



# **NAVAL POSTGRADUATE SCHOOL**

**MONTEREY, CALIFORNIA**

## **THESIS**

**CONTEMPORARY JUS AD BELLUM ON USE OF FORCE  
IN SELF-DEFENSE BY STATES AGAINST NON-STATE  
TERRORIST GROUPS—LIMITATIONS, EVOLUTIONS  
AND ALTERNATIVES**

by

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September 2011

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**CONTEMPORARY JUS AD BELLUM ON USE OF FORCE IN SELF-DEFENSE  
BY STATES AGAINST NON-STATE TERRORIST GROUPS—LIMITATIONS,  
EVOLUTIONS AND ALTERNATIVES**

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## **ABSTRACT**

International law is challenged to ensure the legal and legitimate use of force by states against non-state terrorist groups. Such groups evade easy classification as criminals or armed forces. Their organization, methods and targets are simultaneously local in application, but global in impact. They attack the foundations of state identity and legitimacy, including the monopoly on use of force, but are not state actors. Non-state actor threats are not unprecedented, but states and international law have never had to contend with non-state actors possessing global reach and force, resources and influence on par with some states, which creates a dilemma for contemporary states and *jus ad bellum*—to adhere to principles of international law and customs of legitimate state action, or to ensure the security of the state’s citizens. The predicament is incompatible with the notion that, in the modern era, the use of force by states is to be limited, governed and made legitimate by the rule of law. State use of force without legal authorization creates severe issues of legitimacy, with politically and socially destabilizing effects. This paper examines these issues in full and identifies key trends and potential avenues for legal reform.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

CIA	Central Intelligence Agency
DRC	Democratic Republic of the Congo
FARC	Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia)
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISAF	International Security Assistance Force
MKO	Mujahedin-e Khalq Organization
OAS	Organization of American States
PLO	Palestinian Liberation Organization
U.S.	United States
UAV	Unmanned Aerial Vehicle
UK	United Kingdom
UN	United Nations
UNSC	UN Security Council
WMD	Weapons of Mass Destruction
WTO	World Trade Organization
WWI	World War I
WWII	World War II

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The author wants to thank his mother for teaching him why constitutions matter and his father for teaching him they mean nothing if not protected and enforced.

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## **I. INTRODUCTION**

### **A. PROBLEM STATEMENT**

International law is challenged when faced with the problem of consistently ensuring the legal and legitimate use of force by states against non-state terrorist groups, often acting transnationally, if not globally. Non-state terrorist actors push the limits of modern, international law on state use of force in self-defense. Such groups evade easy classification as international criminals or formal, armed forces. Their use of force is at once both criminal and a form of political, or religious, expression. Their organizational structures, methods and targets are simultaneously intensely local in application and operation, but often truly global in reach and impact. They attack the very foundations of nation-state identity and legitimacy, including the state-monopoly on the use of military force, as well as the state's ability to ensure social and economic stability, but they are not state actors. Standing in opposition to such actors is the modern state and the customs and conventions of international law on the use of force.

### **B. THE NATURE OF NON-STATE ACTORS VS. STATE ACTORS**

While threats posed by non-state actors are hardly unprecedented, never before have states and international law and custom had to contend with a type of non-state actor possessing both global reach and the ability to bring force, resources and influence on par with some states, or at least enough to impact the authority of a state significantly. Such actors and the threat they pose are in opposition to many of the assumptions and principles that have shaped current *jus ad bellum*, or the rights to wage war, if not international law itself, which creates a dilemma for contemporary states—to adhere to principles of international law and customs of legitimate state action, or to ensure the security of the state's citizens. This vacuum must be addressed to ensure international peace and security.

### **C. THE CURRENT FOCUS OF INTERNATIONAL LAW ON STATE ACTORS**

Contemporary international law on the use of force by nation-states was developed by nation-states to govern the conditions under which such states can use force to defend themselves and their allies against threats from other states. For example, the Kellogg-Briand Pact, aka the Paris Pact, aka General Treaty for the Renunciation of War, signed August 27, 1928, which condemns “recourse to war for the solution of international controversies.” This body of law operates on the assumption that the use of force should be limited and used as a last resort in the international arena, which is justified by the governing statutes of international organizations and the historical traditions of *jus ad bellum* (summarized from Cook, 2001, pp. 20–24). The underlying theory of this framework for just war is that through its application, states can limit the use of force and its destructive effects, facilitate the peaceful resolution of conflicts, and establish transparency on what justifies and legitimizes the necessary use of force by states (Blakesly, 2001, ch. 14).

### **D. A MISMATCH OF LAW AND REALITY**

Confusion is created, however, when this body of law and tradition is applied to the use of force by modern states against non-state actors in the form of global terrorist groups who operate in secret, hiding in states with whom the United States is often, otherwise at peace, if not allied (Kilcullen, 2009, p. 264). This uncertainty is caused by: first, the application of a body of law to a type of actor it was not originally intended for—state vs. non-state actors (Kaldor, 2001, pp. 69–70), second, by its application to a type of warfare it did not anticipate—low-level, ongoing, asymmetrical conflict fought literally within populations, often without clear or immediate strategic ends (Smith, 2007, pp. 35–36), and, third to a form of conflict global in scope, yet directed against very particular individuals or groups, within the borders of multiple, foreign states, calling into question otherwise longstanding assumptions about definitions of state sovereignty, and in short, the identity of the state itself and the legitimacy of its actions (Kilcullen, 2001, p. 264).

This confusion creates problems. First, it calls into question the legality and legitimacy of the use of force by states against terrorist organizations abroad. Such legality and legitimacy is vital to gaining both international support for and cooperation against terrorist organizations, as well as the support and cooperation of the local, domestic populations amongst whom modern war is fought (Smith, 2001, pp. 35–36), while also making officials of the state using force open to international criminal prosecution. Questionable legality of the use of force by states against terror groups also severely weakens the development of a simple, unifying, easily expressed narrative rooted in liberal rights critical to countering the narrative used by terror groups to legitimize their own existence and actions (Kilcullen, 2010, p. 7). Second, it creates a situation in which a state facing a terror threat is potentially forced to act outside of international law to pursue otherwise legitimate targets (Bobbitt, 2008, p. 532). Such an impasse potentially jeopardizes international law and the relations of states, undermining a fundamental source of nation-state identity and how states relate to one another—the legitimate control of and authority over the use of force.

The realities of this problem can be seen in contemporary news headlines. One need only consider recent United States (U.S.) military action taken in Pakistan to kill Osama Bin Laden to see the practical implications. On May 1, 2011, U.S. military forces and intelligence agents launched a strike in Abbottabad, Pakistan, presumably originating from outside of Pakistan. The mission put troops on the ground, deep within Pakistani territory just outside of the capital Islamabad and 1/3 of a mile from Pakistan’s “West Point.” The troops used lethal force and stayed long enough to gather an apparently large volume of intelligence before leaving the country. News reports indicated that the Pakistani government was informed of the mission after it was well underway. While cooperation with the Pakistani government on intelligence gathering had led to the strike, the Pakistani government had been given no indication of the mission’s development.

No question remains, whatsoever, that Osama Bin Laden was a criminal and murderer, that he represented an ongoing threat to U.S. national security, that his killing was morally justified, and that it was in line with American national security interests, if not global interests. Yet, it is necessary to take a step back, objectively, and consider the

legal issues brought to light by this type of use of force, the precedent it sets, and the practical impact it has on the U.S.'s ability to pursue its long-term security interests around the world. Counter-terrorism requires a tenuous balancing act between the enforcement of law, and preservation of order and security. A global, non-state terrorist group presents a particularly difficult challenge for jus ad bellum on self-defense, because by definition, it is not a sovereign state, yet still often possesses the ability to control and use force like one, while still never holding sovereign territory of its own.

Consequently, however surgical and limited this strike was, little doubt exists that to execute it, U.S. forces crossed into a sovereign state's territory, without its consent or any clear legal authorization, to kill a person, albeit perhaps a legitimate military target, and seize property on its soil. In the aftermath of the strike, U.S. relations with Pakistan reached a new low, with the leaking of the name of the Central Intelligence Agency's (CIA's) station chief in Pakistan, CIA informants in Pakistan being arrested by the Pakistani government, the expulsion of U.S. and United Kingdom (UK) military advisors, the near resignation of the Chief of the Pakistani Army, the condemnation of the United States by Pakistan's spy chief in the Pakistani parliament, ever worse Pakistani public opinion of the United States, and stronger ties between Pakistan and Iran (Connelly, 2011). Indeed, on July 21, 2011, the President of Pakistan claimed that he had received a pledge from the United States that it would no longer pursue unilateral raids in Pakistan, such as the one used to strike Osama Bin Laden (Borger, 2011).

Realists would counter, quite naturally, "Who cares? We got him, he's dead, our interests are served, a mortal enemy is gone and our relationship with Pakistan has always been fee for service anyway." Yet, use of force like this and other historical examples, taken in combination with ongoing, targeted, U.S. drone strikes in places like South Waziristan (*RRTNews*, 2011), South Yemen (*The Express Tribune News*, 2011), and Somalia (*Eurasia Review*, 2011), present a significant problem for how the United States understands and uses the basic tenets of international law on self-defense to use force legally and legitimately in self-defense against non-state actors in the context of global terrorism.

Was Osama Bin Laden a legitimate military target in an ongoing war of self-defense? Does Al Qaeda's ongoing terror campaign amount to an armed attack justifying use of force in self-defense? Can states like the United States legitimately use force against Bin Laden even years after his organization's last major strike on U.S. sovereign territory? Can it do so on another country's territory, without its consent? Is its annexation of another state's sovereign territory legal and legitimate, even when that state perhaps lacked effective control over the non-state actor in its territory? When, if ever, does the necessity and immanence of a threat permit anticipatory self-defense? In sum, the question must be raised as to just how far a state can take its inherent right of self-defense, in terms of time, space, and level of force, before the law and norms of self-defense are broken, or, indeed, forced to evolve. Furthermore, if such law and norms are changing, the reasons why must be examined in greater detail. Such use of force potentially threatens in the long run to politicize international law and create an expanded definition and custom of state self-defense. In addition, this use of force has the potential to further destabilize places like Pakistan, a nuclear power where many, real, ongoing threats against the United States remain, harbored, knowingly or unknowingly, by an increasingly fragile government whose military is increasingly unable to ensure domestic order, let alone eliminate fundamentalist bases of operation in its federally governed territories (Military Top Brass, 2011). These problems can, at least in part, be eased, through a clearer and stronger international legal regime on the use of force in self-defense, against groups like Al Qaeda by giving the use of such force greater legitimacy and authority.

Jus ad bellum must evolve, as it has before, to account for present-day context, the nature of modern warfare, and the evolution of state sovereignty to address the challenges associated with a state using force against a non-state, global terrorist actor successfully. By viewing the problem in such a holistic manner, the law can be reformed to avoid a conflict between legality and self-defense.

## **E. SIGNIFICANCE OF RESEARCH**

The predicament described above, between legality and security, is incompatible with the notion that, in the modern era, the use of force by states is to be limited, governed and made legitimate by the rule of law. Beyond the purely legal ramifications of compromising the letter of treaty obligations, state use of force without legal authorization creates severe issues of the legitimacy of such force, which can, in turn, have politically and socially destabilizing effects, both locally and globally. Literature on this topic has, to date, identified such deficiencies, but only considered them in terms of contemporary laws and practices themselves—it has identified the problems and examined them in terms of current law and convention, but not considered, in depth, the historical, military, and political factors that could guide successful reforms. Consequently, this research project begins to address such deficiencies.



## II. METHODOLOGY

This research project utilizes a form of legal policy analysis to examine its main problem. The primary issue being analyzed is the apparent inability of international law to consistently ensure the legal and legitimate use of force by states against global, non-state terrorist groups. This gap in international law creates a paradox for states—are they to rightly defend themselves or unjustly break international law, calling into question the legality and legitimacy of their actions, while protecting their citizens? This problem is inherently rooted in the law and policy of international relations. As such, it is best examined using a form of legal policy analysis. Policy analysis allows for a thorough review of existing law and policy, its strengths and weaknesses, and ultimately, analytical results that yield recommendations for policy improvements. By combining standard policy analysis methods with a proven method of legal issue analysis, it is possible to arrive at a research methodology best suited to the problem at hand in this project.

The specific form of policy analysis utilized in this paper is a modified form of the standard issue, rule, application, conclusions method of legal analysis, or “IRAC” (Lawnerds.com). IRAC involves the definition of the legal issue in question, a detailed review of the current legal rules, precedents and influences most relevant to the issue, analysis of the application of the law to the facts of the case in question, and finally, conclusions on how the law should judge the facts of the case in light of the issue. In this case, IRAC is used to: first, identify the legal and policy problems created when contemporary international law and jus ad bellum are used by states to justify their use force in defense against global, non-state terror groups, second, define the legal rules and conventions currently comprising international law and jus ad bellum, as well as the vital outcomes and end-states that such laws and practices are intended to create in the global arena, third, examine the adequacy and limitations of this body of law and practice when applied to the facts of a global, non-state terror group through the lens of three, major influences, including historical context, the nature of warfare, and definitions of state sovereignty, and fourth, compare the analytical results of step three to the desired

outcomes of international law identified in step two, so as to arrive at conclusions on criteria and guidelines for the reform of international law and practice that can ensure the legal and legitimate use of force by states against global, non-state terror actors.

The data required for this analysis is inherently qualitative in nature. It first must substantiate the main problem at hand through accounts and analysis of current events, second, document the content of current law and practice on state use of force, third, characterize the nature of modern, global terror groups, fourth, demonstrate how contemporary context differs from the historical foundations of international law and practice, fifth describe and substantiate how modern warfare is evolving, and sixth, identify trends in the changing nature of the relationship of the individual to the state. Sources include primary sources, such as international treaties, case law, and historical accounts, and secondary sources, such as legal, policy, and history journal articles, other scholarly works, and accounts and analyses of current events.

If applied with sufficient rigor, this method should provide a path for reform, which, if followed, could help bridge the current gap between self-defense and legitimacy that states face when using force against global, non-state terror groups.

### **III. LEGAL ISSUE DEFINED**

To employ IRAC effectively in examining this paper's overarching problem, it is first necessary to identify the core legal issue that is the basis for its larger policy analysis. The core legal issue at work in this paper is the adequacy of modern *jus ad bellum*, the provisions of United Nations (UN) Charter, Article 51, and related case law and international custom, for ensuring the legal and legitimate use of force in self-defense against global, non-state terrorist groups by states (UN Charter, 1945b). As to be seen, Article 51 and its "inherent right of self-defense" are at the heart of contemporary international law on the use of force by states in self-defense from acts of aggression (O'Connell, 2008, pp. 240–285). To examine this central issue effectively, it is essential first to identify the black letter law of self-defense and breakdown its tenets, then review the case law and customs that further define it, and finally, review how this body of law has, to date, been applied. In particular, this issue is examined through the lens of: (1) the relevant portions of the UN Charter, its drafting history and apparent intentions, (2) related international custom affecting the use and interpretation of these UN Charter provisions, (3) the apparent goals and desired outcomes of such law, and (4) case law applying this law and custom in practice, as related to state use of force against terrorist groups, including state-sponsored and non-state actor, global terror groups.

Such focus allows for understanding the overall goals and intentions of the Article 51 regime and then compares them to the reality of its application. By focusing attention on this area of international law and central legal issue, it is then possible to understand the current state of *jus ad bellum*, and in turn, begin to identify the larger trends that may be limiting its successful application.

In relation, of equal importance is defining the legal issues on which this analysis does not focus. This examination does not focus on the UN Charter's rights of collective self-defense and security, state acts of reprisal or retaliation, or the formal definitions of warfare, its onset or conclusion. Similarly, it does not address issues of *jus in bello*, or actual conduct during war, which includes the tenets of the Geneva Conventions, law and

custom on types, degrees, and targets of use of force in combat, or international war crimes prosecutions. When necessary, these other areas of international law are referred to for reference, but not for purposes of examination. Instead, the focus again is on how and when international law, and related case law and custom, effectively authorize the legal and legitimate use of force by states against global, non-state actors and the issues created by attempts to apply such rules to include the creation of ambiguities or grey zones in the law.

## **IV. RULES AND CUSTOM**

### **A. OVERVIEW**

The following section reviews the current state of *jus ad bellum* and focuses on international law and customs related to the use of force in self-defense against global, non-state terrorist actors. The goal of this section is to capture the contemporary state of such law with particular focus on its relevance to global, non-state terror actors.

### **B. HISTORICAL FOUNDATIONS AND EVOLUTION OF *JUS AD BELLUM***

Western concepts of just war can be traced to ancient Rome and the judgments of the *jus fetiales* priests who were charged with determining, amongst other things, *bellum justum* and *bellum injustum*—just and unjust war. Rules of Roman warfare required a formal demand for satisfaction be made of a Roman enemy, followed by a formal declaration of war. Such requirements were not merely procedural, but rather, often used to ensure and determine the legitimacy and justness of the claims leading to war (Dinstein, 2005, p. 64). As Rome Christianized, the concept of just pretense evolved to the notion of divine will or natural law—war was just so long as it was in harmony with the will of God, or, more to the point, the authorization of the Church. St. Augustine thus established the concept that all war was deplorable, but, when necessary, the cause of war had to be just. A just war thus punished wrongs and restored order (Maogato, 2005, p. 11). These Christian, natural-law based notions of just war soon gave way, by the 15th and 16th centuries, to the concept of self-defense (O’Connell, 2008, ch. 4).

With the rise of the sovereign, princely state, and by the 17th century, the advent of the Thirty Years War between Catholic and Protestant European states, it became clear that war could justly be fought by those sides of a conflict, or no side. War had thus evolved to be viewed as a legal, positivist right of a state (Maogato, 2005, p. 11). Grotius, regarded as a father of international law, presented a new legalistic notion of self-defense—a right that a state could employ to protect its property, citizenry and interests under certain conditions (O’Connell, 2008, ch. 1). War was no longer universally

assumed a moral wrong, fought only to affect justice and restore order—it was a state prerogative to be exercised under certain, defined conditions following some form of injury (O’Connell, 2008, ch. 1). This idea marked a critical evolution—a general presumption that war was prohibited was replaced by a notion that war was a just right of states, regularly used to defend state interests.

With the signing of the Treaty of Westphalia in 1648, the nation-state was established as a principle actor in global affairs, or, for the first time, truly “international” affairs (O’Connell, 2008, ch. 4). The state was sovereign over its own territory, and, outside its borders; in the international arena, it was free to assert its rights, including those of self-defense and self-preservation, in what was considered the ungoverned domain of international affairs. Warfare was inherent in the rights of state sovereignty—viewed as a regular function in the balancing act that was international affairs of the 17th to 19th centuries (Maogato, 2005, p. 12).

This expansive, rights-based notion of justified, sovereign state warfare would morph, however, as Europe concluded, and began to recover from the wars of Napoleonic aggression (O’Connell, 2008, ch. 4). With the Congress of Vienna in 1815, and subsequent Concert of Europe, the concept of balance of power was restored in European affairs and warfare, though still a clear, sovereign right, that became viewed as an action of last resort, pursued only after what amounted to judicial procedures under the Concert system to maintain order and the status quo in Europe (O’Connell, 2008, ch. 4), and then, with a very clear declaration of onset and end of hostilities with clearly defined, strategic aims—in a word, balance (Maogato, 2005, p. 21).

By the late 19th and early 20th centuries, warfare itself began to evolve from the very formal, highly organized and regimented process of the 17th through early 19th centuries, into the industrial, democratized, technologically advanced, and extremely expansive and destructive “state on state” conflict with which the World War I (WWI) and World War II (WWII) generations became all too familiar. Advancing on the principles established by the Congress of Vienna of 1815, and recognizing the significant change in warfare occurring by the late 19th century, the Hague Peace Conferences of 1899 and 1907 began a series of attempts to not merely regulate the onset of war, but,

gradually, to actually limit the right of states' use of force in international affairs (Sharp, 2010, p. 337). The Hague Peace Conferences of 1899 and 1907 resulted in two treaties that established the first formal, written statements of the "global" rules of war and were nascent attempts to establish clear and predictable means of ensuring peaceful dispute settlement meant to give states the chance to step back from the brink of conflict (Yale Law School, *Hague Peace Conferences, 1899 and 1907*). The subsequent Bryan Treaties signed beginning in 1913 committed the United States and other states to the use of an international commission for the resolution of interstate disputes before engaging in hostilities (Law Library–American Law and Legal Information, *Bryan Treaties*). No doubt exists that these early attempts failed to prevent WWI. However, they represent a very important, international, legal precedent—war was no longer regarded as a matter of rational, sovereign, state choice and a regular component of international affairs. Indeed, the onset of war was increasingly becoming viewed as a failure of a modern international system.

Following WWI, the League of Nations was established by the Covenant of the League of Nations via Part 1 of the Treaty of Versailles in 1919, which created an international organization dedicated to the peaceful resolution of international disputes and regulation of world affairs (Yale Law School, *The Covenant of the League of Nations*; Yale Law School, *The Versailles Treaty*). These treaties formally ended the classic concept of an inherent sovereign, state right to wage war to preserve its existence (Sharp, 2010, p. 338). While closer to a true prohibition on the use of force in international affairs, the reality was that all the League treaties did was give the League's Council the right to issue formal recommendations to states about to enter conflict, with the intent of mediating the conflict (O'Connell, 2008, ch. 4). The resurgent concept of self-defense, was in practice, viewed as a moderated right of self-preservation, without a clear, legal definition, or conditions for its utilization. The League's system was further hampered by the fact that its commitment to respect and preserve the sovereignty and territorial integrity of states, was limited to member states—not a universal declaration (Maogato, 2005, p. 24).

The Kellogg-Briand Pact of 1928 declared a prohibition of war and gave clear recognition to a legal right of self-defense (Sharp, 2010, p. 338). That prohibition was, unfortunately, without any real teeth, as it was not linked to a sanctions system or other means of enforcement. The prohibition also only applied to formal war and not the use of force in general (Maogato, 2005, p. 29). Finally, it failed to define self-defense, when and how it could be used. All these limitations accepted, the Pact signaled the first time that the international community accepted the idea that war was not a legitimate means of pursuing state interests and of resolving international disputes. It established the idea in international law that only a very limited type of force was legitimate in international affairs, and that the international community had a right to regulate such force (Dinstein, 2005, p. 83).

This stream of custom, tradition and treaties on *jus ad bellum* next flowed into the post-World War II (WWII) world and the establishment of the United Nations. Before turning toward a thorough review of contemporary *jus ad bellum*, with a focus on its relationship to the current threat of global, non-state terror groups, it is vital to note that this entire historical sequence has focused on the law of state conflict. As to be seen, instances have occurred, historically in which states have used force against, or in support of, non-state actors, such as pirates, mercenaries, armed bands, or even domestic insurgents supported by a 3rd party state to hurt mutual enemies. Yet, through it all, international law, by definition, indeed, even within its very name, “inter-national” has sought to regulate the use of force by states themselves. Arguably, never before has the world seen the impact of non-state actors on questions of international law on just war as it does today, and not since the height of the use of mercenaries and pirates during the Thirty Years War of the 17th century have such actors played such a mainstream role in warfare.



### **C. MODERN JUS AD BELLUM IN THE CONTEXT OF GLOBAL, NON-STATE TERROR ACTORS**

Modern jus ad bellum is rooted in the UN Charter. With respect to this analysis, the most relevant portions are found in Chapter II, Article 2, Section 4 (“2(4)”) (United Nations Charter, 1945a), and Chapter VII, Article 51 (“Article 51”) (United Nations Charter, 1945b). These provisions read as follows.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations; and

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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 order to maintain or restore international peace and security.

A literal reading of 2(4) reveals what is arguably the UN Charter’s most remarkable and important innovation in international law and relations—the clear, general prohibition of the use of force in international relations (O’Connell, 2008, ch. 7). Some have interpreted the explicit reference to “territorial integrity” and “political independence” as limiting this prohibition to only states themselves, and to only state uses of force impacting states’ independence (Dinstein, 2005, p. 204). However, the language of “any other manner inconsistent” along with other provisions of the UN Charter, drafting intent, and state practice demonstrate the fact that 2(4) is intended to institute a full prohibition on the use of force on both UN members and non-members alike and on all uses of force in international relations (Dinstein, 2005, p. 204).

The significance of this general prohibition to modern jus ad bellum on self-defense cannot be understated. Under the UN Charter, a fundamental assumption exists that force will not be used in international affairs (Sharp, 2010, p. 340). The general

prohibition does not simply establish the notion that force is something to be regulated or monitored, or allowed only for attempts at cooling off or with proper notice to a potential adversary. Use of force in self-defense by a state, against any actor, must occur as a limited exception to the general rule against using force to pursue national interests, legitimate or otherwise. Self-defense is a special exception to the general prohibition, whose use is not to be taken lightly and must be well justified. While limited, this exception, as Article 51 reveals, is an inherent right (O'Connell, 2008, ch. 7).

Article 2, Section 4, and its general prohibition on force are not a suicide pact for states. Article 51 establishes an inherent right to self-defense. The meaning of the term inherent has been debated; however, it is generally accepted that the term is meant to refer to the principle that the state has a right to take such measures as are required to ensure the safety of its citizenry and preserve its political boundaries and identity (Sharp, 2010, p. 341). This concept of self-defense as a right as evolved, as seen, over the centuries from being viewed as a natural right defined in terms of moral action, to a positivist right defined by Vattel meant not merely as a legally defined right, but a duty of the state itself at the heart of its purpose for existing as a sovereign, to the modern notion in the UN Charter, prescribing a right to use force under a limited exception to a general prohibition (O'Connell, 2008, ch. 4). Nothing in the UN Charter is thus intended to impair this right. However, as Article 51 clarifies, use of this right is only permitted until the UN Security Council (UNSC) has, essentially, caught up with events and taken measures to restore international order under the UN Charter's provisions for either collective self-defense or collective security (Chapter VII in general, and in particular, Chapter VII, Articles 41 and 42).

As clear as the language of 2(4), Article 51 and the charter's provisions for the operations of the UNSC are, the reality of their application since their establishment in 1945 has been a function of international legal custom and case law and political realities.

## **D. CRITICAL FACTORS WHEN EVALUATING THE LEGITIMATE APPLICATION OF ARTICLE 51**

In practice, legal justification for the use of force in self-defense, even under the modern UN Charter regime, must be analyzed through the lens of four, relatively old legal traditions, including occurrence of an armed attack, necessity, immediacy, and proportionality. As seen later, these four factors used to justify self-defense must be considered under two, separate types of scenarios, namely, self-defense in response to an armed attack by a state, and self-defense in response to an armed attack from a state. For purposes of this paper's focus, the latter is the most critical; however, current *jus ad bellum* on self-defense must be reviewed to understand both fully.

### **1. Armed Attack**

No formal or standard definition of armed attack exists. As noted above, the modern expression of the term is rooted in Article 51 (O'Connell, 2008, ch. 7.2). Colloquially, the term defines a type and level of force that amounts to something more than a mere skirmish or criminal act that is severe enough, located appropriately, at the right kind of target by the right kind of actor to amount to a use of force sufficient to justify a state using force to defend itself. As seen in this paper's later review of the *Nicaragua* case, the term is clearly one of art. Five considerations, and a series of sub-considerations, based on international case law and custom, are essential to understanding the concept of "armed attack" and determining if one has actually occurred, including: inception; scale and effect, as well as the concept of accumulation, locale, target, and responsibility and sponsorship including issues of support to armed bands, raiders and/or terrorists. In addition, for the purposes of this particular examination, the special case of armed attack by a non-state actor will be considered in detail to understand when and how armed attack by such an actor vests a right to self-defense (Gray, 2004, pp. 108–134).

***a. Inception***

Article 51 is quite explicit that invocation of the inherent right of self-defense must follow an armed attack. Inception, therefore, requires that an armed attack should actually be underway or have occurred for a state to use self-defense. The notion of armed attack, under Article 51, was developed in an era during which the state-on-state conflict was the norm with the according build up of forces at borders, saber rattling and diplomatic posturing. While surprise or “short notice” attacks were hardly unprecedented before 1945, the notion that a state could bring truly catastrophic, state-life-threatening force, or strike a civilian target causing massive civilian casualties, simply was not yet a full reality. As noted earlier, however, the UN Charter is not a suicide pact. In the modern age, the threat of nuclear weapons and “surprise” acts of terrorism, detected only through advanced intelligence services, often with only limited time at best before their occurrence, makes it almost impractical for a state to tolerate actually being struck by an armed attack before using self-defense force. Therefore, the concept of inception has been interpreted to require, essentially, that a state “see that the gun in being loaded or that the trigger is literally being pulled” to demonstrate inception of an armed attack—it need not wait for the bullet to strike its target. As Sir Humphrey Waldock stated, “When 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” (Dinstein, 2005, p. 191).

***b. Scale, Effect and the Concept of Accumulation***

To amount to an armed attack, and allow the right of self-defense to vest, the “scale and effects” of the force used by an actor must be of “significant scale” (Nicaragua, ICJ, 1986). While this concept is an ambiguous standard, factors, such as the nature and capabilities of the organization conducting the attack, the extent of human injury and physical damage caused (or likely to have been caused if the attack is foiled or otherwise unsuccessful), the relation of the attack to previous attacks and the method and means used to conduct it, are all relevant to determining “significance.” As the International Court of Justice (ICJ) has implied, the bar is fairly low to establish scale and

effect of significance. An operation must amount to more than a “mere frontier incident” to demonstrate significance. However, that incident can involve rebels or armed bands supported by a third-party state (not necessarily soldiers officially of another state’s army), demonstrating, in turn, a threat or use of force amounting to an intervention in the internal or external affairs of another state (Nicaragua, ICJ, 1986).

More recent case law has affirmed the notion that a spectrum of degrees of force used that can establish significant scale and effect exists (Gray, 2004, pp. 108–134). In the *Oil Platforms* case, the ICJ expressly affirmed the distinction between ‘most grave’ and “less grave forms” of the use of force in the context of interstate conflicts (Oil Platforms, ICJ, 2003). In *DRC—Uganda*, insofar as it left open whether states could respond to “attacks by irregular forces,” it contemplated self-defense only if directed against “large-scale attacks” (DRC-Uganda, ICJ, 2005). Recent jurisprudence thus suggests that the distinction between armed attacks and more limited uses of force is still very relevant (Gray, 2004, pp. 108–134).

Perhaps of greatest significance to the doctrine of “scale and effect” is the potential development of a related doctrine of “accumulation of events,” which previously had received little support. This doctrine of course affects many aspects of the law on self-defense. As regards recent jurisprudence, the doctrine was much discussed by the litigants in the *Cameroon—Nigeria*, *DRC—Uganda*, and *Oil Platforms* cases. The International Court of Justice (CJ) seemed inclined to accept the notion—hence its statement, in *Oil Platforms*, that “even taken cumulatively” a series of incidents did not qualify as an armed attack on the United States. These statements suggest a trend towards the recognition of the “accumulation doctrine,” but may require further consolidation. The concept appeals to those who have long criticized the gap between Article 2(4) and Article 51 UNC that more than implies that states may at times have to accept low-level uses of force or “pin pricks.”

However, the “accumulation doctrine,” while closing the gap between Article 2(4) and Article 51 UNC, produces serious side effects, it undermines the temporal dimension (discussed later when exploring the concept of “Immediacy”) of self-defense and risks turning a temporal right into a potentially, open-ended license to use

force. This factor is of great significance to the question of how and when self-defense is justified against a global-non-state terrorist group; as in many cases, it is the “pin pricks” of such groups that collectively, over time, come to justify, in the eyes of the victim state, the use of force to stop such a group’s ongoing campaign of violence against a state. Israeli experiences with “accumulation” along its borders with Palestinian and Lebanese borders are prime examples of this factor at work, and on a larger scale, U.S. experiences with Al Qaeda’s campaign of violence outside the United States (e.g., embassy bombings and the USS Cole) prior to its major strike on 9/11 are also indicative of the concept of an accumulation of attacks giving rise to a justification for the use of force in self-defense. In reality, no bright line rule exists on when accumulation has reached a sufficient degree to find a vested right of self-defense. This factor will likely always have to be taken in context with the other factors explored in this section.

*c.       Locale*

The location factor is a fairly straightforward element. Typically, armed attack must occur across the frontier of the victim state within its boundary. The attacker can cross the frontier prior to the actual use of force. Numerous other location scenarios exist, for example: the attacker can use force against the target state’s territory, outside its actual, national borders, as in the case of an embassy, or it can strike the target state from a third party’s location, or strike the target state’s territory or possessions in neutral territory, such as a battleship in international waters, and it can even strike target state territory within its own borders, such as a military installation or embassy within its own borders. Indeed, the Iranian assault on the U.S. embassy in Tehran in 1979 is a classic example of the locale factor under the concept of armed attack (ICJ, Tehran, 1980). In short, so long as the attacker strikes the sovereign territory or possessions of the target state, the locale factor can be satisfied and demonstrated armed attack (Dinstein, 2005, pp. 196–199).

*d. Target*

Related to the locale factor is the concept of target of an armed attack. Essentially, force must be targeted against the territory of the state being attacked, or its military or public possessions outside its borders, to constitute armed attack (Dinstein, 2005, pp. 199–201). In certain instances, when sufficient force has been used, force against a significant number of private vessels or aircraft of a victim state can also constitute armed attack. Armed attack can also be constituted when the citizens of a target state, acting as diplomatic or official envoys, are targeted by an attacking actor. A serious point of debate is whether the targeting of normal citizens, outside their home-state, carrying no official status of any kind, by an attacking state, can constitute armed attack (Dinstein 2005, pp. 199–201). Increasingly, scholars argue that, particularly in the context of transnational, mass casualty acts of terrorism, armed attack may vest a right of self-defense when a large number of one state's nationals are killed or taken hostage abroad. The increased use of rescue missions to pull citizens out of foreign territory under dire conditions (e.g., embassy rescue missions), and, of course, the increasing number of major, global, terrorist acts, supports this thinking. However, for the time being, armed attack does not appear to have occurred when ordinary nationals are targeted abroad—the vesting of the right to self-defense under such circumstances would, under current notions of state sovereignty, push the figurative notion of state boundaries well beyond their actual reality (Dinstein, 2005, pp. 199–201).

*e. Responsibility and Sponsorship*

The concepts of responsibility and sponsorship, typically arising in the contexts of armed bands, terrorists, and non-state actors, are clearly of great relevance to the issue of how and when self-defense is justified against a global, non-state terrorist group. Article 51, as seen, declares that nothing shall impair the inherent right of self-defense when an armed attack occurs against a member state. When this language is compared to that of 2(4), clearly prohibiting one state's threat or use of force against another, without doubt, it can be seen that the UN Charter can, when it so desires, identify state use of force, as opposed to other forms of force, against a member state.

Therefore, in strict legal terms, the right of self-defense vests when any actor, or source of force, commits an armed attack against a member. However, reality is far more complicated than strict, black letter law. Issues of state-sponsorship, state-omission, or essentially negligence, and in turn, appropriately justified application of force in self-defense, make the factor of responsibility and sponsorship critical to and complicating for the central issue of this paper. The factor of responsibility and sponsorship is best addressed in two main areas, the first being state support to armed bands and terrorist groups that become de facto state organs, and the second, armed attacks by actual, non-state actors.

*f. Armed Bands, Terrorists and State Support*

The most widely accepted legal standard on this issue was set forth in the *Nicaragua* case, which sets a high standard for attributing the actions of a non-state actor to a state in the context of an armed attack. A general agreement on the nature of the acts now appears to exist, which can be treated as constituting armed attacks (Gray, 2004, pp. 108–134). In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which execute acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein (Nicaragua, ICJ, 1986). Nicaragua argued that the United States was responsible under international law for violations of humanitarian law committed by the Contras, the anti-Sandinista rebel group it supported. The ICJ found that such support was insufficient for the purpose of attributing to the United States the acts committed by the Contras in the course of their military or paramilitary operations in Nicaragua. For U.S. conduct to vest legal responsibility it would, in principle, have to be proved that that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed (Nicaragua, ICJ, 1986).



Indeed, the court went so far as to quote Article 3(g) of the UN General Assembly's Definition of Aggression, which it argued reflected customary international law (Dinstein, 2005, p. 201). To clarify, the ICJ determined that the mere supply of arms and other support to armed bands cannot be equated with armed attack (Dinstein, 2005, p. 202). Quite simply, logistical support and provision of arms alone are insufficient to demonstrate an armed attack by a supporting state (Schmitt, 2002).

By this standard, the state to which the acts are to be attributed must be substantially involved in an operation so grave it would amount to an armed attack if conducted by regular members of its armed forces (Schmitt, 2002, pp. 42–48). What seems to run through both the ICJ's and even Judge Schwebel's dissenting position is that the state must at least exercise significant, perhaps determinative, influence over the group's decision making, as well as play a meaningful role in the specific operations at hand, before an armed attack will be imputed to it. However, it is at this point that the previously examined factor or accumulation, or "pin pricks" becomes relevant, again. Irregular troops, armed bands and terrorist groups typically utilize tactics smaller in scale than a full-blown, foreign invasion, which thus takes on a more "hit and run" style. Each individual strike is not likely to reach the necessary, significant, scale and effect to demonstrate an armed attack has occurred and vest a right of self-defense (Gray, 2004, pp. 108–134). However, when a series of such attacks are combined with the additional demonstration of state support, evidence of armed attack mounts. When support reaches an adequate degree, an armed band or terrorist group can become a *de facto* organ of a state, which helps to establish armed attack. Indeed, little difference exists between a formal, regular military unit, and an irregular, armed band or terrorist group, when state support crosses a certain threshold (Dinstein, 2005, pp. 202–203).

The duty to desist from assisting terrorists is further demonstrated in UN resolutions and international treaties. In 1996, the General Assembly articulated this duty in the Declaration on the Strengthening of International Security. The declaration contended that states must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other states, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts. In doing

so, it echoed earlier exhortations in the 1970 Friendly Relations Declaration and its 1965 progenitor, Resolution 2131 (1965). Similar prohibitions can be found in Article 2(4) of the International Law Commission's 1954 Draft Code of Offenses against the Peace and Security of Mankind (Schmitt, 2002, pp. 42–48).

Article 11, also of the Articles of State Responsibility, sets forth a second possibly relevant standard. It provides that “[c]onduct which is not attributable to a state under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct as its own” (Schmitt, 2002, pp. 42–48).

Case law, beyond Nicaragua, has also supported these declarations, most notably in the Corfu Channel. The ICJ held that every state has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other states (Schmitt, 2002, pp. 42–48).

The next issue, naturally becomes what level of support, or control, actually demonstrates state support. The International Criminal Tribunal for the Former Yugoslavia (ICTY) held that when a paramilitary group is organized by a foreign state, its actions could be considered “acts of de facto state organs” regardless of whether or not the controlling state has issued specific instructions (ICTY, 1999). Thus, an armed band or terrorist group can potentially act with significant autonomy, under this rule, while still supporting a finding of state responsibility on the originally, organizing state given “effective control.”

In reality, this concept is a “know it when you see it” test, but the basic point is clear—at some point, the bar appears relatively low, a state moves from providing mere support, to actually helping to organize a group, and thus, takes on responsibility for that group's actions, and liability for resulting, armed attacks (Dinstein, 2005, p. 203). State support, particularly toward organizing a group, through act or omission, helps demonstrate, with proper context, an armed attack and attributes responsibility to the supporting state.

Having established the basic tenets of what defines armed attack under international statute and case law, the concept of armed attack in the specific context of non-state actors is briefly examined.

***g. Armed Attack by Non-State Actors***

As described previously, a basic statutory interpretation of Article 51 and Article 2(4) reveals that, strictly speaking, nothing in the UN Charter prescribes that an armed attack only come from a state actor to show a vesting of the inherent right to self-defense (Article 51 and Article 2(4)). Indeed, while a clear, general prohibition against state use of force under the UN Charter does exist, any armed attack, from whatever source, can be the basis for the use of force by a state in self-defense. Case law supports and refines this basic conclusion, and also demonstrates that while facially clear, in reality, there has been and continues to be certain discord over the limits of when non-state action constitutes armed attack (Gray, 2004, pp. 108–134).

The International Court of Justice, in its 2004 Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, affirmed the inherent right of self-defense when one state commits an armed attack against another. It then noted that no explicit stipulation exists under Article 51 that self-defense only be available when an armed attack is made by a state (Legal Consequences, 2004). In this case, the ICJ was particularly concerned with the distinction between non-state actor action as a function of cross-border terrorism and non-state actor action from within an occupied territory. As to be seen, this distinction is a vital, and contested one, of great significance in the context of the use of self-defense against terrorist groups in Afghanistan, as well as the Israeli occupied territories.

Strictly speaking, when a non-state actor strikes a state from within its territory, an armed attack is not demonstrated because it is a case of domestic terrorism or internal, civil, armed conflict. For armed attack to be demonstrated, and vest a right of self-defense, at least some external factor must be at work in relation to the victim state, for Article 51 to take hold (Dinstein, 2005, pp. 204–205). As the *Nicaragua* case has shown, this threshold, of “externality” can be quite low, even in the case of what are

objectively civil, or internal conflicts, although subjective—a state foreign to the victim state can offer aid to such an extent that armed attack is demonstrated (Nicaragua, ICJ, 1986), by showing the conflict is more than internal and/or domestic and that the terrorists are acting as de facto state-actors or have received a sufficient level of support to demonstrate an external, state level of control. As an aside, as seen in subsequent chapters, as the nature of the use of force in modern warfare is changing, so too is the line between inherently civil, internal conflicts, and international ones. Also, as noted above, a non-state actor can launch its attack from a location outside any state’s jurisdiction, such as the high seas or ungoverned territory—the most classic example being piracy, as described in Article 101 of the 1982 UN Convention on the Law of the Sea (Dinstein, 2005, p. 205). However, ultimately, armed attack analysis in the context of non-state actors causes individuals to probe for a state of origin, from which the non-state actors launched their attack. Whether the state from which the attack was launched was actively conspiring with and supporting the group, or passively, if not unknowingly, allowing the group to base its operations within its boundaries, has been considered above in the discussion of state responsibility—a vital factor in determining how, when, and where the right to self-defense can be found and applied (Gray, 2004, pp. 108–134).

Indeed, in the 1949 *Corfu Channel* case, the IJC determined that every state is obligated to “not allow knowingly its territory to be used for acts contrary to the rights of other states” (*Corfu Channel Case*, 1948, p. 22). It is thus entirely unlawful for a state to allow its territory to be used as a staging ground or sanctuary for terrorists or armed bands with designs to strike at other, foreign states, even, ultimately, constituting a crime under the 1954 Draft Code of Offences against the Peace and Security of Mankind (Dinstein, 2005, p. 206).

*Corfu*’s concept of state liability, even under “passive” circumstances, was affirmed by the ICJ in the 1980 *Tehran* case. The court found that the authorities of one state are required to take appropriate actions to protect the interests of a foreign state’s officials and citizens—particularly while they have the means to do so (Tehran, ICJ,

1980, pp. 32–3, 44). If they fail to maintain such “vigilance” in their “specific duty,” they are liable for acts of omission resulting in wrongful acts by non-state actors in their territory against a foreign state.

While the issue of whether use of force by a non-state actor, emanating from a non-sponsoring state, against another state, can truly constitute armed attack appears, facially, to have been resolved, it can be seen that much debate has occurred on the issue and that the precise determination of exactly whether and when such use of force constitutes armed attack remains a matter of “legal art.” The issue is not likely to go away. However, the legal response to the events of September 11, 2001 has done much to clarify the issue.

Resolutions 1368 (Security Council Resolution 1368 (2001)) and 1373 (Security Council Resolution 1373 (2001)), adopted by the UN Security Council shortly after September 11, both recognized and reaffirmed the “inherent right of individual or collective self-defense” under the UN Charter, in the context of the 9/11 attacks themselves. It is true that the Security Council did not, in these resolutions, explicitly use the term “armed attack,” and instead, referenced “horrifying terrorist attacks.” However, it would be pointless to affirm the right of self-defense in the context of the attacks, without more than implicitly accepting the idea that armed attack had in fact occurred when Al Qaeda, based out of Afghanistan at minimum with the passive awareness, if not acceptance of the governing Taliban regime, struck U.S. sovereign territory.

If this use of language left any further, lingering doubt on whether armed attack had occurred under the UN Charter, the North Atlantic Council subsequently invoked for the first time ever Article 5 of the 1949 North Atlantic Treaty. Article 5 utilizes the term “armed attack” and does so explicitly in the context of the UN Charter and Article 51 (North Atlantic Treaty Organization, 2001). The NATO Council found that its collective defense measures, which hold that an armed attack against one member constitutes an attack against all, were activated by the September 11 attacks. Finally, additionally, the Organization of American States (OAS) applied the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and found that the September 11 terrorist attacks against the United States were attacks against all OAS members, which

invoked the Rio Treaty's Article 3, which, like the North Atlantic Treaty, refers specifically to an armed attack and the right to self-defense under the aegis of Article 51 (Organization of American States, 2001). Thus, taken together, it can be concluded that a non-state actor, striking at a victim state from another state, can commit an armed attack justifying use of force in self-defense under Article 51, even when the state from which the attack is launched has only been negligent. That a global, non-state terrorist group can commit an armed attack under the UN Charter is vital to understanding the current state of jus ad bellum and how it applies to such actors. However, it is not the end of this paper's examination of international law surrounding such actors and the legitimate use of force under contemporary jus ad bellum.

As seen, the concept of armed attack finds its modern roots in the UN Charter's Article 51—the contemporary foundation of international law on the use of force in self-defense. While this vital trigger is prescribed explicitly by treaty, a larger, historically more deeply rooted set of factors exists, which must also be accounted for when determining whether or not, and how, the use of force is justified in self-defense, following the occurrence of an armed attack, both in general and in the case of an armed attack by a global, non-state terrorist group. Armed attack alone is not enough to determine the boundaries and limitations of acceptable use of force in self-defense, against any type of actor. Therefore, it is now necessary to address the factors of necessity, immediacy, and proportionality.

#### ***h. The Caroline Case and Correspondences***

The factors of necessity, immediacy, and proportionality, in their modern form, are rooted in a series of diplomatic correspondences between Secretary of State Daniel Webster and his British counterparts beginning in 1837 resulting from what has come to be known as the *Caroline Incident*. By the mid-1830s, anti-British fervor had reached a stage of rebellion in Canada. The steamboat *Caroline* was being used to ferry supplies and personnel in support of the anti-British rebels across the Niagara River, from U.S. territory. While it was not clear that the U.S. Government was actively, openly supporting these efforts in support of the anti-British insurgency, or even fully aware of

them, it was clear that the support to the rebels was clearly emanating from U.S. territory. British forces, therefore, crossed the border into U.S. territory, killed two U.S. citizens, seized and set aflame the *Caroline*, sent her over the Niagara Falls, and then returned to British-Canadian territory. The United States protested the British action. The British responded by arguing that U.S. law was not being enforced along the border and that they had acted out of necessity. Indeed, ultimately, the two sides would agree that the circumstances potentially, if not likely, justified the actions taken. The issue was not whether the use of force itself was justified, because, as seen previously, prior to the UN Charter's general prohibition on the use of force by states, states possessed, essentially, a natural right to go to war for almost any reason, until the late 19th and early 20th century (Maogato, 2005, pp. 15–18). The issue at hand was whether Britain had a right to anticipatory self-defense, justified by urgent circumstances, without an immediately occurring prior attack, which could be exercised on U.S. soil without driving both states into a full state of war.

Secretary of State Daniel Webster answered this question by arguing that use of force was in fact permissible so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment of deliberation... and the defensive acts must not be unreasonable or excessive” (Maogato, 2005, p. 17). Webster's answer is critical because it marks the beginning of an effort to create a legal distinction between war and self-defense, which would, in turn, ultimately lead to the notion that war was not a natural right of states, and could and should, in fact, be prohibited, with the use of force limited only to acts of self-defense. For states like the United States, which was, at the time, relatively weak compared to Britain, such a right to self-defensive action, that did not constitute a full act of war, was well-received, allowing such states to defend themselves and their existence, without engaging in a full blown, potentially terminal conflict. In the modern context of terrorism, it can likely be correctly concluded that acts of terrorism, or terrorist threats, can also be overwhelming, particularly when a state knows of active, imminent plots against its interests and when such plots are designed to impose mass casualties.

While never formally established by treaty or statute, international case law, such as the *Nicaragua* case, has established Webster's *Caroline* factors of necessity, immediacy and proportionality as the critical guidelines for determining when and how the use of force in self-defense is justified. Indeed, the ICJ confirmed the existence of such principles in both the *Nicaragua* case and the *Nuclear Weapons* advisory opinion. In *Nuclear Weapons*, the ICJ noted that the dual condition of necessity and proportionality applies to Article 51 of the UN Charter; thereby, verifying the applicability of the requirements in both customary and conventional law (Schmitt, 2002). As to be seen, the actual application and interpretation of these factors is, like all international law, often more a product of perceived custom and tradition, than the results of firm, legal adjudicative results.

## **2. Necessity**

The principle of necessity requires that the resort to force occur only when no other reasonable options remain to frustrate continuation of the armed attack, such as negotiation or cease fire (Dinstein, 2005, p. 237). In the context of terrorism and global, non-state terrorist actors, the question is generally whether law enforcement operations are likely to be sufficient to prevent terrorist groups from conducting otherwise imminent, planned attacks. Law enforcement operations may be undertaken by the victim state, the state in which the terrorists are based, or, for that matter, any other state. Similarly, if a state in which the terrorists are located conducts operations with a high probability of success, intended to curtail the terrorist threat and a group's operations, no necessity basis for self-defense by the victim state would exist because the ongoing threat would be eliminated (Schmitt, 2002). The victim state may only act against the terrorists if classic law enforcement reasonably appears unlikely to net those expected to conduct further attacks before they do so (Gray, 2004, pp. 108–134). It is critical to note that no requirement exists for an expectation that law enforcement will fail. Instead, the requirement is that success not be expected to prove timely enough to head off a continuation of the terrorist campaign. Of course, if no further attacks were anticipated, the necessity principle would preclude resort to armed force at all, since contemporary jus



ad bellum on self-defense contains no tolerance for acts of retribution or retaliation (Schmitt, 2002). This idea is in contrast to assumptions of most, domestic criminal law that focuses on delivering justice, often times in the form of balancing out damage imposed on citizens. Retribution and retaliation are not permitted under modern jus ad bellum because, quite simply, they are punitive in nature and not limited in application, sufficient only to eliminate an imminent threat, as the inherent right of self-defense is intended (Gray, 2004, p. 125).

In the case of U.S. action in Afghanistan against Al Qaeda and the Taliban regime, no guarantee that even a law enforcement effort existed, that was arguably proving successful against much of the organization internationally could effectively eradicate the threat of another major attack (Gray, 2004, pp. 159–194). At the same time, aggressively attacking the senior leadership and denying it a base of operations promised great returns in alleviating the threat; far greater than would likely be realized by law enforcement in a comparable period. In addition, it must be remembered that the clock was ticking. As the United States and its coalition partners planned their response, warnings of imminent attacks flowed through intelligence channels with great frequency (Schmitt, 2002). Yet, as seen in subsequent chapters, a line does exist between the concept of anticipatory self-defense and outright preemptive self-defense—striking at someone as they are literally loading a gun as compared to a striking a threatening person who simply possesses a gun (Gray, 2004, pp. 108–134). In addition, as also seen later in this chapter, modern interpretations and applications of the concept of necessity present a danger to the UN Charter’s general prohibition on the use of force, which creates a potential basis for lasting, ongoing use of force under the guise of self-defense against nebulously, or broadly defined, terrorist threats.

### **3. Immediacy**

This second condition on the use of force in self-defense stipulates that force cannot be used too long after an armed attack. However, two riders of reasonableness exist. First, a victim state is not expected to instantly turn from a state of peace to one of war (Dinstein, 2005, p. 242). Even in the modern age, realities of communications,

logistics, organization, policy and tactical decision making, and ultimately orders, are existent. A state is not expected to formulate and act out a response instantly. Second, a delay in the defensive use of force can be further tolerated if justifiable delays occur due to extenuating circumstances. Such situations can involve attempts at negotiations, such as those following the Iraqi invasion of Kuwait, and international attempts at mediating a settlement and withdrawal of Iraq from Kuwait, before coalition forces invaded Iraq to liberate Kuwait, nearly a year and a half following the original Iraqi invasion (Dinstein, 2005, p. 243). Another justifiable delay can involve the existence of sheer distance and time that must be covered to bring to bear a use of force in response to an armed attack, such as that which Britain had to cover to simply reach the Falkland Islands in 1982 (Dinstein, 2005, p. 243).

#### **4. Proportionality**

The principle of proportionality contends that the victim state can use such force until it is satisfied that the aggressor is defeated and no longer constitutes a threat (Gray, 2004, pp. 108–134). Proportionality also conveys that defensive force must be limited in nature, with a level of violence and location limited to that required to defeat an on-going attack or prevent any reasonably foreseeable ones (Schmitt, 2002). In short, the response in self-defense must be no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable future attacks (Dinstein, 2005, pp. 237–242).

The size, nature and consequences of the response do not, strictly speaking, have to be proportional to the size, nature and consequences of the original attack (Gray, 2004, pp. 108–134). It would be senseless, if not debilitating, for an equivalency requirement for the force used in an armed attack and self-defense to exist. Greater force than the original attack is often required to surmount the attack. Indeed, as seen, the inherent right to self-defense is intended to ensure that, despite the general prohibition on the use of force, states are not rendered helpless in the face of an actual attack (Schmitt, 2002).

In the context of armed attacks by global, non-state terrorist actors, the same principles of proportional self-defense persist. However, again, the force necessary to achieve this purpose may far exceed that employed in the attack. Terrorists often operate

in dispersed networks and locations. They may be fanatical devotees willing to die for their cause. Taking them on is a daunting task that typically requires extremely aggressive measures (Schmitt, 2002). In addition, it is in these issues that the line between *jus ad bellum* and *jus ad bello* can be seen—under *jus ad bellum*, of concern is only the right to wage just war and the right to use force in self-defense in the contemporary setting. In that context, proportionality dictates using sufficient, or proportional, force, to eliminate an otherwise imminent threat that creates the necessity for action (Sharp, 2010, pp. 345–347). Under *jus ad bello*, its practice and the Geneva Conventions, an emphasis is placed on a concept of proportionality meant to ensure the use of a level of force that will not unnecessarily injure any state’s citizens or property, and preserve the rights of all citizens involved, all of equal value. In reality, of course, terrorist groups and states alike make conscious decisions about the relative value of citizens in different states and the benefit of saving or hurting them to achieve strategic ends. Yet, in the end, the use of military force, however technologically advanced, or locally applied, is a blunt instrument—innocent people are almost inevitably hurt by the use of force. Of course, in counter-terrorist operations, law enforcement and military force can act in combination, potentially reducing the level of force necessary. For example, law enforcement disruption of a number of terrorist cells within an organization may lessen the extent (number, location, etc.) of military strikes that need to be conducted. Indeed, such coordination resulted in such an effect following the events of September 11 (Schmitt, 2002). However, the ultimate impact of the use of violence, for good or ill, remains the same for citizens in the target zone.

#### **E. THE ISSUE OF PRE-EMPTIVE SELF-DEFENSE**

While easily understood in and of themselves, particularly in their originating, historical context of state-on-state warfare, the concepts of necessity, immediacy and proportionality become increasingly complicated when applied in the environment of the use of force in self-defense against global, non-state terror actors. Indeed, the issue of

pre-emptive self-defense, or preventative action, is among the most complicated and controversial issues in the current, so called global war on terror (Gray, 2004, pp. 159–194)

A group of scholars, increasing in number since September 11, have contended that the pervasive, global, dispersed, unpredictable nature of the global, terrorist threat, combined with such groups' access to the means of delivering massive casualty, conventional strikes, or, even more gravely, weapons of mass destruction, justifies preemptive use of force in self-defense. Under this stream of thought, only the preventive use of force can truly prevent and deter global, non-state actors who act, essentially, without warning, or about whom intelligence is typically fleeting, creating “ticking time bomb” situations or windows of limited opportunity to strike before a target disappears, or actually attacks (Dinstein, 2005, p. 182). Indeed, the United States has strongly argued that “anticipatory” self-defense is justified in response to not only armed attack, but also “hostile intent” (United States Government, 2004, p. 75). The United States has argued that the “imminent” nature of such threats that justifies the use of force in self-defense (Dunlap, n.d., p. 15). Furthermore, and perhaps most remarkably, the 2002 National Security Strategy of the United States established a clear policy of preemption, particularly when global terrorist actors threaten to use weapons of mass destruction (United States Government, 2002). In terms of case law, Judge Schwebel's dissenting opinion in the *Nicaragua* case contended, citing other scholarly works, which Article 51 only defined, or enshrined in statute, one traditional mode, or method, of justified self-defense, in response to an armed attack (Nicaragua, ICJ, 1986). While the accuracy of such policy positions and scholarly, legal theory is open to debate, current jus ad bellum does not appear to support the notion that jus ad bellum on self-defense against global, non-state terror actors justifies preventive force (Gray, 2004, pp. 159–194).

First, the UN Charter's authors clearly, specifically intended to use the term “armed attack” in Article 51. Indeed, throughout the balance of the UN Charter, the broader, more nebulous term “aggression” is used in the context of collective defense, regional compacts and even the purposes of the UN. Yet, when asked to define a right to

self-defense, the authors explicitly chose the term “armed attack,” which cannot be by accident. Thus, to find support for preemption under Art 51, it would be necessary to run counter to a facial reading of the UN Charter (Dinstein, 2005, p. 184).

Second, it is difficult to find true support for preventive self-defense in modern custom on *jus ad bellum* (Gray, 2004, pp. 159–194). The *Caroline* case, often cited as a basis for preemption, or anticipatory self-defense because its facts involved a British strike against a boat that was only waiting to be dispatched to deliver arms and personnel, is, not in fact, relevant to preemption because the *Caroline* was, in fact, part of an ongoing operation of support (Stevens, 1989). Quite simply, the boat had already been and was going to be used in the conflict. Britain was acting to stop an ongoing practice and not to forestall an impending American, or rebel, invasion. Furthermore, the main predecessor to the UN Charter’s provisions on the prohibition on the use of force with a limited exception for self-defense, the Kellogg-Briand Pact of 1928, did not establish an explicit nor implicit right to preemption. In short, it is difficult to find a modern legal or customary tradition for preemption (Dinstein, 2005, pp. 184–185).

Third, and related to the first argument above, clearly the UN Charter’s authors knew how to create a limited right to use force—indeed, for this reason—Article 51 and the right to self-defense was created, which, in turn, is itself ultimately subject to UN Security Council action (Sharp, 2010, p. 348). Were a right to preemption to have been established, little doubt exists that the authors would have explicitly established it and placed it under even greater scrutiny and supervision than the inherent right of self-defense (Dinstein, 2005, p. 185).

Thus, the conclusion remains that in the end, self-defense, even in the context of global, non-state terror actors, requires an armed attack, and is subject to the other major factors described previously (Gray, 2004, pp. 159–194). However, while preemption itself does not appear justified, a limited right to self-defense may be justified when “the bullet is literally being fired but has yet to leave the chamber.”

Case in point, Israel’s attempts at justifying its 1981 targeted strike against Iraq to destroy its nascent nuclear program in terms of preemptive self-defense were inherently

flawed because an actual armed attack had not occurred, nor was there necessity, immanency nor proportionality (McCormack, pp. 295–302, 1996). In contrast, Israel's 1967 Six-Day War fought against the Arab allies was, if not fully, far more legally justified. In that case, Israel, observing the blocking of the Straits of Tiran by Egypt, Egypt's ordering of UN peacekeepers out of the Sinai, initial deployments of its troops into the Sinai counter to earlier cease fire agreements, and a major buildup of troops along its western and eastern borders, proactively invaded its neighbors—the armed attack, although yet to cross Israel's borders, was more than imminent, and was literally underway (Maogato, 2005, pp. 34–35). Indeed, neither the UN Security Council nor the General Assembly condemned Israel's actions, although this absence was likely at least in part due to the underdog position of Israeli during this period of international history. It is worth noting that these same bodies, although passively accepting Israel's actions, did not vote to proclaim or support an actual right to preemptive self-defense (Maogato, 2005, pp. 34–35). Thus, while the armed attack requirement is clear, limited circumstances may exist in which it is evident that the attack itself is underway, and interception is legally justified. Such circumstances do appear to be, historically and legally, extremely rare and carry a high burden of proof. However, as has begun to be observed, and seen further in subsequent chapters, the higher legal and policy goals of the general prohibition on the use of force and the limited means by which to justify the vesting of a right to self-defense are increasingly challenged by modern threats like global, non-state actor terrorist groups.

Figure 1 provides a basic visualization of the legal regime just reviewed. It compares the types of activities that can trigger the various threshold requirements just studied, which in turn, can justify the type of legal responses as examined previously (Sharp, 2010, p. 342).

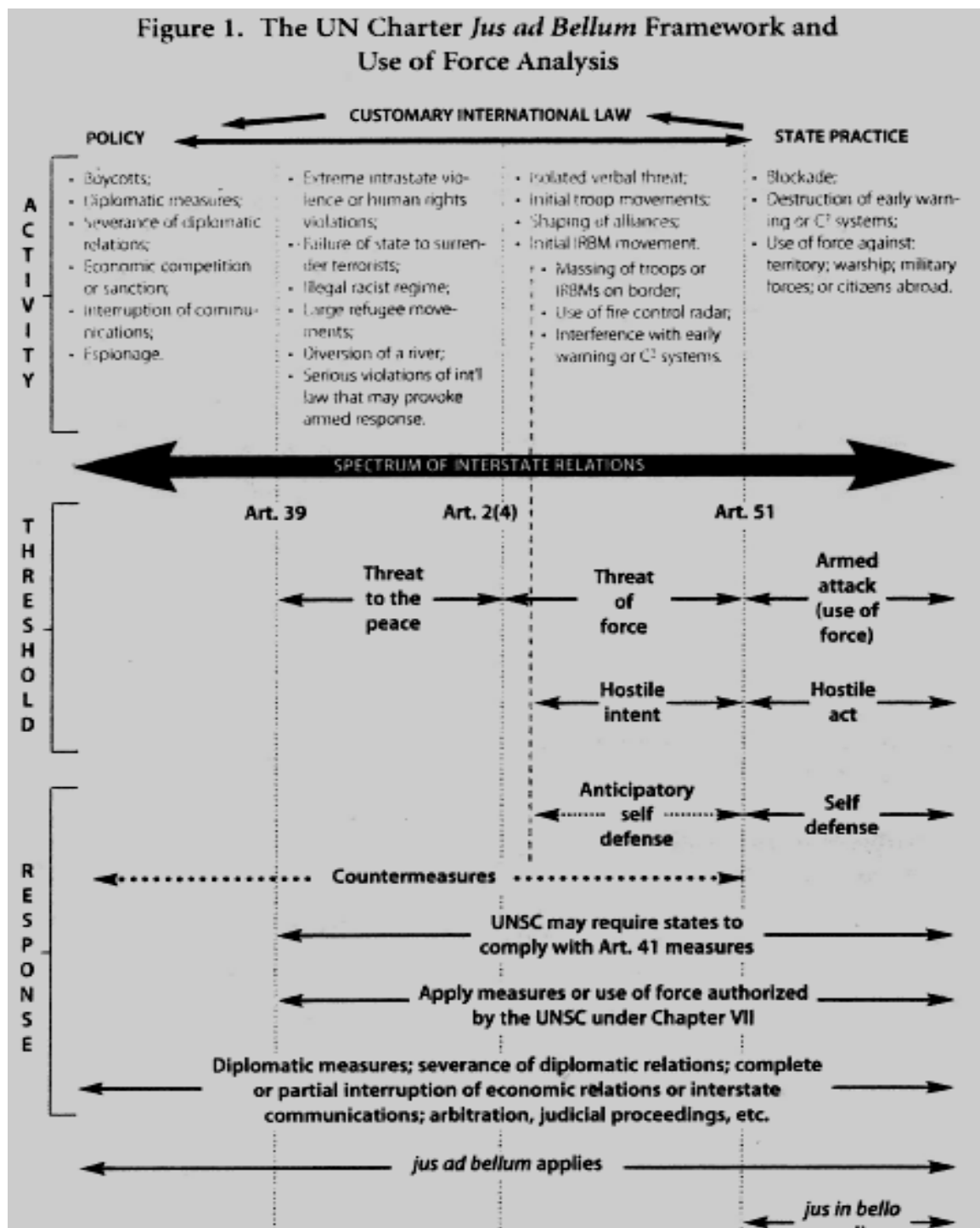


Figure 1. The UN Charter Jus and Bellum Framework and Use of Force Analysis

Having established the rules on jus ad bellum related to self-defense that focus on the question of non-state actors, a review of relevant case law and historical practice applying these rules, and demonstrating how they developed, ensues.



## **V. CASE LAW AND HISTORICAL PRACTICE**

### **A. HISTORICAL EVENTS AND CASE LAW RELEVANT TO THE CENTRAL QUESTION**

Having established the tenets of jus ad bellum dealing with self-defense, with a focus on the context of use of force in self-defense against global, non-state, terror actors, a series of cases and historical incidents relevant to this paper's central question is now briefly examined. While the body of case law on jus ad bellum is relatively large, the number of instances involving use of force in professed self-defense against a global, non-state terror actor is relatively small, albeit growing. These selections are, therefore, meant as exemplary, not comprehensive, to illustrate fully the points made previously. They are also intended to show the evolution in jus ad bellum that has occurred to present day, influenced by the growing use of force in self-defense by states against state supported and non-state actor terrorist groups.

#### **1. Israeli Action Against PLO Headquarters in Tunis, Tunisia, 1985**

In 1985, the Israeli government claimed a right to use force under self-defense when it struck the Tunisian headquarters of the Palestinian Liberation Organization (PLO) (Byers, 2007, p. 62). Israel conducted an airstrike on the headquarters building, well within Tunisian territory in the capital of Tunis (Gray, 2004, p. 161). The Israelis contended that Tunisia was harboring, supplying and assisting non-state actor terrorists who had committed acts of terrorism within Israeli territory, and the building struck housed key PLO leadership and operational authorities (Maogato, 2005, p. 112). The UN Security Council passed Security Council Resolution 573, condemning the air strike, finding no justification for self-defense, and conveying that the attack was, "an act of armed aggression...in flagrant violation of the Charter of the United Nations, international law and norms of conduct" (S.C. Res. 573, UN SCOR, 1985). The case is significant in that, despite the relatively low bar set for attribution of state support seen in the *Nicaragua* case, which demonstrated armed attack, it can be seen that the

international community simply refused to attribute past PLO attacks to the Tunisian government, nor find necessity and immanence in the PLO's operational presence in Tunisia, no matter the organization's past attacks in Israel and against Israeli interests globally. The concept of accumulation clearly had yet to take hold, and the threat of global terrorism had not yet reached a sufficient, apparent level, to make a targeted air strike overseas proportional.

The case is also important, however, because the United States abstained from voting on Resolution 573. In doing so, U.S. Ambassador to the UN Vernon Walters articulated that, "We... recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the UN Charter (Maogato, 2005, p. 91). Two months later, then Secretary of State George Schultz articulated what would become known as the "Schultz Doctrine." He stated, "It was absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerillas. International law requires no such result (Maogato, 2005, p. 91)." Schultz's argument, and the larger U.S. position, was a critical step in the evolution the use of *jus ad bellum* theory to justify the use of force in self-defense against a global, non-state terror actor. While, clearly, the international community was not yet willing to adopt, even implicitly, such interpretations of the inherent right of self-defense, the arguments represent a growing recognition of the global threat of terrorist groups and the need for certain nations to find a larger, more expansive application of the inherent right. The Schultz Doctrine was also important because, despite its facially strong, almost unilateralist tone, it was, in fact, an appeal to international law and norms to recognize and adapt to a real and growing threat. The American position was not one of disregard and contempt for the UN Charter, the kind that had 60 years earlier undermined and ruined the Kellogg-Briand Pact and League of Nations. Rather, it was an argument designed to conform with and shape understanding of Article 51 and the inherent right of self-defense. This view is critical, because it represents an ongoing trend in the post-war

world to actually justify the use of force under a legally vested right of self-defense. It represents, historically, an almost remarkable shift away from the natural rights tradition, to a true, legal positivist one. As is often the case in international law, however, the realities of state survival predate actual, legal and normative reforms.

## **2. UN Reaction to the 1988 Pan Am 103 Bombing, 1992**

In 1992, the Security Council, in a delayed reaction to the 1988 bombing of Pan Am Flight 103 (the Lockerbie case) and UTA Flight 722 the following year, affirmed the right of all states to protect their nationals from acts of international terrorism that constitute threats to international peace and security and expressed concern over Libya's failure to cooperate fully in establishing responsibility for the acts in Security Council Resolution 748 (Schmitt, 2002). The Lockerbie case, and Resolution 748, although not per se involving a non-state terror actor, did mark a fairly remarkable development in the evolution of modern jus ad bellum because it declared that terrorism constituted a threat to international peace and security (Sharp, 2010, p. 349). This concept, in turn, implicated the provisions of the 2(4), more than implying that under the right conditions, an act of terrorism could warrant the use of force in self-defense, if not the UN Charter's collective security provisions, or, more likely, a Security Council mandate to use force to preserve peace and security. In this case, 748 would lead to a series of sanctions against Qaddafi's regime. That it took four years from the events of 1988 and full-scale investigations is testament to what it takes to change the norms of international law and practice on the use of force, and also, by the 1990s, the increased recognition of the real threat that international terrorism, state sponsored and otherwise, posed to international peace. It was a growing recognition that would soon be tested.

## **3. United States Response to East Africa Bombings, 1998**

In 1998, the U.S. embassies in Kenya and Tanzania were bombed and destroyed by Al Qaeda, which killed 252 people and injured over 5,000 individuals. The UN Security Council, in Resolution 1189, condemned the attacks as a threat to international peace and security, despite the fact that no clear indication of a state sponsor or direct

state support to the attacks existed (Maogato, 2005, p. 113). This condemnation confirmed the trend started with 1992's Resolution 748. Soon thereafter, the United States launched cruise missiles into Sudan and Afghanistan to destroy a Sudanese pharmaceutical plant allegedly being used to produce chemical weapons, and training camps in Afghanistan (Gray, 2004, p. 163). The target of these attacks was Al Qaeda. The importance of this full-scale response to the evolution of *jus ad bellum* in the context of self-defense against global, non-state terror actors cannot be understated. The United States actively targeted multiple bases of operation, in different countries, of a "stateless confederation of terrorist groups, without hierarchy, government or territory (Gellman & Priest, 1998)." In addition, while it did so without an actual, explicit UN Security Council authorization, it did do so with UN recognition that the original attacks were a threat to international peace (Sharp, 2010, p. 352).

President Clinton, in publically justifying the use of force, cited the imminent threat of Al Qaeda posed by the bases struck, and more generally, "the inherent right of self-defense consistent with Article 51" (Maogato, 2005, p. 114). Global reaction, to the strikes, and their justifications, was mixed. Western European nations generally supported the measures. Russia, still reeling from Western intervention and use of force in the Balkans expressed outrage at the "indecent" of the measures taken, and the Chinese offered a nebulous statement condemning terrorism in general (Maogato, 2005, p. 114).

The events of 1998 affirm the trends established by the Israeli-Tunisian incident of 1985. The threat of international terrorism, and condemnation of its mass casualty acts, was now clearly recognized by the international community, and quickly affirmed by UN resolution (Sharp, 2010, pp. 352–353). The United States continued to argue that a right to self-defense had vested given that an armed attack had occurred against its official interests abroad, and that a persistent, immediate threat existed that necessitated the use of force—force that was taken relatively soon after the actual attacks (Gray, 2004, p. 163). The use of Tomahawk missiles against select targets appeared to represent a case for proportionality—occurring over a limited period of time—attempting to minimize collateral damage, not putting actual troops on the ground, while still applied in a volume

deemed sufficient to actually stop the immediate threat and deter future attacks. In sum, the United States continued to contend that anticipatory use of force in self-defense against terrorist groups was justified, and that it would continue to justify, and actually use such force, in sync with international law—with one important caveat. While the United States would always attempt to justify its actions in terms of international law, the Clinton administration made clear that the United States would “not simply play passive defense” and “had to be prepared to go on the offensive” (Perl, 1998). The global threat of mass casualty attacks against U.S. interests and citizens had combined with the threat of weapons of mass destruction (WMD) production and use, in the form of Al Qaeda, driving the Clinton administration towards a policy of preemptive, or anticipatory, self-defense. While Clinton’s policy would remain largely focused on a “law enforcement” centric approach to counter-terrorism, the basic framework for future U.S. legal arguments justifying the use of force against global, non-state actors had been established.

#### **4. United States and International Response to 9/11 Terrorist Attacks**

The terrorist attacks of September 11, 2001 killed roughly 3,000 people. Their scale was without precedent. Their impact and significance for *jus ad bellum*, and the primary question of this paper, is substantial. A full examination of these events and all of their surrounding circumstances is beyond the scope of this paper. This paper’s focus must be on how *jus ad bellum* was, or was not, utilized to justify the use of force against the attackers following September 11, and how the legal regime described earlier in this chapter was utilized, and pushed, to do so. To address this focus, this case is divided into three parts, including first, the basic facts of the legal and UN response following 9/11, then, second, the question of whether a right of self-defense had vested against Al Qaeda in Afghanistan, and finally, third, the matter of whether a right of self-defense had vested against the ruling Taliban regime.

*a. UN Resolutions and U.S. Justifications*

From the outset, the United States declared that the circumstances were exceptional, and that it was, essentially, at war. President Bush declared, “Our war on terror begins with Al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated (Maogato, 2005, p. 115).” While the actual legal actions taken by the United States is reviewed to justify its impending use of force in self-defense, it must be recognized at the outset that the Bush Administration, whatever its legal arguments, viewed its response to the September 11 attacks as a larger, global conflict against any and all global, non-state terror groups, including, but not ending with, Al Qaeda. Its notion of self-defense, in this context, went far beyond the concept of a limited, necessary, immediate, and proportional response to an armed attack. Advancing and amplifying the trends started under the Reagan and Clinton Administrations, the Bush Administration was openly pursuing a policy of military-based counter-terrorism that applied anticipatory, if not preemptive self-defense on a scale, scope and duration not seen before. This recognition is critical because the United States, its allies, and the UN Security Council, used the legal regime described earlier in this chapter, to justify U.S. use of force in Afghanistan (Gray, 2004, pp. 164–165). As seen in the brief review that follows, U.S. action against Al Qaeda in Afghanistan was fully supported by *jus ad bellum* as self-defense against a non-state actor. U.S. action against the Taliban in Afghanistan is a far more complicated matter and, despite social, political and historical forces may not have actually been justified under contemporary *jus ad bellum* on self-defense against a state-sponsor of terrorism.

It is, thus, possible to easily begin to understand the incongruities created when the application of a legal regime to justify a state’s actions in self-defense, and the actual policy goals of that state in applying such force, are not in harmony. For the UN and U.S. allies, the use of force against Al Qaeda and the Taliban following 9/11 was a legally, and morally, justified act of self-defense to eliminate a clear and immediate threat—Al Qaeda in Afghanistan. For the United States, action in Afghanistan was only the beginning of what it felt had to be a global, military conflict against all terror groups—a global war on terror.

As seen, contemporary *jus ad bellum* on self-defense against non-state actors was never designed nor intended to provide a “carte blanche” license to a state to seek out any and all enemies, globally, on a preemptive basis. The impact on *jus ad bellum* is still being felt and the degree to which international norms have changed as the result of this gap between official legal license and actual use of force, is still being determined. These issues, and others impacting and limiting contemporary *jus ad bellum* on self-defense, in the context of global, non-state terror actors, is more fully examined in subsequent chapters (Gray, 2004, p. 165).

What is remarkable, historically, is that almost concurrently with President Bush’s declaration, the United Nations Security Council declared a very similar footing, with statements, such as the following coming from its members, “The magnitude of the acts goes beyond terrorism as we have known it so far... We therefore think that new definitions, terms and strategies have to be developed for the new realities (Kuchinsky, 2001). The UN General Assembly also adopted Resolution 56/1 without a vote, which called for international cooperation to prevent and eradicate acts of terrorism, and stressed that those responsible for aiding terrorists would be held accountable (Maogato, 2005, p. 115). The Assembly, however, did not evoke the right of self-defense, perhaps wary of helping to justify too expansive a use of force against terror groups worldwide (Gray, 2004, pp. 165–166).

On September 12, the Security Council passed Resolution 1368 condemning the attacks as horrifying and labeled them a threat to international peace and security, and reaffirmed the inherent right of self-defense as recognized by the UN Charter (Schmitt, 2002). In doing so, the UNSC was maintaining the trend, and precedent, set by its earlier resolutions following the East Africa bombings, invoking 2(4) and the notion that terrorism can be, and was in this case, an armed attack that threatened international peace. Subsequently, Resolution 1373 passed on September 28 and evoked the right to self-defense. It presented steps to address terrorism, such as restricting terrorist financing, denying safe haven to terrorists, and cooperating in law enforcement efforts (Maogato, 2005, pp. 119–122).

In addition, as noted earlier, both the NATO Council and OAS also brought into play their collective security provisions and found, essentially, that an armed attack had occurred. Other major regional organizations, such as the Arab League, also condemned the attacks.

As the United States began to gear up for actual military operations, it promptly notified the Security Council that it was acting in individual and collective self-defense as required by Article 51 of the UN Charter. In the report, the United States asserted that it had clear and compelling information that Al Qaeda, supported by the Taliban in Afghanistan, had a central role in the attacks and an ongoing threat persisted (Gray, 2004, pp. 108–134). That threat, the report argued, was made possible by the decision of the Taliban to let parts of Afghanistan, which the regime controlled, to be used by Al Qaeda as a base of operations. The purpose of U.S. and allied military operations was, therefore, to prevent and deter further attacks on the United States (Schmitt, 2002).

Portentously, the United States gave notice that, “We may find our self-defense requires further actions with respect to other organizations and other States.” Later, when addressing the nation, President Bush echoed the Article 51 notification and stated, “Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril” (Schmitt, 2002).

It is worth noting that the Security Council never, actually, explicitly authorized the United States, or anyone else to use force pursuant to Article 42 of the UN Charter, as the Council is entitled to do in the face of a threat to the peace, breach of peace or act of aggression (Gray, 2004, pp. 165–167). Of course, as previously seen, explicit authorization was not in fact required given a vested right to self-defense. All the UN Charter requires is notice when a state finds the inherent right has vested and it is going to use force in defense. Twice, the UN Council did explicitly refer to the inherent right to individual and collective self-defense prior to the onset of coalition combat operations against the Taliban and Al Qaeda. Subsequently, the UN Council made no



effort to condemn the forceful response once launched. In fact, it repeatedly reaffirmed the right to self-defense and expressed support for the international effort to root out terrorism, as those operations were ongoing (Schmitt, 2002). In short, the world more than implicitly supported U.S. and allied military action in Afghanistan following September 11. If ever there was a case that such use of force was normatively accepted, this acceptance was it.

Thus, throughout this process, when responding to the attacks of September 11, the United States actively sought to justify and make legitimate its actions using international law and the UN Charter's security system (Gray, 2004, pp. 165–167), which is critical to observe for two reasons. First, once again, notice that the post-war prohibition on the use of force and its commitment to legal positivism on use of force was upheld. Historically, no small achievement given the fact that the world's most powerful state had just been directly attacked—historically, the basis for out and out declarations of war and real politick. Second, that same legal regime was actively utilized to support a use of force that was arguably never contemplated when it was created, at once pushing it to its limits, while also providing at least an air of legitimacy to states seeking to use similar force in the future. Whether this will represent an historical anomaly, a precedent setting moment, or both, has yet to be determined.

***b. Use of Force in Self-Defense Against Al Qaeda in Afghanistan After 9/11***

The case for the use of force against Al Qaeda in Afghanistan in self-defense following 9/11 is remarkably straightforward (Gray, 2004, pp. 165–168). Such force was a legitimate exercise of the inherent right to self-defense. As seen, that right extends to armed attacks from whatever source. The attacks clearly occurred, perhaps the most covered news event in history. Their scale was, relatively speaking for a terrorist attack, massive, and their effect was highly destructive. Indeed, even accumulation can apply to help justify self-defense as 9/11 was certainly not the first time that Al Qaeda had struck U.S. interests and citizens (East Africa, USS Cole, and the first World Trade Center Bombing). The group was not a U.S. domestic insurgency and its operatives had

clearly entered the United States from outside its borders. The targets of the attacks were major military and economic centers, as well as the citizenry itself. The group ultimately took responsibility for the events, and its ongoing presence in Afghanistan, if not globally, was, by 2001, well known to intelligence services worldwide—in short, a strong basis for necessity and immanence, in September 2001 (Gray, 2004, pp. 163–168). Also, a relatively sound basis existed for finding the resulting use of force proportional, as the only real way to prevent and deter a future attack was to unseat completely the group from its bases in Afghanistan, which required a sustained assault involving ground forces and the taking of territory. Indeed, once the Taliban failed to police the territory it controlled, the attacks were necessary and proportionate, and they occurred in the face of an imminent, credible continuation of an Al Qaeda campaign underway for years (Sharp, 2010, pp. 353–356).

As seen in subsequent chapters, the issue with the application of contemporary jus ad bellum on self-defense to Al Qaeda itself was not the legitimacy of the original action taken against it in Afghanistan immediately following 9/11, but rather, the global scope, massive military scale, and extended duration of the force used by the United States and its allies following this initial, vesting of the right (Gray, 2004, pp. 108–134). In actuality, this use of jus ad bellum raises some of the most important questions about the adequacy of contemporary international law on the use force in self-defense, against global, non-state terrorist groups.

*c. Use of Force in Self-Defense Against the Taliban in Afghanistan After 9/11*

The legality and legitimacy of use of force in self-defense against the Taliban in Afghanistan, following 9/11, is a more a difficult question (Gray, 2004, pp. 163–168). Facially, it appears obvious that Al Qaeda was operating in Afghanistan with the Taliban regime's knowledge and consent. It also appears obvious that the two groups were, politically and philosophically, of a like mind. Moreover, it is also evident that following 9/11, despite U.S. warnings and demands, the Taliban took no measures to subdue, restrain or otherwise stop Al Qaeda in Afghanistan. Yet, in fact, the case is not so

clear since it is not evident that the regime was, if ever, in a position to really control Al Qaeda, that it was, in fact, actively supporting its operations as much as Al Qaeda was supporting the Taliban, or that the Taliban had any sort of effective control over Al Qaeda issuing it orders or declaring its policies. In short, the “state” of Afghanistan, as governed by the Taliban, was, arguably, more beholden to Al Qaeda, than the opposite (Gray, 2004, pp. 166–67). Thus, the *jus ad bellum* issues revolve around questions of state responsibility and sponsorship, particularly in the context of armed bands and terrorist groups (Sharp, 2010, pp. 349–353).

The essential question with respect to the Taliban in this context is whether or not they engaged in an armed attack under the law of self-defense through its association with Al Qaeda. It is true that principles of state responsibility determine when a state may be held responsible for an act, and thus, subject to reparations or countermeasures (Schmitt, 2002). However, forcible countermeasures are not an acceptable remedy for violations of state responsibility (Schmitt, 2002), whether the issue is harboring a terrorist group or being responsible for an act committed by one. Indeed, current international law makes acts of retribution and retaliation illegal (O’Connell, 2008, p.15). However, certain acts that generate state responsibility may at the same time justify a violent response under the laws of self-defense. Stated differently, just because the Taliban, through their association with Al Qaeda, became an affront to the United States and committed an act of negligence, would not justify an act of revenge against the regime. Instead, the principles of self-defense must apply for force to be justified (Sharp, 2010, pp. 349–353).

Was the Taliban-Al Qaeda association such that an armed attack was attributable to the Taliban? As seen earlier, the rules on what constitutes actual state sponsorship of a terrorist group are hardly bright line—indeed, they are more a “know it when you see it” standard (Sharp, 2010, p. 350). However, on 9/11, the accepted legal standard came from the *Nicaragua* case, which, though unclear, did create a high standard for finding state responsibility for the actions of a non-state actor for an armed attack (O’Connell, 2008, p. 254).

In *Nicaragua*, Nicaragua argued that the United States was responsible for violations of humanitarian law committed by the Contras, the anti-Sandinista rebel group it supported. The ICJ found that it could not attribute the Contra's actions to the United States in the course of its military or paramilitary operations in Nicaragua. The ICJ found that for its conduct to give rise to legal responsibility, the United States would have had to have maintained effective control of the Contras, instead of merely aiding them through supplies and training. Thus, while the United States had a degree of state responsibility for the Contras, it had not committed an armed attack, and thus, had not violated *jus ad bellum* (O'Connell, 2008, p. 254).

Consequently, it can be concluded that an armed attack must be understood as including not merely action by regular armed forces across a border, but also the sending by, or on behalf of, a state of armed bands, irregulars or mercenaries that use force against the victim state similar to what regular forces would otherwise achieve (O'Connell, 2008, p. 254). The "controlling" state has to be so substantially involved in the operation that it would amount to an armed attack if conducted by regular members of its own, standing armed forces. In sum, the state has to have, at minimum, significant, if not determinative, influence over the group's decision making, and have a meaningful, operational role in the specific actions in question to attribute an armed attack (Schmitt, 2002).

The Taliban's failure to prevent Afghanistan from being used as a base for Al Qaeda did not in and of itself justify use of force against the Taliban (Sharp, 2010, p. 351). Little evidence exists that Al Qaeda was under the direction or control of the Taliban in conducting the 9/11 attacks or any other acts of international terrorism—certainly not sufficient to meet Nicaragua's requirements for attribution. In fact, in many ways, it appears the Taliban were actually dependent on Al Qaeda for money and military support.

Furthermore, the level of Taliban support fell below that of the Iranian government in the Embassy case (ICJ, Tehran, 1980). The regime did not publically support the attacks, and it never assumed control of the terrorist campaign in a way

similar to how the Iranian regime took effective control over the release of the U.S. hostages. Further, Taliban military operations against the United States only began after the onset of U.S. and coalition forces' military action.

Equally, little evidence exists that the Taliban actually ordered Al Qaeda to strike specific targets or provided the kind of material and logistical support that the United States had to the Contras, as cited by the Nicaragua Court as potential evidence of contributing to an armed attack. What the Taliban did do was grant Al Qaeda a base of operations that it was free to use as it saw fit (Sharp, 2010, p. 351). As Nicaragua states, an armed attack cannot be attributed to a state through the harboring of terrorists alone—no matter how likeminded and in harmony the state and group may be.

Following 9/11 and before it began its use of force, the United States demanded that the Taliban turn over Al Qaeda leaders and that the United States be permitted to confirm the end of Al Qaeda operations in Afghanistan (Sharp, 2010, p. 351). Of course, the Taliban failed to comply. At this point, a U.S. right to enter Afghanistan for the defined purpose of eliminating Al Qaeda operations and their threat clearly vested. It remains quite unclear that a right to strike at and eliminate the Taliban regime itself, in essence, to conquer Afghanistan, had also been secured. Nonetheless, no international opposition to the use of military force to remove the Taliban regime and to conquer Afghanistan in the process occurred.

It is critical to note that these comments are not made in any context other than a legal one. Socially, morally, and politically, the Taliban was an abhorrent regime that oppressed its population and whose negligence clearly contributed to the terrible results of the 9/11 attacks, if not other acts of terrorism. However, the troubling implications for respect for state sovereignty and the bounds of the use of force in self-defense remain, despite the reprehensible nature of the Taliban regime itself. It is definitely not possible to ignore the reality that *jus ad bellum* was actively used to justify the overthrow of a regime, when it is unclear that international law and norms actually supported such force. That international political will, following the outpouring of support for the United States in the aftermath of 9/11 accepted and supported such force, cannot make up for the impact of such precedents on the future use of the Article 51

system. Indeed, when taken in combination with the clear intentions of the United States to find similar legal justifications in *jus ad bellum* for future preemptive actions against Al Qaeda and other terror groups worldwide, it is thus possible to begin to appreciate fully the serious implications of post-9/11 use of *jus ad bellum* to support use of force in self-defense against Al Qaeda, and the Taliban, in Afghanistan. Subsequent chapters more fully explore such consequences.

## **5. Israeli and United States Targeted Killings with Precision Weapons, Late 2000s**

A final exemplary case relevant to this paper's central question involves U.S. and Israeli use of precision munitions, and often unmanned aerial vehicles (UAVs) to deliver them, to strike at very specific terrorist targets. Increasingly, such strikes have become a preferred method of self-defense force because they can be brought to bear very quickly, with minimal notice, capitalizing on the latest intelligence, in theory limit the prospect of collateral damage, place home troops and citizens in minimal danger, and create minimal violation of another state's territory (Wittes, 2009). In theory, this method of force presents certain, significant advantages in terms of *jus ad bellum* on self-defense against a global, non-state terror actor—keeping defensive force proportional, very responsive to an imminent threat, with global reach, and used only when a substantiated threat exists. In reality, application of this method of force in self-defense presents significant issues for the normative limits of self-defense, the definition of armed attack, and for state sovereignty.

As seen, the United States has, arguably since *Caroline*, and certainly since the mid-1980s, attempted to at once justify its use of force in terms of the UN Charter's Article 51 inherent right provisions, while also contending that a state has a right to anticipatory, or preemptive, self-defense when a threat is real and imminent. It has definitely applied such arguments in the context of global, non-state terrorist threats. Most recently, it has pursued the extensive use of targeted missile strikes from UAV drones in places including Yemen, Somalia, and South Waziristan (Pakistani Federal Territories) (Wittes, 2009). Politically, such strikes make sense for the United States

because it allows it to strike at a moment's notice, anywhere in the world, capitalizing on the latest intelligence, allowing it to keep up true pressure on terrorist groups while minimizing *jus ad bello* issues like collateral damage, and appearing, at home, to be actively pursuing the enemy, while putting U.S. troops in minimal danger. To justify the use of this type of force, the United States has turned to self-defense law and norms.

Indeed, the 9/11 Commission reported that the Clinton administration had legally justified an ultimately aborted, targeted strike to kill Osama Bin Laden, on the basis that he was an imminent threat to the United States by invoking the imminence standard. In broader terms, successive U.S. administrations, including, arguably, the present Obama administration more than any preceding one, have taken the view that targeted killings are wholly justified in terms of self-defense because the United States is engaged in a real, long term conflict with groups like Al Qaeda and that for armed attack, immanence and necessity requirements are satisfied thanks to the ongoing campaign of such groups against U.S. interests. Furthermore, proportionality is satisfied in that the use of force is “surgical” and well adapted to the nature of a terrorist group—kill the leaders, destroy a cell, damage the group’s infrastructure—all legitimate aims in an ongoing, armed conflict. Indeed, Hays Parks presented this basic U.S. conception of self-defense as early as 1989 in a Department of Defense memorandum, in which it was contended that three basic types of self-defense exist, including defense against an actual armed attack, preemptive self-defense against an imminent threat, and self-defense against a continuing threat (Wittes, 2009, pp. 366–370). In practice, in the global war on terror, the United States has also capitalized on fairly broad, international acceptance of its use of force in pursuit of Al Qaeda following 9/11. Thus, once again, the commitment of the United States is used to justify its use of force in self-defense-legal terms, even in the case of targeted killings, its intent, however, to remain flexible and pragmatic in its use of self-defense law and practice, and, in candid terms, its willingness to accept that sometimes its use of force will be accepted, internationally, and other terms, a diplomatic cost will have to be paid to protect its security interests.

The difficulty of this position is that legally, as already seen, it is hardly obvious that the necessity and imminence requirements allow for the kind of long-term view of

legitimate self-defense that the United States favors, particularly in the context of a global, non-state terrorist actor. Such groups are not engaged with the United States in classic, state on state, WWII style military conflict. Its use of force is sudden and temporally limited from case to case, which occurs in a wide array of locations, globally. While collectively constituting a campaign, perhaps triggering accumulation, it is simply not clear that even such a campaign permits targeted killings, essentially at will, when intelligence identifies the location of a target. In addition, that such groups are not state actors, and take refuge in third-party states, raises issues of state consent and sovereignty, particularly when it is difficult to establish state support for armed attacks, requiring the *Nicaragua* standard of effective control—a high bar indeed. Thus, without consent from states like Pakistan, it is not readily apparent how targeted killings occurring in a third-party state are fully, legally justified (Murphy, 2009).

What happens, then, when U.S. use of targeted killings in self-defense, meets the international community's far narrower concept of self-defense? What happens when the United States begins to use targeted killings against non-Al Qaeda targets that lack the implicit support of international good will following 9/11 and the explicit support of UN Security Council resolutions? In addition, perhaps most importantly for the meaning of *jus ad bellum*, what happens when states like Turkey want to use drone strikes to kill Kurdish group leaders in Northern Iraq, or Colombia's military wants to routinely assassinate FARC leaders in Ecuador, or the government of Congo wants to strike at targets in Uganda from which raids are launched (Murphy, 2009)? The Israeli experience with targeted killings is useful to understand the more likely, normative, legal and diplomatic limits of such use of force in self-defense.

## **6. Israel**

The State of Israel has at times utilized targeted killings as part of a spectrum of methods of force in its counter-terrorism efforts. Israel does not prefer to use targeted killings because, first and foremost, it prefers the arrest of terrorist group leaders to reap the intelligence gains that typically result from capture. In fact, between 2000 and 2005, the ratio of terror suspects arrested to terrorists targeted for killing was 45 to 1 (Morag,



2011). In addition, it prefers to avoid the potential collateral damage that can result for civilians who simply happen to be in the way of a terrorist, or who are placed in the way intentionally by such leaders. Finally, targeted killings are used sparingly to prevent paying the moral, political, and social costs that can result from what are, essentially, extra-judicial murders in the form of international condemnation and disruption of peace negotiations. Nonetheless, at times, the opportunity to strike at a high value target that has and will continue to pose a serious and immediate threat to Israeli territory and citizens cannot be avoided. Indeed, targeted killings have been shown to correlate with reductions in overall terrorist activity due to their organizational disruptive and deterrent effect (Morag, 2011).

For the Israeli government, the use of targeted killings is a matter of self-defense; that position has been contested, both in the realm of international diplomacy and in the Israeli judicial system. In 2004, Israeli used a targeted missile strike to kill wheelchair bound Sheikh Ahmad Yassin, leader of Hamas, as he was leaving a Mosque (Byers, 2007, pp. 68–72). His successor was then killed in a similar attack one month later. Perhaps no use of force has resulted in a clearer, more exemplary case of the challenge that use of force against global, non-state terror actors presents for *jus ad bellum* on self-defense. The United States supported the Israeli position that the strikes were an act of state self-defense. The men killed were leaders of a terrorist group who had essentially admitted to and promised future use of mass casualty acts against Israeli interests and citizens as part of an ongoing-armed conflict, and thus, establishing armed attack, necessity and immanency. Furthermore, the Israeli, U.S. backed, argument felt that Hamas was based in territory outside Israeli borders, on land that had, effectively, never belonged to any state, having only been occupied in modern times, thus establishing “externality” as opposed to Hamas being a sort of domestic insurgency, or qualifying for protections under the Geneva Convention as an independent state.

For those opposed to targeted killings, the Hamas assassinations were a breach of *jus ad bello*, or the law and custom of armed conflict. In short, their killing was a breach of the Geneva Conventions and a denial of due process (Byers, 2007, pp. 68–72).

Despite Israeli precautions and attempts at avoiding collateral damage, the debate and controversy over the use of targeted killings persisted, arguably culminating in a 2005 decision by the Israeli High Court of Justice in the case of *The Public Committee against Torture in Israel vs. The Government of Israel* (HCJ 769/02, 2005). The Israeli High Court decided the case not only in terms of Israeli law, but also directly in terms of international law and custom on armed conflict. Much of the resulting decision is most relevant to questions of *jus ad bello* and the distinction between combatants and civilians in the context of terror groups and their hostilities—in short, only combatants and civilians exist, no unarmed combatants. Terrorists are not combatants, they are civilians, but when they engage in hostilities, they forego the protections afforded civilians under law. An individual engages in hostilities when planning, conducting and recovering from acts of terrorism. When not engaged in such activities, said individual has the protections of a civilian. The Israeli High Court recognized that a spectrum between a true civilian and a person who is constantly in the revolving door of terrorist acts exists, and that, consequently, a real grey zone exists in most cases when determining when a civilian is in fact engaged in hostilities.

For purposes of this paper's central examination, the case also does offer a few key points relevant to how and when targeted killings may be justified under the law of self-defense. First, the Israeli High Court found that the conflict between Israel and the terror groups it targeted was an international one, subject to international law and custom on armed conflict, and not a domestic, law-enforcement effort. Second, the Israeli High Court found that it is impossible to determine ahead of time whether every targeted killing is in fact, legally permissible or prohibited, under international law and custom—a bright-line rule on the issue is impossible and each case must be reviewed on its own facts, sometimes, even retroactively.

To this end, the Israeli High Court laid out four key steps that must be followed before and after any targeted killing, including the following. First, well-based, strong, convincing and well-verified information is needed before determining a person is a target to avoid striking an innocent person. Second, a civilian directly participating in hostilities cannot be attacked if a less harmful means can be employed, such as arrest,

interrogation and trial, since terrorists remain civilians who never relinquish their human rights. Further, harm can only go so far as is necessary to achieve security, e.g., an entire building of innocents cannot be destroyed to kill one person in the planning stage of an attack. This example is based on an actual event, in which Hamas military chief Salah Shehada was killed using an aerial bomb that created significant collateral loss of life, which resulted from an intelligence gap that showed, incorrectly, that surrounding buildings in Gaza were empty (Byman & Dicter, 2006, p. 9). Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough, independent investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). Fourth, every effort must be made to minimize harm to innocent civilians. Harm to innocent civilians caused during military attacks (collateral damage) must be proportional. In other words, attacks should be conducted only if the expected harm to innocent civilians is not disproportional to the military advantage to be achieved by the attack. In sum, a meticulous examination of every case is required (Jewish Virtual Library, 2006).

Israeli targeted killing policy has adapted to these requirements, as well as the realities of international and domestic political pressure to balance security with human rights. All targeted killings require the approval of the Prime Minister and a very select, prioritized target list is maintained of only the most “arch” terrorists (Morag, 2011). The Israeli military also goes to great lengths to maintain professionalism and not become a hit squad, routinely foregoing actionable intelligence due to concerns for collateral loss of life (Byman & Dicter, 2006, p. 9). Efforts have also been made to ensure the relative transparency of this process by clarifying to the Israeli public and the world how and why Israel engages in targeted killings to create both a sense of accountability, as well as realistic expectations on what such force can and cannot achieve (Morag, 2011).

Clearly, considerable debate remains over whether even these extensive, Israeli conditions on use of targeted killings justify this use of force as self-defense. However, the lessons of this Israeli practice are very instructive for this paper’s examination of the limits of *jus ad bellum* on self-defense, against a global, non-state terror actor. Like the United States, Israel strives to use force in compliance with the obligations of

international law and custom. It has modified its practices not only due to domestic concerns over targeted killings practice, but also, to some degree, the force of international opinion—in essence, the force of international custom on the bounds of use of force in self-defense. Of course, faced with realities, Israel also retains a degree of pragmatic flexibility in dealing with what its own High Court has deemed an ongoing, armed conflict. Nonetheless, it has retained a right to use targeted killings as a means of self-defense, while creating what is a fairly transparent process, with a relatively high level due process and evidence requirements.

## **B. KEY ISSUES FOR ANALYSIS**

Having completed a brief review of contemporary jus ad bellum on self-defense, with particular attention to issues related to global, non-state terror actors, it is possible to identify a set of key issues that require additional analysis to understand fully the limitations of jus ad bellum when confronting the problem of global, non-state terror actors. By analyzing these issues, it is possible to gain a more thorough understanding of the limitations of modern jus ad bellum when confronting groups like Al Qaeda and potentially identify ways in which international law will have to reform to effectively adapt to this threat. Three groups of issues are discernable from the previous legal review, including the following issues of: shifts in historical context, evolution of the nature of the use of force, and changing norms of sovereignty. Within each of these three groups, a set of critical sub-issues can be identified. Table 1 summarizes the groups and their respective sub-issues in terms of the questions they present for further examination. The next three chapters examine each group in detail.

Issue Area	Sub-Issues
<b>Historical Context</b>	To what degree is the original intent of the general prohibition on the use of force being eroded by a shift toward more regular use of force in self-defense, particularly because of the pursuit of global, non-state terror actors?
<b>Evolution of Use of Force</b>	To what degree are the varying scope, scale and duration of use force against global, non-state terror groups affecting traditional norms of self-defense including the principles of armed attack, necessity, immanence, and proportionality?
<b>Changing Norms of Sovereignty</b>	How are norms of sovereignty affected when the force required for use against groups like Al Qaeda must be applied globally, across borders, often with minimal, or no warning, in states possessing no effective control over such groups?

Table 1. Description of Issue Areas and Sub-Issues

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## **VI. ANALYSIS—SHIFTS OF HISTORICAL CONTEXT**

### **A. OVERVIEW**

Having reviewed the international law and custom that currently governs the use of force in self-defense, with focus on its application to non-state terrorist groups, next is an analysis of three overarching factors that appear to be pushing this area of law's limits and forcing its evolution. The first such factor includes changes in historical context, from the origination of current legal regime, to the present day. The central question essential to analyze, under this factor, is the degree to which the original intent of the general prohibition on the use of force is being eroded by a shift toward more regular use of force in self-defense, particularly as a result of the pursuit of non-state terror actors.

### **B. HISTORICAL ORIGINS**

To begin, the origins of the UN Charter's provisions on the use of force, its original assumptions and intentions are briefly examined. As observed in the previous rules chapter, arts. 2(4), 421 and 43 were intended to, in a perfect world, to ensure that no state would ever again use force against another, and even if one did, the collective security provisions of this "new world order" would quickly and overwhelmingly subdue such aggression (Franck, 2002, pp. 2–5). Yet, even in 1945, clearly, the UN Charter's founders had doubts that the general prohibition would always be followed, if ever. Thus, the UN Charter's provisions in Article 51, which has already been reviewed in detail, and Article 106, which provides for so called "transitional security arrangements" amongst the permanent members of the Security Council that permits the permanent members to act together to maintain international peace and security until the Security Council itself could act to restore order.

Thus, a two-tier structure of security is envisioned in the UN Charter. The first tier includes the general prohibition, which, if broken, would be met by collective security action, or, a transitional security operation organized by the permanent Security

Council members. The second tier includes Article 51, and the intent that unilateral, self-defense occur only until the UN Council can act to restore order, and only following an armed attack (Franck, 2002, pp. 2–5).

Indeed, with the end of WWII, the UN Charter's drafters, observing the lessons of the failed League of Nations and its failure to prevent state-on-state violence, wanted to establish a much clearer and stronger commitment to international peace. That said, they also knew that preservation of order would require establishment of a clear right to defend one's state when faced with an aggressor, such as Nazi Germany. Although perhaps appearing, facially, in opposition, in reality, these two concepts were not. The inter-war period demonstrated the fact that the international community required a clear, firm commitment to peace enforced by the world's principle powers, but that states, any state, had to have a definitive right to defend themselves, and not be a pawn in games of real politick (e.g., Poland or Czechoslovakia). What could not have been expected, during the drafting, was just how quickly the necessary commitment to collective security would unravel, turning an intended, limited exception, into a global norm.

Article 51's origins can thus be seen as a balancing act between the interests of major powers and those of lesser states. The debate centered on whether assistance to states under attack should be made mandatory or voluntary—whether the Security Council should play a case-by-case, political decision-making role in security decisions, or force against aggression should be essentially automatic (Franck, 2002, p. 46). The resulting compromise is fairly clear from the text itself—a universal commitment to international peace would exist in the form of an accepted, general prohibition on the use of force, but the authorization of an actual, collective security action would be subject to the decision making process of the Security Council itself. Consequently, the only way to assure all UN member states of their rights, was to create a limited exception to the general prohibition, so that states could be guaranteed the right to look after themselves without a mandatory collective security action that could drive the whole world into war, if followed strictly (Franck, 2002, p. 48). The concern, of course, was to limit this right so that unilateral use of force did not again, become a norm in international affairs. Thus, Article 51's provisions requiring that an armed attack occur and that self-defense force



only continue to such time as the Security Council had taken action. The strength of this balance was that all states could now be assured a clear right to defend themselves, even if under limited circumstances. The downside was that no clear definition of armed attack was provided (despite Chinese attempts at offering one), and ultimate resolution of armed conflict between states was left to an inherently politicized, Security Council.

This vision of global security and order, of course, soon gave way to its historical contemporary context. Four elements, of the late 1940s and early 1950s, were critical to shaping *jus ad bellum* until recent times. First, the Cold War soon became a reality, thus freezing the Security Council's inherently political process, and all but eliminating a functioning collective security system or the prospect of any transitional security arrangements. Second was the increased use of proxy war, during the Cold War, to pursue states' interests—supporting one side over others in civil wars, fostering insurgencies, and otherwise meddling, through rebels and mercenaries, in the affairs of other states, without the actual, direct application of a state's own forces. As seen, such warfare resulted in the *Nicaragua* case and its points on effective control and just how far a state must take control of a rebel group for its actions to constitute armed attack. Third were advancements in military technology, in particular, global delivery systems for nuclear weapons and the advent of “mutually assured destruction.” In a world in which the power to literally destroy another country could be launched instantaneously and delivered in less than an hour, the notion of awaiting an armed attack before pursuing the inherent right of self-defense became, almost, absurd. Thus, the growth of arguments of anticipatory self-defense during the Cold War, which, in turn, also led to absurd conclusions—if any state had a right to launch its missiles at any time to protect itself from annihilation, and such launch would result in its destruction, the general prohibition, and the meaning of a limited exception for self-defense, were made irrelevant (Franck, 2002, pp. 2–5). Fourth was the trend of globalization, and specifically, a rising global consciousness of the notion of universal human rights, civil, economic and otherwise. The UN Charter's provisions on force deal, primarily, with state-on-state conflict, which was natural following a half-century of global warfare involving nation-states. However,

this emphasis on regulating state conflict arguably relegated issues of human rights violations, genocide, indiscriminate use of WMD, and other “global” or “non-state-based” security issues, to the periphery.

### **C. HISTORICAL SHIFT**

So long as the Cold War’s bi-polar balance of powers dynamic was maintained, *jus ad bellum*, under the UN Charter’s provisions, could effectively account for state-on-state conflict and, through the creation of “legal illusions,” as evidenced in the *Nicaragua* case, tolerate proxy wars without creating a rise to the level of state-on-state conflict. However, as non-state conflict became an increasing norm, particularly in the form of state supported, and non-state actor terrorism, modern *jus ad bellum*, and the meaning of the self-defense exception, became increasingly challenged.

This trend can be observed toward increased, international acceptance of use of force in self-defense against extra-territorial terrorist threats, and the resulting challenges to *jus ad bellum*, by reviewing a series of historical examples. This review pays particular attention to how such use of force was received by the international community in an attempt to find evidence of shifts in custom and practice.

After 50 Americans were injured and two killed in the La Belle Disco attacks, the United States attacked Libya with a series of air strikes (Gray, 2002, pp. 161–162). Before the attacks, Qadhafi repeatedly threatened that the Libyans could export terrorism to America. Despite Libya’s public support of terrorism, international reaction was negative. Many of the U.S.’s closest allies were critical. The UN General Assembly passed a resolution condemning the action, while Secretary General Javier Pérez de Cuéllar deplored the state-on-state conflict.

This reaction was not surprising under the context of international security at the time. *Nicaragua* set a very high bar for assigning rebel actions to their state sponsors or for finding assistance to a rebel group constituted an armed attack that validated a victim state’s response, which was a very practical approach. The superpowers of the day were going to engage in such activity regardless of norms. As a result, a legal fiction was created that states otherwise clearly party to a conflict were not, which resulted from the

reality of the Cold War—if state sponsorship of terrorism demonstrated an armed attack validating a response in self-defense, then the risk of a direct superpower conflict became heightened. As to be seen, this understanding of the limits of self-defense and whether terrorism could be accepted as an armed attack would change significantly with the end of the Cold War.

During the mid-1990s, Iran routinely invoked Article 51 to justify the use of force against bases of the Mujahedin-e Khalq Organization (MKO) on Iraqi territory. Similarly, Iran routinely pursued incursions into Iraqi territory to pursue Kurdish armed bands. Almost no proof exists that the MKO or Kurdish insurgents were under the effective control of the Iraqi government. Despite Iraqi condemnation, the international community did not denounce this use of force (Tams, 2009).

In 1993, a plot to assassinate former President George Bush during a visit to Kuwait was foiled with strong evidence of Iraqi government sponsorship. The United States launched cruise missiles against Iraqi intelligence facilities in response (Gray, 2002, p. 162). As discussed earlier, President Clinton justified the actions in terms of self-defense, and maintained that the use of force was meant to be proportional and eliminate Iraq's capacity to pose a threat. The international community generally supported the strikes, implicitly and explicitly, with the Chinese expressing concern, but clear support from the United Kingdom, Israel, Russia, Germany, Italy, Japan and South Korea, as well as the three Islamic states then sitting on the Security Council: Pakistan, Djibouti and Morocco. Egypt, Jordan and Iran criticized the attack, but based on the civilian casualties caused.

The U.S. response was, in reality, questionable as a legitimate act of self-defense. The plot in question was already foiled and some of those responsible were already incarcerated. Also, no evidence existed of a continuing campaign of terrorism. Even more curiously, the Security Council appeared more interested in the facts of the case and found Iraqi involvement to be clear (Gray, 2002, p. 162).

Further evidence of the trend came in 1998 in response to the bombings of the U.S. embassies in Nairobi and Dar es Salaam. The previous chapter described the facts of

this case. Iran, Iraq, Libya, Pakistan, Russia and Yemen condemned the response. Australia, France, Germany, Japan, Spain and the United Kingdom supported them. Clearly, backing or censure tracked with alignment of political and strategic interests with the United States. Reaction to the strikes in Sudan differed significantly from those in Afghanistan as well. The League of Arab states condemned the strikes against the Sudanese pharmaceutical factory, but not those against the bases in Afghanistan. The group of African states, Islamic states and the League of Arab states each requested that the Security Council review the attacks against the pharmaceutical plant, but not the strikes in Afghanistan.

The difference is best explained by the degree to which “the facts” ultimately supported the different U.S. actions. The United States never really made a clear case that the Sudanese plant was producing WMD. In addition, the actual connection between the plant and the attacks against the embassies was tangential. In contrast, no doubt existed that terrorists were operating from bases in Afghanistan with the acceptance of the Taliban regime and that Al Qaeda was connected to the original bombings. The issue, from the perspective of international norms on justifiable use of self-defense, was whether the United States had adequate evidence to justify its choice of target given the original, offending armed attack and the prospect for an ongoing campaign of terror.

In 2000, 2004 and 2007, Russia argued a right to respond extraterritorially to Islamic terrorists. In 2007, responding to attacks by Chechen rebels, it sent air strikes against Chechen bases in the Pankisi Gorge. Russia argued that Georgia had been unable to establish a security zone in the area of the Russian-Georgian border, continued to ignore Security Council Resolution 1373 and would not, or could not, put an end to the persistent, cross-border raids. International reactions were mixed, but, once again, no major condemnation ensued (Tams, 2009).

Finally, in March 2008, Colombian forces entered Ecuadorian territory to pursue Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia (FARC) rebels, considered a terrorist organization by the government of Columbia. The OAS denounced the action as a violation of Ecuador’s sovereignty, yet,

other international organizations were largely silent and the United States expressed direct support for the use of force (Tams, 2009).

The apparent trend toward an expanded, facts-based concept of self-defense, particularly, against non-state actors, is evidenced by evolving case law. Case in point, the ICJ, in 2004, seemed willing to defend the traditional, more restrictive interpretation of the inherent right of self-defense. In the Israeli Wall case, it observed that Article 51 clearly states an inherent right of self-defense exists in the case of armed attack by one state against another state, and thus, did not justify Israeli measures aimed at preventing attacks by terrorists operating from within the occupied territories (Legal Consequences, 2004).

Yet, one year later in 2005, the ICJ's majority was far more equivocal. It rejected Uganda's reliance on self-defense as a response to armed attacks by a rebel movement operating from within the Democratic Republic of the Congo (DRC), since these could not be attributed to the DRC. However, the ICJ then expressly left open the question "whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces." Individual judges criticized both pronouncements. Predictably, a number of judges were not convinced by the majority's (lack of) reasoning in the Israeli Wall opinion and drew attention to the more recent practice. More importantly, Judges Buergenthal, Kooijmans, and Simma expressly accepted that self-defense was available against armed attacks "even if [these attacks] cannot be attributed to the territorial State" in the Uganda case (Tams, 2009).

#### **D. THE SIGNIFICANCE OF THE HISTORICAL SHIFT**

What then is the historical relationship between the apparently increasing numbers of incidents, over time, involving invocation of the self-defense exception against terrorist groups, state-sponsored and non-state, to the evolution of *jus ad bellum*?

The U.S. military response to the September 11 attacks has no doubt pushed U.S. understanding of international law regarding the use of force and the UN Charter's general prohibition on the use of force. Yet, as seen, as dramatic and impactful these events, and the military response to them were, they, and their impact on international

law, must be seen as part of a larger, historical trend toward an expanded, accepted definition of self-defense, tied directly to the rise of non-state terror actors as a global threat. Indeed, the events of the past 50 years are more likely to prove part of a regular, ongoing evolution in the global community's understanding of jus ad bellum—adapting to new global contexts.

As seen previously, observing changes in the historical context in which use of force norms operate, help demonstrate the “normative drift” of international law and practice. Following WWII, the world adopted an understandable desire for collective remedies to threats to peace and security—hence the United Nations, its general prohibition, and limited exception for self-defense. The Cold War rendered the original intent, and design of that system, unattainable and impotent. States thus engaged in self-help to ensure their security—where the Security Council had originally been hoped to operate. With the end of the Cold War, the Security Council was reenergized as the bipolar, stifling effects of superpower conflict ended—the UN Council's permanent members were no longer guaranteed to stand in opposite corners on every issue. The UN Council could assume, at least in part, more of its aspired role in the maintenance of international peace and security. In addition, indeed, the UN Council did so, authorizing the 1990–1991 Gulf War, and multiple peace enforcement operations. In addition, the Cold War's limitations on the unilateral use of force were also relieved, as the prospect of proxy war erupting into global war, receded. States today are thus more willing to take advantage of, and accept, unilateral uses of force, as fewer “spill over” effects occur. As seen in this paper's historical review, international law is as much a function of shifts in internationally accepted practice, and historical and geopolitical context, as it is the literal text of treaties and charters.

Such changes have clearly shifted U.S. understanding of international law regarding responses of self-defense to terrorism. As the *Nicaragua* case showed, during the Cold War, guerilla warfare, wrapped up in proxy conflict, constituted the most serious issue of use of force outside the classic state-on-state dynamic. Each superpower had its clients, including states or rebels. The reason for the general acceptance of such “surrogate” conflict was its ability to limit the potential for outright, superpower conflict.

Needless to say, the past 20 years have brought dramatic change. Today, only one superpower exists. The prospect of open conflict between the United States and states like Russia and China appears minimal for at least a generation. Yet, while the prospect of formal, state-on-state conflict, as originally contemplated by the UN Charter's system, has gone down, the relative significance, and cause for conflict, of the terrorist threat, has grown. Today, international security is dominated by questions of regional instability, failed states, the proliferation of weapons of mass destruction, and the often global, decentralized threat of non-state terrorist groups that now operate not as proxies, but more often, as independent actors in the international arena in their own right. These are precisely the kinds of threats relegated to the fringe of the UN Charter's security system—at least as it was originally intended. This apparent gap has arguably forced U.S. understanding of *jus ad bellum* to change more than any other historical factor, in no small part because of increased use of self-defense law and practice against non-state terrorist groups.

At no point has the shift in historical context been more evident than when U.S. and British forces invaded and conquered Afghanistan in response to the events of September 11. They did so with global acceptance and UN approval. Indeed, the issue of the lawfulness of the U.S. and UK actions were never truly challenged, at least not formally at the UN or by a major government. In fact, much of the world tried to join the cause. Such global acceptance and support was, as observed, part of a post-Cold War trend toward increased acceptance of use of force in self-defense against non-state terror groups. What is the impact and significance, however, of this historical shift?

#### **E. KEY OBSERVATIONS FOR THE CENTRAL QUESTION**

Based on this paper's review of shifts in historical context surrounding contemporary *jus ad bellum* on self-defense against non-state terrorist groups, it does appear that the UN Charter regime has been re-adjusted, so as to permit forcible responses to non-state terrorist groups under more lenient conditions. A series of key observations reveal the implications of this shift in historical context.

First, the modern notion of self-defense has shifted significantly from its historical origins. Its original conception in 1946 was based on state-on-state conflict, as a limited exception to a strong, general prohibition that would ultimately be regulated or limited, by the Security Council and collective security. Today, self-defense is based on an expanded range of threats, including non-state terrorist actors and operates as a larger exception, to a still accepted general prohibition on the use of force.

Indeed, practice since 1989 makes it abundantly clear that acts of terrorism can amount to threats to peace in the sense of Article 39 UNC, and, as earlier observed, constitute armed attacks, invoking Article 51. As regards statements of principle, SC Resolution 1566 (2004) is particularly clear; in it the Council, acting under Chapter VII, “condemns in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security” (UNSCR 1566, 2004).

In contrast, the Security Council has not so far not actually directly authorized the use of anti-terrorist force as a military sanction. While stretching the interpretation of Article 41 UNC, it has refrained from applying Article 42 UNC in the fight against terrorism, which does not mean that it has not contemplated military sanctions. In SC Resolutions 1368 and 1373, following 9/11, the UN Council expressly noted that the attacks of 9/11 had triggered a right of self-defense—but this amounted to a multilateral endorsement of a claim to use force unilaterally, rather than multilateral enforcement action in the sense of Article 42 (Tams, 2009).

Second, this more expansive, accepted practice of self-defense has been driven, in no small part, by the use of force against non-state, terrorist groups, as demonstrated by the historical cases illustrated above. The proxy wars of the Cold War have given way, as seen in the next chapter, to a new norm in warfare and the nature of the use of force in general. The need for self-defense by states is thus, perhaps, greater than ever before as localized conflicts, crossing traditional state boundaries and fought amongst civilian populations become the most common form of warfare. Yet, as to be seen, the need for



true, collective security to address global, non-state terror threats is also, arguably, more in demand than at any time. This dual reality is challenging U.S. accepted notions of state self-defense, and the meaning of state-sponsorship of terror groups.

Third, a growing, and perhaps worrying reality exists that these trends point toward an increasing tendency of the international community to accept use of force against non-state terrorist groups based on claims of self-defense, which in reality, serve less than truly defensive purposes. The result may be rather paradoxical: while unequivocally condemning the doctrine of armed reprisals, the international community seems increasingly inclined gradually to accept armed reprisals disguised as self-defense. In so doing, it may re-introduce an altogether flexible exception to the ban on force, which had been considered illegal for decades, and abandon an intrinsic feature of the right of self-defense. Even if this potential resurgence of armed reprisal fails to come to fruition in the coming years, the use of force, justified under the terms of self-defense, has clearly expanded beyond its original, historical intentions. Self-defense is now routinely used to justify unilateral use of force, particularly in the context of actions taken by states against non-state terrorist groups. In and of itself, this apparent commitment to international law in governing the use of force would seem to be a positive outcome—the international, legal justification for use of self-defense force is now an accepted reality. However, in application, this clearly impacts the actual meaning of self-defense (Tams, 2009).

In sum, moving beyond the original intentions of the UN Charter's general prohibition on the use of force, the UN Security Council in the post-Cold War era, along with the common practice of the international community, has accepted an expanded exception for the use of self-defense force, particularly against non-state terrorist threats, which has occurred without a similar expansion of the UN Charter's collective security provisions against such threats. States are freer to use force unilaterally against terrorist threats under the aegis of self-defense, and the UN Council appears less inclined to involve itself directly in such use of force, through its direct authorization or commitment of actual, UN forces (Tams, 2009).

Yet, shifts in historical and geopolitical context alone are not the only factors driving this shift in jus ad bellum toward an expanded definition of self-defense, particularly against non-state terrorist groups. Just as the realities of mutually assured destruction and super power supported insurgencies shaped, and often constrained, notions of self-defense during the Cold War, so today is the changing nature of warfare itself causing jus ad bellum to evolve. These changes are addressed in the following chapter.

## **VII. ANALYSIS—EVOLVING NATURE OF USE OF FORCE**

### **A. OVERVIEW**

Having reviewed and identified the manner in which changes in historical context are forcing jus ad bellum on self-defense against non-state terror actors to change, how the evolving nature of the use of force itself is impacting how states justify military action against non-state terror groups is examined next. As the previous chapter recognized, the technological and tactical realities of how wars are fought are central to how international norms on just war, against any threat, take shape, which is certainly the case with non-state terrorist groups. Just as the threat of nuclear tipped intercontinental ballistic missiles and the use of proxy wars shaped accepted notions of self-defense during the Cold War, so too is a “devolution” and “localization” of warfare shaping contemporary norms, as contemporary warfare is increasingly fought at once, at the local and regional levels, in the form of civil conflict and domestic insurgencies while also being tied, through global ideological movements and communications, to the greater world. The central question to inspect in this chapter is the degree to which the scope, scale and duration of use of force against global, non-state terror groups are causing traditional norms of self-defense, including the principles of necessity, immanence, and proportionality, to bend, if not break. A brief review identifying the principle tenets of modern warfare is first, and then a evaluation of how these realities are creating an increased emphasis on necessity, a more regular or constant connotation of immanence, a more expansive concept of proportionality, and a lower bar for finding state sponsorship or support for non-state terror groups follows.

### **B. THE CONTEMPORARY NATURE OF THE USE OF FORCE**

A series of authors provide critical insights on the development and reality of modern warfare. Martin Van Creveld argues that two visions of modern warfare have been competing since 2000. The first essentially argues that warfare will continue to follow the principles of Carl Von Clausewitz—“that war will continue to be used mainly

as an instrument of policy at the hand of one state against another” (Creveld, 2000, pp. 213–217). Clausewitz argued that wars by an armed populace (a non-state actor) could only serve as a strategic defense (Headquarters, 2006. pp. 1–4), and that “the political aims [of war] are the business of the government alone” (Clausewitz, 1993, book 6, ch. 26). He also contended, like the Newtonian physics that dominated his time, that every enemy had a single, center of gravity that if struck could knock an enemy terminally off-balance (Clausewitz, 1993, book 3, ch. 15).

The second vision, Creveld contends, to which he himself belongs, reasons that large-scale interstate warfare is at an end due to the proliferation and deterrent effects of nuclear weapons proliferation. In addition, as Marston describes, overwhelming conventional strength of U.S. and UK forces also make state-to-state conflict very unlikely, and that such conventional, battlefield dominance equally contributes to lower intensity conflicts being more likely and more complicated (Marston, 2010, p. 2), which however, does not mean an end to war. Instead, warfare, although potentially involving states, will more likely involve extremely bloody conflicts of limited geographic scope fought against or between organizations not state actors, Creveld contends (Creveld, 2000, pp. 213–217).

Building on Creveld’s second argument, Mary Kaldor asserts, quoting Hannah Arendt, “that power rests on legitimacy and not on violence,” and that, “the monopoly of legitimate violence has broken down. And what is crucial is not the privatization of violence, as such, but the breakdown of legitimacy” (Kaldor, 2001, pp. 114–115). It is worth noting that in some ways, Kaldor’s points, although very relevant to contemporary affairs, are rooted in quite ancient questions about the fundamental nature of power and government—are people to be ruled for their own protection, or is the ultimate security of the state rooted in the consent of the governed. Note that these questions were asked as early as Plato’s *Republic* and later in Hobbes’ *Leviathan*. In relation to the current modern setting, Kaldor contends,, “the new type of warfare has to be understood in terms of global dislocation (defined by those who participate in transnational networks and those who do not)” (Kaldor, 2001, pp. 69–70). Thus, seconding Creveld’s notion that modern war is fought largely by or against non-nation state actors, Kaldor conveys that

the nation state, in the 21st century, is no longer the sole possessor of legitimate, political power, and thus, no longer the sole makers of war. It is critical to observe that there have always been non-state actors and that long before the nation-state itself became the predominant unit of governance on the world's stage, empires and princely states ruled. For the past 500 years, indeed the nation-state has served as the primary player in world affairs. Kaldor's arguments are important to identify a new transition occurring in strategic, international affairs, but it must be remembered that the nation-state as a unit has never been alone on the world stage, only the leading player of recent history. Thus, Kaldor argues, "The new wars have political goals." This idea is unlike nation-states during the 20th century, which fought wars to advance the interests of the nation and secure its nation's borders, interests and resources. Instead, the aim of modern war "is political mobilization on the basis of identity. The military strategy for achieving this aim is population displacement and destabilization so as to get rid of those whose identity is different and to foment hatred and fear," if necessary, on a global scale or using global trends and support to advance a cause (Kaldor, 2001, p. 10). To avoid the appearance of innocence in this paper's analysis, it is essential to recognize that warfare has, is and likely always will ultimately be fought to kill enemies and take their resources, based on strategic demands. Yet, to be fair to Kaldor, the social, political and economic reasons that wars have been fought have and do change over time. Nazi Germany fought as much for control of Europe's economic resources as it did the notion that Germany had a natural right to rule the continent. The protestors who recently brought down the Mubarrak regime in Egypt demonstrated as much out of anger over inflation, rising food prices and an absence of economic opportunity, as they did out of a belief that the regime that ruled them was illegitimate and undemocratic. It is necessary to understand Kaldor to argue that the major, driving force behind much of contemporary warfare, particularly civil wars, domestic insurgencies, and ethnic conflicts, is political authority reaped through possessing enough military and social strength to bring stability, and in turn, perceived legitimacy.

Lawrence Freedman helps to give context to Kaldor's notions by describing the War on Terror through the concept of "offensive liberal wars", which are "designed to

bring liberal values to parts of the world where they are not yet in evidence,” and thus, “tend to focus on the balance of power within states rather than between states and reflect the growing importance of the norms of human and minority rights. [And, in turn] almost by definition challenge the norm of non-interference in internal affairs” (Freedman, 2006, p. 39). He also notes how the 2006 Quadrennial Defense Review emphasized major problems like defeating terrorist networks, defending the homeland, preventing or precluding WMD proliferation, and preventing state and non-state actors from acquiring them (Freedman, 2006, p. 16). In short, echoing Creveld and Kaldor, Freedman shows how increasingly, U.S. defense strategy must focus on fighting non-state actors and networks, irregular, asymmetric operations, and at times, enforcement of liberal values. Here again, it is essential to emphasize that while such strategy must adapt to the realities behind sources and nature of threats in modern conflict, the ultimate objective of use of force, particularly by major powers like the United States, remains achievement of national interest and strategic gain. Clearly, some such interests are rooted in political values and desired socio-political outcomes, but in the end, force is used to ensure the security of a state’s citizens against threats, and optimal influence and control over vital resources.

Advancing on the notion that modern warfare is focused on conflict with and between non-state actors, Cebrowski focuses on the capabilities required to fight a modern war effectively by clarifying that, “The ambiguities resident in a complex adaptive environment demand flexibility”(Cebrowski, 2010, p. 8). Thus, in turn, “What is changing is the character of warfare just as societies, political entities and technologies change—our fixation with technical and industrial means of waging war is now misplaced—war is now a networked affair which is to say, war now requires the ability to create and preserve options, develop high transaction rates, develop high learning rates, and overmatching complexity at scale” (Cebrowski, 2010, p. 6). In short, modern warfare requires great plasticity, and the ability to develop more options for victory faster than the enemy can and then to have the strong, standing, diverse capabilities to implement such options quickly.

Finally, General Rupert Smith, capturing elements of each of the preceding authors and combining them with his own, extensive, real-world, experiences, defines six major characteristics of modern warfare (Smith, 2007, pp. 35–36): (1) the ends for which we fight are changing from hard absolute objectives of interstate industrial war to more malleable objectives to do with the individual and societies that are not states; (2) we fight amongst the people, both literally and in the media; (3) our conflicts tend to be timeless since we are seeking a condition as opposed to a definitive outcome; (4) we fight so as not to lose the force, rather than fighting by using the force at any cost; (5) new uses are found for old weapons, since the tools of industrial war (EG tanks) are irrelevant to war amongst people; and (6) the sides are mostly non-state since we tend to conduct our conflicts and confrontations in some form of multinational grouping, or against some party(ies) that are not states. Smith summarizes these trends by affirming, “[they] reflect the reality of our new form of war: it is no longer a single massive event of military decision that delivers a conclusive political result.” As Smith implies, the ageing principles of Clausewitz, at least as originally conceived, are increasingly obsolete.

Based on this review, modern warfare can be understood as: (1) largely comprised of conflicts against or between non-state actors, (2) fought more commonly amongst people themselves, along with critical infrastructure, military forces and resources, (3) fought over control of the political sources of legitimacy and consent, (4) driven by social values, or to defeat them, and, (5) fought on a complex, networked, global scale. More to the point, as Kaldor specifies, “modern war is about the need to protect people, get political process of consent going and support rule of law because new wars are fought by networks of state and non-state actors with few outright battles and most strikes against civilians” (Kaldor, 2005). Again, it must be understood that Kaldor and her contemporaries are demonstrating a shift in the emphasis of modern conflict and not an end to historical realities, and truths, of warfare. Just war, as a legal theory, must be understood as much through its precedents and statutes, as in the strategic environment in which it must be applied. The authors above have shown that today, *jus as bellum* must grow to better account for the use of force in self-defense by states against non-state

actors, particularly terrorist groups, with greater frequency, scope and scale. States remain the primary source of military force in the world, but the targets of their force, and threats their citizens face, requiring application of force, are increasingly non-state-based.

### **C. KEY OBSERVATIONS FOR THE CENTRAL QUESTION**

The reality of modern force itself is pushing current understanding of jus ad bellum on self-defense against non-state terror actors in three ways: (1) a heightened notion of necessity creating arguments for rights to preemptive and anticipatory self-defense, (2) a sense of constant or regular immanency of threats through the accumulation of attacks, and (3) a potentially much broader idea of proportionality.

#### **1. Evolving Nature of Force and Its Impact on Necessity**

Accepted norms of necessity have been directly challenged and stretched because of changes in the nature of force. As seen previously, modern warfare, increasingly driven by socio-political and religious values, is inherently more erratic, less predictable, and arguably less “containable” than its Cold War era predecessors. Even use of force in places like Afghanistan by the United States, while driven by more general American strategic and security interests, must be understood as a response to a threat that viewed the world, and applied its own force, in terms of social-political-religious values—thus directly impacting and shaping the nature of the force the United States had to apply to achieve its strategic goals. Indeed, the Bush administration, although arguably driven by raw, military interests to defeat what it perceived as a long standing enemy, colored its subsequent invasion of Iraq in terms of spreading democracy and liberating a domestic population from tyranny. It increasingly poses a direct, imminent and persistent threat to the identity, values and existence of states themselves, as it is fought against or between “non-state” actors, including terrorist groups and groups linked to them, who fight for political legitimacy and consent, literally amongst the citizenry. Further complicating this reality is that unlike states, non-state actors are able to apply force for, relatively speaking, very low cost and very low risk, not having to keep and protect their own sovereign territory or secure long supply lines. The severity or degree of necessity in self-



defense calculations is thus heightened for states as they seek to defend their citizens from threats not only against individual lives and infrastructure, but the perceived ability of the state itself to perform its vital functions. Clearly, states and their existence have been attacked before by external threats. What makes this threat different, in one critical way, is its apparent intent to strike at the perceived legitimacy and authority of the state to ensure key opportunities, rights and general stability for its citizens. When non-state actor terror groups combine this type of threat with the potential acquisition of weapons of mass destruction, necessity, for some if not all states, reaches a critical level. This heightened concept of necessity has manifested itself most directly on the issue of pre-emptive and anticipatory self-defense, and the appropriate timing of use of force in self-defense against non-state terror actors and their state supporters.

As seen in this paper's examination of the rules on self-defense, the temporal limitation of self-defense has come under pressure from different directions. No influence has been more significant to the question of the appropriate timing of self-defense, than the current nature of force. States' assertions of a right of pre-emptive self-defense present the most obvious manifestation of this impact. That challenge has led to a more flexible handling of the necessity factor, particularly by nations, such as the United States and Israel. Indeed, in its 2001 National Security Strategy the United States explicitly argued for a right to preemption given the current global threat environment, and both the United States and Israeli routinely use force to eliminate threats that, under customary norms, do not fit the classic definition of necessity, which uses targeted killings with drones worldwide, or strike nascent nuclear power plants in Syria. Such use of force is pursued in no small part because the nature of modern warfare is so fast, diffuse, and often lethal, that opportunities to strike at critical targets often, simply cannot be passed up for fear of foregoing an opportunity to eliminate an otherwise imminent threat. No doubt exists that custom is impacted when the world's principle power and a state routinely engaged in combat against terror groups, who both attempt to justify their uses of force in international legal terms, both interpret necessity to justify preemption. Preemption, and the desire to establish a stronger right to it in self-defense, particularly by contemporary major powers, is clearly a response to a changing, strategic

environment, which at once makes preemption a realistic option, unlike the Cold War, and one of necessity, given the nature of a non-state terror threat operating so as to be difficult to predict, with no formal declarations of hostilities.

However, as also seen, an enhanced notion of necessity justifying preemption against non-state terror groups has yet become a universally accepted international norm. For the most part, few states have been unwilling, officially, to accept the U.S.'s argument for a right of pre-emptive self-defense. Indeed, the United Kingdom's Attorney General, not known, typically, to oppose U.S. defense policy, has been adamant that, "international law permits the use of force in self-defense against an imminent attack but does not authorize the use of force to mount a pre-emptive attack against a threat that is more remote" (Rigstad, 2007). Such comments were made in the context of remote, targeted killings against actors on wanted lists, as opposed to suicide bombers literally en route to a strike. Furthermore, in his report, "In Larger Freedom," Kofi Annan equally made it clear that Article 51 "covers an imminent attack," but "[w]here threats are not imminent but latent, the UN Charter gives the Security Council full authority to use military force, including preventively, to preserve international peace and security" (Rigstad, 2007). The phrase, "including preventively" would appear, at least in theory, to leave the door open to preemptive self-defense force; however, Annan's direct reference to the Security Council more than implies that such force, if ever used, must only come after the UN Charter's security decision-making body, acting as proxy for international consent, has approved the action. Indeed, as seen shortly, it is more likely that Annan's use of language implies a nascent right of anticipatory self-defense. Finally, the ICJ's ruling in the *DRC-Uganda* case indicates findings similar to those of Annan. Responding to Uganda's case for the defense of its security interests, including those not under a traditionally imminent threat, the ICJ argued that use of force cannot be used, under Article 51 to protect against merely perceived security interests, and that such concerns are most appropriately addressed by the Security Council (Rigstad, 2007).

As is often the case in international law, exceptions to rules and dissenting opinions often, over time, become the rules and norms themselves. With time, this idea may well be the case with respect to heightened concepts of necessity and the notion that

they justify a right of preemptive self-defense. Certainly, the realities of contemporary force are not about to go away nor the manner in which such force is used by non-state terror actors. Taken together, however, the statements and findings above indicate that while a heightened concept of necessity in international affairs brought on by the realities of contemporary force exists, a resulting right of pre-emptive self-defense has yet to become an international norm under the Article 51 regime.

Yet, while the realities of modern armed conflict have yet to force a clear right of preemption, the international community does appear to have moved closer to acknowledging the doctrine of anticipatory self-defense because of growing acceptance of the concept of accumulation. To examine this growing right, the impact of the nature of force in modern warfare on the immanency factor is addressed next.

## **2. Immanency, the Nature of Force and the Impact of Accumulation**

Traditionally, pin prick attacks have not been seen to reach the level of an armed attack, nor to justify a right to self-defense. Accumulation becomes increasingly relevant to *jus ad bellum* because of the use of terrorist campaigns by non-state terror actors, using violence which in and of themselves, might not warrant all out war in self-defense by a state, but which taken together, certainly can attain such a level. The doctrine was much discussed by the litigants in the *Cameroon–Nigeria*, *DRC-Uganda*, and *Oil Platforms* cases. The ICJ did not expressly pronounce on the matter, but equally seemed inclined to accept it—hence its statement, in *Oil Platforms*, that “even taken cumulatively,” a series of incidents did not qualify as an armed attack on the United States. These statements suggest a trend towards the recognition of the “accumulation doctrine,” but may require further consolidation.

The increasing legal acceptance of the concept of accumulation comes not only because of persistent legal wrangling, but also because of the realities of modern warfare. As Smith has revealed above, force is increasingly used by non-state as much as by state actors, and over extended periods of time, against and amongst civilian targets, with objectives often less than well defined. Stated differently, pin prick attacks, traditionally viewed as mere skirmishes or “dust ups,” are far more common today than set-piece

battles with clear strategic objectives and clear beginnings and endings. these pin prick attacks are also increasingly part of ongoing, systematic terror campaigns designed to degrade the authority of the state itself to maintain order. As real world realities shift, so must law and custom. The accumulation doctrine thus helps to close what many have argued is a gap between Articles 2(4) and 51 and the notion that mere, low level uses of force, such as cross-border raids or skirmishes, do not rise to the level of armed attack, and thus, justify self-defense.

Of course, the acceptance of accumulation produces some potentially serious side effects. Anticipatory self-defense is not meant to be the same as preemption. A difference exists between swatting the hand of a man seen loading and preparing to fire a gun, and shooting a man who owns a gun before he picks it up—thus, increasing acceptance of a right to anticipatory self-defense, but not necessarily, nor clearly yet, a right to outright preemption. Accumulation and its relationship with immanency, have the potential to become easily confused with the concept of necessity, and in turn, create the basis for an ongoing, lasting finding of necessity, which creates a potentially unending authorization to use force under the guise of self-defense. In counter to these concerns, it can, of course, be argued that realities are not going to go away—Taliban raids and support into Afghanistan from Pakistan are not going to stop because international law fails to vest a right of self-defense against low-level, cross-border insurgencies. The danger, however, is that concepts like accumulation, although properly arising in response to the realities of modern conflict, degrade the original intentions of the general prohibition on the use of force, and the concept that self-defense is intended as a limited exception—limited not only in terms of the frequency of its use, but also its duration, lasting only until the Security Council has taken action to restore order. In a world in which force is increasingly used constantly, at a low level, over extended periods of time and territory, the danger that an “open checkbook” for self-defense force can create can quickly be seen. States could feel justified in using force for however long and wherever they feel necessary to end the immanency of future attacks out of perceived, if not real, necessity. To some degree, the world has already seen this effect with Operation Enduring Freedom in Afghanistan, an operation initially based on a broad, yet defensible reading of Article

51 UNC in response to a clear, immediate, imminent threat, and specific attacks, which has turned into a self-perpetuating military campaign serving a range of objectives, last over a decade.

Closely related to the dangers of accumulation to undermining traditional, temporal, boundaries of self-defense, is the impact of the realities of modern warfare on the proportionality factor.

### **3. Expanded Proportionality**

Arguably, no factor of self-defense has been more impacted by the modern nature of the use of force than that of proportionality. As seen earlier, proportionality is traditionally interpreted to permit a level of force sufficient to eliminate a threat; thus, self-defense force need not literally match the force originally used and can exceed it, but only as required to end its source. Modern warfare, and the kind of force utilized by non-state terror groups, presents a significant challenge to traditional notions of proportionality because the source of such force is often spread over many countries, borders, local conflicts and civilian populations. Proportionality, historically, called for eliminating an enemy state's supply hubs, military assets, or command and control structures, but not necessarily the annexation of large swaths of enemy territory, or targets worldwide (Gray, 2004, pp. 120, 160), such as, arguably, U.S. force in Afghanistan has been pursued since 9/11. As seen previously, non-state actor terrorist groups are often complex, networked, decentralized, and often operating on a global scale. Just how far can use of force be taken, under the guidelines of proportionality, when pursuing a group like Al Qaeda, whose core has been based in Afghanistan and Pakistan, but is also tied to regional conflicts and affiliate groups, worldwide?

The limits of proportionality have not yet been clearly defined by international case law. However, U.S. military practice, and to a degree, UN Security Council resolutions, do provide an indication of the apparent boundaries of accepted, international custom.

In the months prior to 9/11 the Bush administration had already departed from the policies of the Clinton administration by not launching targeted strikes in response to the

bombing of the *USS Cole*. According to Condoleeza Rice, this change in strategy came because President Bush was “tired of swatting flies” (Rigstad, 2007). This statement was meant to imply the administration found little to gain from destroying known training camps and bases when the organization itself was spread throughout Afghanistan, Pakistan, and globally—limited strikes against such targets simply would not eliminate the threat, or its capacity to strike at U.S. targets. Indeed, as Rice elucidated, “There is a question of whether or not you respond in a tactical sense or whether you respond in a strategic sense, whether or not you decide that you are going to respond to every attack with minimal use of military force . . . on a kind of tit-for-tat basis . . . [or] . . . *not* doing this tit for tat, doing this on a time of our choosing” (Rigstad, 2007).

Thus, little doubt remains that the Bush administration, even before 9/11, believed that for force to be effective against Al Qaeda, it would have to be applied “comprehensively” and globally. In addition, clearly, it did so, leading a coalition essentially to conquer Afghanistan to eliminate Al Qaeda’s entire base of support in that country. Historically, such scope of force in self-defense (not outright war, but self-defense), geographically, and temporally, is without precedent, which signals a potentially radical revision of the concept of proportionality.

UN Security Council resolutions have, at least in part, apparently supported such revision. As seen earlier, U.S. Security Council Resolutions 1368 and 1373 condemned the attacks of 9/11, affirmed the right of self-defense, as well as the need to “combat by all means” the “threats to international peace and security caused by terrorist acts” (Murphy, 2009, p. 121). These resolutions were followed first by Resolution 1386 authorizing the establishment of the International Security Assistance Force (ISAF) and then Resolution 1413 that authorized member states to take all necessary measures to fulfill ISAF’s mandate in Afghanistan (Murphy, 2009, p. 121). Such resolutions more than imply that the international community, at least in the limited, but extreme, example of Afghanistan, was willing to accept the annexation and reconstitution of a country to defeat a non-state, global terrorist threat. While such acceptance may well have come, in no small part, as a result of general sentiment for the United States following 9/11 and the recognition that Al Qaeda posed a threat to countries besides the United States, the

precedent, for *jus ad bellum*, is real and as seen, is in line with a series of historical, legal trends surrounding *jus as bellum* and justification of self-defense force against non-state terror actors.

Obviously, international reaction to the subsequent invasion of Iraq indicates that international tolerance of enhanced proportionality has its limits—the world will not support the invasion of a country just because one state says a terrorist threat exists within its borders that could affect places outside them. Yet, the precedent of Afghanistan is set and it must be considered that if, following another, large, mass casualty attack by a non-state terror group, if similar application of self-defense force would be, again, permitted.

Some evidence of proportionality's redefined limits based on reactions to U.S. actions since 2002 may exist. Since the initial invasion of Afghanistan, the United States has continued routinely to launch targeted strikes into Pakistan's federally governed territories, southern Yemen, Somalia and likely many other places that remain classified, against select terrorist targets. As Murphy notes, actions in Waziristan have occurred, for the most part, with the apparent consent of the Pakistani, and other states', governments (Murphy, 2009, pp. 132–133). While the killings themselves are often criticized on humanitarian grounds, or as violations of *jus en bello*, the tacit consent appears to satisfy questions of their justification as proportional under *jus ad bellum*. Tactically, such use of force clearly provides a state like the United States with the ability to match the nature of the force and threat posed by a non-state actor—it matches the evolution in the use of force itself. However, in so doing, justifying and applying self-defense force wherever necessary to match the non-state threat, serious questions are raised about the meaning of state sovereignty and authority. Without doubt, this type of force broadens current understanding of the accepted limits of proportionality to be more expansive than traditionally thought.

In sum, changes in the strategic realities of force, and the nature of contemporary conflict themselves are causing *jus ad bellum* on self-defense against non-state actors, to evolve. A heightened concept of necessity is increasingly justifying a right to anticipatory self-defense, bordering on, but not yet, finding a full right to preemption. An enhanced

notion of accumulation is allowing states to find immanency in a campaign of lower level terror strikes. In addition, the theory of proportionality has been advanced to allow for application of force on a much larger geographic and temporal scale than, arguably, any time in history, due to the tactical and operational realities of non-state terror groups, particularly those operating transnationally. The primary purposes and intentions of war have not gone away. War remains violence used to kill enemies for strategic ends. The state remains the primary user and controller of such violence. However, as seen above, the manner of force used by the primary threats to states has shifted, and the owners of such force have increasingly become non-state actors.

Taken together, it is possible to begin to see how shifts in historical context and evolutions in the nature of force themselves, are connected to, and impacting how state sovereignty is understood, which results, in no small part, because of the need to pursue the use of force in defense against non-state terror actors, and to do so, in synergy with the reality of modern force itself. Consequently, the next chapter examines how international law and practice on self-defense against non-state terror groups is challenged to account for such transnational threats, and in turn, potentially force current understanding of state sovereignty to evolve.



## **VIII. ANALYSIS—CHANGING NORMS OF STATE SOVEREIGNTY**

### **A. OVERVIEW**

As seen, *jus ad bellum* on self-defense is evolving due to a variety of strategic factors related to the advent of non-state terror actors. A shift in the character of the identity of the state itself brought about, at least in part, by transnational terrorist groups, and other non-state actors, is vital to understand given that the principle actor that *jus ad bellum* has sought to regulate, certainly for the past 60 years, arguably the last 500, is the state.

In many ways, the advent of non-state actor terrorist groups operating on the global stage has reaffirmed the primary role of the state in international affairs. Al Qaeda, on 9/11, was clearly striking at the American state, its symbols of power, authority and prosperity. The U.S. response, and global affirmation of it, demonstrated without doubt, where ultimate power resided on the world stage and confirmed that the primary protector and defender of citizens is and remains the nation-state. What had changed, however, was the risk calculation of primary threats facing the nation-state—while interstate geopolitics and resource control remained a critical component of the threat-interest matrix—the placement of non-state actor terror threats had to rise. In turn, to address such increasingly common, and lethal non-state threats effectively, the nation-state itself may have to change, or arguably, is already undergoing an evolution. In this context, the limitations of *jus ad bellum* as applied to non-state terror actors operating globally may, in fact, be part of a larger trend involving how the United States defines sovereignty and the modern state themselves.

As Hobbes argued so fundamentally, and long ago, the primary duty of the state is to ensure the security and stability of the realm and its citizenry (Jackson, 2007, pp. 135–160). With the birth of modern international relations, came the notion, or accepted reality, that certain affairs were inherently domestic and others particularly international. Those affairs considered inherently domestic were clearly governed under the authority

of the state, and most decidedly not any other, foreign, external state or actor. Conversely, those affairs considered inherently international occurred on a global stage, which was, essentially, lawless and ungoverned. As seen throughout the 20th century, particularly in the past 60 years, a growing body of international law designed to regulate the affairs of sovereign nation-states has advanced. 2(4) and Article 51 are two critical, albeit limited, examples of how international law, regulation and custom, has come to impact increasingly and directly the conduct of states. Despite these trends toward globalization, and perhaps the beginnings of “global governance,” the U.S.-led international response to 9/11 has demonstrated that the primary vehicle for the defense of citizens, and guarantor of global order, remains the state (Jackson, 2007, pp. 135–160).

Yet, the threat of non-state actor terrorism on the global stage still presents direct challenges to U.S. concepts of state sovereignty (Jackson, 2007, pp. 135–160). Non-state terrorists are clearly capable of applying force to justify a finding of armed attack, and thus, warlike behavior, but it remains, fundamentally, a form of inter-state or non-state criminal—a form, which, as seen, occupies a grey zone between domestic, criminal law, and international *jus ad bellum*, more lethal than normal murderers, but of insufficient power and character to take on the form of a traditional military opponent.

Concurrently, also observed has been that the nature of force itself in international affairs increasingly resembles what historically has been thought of as civil strife and/or terrorism, both, historically considered, far more domestic in nature, than international. In short, a recipe for far more force to be used more often and in more conflicts should these trends continue, but, perhaps, for that force to be applied with greater precision at more specific targets, albeit over more extended periods of time and distance from a victim state. Furthermore, states may increasingly have to think of force, when applied in self-defense to non-state terror actors, as an extension of domestic, criminal investigations, not unlike the United Kingdom’s definition of terrorism under the United Kingdom Terrorism Act of 2000, which emphasizes that terrorism includes actions both within and outside the UK itself, upon any person or property, regardless of international boundaries, but still, with emphasis on the relationship of states to one another, and their boundaries and jurisdictions (Jackson, 2007, p. 159).

To examine this issue fully in the context of this paper's central questions, it is necessary to briefly review the following: first, the nature and legitimacy of modern international law, second, consider the nature of today's non-state actor threat to international peace in greater detail, third, examine the manner in which such transnational, non-state actor terrorist groups relate to, challenge, and threaten international law and its system of state sovereignty, and fourth, reach a set of key observations for the central question.

## **B. NATURE AND LEGITIMACY OF INTERNATIONAL LAW**

A comprehensive review of the development and current state of the nature of contemporary international law and its sources of legitimacy is outside the scope of this paper. However, as noted above, a brief review is important to set up the remainder of this paper's examination of the implications of shifts in definitions of state sovereignty for the application of *jus ad bellum* to non-state terror actors.

Economic globalization and new security threats have led to a new kind international law. Such law is built on institutions, treaties, case law and norms established after the WWII, including the 2(4) general prohibition on the use force and the limited exceptions of Article 51. As seen, innovations, such as these, are, historically, remarkable, in that they seek to regulate directly what has been considered the ultimate hallmark of statehood—control over the use of force to defend the state and its citizens. On the surface, this transformation was significantly more impressive than that which occurred in the 1990s, notwithstanding a shift toward institutionalization in the form of the International Criminal Court and the World Trade Organization (WTO). However, subtle institutional changes have changed the practice of international law across three primary dimensions (Kumm, 2004).

First, international law now covers a much broader range of topics. Today, the traditional divide between the issues addressed by liberal democracies as domestic matters and those as foreign has been significantly reduced. State boundaries remain very relevant even with the dramatic expansion of globalization. However, forces outside democratic, domestic decision-making processes increasingly determine just how such

borders are made relevant. A new, growing, increasingly deep set of substantive rules and regulations affect matters historically, solely decided by national legal processes, such as customs, immigration, currency values, environmental safeguards, and security (Kumm, , 2004).

Second, the ways in which international law is produced are creating increased distance between the creation of new obligations under such law and the explicit consent of states. Contemporary treaties, while still grounded in state ratification, pass on powers to treaty-based, “governing” bodies that maintain an almost legislative or judicial nature, such as the WTO or even special military tribunals. These organs are authorized, by treaty, to settle on the specific obligations the states are under, again, by treaty. Therefore, the treaty becomes a framework for dealing with a specified range of issues, and once the states have signed on, their specific rights and obligations are determined without their explicit consent by these treaty-based bodies—the states consent to the decision-making framework, and in doing so, agree to abide by that system’s decisions (Kumm, 2004).

International law, with these features, thus takes on an almost governmental form. International law as governance blurs the distinction between national and international law. In this way, on many issues, it is increasingly difficult to find a bright line between international and national law, except with the one, obvious exception that national law is derived from a clear, liberal democratic process and international law, is derived, at its clearest, from the voting of the representatives of states in one of the treaty-based, “governing” bodies described above (Kumm, 2004).

No doubt exists that in practice, state representatives, authorized by national constitutions, remain the primary actors on the world stage. Yet, the increased presence and authority of non-state actors, such as international courts, tribunals, transnational bureaucracies, humanitarian assistance organizations, multi-national corporations, individuals, and as seen, terrorist groups operating transnationally, if not globally, have emerged as significant participants in the international legal process, and international law itself has taken on an almost “state-governance” form in many issue areas. Still,

networks of national governments, national administrators and national courts remain at the very heart of global governance—as Anne Marie Slaughter aptly describes, “The state has not disappeared, it has become disaggregated.”

Nowhere have these dual trends been more apparent than in the case of U.S. use of force against the global terrorist threat since 9/11. Following 9/11, no doubt exists that that the United States would respond militarily and that very little would stand in its way when doing so. Yet, the United States, and the rest of the world, still went and appealed to the UN Security Council to fulfill treaty obligations and receive the approval, if not consent, of international law, to pursue military action in Afghanistan, and subsequently, authority to administer and secure that country. Realists will argue this was a pro forma effort, that the United States could act as it saw fit regardless, and that following 9/11, world sympathy and support for the United States all but assured tacit approval for U.S. action. Yet, UN Charter obligations were still strong enough that the United States still worked to have its use of force authorized by the UN process, and no doubt exists not only the United States has put troops on the ground in Afghanistan to help prevent future terrorist threats from developing there. Realists will argue, correctly to some degree, that states, particularly powerful ones, engage forms, such as the Security Council, when it serves their interests, legitimization of otherwise unilateral use of force not the least amongst such interests. Moreover, indeed, as seen in earlier chapters, the United States has long committed itself to exercising its right of self-defense as it sees fit, arguing in favor of preemption, amongst other rights. Yet, the fact that even a great power, such as the United States, feels that the bonds of the UN Charter regime are strong enough to compel it to at least shape its arguments for force in terms of Article 51, and to seek Security Council approval, more than indicates a significant impact of the UN Charter and related international law on self-defense on sovereign, U.S. defense decisions.

The counterexample of the later U.S.-led invasion of Iraq helps make this point. Once again, the United States sought UN and international approval for its invasion, but did not wait for clear Security Council authorization. While the international system actually was not strong enough to prevent U.S. action, it was strong enough to force, at minimum, a degree of U.S. deference to the Security Council attempting to at least make

the argument that its actions were justified, if not authorized, by past Security Council resolutions. The point made earlier becomes clear—the state remains the primary actor in global affairs, but its ability to act is increasingly, significantly regulated and impacted by a system of international law that is, in many ways, at most, approaching governance, and at minimum, is creating a greater division between actual state consent and international, legal obligations. How then, does this trend toward the increased strength of international law over state affairs and its impact on state sovereignty, relate to the nature of the threat of non-state, terrorist actors?

### **C. NON-STATE ACTOR THREATS, THEIR CHALLENGES TO STATE SOVEREIGNTY AND SHIFTS IN GLOBAL ORDER**

Armed, non-state actors directly challenge security governance. These actors undermine the state's traditional monopoly on the use of force. They can even, in extreme circumstances, replace or supplant the state and its security apparatus, at least sub-nationally.

In general, armed non-state actors: 1) use violence to pursue their objectives, 2) are not integrated into traditional state institutions like standing armies, police or special-forces, and therefore, 3) have some degree of self-rule of their politics, resources, infrastructure and decisions to use force. They can, as seen, be supported or used by state actors officially or informally, and state officials can be directly or indirectly ingrained in the activities of such actors (Bailes, Schneckener, & Wulf, 2007).

Most such armed non-state actors share two basic characteristics. First, the targeting of their violence does not differentiate between combatants and non-combatants as international law, and states, do. As seen in the previous chapter, in modern conflicts, particularly intra-state ones, the line between combatants and noncombatants is increasingly blurred. Second, especially since the 1990s, such groups increasingly operate transnationally using networks and global ties to thrive and gain new room to move and survive. This global networking links local and international markets to

smuggling routes and “shadow” markets, and facilitates the movement and communication of political agendas and ideological propaganda through international supporters and global communications networks (Bailes et al., 2007).

Non-state actor terrorist groups exist within a spectrum of armed non-state actors, each with their own types of objectives, foundations and characteristics. Table 2 summarizes this spectrum to give context to the nature of the non-state actor terrorist threat, and demonstrates how this particular type of group is an important part of the spectrum, but still part of a larger trend in current international affairs showing the growing influence of non-state actors over the control of the use of force. In sum, the dominance that the nation-state has possessed over the use of force for the past 500 years, and in particular, the past 100 years, is being reduced as the influence of non-state actors, particularly terror groups, rises.

**Table 2: Types of armed non-state actors**

	Change vs. status quo	Territorial vs. non-territorial	Physical vs. psychological use of violence	Political vs. economic motivation
Rebels, Guerrillas	Change	Territorial	Physical	Political
Militias, Para-militaries	Status quo	Territorial Non-territorial	Physical Psychological	Political
Clan chiefs, Big men	Status quo	Territorial	Physical	Political
Warlords	Status quo	Territorial	Physical Psychological	Economic
Terrorists	Change	Non-territorial	Psychological	Political
Criminals, Mafia, Gangs	Status quo	Non-territorial	Psychological	Economic
Mercenaries, PMCs/PSCs	Indifferent	Territorial	Physical	Economic
Marauders, 'sobels'	Indifferent	Non-territorial	Psychological	Economic

Table 2. Types of Armed Non-State Actors. (From: Bailes et al., 2007)

Non-state actor terrorist groups thus pose a challenge to traditional definitions and functions of state sovereignty, as well as the sources and legitimacy of force in global

affairs. The control of the use of force in global affairs has traditionally been seen as the ultimate characteristic, if not purpose, of state identity. Terrorist force is, instead, a pervasive form of social and political violence that challenges state institutions and global security. Non-state actor terrorist groups operate across international borders, and engage in an almost global insurgency of extremism that transects the traditional boundaries of crime and war, which poses major challenges to defense, intelligence and law enforcement agencies. These systems of global insurgents merge political and religious fanaticism with traditionally criminal behavior and systems that challenge the rule of law and changes how states relate to one another and the authority they carry in international affairs. Pioneered by the vanguard of Osama bin Laden and Al Qaeda, they today link many other networks, including notably Jemaah Islamiya and Lasker-e-Toiba, together in their quest for a new caliphate and ultimately to disrupt the legitimacy and function of liberal democracies worldwide. In so doing, these networks of networks challenge the nation-state given their diffuse nature, at times appearing headless, and at others appearing multi-headed. Their component parts will often “swarm,” to concentrate, focus, and mass resources to conduct an attack or campaign (Sullivan & Bunker, 2009). These evolutions in the sources of and control over force in global affairs are occurring concurrently with a potential shift in the identity of the nation-state itself.

Three authors have made it possible to understand the shifting global order in which the United States and other states currently reside.

Joseph Nye argues that the 21st century presents the United States and other states with a complex distribution of power and that more and more factors are outside the control of even the most powerful states (Nye, 2002, p. 40). Contending that 9/11 should be a wakeup call for the United States, Nye notes that while the United States remains, singularly, the most powerful economic, military and social force in the world, more measures of power, quite simply, exist that traditional metrics of international influence do not capture, which are brought on by the real-time, global exchange of information and the vastly increased scale and speed of global travel, trade, and interdependence (Nye. 2002, p. 40). He quotes Sebastian Mallaby, when concluding, “The paradox of American power at the end of this millennium is that it is too great to be challenged by



any other state, yet not great enough to solve problems such as global terrorism and nuclear proliferation” (Nye, 2002, p. 40). No doubt, American power, even at its peak following WWII, or the collapse of the Soviet Union, has always had its limits, if not more limitations than actual strengths. However, more significantly, the current global stage requires state interests to be pursued along a variety of lines, not simply “military” and “diplomatic” but rather, a whole spectrum of influence competing with a far greater variety of actors. Thus, to describe the basic dichotomy of American power, Nye describes hard and soft power, the former indicative of the nation’s ability to apply military force and economic might to international problems, and the latter indicative of the nation’s ability to persuade, coerce, and negotiate solutions through cultural, diplomatic and systemic influence (Nye, 2002, p. 9).

Building on Nye’s concept of a complex array of American power, Mead argues that the contemporary influence of states in international affairs can be divided into four categories, including sharp, sticky, sweet, and, in the limited case of the United States, hegemonic power. Each of these elements focuses, respectively, on military force, treaty networks and collective defense arrangements, trade, economic and military assistance incentives, and finally, again, in the case of the United States, the general, global influence of being the world’s most powerful nation (Mead, 2004, pp. 26–40, ch. 3). He argues that the war on terror should be fought and won through a grand strategy that uses an updated form of Communist containment, which focuses on being more proactive, ideologically persuasive and opposes Arab fascism (Mead, 2004, p. 167). Like Nye, Mead recognizes that American power alone cannot defeat modern, global terrorism. He writes, “Governments that cannot police their territory pose serious security risks in a world where terrorists are looking for safe havens and bases... unless the United States and its allies find ways to promote orderly and peaceful development... terror will flourish and our security at home will be endangered” (Mead, 2004, p. 167).

Nye and Mead identify important trends. American power is global, but has limitations, its interests require alliances to be achieved, and security against terror requires a global response. Here again, it must be emphasized that perhaps most significantly, today, those interests must be pursued along a wider variety of lines, not

simply “military” and “diplomatic” but rather, a whole spectrum of influence competing with a far greater variety of actors that links what were once considered strictly, or inherently, domestic affairs, with international affairs, and vice versa. Domestic security, and thus rule of law, has become inextricably tied to global events and actors. Their work can also be read to imply that, at least to some degree, the nature of the state itself is evolving alongside the threats it faces, including the modern, non-state actor terrorist threat.

Philip Bobbitt thus argues that in the 21st century, the advent of the market state is about to be witnessed. As he describes, “the Market states say: Give us power and we will give you new opportunities. In contrast to the nation state, the market state does not see itself [as the nation-state did] as more than a minimal provider or re-distributor of goods and services...[market states] abandon these enterprises and see their role as enabling and assisting rather than directing the citizen’s interaction with choice” (Bobbitt, 2008, p. 88). For Bobbitt, the innovation to be understood is not that the international stage includes major powers that serve as guarantors of the peace, but rather, the nature of what such powers are guaranteeing, such as, historical efforts to maintain, for example, a balance of powers in Europe, as compared to today’s efforts to ensure the global flow of commerce, communications, and finance. Bobbitt further elucidates that the rise of the market state comes as the result of the success of the nation state model and U.S. victory of the long war of the 20th century that culminated in the end of the Cold War. By victory, he does not mean the literal collapse of the Soviet Union, but rather, the overall, global acceptance of parliamentary democracy, liberal rights, market-based economics, globalized trade, finance, communications, information and increasingly the “universalization” of culture, or at least, the global spread of major cultural trends (Bobbitt, 2008, p. 87). Whereas the nation-state promised to “continually improve the material well-being of all its citizens,” the market state outsources many key functions, reduces its size, relies less on brute regulatory force and instead focuses on market demands and incentives to help ensure opportunities (Bobbitt, 2008, p. 87).

The market state’s legitimacy, therefore, rests on its ability to ensure opportunities, and freedoms, for its individual citizens based on their consent. This point

must be emphasized. The key ingredient to the market state's legitimacy is the individual's consent to and trust in a state that will ensure opportunities, not necessarily those of huge segments of society seeking a new right or support mechanism, but a person's own, individual opportunities and freedoms (Bobbitt, 2008, p. 87).

Drawing from the trends observed in the preceding chapter, and the points from Bobbit above, conflict in the 21st century can, therefore, continue to be defined as a matter between states, or constitutional entities, created by and wielding law (Bobbitt, 2008, p. 125), but takes on a very different character from the industrial, nation-state warfare of the 20th century, which Americans, and their military, have come to presume as normal. Instead, standing in opposition to the market states, including the United States, will be non-state, terror actors or "market state terrorists" (Bobbitt, 2008, p. 126). Such market state terrorists are essentially the dark mirror of the market state that capitalizes on all of the same forces that give rise to the market state, but using them to attack the very source of legitimacy of the market state, namely, its ability to ensure and deliver opportunities to and at the consent of the individual (Bobbitt, 2008, p. 85).

Under this theory, Osama bin Laden's Al Qaeda is a malignant and mutated version of the market-state itself. As such, Al Qaeda and its kin are more than stateless gangs. These new-networked adversaries possess near-standing armies, treasury and revenue sources (even if derived from criminal enterprises), a bureaucracy or 'civil' service, intelligence collection and analysis organs, welfare systems, and the ability to make alliances (with state and non-state entities). They also promulgate law and policy, and declare war, albeit not the kind of formal, state-on-state war that international law accounts for and now defines. As such, the Al Qaeda network and others like it are virtual states, except that its primary interests lie in advancing its fundamentalist, Islamic ideology and eliminating any influence in opposition to it. These virtual states are non-territorial market-states (although they sometimes hold and control territory) and through insurgency seek to hold or influence more, with the ultimate goal of replacing a system of liberal rights, with the Caliphate system, as Bobbitt contends, regarding the case of Al Qaeda.

Organizations like Al Qaeda are thus an early, although almost certainly not the last example, of a modern terror state. While this organization lacks formal territory as customarily understood, it carries many if not most of the essential characteristics of the market state itself. It is global in reach and goals, it is devolved, outsourcing its operations and functions to local organizations and specialists, it uses global trade, finance, communications and information exchange to finance, plan, organize and publicize its activities, and although it lacks territory of its own, per se, it has clearly demonstrated the ability to coerce and manipulate traditional nation-state regimes to its ends, as in Sudan, Afghanistan, and arguably, Pakistan (Bobbitt, 2008, pp. 126–128). In the 21st century, war in its most formal sense is against market-state terror, or, as Bobbitt aptly describes, “In the twentieth century, terrorism was wielded for domestic purposes; it was the extension of internal politics, as it were, by criminal means. With the creation of al Qaeda, terrorism has internationalized, and it has become the extension of diplomacy by other means” (Bobbitt, 2008, p. 143). Historians will rightly note internationally operating terrorist organizations have long been in existence and have wrought violence on countries other than the United States. Bobbitt would counter, however, that market-state terror is a new evolution in such trends, in that it does not seek to assert a particular ethno-nationalist identity and right to self-determination, but rather, attempts to supplant the system in which nation-states operate from the outset.

It is critical to note that Nye, Mead, and most significantly Bobbitt, are identifying trends and not necessarily absolute, contemporary realities. States, armies, territories, borders and sovereignty are all still absolutely relevant in international affairs. The process of change described above is not distributed evenly around the world. Perhaps the most important lesson to be gleaned from the apparent shifts in global order described previously is that warfare between states as known during the 20th century has, arguably, become increasingly too expensive, both literally and in terms of the costs to global trade, commerce, transportation and communication, to be fought. Yet, concurrently, use of force by non-state actors has become more inexpensive to use on a truly global stage, than ever before. Thus, *jus ad bellum* on self-defense may, with time, have to be used by states not against other states, but rather, against transnational threats to the operation of

the global market system the United States has come to take almost for granted, including, quite possibly the most pervasive of such treats, non-state terrorists groups operating globally.

#### **D. KEY OBSERVATIONS FOR THE CENTRAL QUESTION**

In more immediate, and practical terms, the challenges and shifts identified above likely support the notion that the bar for attributing support from a state to a non-state terror group is currently being lowered within *jus ad bellum* on self-defense. As the divisions between domestic criminal and international defense interests are increasingly punctuated, states are more likely to apply self-defense in places well beyond their boundaries to eliminate non-state terror threats. Combined with the additional themes of globalization described above, in which states pursue their interests in more active competition, or cooperation, with non-state actors, states are more likely to find less distance between a non-state actor and the state in which it resides. As in the evolutions described earlier, a more lenient standard of attribution should not be seen as revolutionary but as a process of reform. Contemporary practice, as that in Afghanistan following 9/11, suggests that a territorial state has to accept anti-terrorist measures of self-defense directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory. Such complicity can take the form of either support below the level of effective control, or more proactive provision of a safe haven. Attribution can also, potentially, take the form of a non-state actor coming to have such influence over its host state that the non-state actor effectively, ironically, becomes the state authority—again, increasing the likelihood of a victim state attributing armed attack to a state “supporter” of “non-state” terrorism. This lowered bar is significant, because it means that if a non-state actor terror threat is found to reach a sufficient threshold of significance internationally, organs of international legal governance like the UN Security Council can act to authorize use of force against not only the terror group, but the state in which it resides, in extreme cases, such as Afghanistan, sanctioning,

essentially, the annexation and reconstitution of such states. Needless to say, this notion represents a shift in the meaning of and level of deference to state sovereignty in international relations.

In more prospective and perhaps theoretical terms, the challenges and shifts identified above support the notion that international security today really means ensuring the successful operation of the global, market place and guaranteeing citizens' rights under that system. Jus ad bellum on self-defense may thus, over time, be increasingly used to justify the use of force in self-defense of networks, or alliances, of states, to address the non-state terrorist threat effectively. In turn, such just use of force in self-defense may be used to warrant a spectrum of alternative forms of force to combat transnational terrorist groups, ranging from traditional, military occupation, to targeted killings, to law enforcement, intelligence operations, and financial regulation.

Thus, the advent of the non-state actor, transnational terror threat connects to a larger shift occurring in global affairs related to the growth in importance and power, in general, of non-state actors, and in turn, a changing role and definition, although not extinction, of the state itself. It is a shift that jus ad bellum must account for if states are supposed to remain the primary means of defense for citizens and the "global order." The state will remain the primary unit, or actor, in this system, but self-defense force itself, and the legal means of justifying it, will have to become more flexible and fine-tuned to address the threats faced by the global market system in which the state resides.

## **IX. OBSERVATIONS AND CONCLUSIONS**

Having established the rules currently governing jus ad bellum on use of self-defense force against non-state actor terrorist groups, and analyzed them in the contexts of shifts in historical context, evolutions in the nature of force in modern warfare, and changes in the nature and accepted definitions of the state, it is possible to reach a series of basic conclusions on how international law is being affected, if not pushed, to its limits by these factors. Furthermore, certain observations can be arrived at on how such law may have to evolve to address the ongoing issue of how states can legally use force against transnational, non-state actor terrorist groups more effectively.

First, jus ad bellum on self-defense has not been broken or made irrelevant by having to be applied to non-state actor, terrorist groups. On the contrary, as discussed further later in this chapter, if anything, this area of international law has only become more relevant in global affairs. However, it is clearly being forced to evolve and be applied on a scope and scale not originally foreseen nor intended, to potentially dangerous effect, first and foremost, because of a shift of historical context. Whereas Article 51 and the UN Charter focused originally on state-on-state conflict and pushed “global” issues of non-state actor threats, WMD proliferation, and human rights violations to the periphery of thinking on jus ad bellum; today, such “global” cross border issues are now clearly at the forefront of and at least of equal importance to state-on-state conflict in matters of international security. In addition, the original intent of UN Security Council-based collective security has not been realized, even with the end of the Cold War and its stifling effects on the operation of the Security Council. As a result of these two factors, the originally intended, limited exception to the general prohibition on the use of force, self-defense, has in fact, become an international norm when justifying force. This shift has come in no small part because of the advent of non-state actor terror threats causing increased application of self-defense force in the modern era—a reality demonstrated through a series of varying examples ranging from the response to 9/11 to Columbian strikes at FARC rebels in Ecuador.

Second, shifts in historical context have combined with evolutions in the nature of force itself to cause the central tenets of *jus ad bellum* to evolve significantly. As observed, the threat of non-state terror groups, particularly when operating transnationally, has created an enhanced notion of immanency which is in turn, most likely, creating a clear right to anticipatory self-defense—striking at non-state terror threats based on “of the moment” intelligence across the borders of other states. When combined with a heightened sense of necessity, brought about by the non-state terror threat joined with the potential acquisition of WMD, also observed has been that more states, including the United States and Israel, attempt to find a complete right of preemptive self-defense in contemporary *jus ad bellum*. Finally, the concept of proportionality, historically defined as permitting application of such force necessary to eliminate an imminent threat of necessity, has expanded significantly and is being used to justify persistent, often global, lasting military operations in places like Afghanistan and Iraq, as well as ongoing, smaller scale strikes in places like South Waziristan and the Horn of Africa. Collectively, these progressions indicate a more expansive interpretation of the inherent right of self-defense being brought about by the response to non-state terror actors.

Third, the erosion of the general prohibition, when combined with these more expansive interpretations of self-defense norms, has created a juxtaposition in *jus ad bellum*, as one supposedly central tenet of international law on use of force is depreciated, while another is used more and more expansively. The irony is that increased use of the inherent right of self-defense to justify force against non-state actor terror threats has created an almost historically unprecedented emphasis on rule of law over use of force in international affairs (Kennedy, 2006, p. 129), while at the same time, arguably allowing more force to be used on the international stage.

It is not entirely clear if such increased application of the inherent right of self-defense, brought about in no small way by the threat of non-state terror actors, is a truly positive or negative development. In one sense, it is a positive development as states, including the worlds most powerful, are now clearly committed to a body of international law intended to govern and regulate the use of force. Conversely, it is also a negative



trend in that, this increased emphasis on legal positivism in jus ad bellum on self-defense against non-state actor terror threats has, perhaps, created the wrong relationship between the inherent right of self-defense and the use of force. As states use law and practice as a pretext for force they would seek to use even without an immediate non-state actor, terror threat, they arguably degrade the meaning of the inherent right of self-defense by using it to pursue force, which is no longer truly in self-defense. The truth will likely have to be found in the future study of history.

Fourth, current use of jus ad bellum to justify self-defense against non-state terror actors is, potentially, in conflict, or at least in contrast with, trends in international relations toward more open and relaxed concepts of state sovereignty, brought out about by the advent of global markets, communications, transportation and interdependence of states. The welfare and stability of sovereign states are increasingly linked, and, consequently, so too are the threats facing them. While the state remains the primary actor in global affairs, serving as the defender and stabilizer of last resort, its influence is increasingly being met and challenged by a growing number of non-state actors operating transnationally that control sufficient resources and force to attack the authority and legitimacy of states themselves. Globalization has given rise to a series of truly global, non-state threats. Non-state terror groups are one such threat, perhaps the most prevalent and prominent, particularly when combined with the threat posed by the proliferation of WMD.

Legally, in the short term, these shifts in U.S. notions of state sovereignty have likely contributed to a lowering of the bar for finding attribution of state support to non-state actor terror groups.

Quite simply, heightened norms of necessity and enhanced immanency have driven more states to find a need to strike at non-state terror groups residing in other countries at will, and to attack not only the groups themselves, but their sources of support including the states in which they reside, even when actual state support or effective control by such states is unclear, or debatable. The primary examples of this lowered bar have been U.S. action in Sudan following the East Africa embassy

bombings, and of course, the invasion of Afghanistan and subsequent removal of the Taliban regime, but also, actions by the governments of Congo and Uganda in pursuit of cross-border raiders under their effective control.

In the long term, changes in how state sovereignty is defined, combined with the reality of truly global, non-state threats, including non-state terror groups, may create a need for *jus ad bellum* to evolve to account for what could be described as an inherent right of “global” self-defense. Arguably, ultimately, transnational, networked, non-state terror threats can only effectively be addressed through a global, networked response of states. The concept of the inherent right of state self-defense may thus have to evolve to account for the reality that true, legitimate, security from such threats can only be found through collective self-defense and coordinated use of force. Of course, the basis for collective security already exists in the UN Charter under 2(4) and Article 42. While currently, likely politically unviable, due to the realities of the Security Council and its political machinations and divisions, it is not inconceivable that with time, the rise of global, transnational threats, such as non-state terror groups, could result in an equal rise, or restoration, of the UN Charter’s notion of collective security, adapted to deal with this contemporary threat. What might such an “evolved” right of self-defense for use against non-state terror actors, operating transnationally, look like?

Changes in proportionality arguably have already accounted for the geographic scope and scale of military operations required to strike at non-state terror actors. Enhanced concepts of immanence and accumulation, and the resulting near acceptance of a right to anticipatory self-defense have likely addressed the temporal requirements for speed of action against non-state terror groups. The primary issue remaining then is the often-transnational nature of non-state terror groups and the reality that truly effective force must be applied, often times, within multiple states and across varying borders, both at groups directly, and also, at the states in which the groups reside. The apparently reduced bar for state support only makes such cross border incursions more likely, but no less controversial and with potentially negative fallout. Indeed, perhaps more than anything else, striking at will in other states, supporting groups or not, to attack groups, albeit legitimate threats, creates larger issues of infringement of sovereignty and

perceptions of illegitimacy of action amongst local populations, which potentially undermines the very governments from whom support is required to defeat non-state actors, and driving local populations closer to the very groups that must be defeated.

Such potential, perceived illegitimacy of action, as seen, is a serious negative externality to the use of force against non-state terror groups and the states supporting them, given the nature of modern warfare, which is increasingly fought for sources of political legitimacy and authority, as well as traditional strategic objectives. The use of force in self-defense against non-state terror actors must thus serve both ends to be fully effective against non-state terrorist groups operating globally; the elimination of a raw, immediate military threat to a state's own population, but also the greater, long-term political, social and economic goals of a larger strategic narrative designed to counter the ideological and political goals of the non-state terror groups.

In practice, advancing *jus ad bellum* on self-defense to achieve such dual ends will be difficult, to say the least, but not without basis or precedent. In fact, organizations, such as the United Nations and NATO, were both created with clear provisions for collective security. As this paper's analysis of historical context demonstrated, however, it was general fears that those provisions could create, essentially, a sort of suicide pact, particularly for smaller states as well inhibit regional security organizations that the inherent right of self-defense was in fact prescribed in the UN Charter. Still, the collective security provisions remain, and, here again, as seen earlier, in no instance has the world truly come closest to utilizing such provisions than in the response to 9/11.

For the right of self-defense to be applied against non-state terror actors in such a way as to serve both military and political ends, it will likely have to evolve to account for situations requiring what can perhaps best be described as a global right to self-defense. Such a right would vest when non-state terror actors operating transnationally demonstrate a truly global threat, either through actual armed attack, as 9/11, Bali, Madrid, or 7/7, or an accumulation of attacks demonstrating immanency and justifying anticipatory defense. Under such a right, the use of force used to counter the armed attack, or immanent attack, would be viewed as an international response. A legal bar would have to be established to clarify the criteria that would allow such a right to vest,

perhaps through Security Council resolution or international, multilateral treaty. This right would essentially provide international support and justification for self-defense force against the transnational threat wherever it was based—not unlike proposed, contemporary adaptations for wiretap laws in the United States to permit the tracking of an “individual” instead of specific lines of communication—the justified force would follow the threat, and not simply a particular location. This right would provide very strong incentive for states to avoid any appearance of support to such non-state groups and/or to consent to if not actively request assistance in ridding themselves of such groups if they lacked the means to do so alone. It would also carry the weight of the international community, providing greater, perceived, if not real, socio-political legitimacy.

The danger of such a right, of course, would be its expansive application in unpredictable and untenable locations. Imagine a state asserting such a global right, arguing it had international support given previous recognition of a given threat, and then using force for a period of years, even in places in which a group simply had agents, instead of a base of operations. What would happen, for example, if the Israeli government determined that it had a right to conduct targeted killing operations in Germany to strike at Hezbollah agents, or if the United States determined it had a right to conduct targeted drone strikes in the Sinai to counter alleged growth of Al Qaeda operations? Also imagine a despotic regime requesting assistance to rid itself of a threat to its own survival, having painted a domestic insurgency as part of a larger, global, non-state terror network. Clearly, the global right would have to be of very limited and narrow scope, only to be applied against truly exceptional threats.

In some ways, the genuinely international reaction to and support for use of force in Afghanistan following 9/11 supports this possibility. Further, as seen from the UK’s domestic, legal definition of terrorism, even major powers are increasingly viewing terrorism as a truly global threat, and thus, justifying application of counter-terrorism statutes regardless of where the terrorism actually occurs or which state’s citizens are

targeted. What remains unknown is whether international practice on *jus ad bellum* on self-defense can evolve to make such collective response against non-state terror actors a norm, or an exception.

In addition, finally, two recent international efforts begin to echo the basic concept described above. The first, a report of the International Commission on Intervention and State Sovereignty, whose commissioners included former 9/11 Report commissioners, attempted to lay down an international consensus on how to balance the rights of state sovereignty with the growing recognition of the need to at times bring international military intervention when a population is suffering serious harm due to insurgency or state failure (ICISS, 2001). The report presents a framework for intervention, which would have been unthinkable 60 years ago, or at minimum, deemed unnecessary. Perhaps even more importantly, it essentially calls for new emphasis on the collective security elements of the UN Charter and the notion that the international community has and will at times face genuinely global threats to peace and stability, which must be addressed by the international community as a whole.

The second is an ongoing effort by the UN to create a comprehensive international convention for dealing with the whole of international terrorism and consolidating the 13 individual treaties that now each, individually address different aspects of terrorism ranging from its definition, to WMD and finances (NTI, 2011). The goal is to unify these different international legal compacts, and in so doing, clarify and make global cooperation on anti-terrorism more efficient. The significance, of course, is the recognition of international terrorism a global problem that a common body of international law must address. To date, however, the effort has been stymied by debates over the definition of terrorism, and in turn, which groups would become officially labeled terrorist organizations.

Such a shift in *jus ad bellum* would require leadership from the world's most powerful states and a new commitment to an updated notion of collective security against global, non-state threats.

In truth, the trends identified above indicate that in fact, the world, while recognizing a right of self-defense against non-state terror threats, views that right in individual terms, and not collective terms, and that the force available to states under that right, against non-state terror actors, is only becoming more expansive.

This examination of the limitations of jus ad bellum on self-defense when applied to non-state terror threats thus reveals a fundamental choice currently facing the members of the international community. They can choose to accept trends in jus ad bellum justifying greater frequency, scope and scale of force, as well as increasingly preemptive timing, under the justification of self-defense against non-state terror threats. In doing so, states would be preserving their individual, inherent right, while also, likely eroding the intended, general prohibition on the use of force. Alternatively, states can choose to recognize the true nature of non-state actor terror threats and find a common, mutual right of self-defense.

Jus ad bellum will continue to evolve under either of these paths, as it always has, adapting to contemporary strategic, military, political realities and practices. The question that will remain is which path of development can truly ensure the just, legitimate and effective use of force in self-defense, against non-state terror threats, and which will lead instead to retribution, retaliation, and self-interest.

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