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ARTICLE: THE USE OF FORCE AGAINST NON-STATE ACTORS UNDER INTERNATIONAL LAW: AN ANALYSIS OF THE U.S. PREDATOR STRIKE IN YEMEN

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SUMMARY:

... Last November, a Predator unmanned aerial vehicle operated by American forces fired a Hellfire missile at a car in Yemen, killing six suspected members of the al-Qaeda terrorist organization. ... " Together, the customary international law concepts of necessity and proportionality, in conjunction with the norms established by the Charter, constitute the "use of force paradigm" under international law. ... Thus, a state may rightfully exercise self-defense in response to an armed terrorist attack as long as the response comports with the Charter's strictures and relevant customary international law norms. ... In that the conflict between the U.S. and al-Qaeda is governed by the jus ad bellum pursuant to conventional and customary international law, at least to the extent that the U.S. is bound by these international use of force norms, the legality of the Yemen attack must be viewed through the prism of these two bodies of law. ... Specifically, American officials believed that the six men killed in Yemen were members of al-Qaeda, a terrorist organization dedicated to creating fear among civilian populations and intimidating governments through violent means. ... It would be anomalous to hold that a belligerent is a protected person under the laws of war. ...

TEXT:

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Introduction

Last November, a Predator unmanned aerial vehicle operated by American forces fired a Hellfire missile at a car in Yemen, killing six suspected members of the al-Qaeda terrorist organization. n1 Sources both domestically and abroad criticized the strike, aimed at one of Osama bin Laden's top lieutenants, as an extrajudicial killing or assassination in violation of international law. n2 This paper will examine whether the attack was contrary to [*333] international law and will describe principles of legal analysis likely to be most relevant in future armed conflict between states and non-state actors in the global "War on Terror." n3

A legitimate use of transnational military force must comply with two general requirements, the jus ad bellum and the jus in bello. n4 The jus ad bellum are the rules by which a state may lawfully resort to the use of armed force in the international arena. n5 The jus in bello establishes the modalities of conflict once hostilities have been initiated. n6 Only after examining these two separate and distinct concepts can one ascertain whether the U.S. strike in Yemen comported with international law. n7

Section I consists of a brief factual primer on the attack in Yemen. Section II discerns the jus ad bellum in light of the use of force paradigm established by the UN Charter n8 and extant customary law, and specifically whether the U.S. military response against al-Qaeda following the terrorist attacks of September 11, 2001 was justified as a proper invocation of the right to self-defense. An analysis of these issues concludes that the use of force paradigm as established by the UN Charter and extant customary law, applies to military conflicts between state and non-state actors. In particular, [*334] the Charter's use of force provisions should apply to terrorist groups as a matter of customary law because groups that can carry out armed attacks that threaten global peace and security should be bound by the very provisions that seek to constrain such behavior. Although non-state actors are not traditionally subject to provisos involving the interstate use of force, the current legal construct must evolve such that the application of the use of force paradigm depends upon the nature of the armed coercion and not on the legal status of the organization using force. These considerations dictate that the jus ad bellum applies to the on-going conflict between the U.S. and al-Qaeda. Section II concludes that the attack in Yemen was consistent with the jus ad bellum, since September 11 served as a reasonable justification for the U.S.'s choice to resort to self-help, and the self-help attack comported with the customary international law concepts of military necessity and proportionality.

Section III outlines the jus in bello as found in the Hague and Geneva Conventions, in addition to the relevant customary principles of the laws of armed conflict, and examines the particulars of the strike in Yemen in light of the jus in bello. The law of armed conflict seeks to limit the horrors of war by limiting the modalities of the use of force between belligerents, pursuant to the concepts of necessity, discrimination, and proportionality. The Hague and Geneva Conventions, which afford certain protections to persons who observe the laws and customs of war, have further refined these principles. By definition, terrorists who engage in the interstate use of force do not observe the laws of war. Therefore, they are not entitled to an elevated status that would grant them protections under the jus in bello. As such, members of terror groups are entitled to fewer rights than protected persons and lawful combatants. Therefore, they may lawfully be targeted in instances of self-defense, provided that the other provisions of the jus in bello are also satisfied. Members of al-Qaeda who actively support and engage in terrorist activities, such as the six men traveling in Yemen, are rightfully considered unlawful combatants. As unlawful combatants, these six men were lawfully targeted by the Predator drone operated by U.S. forces. Moreover, the strike in Yemen was consistent with the customary international law concepts of necessity, proportionality, and discrimination. Section III then analyzes whether the attack was an assassination or extrajudicial killing in contravention of international law and finds that because the attack was carried out in the larger scheme of self-defense, the jus in bello was not violated.

The last section of this article examines the jus ad bellum and the jus in bello in the larger context of transnational conflicts between state and non-state actors, before summarizing the international law underpinnings of the strike in Yemen.

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I. Background on the Strike in Yemen

The strike in Yemen was aimed at Ali Qaed Salim Sinan al-Harethi, the leader of the al-Qaeda organization in Yemen, n9 considered one of the top twelve al-Qaeda figures in the world. n10 Al-Harethi, a former bodyguard to Osama bin Laden, had associated with the top al-Qaeda leader for over twenty years. n11 It is believed that he acted as the "communications coordinator" for the September 11 attacks against the U.S., n12 and that he played a key role in the October 2000 bombing of the USS Cole that killed 17 sailors and nearly sank the American destroyer, n13 in addition to committing other terrorist acts. n14 Yemen, the ancestral home of Osama bin Laden, n15 is assisting the U.S. in the war on terror but continues to be a haven for al-Qaeda. n16 Previous efforts by the Yemeni government to detain al-Harethi and other suspected terrorists had been unsuccessful n17 and often led to bloody firefights that resulted in the deaths of several police officers and soldiers. n18

On November 3, 2002, a joint American and Yemeni intelligence team was conducting surveillance on al-Harethi with a Predator unmanned aerial vehicle (UAV). n19 Al-Harethi was traveling in a car with five other suspected [*336] al-Qaeda members in northern Yemen. n20 The Predator, which was controlled by CIA operators based at a

French military facility in Djibouti, n21 a tiny nation about 160 miles west of Yemen, was operating in Yemeni airspace with the permission of the Yemeni government. n22 Once the car was isolated far from any other traffic, CIA operatives gave the order to fire an air-to-ground Hellfire missile from the Predator at al-Harethi's car. n23 All six occupants of the car were killed. n24 Al-Harethi's remains were positively identified. n25 The attack was part of the on-going military conflict between the U.S. and al-Qaeda that began after President Bush declared "war" on terrorism following the events of September 11, 2001. n26 Since the U.S began military operations in Afghanistan on October 7, 2001, over 3,000 suspected terrorists have been captured or killed in action. n27

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II. The Jus ad Bellum and the Strike in Yemen

Many of those familiar with international law have suggested that there are no rules when dealing with terrorist organizations. n28 This raises the issue of what, if any, norms of international law apply to the military conflict between al-Qaeda and the U.S. To answer this question, the use of force paradigm under the UN Charter and extant customary international law n29 will be examined. Then, provided that some or all of the norms apply, the strike in Yemen will be analyzed for compliance with the jus ad bellum.

A. The Use of Force Paradigm

1. UN Charter

After the scourge of World War II, the international community sought to establish a new normative standard for the use of force between state actors. The result was the UN Charter, which unequivocally outlaws the use of aggressive force. n30 The Charter's mandate under Article 2(4) is clear: "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." n31 The document only outlaws the use of aggressive force; it does not outlaw the use of force in its entirety, and recognizes an exception to the general rule by acknowledging the right to self-defense. n32 Specifically, Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately [*338] 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. n33

The fact that the language states that the right to self-defense is "inherent" suggests that the right, which existed as a matter of customary international law before the Charter was adopted, n34 was incorporated into the Charter n35 and continues to exist independently of the Charter. n36

Although the Charter provides for the right to self-help, it gives little guidance regarding the modalities of self-defense. The requirement of a condition precedent means that the right may only be exercised in the case of an "armed attack." n37 However, the Charter does not define what constitutes an "armed attack." n38 This has left scholars to debate whether the right to use counter force exists only in cases of an armed attack, or whether it may exist in situations other than an armed attack. n39 Regardless, the generally accepted standard is that to constitute an armed attack pursuant to the Charter the aggression must be by armed force and of sufficient magnitude and severity. n40 Admittedly, the determination of whether an aggressive use of force crosses the threshold and triggers the exercise of self-help is a subjective one [*339] to be made by the attacked state. n41 Nonetheless, the determination is ultimately subject to legal scrutiny by the international community in conformity with the preceding standard. n42 If an aggressive use of force does not rise to the level of an armed attack, a state may pursue traditional criminal law sanctions, but may not rightfully respond with military action. n43

Despite the Charter's recognition of the right of self-defense, the right is not unfettered. The Security Council may intervene by taking "measures," which would effectively truncate the exercise of self-defense. n44 What constitutes

"measures" as contemplated by the Charter is subject to debate, but the language of Article 51 suggests that the Council's actions must be affirmative acts in furtherance of international peace and security. n45 Indeed, mere words or rhetoric are insufficient to divest a state of the right to self-help. n46 Finally, a state intending to use self-help or engaged in self-help must report its intentions to the Security Council or jeopardize its continued right to use force. n47 Other than the limitations discussed above, the Charter does not delimit the parameters of self-defense. n48

The use of force regime outlined above is recognized as customary international law, meaning that it is binding upon all states, even those few states that do not belong to the UN. n49 Although it is still debated whether the Charter intended to codify customary international law as of the Charter's inception, n50 it is undisputed that all states are bound by the document's norms. Moreover, nearly all states are members of the UN n51 and most of those recognize, if not observe, Articles 2(4) and 51 as the normative standard [*340] for the use of force. n52 Furthermore, the Restatement asserts that the Charter norms are generally recognized as jus cogens. n53

2. Customary International Law

Although it is generally accepted that the Charter's norms have ripened into customary international law, it is less clear whether customary international law has come to reflect the Charter in toto; that is, whether the Charter and customary law have become synonymous. n54 It has been suggested that as of 1945 the UN Charter "subsumed" and "supervened" customary rules for the use of force in their entirety. n55 However, any doubt as to the continued viability of customary international law was extinguished by the International Court of Justice in the 1986 case Concerning Military Activities in and against Nicaragua (Nicaragua v. U.S.). n56 In that case, the court considered whether the U.S. properly exercised a right of collective self-defense in aiding Nicaraguan "contras" in response to an alleged armed attack on another state. n57 In reaching a decision, the court stated that rules for the non-use of force "continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." n58 The significance is that when the Charter's norms do not apply, extant rules of customary international law will govern. Although the court did not fully delineate the customary rules regarding the use of force, it implicitly denied the hegemony of the Charter by recognizing that the Charter [*341] and customary norms do not coincide exactly, especially with regard to the right of self-defense. n59 More importantly, the court unambiguously stated that the right of self-defense exists as a matter of customary international law. n60 In short, while scholars continue to debate whether the text of Article 51 is a realistic and workable standard consistent with customary international law, n61 it is plain that the use of force paradigm incorporates conventional and customary law.

Customary international law is all the more important when examining the parameters of self-defense because, as previously recognized, the Charter offers little guidance. Professor L. C. Green summed up the relationship between the two bodies of law on the right of self-defense:

While the Charter restricts the right to resort to measures of a warlike character to those required by self-defense, its provisions only relate to the jus ad bellum. Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no obligation upon a party resorting to war in self-defense to limit his activities to those essential to his self-defense. Thus, if an aggressor has invaded his territory and been expelled, it does not mean that the victim of the aggression has to cease his operations once his own territory has been liberated. He may continue to take advantage of the jus in bello, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat. n62

Without further constraints, the right of self-defense as stated might appear to be relatively open-ended; however, customary law prescribes additional limitations on the resort to self-help. Specifically, "it is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be limited to that force necessary to defend against the attack and [*342] must be proportionate." n63 The concept of necessity dictates that military force may be used only when there are no alternative means of redress. n64 That is, if a state perceives that it has no other choice but to use force in self-defense, it may do so, provided that it has exhausted all reasonable peaceful means to resolve the situation n65 and "delay in the use of force would make it impossible to guarantee the defense of the state." n66 Stated differently, an attacked state may rightfully respond militarily if it reasonably believes that force is the only option available to defeat the enemy and to eliminate or reduce the threat of future attacks. n67 However, in the absence of a continuing threat, the principle of necessity would

not justify the use of force. For instance, in the case of a single terrorist attack without the expectation of another attack. n68 Suffice it to say, force may not be used legitimately in reprisal or to simply punish an enemy. n69

Necessity not only limits the circumstances in which defensive force may be used, but it also acts as a check on the duration in which counter force may be used. By limiting the use of force to circumstances only when necessary, it follows that once military operations have been initiated, they must cease when an enemy has been defeated or no longer has the means to fight. n70 In that sense, the concept of necessity effectively imposes a cap on [*343] the lawful period of hostilities. For example, a victim state would be required to cease hostilities if the leaders of an opposing force surrendered. Note that the principle of necessity, as a limit on the acceptable duration of hostilities, is outcome determinative - that is, until the enemy is vanquished - and is not temporal in nature. There is no time limit or expiration date that obviates a justified use of counter force. n71 Rather, the test is whether the enemy continues to pose a threat that can only be effectively countered with armed coercion. While the above rule is easy to articulate, its application may be more problematic in that the exact moment when an opposing force poses little to no threat such that necessity no longer justifies military action is arguably more of a policy question than a legal question. n72 Nevertheless, the point is that the concept of necessity regulates the use of defensive force not only as to the initiation of self-help but also as to its continued application.

Another customary international law consideration relevant to the concept of self-defense is the concept of proportionality, which requires that a military response over the course of a conflict is proportionate to the threat posed by the enemy. n73 It is not possible for enemy states to calculate precisely the casualties and damages that they are likely to inflict on each other during the course of a conflict. n74 This "is neither a necessary nor a possible condition." n75 However, there must be some symmetry between the initial use of unlawful force and the responsive counter force, based upon the gravity of the preliminary attack and the continuing threat posed by the enemy. n76 For instance, a nuclear strike in response to a single terrorist attack in which ten people were killed would be disproportionate. n77 Because it is impossible to [*344] know with any degree of certainty at the onset of a conflict what amount of counter force will be required to defeat an aggressor, proportionality is essentially a standard of reasonableness that "must be applied with some degree of flexibility." n78 Together, the customary international law concepts of necessity and proportionality, in conjunction with the norms established by the Charter, constitute the "use of force paradigm" n79 under international law.

B. The Use of Force Paradigm and Terrorist Organizations

Although the use of force paradigm regulates interstate violence, the question remains whether the paradigm is relevant to conflicts with terrorist organizations, since such groups are non-state actors. n80 If the paradigm is relevant, a secondary issue is whether the paradigm applies to the victimized state, to the terror organization, or to both. The following analysis proffers that conventional and customary use of force provisions should apply to interstate conflicts between state and non-state actors. Specifically, the conflict regime established by the UN Charter should apply with equal force to non-state actors, such as terrorist organizations, as it does to state actors because to do otherwise would undercut the Charter's primary purpose, the maintenance of international peace and security. The Charter cannot bind terror groups as a matter of conventional law, in that no such group is a signatory to the Charter. However, the maintenance of global stability dictates that transnational terror networks should be bound by the document's use of force provisos and other accepted international norms as a matter of customary international law.

1. UN Charter

To assess whether the UN Charter applies to a conflict with a terrorist organization, one must look to the prohibitive language in Article 2(4), which states that "all Members shall refrain ... from the threat or use of force against ... any state." n81 Superficially, one could argue that the Charter does [*345] not apply to situations involving non-state actors because the language explicitly states that only "members" are bound by its terms, and no non-state actor is a member of the UN. Moreover, the Charter's status as a treaty means that, it can only bind states qua states. Therefore, the Charter, is not binding upon non-state actors as a matter of conventional law. n82 To the extent that these points are technically correct, a terrorist organization, as a non-state entity, cannot be bound by the Charter as a matter of conventional law.

The more difficult question is whether the Charter's norms are controlling as a matter of customary international law in an armed conflict between a state and a terrorist group. As previously discussed, the Charter, as customary law, is binding upon all states, even non-UN members. n83 However, the fact that the document's norms bind all states does

not speak to the issue of whether they bind, or should bind, non-state actors. Stated differently, a customary norm that binds all states is not necessarily binding upon a terror group, a non-state entity.

An analysis of the competing arguments suggests that the customary use of force provisions should bind non-state actors. Terrorist organizations that use aggressive force against a state that rises to the level of an armed attack should not escape the very provisos of the Charter that seek to constrain such behavior. There are two interrelated reasons supporting this conclusion. First, an entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms. This argument is supported by practical considerations. n84 As Ian Brownlie stated:

[International] lawyers cannot afford to ignore entities which maintain some sort of existence on the international plane in spite of their anomalous charter. Indeed, the role played by politically active entities such as belligerent communities indicates that, in the sphere of personality, effectiveness is an influential principle. n85

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Second, it would be inconsistent with the purpose of the Charter - the maintenance of international peace and security - to allow terrorist groups that engage in transnational armed conflict against a state to fall outside the Charter. n86 In short, the nature of the terrorist act should dictate whether international norms apply, not the nature of the organization.

The fact that terrorist networks, as private actors, are not generally recognized as subjects of international law should not deter the applicability of the Charter's norms to such organizations that use transnational force. n87 Ostensibly, the legal issue is the application of public international law to non-state entities that are generally thought of as private actors. Public international law does not typically apply to private entities. However, in the aftermath of World War II, international norms have been able to adapt to unanticipated situations to the point that the line between public and private international law has become increasingly blurred. Matters that were once thought to be issues solely between state actors have devolved to affect private entities and private persons.

At the end of World War II, a state-centered approach to international law that did not recognize the individual as a subject of international law existed. The continuation of this approach would have meant that the Axis leadership would have been largely immune from violations of various international humanitarian norms. However, the post-war jurisprudence evolved such that individuals could be held responsible for violations of international norms, recognizing that individuals were ultimately responsible for the millions of deaths suffered at the hands of the Axis governments. n88 Arguably, if antiquated notions of legal personality had not been revisited at Nuremberg, the International Military Tribunals might not have been constituted and impunity would have prevailed. Fortunately, the legacy of Nuremberg in the twenty-first century is that traditional notions of international legal personality [*347] have been severed from sovereignty, so that the state is no longer the sole actor on the international stage. n89

Just as the jurisprudence at Nuremberg evolved to account for the violation of international norms by previously unrecognized subjects of international law, a similar innovation is warranted to hold terrorist organizations accountable for the unlawful use of force. n90 Admittedly, this might require that terrorist organizations be granted limited international legal personality. While the idea of granting terror groups de jure status does not fit neatly into preconceived notions under the UN Charter, n91 it is consistent with the norms that have developed since Nuremberg. n92 To conceptualize the argument that terrorist groups should enjoy some incidents of international legal status, it helps to think of the similarities between terror groups and non-governmental organizations (NGOs). An NGO is an international "organization that is neither affiliated with nor under the direction of a government[,] ... but rather is composed of private individuals. ..." n93 Although NGOs do not typically enjoy international legal personality, their status has evolved such that they are increasingly recognized as subjects of international law with some incidents of international legal status. n94 A terrorist network that operates on a global basis, insofar as it is an association of persons with a common purpose not affiliated with a state, arguably has attributes similar to an [*348] NGO. n95 It follows that such networks should not be prohibited from possessing some incidents of international legal status if the consequence is to enhance their accountability under international law. This is not to suggest that a group organized for an illegal purpose, such as a terror organization, should enjoy the same legitimacy as an NGO organized for a legitimate purpose. Instead, terror groups should only receive a limited, albeit definite, form of international personality, with a focus on the rights of states and the international community to hold such organizations accountable for violations of customary use of force norms. n96

In addition, if the Charter's norms were applied to the actions of terror organizations, the purpose of the Charter to maintain international peace and security would be furthered. Conversely, the Charter's principles would be ill-served if the activities of rogue groups fell outside the document's norms. A non-state entity that uses deadly force on a global scale can just as easily threaten peace and security as a state entity can. An armed attack promulgated by a non-state entity is still an armed attack. n97 A state's national security is no less threatened because the offending organization may not be recognized as a subject of international law. n98 As Michael J. Glennon stated:

The whole purpose of permitting a state to use force to defend itself from attack is to prevent massive injury. That injury is no less significant if private rather than public wrongdoers inflict it. In contemporary times, non-state actors are as capable of inflicting widespread injury as many state actors. n99

Arguably, a terrorist group may pose a greater threat than a state that possesses similar capabilities. n100 Regardless, non-state actors have, as a practical matter, the same potential to wreak havoc with international peace and security as do state actors. Therefore, the Charter's norms, which seek to limit [*349] interstate violence, should apply equally to all transnational acts of armed aggression, regardless of the proponent of the violence. n101 The focus should be on the nature of the violence, not on the legal status of the aggressor. Not operating according to this logic could create a double standard that would require states to follow the Charter's strictures, while terrorist groups would follow a different set of norms, or perhaps no norms at all. A patchwork of rules would only further convolute the already opaque use of force paradigm, lessening the viability of the Charter and destabilizing the pursuit of international security. Explicitly incorporating terror networks under the umbrella of the UN regime would only fortify the use of force paradigm.

One could contend that holding terror groups accountable to the current conflict regime is unnecessary since the currently existing criminal norms obviate the need to impose the Charter's standards by serving as a sufficient check on terror. n102 It is true that a member of a terrorist organization can be held individually accountable through the application of criminal norms, but this argument is not persuasive in that the current use of force regime employs a two-tiered approach to restrain the aggressive use of force by state actors. n103 Specifically, the UN Charter and other customary norms impose restraints on the use of force by states qua states. n104 Simultaneously, criminal law norms impose liability on individual state actors, who use force in contravention of international law. n105 For instance, Iraq's invasion of Kuwait in [*350] 1990 violated the UN Charter, for which the former state of Iraq could have been held accountable under the theory of state responsibility. n106 Iraq's deposed leaders could also have been held individually accountable for committing crimes against peace in violation of customary international law. n107 The existence of a multi-tiered system of accountability implicitly rejects a single-tiered approach as insufficient to modify unacceptable forms of behavior vis-a-vis the use of force.

A two-tiered accountability regime should apply to terrorist organizations that commit hostilities on a global scale for the same reason that it applies to state actors at both the individual and governmental level. It is difficult to discern why a two-tiered approach that is deemed necessary to hold state actors accountable is unnecessary to restrain the actions of non-state actors. If anything, a multi-tiered approach is all the more essential to constrain the behavior of terror groups ** because such groups have demonstrated that they are less responsible than states when using unlawful force. Moreover, to suggest that criminal norms in and of themselves are sufficient intimates that the jus ad bellum is superfluous - that the UN Charter is irrelevant and serves no purpose. This can hardly be the case. If it were, this argument would apply with equal force to hostilities committed by states. That is, if criminal norms were an adequate restraint on terrorists, would they then not also be an adequate restraint on state actors? However, a single-tiered approach to accountability for the use of force has already been rejected implicitly. A more viable explanation would be that while terrorists are subject to individual criminal liability for their actions, there should also be accountability at the organizational level, just as there is for state actors. To do otherwise would be inconsistent with the current use of force regime.

Finally, it might seem pointless to maintain that an association organized for an unlawful purpose should fall under the auspices of the Charter. However, for the very reason that terrorist groups do not abide by international norms, it behooves the international community to hold such groups accountable to the Charter's directives, because in breaching the norms, international stability may be threatened. In short, it follows that if a non-state entity is going to use force on a global scale, the maintenance of global peace [*351] and security demand that the UN conflict management regime should govern that group's behavior as a matter of law.

Even if one were to dismiss each of the above arguments that the Charter's provisions should bind terrorist groups as a matter of law, there is no question that a state that is attacked by a terrorist group is bound by the Charter's norms as a matter of both conventional and customary law, because the language of Article 51 does not restrict against whom the inherent right of self-defense may be exercised. n108 Thus, a state may rightfully exercise self-defense in response to an armed terrorist attack as long as the response comports with the Charter's strictures and relevant customary international law norms. In sum, even if international norms do not constrain the actions of terrorist groups as a matter of law with regard to the use of force, they do define the scope of actions that a state may take in response to an armed attack by a non-state entity.

Finally, one last argument pertaining to the applicability of the Charter requires attention. One could argue that because the Charter's language suggests that it only regulates the use of force between states, the use of armed force against terrorists is impermissible in that any use of force not sanctioned by the Charter is unauthorized. n109 Such a reading of the Charter is unduly narrow in both a pragmatic and normative sense. As a practical matter, construing the Charter in such a manner would effectively leave a state helpless by denying it the right of self-defense against an armed attack by a terrorist organization. n110 This would be tantamount to unilateral disarmament by all sovereign states against acts of terrorism. n111 Under this theory, a state could only rightfully respond to an armed attack by another state, while a terror group would, in essence, be granted immunity from all acts of counter force. This outcome would fly in the face of the Charter's purpose "to maintain international peace and security" and to "bring about by peaceful means, ... adjustment or settlement of international disputes or situations which [*352] might lead to a breach of the peace." n112 Moreover, to interpret Article 51 in such manner ignores the fact that the inherent right of self-defense, which is also a matter of customary international law, exists independently of the Charter. n113 Thus, even if the Charter somehow deprived a state of the ability to defend itself against a terrorist attack, a state still has that right as a matter of extant customary law. n114 Given the pragmatic considerations and the purpose of the Charter, the better answer is that the use of force regime applies to hostilities involving terrorist networks.

2. Customary International Law

Apart from whether the use of force paradigm applies to conflicts with terrorist groups, the question remains whether extant rules of customary law govern hostilities with such groups. n115 The foregoing analysis indicates that customary law should apply to conflicts with terrorist groups for the same reasons that the Charter applies to such conflicts as a matter of customary law. Customary international law should only apply to the extent that it differs from the Charter. Nonetheless, conflicts between state and non-state actors should still be bound by extant customary law.

C. Applying the Jus ad Bellum to the Strike in Yemen

In that the conflict between the U.S. and al-Qaeda is governed by the jus ad bellum pursuant to conventional and customary international law, at least to the extent that the U.S. is bound by these international use of force norms, the legality of the Yemen attack must be viewed through the prism of these two bodies of law. Specifically, whether the U.S. had a right to use self-help after September 11, and whether the strike in Yemen last November was consistent with that right. n116

Whether the U.S. had a right to self-defense under the UN Charter depends on whether the U.S. sustained an "armed attack" and on the subsequent [*353] actions of the Security Council. There can be little doubt that the terrorist attacks carried out by al-Qaeda on September 11 were of sufficient gravity both quantitatively and qualitatively to constitute an armed attack as envisaged by the Charter. n117 More people died on the morning of September 11 n118 than died during the attack on Pearl Harbor. n119 In addition to the loss of life, the damage to the American economy has been appraised at over $ 630 billion through 2003. n120 Not only was the strike an act of aggression against civilians and civilian property, but the attack on the Pentagon, the heart of the U.S. military command structure, was unequivocally an attack against the state. n121 Even if the hijacking of four planes on the morning of September 11 was viewed collectively as a single event, it was but one act of aggression in a long line of attacks by al-Qaeda against Americans and American interests worldwide. n122 The totality of those attacks support the claim that as of September 12 the U.S. justifiably concluded, as both a de facto and a de jure matter, that it was the victim of an armed attack that triggered the inherent right to exercise self-defense. n123

Once international law vested the U.S. with the right to use self-help, the U.S. retained the right unless the UN Security Council took "measures [*354] necessary to maintain international peace and security." n124 On September 12, the Council passed a resolution condemning the attacks, calling upon states to combat terrorism, and "recognizing the inherent right of individual or collective self-defence [sic] in accordance with the Charter." n125 Later that month,

the Council reaffirmed the inherent right of self-defense and acknowledged "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts." n126 The same resolution declared under Chapter VII that the "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations ... ." n127 While the UN did not explicitly authorize military action, it did not need to. Action by the Security Council is not a condition precedent to the use of self-help. Rather, one may exercise self-help until the Council takes action. In this case, the Council's repeated reaffirmation of the inherent right to self-defense could be reasonably construed as implicitly recognizing the right of the U.S. to use self-help. n128 Moreover, the Security Council failed to renounce the use of self-help even after the U.S. notified the Council that it had, "in accordance with Article 51 of the Charter of the United Nations, ... initiated actions in the exercise of its inherent right of individual and collective self-defence [sic] following the armed attacks that were carried out against the United States on 11 September [*355] 2001." n129 If the UN had disapproved of the actions taken by the U.S., it could have expressed its displeasure by voting to condemn such action, or it could have formally terminated Washington's right to use self-help by taking "measures" as contemplated by the Charter. The Council has done neither.

Although the U.S. had a right under the UN Charter to respond with force, we must also examine whether such a right existed as a matter of customary international law. Customary international law sanctions the use of counter force to the extent allowed by the Charter, provided that the precepts of necessity and proportionality are satisfied. n130 As required by the doctrine of necessity, the United States did not respond with force until it had explored peaceful options in response to the September 11 attacks. n131 Although it was not possible to seek a negotiated settlement with al-Qaeda because the terrorist group is a clandestine organization with no formal legal representatives, the U.S. government attempted to avert conflict by pursuing the only other seemingly viable diplomatic option when it called upon the Taliban government to produce Osama bin Laden and other al-Qaeda leaders believed to be responsible for September 11. n132 The Taliban refused to negotiate, at times seeming more eager to go to war than the U.S. n133 After nearly [*356] four weeks, Washington concluded that given the threat of another terrorist attack by al-Qaeda, the only viable option was to use military force. Instead of using force, the U.S. could have, as a matter of policy, continued to pursue a diplomatic solution, or chosen not to respond at all to the September attacks, but policy considerations do not dictate legal considerations. n134 An attacked state does not need to wait indefinitely before exercising a right to use counter force. Indeed, a prolonged delay in responding to a terrorist attack might jeopardize a state's right to respond. n135 It was only after the U.S. made feasible overtures to peacefully resolve the situation with al-Qaeda through the Taliban that it chose to exercise self-help. Thus, the initial application of self-defense was consistent with the principle of military necessity.

Whether the attack in Yemen in November 2002, fourteen months after the attacks in the U.S., was warranted depends on whether there existed a continued military necessity, as required by the jus ad bellum, which justified the right to self-defense. Recall that necessity is not a temporal limit on the right to use counter force. n136 The defending party may use responsive force until the enemy is defeated. On November 3, 2002, the day of the Predator attack, the al-Qaeda organization was still operational. Its leadership had not surrendered nor been defeated. According to a recent statement by President Bush, about one-half of the al-Qaeda leadership has either been captured or killed. n137 While the exact number of al-Qaeda leaders captured or killed in November 2002 is unknown, it follows that far fewer leaders had been captured or killed in November 2002 than today. Moreover, this terrorist group has continually conducted terrorist operations since September 11th, n138 and recent statements by Osama bin Laden suggest that the organization still [*357] poses a threat. n139 Although these recent statements cannot justify the existence of military necessity as of the date of the Predator attack, they do evince the continued viability of the al-Qaeda organization since September 11, 2001. It follows that al-Qaeda still posed a threat to the U.S. in November 2002. Thus, it was reasonable for the U.S. to conclude in November 2002 that military necessity, as required by the jus ad bellum, justified the use of counter force against the six al-Qaeda members found in Yemen. n140

Finally, customary law mandates that the U.S. military response is proportionate to the continuing threat of force posed by al-Qaeda. The concept of proportionality, which is based upon a standard of reasonableness, allows the U.S. to use whatever force it deems necessary to defeat al-Qaeda, provided that the force is proportionate to the nature of the threat. n141 Because proportionality is not a mathematical calculation requiring exact symmetry, the U.S. response to September 11 is not limited to the nature and type of unlawful force initially used by al-Qaeda. n142 By all accounts, the U.S. response has been proportionate. The U.S. has used conventional military forces to search for Osama bin Laden and to destroy forces loyal to the al-Qaeda leader, in addition to finding suspected terror training camps and mountain hideouts. In light of the threat posed by the terrorist organization, the responsive force used by the U.S. cannot be said to be disproportionate.

The strategic use of special forces and advanced aircraft against terrorists is not a disproportionate use of force. Such a suggestion fails to understand the concept of proportionality since proportionality does not limit the means of the military response. Moreover, the suggestion that the U.S. response is asymmetrical in that there has been a loss of innocent life and damage to civilian property is equally without merit. It is unfortunate that protected persons have lost their lives in the war in Afghanistan. However, [*358] there is no question that al-Qaeda and its sympathizers were the target of U.S. actions, not the state of Afghanistan or the Afghan people. n143 Equally as important is that the quality of life for most Afghans has improved, and the country's long-term prospects continue to mature as it recovers from years of Taliban rule. n144 Furthermore, if one considers the cost to the economies of both countries, there is no comparison between the financial losses suffered by the U.S., estimated at well over $ 600 billion, and the economic impact borne by Afghanistan. n145 Although proportionality is not based upon a simple dollar-for-dollar comparison, the point is that the actions of the U.S. have not been disproportionate, especially given the detriment to the U.S. economy. In short, considering the loss of life on September 11, the economic impact suffered by the U.S., and the continuing threat posed by al-Qaeda, it cannot be said that the U.S. response to September 11 has been disproportionate. n146

To summarize, the use of force by the U.S. after September 11, and specifically on November 3, 2002, comports with the jus ad bellum in that the U.S. response has been consistent with the strictures of the UN Charter and customary law. The U.S. resorted to force only after it sustained an armed attack, and only after the matter was brought to the attention of the Security Council, which gave its imprimatur to the use of self-help. Furthermore, the use of force was justified by military necessity, in light of the threat posed by al-Qaeda and the unsuccessful efforts to avoid confrontation. In addition, the U.S. response has been proportionate to the perceived threat, in that the U.S. has sought to limit its actions to only those persons believed to belong to al-Qaeda, and the practical observation that many senior al-Qaeda leaders remain at large. It was in this context that the targeting of the suspected terrorists in Yemen was consistent with the jus ad bellum.

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III. The Jus in Bello and the Strike in Yemen

Although the jus ad bellum supports the right of the U.S. to continue to exercise self-defense in the face of the perpetual terrorist threat after September 11, the legality of the attack on the six suspected al-Qaeda members under international law must also be viewed through the lens of the jus in bello - whether the means of force employed was consistent with the laws of war. n147 The jus in bello forms the basis of what is known as the law of armed conflict (LOAC) and more generally, humanitarian law, which is founded upon the customs and laws of war that have developed over the centuries.

A. The Law of Armed Conflict

The law of armed conflict is a body of international customary and treaty law that governs how force may be used during a military conflict. The purpose of LOAC is to make war as humane as possible by limiting the permissible scope of warfare. n148 Restrictions on the use of force are designed to minimize the effects of war on belligerents and non-belligerents alike. It might seem anomalous that a legal regime would seek to impose a set of rules upon the conduct of warfare. After all, if the goal in combat is to kill the enemy, n149 efforts to regulate hostilities might seem superfluous and inconsistent with that objective. However, it has been widely recognized since Sun Tzu in the fourth century B.C. that the goal in war is to defeat the enemy, not to destroy the enemy. n150 While pursuing the former may result in the latter, the objective of war is not to annihilate the adversary. n151 War is not violence for the sake of violence, but the application of military force necessary [*360] to bring about the submission of the enemy. n152 This concept operates on the premise that war has limits. n153 By placing limitations on the conduct of hostilities, the law of war endeavors to relativize the inherent tension between violence on the battlefield and the interest of humanity so that armed conflict does not degenerate into savagery. n154 Thus, it is a well-accepted international convention that military contests must be fought within the confines of generally recognized standards, with the goal of subduing the enemy with as little destruction as possible. n155

1. General Principles

Fundamental to the notion of limited war is the concept of military necessity. n156 In the context of the jus in bello, military necessity requires that force may only be used against persons or objects contributing to an opponent's war effort, whose total or partial destruction is expected to contribute to the successful conclusion of hostilities. n157 Professor L.C. Green put it succinctly:

The purpose of armed conflict is to defeat the adverse party. The law of armed conflict only permits such actions as are imperative for this purpose and forbids acts which go beyond this and cause injury to persons or damage to property not essential to achieving this end. n158

In application, military necessity dictates what objects may legitimately be targeted. n159 By placing restrictions on how force may be used, military necessity diminishes the effects of war on both combatants and noncombatants alike. n160

[*361] Central to the concept of military necessity are the principles of discrimination and proportionality, which prohibit the use of force in a wanton and indiscriminate manner. n161 Specifically, the concept of discrimination dictates who and what may be targeted lawfully. If efforts to reduce the horrors of war are going to succeed, it follows that force should only be used against those persons and objects actively engaged in the opponent's war effort. n162 Thus, the law distinguishes between civilians and soldiers, and requires that force be used in a discriminate manner only against legitimate targets.

Proportionality demands that force is used in a manner to minimize the collateral damage to civilian persons and property. n163 It requires "weighing the interests arising from the success of the operation against the possible harmful effects upon protected persons or objects on the other." n164 Stated differently, the gain sought from accomplishing the military objective must be balanced against the probable damage to noncombatants. Only if the well-being of protected persons or property is implicated is the concept of proportionality relevant to the battlefield. Moreover, proportionality is not based upon a mathematical formula whereby the degree of responsive force is limited to the amount of force used by the aggressor. The concept does not require that counter force be limited to a lex talionis or an "in-kind" response. n165 If an opponent chooses to undertake offensive military action using only infantry soldiers, the defending force may use whatever means it has at its disposal, e.g., tanks, airplanes, etc., in repelling the attack; it is not limited to responding with its own foot soldiers. For example, it is equally lawful to target an enemy combatant with a M1A1 tank firing a 120 mm shell as it is with an M16 rifle firing a 5.56 mm round. n166 However, it would be unlawful to raze a village of 500 civilians to destroy a single enemy sniper. n167 A soldier may target the enemy with whatever means at his disposal, provided that he takes into account the possibility of collateral injury to civilians.

[*362] Although the aforementioned concepts limit the permissible scope of warfare, they are not inconsistent with effective war fighting. Quite the contrary, the jus in bello complements and supports "the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security." n168 A military organization has finite resources. The supplies of both men and material are finite. Those resources must be used in the most effective and efficient manner. A commander would therefore only want to expend ordinance on targets of military value rather than objects with no military significance. It would make little sense to target a civilian, who poses no threat and does not contribute to an opponent's war effort, as opposed to an enemy soldier or military base. Thus, it behooves military personnel to follow the fundamental tenets of the laws and customs of war because, if nothing else, notions of limited warfare are also consistent with good military practices.

2. Conventional Law

Battlefield customs have existed in one form or other since feudal times, but it was only in the mid-to-late-nineteenth century that modern efforts to codify and refine the customary laws of war began. Over the past 140 years, there have been many attempts to establish positive law based upon the notions of limited warfare. n169 The first modern comprehensive code of war was drafted by Dr. Francis Lieber during the American Civil War. n170 Although the Lieber Code was promulgated for the benefit of Union forces, it served as a prototype for similar codes that were introduced in several countries between 1870 and 1893, n171 and it continued to serve as "the foundation for much of the law of war as it was to exist over the next century, including World War II." n172

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a. The Hague Conventions and the Definition of Combatants

About the same time that the Lieber Code was introduced, a desire developed among European powers to regulate the use of modern armaments. n173 Scientific and technological progress in the nineteenth century had enhanced the destructiveness of weapons to unprecedented levels such that they were thought too inhumane for the battlefield. n174 There was also concern that the effectiveness of the new armaments would make them too difficult to use in a discriminate manner, thereby threatening the well-being of civilians. n175 To address these concerns, several international conferences dedicated to eliminating or curtailing the use of the new weapons were convened. Specifically, the first such conference was convened in St. Petersburg by the Russian Czar in 1868 for the purpose of "insuring to all people the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments." n176 The St. Petersburg Conference produced an agreement limiting the use of a certain type of bullets. n177 The next conference, held in Brussels in 1874, considered a variety of law of war issues, n178 but failed to garner widespread acceptance. Notably, however, the Brussels Conference produced a declaration that, inter alia, was the first to prescribe objective criteria for "who should be recognized as belligerents, combatants and noncombatants." n179

The next multilateral disarmament conference, known as the First Peace Conference, took place in Geneva twenty-five years later in order to revisit some of the issues previously addressed at Brussels. n180 The 1899 conference [*364] produced several treaties n181 that were subsequently revised and modified at the Second Peace Conference in 1907. n182 The second conference produced thirteen conventions, n183 most notably the Hague Convention Respecting the Laws and Customs of War on Land of 1907 (Hague IV). n184 The Annex to Hague IV is significant in that it prescribes a definition for those belligerents who are entitled to lawful combatant status that is still used today. n185 To that point in time, customary usage had found it sufficient to simply distinguish between those in direct, active military service and everyone else, n186 but the Annex to Hague IV specifically articulates objective criteria that an individual must satisfy to qualify for lawful combatant status. The Annex provides in relevant part:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army." n187

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Only individuals who satisfy each of the four conditions are entitled to de jure combatant status under international law. n188 Of particular importance is that a belligerent must observe the laws of war in order to qualify as a lawful combatant. This notion of reciprocity is important in that it encourages compliance with the laws of war in that only those who observe the rules are entitled to its benefits.

The conferees at both Hague Conferences recognized that their efforts to codify the customary laws of war were not exhaustive and stated as much in the preamble to Hague IV. n189 Specifically, what has become known as the Martens clause, named after the Russian Minister of Defense who proposed the passage, makes it clear that Hague IV does not and could not provide for every eventuality in conflict. n190 In those instances not addressed in the Convention, extant customary law according to "the rule of the principles of the law of nations" still applies. n191 Finally, although Hague IV did not replace customary law in toto, it has come to represent customary international [*366] law. n192 As such, it is binding on all states, regardless of whether a state is a party to the Convention.

b. The Geneva Conventions and Protected Persons

A movement also began in Europe in the 1860's to address the inhumane field conditions faced by soldiers who were hors de combat - those injured and incapacitated during battle. n193 A conference of sixteen states met in Geneva in August in 1864 n194 and in a matter of weeks produced the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. n195 Within four years, the Convention commanded universal respect

throughout Europe. n196 The 1864 Convention was subsequently revised and amended on multiple occasions, most significantly in the aftermath of World War II.

The 1949 Geneva Conventions establish the present-day body of humanitarian law for international and internal conflicts. n197 There are four separate conventions that each address a particular area of humanitarian concern and also certain common articles. n198 The scope of the conventions was expanded [*367] to provide not only for the treatment of persons hors de combat but also for the protection of civilians during hostilities. Specifically, the Geneva Convention Relative to Protection of Civilian Persons in Times of War n199 (Geneva IV) was the first multilateral effort to codify rules pertaining to civilians during conflict and is significant for our purposes because it stipulates the protections to which civilians are entitled. n200

Although Geneva IV offers legal protections for civilians in times of war, the term "civilian" is not defined in the convention. n201 The presumption is that a civilian is a person who is not a member of an armed force. n202 As noncombatants, civilians are considered protected persons who should be spared the ravages of war to the extent possible, consistent with the precepts of necessity, discrimination, and proportionality discussed above. The term "protected person," however, is not defined in the convention either. n203 Thus, to the extent that the term "civilian" can be defined, it is apparently a negative definition, in that persons who are not belligerents are presumed to be civilians. n204 When reading Geneva IV, one must glean from the context of a particular passage whether it is intended to apply to civilians as protected persons. Regardless, it is clear that lawful belligerents, who comport with [*368] the four criteria in the Hague Annex, are not civilians and are therefore not considered protected persons. n205

c. Unlawful Combatants

In addition to combatants and noncombatants, there is a third category of persons, commonly referred to as "illegal belligerents" or "unlawful combatants," n206 that blurs the line between the two groups. Unfortunately, there have always been individuals who have employed arms but who have refused to observe the rules of warfare. n207 These persons share certain traits with both combatants and noncombatants, but squarely fit the definition of neither, thereby diluting the distinction between the two. n208 The existence of unlawful belligerents is antithetical to the notions of limited warfare, in that they severely complicate the practical application of military necessity, the discriminate use of force, and proportionality. n209 Although the Hague and Geneva Conventions were drafted, in part, to address the status of unlawful [*369] belligerents, the conventions fail to define the term. n210 Thus, according to the Martens clause in Hague IV, we must look to customary international law. n211 Generally, custom recognizes that an illegal belligerent is a person who takes up arms, without authority, in defiance of the laws of war. n212 Because an unlawful combatant uses force without legal justification, he or she may be held criminally liable for the unlawful use of force.

3. The Significance of Status

It is important to recognize the distinctions between combatants, noncombatants, and unlawful combatants because status dictates the rights and duties to which an individual is entitled pursuant to conventional and customary law. n213 As touched upon above, the 1907 Convention Respecting the Laws and Customs of War on Land n214 and the 1949 Geneva Conventions n215 ascribe certain rights and duties based upon an individual's status. These distinctions have many practical implications. Foremost, combatants may lawfully engage in hostilities but civilians may not. Stated bluntly, a combatant may lawfully kill an enemy without fear of legal process, whereas a civilian would be subject to criminal sanction for the same conduct. Correlatively, combatants are lawful targets whereas civilians, as protected persons, may not be targeted lawfully. During the course of a war, a combatant is at all times a lawful target even if he is not actively engaged in combat. A combatant's status under international law depends on his affiliation with the military and whether he satisfies the criteria to the Hague Annex, n216 not whether he is actively engaged in hostilities. Thus, a combatant is as much a lawful target while enjoying a cup of coffee at a bistro as he is while fighting on the battlefield. n217 In addition, lawful belligerents captured by the enemy qualify for prisoner of war (POW) status and its associated protections, n218 but civilians, as noncombatants, are not entitled to POW status. n219 As a legal matter, there is no basis for capturing a noncombatant, and as a practical [*370] matter, a civilian would not usually be in a situation to be captured in the first place, e.g., on the battlefield.

Unlawful combatants are generally recognized as criminals and have typically enjoyed fewer rights than those held by lawful combatants and protected persons. n220 Until contemporary times, some took the view that illegal belligerents had absolutely no protection under international law n221 and, as such, illegal belligerents were often subject to summary execution upon capture. n222 Today, however, such inhumane treatment would be inconsistent with a host of international treaties and fundamental human rights norms. n223 Furthermore, the Hague Conventions of 1907 and the

Geneva Conventions of 1949 outline some of the rights held by illegal belligerents, such as a right to trial upon capture. n224 However, there is no duty to capture or to take an unlawful combatant into possession any more than there is a duty to capture a lawful combatant, provided he or she has not attempted to surrender.

B. The Jus in Bello Applied to the Strike in Yemen

Whether the U.S. attack in Yemen is concordant with the jus in bello depends on whether it comports with the precepts of military necessity, discrimination, and proportionality, as recognized by the conventional and customary laws of war. The threshold question is whether the suspected terrorists were lawful targets. If so, the particulars of the attack will be examined for compliance with the above norms. This analysis concludes that the six suspected terrorists were lawful targets and that the Predator attack in Yemen comports with the jus in bello.

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1. Status of al-Qaeda Members Under LOAC

Whether the six suspected terrorists were lawful targets depends on their status pursuant to the Hague and Geneva Conventions, which apply to the current conflict as a matter of conventional and customary international law. Although al-Qaeda is not a party to the conventions, the U.S. is. Therefore, the U.S. treatment of individual al-Qaeda members must comport with the strictures of the conventions because the conventions apply in all instances of international conflict. n225 To suggest that the conventions do not apply, even as a matter of customary law, would create a legal black hole. An individual involved in an international armed conflict must have some status under the laws of war. As a practical matter, a person either is or is not a belligerent - there is no happy medium. Given the prominence of the Hague and Geneva Conventions, and the absence of any other legal regime for the determination of one's status under the laws of war, it follows that the conventions are controlling as a matter of customary international law.

To determine the status of the six suspected al-Qaeda members, the Annex to Hague IV is the most logical place to start because it offers definitive and objective criteria for determining the status of an individual under the laws of war. n226 To review, a lawful combatant must be commanded by a person responsible for his subordinates; have a fixed distinctive emblem recognizable at a distance; carry arms openly; and conduct operations in accordance with the laws and customs of war. n227 Each of the four requirements must be satisfied; it is insufficient to merely be a member of an army or a de facto belligerent to qualify as a lawful combatant.

The six persons traveling in Yemen did not qualify for lawful combatant status because they failed to satisfy one or more of the four Annex requirements, most notably the observance of the laws of war. n228 Specifically, American officials believed that the six men killed in Yemen were members of al-Qaeda, n229 a terrorist organization dedicated to creating fear among civilian populations and intimidating governments through violent means. The [*372] events of September 11 bear witness to al-Qaeda's terror-based methodologies and objectives. Targeting noncombatants with civilian airliners full of innocent passengers runs counter to the laws and customs of war n230 and violates the most basic precepts of the jus in bello.

Of course, groups cannot carry out terrorist acts without the active support of their individual members. Al-Qaeda is only able to function with the aid of its members. Individuals who carry out such acts, in violation of the laws of war, cannot be said to be lawful belligerents because their actions violate the fourth precept of the Hague Annex. In that the six suspected terrorists in Yemen were believed to be active members of the al-Qaeda organization, who contributed to the group's actions in violation of the laws of war, it follows that they could not be lawful belligerents. More specifically, the principal target of the Yemen strike, Qaeda Salim Sinan al-Harethi, was a known member of the al-Qaeda hierarchy who played an integral role in the September 11 attack and the bombing of the USS Cole. n231 Suffice it to say, his conduct in support of terrorist operations was violative of the laws and customs of war. n232 Less is known about the five individuals who accompanied al-Harethi, but American officials believed that they were low-level al-Qaeda operatives. n233 Without obtaining access to the intelligence that was used by U.S. authorities on the day of the attack, it is probably impossible to verify using sources available to the public whether the five individuals were in fact al-Qaeda members. However, one can infer that the five men who accompanied al-Harethi were al-Qaeda members in that they were likely al-Harethi's associates or bodyguards. n234 As such, it was reasonable to conclude that the individuals traveling with al-Harethi were not lawful belligerents because, [*373] as his associates or bodyguards, they enabled al-Harethi to plan and perform terrorist operations in violation of the laws of war. n235

The fulfillment of the other three Hague criteria proves to be much easier. There is no indication that al-Harethi and his companions were wearing uniforms. It is well-known that al-Qaeda members do not wear uniforms or distinctive

emblems. n236 The absence of a distinctive emblem contradicts the concept of the discriminate use of force by making it difficult to distinguish belligerents from the general population. Of course, terrorists do not comply with this condition because they want to blend in with the civilian populace to avoid the attention of the authorities. The third requirement, that a combatant carry arms openly, is also not typically satisfied by al-Qaeda members. Some terrorists might carry arms openly during training exercises or while in their host countries, but as a matter of course, they do not carry arms openly while conducting terrorist operations. The September 11 attackers did not openly carry box cutters or other weapons. Finally, the fourth Annex requirement, that a person be commanded by a person responsible for his subordinates, might very well have been satisfied by al-Harethi and his companions. If they were indeed members of al-Qaeda, they might have been subject to a hierarchy resembling a military chain of command whereby subordinates are responsible to their superiors. n237 However, this is not the type of command structure contemplated by the Annex designed to compel compliance with the laws of war. n238 Regardless, whether this fourth criterion is satisfied is moot in that the other three are not. In sum, given the requirements [*374] of the Hague Annex, an examination of the information available on the six suspected terrorists suggests that they were not lawful combatants. n239

If the suspected al-Qaeda members were not lawful combatants, the law of war presumes that they were protected persons. However, the law of war does not define the term "protected person"; therefore, it can be difficult to determine who is actually entitled to a protected status. The significance of having a protected status is that such an individual is not a lawful target. To suggest that a terrorist is a protected person means that he or she may not lawfully be targeted. This conclusion, however, seems at odds with the fact that a terrorist, as a person committed to using violence against civilians in breach of the laws of war, is a de facto belligerent. It would be anomalous to hold that a belligerent is a protected person under the laws of war.

There are two reasons why the laws of war would not likely allow a terrorist to occupy a protected status. First, to grant an elevated status to a member of a terror group would fly in the face of the notion of reciprocity underlying the fourth criterion in the Hague Annex - that is, only those belligerents who observe the laws and customs of war are entitled to its protections. n240 By analogy, only protected persons who observe the laws and customs of war should be entitled to a protected status. However, since members of terror groups do not observe the laws of war, they should not be entitled to a protected status. Granting an elevated status to members of al-Qaeda - a group dedicated to employing methodologies contrary to the customs of war - would make the concept of reciprocity a one-way street. It would be incoherent to condition lawful combatant status upon the observance of the laws of war, but to grant a protected status to belligerents who violate the laws of war. So as to not undercut the notion of reciprocity, only those persons who observe the laws of war should be entitled to an elevated status. Thus, al-Qaeda terrorists should not enjoy protected status under the laws of war.

[*375] Furthermore, according a protected status to terrorists would only create an incentive for noncompliance with the laws and customs of war. If a terrorist could claim a privileged status, he would, in effect, be rewarded for disobeying the rules. This result would promote violations of the laws of war and undercut the primary purpose of LOAC to limit the horrors of combat. To be true to the theoretical underpinnings engendering the distinctions between combatants and noncombatants, the law should only grant an elevated status to those who abide by the rules.

In addition, practical considerations dictate that terrorists should not occupy a protected status. If a terrorist was considered a protected person, he could use force without being subject to counter-force. A state subjected to a terrorist attack would effectively be deprived of the right of self-defense. If terrorists were allowed to occupy a protected status, a state could not lawfully respond to a terrorist attack because protected persons are unlawful targets. n241 In effect, terrorists would be legally bulletproof. They would enjoy the best of both worlds by being able to target the enemy, albeit unlawfully, while at the same time being immune from the threat of counter force. This is undesirable in that the law does not allow a person to be "a combatant and a noncombatant at the same time." n242 Thus, al-Qaeda terrorists should not be able to claim a protected status.

Finally, the only other category recognized under international law that might pertain to the six suspected terrorists is that of unlawful combatant. By default, one could simply say that because the six persons were not lawful combatants or protected persons they were unlawful combatants. The simplicity of this argument has some appeal. However, a more rigorous examination of this assertion also suggests that the suspected terrorists were unlawful combatants. An unlawful combatant is a belligerent who fails to observe the laws and customs of war. n243 As active members of the al-Qaeda organization, the six individuals attacked in Yemen fall into this category.

First and foremost, the suspected terrorists were likely belligerents. As previously discussed, all persons killed in the Predator attack had been identified as al-Qaeda members. n244 Arguably, membership in a terrorist organization

known to use interstate force without legal justification is sufficient to qualify a person as a belligerent, just as belonging to an army confers combatant [*376] status on its members. n245 However, we need not rely upon membership alone. At least one of the vehicle's occupants, Qaeda Salim Sinan al-Harethi, was thought to be a high-ranking al-Qaeda operative who was believed to be involved in several major terrorist operations. As such, it was reasonable to consider him a belligerent. Although the status of the other five individuals is less clear, they were also likely belligerents in that they were actively involved with the al-Qaeda organization, as demonstrated by their association with al-Harethi, and that arms and traces of explosives were found in the car. n246 Thus, it is reasonable to conclude that al-Harethi's companions were also belligerents under the laws of war.

Admittedly, it would be preferable not to speculate about the identities and activities of the six suspected al-Qaeda members traveling in Yemen. However, the U.S. and the other states fighting terrorism have little choice but to resort to conjecture and speculation given the limited information that is available about terrorist organizations and their members, due to the fact that terror groups do not conduct themselves in accordance with the laws of war. More specifically, because al-Qaeda operates in a covert and clandestine manner - without uniforms and without carrying arms openly - the U.S. is left to speculate as to who belongs to the organization and in what capacity. Since Al-Qaeda intentionally obfuscates the identity and status of its members, it should bear the responsibility for any errors in identification that are made in good faith. n247 Certainly, a terrorist group should not be able to benefit from the confusion it creates by failing to abide by the laws of war. This is contrary to the whole notion of reciprocity underlying the fourth requirement of the Hague Annex, as discussed above. Therefore, good faith attempts to establish the identity of various al-Qaeda members should be given a presumption of validity, in that a defending state has no choice but to make decisions on scant information caused by the terrorist organization's efforts to conceal information. With regard to the attack in Yemen, the evidence discussed above suggests that the U.S. prudently concluded that the six persons were active members of al-Qaeda.

[*377] The second component necessary to establish unlawful belligerency is that the individual does not abide by the laws of war. As previously discussed, al-Qaeda and its members, by definition, do not observe the customs of armed conflict. n248 Thus, based upon their status as belligerents who do not observe the laws of war, the six suspected terrorists killed in Yemen may reasonably be considered unlawful combatants.

2. Significance of Status as Unlawful Combatants.

The status of the al-Qaeda members in Yemen as unlawful combatants is significant because status connotes one's rights under international law. In this case, the question is whether the terrorists were lawful targets. As unlawful combatants, the suspected terrorists arguably had fewer rights than they would have had if they had been lawful combatants. n249 The fact that a person has a diminished status, however, does not mean ipso facto that he or she may be targeted lawfully.

For the sake of argument, let us assume that lawful combatants and unlawful combatants enjoy the same protections. If a combatant may be targeted legitimately during a military operation, it follows a fortiori that an unlawful combatant may be targeted. To conclude otherwise would afford greater protection to an unlawful belligerent - a criminal - than a soldier who follows the rules. Moreover, as discussed above, if unlawful belligerents were not legitimate objects of attack, they would enjoy the same protected status as civilians. n250 The more coherent answer is that the suspected al-Qaeda terrorists were targeted lawfully given their status as unlawful combatants.

It has been suggested that targeting particular members of al-Qaeda is assassination, in violation of the laws of war. n251 It is widely believed that assassination is unlawful because it is the targeting of a particular individual. However, this cannot be the case because when a soldier fires his rifle at an opponent he is targeting a particular person; n252 yet no one would argue that he has attempted or committed assassination. Clearly, something more is required. Another commonly held view is that assassination is simply a killing [*378] with a political motive. Yet, it is recognized that in the recent war with Iraq it was lawful to target Saddam Hussein. n253

The argument that the U.S. assassinated individual members of al-Qaeda in violation of the laws of war is misguided in that it fails to appreciate that "assassination" is a term of art that prohibits the targeting of an individual using treachery n254 or perfidy during time of war. n255 Treachery and perfidy are necessarily violations of the law of war, in that deceit and trickery may not be used as a pretense to lure an opponent into a false sense of security. n256 Actions that do not employ treachery or perfidy that are otherwise consistent with the laws of war are permitted. For instance, stealth and camouflage are permissible because they do not involve affirmative efforts as a pretext to lure an enemy into a false sense of complacency, whereas using a white flag to draw out an opponent so that he can be targeted would be

impermissible. n257 Neither of the preceding scenarios discussed in the paragraph above is assassination because they do not involve treachery or perfidy.

Based upon the aforementioned discussion, the Predator attack was not an assassination because it was a justified exercise of self-defense n258 consistent with the laws and customs of war. n259 First, the attack was not assassination because treacherous means were not used. Using a Predator unmanned aerial vehicle (UAV) to fire a Hellfire anti-tank missile may have surprised the suspected terrorists, but neither the platform nor the weapon are prohibited [*379] by conventional or customary law. All weapons in the U.S. arsenal go through multiple legal reviews to ensure compliance with the jus in bello before being issued for use during hostilities. n260 Second, only one of the persons, al-Harethi, was specifically targeted. The other five persons were not the primary object of the attack and could be considered collateral damage, as discussed below. n261 Al-Harethi, however, was specifically targeted given his position within the al-Qaeda organization. Thus, it should be emphasized that even if the actions by the U.S. Predator were tantamount to assassination, only one person was targeted, arguably mitigating the unjustified nature of the attack. However, as noted, the attack was not an assassination because it did not make use of perfidy or treachery.

3. Considerations of Military Necessity, Discrimination, and Proportionality

Although the suspected terrorists were lawful targets, the question remains whether the attack was consistent with the concepts of military necessity, discrimination, and proportionality. Since al-Harethi held a high-ranking position in the al-Qaeda organization and was responsible for two of the more recent and egregious attacks against the U.S., it was perfectly rational to conclude that his death would contribute to the successful conclusion of hostilities. n262 The fact that he was traveling with five other suspected terrorists probably only reinforced the conclusion that military necessity warranted the attack. Necessity might be more justified when targeting senior leaders, but targeting common soldiers is well within the ambit of military necessity.

The lawfulness of the attack must also be viewed in light of the concepts of discrimination and proportionality. The discriminate use of force required that the U.S. distinguish between military targets and protected persons in order to avoid unnecessary harm to civilians. Since the individuals in the car were belligerents, no civilians were harmed in the attack. As such, the attack was conducted in a discriminate manner. Finally, the notion of proportionality, which requires that the amount of force used is limited to the extent necessary to prevent and minimize damage to protected persons and property, was equally satisfied. The U.S. intentionally waited to fire the missile [*380] until the car was in the desert, presumably far removed from any innocent bystanders. n263 Since injury to civilians was not at issue, the concept of proportionate force was nugatory. The law of war allows any degree of force against a legitimate target. n264 While as a practical matter it might seem that targeting a sport utility vehicle with a Hellfire anti-tank missile n265 is overkill, this has no bearing on the legal validity of the attack.

The concept of proportionality would have been implicated if it was known in advance that one or more of the persons in the car held a protected status, i.e., a civilian. If that had been the case, then the military benefit gleaned by killing al-Harethi would have needed to have been balanced against the prospect of killing a protected person. Even then, the killing of a civilian would not have been a per se violation of the concept of proportionality. Some amount of collateral damage to protected persons and property n266 is acceptable, provided that force is selectively used relative to the military advantage sought. A recent example of the proportionate use of force was the aerial bombing of military targets in Iraq. Although the bombing of lawful targets in Baghdad injured and killed innocent civilians, it was justified under the concept of proportionality given the military advantage to be gained compared to the probable damage to protected persons. In short, a high value military objective may justify the taking of one or more innocent lives. n267 However, the concept of proportionality was not even implicated by the attack in Yemen because it is believed that no protected persons were at risk, as all six persons were suspected al-Qaeda members.

Conclusion

The global "War on Terror" presents new challenges to the jus ad bellum and jus in bello that have regulated the modalities of armed conflict between states since the end of World War II. Some have suggested that the current conflict regime is incapable of dealing with the new realities posed by the willingness of terrorist organizations to use interstate violence. Although the current regime did not contemplate the use of armed force by non-state actors, it does provide a valuable framework to address the contemporary issues presented by the use of force by non-state actors. The use of [*381] force paradigm, as established by the UN Charter and customary international law, must encompass the transnational activity of non-state actors so as to hold such organizations responsible for acts of aggression that threaten international peace and security. In light of the growing threat posed by terrorist organizations, international law must

evolve to hold such organizations accountable for the use of armed force inconsistent with the current use of force paradigm.

The jus in bello is also capable of meeting the challenges posed by non-state actors. Individuals who do not observe the laws and customs of war are not entitled to its privileges. Members of organizations that actively engage in terrorist acts or enable their leaders to carry out such attacks should not be entitled to the elevated status bestowed upon protected persons and lawful combatants. As such, terrorists are unlawful belligerents and may lawfully be targeted pursuant to the laws of war, provided that the customary international law concepts of necessity, discrimination, and proportionality are satisfied. Finally, attacks against terrorists are not assassination or extrajudicial killings, provided that they are legitimately carried out in self-defense. In short, the current rules pertaining to the use of force between states provide a useful and necessary construct to address the challenges posed by the willingness of non-state actors, such as terrorist organizations, to use interstate force.

An analysis of last fall's Predator attack in Yemen against six suspected al-Qaeda members illustrates the ability of the current conflict regime to provide a useful outline to evaluate military conflicts between state and non-state actors under international law. Specifically, the attack comported with the jus ad bellum and the jus in bello. Although the attack was criticized in the U.S. and abroad as somehow extralegal or in contravention of international law, the legal foundations of those criticisms are unwarranted. The strike was an appropriate exercise of self-defense in the continuing war with al-Qaeda that comported with the laws and customs of war.

Specifically, the conflict with al-Qaeda began with the terrible events of September 11, 2001, that the U.S. reasonably construed as an armed attack, particularly in light of the previous aggression by al-Qaeda against U.S. interests. In response to the September 11 attacks, the U.S. invoked its right to self-defense under the UN Charter, which does not limit against whom the inherent right may be exercised. As required, the U.S. notified the Security Council of the impending U.S. response against al-Qaeda in Afghanistan. Notably, the Council did not choose to take measures that would have divested the U.S. of the right to self-help. Rather, the Security Council's repeated reaffirmation of the inherent right of self-defense and recognition of [*382] the threat to international peace and security further legitimated the right of the U.S. to use self-help.

Of course, the resort to self-defense is not without limitation. An aggressor may be pursued until it is no longer a threat, provided that the responsive force is necessary and proportionate. In this case, the U.S. sought an amicable resolution to the conflict for nearly a month before unleashing military force upon the Taliban and al-Qaeda in Afghanistan in October 2001. Moreover, the U.S. response has not been disproportionate in terms of lives lost and damage inflicted given the losses suffered as a result of the September 11 attacks and the continuing threat posed by al-Qaeda. In particular, on the day that the U.S. struck in Yemen, al-Qaeda was still a threat to U.S. security in that the terrorist network had not been defeated militarily and had continued to conduct terrorist attacks after September 11. Thus, the Yemen attack comports with the jus ad bellum, pursuant to the international use of force regime.

The Predator attack also comports with the jus in bello, the laws and customs of war. International law dictates that interstate military conflicts are fought according to well-established customary norms that seek to diminish the horrors of war for both combatants and noncombatants alike. Essential to achieving this end is that the involved parties conduct hostilities in accordance with the interrelated concepts of military necessity, discrimination, and proportionality. These venerable concepts have been codified in the now familiar Hague Conventions of 1907 and the Geneva Conventions of 1949, which ascribe the rights and duties of the participants to a conflict depending upon their legal status. In particular, a lawful combatant is a belligerent who observes the laws of war, in addition to being commanded by a person responsible for his subordinates; wearing a distinctive emblem; and carrying arms openly. On the other hand, terrorists that use transnational force against innocent civilians in situations that constitute an armed attack under the UN Charter are unlawful combatants under the laws of war.

The six suspected terrorists in Yemen were lawfully targeted by the U.S. Predator. As unlawful combatants, the suspected terrorists enjoyed no more rights than they would have if they had been lawful combatants. Therefore, the U.S. was justified in targeting the six individuals based upon their suspected status as al-Qaeda members and support of terrorist operations. It would have been preferable to have confirmed the identity of the occupants of the car, but the risk of misidentification should be borne by individuals who choose not to observe the laws of war, namely, the wearing of a uniform or distinctive emblem, such that states that act in good faith should not be held accountable. Regardless, there has been no allegation that al-Harethi or the others were not al-Qaeda operatives. Moreover, targeting al-Harethi was [*383] not an assassination, in that a killing exercised in self-defense is by definition permitted by the laws of war. Furthermore, the strike comports with the precepts of military necessity, discrimination, and proportionality. Previous

attempts by Yemeni and American authorities to capture al-Harethi had been unsuccessful. As a senior al-Qaeda leader, his capture or demise was designed to bring about the successful conclusion of hostilities. Also, because no protected persons or property were injured or damaged in the attack, the attack was a discriminate and proportionate use of force. In short, the U.S. Predator attack in Yemen complied with international law.

Legal Topics:

For related research and practice materials, see the following legal topics:
International LawDispute ResolutionLaws of WarInternational LawSources of International LawInternational LawSovereign States & IndividualsHuman RightsTerrorism

FOOTNOTES:

n1. Walter Pincus, Missile Strike Carried Out with Yemeni Cooperation; Official Says Operation Authorized Under Bush Finding, Wash. Post, Nov. 6, 2002, at A10.

n2. The attack was criticized as an extrajudicial killing in a report to the UN Commission on Human Rights. See Report of the Special Rapporteur on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/2003/3, PP37-39 (2003). The report's author, Special Rapporteur Asma Jahangir, states that "in the opinion of the Special Rapporteur, the attack in Yemen constitutes a clear case of extrajudicial killing." Id. at PP39. In the three paragraphs dedicated to this issue, the Special Rapporteur fails to support her opinion with any analysis. Amnesty International wrote a letter to President Bush condemning the extra-judicial nature of the attack. See Press Release, Amnesty International, Amnesty International Claims Government Must Not Sanction Extra-Judicial Executions, Nov. 8, 2002, available at http://www.amnestyusa.org/news/2002/yemen11082002.html (last visited Jan. 19, 2004). The Washington D.C. office of Amnesty International has not responded to multiple attempts by the author to obtain copies of the aforementioned letter. The executive director of Human Rights Watch, Kenneth Roth, seems to have a more sympathetic view, stating that "the U.S. government has a duty to use law enforcement against terrorists when it is possible." However, he acknowledges it might not have been feasible to arrest the Yemeni men and bring them to trial. Scott Shane, Pros, Cons of Assassination; Policy: Killing the Enemy is Traditional, But the United States Can Expect the Practice to Draw Criticism, Retaliation and Other Complications, Balt. Sun, Nov. 8, 2002, at 2A. A senior researcher for Human Rights Watch, Peter Bouckaert, commented to a Cairo-based on-line newspaper that "such targeted military strikes are not necessarily prohibited by the laws of war', but the circumstances that bring them under the confines of war are still a matter of interpretation." See Nyier Abdou, Death by Predator, AL-AHRAM WEEKLY ON-LINE, Nov. 14-20, 2002, at http://weekly.ahram.org.eg/2002/612/re5.htm (last visited Jan. 19, 2004). The late Swedish Foreign Minister Anna Lindh complained that the strike was a "summary execution that violates human rights." Editorial, Yemen Strike Was Justified, Post & Courier (Charleston, S.C. Nov. 8, 2002, at 18A. See also Editorial, Southland Times (N.Z.), Nov. 12, 2002, at 4. But cf. Seymour Hersh, New Yorker, Dec. 22, 2002, at 66 (stating that domestically the concern is not so much whether these types of attacks are legal but whether they are wise, ethical, and efficacious).

n3. The Bush Administration maintains that the strike does not raise any constitutional questions. See U.S. Defends CIA Strike in Yemen; Bush Gives Others Power to Order Attack: Rice, Toronto Sun, Nov. 11, 2002, at 32. Unless otherwise noted, this paper will only address issues related to international law. Any U.S. domestic legal issues, e.g., the fact that one of the six persons was allegedly a naturalized American citizen, is outside the scope of this paper and will not be addressed. See Dana Priest, U.S. Teams Seek to Kill Iraqi Elite; Covert Missions Target Hussein's Inner Circle, Wash. Post, Mar. 30, 2003, at A1. Similarly, any issues presented under Yemen's constitution will not be examined.

n4. See Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, *96 Am. J. Int'l L. 905, 906 (2002).*

n5. Michael J. Glennon, The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, *25 Harv. J.L. & Pub. Pol'y 539, 551 (2002).*

n6. Id.

n7. "International law has long insisted upon the complete disjunction of jus ad bellum from jus in bello ... ." Id. A violation of one concept is not a per se violation of the other, but a violation of either is a breach of international law. In reviewing the more general question of whether the strike in Yemen was consistent with international law, it would make little practical sense to say that the attack comported with the laws of war, but that the U.S. did not have a right to exercise self-defense. See Ratner, supra note 4, at 905-06. Thus, this paper examines the legal basis of the ongoing war against al-Qaeda before reviewing the particulars of the strike in Yemen.

n8. See U.N. Charter art. 2, para. 4, and art. 51.

n9. Mark Hosenball, Terrorism Nabbing Nashiri, Newsweek, Dec. 2, 2002, at 4. The information provided in this section is intended only to give a brief overview of the strike and is not meant to be an exhaustive account of the attack in Yemen or of the continuing conflict between the U.S. and al-Qaeda. Additional facts, as needed, will be provided below. Finally, one must acknowledge that the capability of this article to fully analyze the legitimacy of the attack may be limited to the extent that the publicly available information may not provide a complete account of the events surrounding the strike. Such information is likely classified and is only available to those at the highest levels of the U.S. government. This paper is drafted with that understanding.

n10. U.S. Spy Plane Strikes al-Qaeda, Hous. Chron., Nov. 5, 2002, at A1.

n11. See Yemen Strike Was Justified, supra note 2.

n12. Austin Bay, Signals from the Predator Robot Hit, Wash. Times, Nov. 8, 2002, available at http://www.washingtontimes.com/archive/ (last visited Jan. 19, 2004).

n13. Id.; see also U.S. Spy Plane Strikes al-Qaeda, supra note 10, at A1.

n14. It is believed that he also directed an attack on a French supertanker in Yemen in October 2002. Editorial, Death from a Distance, Prov. J.-Bull., Dec. 4, 2002, at B6.

n15. See Ian Fisher, Threats and Responses: Terror; Hate of the West Finds Fertile Soil in Yemen. But Does Al Qaeda?, N.Y. Times, Jan. 9, 2003, at A14.

n16. James Risen, Threats and Responses: Hunt for Suspects; C.I.A. is Reported to Kill A Leader of Qaeda in Yemen, N. Y. Times, Nov. 5, 2002, at A1.

n17. Two Dozen on CIA's Hit List, Hamilton Spectator (Hamilton, Ont.), Dec. 16, 2002, at C2.

n18. Howard Witt, Killing of Al Qaeda Suspects was Lawful, Chi. Trib., Nov. 24, 2002, at C1.

n19. The Predator is a "propeller-driven craft that flies as slowly as 80 miles per hour and is guided by an operator at a television monitor hundreds of miles away ... ." Eric Schmitt, U.S. Would Use Drones to Attack Iraqi Targets, Wash. Post, Nov. 5, 2002, at A16. For detailed information on the predator, see Fed'n of Am.

Scientists, RQ-1 Predator MAE UAV, at http://www.fas.org/irp/program/ collect/predator.htm (last visited Jan. 19, 2004).

n20. American officials believed that the persons accompanying al-Harethi were also al-Qaeda operatives. James Risen, Threats and Responses: Hunt for Suspects; C.I.A. is Reported to Kill A Leader of Qaeda in Yemen, N.Y. Times, Nov. 5, 2002, at A1; see also CIA 'Killed al-Qaeda Suspects' in Yemen, BBC News World Edition, Nov. 5, 2002, at http://news.bbc.co.uk/2/hi/middle east/2402479.stm (last visited Sept. 28, 2003) [hereinafter BBC NEWS].

n21. U.S. Spy Plane Strikes al-Qaeda, supra note 10, at A1. Because the Yemeni government gave its consent to the attack, issues of sovereignty and whether the U.S. could have pursued the suspected terrorists without Yemeni consent will not be discussed here. However, there is a strong argument that even without consent, the use of force was justified given the inability of the Yemeni government to capture the wanted terrorists. See Yoram Dinstein, War, Aggression and Self-Defence 224 (1988) (analyzing right of self-defense to pursue hostile armed bands into another sovereign state).

n22. See Pincus, supra note 1, at A10.

n23. See Hersh, supra note 2, at 66. The fact that the exact date of the attack is unknown carries some legal significance.

n24. U.S. Spy Plane Strikes al-Qaeda, supra note 12, at A1. The car was later found to contain arms, traces of explosives, and communications equipment. BBC News, supra note 20.

n25. Al-Harethi's remains were identified by a mark on his leg, which was found near the blast. U.S. Kills Cole Suspect, CNN.com, Nov. 5, 2002, at http://www.cnn.com/2002/ WORLD/meast/11/04/yemen.blast/ (last visited Jan. 19, 2004).

n26. Unless otherwise stated, the term "war" is used throughout this paper in the vernacular, not as a term of art, in that the U.S. Congress has not formally declared war against al-Qaeda. See U.S. Const. art. I, 8, cl. 11. Congress, however, has authorized the President to use "all necessary and appropriate force. . ." in order to prevent "any future acts of international terrorism against the United States" and invoking the right of self-defense. See S.J. Res. 23, 107th Cong. (2001) (enacted).

n27. See Afghanistan Wakes after Night of Intense Bombings, CNN.com, Oct. 7, 2001, at http://www.cnn.com/2001/US/10/07/gen.america.under.attack/ (last visited Jan. 19, 2004). Most recently, Khalid Sheikh Mohammed, the suspected mastermind behind the September 11 attacks, was captured. See Khalid Sheikh Mohammed Is Biggest Al Qaeda Catch, Reuters, Mar. 1, 2003, at http://www.tiscali.co.uk.cgi-bin/news/newswire.cgi/news/reuters/ 2003/03/01/topnews/khalidsheikhmohammedbiggestalqaedacatch.html (last visited Jan. 19, 2004) President Bush recently remarked that "nearly two-thirds of al Qaeda's known leaders have been captured or killed ... ." President George W. Bush, Address of the President to the Nation (Sept. 7, 2003) (transcript available at http://www.whitehouse.gov/news/releases/ 2003/09/20030907-1.html) (last visited Jan. 19, 2004).

n28. Former Senator Warren Rudman stated: "I think in the war on terrorism there are no rules. They [the terrorists] have none and we have to take whatever risks you have to take to make them fear us." Pincus, supra note 1, at A10.

n29. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) of Foreign Relations Law 102(2)* (1987).

n30. U.N. Charter art. 2, para. 4.

n31. Id.

n32. "Self-defence in inter-state relations may be defined as a lawful use of force (principally, counter-force), under conditions prescribed by international law, in response to the previous unlawful use (or, at least, the threat) of force." See Dinstein, supra note 21, at 165 (citing Report of the International Law Commission, [1980] Y.B. I.L.C. II(2) 1, 54).

n33. U.N .Charter art. 51 (emphasis added).

n34. See Dinstein, supra note 21, at 171-72. For a more thorough discussion of the meaning of the "inherent" nature of the right to use counterforce, see id. at 169-172.

n35. Gregory M. Travalio, Terrorism, International Law, and the Use of Military Force, *18 Wis. Int'l L.J. 145, 159-60 (2000).*

n36. Oscar Schachter, International Law: The Right of States to Use Armed Force, *82 Mich. L. Rev. 1620, 1633-33 (1984);* see also Dinstein, supra note 21, at 96. See infra Section II.A.2 (discussing the extant customary rules on the use of force).

n37. Counterforce may also be used in other instances, such as for the protection of nationals abroad. See Dinstein, supra note 22, at 212-13.

n38. See U.N. Charter art. 51.

n39. See Louis Henkin et al., Right v. Might 45 (2d ed. 1991); see also Travalio, supra note 35, at 160.

n40. See Dinstein, supra note 21, at 189. The I.C.J. has articulated a standard on what constitutes an armed attack:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. 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 carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein."

See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) [hereinafter "Nicaragua"].

n41. See Timothy L. McCormack, Self-defense in International Law 259 (1996).

n42. For example, the Security Council has repeatedly cited Israel for violating acceptable norms for the use of force. See, e.g., S.C. Res. 611, U.N. SCOR, 43d Sess., Supp. for Apr.-June 1988, U.N. Doc. S/RES/611 (1988), available at http://www.un.org/Docs/ scres/1988/scres.htm ("condemning vigorously the aggression ... against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter ..." and international law).

n43. Even in the face of an armed attack, a state has the right to pursue criminal law sanctions. The two options are not mutually exclusive. See Note, Responding to Terrorism: Crime, Punishment, and War, *115 Harv. L. Rev. 1217, 1226 (2002).*

n44. See Geoffrey Best, Humanity in Warfare 260 (1983).

n45. See U.N. Charter art. 51.

n46. See Dinstein, supra note 21, at 196-97.

n47. See id. at 197.

n48. As discussed infra, the parameters of Article 51 must be read in conjunction with the customary international law concepts of proportionality and necessity. See Dinstein, supra note 21, at 190.

n49. See Nicaragua, supra note 40, at 100.

n50. See id.

n51. As of September 11, 2001, not all states were UN members. It is not legally significant that there was less than full membership, since a norm does not require one-hundred percent recognition or absolute compliance to become customary. See Nicaragua, supra note 40, at 98 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

n52. While this argument may seem circular - the Charter has universal applicability because it is customary, and because it is customary it has universal applicability - it is really a distinction without a difference. Regardless of the theory to which one subscribes, the content of the normative rules is the same.

n53. Jus cogens is defined as "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." Black's Law Dictionary (7th ed. 1999). "It is generally accepted that the principles of the United Nations Charter prohibiting the use of force ... have the character of jus cogens." See Restatement, supra note 29, 102 cmt. k; see also Nicaragua, supra note 40, at 100.

n54. See Dinstein, supra note 21, at 96.

n55. Whether the Charter was intended to replace customary law has been the subject of much debate. For instance, the U.S. argued in Nicaragua that customary international law had been "subsumed" and "supervened" by international treaty law. See Nicaragua, supra note 40, at 93.

n56. Id.

n57. See id. at 27-28.

n58. Other principles that the court identified as extant customary international law despite being integrated into conventional law, include "non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation ... ." Id. at 93 (internal quotations omitted).

n59. See id. at 93-94; see also Dinstein, supra note 21, at 95.

n60. "Thus, the Charter itself testifies to the existence of the right of collective self-defense in customary international law." Nicaragua, supra note 40, at 103.

n61. See generally Glennon, supra note 5.

n62. L.C. Green, The Contemporary Law of Armed Conflict 10 (2d ed. 2000); see also Henkin, supra note 39, at 45. Stated somewhat differently, although an aggressor may choose how and when to initiate hostilities, an attacked state has the right to take the fight to the enemy on its own terms and to continue military action until victory, presuming that other international norms are observed. See Green, supra, at 10; see also Dinstein, supra note 21, at 219; Nicaragua, supra note 40, at 371-72 (Schwebel, J. dissenting). A case in point is the unconditional surrender of Japan following the attack on Pearl Harbor in World War II. See Dinstein, supra note 22, at 219. With regard to the right of self-defense, Grotius said that "if a Man is assaulted in such a Manner that his Life shall appear in inevitable Danger, he may not only make War upon, but may very justly destroy the Aggressor." Green, supra, at 2 (citation omitted).

n63. Jack M. Beard, America's New War on Terror: The Case for Self-Defense Under International Law, *25 Harv. J.L. & Pub. Pol'y 559, 583 (2002)*; see also Henkin, supra note 39, at 45. As used here, the concepts of necessity and proportionality are examined vis-a-vis the overarching conflict between the U.S. and al-Qaeda in the war against terrorism. Similar concepts are also discussed in the context of the jus ad bellum - whether the use of force in a particular situation was consistent with the laws of war. See infra Section III.A.1.

n64. See Dinstein, supra note 21, at 191. The modern concept of necessity purportedly derives from the celebrated Caroline exchange, in which U.S. Secretary of State Daniel Webster stated that the British government needed to show a "necessity of self-defense, [that is] instant, overwhelming, and leaving no choice of means, and no moment for deliberation." McCormack, supra note 41, at 245 (citation omitted).

n65. Dinstein, supra note 21, at 191. Dinstein suggests that before a state can resort to self-help it must negotiate with the offending state, which is consistent with the notion of exhausting all peaceful means before resorting to force. See id. at 206-07.

n66. See McCormack, supra note 41, at 269.

n67. See id. at 274.

n68. See Walter Gary Sharp, Sr., The Use of Armed Force Against Terrorism: American Hegemony or Impotence?, *7 Chi. J. Int'l L. 38, 42 (2006)*.

n69. An armed reprisal is a use of force, which would normally be considered illegal, in response to an earlier violation of international law to coerce the opponent state from continuing the offending behavior. See Dinstein, supra note 21, at 202-03. Customary international law requires that even reprisals in self-defense must comport with the limits of proportionality and necessity. See id. at 205.

n70. Of course, the Security Council has the option under Article 51 to take "measures" that could truncate a state's right to use self-help. See U.N. Charter art. 51.

n71. One author suggests that the reporting duty under Article 51 might impose a time limit on the right to exercise self-defense measures because the Security Council has the primary responsibility for maintaining international peace and security, thereby subordinating unilateral military action to Chapter VII of the Charter. See Yutaka Arai-Takahashi, Shifting Boundaries of the Right of Self-Defence - Appraising the Impact of The September 11 Attacks on Jus ad Bellum, *36 Int'l Law. 1081, 1089 (2002)*. This argument seems to focus more on the right of the Security Council to take "measures" that would truncate the right to use counterforce rather than an actual time limit in which defensive measures must cease.

n72. For a somewhat different perspective on how the diminution in the threat is related to the concept of proportionality and the cessation of hostilities, see McCormack, supra note 41, at 277.

n73. See Dinstein, supra note 21, at 216-17.

n74. Id. at 206.

n75. Id.

n76. Id. at 191, 206, 217. Dinstein suggests that in the case of a single armed attack, the resort to war "cannot be the yardstick for determining the legality of a war of self-defense ... ." Id. at 217.

n77. Arguably, the use of nuclear weapons may implicate other violations of the international use of force norms. See McCormack, supra note 41, at 283.

n78. Dinstein, supra note 21, at 191. In reality, a bona fide analysis of proportionality can only occur after the conclusion of hostilities. Id. at 216-17.

n79. The term "use of force paradigm" is also referred to in this article as the "conflict regime." Hereinafter, these terms are used interchangeably to refer to the use of force precepts established by conventional and customary law.

n80. This discussion focuses solely on the right to use self-help against terrorist organizations that are not state-sponsored and not whether military action against a state either unwilling or unable to remediate terrorist activities is justified. Thus, any issues involving state responsibility will not be addressed. See generally Sharp, supra note 68 (discussing whether force may be used against in and against such states).

n81. U.N. Charter art. 2, para. 4 (emphasis added).

n82. A treaty may typically only be concluded between two states, although other international entities may also enter into treaties. See Ian Brownlie, Principles of Public International Law 609 (5th ed., 1998).

n83. As previously discussed, the Charter's use of force regime is recognized as customary international law. See infra Section II.A.2.

n84. It is not uncommon that states use pragmatic reasons to justify actions for which no traditional legal basis exists. See generally Michael J. Matheson, Justification for the NATO Air Campaign in Kosovo, 94 Am. Soc'y Int'l L. Proc. 301 (2000). There is also a consent aspect to this contention in that if an organization chooses to use interstate force, it does so knowing that it is bound by customary international norms.

n85. Brownlie, supra note 82, at 64.

n86. "The Purposes of the United Nations are: 1. To maintain international peace and security ... ." U.N. Charter art. 1, para. 1. For a discussion analyzing the purpose of the UN and of the Charter in light of Articles 2(4) and 51, see McCormack, supra note 41, at 186-190.

n87. Interestingly, some terrorist organizations have sought to obtain legitimacy under international law by splintering into separate factions, such as a political and an operations section, so that the political wing can benefit from a de jure status. Some examples are Sinn Fein in Northern Ireland and the Palestine Liberation Organization.

n88. The International Military Tribunal was conferred the power to try and punish persons who acted in the interests of the European Axis countries, regardless of whether they acted as individuals or as members of organizations and committed any of the following: crimes against peace, war crimes, or crimes against humanity. Const. of the Int'l Mil. Tribunal art. 6, available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (last visited Jan. 25, 2004).

n89. One result has been the proliferation in the number of non-state actors considered subjects of international law, including individuals and non-governmental organizations (NGOs). In certain contexts, the individual is a subject of international law. Brownlie, supra note 82, at 66.

n90. By way of introduction, an example in which public international law evolved to deal with bands of semi-stateless persons who used violent means on a transnational basis to pursue criminal endeavors is that of pirates. See generally Alfred P. Rubin, The Law of Piracy (2d ed. 1998).

n91. Admittedly, the Charter's failure to contemplate warlike behavior by non-state entities that threaten international peace and security creates a "regulatory gap" in public international law. See Mark A. Drumbl, Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order, *80 N.C. L. Rev. 1, 48-49 (2002)*.

n92. Belligerent communities and entities sui generis are just two examples of non-state entities that may have international legal personality. See generally Brownlie, supra note 80, at 59-68.

n93. See Black's Law Dictionary (7th ed. 1999).

n94. Some NGOs have international legal status, e.g., the Holy See, the International Committee of the Red Cross, and the Sovereign Order of Malta. See Karsten Nowrot, Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law, *6 Ind. J. Global Legal Stud. 579, 622 (1999)* (arguing that NGOs should have international legal personality). See Stephan Hobe, Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations, *5 Ind. J. Global Legal Stud. 191 (1997)* for an argument that NGOs should be considered subjects of international law because their conduct is regulated by international law and they are able to submit petitions, file complaints, negotiate conventions, and assist in enforcement measures. Finally, even if NGOs are not generally recognized as having an international status, they likely enjoy a legal status in their municipal states.

n95. In the cases of state-sponsored terrorism, the argument that the relevant terrorist organization should be a subject of international law is even greater.

n96. See Brownlie, supra note 82, at 68. ("The number of entities with personality for particular purposes is considerable.").

n97. See Dinstein, supra note 21, at 222 (citing UN Security Council Resolution 241 for the proposition that the UN has recognized that non-state actors are capable of conducing "armed attacks"). See S.C. Res. 241, U.N. SCOR, Sess. 22d, 1378th mtg., U.N. Doc. S/RES/241 (1967) ("following the armed attacks committed ... by foreign forces of mercenaries"), available at http://www.un.org/documents/sc/res/1967/scres67.htm (last visited Jan. 19, 2004).

n98. Nor does the victim of an attack distinguish between the source of the violence, whether it was a state or a non-state actor.

n99. Glennon, supra note 5, at 550.

n100. This may help to explain why the U.S. pursued a policy of containment vis-a-vis the Soviet Union, which possessed weapons of mass destruction (WMD), but seeks to prohibit rogue regimes such as Iraq and North Korea and terror groups from even possessing such weapons.

n101. For example, see the comments of Assistant Professor Andreas Paulus at the 2002 Proceedings of the Annual Meeting of the American Society of International Law: "I find it highly questionable whether the Charter really intends to differentiate between attacks from state and those from nonstate actors." Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law, Realism and Legalism, 96 Am. Soc'y Int'l L. Proc. 260, 271-72 (2002).

n102. There are two bases for the imposition of criminal law in an international setting: international law tribunals applying international law, or domestic courts applying domestic law extraterritorially. See Brownlie, supra note 82, at 565.

n103. See Brownlie, supra note 82, at 511 (citation omitted). ("States may bear a criminal responsibility for certain categories of wrongdoing ...; and, irrespective of the criminality of the act qua act of state, criminal responsibility of individuals participating may exist under international law.")

n104. See id.; see also Draft Articles on the Responsibility of States for Internationally Wrongful Acts, I.L.C. (2001), at http://www.un.org/law/ilc/texts/State responsibility/ responsibilityfra.htm (last visited Jan. 19, 2004).

n105. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277; Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, at http://www.un.org/icty/legaldoc/index.htm (last visited Jan. 19, 2004); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, Int'l Crim. Trib., 49th Sess., 3453d mtg., Annex at 3-15, U.N. Doc. S/RES 955, available at http://www.ictr.org/wwwroot/default.htm (last visited Jan. 19, 2004). State actors may also be held individually liable through the extraterritorial application of municipal law. See, e.g., *U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997)* (defendant charged with conspiracy to commit racketeering, conspiracy to import and distribute cocaine, distribution of cocaine, manufacture of cocaine, conspiracy to manufacture, distribute, and import cocaine, and traveling in interstate or foreign commerce to promote unlawful enterprise).

n106. See Draft Articles, supra note 104.

n107. See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, I.L.C., I.L.C. Doc. A/1316 (1950), available at http://www.icrc.org/ihl.nsf/WebPRES?OpenView (last visited Jan. 20, 2004).

n108. Article 51 provides that self-help is available "if an armed attack occurs against a Member of the United Nations ... ." U.N. Charter art. 51.

n109. But see John W. Head, Essay: The United States and International Law After September 11, *11 Kan. J.L. & Pub. Poly 1, 2 (2001)* (refuting the suggestion that the Charter does not permit the use of force against non-state actors).

n110. It seems odd to suggest that a state would not have the right to respond to a terrorist act (if terrorists fell outside the use of force paradigm) when it is the terrorists who are the aggressors. The upshot of this argument would effectively punish states for the illegal force used by the aggressor.

n111. The use of force against a non-state entity may "be the only means available to a victim state to terminate the pernicious use of force against it - force that might, in every respect, represent the equivalent of state-sponsored force." Glennon, supra note 5, at 550.

n112. U.N. Charter art. 1, para. 1.

n113. See infra Section II.A.1 for a discussion on the customary international law status of the UN Charter.

n114. See Nicaragua, supra note 40, at 103.

n115. As recognized by the I.C.J. in the Nicaraguan paramilitary case, the use of force regime does not wholly obtain its normative content from the UN provisions. See id.

n116. This discussion presupposes that al-Qaeda is responsible for the September 11 attacks. Given the subsequent representations of Osama bin Laden and other al-Qaeda members, it would not be unreasonable to conclude that the organization is responsible for the attacks. See Beard, supra note 63, at 577. Moreover, responsibility for the attacks is a question of fact that is beyond the scope of this paper. Therefore, representations made by the news media will be taken as true for purposes of this discussion.

n117. See Dinstein, supra note 21, at 189. "Armed attacks by non-State armed bands are still armed attacks, even if commenced only from - and not by - another State." Id. at 222.

n118. See Bob Herbert, Vital Statistics, N.Y. Times, Oct. 22, 2002, at A27.

n119. See The Pearl Harbor Attack, Dept. of the Navy Naval Historical Ctr., at http://www.history.navy.mil/faqs/faq66-1.htm (last visited Jan. 19, 2004).

n120. Study: Terrorist Attacks Could Cost National Economy About $ 600 Billion, Jan. 28, 2002, Associated Press, available at LEXIS, Nexis library, Associated Press file. The cost of the terror attacks to New York City alone is estimated at over $ 30 billion. Amy Westfeldt, Terrorist Attacks on World Trade Center Cost NYC

$ 33 Billion to $ 36 Billion, Experts Say, ASSOCIATED PRESS, Nov.13, 2002, available at LEXIS, Nexis library, Associated Press file.

n121. Approximately 22,000 people, almost exclusively military and civilian Department of Defense personnel, work at the Pentagon. For official information on the Pentagon, see Defenselink, at http://www.defenselink.mil/pubs/pentagon/about.html (last visited Jan. 19, 2004).

n122. For a discussion of the terrorist activities by al-Qaeda against the U.S., see Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, *11 Cardozo J. Int'l & Comp. L. 1, 26-27 (2003).*

n123. See Dinstein, supra note 21, at 189 ("[A] series of pin-prick assaults might be weighed in its totality and count as an armed attack."). One could argue that the attacks of September 11 amounted to no more than "low-level" warfare. This argument might have appeal if the events of September 11 were the full extent of al-Qaeda's activities conducted against the U.S. However, this is not the case. As noted above, whether an attack rises to the level such that the right to self-defense is implicated is a subjective determination. See infra Section II.A.1. Given the loss of 3,016 lives, the massive impact on the American economy, the history of attacks by al-Qaeda against U.S. interests before September 11, 2001, and the continuing military threat posed by the organization, the better argument is that al-Qaeda's actions were reasonably construed as an armed attack that triggered the right to self-defense under Article 51. See id.

n124. U.N. Charter art. 51. The right, of course, would also cease to exist upon the defeat of al-Qaeda.

n125. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at http://www.un.org/Docs/scres/2001/sc2001.htm (last visited Jan. 19, 2004).

n126. S.C. Res. 1373, U.N. SCOR 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), available at http://www.un.org/Docs/scres/2001/sc2001.htm (last visited Jan, 19, 2004). The Council also stated that the "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations ... ." Id. at P5.

n127. S.C. Res. 1373, U.N. SCOR 56th Sess., 4385th mtg., P5; U.N. Doc. S/RES/1373 (2001), available at http://www.un.org/Docs/scres/2001/sc2001.htm (last visited Jan, 19, 2004).

n128. Moreover, the actions of other international organizations affirmed the right to individual and collective self-defense. NATO invoked Article 5 of the Washington Treaty. See NATO's Response to September 11 Chronology, at http://www.nato.int/terrorism/ chronology.htm (last visited Jan. 19, 2004). The Organization of American States (OAS) also recognized the "inherent right of states to act in the exercise of the right of individual and collective self-defense in accordance with the Charter of the United Nations and with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)." Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/Res.1/01, Sept. 21, 2001, available at http://www.oas.org/OASpage/crisis/ RC.24e.htm (last visited Jan. 20, 2004). See also Beard, supra note 63, at 566 (citing Charles Bremner, Europeans Support 'Legitimate' US Action, Times (London, U.K.), Sept., 22, 2001, at 2).

n129. Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, *40 I.L.M. 1281 (2001).*

n130. For a discussion regarding some of the particulars regarding the customary international law rules regarding the use of force, see Nicaragua Case, supra note 40, at 105 ("It is clear that in customary international

law it is not a condition of the lawfulness of the use of force in self-defense [sic] that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed.").

n131. For a discussion on the concept of necessity, see infra Section II.A.2.

n132. In an address to the American people on September 20, 2001, President Bush stated:

"The United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. ...

... Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities ... .

... These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate."

President George W. Bush, Address to Joint Session of Congress, available at *2001 WL 1104160* (F.D.C.H.); see also Rajiv Chandrasekaran, Taliban Rebuffs Pakistani Clerics' Call for bin Laden; Afghan Leader Vows 'Fight Until the End' in 'War With the Infidels' if U.S. Uses Military Force, Wash. Post, Sept. 30, 2001, at A2.

n133. Taliban leader Mohammad Omar reportedly promised that "the Taliban was willing to fight to the death to protect bin Laden from U.S. military forces" and spoke "at length about the 'virtues of going to war with the infidels'." Chandrasekaran, supra note 132, at A2. The Taliban had also rejected previous calls by the UN Security Council to produce the al-Qaeda leader. See, e.g., S.C. Res. 1214, U.N. SCOR, 53d Sess., 3952d mtg., U.N. Doc. S/RES/1214 (1998); S.C. Res. 1267, Sess., 4251st mtg., U.N. Doc. S/RES/1267(1999); S.C. Res. 1333, U.N. SCOR 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

n134. However, legal considerations may dictate policy considerations.

n135. See Dinstein, supra note 21, at 220 (claiming that negotiations must justify a delay in responding with counterforce).

n136. See infra Section II.A.2.

n137. Press Release, White House, President Bush Announces Combat Operations in Iraq Have Ended (May 1, 2003) (transcript available at http://www.whitehouse.gov/news/ releases/2003/05/iraq/20030501-15.html) (last visited Jan. 19, 2004).

n138. Recently six more al-Qaeda suspects were arrested in Pakistan with 350 pounds of explosives. One of the individuals was a highly sought al-Qaeda leader, suspected of being involved in several terrorist bombings, including the USS Cole. See Kamran Khan, Pakistani Police Arrest Six Al Qaeda Suspects, Wash. Post, May 1, 2003, at A23; see also CNN: Al Qaeda Plot Against U.S. Embassy in Manila, Reuters, Sept. 9, 2002. Moreover, the recent attacks in Indonesia suggest that al-Qaeda and related organizations are still operational. See Ellen Nakashima and Alan Sipress, Southeast Asia's New Corps of Suicide Bombers, Wash. Post, Aug. 16, 2003, at A14.

n139. On the eve of September 11, 2003, Al Jazeera Television broadcast a videotape of Osama bin Laden and his chief lieutenant, Ayman al-Zawahiri, in which bin Laden referenced five of the September 11 hijackers and al-Zawahiri "exhorted Iraqi resistance fighters to 'bury' American troops in Iraq." James Risen and David Johnson, Two Years Later: Qaeda Leaders; Bin Laden is Seen with Aide on Tape, N.Y. Times, Sept. 11, 2003, at A1; see also Miral Fahmy, Bin Laden Exhorts Muslims to Fight 'Enemy' U.S., Reuters, Feb. 16, 2003.

n140. For a brief discussion on the recent activities of al-Qaeda that suggests the organization is not defunct, see infra Section III.B.3.

n141. See supra note 77.

n142. For instance, the U.S. response is not limited to killing 3,000 terrorists with four civilian airliners. Somewhat ironically, however, over 3,000 suspected terrorists have been killed or arrested - approximately the same number of persons killed on September 11. See President George W. Bush, 2003 State of the Union Address (Jan. 28, 2003) (transcript available at *2003 WL 187445* (F.D.C.H.)). While such a comparison may have a certain rhetorical poignancy, it is unduly simplistic and not a true measure of proportionality.

n143. The extent that the Taliban were complicitly, if not actively involved, in supporting terrorism bears upon the culpability of the state of Afghanistan under Taliban rule and the right of the U.S. to use defensive measures in that country. Since the scope of this paper focuses on the attack in Yemen against the backdrop of the defensive use of force against al-Qaeda, issues regarding the use of force against the Taliban will not be addressed herein.

n144. See Said Mohammad Azam, Kabul Citizens Eye Bright Future Six Months on from Start of Bombing, Agence France Presse, Apr. 4, 2002; see also Sonia Bakaric, Taliban-Silenced Afghan Musicians Tune into Cultural Revival, Agence France Presse, Oct. 21, 2002. Even the harshest critics of the post-Taliban government admit that the quality of life has improved for many Afghans. See Todd Pitman, Group: Suffering Continues for Women in Afghanistan; Role: Report Says that Gains Since the Taliban's Ouster Have Been Limited, Telegraph Herald (Dubuque, I.A.), Dec. 18, 2002, at C5.

n145. See Westfeldt, supra note 120.

n146. This argument is further supported by the fact that if the U.S. response had been disproportionate, it is likely that al-Qaeda would have been defeated.

n147. While the jus ad bellum governs when a state may resort to force, the jus in bello regulates the modalities of conflict after the initiation of hostilities.

n148. See Best, supra note 44, at 139.

n149. When asked about the objective of war, it is not uncommon to hear a U.S. military member say that the goal is "to kill people and break things." See, e.g., Lisa L. Turner et al., Civilians at the Tip of the Spear, *51 A.F. L. Rev. 1, 11 (2001)* ("The law of war recognizes that the purpose of the military in wartime is killing people and breaking things." (quoting the legal advisor to the Chairman of the Joint Chiefs of Staff)). This saying has more than a degree of truth.

n150. See Sun Tzu, The New Translation 48 (J.H. Huang trans., 1993). A more recent statement of the concept: "The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy." Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive

Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, available at http://www.icrc.org/ihl.nsf/ Web-FULL?OpenView (last visited on March 7, 2003).

n151. LOAC seeks to "prevent things being done in war that might hinder the return to peace ... ." Best, supra note 44, at 154. Thus, it is preferable to make the enemy bend to your will with as little bloodshed and destruction as possible. See Green, supra note 62, at 15.

n152. There is no single definition of war, but most definitions acknowledge that violence is a means, not an end. For a discussion on the definition of war, see generally Dinstein, supra note 21.

n153. Limitation and restraint are the overriding principles of the law of war. Best, supra note 44, at 157.

n154. See id.

n155. See id. at 159.

n156. Military necessity as discussed here is similar to but not the same as the concept of necessity vis-a-vis jus ad bellum discussed above. As defined here, military necessity concerns itself with the application of force against a particular person or object, i.e., the attack in Yemen.

n157. See generally Green, supra note 62, at 348-50. Even Napoleon professed to observe some form of military necessity: "My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal." Best, supra note 44, at 242 (citation omitted).

n158. Green, supra note 62, at 122.

n159. See Best, supra note 44, at 272-73.

n160. Although the concept of military necessity seeks to make battle more humane, it also correlates with effective military strategy.

n161. Professor Green refers to the principle of discrimination as the "principle of identification," which is a distinction without a difference. See Green, supra note 62, at 350.

n162. See id.

n163. See id. at 351.

n164. Id.

n165. The concept of proportionality is commonly misunderstood because the term is often used in the vernacular and not as a term of art. See W. Hays Parks, Air War and the Law of War, *32 A.F. L. Rev. 1, 168 (1990).*

n166. For obvious reasons, it would not be preferable to use a tank round against an individual soldier. However, if the tank was the only weapon available, it would be perfectly lawful under LOAC to target the enemy combatant.

n167. See generally Green, supra note 62, at 351.

n168. Walter Gary Sharp, Sr., Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal, *22 Md. J. Int'l L. & Trade 1, 11-12 (1998).*

n169. See Best, supra note 44, at 129.

n170. See Percy Bordwell, The Law of War Between Belligerents 74 (1908). Dr. Lieber was an international legal scholar and professor at Columbia University who was commissioned by President Abraham Lincoln to draft a definitive statement regulating the conduct of Union forces, partially out of mounting concern for the problems associated with guerrilla warfare. See Parks, supra note 165, at 7; see also BEST, supra note 44, at 155. To view a copy of the Lieber Code, see Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView (last visited Jan. 19, 2004).

n171. Prussia, The Netherlands, France, Russia, Serbia, Great Britain, and Spain all enacted codes during this timeframe. See Green, supra note 62, at 30.

n172. See Parks, supra note 160, at 7.

n173. For a more complete discussion on the conditions that existed in the mid-nineteenth century that gave rise to the promulgation of the Hague and Geneva Conventions, see Best, supra note 44, at 158-59.

n174. One example was a new bullet developed by the Russian government that expanded upon contact with human tissue. It was thought that the new projectile would create unnecessary misery on the battlefield. See Bordwell, supra note 165, at 87; see also Green, supra note 62, at 22.

n175. See Best, supra note 44, at 159.

n176. Bordwell, supra note 165, at 128 (citation omitted).

n177. "The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances." See Saint Petersburg Declaration, supra note 150.

n178. See Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView (last visited Jan. 19, 2004).

n179. Id. art. 9.

n180. The "object [of the conference was] to revise the laws and general customs of war, either with the view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible." Twenty-six states were in attendance. Bordwell, supra note 170, at 129.

n181. See, e.g., Final Act Of the International Peace Conference, July 29, 1899; Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex, July 29, 1899; Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899; Declaration (IV, 1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899; Declaration (IV, 2) Concerning Asphyxiating Gases, 29 July 1899; Declaration (IV, 3) Concerning Expanding Bullets, (July 29, 1899), each available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView (last visited Jan. 19, 2004).

n182. Forty-four nations attended the second conference. BORDWELL, supra note 165, at 193.

n183. Documents on the Laws of War 67 (Richard Guelff and Adam Roberts eds., 3d ed.2000).

n184. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 1910, *36 Stat. 2277*, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague IV"]. The preamble to Hague IV states that "these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants." Id.

n185. See Annex to Hague IV, supra note 184. Although providing for rules to distinguish between belligerents and non-belligerents was not the purpose of the Peace Conferences, it was largely viewed as a positive development. See Geoffrey Best, War and Law Since 1945 46 (1994).

n186. See Best, supra note 44, at 180.

n187. Hague IV, supra note 184. For a discussion of other criteria that were discussed but rejected at the Hague Conference, see Bordwell, supra note 170, at 231-32. Protocol I to the Geneva Conventions has a more flexible definition of combatant in that lawful belligerents do not always need to distinguish themselves from civilians. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, art. 18, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.S.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. However, Protocol I is not discussed here in that the U.S. is not a party to the convention and its status as customary international law is dubious.

n188. A literal reading of the Hague Annex might suggest that membership in an army irrespective of the four criteria is sufficient to obtain lawful belligerent status. See Bordwell, supra note 170, at 228. However, it would be contrary to the purpose of the rules in drawing distinctions to merely allow formal association with an armed force to obtain the protections of LOAC. In support of this argument, an early nineteenth century author noted that in drafting the Hague Conventions it was almost taken for granted that combatants must carry arms openly and observe the laws and customs of war, for it was understood that a soldier in the service of his country would necessarily meet these requirements. See id. at 232. Thus, the better position is that even a member of an army must adhere to the four Hague criteria to merit the status of a lawful belligerent.

n189. The preamble provides in relevant part: "It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice; on the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. Id.

n190. Id. For more information on Fedor Fedorovich Martens, see Best, supra note 44, at 163.

n191. Hague IV, supra note 184.

n192. The Conventions are unquestionably recognized as customary international law and are, therefore, binding upon all states. See Green, supra note 62, at 135.

n193. The movement was spearheaded by Geneva businessman, Jean Henri Dunant, who was horrified by the deplorable field conditions he witnessed during the Italian War in 1939. Mr. Dunant, with three other citizens of Geneva, founded the International Committee of the Red Cross (ICRC) in 1864. See Francoise Bory, Origin and Development of International Humanitarian Law 9 (1982).

n194. Bordwell, supra note 170, at 85.

n195. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, (Aug. 22, 1864), available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView (last visited Apr. 21, 2003).

n196. Bordwell, supra note 170, at 86; see also Best, supra note 44, at 151.

n197. See Green, supra note 62, at 43.

n198. For instance, the four conventions share certain common articles, most notably common Articles 2 and 3. See generally Amelioration for the Condition of the Wounded and Sick of the Armed Forces in the Field, Aug. 12 1949, *6 U.S.T. 3115* (Geneva I); Geneva Convention for the Amelioration for the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, *6 U.S.T. 3219* (Geneva II); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *6 U.S.T. 3317* (Geneva III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, *6 U.S.T. 3516* (Geneva IV) (collectively referred to as the "Geneva Conventions"). It was inevitable that the initial interest in providing for incapacitated belligerents, who usually became prisoners of war, would eventually evolve into the promulgation of standards for the treatment of prisoners of war. See Best, supra note 44, at 154. Protocol I to the 1949 Conventions, although not an insignificant development in humanitarian law, will not be addressed here for two reasons. See generally Protocol I, supra note 187. First, the protocol is not relevant to this discussion because it is not binding upon the U.S. nor Afghanistan (nor al-Qaeda) because these entities are not parties to the 1977 Protocol. Second, the Protocol's status as a matter of customary international law is dubious. The U.S. has repeatedly voiced its objection to various provisions of the convention, including the status of noncombatants, leaving little doubt as to the protocol's status as a matter of customary international law vis-a-vis the U.S. See J.W. Crawford, III, The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems, *21 Fletcher F. World Aff. 101, 107 (1997)* ("At present, there are 143 parties to the Protocol; however, it has yet to gain universal acceptance, as the United States continues to withhold ratification."); Judith G. Gardam, Noncombatant Immunity and the Gulf Conflict, *32 Va. J. Int'l L. 813, 814-15 (1992)* ("The provisions of Protocol I, including the rules relating to the protection of noncombatants, have been strongly opposed by some states, particularly the United States, and the extent to which the customary norm reflects the detailed conventional rules is a controversial issue."); see also Parks, supra note 165, at 84.

n199. See Geneva IV, supra note 198.

n200. Green, supra note 62, at 43.

n201. See generally Geneva IV, supra note 198; see also Bordwell, supra note 170, at 320. The 1938 Draft Convention for the Protection of Civilian Populations Against New Engines of War defined the "phrase 'civilian

population' ... as all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2." Draft Convention for the Protection of Civilian Populations Against New Engines of War, available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView (last visited Jan. 19, 2004).

n202. See Francoise Bouchet-Saulnier, The Practical Guide to Humanitarian Law 42 (2002); see also Green, supra note 62, at 105.

n203. See generally Geneva IV, supra note 198.

n204. See Michael Bothe et al., New Rules for Victims of Armed Conflicts 293 (1982); see also GREEN, supra note 62, at 105.

n205. Thus, a person may qualify as a civilian if he or she is not commanded by a person responsible for his subordinates; does not wear a fixed distinctive emblem; does not carry arms openly; or does not comply with the laws and customs of war. See Annex to Hague IV, supra note 184, 1, ch. 1, art. 1.

n206. The term "unlawful combatant" came into favor after it was first used by the U.S. Supreme Court in *Ex parte Quirin, 317 U.S. 1, 31 (1942),* a case that considered the status of German saboteurs under international law. The Germans were found on American soil and apparently were planning to destroy several factories engaged in producing materiel. The Court's decision is not binding as a matter of international law, but it is nonetheless illustrative. Although the term was recently conceived, states have long grappled with the problem of "irregular combatants" and "marauders." See Michael H. Hoffman, Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law, *34 Case W. Res. J. Int'l L. 227, 228 (2002).*

n207. One example is the existence of pirates. This concept is not developed here, but is merely introduced. See generally Rubin, supra note 90.

n208. Some commentators argue the terms "unlawful combatant" and "quasi-combatant" are misnomers, in that the word "combatant" is a term of art that should be reserved for individuals who satisfy the four criteria under the Hague Annex. See Hoffman, supra note 206, at 228. Arguably, the term "unlawful belligerent" may be more appropriate both as a legal and factual matter. All three terms are used interchangeably here.

n209. When it is impossible to distinguish between civilians and belligerents, "the enemy, unable to distinguish between them and the worst breakers of the peace, has been compelled to resort to measures of punishment which have embittered the struggle and sown the seeds of national distrust and hate." See Bordwell, supra note 170, at 229. The Lieber Code also indirectly touched upon some of the problems and consequences associated with unlawful uses of force: "While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them." Lieber Code, supra note 170, art. 101.

n210. See generally Hague IV, supra note 184; Geneva III, supra note 198; Geneva IV, supra note 198.

n211. See Hague IV, supra note 184.

n212. See Hoffman, supra note 206, at 228.

n213. See Green, supra note 62, at 105.

n214. See generally Hague IV, supra note 184.

n215. See Geneva Conventions, supra note 198.

n216. See Annex to Hague IV, supra note 184.

n217. Ironically, a combatant is immune from legal process for what would otherwise be criminal behavior; yet, he is subject to death without trial at the hands of the enemy - arguably the ultimate sanction.

n218. See Geneva III, supra note 193, art. 4.

n219. See Green, supra note 62, at 197.

n220. For a discussion on some of the differences in rights enjoyed by lawful and unlawful combatants, see Daniel Kanstroom, "Unlawful Combatants" in the United States: Drawing the Fine Line Between Law and War, 30 Hum. Rts., Winter 2003, at 18, 19-21.

n221. For a discussion comparing a war against terrorists with a war against a "legitimate" enemy, legitimus hostis, see Sir Michael Howard, It's Not So Much 'War' - It's More Like a Hunt, Times (London, U.K.), Oct. 2, 2001.

n222. Id. For an analysis of Grotius' view on unlawful belligerents, see Bordwell, supra note 170, at 32.

n223. See e.g., G.A. Res. 217 A (III), U.N. GAOR, Universal Declaration of Human Rights, available at http://www.unhchr.ch/udhr (last visited Apr. 19 2003); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 22, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

n224. See Hague IV, supra note 184; Geneva Conventions, supra note 198, arts. 99-108.

n225. The Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ...." Geneva Conventions, supra note 177, art 2. Moreover, the U.S. government has a policy of complying with LOAC in all armed conflicts. See Implementation of the DOD Law of War Program, Chairman of the Joint Chiefs of Staff Instruction 5810.01A, P 5a (Aug. 27, 1999); see also Standing Rules of Engagement for U.S. Forces, Chairman of the Joint Chiefs of Staff Instruction 3121.01A, A-2 P 1g (Jan. 15, 2000); DOD Law of War Program, Dep't Of Defense Directive 5100.77 (Dec. 9, 1998).

n226. See Annex to Hague IV, supra note 184.

n227. Id.

n228. See By the Laws of War, They Aren't POWs, Wash. Post, Mar. 3, 2002, at B3.

n229. Risen, supra note 16.

n230. International law does not recognize a common definition of "terrorist" or "terrorism." See Jordan J. Paust et al., International Criminal law 995 (2d ed. 2000). However, seemingly most definitions reference the unlawful use of violence against civilians. See John Alan Coban, Formulation of a State's Response to Terrorism and State-Sponsored Terrorism, *14 Pace Int'l L. Rev. 77, 78-79 (2002).*

n231. See Bay, supra note 12.

n232. A leader who plans such attacks is responsible for the violations of the laws of war committed by his subordinates. See *Yamashita v. Styer, 327 U.S. 1, 15-16 (1946)* (holding a Japanese General responsible for the actions of his subordinates); see also Brigadier General Charles J. Dunlap, Jr., USAF, International Law and Terrorism: Some "Qs and As" for Operators, Army Law., Oct.-Nov. 2002, at 23, 30. (asserting that although Adolf Hitler and the Nazi leadership did not fight in the trenches, nobody would argue that their conduct was in accordance with the laws of war).

n233. See Risen, supra note 16.

n234. Id. It is highly unlikely that such a high-ranking al-Qaeda leader would travel with individuals who had absolutely no connection to al-Qaeda. The security risk alone would prevent this from occurring.

n235. See Annex to Hague IV, supra note 184. Without the assistance of his associates or bodyguards, Al-Harethi likely could not have as effectively performed his leadership duties for al-Qaeda, just as any leader relies upon the services of his or her subordinates for assistance.

n236. It has been suggested that some al-Qaeda members wear a black turban that might satisfy the requirement for a distinctive emblem. See John Hendren, Response to Terror; Captives Not POWs, U.S. Contends, L.A. Times, Jan. 22, 2002, at A-1-12; see also Neil P. McNulty, Guantanamo Detainees Don't Qualify for POW Status, Virginian-Pilot (Norfolk, Va.), Feb. 1, 2002, at B11. To the extent that a turban is an emblem, it is not distinctive. It seems problematic that a piece of headwear that seems to be unremarkable, especially when compared to turbans worn by other Muslims, would be considered distinctive. Compare this to the headwear worn by U.S. and Western European military personnel that is not commonly available in civilian stores, not regularly worn by civilians, and has some indicia of rank or branch of service distinguishing it from other head covers.

n237. The al-Qaeda command and control structure discussed and approved terrorist operations, and also considered and approved military operations. See Thomas Geraghty, The Criminal-Enemy Distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Terrorist Attacks, *33 McGeorge L. Rev. 551, 577 (2002).*

n238. The Annex contemplates "command" in the sense that a commander has de jure authority over a person necessary to compel compliance with the laws of war. See George H. Aldrich, Editorial Comments: The Taliban, Al Qaeda, and the Determination of Illegal Combatants, *96 A.J.I.L. 891, 895 (2002).* The Department of Defense's definition of command, as the "authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment," lends support to this interpretation.

n239. As a practical matter, there is some validity to the argument that because these persons were killed we will never be able to verify their identity and, as a consequence, will never be able to definitively ascertain their status under the jus in bello. However, this argument has no bearing on whether an attack may proceed in the

absence of complete information. There is rarely, if ever, complete information on the battlefield. The "fog of war" means that most applications of force will occur only with partial information. Moreover, as discussed infra, states responding to acts of terror should not be hamstrung by a lack of information about organizations that, as a matter of course, conduct clandestine operations in violation of the laws of war. Finally, the premise of the argument is that the U.S. had another option, which it did not. Previous attempts to capture al-Harethi had been unsuccessful. See supra Section I.

n240. See Annex to Hague IV, supra note 184.

n241. This would have obvious implications for the use of force regime discussed in Section II, supra.

n242. See Green, supra note 62, at 105.

n243. See Hoffman, supra note 206, at 228.

n244. See Risen, supra note 16.

n245. As discussed supra note 188, the presumption is that a member of a military will ipso facto comport with the Hague Annex.

n246. See BBC World News, supra note 20.

n247. The element of good faith is introduced to emphasize that a state does not have carte blanche authority to use force against an individual without a reasonable basis in fact or to believe that the person is a lawful target, e.g., a member of a terrorist organization. The author is of the opinion that the notion of good faith is an objective standard, implicit in the application of the jus in bellum in that force cannot be used in a discriminate manner unless the intended target is reasonably believed to be a lawful one.

n248. See supra Section III.B.1.

n249. For instance, lawful combatants are entitled to prisoner of war status and its attendant protections, whereas unlawful combatants are not entitled to such protections. See generally Geneva III, supra note 195; see also Kanstroom, supra note 220.

n250. See supra, Section III.B.1.

n251. For a discussion on the criticisms of the Predator attack, see supra note 2, and accompanying text.

n252. That is, of course, unless the soldier is firing his weapon blindly.

n253. The U.S. attempted to target the Iraqi leadership in a missile strike just a few hours after the U.S.-imposed deadline on the Iraqi regime expired. See Michael Gordon, Setting the Stage, N.Y. Times, Mar. 20, 2003, at A1.

n254. Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, *17 Yale J. Int'l L. 609, 632 n.109 (1992)*. Assassination in peacetime is defined somewhat differently: an intentional killing,

of a specifically targeted individual, for a political purpose. See Tyler J. Harder, Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law, *172 Mil. L. Rev. 1, 5 (2002).*

n255. Dunlap, supra note 232, at 28.

n256. "The essence of treachery is a breach of confidence." Schmitt, supra note 254, at 633. "For instance, an attack on an individual who justifiably believes he has nothing to fear from the assailant is treachery." Id.

n257. See Dunlap, supra note 232, at 28. Allegations of improperly using a white flag have been made against the Iraqis in the current conflict with that country.

n258. "The concept of assassination as a limit on the use of force precludes acts that amount to murder; it does not limit the use of force in self-defense." Abraham D. Sofaer, Playing Games with Terrorists, *36 New Eng. L. Rev. 903, 907 (2002).*

n259. Even applying the relevant definition of assassination during peacetime would likely yield the same result, as the killing was not likely done for political purposes. Al-Harethi was not targeted for his politics, but because he was a member of a violent terrorist organization, whatever his politics may have been.

n260. See, e.g., Review of Legality of Weapons Under International Law, Department of Defense Instruction 5500.15, Oct.16, 1974; see also Weapons Review, Air Force Instruction 51-402, May 13, 1994; Compliance with the Law of Armed Conflict, Air Force Policy Directive 51-4, Apr. 26, 1993.

n261. See infra Section III.B.3.

n262. Bear in mind that the concept of military necessity, as used in this context, is somewhat different from the concept of necessity with regard to the jus ad bellum discussed above.

n263. See Hersh, supra note 2, at 66.

n264. See supra Section III.A.1.

n265. For information on the AGM-114 Hellfire missile, see Fed'n of Am.Scientists, AGM-114 Hellfire, at http://www.fas.org/man/dod-101/sys/missile/agm-114.htm (last visited Apr. 19, 2003).

n266. Civilian vehicles containing combatant personnel are legitimate targets. Green, supra note 62, at 191.

n267. A related example is that the jus in bello would likely permit the targeting of Osama bin Laden even if it meant killing several civilians, although a policy analysis might produce a different result.