www.law.uchicago.edu/files/files/48.eap-av.emergency.pdf>

Against the view that panicked government officials overreact to an emergency, and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. **It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm**. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the antiaccommodation theory that the Constitution should be enforced as strictly during emergencies as during non-emergencies.

C. The Influence of Fear during Emergencies

Suppose now that the simple view of fear is correct, and that it is an unambiguously negative influence on government decisionmaking. Critics of accommodation argue that this negative influence of fear justifies skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than decisionmaking during non-emergencies.

The panic thesis, implicit in much scholarship though rarely discussed in detail, holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: thus, (i) the response is instinctive rather than reasoned, and thus subject to error; and (ii) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an immediate reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweight the threat and underweight other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces a irresistible urge to flee. **But this kind of fear is not the kind in which cognition shuts down**. (Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare.) The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.53

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-immediate threat are incapable of thinking, or thinking properly, or systematically overweight the threat relative to other values. Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children; about their health; about their job prospects; about their vacation arrangements; about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified, and to sacrifice civil liberties.

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus, or to a mistaken assessment of the risks; it was not the direct result of panic; indeed there was a delay of weeks before the policy was seriously considered.54 Post-9/11 curtailments of civil liberties, aside from immediate detentions, came after a significant delay and much deliberation. The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality, and to collectively harmful outcomes that are driven by rational decisions, such as a bank run, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the constitution be enforced normally during emergencies. Political errors occur during emergencies and nonemergencies, but the stakes are higher during emergencies, and that is the conventional reason why constitutional constraints should be relaxed.

#### LOAC does not legitimize violence—alternative is militarized violence

Charles Kels, attorney for the Department of Homeland Security and a major in the Air Force Reserve, 12/6/12, THe Perilous Position of the Laws of War, harvardnsj.org/2012/12/the-perilous-position-of-the-laws-of-war/

The real nub of the current critique of U.S. policy, therefore, is that the Bush administration’s war on terror and the Obama administration’s war on al Qaeda and affiliates constitute a distinction without a difference. The latter may be less rhetorically inflammatory, but it is equally amorphous in application, enabling the United States to pursue non-state actors under an armed conflict paradigm. This criticism may have merit, but it is really about the use of force altogether, not the parameters that define how force is applied. It is, in other words, an ad bellum argument cloaked in the language of in bello.

LOAC is apolitical. **Adherence to it does not legitimize** an unlawful resort to **force**, **just as its violation**—unless systematic—**does not automatically render one’s cause unjust**. The answer for those who object to U.S. targeted killing and indefinite detention is not to apply a peace paradigm that would invalidate LOAC and undercut the belligerent immunity of soldiers, but to direct their arguments to the political leadership regarding the decision to use force in the first place. Attacking LOAC for its perceived leniency and demanding the “pristine purity” of HRL in military operations is actually quite dangerous and counterproductive from a humanitarian perspective, because there remains the distinct possibility that **the alternative to LOAC is not HRL but “lawlessness**.” While there are certainly examples of armies that have acquitted themselves quite well in law enforcement roles—and while most nations do not subscribe to the strict U.S. delineation between military and police forces—**the vast bulk of history indicates that in the context of armed hostilities, LOAC is by far the best case scenario, not the worst**.

Transnational terrorist networks pose unique security problems, among them the need to apply preexisting legal rubrics to an enemy who is dedicated to undermining and abusing them. Vital to meeting this challenge—of “building a durable framework for the struggle against al Qaeda that [draws] upon our deeply held values and traditions”—is to refrain from treating the deeply-ingrained tenets of honorable warfare as a mere mechanism for projecting force. The laws of war are much more than “lawyerly license” to kill and detain, subject to varying levels of application depending upon political outlook. They remain a bulwark against indiscriminate carnage, steeped in history and tried in battle.

Oppositional views of the law and it’s use for war are inevitable – ONLY the permutation resolves academic conflict

Luban ’13 (David, University Professor in Law and Philosophy, Georgetown University Law Center, “Military Necessity and the Cultures of Military Law,” Leiden Journal of International Law, Volume 26, Issue 02, pp 315-349)

These arguments about military necessity are not meant as a ‘refutation’ of the LOAC version of the laws of war or anything resembling it. That would be silly. **Military necessities are real**, and law will not make them go away. The same is true of the other elements of the LOAC vision. States may no longer be the sole sources of international law, but we live in a world of states, which **remain the pre-eminent international lawmakers**. The laws of war must take the civilian point of view seriously, but it is still a long step from there to human rights. On all these points, humanitarian lawyers who pretend otherwise are fooling themselves both legally and practically. Legally, because the sources of law will not bear so much humanitarian weight, and practically because the only hope for the humanitarian project lies in militaries and military lawyers who believe in it and want to make it happen. Like it or not, the two legal cultures must live with each other, and that requires reasonableness, in the sense defined by John Rawls: a reciprocal desire for principles that could be accepted even by adherents of the other comprehensive view.

To illustrate with an example: Article 57 of AP I requires militaries to take all ‘feasible’ precautions to verify that their targets are legitimately military and to minimize civilian damage. Notoriously, there is no agreement on what ‘feasible’ means. Does it include anything technologically possible, regardless of cost or risk to the attacker? Alternatively, does it exclude anything that might increase military risk, no matter how slightly? Clearly, militaries could not reasonably accept the former, and humanitarians could not reasonably accept the latter – so, on my proposal, neither of these interpretations can be right, and lawyers should not advance them.

This conciliatory approach is not self-evident. In purely scientific pursuits, epistemologists offer powerful arguments that it is more rational both for individual researchers and for the scientific community at large if competing research programmes **forcefully press their own agendas**, even in cases when one programme is less likely than its rivals to be fruitful.101 Lawyers are, for obvious reasons, instinctively drawn to a similarly adversarial, competitive model of truth seeking. Why not let the LOAC and IHL versions of the law of war continue to compete for supremacy? Is that not the most likely way in which truth will out?

The obvious difference is that lawyers arguing about the interpretation of law are not pursuing hidden truths. They are not physicists hunting the Higgs boson or mathematicians vying for the honour of being first to solve a famous problem.102 They are trying to give concrete meaning to past lawmakers’ constructions**, in order to impose** discipline on violence **when collectivities go to war.** The obvious danger in an adversarial competition over who owns the law of war is one David Kennedy highlights: when legal interpretation turns into a political game, the players’ trust in each other's candour inevitably erodes, so that ‘as we use the discourse more, we believe it less – at least when spoken by others’.103 The result (Kennedy adds) is a law of armed combat that undermines itself and casts its own legitimacy into disrepute, even in the eyes of its practitioners. I wholeheartedly agree with this diagnosis, but not with Kennedy's cure, which is to downplay legality in favour of pure choice – to ‘be wary of treating the legal issues as the focal points for our ethics and politics’.104 In place of legalism, Kennedy calls for ‘recapturing the human experience of responsibility for the violence of war’ – accepting that ‘those who kill do “decide in the exception”, . . . [and] as men and women, our military, political, and legal experts are, in fact, free – free from the comfortable ethical and political analytics of expertise, but not from responsibility for the havoc they unleash’.105 His argument appears to be that debates over the laws of war are irredeemably strategic. Officers and political leaders – and, for that matter, humanitarians – find it all too convenient to fob responsibility onto lawyers and the law when in fact the law is ‘an elaborate discourse of evasion’.106

But suppose there were no LOAC or ICL. **Do we really believe that more responsible decisions would result, that fewer lives would be lost**, or that an alternative and better vocabulary than ‘the analytics of expertise’ would arise for deliberation? I see no reason to think so. Without some vocabulary for deliberation, the pure experience of responsibility floats in a vacuum and goes nowhere. Like it or not, and **no matter where we end up,** we must start with the vocabulary we have. **That is the legal vocabulary of the law of war**, heavily inflected with the just-war theory of past centuries. **Where else could we start?** In Quine's words, ‘We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom.’107

**The two cultures are stuck with each** other aboard the same wounded ship. The argument of this article has been that their differing comprehensive views arise from competing premises about the primacy of military necessity and human dignity. Both are reasonable premises, and mutual recognition that they are reasonable – more precisely, willingness to discard one's own interpretations if a similarly willing adherent to the alternative view could not possibly accept them – seems like a plausible canon of interpretation. It is also the most plausible strategy for achieving whatever convergence is humanly possible.

No one will accept major changes to the structure of sovereignty

Brooks ’12 (Rosa, Professor of Law at Georgetown University Law Center and a Bernard L. Schwartz Senior Fellow at the New America Foundation, “Strange Bedfellows: The Convergence of Sovereignty-Limiting Doctrines in Counterterrorist and Human Rights Discourse,” Law and Ethics Summer/Fall 2012)

None of these projects would be straightforward; each might be seen as facing barriers so high as to be virtually insurmountable. If the various institutional and legal “fixes” we might envision are unrealistic in the near term, is there any responsible way forward? The overall thrust of this essay has been to call for intellectual honesty about the logical implications of emerging sovereignty-limiting doctrines. But, perhaps, this is one of those areas where discretion—even disingenuousness—is the better part of valor, or at least the better part of preserving stability. Stephen Krasner makes a variant of this argument in some of his recent work. Krasner famously dubbed sovereignty “organized hypocrisy,” noting that while the notion of “sovereignty” has long been associated with clear legal criteria and rules, states have, for just as long, routinely ignored those rules when it suited them to do so.18 To Krasner, this organized hypocrisy is nonetheless functional—or at least **more functional than any available alternative.** In a 2010 essay on “The Durability of Organized Hypocrisy,” Krasner argues that this remains true today.19 He grants that emerging normative or legal doctrines will continue to challenge and delegitimize traditional notions of sovereignty, and significant “shocks”— such as “the possibility of mega-terrorist attacks”—might lead to radical change: “Governments in advanced countries would begin to reconfigure their bureaucratic structures to… [reflect] new rules and principles about responsibilities for territories or functions beyond national borders.” But, argues Krasner, “Such fundamental challenges to the existing sovereignty regime are not to be welcomed. Any new set of principles…would be contested. External actors, even if their claims were legitimated…would not find it easy to exercise the authority they had asserted…there are no formulaic solutions.” Krasner concludes, **“Sovereignty has worked very imperfectly but it has still worked better than any other structure that decision-makers have been able to envision**.”20 In other words: in the end, perhaps, when it comes to teasing out the implications of emerging sovereigntylimiting doctrines, organized hypocrisy is the best we can do.

They are a criticism of status quo legal practices – the aff’s restraint solves militarism

Brooks ’13 (Rosa, Professor of Law at Georgetown University Law Center and a Bernard L. Schwartz Senior Fellow at the New America Foundation, “Drones and Cognitive Dissonance,” chapter for *Drones, Remote Targeting And The Promise Of Law*, Peter Bergen and Daniel Rothenberg, Eds. Forthcoming, Cambridge University Press, 2013)

There is nothing mystical about drones. They are not inherently “evil,” and they’re not a panacea, either. Drone strikes are just another tactic in America’s lethal toolkit – just another means of delivering death, **not inherently any worse** or any better than any other way to kill people. From a narrow legal perspective, drones are also just “business as usual”. Both the United States and the international community **have long had rules** governing armed conflicts and the use of force in national selfdefense. These rules apply whether the lethal force at issue involves knives, assault weapons, grenades, tank-mounted machine guns, or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – **they pose no new legal challenges**, and can and should be regulated using the existing laws of war. But if drones used in traditional armed conflicts present no “new” legal issues, some of the activities and policies enabled and facilitated by drones pose enormous challenges to existing legal frameworks. For example, as discussed above, the availability of drone technologies makes it far easier for the United States to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Often this expansion challenges existing legal frameworks. For example, drones enable the United States to strike targets inside foreign states, and do so quickly, efficiently and deniably.37 As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of recognized armed conflicts that their use challenges existing legal frameworks. Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in **jamming square pegs into round holes.** Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Ideally, we update the laws before too much damage is done. Right now, US drone policy is on the verge of doing irreparable damage to the rule of law – and it’s not clear that either the President, Congress of the public cares. Understanding how US drone policy challenges existing legal ideas, systems and norms requires a consideration of the concept of “rule of law” as well as a review of the relationship between the laws of war and “ordinary” law.

Quality of life is skyrocketing worldwide by all measures

Ridley, visiting professor at Cold Spring Harbor Laboratory, former science editor of *The Economist*, and award-winning science writer, 2010

(Matt, *The Rational Optimist*, pg. 13-15)

If my fictional family is not to your taste, perhaps you prefer statistics. Since 1800, the population of the world has multiplied six times, yet **average life expectancy has more than doubled and real income has risen more than nine times**. Taking a shorter perspective, in 2005, compared with 1955, the average human being on Planet Earth earned nearly three times as much money (corrected for inflation), ate one-third more calories of food, buried one-third as many of her children and could expect to live one-third longer. She was less likely to die as a result of war, murder, childbirth, accidents, tornadoes, flooding, famine, whooping cough, tuberculosis, malaria, diphtheria, typhus, typhoid, measles, smallpox, scurvy or polio. She was less likely, at any given age, to get cancer, heart disease or stroke. She was more likely to be literate and to have finished school. She was more likely to own a telephone, a flush toilet, a refrigerator and a bicycle. All this during a half-century when the world population has more than doubled, so that far from being rationed by population pressure, the goods and services available to the people of the world have expanded. It is, by any standard, an astonishing human achievement. Averages conceal a lot. **But even if you break down the world into bits**, **it is hard to find any region that was worse off in 2005 than it was in 1955**. Over that half-century, real income per head ended a little lower in only six countries (Afghanistan, Haiti, Congo, Liberia, Sierra Leone and Somalia), life expectancy in three (Russia, Swaziland and Zimbabwe), and infant survival in none. In the rest they have rocketed upward. Africa’s rate of improvement has been distressingly slow and patchy compared with the rest of the world, and many southern African countries saw life expectancy plunge in the 1990s as the AIDS epidemic took hold (before recovering in recent years). There were also moments in the half-century when you could have caught countries in episodes of dreadful deterioration of living standards or life chances – China in the 1960s, Cambodia in the 1970s, Ethiopia in the 1980s, Rwanda in the 1990s, Congo in the 2000s, North Korea throughout. Argentina had a disappointingly stagnant twentieth century. But overall, after fifty years, **the outcome for the world is** remarkably, astonishingly, **dramatically positive**. The average South Korean lives twenty-six more years and earns fifteen times as much income each year as he did in 1955 (and earns fifteen times as much as his North Korean counter part). The average Mexican lives longer now than the average Briton did in 1955. The average Botswanan earns more than the average Finn did in 1955. **Infant mortality is lower today in Nepal than it was in Italy in 1951**. The proportion of Vietnamese living on less than $2 a day has dropped from 90 per cent to 30 per cent in twenty years. The rich have got richer, but the poor have done even better. **The poor in the developing world grew their consumption twice as fast as the world as a whole between 1980 and 2000**. The Chinese are ten times as rich, one-third as fecund and twenty-eight years longer-lived than they were fifty years ago. Even Nigerians are twice as rich, 25 per cent less fecund and nine years longer-lived than they were in 1955. **Despite a doubling of the world population**, even **the raw number of people living in absolute poverty** (defined as less than a 1985 dollar a day) **has fallen since the 1950s**. The percentage living in such absolute poverty has dropped by more than half – to less than 18 per cent. That number is, of course, still all too horribly high, but the trend is hardly a cause for despair: at the current rate of decline, it would hit zero around 2035 – though it probably won’t. The United Nations estimates that poverty was reduced more in the last fifty years than in the previous 500.

#### Their conception of violence is reductive and can’t be solved

Boulding 77

Twelve Friendly Quarrels with Johan Galtung

Author(s): Kenneth E. BouldingReviewed work(s):Source: Journal of Peace Research, Vol. 14, No. 1 (1977), pp. 75-86Published

Kenneth Ewart Boulding (January 18, 1910 – March 18, 1993) was an economist, educator, peace activist, poet, religious mystic, devoted Quaker, systems scientist, and interdisciplinary philosopher.[1][2] He was cofounder of General Systems Theory and founder of numerous ongoing intellectual projects in economics and social science.

He graduated from Oxford University, and was granted United States citizenship in 1948. During the years 1949 to 1967, he was a faculty member of the University of Michigan. In 1967, he joined the faculty of the University of Colorado at Boulder, where he remained until his retirement.

Finally, we come to the great Galtung metaphors of 'structural violence' 'and 'positive peace'. They are metaphors rather than models, and for that very reason are suspect. Metaphors always imply models and metaphors have much more persuasive power than models do, for models tend to be the preserve of the specialist. But when a metaphor implies a bad model it can be very dangerous, for it is both persuasive and wrong. The metaphor of structural violence I would argue falls right into this category. The metaphor is that poverty, deprivation, ill health, low expectations of life, a condition in which more than half the human race lives, is 'like' a thug beating up the victim and 'taking his money away from him in the street, or it is 'like' a conqueror stealing the land of the people and reducing them to slavery. The implication is that poverty and its associated ills are the fault of the thug or the conqueror and the solution is to do away with thugs and conquerors. While there is some truth in the metaphor, in the modern world at least there is not very much. Violence, whether of the streets and the home, or of the guerilla, of the police, or of the armed forces, is a very different phenomenon from poverty. The processes which create and sustain poverty are not at all like the processes which create and sustain violence, although like everything else in 'the world, everything is somewhat related to everything else. There is a very real problem of the structures which lead to violence, but unfortunately Galitung's metaphor of structural violence as he has used it has diverted attention from this problem. Violence in the behavioral sense, that is, somebody actually doing damage to somebody else and trying to make them worse off, is a 'threshold' phenomenon, rather like the boiling over of a pot. The temperature under a pot can rise for a long time without its boiling over, but at some 'threshold boiling over will take place. The study of the structures which underlie violence are a very important and much neglected part of peace research and indeed of social science in general. Threshold phenomena like violence are difficult to study because they represent 'breaks' in the systenm rather than uniformities. Violence, whether between persons or organizations, occurs when the 'strain' on a system is too great for its 'strength'. The metaphor here is that violence is like what happens when we break a piece of chalk. Strength and strain, however, especially in social systems, are so interwoven historically that it is very difficult to separate them. The diminution of violence involves two possible strategies, or a mixture of the two; one is Ithe increase in the strength of the system, 'the other is the diminution of the strain. The strength of systems involves habit, culture, taboos, and sanctions, all these 'things which enable a system to stand lincreasing strain without breaking down into violence. The strains on the system 'are largely dynamic in character, such as arms races, mutually stimulated hostility, changes in relative economic position or political power, which are often hard to identify. Conflicts of interest 'are only part 'of the strain on a system, and not always the most important part. It is very hard for people ito know their interests, and misperceptions of 'interest take place mainly through the dynamic processes, not through the structural ones. It is only perceptions of interest which affect people's behavior, not the 'real' interests, whatever these may be, and the gap between percepti'on and reality can be very large and resistant to change. However, what Galitung calls structural violence (which has been defined 'by one unkind commenltator as anything that Galitung doesn't like) was originally defined as any unnecessarily low expectation of life, on that assumption that anybody who dies before the allotted span has been killed, however unintentionally and unknowingly, by somebody else. The concept has been expanded to include all 'the problems of poverty, destitution, deprivation, and misery. These are enormously real and are a very high priority for research and action, but they belong to systems which are only peripherally related to 'the structures whi'ch produce violence. This is not rto say that the cultures of violence and the cultures of poverty are not sometimes related, though not all poverty cultures are cultures of violence, and certainly not all cultures of violence are poverty cultures. But the dynamics lof poverty and the success or failure to rise out of it are of a complexity far beyond anything which the metaphor of structural violence can offer. While the metaphor of structural violence performed a service in calling attention to a problem, it may have d'one a disservice in preventing us from finding the answer.

#### 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 2008, 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.

#### Reality outweighs representations

**Wendt, 1999**

Alexander Wendt, Professor of International Security at Ohio State University, 1999, “Social theory of international politics,” gbooks

The effects of holding a relational theory of meaning on theorizing about world politics are apparent in **David Campbell's** provocative study of US foreign policy, which **shows** how the **threats** posed by the Soviets, immigration, drugs, and so on, **were constructed** out of US national security discourse.29 The book clearly shows that material things in the world did not force US decision-makers to have particular representations of them - the picture theory of reference does not hold. In so doing it highlights the discursive aspects of truth and reference, the sense in which objects are relationally "constructed."30 On the other hand, while emphasizing several times that he is not denying the reality of, for example, Soviet actions, he specifically eschews (p. 4) any attempt to assess the extent to which they caused US representations. Thus **he cannot address the extent to which US representations of the Soviet threat were accurate or true** (questions of correspondence). **He can only focus on the nature and consequences of the representations**.31 Of course, there is nothing in the social science rule book which requires an interest in causal questions, and the nature and consequences of representations are important questions. In the terms discussed below he is engaging in a constitutive rather than causal inquiry. However, I suspect **Campbell thinks that any attempt to assess the correspondence of discourse to reality is inherently pointless.** According to the relational theory of reference **we simply have no access to what the Soviet threat "really" was, and as such its truth is established entirely within discourse**, not by the latter's correspondence to an extra-discursive reality 32 **The main problem** with the relational theory of reference **is that it cannot account for the resistance of the world to certain representations, and thus for representational failures or m/'sinterpretations**. Worldly resistance is most obvious in nature: whether our discourse says so or not, pigs can't fly. But examples abound in society too. **In 1519 Montezuma faced the same kind of epistemological problem facing social scientists today: how to refer to people who, in his case, called themselves Spaniards. Many representations were conceivable**, and no doubt the one he chose - that they were **gods - drew on the discursive materials available to him. So why was he killed and his empire destroyed by an army hundreds of times smaller than his own**? The realist answer is that **Montezuma was simply wrong: the Spaniards were not gods, and had come instead to conquer his empire. Had Montezuma adopted this alternative representation of what the Spanish were, he might have prevented this outcome because that representation would have corresponded more to reality. The reality of the conquistadores did not force him to have a true representation**, as the picture theory of reference would claim, **but it did have certain effects - whether his discourse allowed them or not.** The external world to which we ostensibly lack access, in other words. often frustrates or penalizes representations. **Postmodernism gives us no insight into why this is so, and indeed, rejects the question altogether.33** The description theory of reference favored by empiricists focuses on sense-data in the mind while the relational theory of the postmoderns emphasizes relations among words, but they are similar in at least one crucial respect: neither grounds meaning and truth in an external world that regulates their content.34 Both privilege epistemology over ontology. What is needed is a theory of reference that takes account of the contribution of mind and language yet is anchored to external reality. The realist answer is the causal theory of reference. According to the causal theory the meaning of terms is determined by a two-stage process.35 First there is a "baptism/' in which some new referent in the environment (say, a previously unknown animal) is given a name; then this connection of thing-to-term is handed down a chain of speakers to contemporary speakers. Both stages are causal, the first because the referent impressed itself upon someone's senses in such a way that they were induced to give it a name, the second because the handing down of meanings is a causal process of imitation and social learning. Both stages allow discourse to affect meaning, and as such do not preclude a role for "difference" as posited by the relational theory. Theory is underdetermined by reality, and as such the causal theory is not a picture theory of reference. However, conceding these points does not mean that meaning is entirely socially or mentally constructed. In the realist view beliefs are determined by discourse and nature.36 This solves the key problems of the description and relational theories: our ability to refer to the same object even if our descriptions are different or change, and the resistance of the world to certain representations. **Mind and language help determine meaning, but meaning is also regulated by a mind-independent, extra-linguistic world**.

#### Legal restraints work – the theory of the exception is self-serving and wrong

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against** **legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role** **in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22

Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.

This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive** – **and by no means incoherent** – light.24

Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).

As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

#### Legal norms don’t cause wars and the alt can’t effect liberalism

David **Luban 10**, law prof at Georgetown, Beyond Traditional Concepts of Lawfare: Carl Schmitt and the Critique of Lawfare, 43 Case W. Res. J. Int'l L. 457

Among these associations is the positive, constructive side of politics, the very foundation of Aristotle's conception of politics, which Schmitt completely ignores. Politics, we often say, is the art of the possible. It is the medium for organizing all human cooperation. Peaceable civilization, civil institutions, and elemental tasks such as collecting the garbage and delivering food to hungry mouths all depend on politics. Of course, peering into the sausage factory of even such mundane municipal institutions as the town mayor's office will reveal plenty of nasty politicking, jockeying for position and patronage, and downright corruption. Schmitt sneers at these as "banal forms of politics, . . . all sorts of tactics and practices, competitions and intrigues" and dismisses them contemptuously as "parasite- and caricature-like formations." n55 The fact is that **Schmitt has nothing** whatever **to say about the constructive side of politics**, and his entire theory focuses on enemies, not friends. In my small community, political meetings debate issues as trivial as whether to close a street and divert the traffic to another street. It is hard to see mortal combat as even a remote possibility in such disputes, and so, in Schmitt's view, they would not count as politics, but merely administration. Yet issues like these are the stuff of peaceable human politics.

Schmitt, I have said, uses the word "political" polemically--in his sense, politically. I have suggested that his very choice of the word "political" to describe mortal enmity is tendentious, attaching to mortal enmity Aristotelian and republican associations quite foreign to it. But the more basic point is that Schmitt's critique of humanitarianism as political and polemical is itself political and polemical. In a word, the critique of lawfare is itself lawfare. It is self-undermining because to the extent that it succeeds in showing that lawfare is illegitimate, it de-legitimizes itself.

What about the merits of Schmitt's critique of humanitarianism? His argument is straightforward: either humanitarianism is toothless and [\*471] apolitical, in which case ruthless political actors will destroy the humanitarians; or else humanitarianism is a fighting faith, in which case it has succumbed to the political but made matters worse, because wars on behalf of humanity are the most inhuman wars of all. Liberal humanitarianism is either too weak or too savage.

The argument has obvious merit. When Schmitt wrote in 1932 that wars against "outlaws of humanity" would be the most horrible of all, it is hard not to salute him as a prophet of Hiroshima. The same is true when Schmitt writes about the League of Nations' resolution to use "economic sanctions and severance of the food supply," n56 which he calls "imperialism based on pure economic power." n57 Schmitt is no warmonger--he calls the killing of human beings for any reason other than warding off an existential threat "sinister and crazy" n58 --nor is he indifferent to human suffering.

But **international** humanitarian law **and criminal law are not the same thing as wars to end all war or humanitarian military interventions, so Schmitt's** important moral **warning** against ultimate military self-righteousness **does not** really **apply**. n59 Nor does "bracketing" war by humanitarian constraints on war-fighting presuppose a vanished order of European public law. The fact is that in nine years of conventional war, the United States has significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity. n60 This may frustrate current lawfare critics who complain that American soldiers in Afghanistan are being forced to put down their guns. Bracketing warfare is a decision--Schmitt might call it an existential decision--that rests in part on values that transcend the friend-enemy distinction. **Liberal values are not alien extrusions into politics** or evasions of politics; **they are part of politics, and**, as Stephen Holmes argued against Schmitt, **liberalism has proven remarkably strong, not weak**. n61 We could choose to abandon liberal humanitarianism, and that would be a political decision. It would simply be a bad one.

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Util’s the only moral framework

**Murray 97** (Alastair, Professor of Politics at U. Of Wales-Swansea, *Reconstructing Realism*, p. 110)

Weber emphasised that, while the 'absolute ethic of the gospel' must be taken seriously, it is inadequate to the tasks of evaluation presented by politics. Against this 'ethic of ultimate ends' — Gesinnung — he therefore proposed the 'ethic of responsibility' — Verantwortung. First, whilst the former dictates only the purity of intentions and pays no attention to consequences, the ethic of responsibility commands acknowledgement of the divergence between intention and result. Its adherent 'does not feel in a position to burden others with the results of his [OR HER] own actions so far as he was able to foresee them; he [OR SHE] will say: these results are ascribed to my action'. Second, the 'ethic of ultimate ends' is incapable of dealing adequately with the moral dilemma presented by the necessity of using evil means to achieve moral ends: Everything that is striven for through political action operating with violent means and following an ethic of responsibility endangers the 'salvation of the soul.' If, however, one chases after the ultimate good in a war of beliefs, following a pure ethic of absolute ends, then the goals may be changed and discredited for generations, because responsibility for consequences is lacking. The 'ethic of responsibility', on the other hand, can accommodate this paradox and limit the employment of such means, because it accepts responsibility for the consequences which they imply. Thus, Weber maintains that only the ethic of responsibility can cope with the 'inner tension' between the 'demon of politics' and 'the god of love'. 9 The realists followed this conception closely in their formulation of a political ethic.10 This influence is particularly clear in Morgenthau.11 In terms of the first element of this conception, the rejection of a purely deontological ethic, Morgenthau echoed Weber's formulation, arguing tha/t:the political actor has, beyond the general moral duties, a special moral responsibility to act wisely ... The individual, acting on his own behalf, may act unwisely without moral reproach as long as the consequences of his inexpedient action concern only [HER OR] himself. What is done in the political sphere by its very nature concerns others who must suffer from unwise action. What is here done with good intentions but unwisely and hence with disastrous results is morally defective; for it violates the ethics of responsibility to which all action affecting others, and hence political action par excellence, is subject.12 This led Morgenthau to argue, in terms of the concern to reject doctrines which advocate that the end justifies the means, that the impossibility of the logic underlying this doctrine 'leads to the negation of absolute ethical judgements altogether'.13

## sovereignty

Just war is being reconfigured by non-US approaches, but the debate itself is still key

Debra Bergoffen, Professor of Philosophy and a member of the Women's Studies and Cultural Studies programs at George Mason University, Spring 2008, The Just War Tradition: Translating the Ethics of Human Dignity into Political Practices, Hypatia Volume 23, Number 2

In its beginnings, these strictures were vulnerable to being co-opted by the logic of domination, for they were formulated within the boundaries of a Western tradition that considered its visions of reality absolute. In throwing off the yoke of colonialism, emerging nation states challenged the Western grounds of just war concepts of war and peace, crimes against humanity and war crimes laws. Former colonies, criticizing the imperialist biases of these ideas insisted on establishing a priority right to development and self-determination (Bouandel 1977, 48). Similarly, feminist critiques of the masculine and heterosexist biases embedded in these rights challenge the universality claimed for these laws (Peterson and Parisi 1998).

One would think that these arguments, not only because they reflect strongly held principles but also because they represent important power struggles, would destroy the credibility of the just war tradition and its legacies of wartime rules and peacetime aspirations. That has not happened. Instead, there is an emerging cross-cultural consensus definition of war crimes, crimes against humanity, and human rights that condemns torture and killing, recognizes the necessity of political and civil rights (this a result of the end of the cold war), and is beginning to include economic and social rights (Bouandel 1977, 62–63).

There was a point in time when it could have been said that the universality claimed for these identified crimes and rights were no more than a figment of the Western imagination, or less kindly, a product of Western hegemony; one more sign of the power of the West to impose its will on the rest of the world. This argument, intended to criticize Western arrogance, is itself a display of this arrogance. It presumes that human rights can only be derived from Enlightenment principles. The fact that countries and peoples who find Enlightenment appeals to autonomy and individual rights alien and find resources within their own traditions for adopting human rights principles falsifies this arrogant presumption (Coomaraswamy 1999, 168–69; Donnelly 2003, 71). Further, in the area of developing human rights laws at least, the era of Western hegemony is over. If human rights laws and war crimes prosecutions continue to be a matter of international concern, it will not be because the West is imposing its will on others, and it will not be because some absolute foundation grounded in the Western metaphysical or religious traditions will be invoked. It will be the effect of a common interest emerging from peoples of diverse traditions and absolutes finding themselves in an increasingly global environment that requires them to confront other peoples, traditions, and absolutes. As often [End Page 88] as not, these confrontations will follow the logic of the friend and the enemy and its demand that only one absolute prevail. Increasingly, however, the hot violence of war and the cold violence of the peace that war produces have been supplemented by what Merleau-Ponty called (1973) the violence of dialogue. This violence, instead of initiating a logic where the nature of certain issues is determined by the one who succeeds in dominating the other(s), introduces a logic where the many, instead of being reduced first to a two of the enemy and friend and then to a victorious one, are supported in their differences through reference to a shared point of departure that makes both their differences and their commonality possible.