

WAR ON TERRORISM: SELF DEFENSE, OPERATION ENDURING FREEDOM, AND THE LEGALITY OF U.S. DRONE ATTACKS IN PAKISTAN

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INTRODUCTION AND HISTORICAL BACKGROUND

Few would deny the fact that Pakistan faces a contemporary existential threat.¹ The writ of the federal government in various parts of the country is becoming increasingly non-existent.² The inception of parallel judicial systems³ coupled with the materialization of accords between the federal

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1. See, e.g., *FOX News Sunday with Chris Wallace* (FOX News Channel television broadcast Mar. 29, 2009) (interview by Chris Wallace with Robert Gates, Sec'y of Def., U.S.), transcript available at <http://www.foxnews.com/story/0,2933,511368,00.html>; *Clinton Cites Al-Qaeda as Key Target in Obama Plan*, NEWS, Apr. 22, 2009, <http://www.thenews.com.pk/updates.asp?id=75615>.

2. *Pakistan: Negotiating Away the Writ of the State*, STRATFOR GLOBAL INTELLIGENCE, Feb. 17, 2009, http://www.stratfor.com/analysis/20090216_pakistan_negotiating_away_writ_state.

3. Khalid Aziz, Op-Ed., *Has Waziristan Stabilized?*, NEWS, Apr. 14, 2009, http://www.thenews.com.pk/editorial_detail.asp?id=117143.

government and Pakistan-based Taliban militias responsible for heinous crimes and acts of terrorism is alarming.⁴ Equally distressing is the determination that these accords are, in actuality, acts of desperation on behalf of the government that further dilute effective control over national territory.⁵ From a human rights perspective, the government is condoning reprehensible and criminal modes of conduct in the heartland of Pakistan by bowing down to radicals, who subscribe to a contorted and purist version of religious law and belief system. Such outsourcing of judicial function, executive authority, and enforcement is in complete contravention of the Constitution of Pakistan and classical Shariah (Islamic) law.⁶

There are doctrinal complexities concerning jurisdiction and sovereignty in the volatile frontier region of Pakistan that borders Afghanistan, as a sizeable parcel of the territory is semi-autonomous as affirmed under the 1973 Constitution of Pakistan.⁷ Numerous Pashtun tribes retain administrative control of this territory and matters have historically been regulated under the Pashtunwali code,⁸ which has been affected by the Salafi,⁹ Wahhabi,¹⁰ and Deobandi¹¹ revivalist movements. This phenomenon, coupled with a lack of sustainable development, is directly responsible for the recent and horrible repression of civilians, the perpetuation of intolerance, and the fostering of militancy in the region.

Historical contingencies are also to blame for the radicalization process that has continued unabated in the tribal belt. The Soviet invasion of Afghanistan during the height of the Cold War turned into a proxy war

4. *Zardari Details Swat Peace Deal*, BBC NEWS, Feb. 17, 2009, http://news.bbc.co.uk/2/hi/south_asia/7894581.stm.

5. Nasim Zehra, *Swat Deal: An Act of Desperation?*, NEWS, Feb. 18, 2009, http://www.the-news.com.pk/daily_detail.asp?id=163192.

6. See *Qazis' Verdict Can't be Challenged in SC*, NEWS, Apr. 16, 2009, http://thenews.jang.com.pk/top_story_detail.asp?Id=21541. But see Akhtar Amin, *Qazi Courts to Work Under High Court: NWFP AG*, DAILY TIMES, Apr. 22, 2009, http://www.dailytimes.com.pk/default.asp?page=2009/04/22/story_22-4-2009_pg7_1. See also PAK. CONST. (1973) art. 175. See generally AL-MAWARDI, *THE ORDINANCES OF GOVERNMENT* (Wafaa H. Wahba trans., 2006); IBN TAIMIYYA, *ON PUBLIC AND PRIVATE LAW* 11–35 (Omar A. Farrukh trans., 1966).

7. See PAK. CONST. (1973) arts. 246–247.

8. Pashtunwali is the code of conduct and the unwritten customary law of the tribal Pashtun community based on the principles of hospitality, honor, and revenge. See NEAMATOLLAH NOJUMI, *THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION* 224 (2002); see MARTIN EWANS, *AFGHANISTAN: A NEW HISTORY* 5 (2001).

9. See YOUSSEF M. CHOUERI, *ISLAMIC FUNDAMENTALISM* 37–39 (1990); BEVERLY MILTON-EDWARDS, *ISLAM AND VIOLENCE IN THE MODERN ERA* 17 (2006).

10. See DAVID BUKAY, *FROM MUHAMMAD TO BIN LADEN: RELIGIOUS AND IDEOLOGICAL SOURCES OF THE HOMICIDE BOMBERS PHENOMENON* 202–05 (2007); see PETER MARSDEN, *THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN* 73 (1998).

11. See MARSDEN, *supra* note 10, at 79–81.

fought between the two world superpowers,¹² resulting in massive flows of money and modern weaponry into Pakistan and Afghanistan without any real accountability.¹³ Subsequent to the Soviet war, Afghanistan was plagued with incessant civil unrest and turmoil, a constant state of political instability, and a complete absence of law and order.¹⁴ The United States, after accomplishing its objective of driving the Soviets out of Afghanistan, completely withdrew all support and aid to Afghanistan, and consequently, necessary international assistance for development and rebuilding the devastated war-torn nation did not materialize.¹⁵ Afghanistan's neighbors actively intruded in its internal affairs to pursue their own objectives.¹⁶ Such intrusion often proved detrimental for Afghanistan and was primarily a product of regional power dynamics. For instance, the Shia community, other ethnic minorities, and Persian speakers in Afghanistan enjoyed the patronage of Iran,¹⁷ whereas Pakistan, along with Saudi Arabia, backed the majority Pashtun community of Afghanistan.¹⁸ The Pashtuns primarily adhere to a conservative version of the Sunni faith and also compose the second largest ethnic group in Pakistan.¹⁹

The Pakistani establishment, including its armed forces and intelligence agencies, strongly supported conservative Sunni radicals and the Taliban movement to gain putative strategic depth through a subordinated Afghanistan and by preempting the formation of a hostile Indian-Afghanistan consortium.²⁰ The Taliban movement was also seen as

12. See generally GEORGE CRILE, *CHARLIE WILSON'S WAR: THE EXTRAORDINARY STORY OF THE LARGEST COVERT OPERATION IN HISTORY* (2003); Parvez Ahmed, *Sacred Violence: Religion and Terror: Terror in the Name of Islam-Unholy War, Not Jihad*, 39 CASE W. RES. J. INT'L L. 759, 780–81 (2007–2008).

13. See KURT LOHBECK, *HOLY WAR, UNHOLY VICTORY: EYEWITNESS TO THE CIA'S SECRET WAR IN AFGHANISTAN 182–90* (1993).

14. *Id.* at 276.

15. See Ahmed, *supra* note 12, at 781.

16. LOHBECK, *supra* note 13, at 276.

17. *Id.* at 275.

18. See TALIBAN AND THE AFGHAN TURMOIL: THE ROLE OF USA, PAKISTAN, IRAN, AND CHINA 82 (Sreedhar et al. eds., 1997); Timur Kocaoğlu, *Could Afghanistan Be a Key to Asian Co-operation and Security?*, 5 PERCEPTIONS 106, 110 (2001), available at <http://www.sam.gov.tr/volume5d.php>; AHMED RASHID, *JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA* 224 (2002); MARSDEN, *supra* note 10, at 53, 145.

19. THE ENCYCLOPEDIA OF RELIGION AND WAR 1 (Gabriel Palmer-Fernandez ed., 2004); HISTORY AND ETHNICITY 233 (Elizabeth Tonkin et al. eds., 1989); Ali Khan, *A Civil War: Obama's Gift to Pakistan*, Aljazeera.com, June 22, 2009, http://aljazeera.com/news/articles/39/A_civil_war_Obamas_gift_to_Pakistan.html; Ahmed Rashid, *Pakistan's Explicit Pro-Pashtun Policy and Pro-Taliban Support*, ANALYST, June 21, 2000, <http://www.cacianalyst.org/?q=node/304>.

20. Steven Simon & Jonathan Stevenson, *Afghanistan: How Much Is Enough?*, SURVIVAL: GLOBAL POLITICS & STRATEGY, Oct.–Nov. 2009, at 47, 48–49 (2009), available at <http://www.iiss>.

a weapon which, if effectively utilized, would bleed India in the troubled Kashmir region located a few hundred kilometers from Afghanistan, where India was committing grave human rights violations in quelling a genuine freedom struggle of independence of the Kashmiri people.²¹ The Taliban movement itself was conceived in the frontier regions of Pakistan and Afghanistan in mushrooming religious schools originally funded by the United States to fight the Soviet invasion of Afghanistan.²² These *madaris* (schools) proved attractive for destitute, impressionable young men because they were provided with basic sustenance, but they were also unfortunately indoctrinated with fanatical ideologies premised on scriptural literalism that transformed many of them into radicals and extremists.²³

Soon civil war engulfed Afghanistan, and eventually the Taliban established effective control over most of the country.²⁴ Initially, they were welcomed by the majority of Afghans because they were able to provide some level of stability and security to the country.²⁵ However, this regime became increasingly repressive and fascist as it systematically violated all norms of universal human rights.²⁶ Yet, in effect, the Taliban regime was condoned and tolerated by the majority of the international community and especially by the United States.²⁷ It was only subsequent to the events of September 11, 2001, once the United States embarked on the War on Terror, that the averred heroic freedom-fighting Mujahedeen, credited for defeating the Soviet Union and triggering its disintegration, became formally reclassified by the United States and many Western nations as an integral component of the global terrorist network and the new enemy of the twenty-first century.²⁸

org/publications/survival/survival-2009/year-2009-issue-5/afghanistan-how-much-is-enough (follow “Get full article here” hyperlink; then follow “View Article (PDF)” hyperlink).

21. See NOJUMI, *supra* note 8, at 131; see generally Sikander Shah, *An In-Depth Analysis of the Evolution of Self-Determination Under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle, Past and Present*, 34 N. KY. L. REV. 29 (2007).

22. See generally STEPHEN TANNER, *AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN* 271–87 (2003); see MUSA KHAN JALALZAI, *TALIBAN AND THE NEW GREAT GAME IN AFGHANISTAN* 130–31 (2002); Febe Armanios, *Islamic Religious Schools, Madrasas: Background*, CONGRESSIONAL RESEARCH SERVICE, Oct. 29, 2003, <http://www.policyalmanac.org/world/archive/madrasas.pdf>.

23. See NOJUMI, *supra* note 8, at 122.

24. See *id.* at 121; see generally JALALZAI, *supra* note 22, at 109–26.

25. See MARSDEN, *supra* note 10, at 115.

26. See *id.* at 115–16.

27. AMIN SAIKAL, *MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* 225 (2004).

28. See *id.* at 227–30.

The advent of the U.S. War on Terror in Afghanistan brought an end to the Taliban regime, but not to the movement.²⁹ As a consequence, Afghanistan returned to a state of anarchy with the authority of the American-instituted Afghan government primarily limited to the capital city of Kabul.³⁰ U.S. and NATO forces have not been successful in controlling any part of Afghanistan.³¹ The region has been flooded with thousands of radical fighters from Central Asia, the Middle East, and other diverse parts of the world that see the region as a religious battlefield and cherish the opportunity to battle the West.³² Given the porous border between Pakistan and Afghanistan, the United States asserts that many such fighters routinely flee into the frontier region of Pakistan where they are provided a safe haven by the local tribal communities.³³ There are also claims that many local fighters from the tribal areas of Pakistan engage with U.S. forces in Afghanistan.³⁴ The veracity of these claims is contestable to some, but irrespective of that determination, one thing is for certain: the fight against terrorism has spilled into Pakistan.³⁵ The outcome of this ideological battle between state and non-state actors has resulted in more radicalization, civilian deaths, and suffering, and in turn threatens fragmentation of a nuclear Pakistan that is also battling an economic meltdown, religious fanaticism, sectarian violence, and secessionist movements.³⁶ The concern therefore, that an implosion of Pakistan threatens international peace and security, is a serious one.

One must analyze the significance and legality of U.S. drone attacks in Pakistan in light of these circumstances. It is quite troubling to witness the United States consistently use force against and violate the territorial

29. THE TALIBAN AND THE CRISIS OF AFGHANISTAN 9 (Robert D. Crews & Amin Tarzi eds., 2008).

30. NABI MISDAQ, AFGHANISTAN: POLITICAL FRAILTY AND FOREIGN INTERFERENCE 269 (2006).

31. See Room for Debate, How Not to Lose Afghanistan, <http://roomfordebate.blogs.nytimes.com/2009/01/26/how-not-to-lose-afghanistan> (Jan. 26, 2009, 11:55); *NATO or Taliban? Who is Winning the War in Afghanistan?*, PAKISTAN DEFENCE, Jan. 2, 2009, <http://www.defence.pk/forums/pakistans-war/20884-nato-taliban-who-winning-war-afghanistan.html>; Mark Tran, *Afghanistan Strategy Must Change, US Commander McChrystal Says*, GUARDIAN, Aug. 31, 2009, <http://www.guardian.co.uk/world/2009/aug/31/general-mcchrystal-afghanistan-bull>.

32. THE TALIBAN AND THE CRISIS OF AFGHANISTAN, *supra* note 29, at 232.

33. See *id.* at 230.

34. See *id.* at 231.

35. See Syed Shoab Hasan, *Centre-Stage in the 'War on Terror'*, BBC NEWS, Mar. 31, 2009, http://news.bbc.co.uk/2/hi/south_asia/7974520.stm.

36. See Jonathan S. Landay, *Pakistan at Risk of Split into Islamist Fiefdoms*, MIAMI HERALD, Apr. 18, 2009, at A14; *Situation Dangerous in Pakistan: Holbrooke*, DAWN NEWS, Apr. 20, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/situation-dangerous-in-pakistan-holbrooke--za>.

sovereignty of a nation that it officially proclaims to be an important ally in its declared fight against global terrorism,³⁷ especially when the Government of Pakistan has explicitly and repeatedly condemned such U.S. attacks as a violation of its territorial sovereignty and as a serious undermining of its own fight against curbing terrorism emanating from Pakistan.³⁸

A diversity of views is presented upon analyzing the reasons behind such unilateral acts of aggression committed against Pakistan by U.S. forces stationed in a foreign country neighboring Pakistan. Vocal critics of U.S. foreign policy maintain, at the risk of oversimplification, that the U.S. attacks on Pakistan are consistent with its past policy and practice of routinely disregarding norms of international law,³⁹ including disrespecting the sovereignty of relatively weak nations when in pursuit of its varied, vague, and hegemonic objectives.⁴⁰ They also assert that the United States has systematically exhibited impatience in having grievances and disputes addressed through multilateral paradigms and processes that enjoy the support of the international community and are based on global consensus while maintaining requisite due process.⁴¹ For these critics, it is troubling that the United States bypassed international institutional involvement when it had been directly affected by the events of September 11, because this time there was United Nations (“U.N.”) sanction of the U.S. position, and international consensus on a suitable course of action was forthcoming.⁴²

37. *Pakistan Poll Results Victory in War on Terror, Says Bush*, DAWN NEWS, Feb. 21, 2008, <http://www.dawn.com/2008/02/21/top12.htm>.

38. *Zardari Vows to Fight Militants*, NEWS, Apr. 7, 2009, <http://thenews.jang.com.pk/print3.asp?id=21372>.

39. See generally JOHN. F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004).

40. See *id.* at 145 (U.S. invasion of Grenada in 1983; U.S. support of rebellion of Contras in Nicaragua). S. Brian Willson, *The Case of Panama: U.S. Continues its Bully Ways as International Outlaw* (1991), <http://www.brianwillson.com/awolpanama.html>.

41. See generally MURPHY, *supra* note 39, at 8 (highlighting U.S. withdrawal from International Court of Justice proceedings after losing in the jurisdictional phase of *Nicaragua v. United States*). See Statement by H.E. Mr. Percy M. Mangoela, Permanent Representative of Lesotho to the United Nations, Before the Plenary of the Fifty-fifth Session of the General Assembly, Oct. 26, 2000, http://www.un.int/lesotho/s_1026_0.htm (“[T]he ICJ continues to enjoy universal support and respect, hence a noticeable increase in the number of cases being referred to it.”).

42. U.S. attacks on Afghanistan were carried out on the basis of self defense when authorization of the use of force was forthcoming under the collective security system of the U.N. under article 42 of the Charter. See generally TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 77 (2005); see James Saura, *Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council*, 26 LOY. L.A. INT’L & COMP. L. REV. 7, 29 (2003) (concluding that “we have lost an opportunity to renew the international commitment to the creation of a new world order based on international law”); see also

For critics, the status of the United States as a hyper power has allowed it to consider itself as not effectively constrained by or subject to rules of international law, even when it has historically enjoyed a preferential status both legally and in practice within international governmental systems.⁴³ The United States, however, mandates that other nations be bound by the same norms of international law that it routinely violates.⁴⁴ This approach undermines the role and effectiveness of important multilateral systems both in the short and long term.⁴⁵ Critics maintain that U.S. foreign policy is, broadly speaking, blindly driven by a dangerous interplay of self-interest and short term objectives that encourages it to act paternalistically and also to unwarrantedly intrude into the domestic affairs of foreign nations.⁴⁶ These unholy alliances between the United States and foreign governments eventually give birth to mutual mistrust and may bring about radical regime changes or even ignite revolutions.⁴⁷ Frequently, U.S. allies transform into foes, or at the very best, the United States is dissatisfied with the performance of these governments and their inability to deliver on its mandate.⁴⁸ U.S. transgressions of international law in the form of reprisals are often a result of such processes taking a turn for the worse and are thus a consequence of its own creation. These observations are substantiated with regard to the use of force when the United States acts either preemptively or in the form of reprisals against governments or other actors who were created or supported by the United States, not far in the distant past, for the pursuit of ulterior motives.⁴⁹

Eric P. J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self Defense?*, 7 J. CONFLICT & SEC. L. 5, 16 (2002).

43. MURPHY, *supra* note 39, at 3, 7 (outlining the United States' absolute unwillingness to have its soldiers and citizens subjected to the jurisdiction of the International Criminal Court).

44. See CHRISTIAN GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 230–31 (3d ed. 2008).

45. See *id.* at 301–02 (explaining that U.S. reluctance to accept and submit to U.N. command undermines the legitimacy and effectiveness of U.N. operations).

46. MAURICIO SOLAÚN, U.S. INTERVENTION AND REGIME CHANGE IN NICARAGUA 14–15 (2005). See Sepehr Shahshahani, *Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?*, 25 B.U. INT'L L.J. 369, 403 (2007).

47. See Shahshahani, *supra* note 46, at 403–04.

48. Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 973–84 (2004).

49. *Id.* at 962–67; William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003) (essay by the State Department Legal Adviser and his assistant basing the legality of the invasion upon Security Council resolutions, while at the same time stating that “a principal objective” of coalition forces in the context of those resolutions was to preempt Iraq’s possession and use of weapons of mass destruction); President George W. Bush, Nationwide Televised Address (Mar. 17, 2008), *transcript available at Bush: ‘Leave Iraq Within 48 Hours’*, CNN NEWS, Mar. 17, 2003, <http://edition.cnn.com/2003/WORLD/meast/03/17/sprj.irq.bush>. *transcript* (“The United States of America has the sovereign authority to use force in assuring its own national security.”).

Conversely, many supporters of such U.S. foreign policy pursue a short-sighted approach when analyzing international relations. Rather than determining the root causes of certain global anathemas and then postulating a workable solution, their approach is centered on addressing symptoms, occasionally by condoning the inappropriate use of force against perceived transgressors, and not adequately factoring in the resulting adverse ramifications. For many of them, the United States is justified and must act as a bulwark to preserve liberal values that are globally threatened by the scourge of international terrorism at all costs.⁵⁰ In progression of this view these supporters of U.S. foreign policy see the drone attacks on Pakistan as completely justified because they perceive the Pakistani Government as unable to constrain a global terrorist threat emanating from within its borders, either because of a lack of determination or inability.⁵¹ Interestingly, many states historically hostile to Pakistan, like India, also support this hawkish position for different strategic interests.⁵²

To an extent, U.S. drone attacks on Pakistan substantiate the claim that the United States is hesitant to rely on other states in fulfilling commitments that promote U.S. objectives. It also supports the assertion that the United States is not constrained to respecting the sovereignty of weaker states when it feels a moderate need to act.⁵³ However, a closer inspection of the issue does highlight a more convoluted state of affairs.

There is some truth to the assertion that the United States and Pakistan might be fighting two completely different wars. Following the events of September 11, Pakistan, under intense U.S. pressure, had no real choice but to assure the United States of unstinted support in the War on Terror

50. Maxwell O. Chibundu, *For God, For Country, For Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 909 (2004); John McCain, *The Road to Baghdad*, TIME, Sept. 9, 2002, at 107. *But see* Rasul Bakhsh Rais, *Under Foreign Influence*, DAILY TIMES (Lahore, Pakistan), Sept. 4, 2007, at 1, available at http://www.dailytimes.com.pk/default.asp?page=2007\09\04\story_4-9-2007_pg3_2.

51. Aryn Baker, *US Stepping Up Operations in Pakistan*, TIME, Sept. 17, 2008, <http://www.time.com/time/world/article/0,8599,1840383,00.html>.

52. Hasan-Askari Rizvi, Editorial, *Terrorism and India's Expanded Agenda*, DAILY TIMES (Lahore, Pakistan), Jan. 11, 2009, at A61, available at http://www.dailytimes.com.pk/default.asp?page=2009%5C01%5C11%5Cstory_11-1-2009_pg3_2 (“At the international level, India is using the global consensus on counter-terrorism to advance its broader foreign policy agenda of maligning Pakistan as an irresponsible state and isolating it.”).

53. See Steve Holland, *Tough Talk on Pakistan from U.S. Democrat Obama*, REUTERS, Aug. 7, 2007, <http://www.reuters.com/article/domesticNews/idUSN0132206420070801> (“Obama said if elected in November 2008 he would be willing to attack inside Pakistan with or without approval from the Pakistani government . . .”).

panning out in Afghanistan.⁵⁴ However, when the Pakistan army was forced to act against tribal militias within its own borders in the Federally Administered Tribal Areas (“FATA”), under U.S. directives, it found itself fighting an unpopular war against a segment of its own population.⁵⁵ This course of action was directly fomenting insurgency and civil unrest within its borders and was overwhelmingly opposed by most segments of Pakistani society.⁵⁶

Until recently, the Pakistan Army had denied the involvement of FATA tribesmen and, to a limited extent, *local* Taliban operating from within its tribal belt as complicit in international terrorism.⁵⁷ Recently, however, local Taliban militias have actively carried out acts of *domestic* terrorism in previously secure centers of Pakistan, in claimed retaliation to U.S. drone attacks.⁵⁸ The Pakistan Government is aware that public sentiment in the nation overwhelmingly supports a peaceful and negotiated settlement to the hostilities playing out in FATA.⁵⁹ The establishment sees

54. AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 28–32 (2008); see GRAY, *supra* note 44, at 112.

55. *Frontline* (PBS television broadcast July 20, 2006) (interview with Steve Coll, Correspondent for *The New Yorker*), *partial transcript available at* <http://www.pbs.org/wgbh/pages/frontline/taliban/interviews/coll.html> (“[W]hen the Pakistan army is fighting the Taliban, they’re fighting cousins . . .”). See also Pamela Constable, *The Taliban Tightens Hold in Pakistan’s Swat Region*, WASH. POST, May 5, 2009, at A1, A8.

56. Omar Waraich, *Time and Money Running Out for Pakistan*, TIME, Oct. 25, 2008, <http://www.time.com/time/world/article/0,8599,1852847,00.html>.

57. RASHID, *supra* note 54, at 269.

58. *Lahore ‘Was Pakistan Taliban Op.’*, BBC NEWS, Mar. 31, 2009, http://news.bbc.co.uk/2/hi/south_asia/7973540.stm [hereinafter *Lahore*].

59. However, recently, the Federal Government has ordered the Armed Forces of Pakistan to neutralize the local Taliban based out of the Swat Valley in the Provincially Administered Tribal Areas (“PATA”). *Pakistan Army Steps Up Swat Offensive*, VOA NEWS, May 8, 2009, <http://www1.voanews.com/english/news/a-13-2009-05-07-voa54-68688002.html>. The armed forces are carrying out a massive armed operation to achieve this objective and presently such use of force enjoys the overwhelming support of the populace. Ashfaq Yusufzai, *PAKISTAN: Local Residents Tacitly Approve of Swat Killing*, INTER PRESS SERVICE, Oct. 1, 2009, <http://www.ipsnews.net/news.asp?idnews=48675>; Masud Khan, *Military Operation in Swat*, PAK INST. FOR PEACE STUD., May 27, 2009, at 2, available at <http://san-pips.com/download.php?f=12.pdf>; *Most of Pakistani Political Parties Support Swat Military Operation*, GlobalSecurity.org, May 18, 2009, <http://www.globalsecurity.org/wmd/library/news/pakistan/2009/pakistan-090518-irna01.htm>. Seemingly, there are reasons why there is a divergence in the Government’s approach and popular support for an armed solution in regions of PATA and not in FATA. PATA enjoys a somewhat different status under the nation’s Constitution. See PAK. CONST. (1973) arts. 246–247. The Malakand division of PATA, where such operations are underway also lies within the heartland of Pakistan and is proximately located a few miles away from the capital of the country and other city centers of Pakistan, unlike the far-fetched FATA border region. Amir Zia, *Recipe for Disaster*, NEWSLINE, May 29, 2009, <http://newsline.com.pk/NewsMay2009/cover4may2009.htm>. Thus, even though many in the Pakistani establishment are willing to tolerate and even promote extremists and armed radicals for strategic reasons, such as to bleed India or exert influence over Afghanistan, they are not willing to let such movements threaten

its present role in the U.S. War on Terror as fueling unsought radicalization and fundamentalism in Pakistan, and that terrorism within Pakistan is actually a consequence of U.S. actions in Afghanistan and Pakistan⁶⁰ and the proxy war fought between the United States and non-state actors, who are primarily foreign terrorists belonging to al-Qaeda and other similar outfits.⁶¹ The establishment in Pakistan realizes that foreign extremists with links to al-Qaeda have been provided with sanctuary in areas of FATA by local Taliban and other extremist groups or tribesmen who were lucratively paid on the condition of providing such services.⁶² It, however, still maintains that such assistance, if systematically provided by members of the local tribal community, was mostly unwitting and without realization of its wrongfulness.⁶³

Many in Pakistan see foreign extremists as exploiting their own status as Muslims and the local customs and traditions of the Pashtunwali code of hospitality and sanctuary to gain protection in the tribal region.⁶⁴ For them, foreign extremists have been highly successful in presenting an ideological and civilizational divide that vilifies the United States and the West by pointing to a biased U.S. foreign policy that consistently undermines the Muslim Community (Ummah).⁶⁵ Relentless drone attacks carried out by the United States in FATA, which have killed scores of

the Pakistani heartland itself. Nahal Toosi & Asif Shahzad, *Strife Threatens Pakistan Peace*, BOSTON GLOBE, May 4, 2009, http://www.boston.com/news/world/asia/articles/2009/05/04/strife_threatens_pakistan_peace. Furthermore, Swati Taliban are viewed by most Pakistanis as miscreants who systemically violate the penal code, whereas the troubles of FATA are seen as stemming from political discrepancies that have extra-judicial or extra-constitutional undertones which can be most effectively addressed through political compromise and dialogue. *Pakistan: Countering Militancy in FATA*, INTERNATIONAL CRISIS GROUP, Oct. 21, 2009, http://www.crisisgroup.org/library/documents/asia/south_asia/178_pakistan___countering_militancy_in_fata.pdf. According to the author, however, most of these distinctions or justifications are illusory in nature.

60. *Lahore*, *supra* note 58.

61. RASHID, *supra* note 54, at 265.

62. *Id.* at 148.

63. *See id.* at 265 (“The tribes on both sides of the border . . . adhere to *Pashtunwali*, the tribal code of honor and behavior, which includes *melmastia*, or hospitality, *nanwati*, the notion that hospitality can never be denied to a fugitive . . .”).

64. *Id.*; *see also* Aryn Baker, *Dangerous Ground*, TIME ASIA, July 10, 2008, at 26, *available at* <http://www.time.com/time/magazine/article/0,9171,1821495-3,00.html> (“In May C.I.A. Director Michael Hayden called the FATA an al-Qaeda ‘safe haven’ . . .”); *Pakistan: Cultivating Locals in the Jihadist Struggle*, STRATFOR GLOBAL, Sept. 19, 2008, http://www.stratfor.com/analysis/20080919_pakistan_cultivating_locals_jihadist_struggle_0 (“The Taliban movement in Pakistan’s northwest, like its Afghan counterpart, derives much of its support and operational security from local populations. This support often allows Taliban militants to blend in with the crowd when they are being pursued by Pakistani police or military.”).

65. *See* Posting of Robert Mackey to The Lede: The New York Times News Blog, <http://thelede.blogs.nytimes.com/2009/05/14/pakistans-daily-show-diplomacy/?apage=2> (May 14, 2009) (“[T]he rise of the Taliban [is] a result of U.S. foreign policy in the region in previous decades.”).

innocent civilians, including women and children, are presented as proof to substantiate such claims by foreign extremists.⁶⁶ In reality, the United States is bombing such areas, albeit quite recklessly, with the aim to neutralize the same foreign extremists or Taliban membership.⁶⁷

The overwhelming majority of Pakistanis correctly do not perceive the indigenous tribal communities of FATA as complicit in the original attacks of September 11 in the United States.⁶⁸ Many also do not subscribe to the view of them being involved in *international* terrorism per se.⁶⁹ For most Pakistanis, U.S. drone attacks on Pakistani soil are continuing as futile acts of reprisals in response to the September 11 attacks nearly a decade ago, which rather than eradicating the threat of global terrorism, will increase it further.⁷⁰ For them, such armed aggression perpetuates insurgency and also gives insurgents a perfunctory reason to defy the writ of the government—the mantra that the government is unable to provide protection to the people of the region against an aggressor United States that attacks civilians with impunity.⁷¹ Furthermore, the defenselessness of the Pakistani government against U.S. armed attacks bolsters the morale of the extremists as proof of the government's inability to move against them

66. Jonathan S. Landay, *Do U.S. Drones Kill Pakistani Extremists or Recruit Them?*, MCCCLATCHY WASH. BUREAU, Oct. 5, 2009, <http://www.mcclatchydc.com/251/v-print/story/65682.html>; see *Counterproductive Drone Attacks*, DAILY MAIL, Feb. 3, 2009, <http://www.dailymailnews.com/200902/03/dmeditorialpage.html>; TARIQ ALL, *THE DUEL PAKISTAN ON THE FLIGHT PATH OF AMERICAN POWER* 242 (2008) (“[T]he largest pool of recruits . . . has been ‘communities antagonized by the local authorities and security forces. . . . [T]he Taliban themselves have claimed that families driven into refugee camps by indiscriminate U.S. airpower attacks on the villages have been the major source of recruits.’”).

67. *Pakistan Taliban Hideout Hit in ‘U.S. Drone Attack’*, GUARDIAN, Apr. 1, 2009, <http://www.guardian.co.uk/world/2009/apr/01/pakistan-missile-strike-taliban>; *Pakistan: Cultivating Locals in the Jihadist Struggle*, supra note 64 (“This has opened up an opportunity for the United States to increase the number of unilateral U.S. operations in Pakistan, which has led to civilian deaths—only helping the insurgency gain support.”).

68. Press Release, Federal Bureau of Investigation, *The FBI Releases 19 Photographs of Individuals Believed to be the Hijackers of the Four Airliners that Crashed on September 11, 01* (Sept. 27, 2001), available at <http://www.fbi.gov/pressrel/pressrel01/092701hjpgic.htm>.

69. Pir Khalid, *The Victims of ‘Great Game’*, ONLINE NEWS, <http://www.onlinenews.com.pk/details.php?id=51317> (last visited Nov. 19, 2009).

70. *Pakistani Taliban Chief Claims U.S. Shooting*, REUTERS, Apr. 4, 2009, <http://www.reuters.com/article/newsOne/idUSTRE5330H420090404>; Alamgir Bhattani, *Baitullah Claims Responsibility for Manawan Attack*, DAWN NEWS, Mar. 31, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/attack-on-police-academy-leaves-8-dead--150-injured--il>.

71. *Islamabad Urged to Concede Its ‘Tacit Approval’ of Drones*, DAWN NEWS, July 10, 2009, <http://www.dawnnews.tv/wps/wcm/connect/dawn-content-library/dawn/news/world/14-islamabad-urged-to-concede-its-tacit-approval-of-drone-attacks-zj-02> (“Official Pakistani sources say that since 2006, the drones have killed only 14 militants and over 700 civilians.”); Jay Solomon et al., *U.S. Plans New Drone Attacks in Pakistan*, WALL ST. J., Mar. 26, 2009, at 3, available at <http://online.wsj.com/article/SB123803414843244161.html> (“concern in Islamabad that such strikes will greatly increase the numbers of civilian casualties and further fuel unrest”).

effectively. This realization provides impetus to the extremists to become more belligerent in their armed struggle.⁷²

Undoubtedly the frontier region of Pakistan and Afghanistan is fraught with complexities and is affected by both regional and international politics, religion, culture, and tradition, among other things. Furthermore, there is no question that international terrorism, whether in the form of state action or non-state action, poses a threat to international peace and security.⁷³ Global terrorism presents a highly convoluted situation and its resolution, however possible, is even more so. The scope of this work, however, is limited to outlining the international law governing the use of force in self defense before determining the legality of the U.S. attacks on Afghanistan and the continued occupation by the United States of the nation under Operation Enduring Freedom. It then moves on to answer the important question of whether U.S. drone attacks on Pakistani soil to eliminate terrorism under the guise of Operation Enduring Freedom are legal under the international law of self defense.

I. INTERNATIONAL LAW GOVERNING THE USE OF FORCE IN SELF DEFENSE AND THE U.S. WAR IN AFGHANISTAN

A. *International Law of Self Defense and Terrorism*

A copious amount of discourse has been generated by international law scholars in determining the legality of U.S. actions under Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom in Iraq. However, most Western scholars agree that the United States' use of force in Afghanistan, in response to the attacks of September 11 on the basis of self defense, was legal.⁷⁴ For some, the grave nature of the September 11

72.

"They are demonstrating that the government of Pakistan is totally ineffective," said Tariq Fatmi, a former Pakistani Ambassador to the United States. "It is further strengthening the extremist sentiments in Pakistan. And of course providing a lot of ammunition for those who would like to place America in the dog house, who want to ascribe all sorts of evil intentions to the United States."

Nick Schiffrin, *Pakistan Urges Obama to Halt Drones*, ABC NEWS, Jan. 24, 2009, <http://abcnews.go.com/International/Inauguration/Story?id=6724182&page=1>.

73. ROBERT P. BARNIDGE JR., NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE 130 (2008); S.C. Res. 57/1440, ¶ 1, U.N. Doc. S/RES/1440 (Oct. 24, 2002) (condemning "in the strongest terms the heinous act of taking hostages in Moscow, the Russian Federation, on 23 October 2002, as well as other recent terrorist acts in various countries, and regard[ing] such acts, like any act of international terrorism, as a threat to international peace and security").

74. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENCE 237 (2005). *But see*

attacks radically altered the use of force paradigm of international law in light of the presence of global terrorism undertaken by elaborate non-state actor-based networks, which resulted in the formation of instant customary international law.⁷⁵ Some believe this justified states to unilaterally attack and violate the sovereignty of particular nations where these networks were perceived to be thriving, both in the form of anticipatory and preemptive self defense even when there existed no immediate need to carry out these attacks.⁷⁶ Other academics view international law governing the use of force as a set of dynamic principles founded at the inception of the U.N. Charter that have been transformed and broadened relative to the need of the hour.⁷⁷ Yet other scholars do not recognize any alteration in the law of self defense, but have re-interpreted the concepts defining self defense and its limits in a constructed manner that synthetically justifies U.S. attacks.⁷⁸

The author views all of these approaches critically. Customary international law, defined in tandem with the legal framework governing the use of force formalized under the U.N. Charter, is still in force and has not undergone any material change.⁷⁹ The narrow confines, on the basis of which the right of self defense can be exercised under article 51 of the U.N. Charter, legally prevail and any dilation of its contours is inadvisable.⁸⁰ These factual and legal determinations can be ascertained from all sources of international law, as will be subsequently elucidated. From an international relations and policy perspective, adopting such a conservative approach is quintessential for purposes of maintaining international peace and security. Forced acquiescence to an expansive right of self defense relative to global terrorism has dangerously allowed some powerful states an excuse to unilaterally and preemptively attack relatively weaker states illegally.⁸¹ Other states have brutally suppressed the right of internal self-determination and civil rights on the pretext of terrorism.⁸²

ANTONIO CASSESE, *INTERNATIONAL LAW* 476 (2005).

75. CASSESE, *supra* note 74, at 475. The author refutes this assertion.

76. *See id.* at 476 (outlining such action as illegal armed reprisals).

77. *See* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002).

78. *See* Michael Byers, *Terrorism, the Use of Force and International Law After September 11*, 51 INT'L & COMP. L.Q. 401 (2002).

79. *See generally* GRAY, *supra* note 44, at 118.

80. *See* Myjer & White, *supra* note 42, at 17.

81. *See* GRAY, *supra* note 44, at 218.

82. *See generally* Shah, *supra* note 21.

Alarming, what has been witnessed is the development of the Bush Doctrine⁸³ and the successive U.S. National Security Strategies, both of which prompt the United States to preemptively attack other states on the basis of vague parameters.⁸⁴ Such developments most directly undermine the legitimacy of the Security Council (“S.C.”), which the majority of developing and Muslim nations alike increasingly view as primarily supportive of neo-colonial agendas.⁸⁵ Without any permanent representation in the S.C., these countries frequently have their grievances blocked by veto, leaving the overall resentment of the population within such states extremely high.⁸⁶ This divide is widening with the realization within the global community of states that many permanent members of the S.C. act unilaterally in contravention of multilateral systems when their own vested interests, or those of their important allies, are at stake.

Historically, before the development of the U.N. Charter, the right of self defense was construed quite broadly. This determination can be gauged from historical state practice.⁸⁷ For instance, numerous states used force preemptively, and their actions were generally accepted and considered legal by the world community.⁸⁸ In the aftermath of World War II and the magnitude of the devastation caused, the U.N. Charter was formulated to clearly reflect altered customary international norms

83. The United States, in putting forward a new “Bush Doctrine,” has extended the right of self defense far beyond its traditional scope. The United States has indicated that “force may be used even where there has been no actual attack, purely in order to pre-empt future, even non-imminent, attacks.” GRAY, *supra* note 44, at 209–10.

President Bush’s doctrine on ‘preventive war’, as spelled out in the 2002 National Security Strategy of the United States, is in reality a new and expanded interpretation of the notion of imminence of armed attack, which affords new possibilities to react in self-defence. In the Presidential document, the new threats are constituted by the possession of Weapons of Mass Destruction (WMD) by States ready to use them and by terrorist movements. Deterrence does not work against the new threats.

Ronzitti, *infra* note 98, at 347–48.

84. See GRAY, *supra* note 44, at 209–16.

85. *The United Nations: An Organ for World Democracy, or Imperial Hangover?* (Nov. 2002), http://india_resource.tripod.com/UN.html.

86. *Indonesia Calls for Muslim Representation on Security Council*, UN NEWS CENTRE, Sept. 28, 2008, <http://www.un.org/apps/news/story.asp?NewsID=28334&Cr=general+assembly&Cr1=debate#>; *US Has Vetoed Dozens of UN Security Council Resolutions to Shield Israel from Criticism*, <http://www.un.org/apps/news/story.asp?NewsID=28334&Cr=general+assembly&Cr1=debate#> (Sept. 27, 2008, 05:01 PKT); see *The United Nations Security Council and the Christian Monopoly*, ISLAMIC HISTORY AND RESEARCH COUNCIL OF INDIA, May 23, 2006, http://www.ihrcindia.com/index2.php?option=com_content&do_pdf=1&id=17.

87. Sikander Ahmed Shah, *The U.S. Attacks on Afghanistan: An Act of Self-Defense Under Article 51?*, 6 SEATTLE J. SOC. JUST. 153, 160–62 (2007).

88. *Id.* (highlighting, as a valid exercise of self defense as viewed by the world community, Britain’s destruction of the Oran fleet of the Vichy French Government to prevent it from falling into the hands of the Germans and potentially being used against Britain).

prohibiting a state from threatening or using force, unless it was solely to exercise the inherent right of self defense.⁸⁹ Under article 2, section 4 of the U.N. Charter, states are to “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.”⁹⁰ Exceptions to this rule are narrowly confined. For instance, article 51 of the U.N. Charter sanctions an interim, but inherent, right to use force if necessary for self defense, but requires immediate notice of all actions to the S.C. and termination of actions as soon as the S.C. takes measures necessary to maintain international peace and security.⁹¹

A state can only exercise its right to use force in self defense under article 51 if an “armed attack occurs” against it.⁹² As an actual armed attack has to be carried out,⁹³ the right to attack another state on the basis of anticipatory or preemptive self defense is not available under the U.N. Charter.⁹⁴ This conclusion admittedly raises difficult theoretical and practical questions in current times when states possess sophisticated missile technology and nuclear weaponry. In the *Case Concerning Oil Platforms*,⁹⁵ the International Court of Justice (“I.C.J.”) clearly required that a state that justifies its use of force on the basis of self defense has the burden of proving the existence of an armed attack.⁹⁶ Furthermore, when an armed attack has come to an end, an attacked state cannot retaliate by

89. However, the Kellogg–Briand Pact of 1928 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact of Paris), 1928, 94 L.N.T.S. 57, did severely constrain the lawful conduct of war. See DINSTEIN, *supra* note 74, at 83.

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

91. U.N. Charter art. 51. Legitimate uses of force are available if the Security Council mandates such action under article 42 of the U.N. Charter as an instance of collective security to maintain or restore international peace and under article 53 and article 107 of the U.N. Charter which relate to World War II-specific interstate use of force.

92. U.N. Charter art. 51; Shah, *supra* note 87, at 160–62; see Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227, 228–30 (2003).

93. See DINSTEIN, *supra* note 74, at 182, 184.

94. *But see* Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law’s Response to Terrorism*, 12 J. CONFLICT & SEC. L. 95, 100 (2007) (“I do not agree with a construction of the United Nations Charter which would read article 51 as if it were worded: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs . . .’ I do not agree that the terms or intent of article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of article 51.” (quoting the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27))). See generally Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

95. *Case Concerning Oil Platforms (Iran v. U.S.)* (“*Oil Platforms*”), 2003 I.C.J. (Nov. 6), 42 I.L.M. 1334, 1356.

96. *Id.*

using armed force because such a response would then qualify as an unlawful reprisal under international law, as evinced by numerous General Assembly (“G.A.”) resolutions,⁹⁷ S.C. resolutions,⁹⁸ and I.C.J. judgments.⁹⁹ This line of reasoning comports with the customary international law of self defense under which a state cannot use force in self defense when there is no immediacy or imminence requiring using such force.¹⁰⁰

Post-World War II, a few States have used force against other states both in response to perceived past attacks and to deter future attacks based on anticipatory and preemptive self defense.¹⁰¹ Justifications presented for such uses of force refer to conventional threats from enemy states¹⁰² and terrorist threats emanating from both state and non-state actors.¹⁰³ However, the international community of states has not been receptive to such justifications.¹⁰⁴

Unfortunately, subsequent to the attacks of September 11, 2001, some of these states have acted opportunistically and have increased the frequency and intensity of such illegal uses of force, in the form of both anticipatory and preemptive attacks, on the premise of fighting global terrorism.¹⁰⁵

While claiming to act in self defense, these states argue that they fulfill the requirements of customary international law in order to derive from the law their authority to undertake such preventive actions. The three requirements of immediacy, necessity, and proportionality relative to self defense were famously outlined in the 1837 *Caroline* incident by U.S. Secretary of State Daniel Webster during the exchange of diplomatic notes

97. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), ¶ 122, U.N. Doc. A/8028 (Dec. 17, 1970) [hereinafter “Declaration Concerning Friendly Relations”] (“States have a duty to refrain from acts of reprisal involving the use of force.”).

98. Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 J. CONFLICT & SEC. L. 343, 354 (2006); see S.C. Res. 188 (XIX), ¶ 1, U.N. Doc. S/5650 (Apr. 9, 1964).

99. See Military and Paramilitary Activities (Nicar. v. U.S.) (“*Nicaragua*”), 1986 I.C.J. 14, 82 (June 27); see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (“*Nuclear Weapons*”), 1996 I.C.J. 226, 246 (July 8) (“[a]rmed reprisals in time of peace . . . are considered to be unlawful”).

100. See *Caroline* Paradigm, *infra* note 106.

101. See *infra* note 153.

102. GRAY, *supra* note 44, at 163 (Israel claiming anticipatory self defense when it attacked an under-construction Iraqi nuclear reactor in 1981).

103. See *infra* note 153.

104. See *infra* note 161; see GRAY, *supra* note 44, at 161.

105. See Eric Schwartz, *U.S. Security Strategy: Empowering Kim Jong-Il?*, 30 LOY. L.A. INT’L & COMP. L. REV. 1, 3 (2008) (“The Bush administration [U.S.] employed the doctrine of preemptive self-defense in the war against Iraq without UN approval.”); GRAY, *supra* note 44, at 242.

between the United States and the United Kingdom.¹⁰⁶ According to Webster, only when the danger posed to a state is “instant, overwhelming, leaving no choice of means, and no moment for deliberation can a state respond.”¹⁰⁷ Interestingly, regarding this conflagration, it is pertinent to point out that Britain was not acting anticipatorily on U.S. territory against the *Caroline* steamboat as the *Caroline* had been “transporting men and materials . . . in support of anti British rebellion in Canada.”¹⁰⁸

The customary international law requirements of immediacy and necessity are inextricably linked.¹⁰⁹ Necessity can only be met when alternative peaceful means of resolving the dispute have been exhausted, given the time constraints involved.¹¹⁰ Proportionality requires the response to be proportional in relation to both the wrong suffered and “the nature and the amount of force employed to achieve the objective or goal.”¹¹¹ Interestingly, as preemptive self defense does away with the requirement of immediacy, it is quite tenuous to argue such rights of action derive from customary international law. Numerous I.C.J. judgments, as in *Military and Paramilitary Activities (Nicaragua v. United States)*,¹¹² *Oil Platforms*,¹¹³ and the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹¹⁴ have recognized the requirements of necessity and proportionality as limits on the right of self defense.

Armed attacks can only be committed by a state or its organs and agents. This principle was clearly upheld by the I.C.J. in *Nicaragua*¹¹⁵ and recently affirmed in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹¹⁶ Non-state actors cannot undertake an armed attack until state sponsorship is present,¹¹⁷ and the state from which the non-state actors are operating

106. See Letter from Daniel Webster to Mr. Fox, Apr. 24, 1841, 29 B.S.P 1129 (1843) [hereinafter *Caroline Paradigm*].

107. *Id.*

108. DINSTEIN, *supra* note 74, at 184–85.

109. Shah, *supra* note 87, at 171.

110. *Id.* at 172.

111. RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 146 (1989); see also *Naulilaa Case (Port. v. F.R.G.)* (1928), 2 R.I.A.A. 1011, 1026–28 (holding that the destruction of several Portuguese installations in its colony of Angola over the course of several weeks in response to a border skirmish in which three German civilians and two officers were shot dead was disproportionate).

112. *Nicaragua*, 1986 I.C.J. 14, 94, 103.

113. *Oil Platforms*, 42 I.L.M. 1334, 1415.

114. *Nuclear Weapons*, 1996 I.C.J. 226, 245.

115. *Nicaragua*, 1986 I.C.J. at 103.

116. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (“*Wall Construction*”), 43 I.L.M. 1009, 1050 (July 9, 2004).

117. See ERICKSON, *supra* note 111, at 32.

cannot be attacked on the basis of self defense, as affirmed in the recent *Case Concerning Armed Activities (Democratic Republic of the Congo v. Uganda)*.¹¹⁸ Furthermore, it was held in *Nicaragua* that the supply of weapons and logistical or other support to non-state actors does not qualify as an armed attack.¹¹⁹ In *Nicaragua*, the I.C.J. held that for a state to be responsible for the activities of contras, it would “have to be proved that that state had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”¹²⁰ However, in *Prosecutor v. Tadić*,¹²¹ the Court held that to be a de facto organ of the state, “overall control” over such outfits would suffice.¹²²

Nicaragua also held that not all forms of use of force qualify as armed attacks justifying self defense,¹²³ and that less grave forms of force can only warrant legitimate countermeasures.¹²⁴ Such countermeasures likely exclude actual uses of force.¹²⁵ This differentiation in attacks has been confirmed in *Oil Platforms*.¹²⁶

It is therefore clear that non-state terrorist organizations, even while residing in one state, cannot undertake armed attacks, for purposes of article 51 and the customary international law of self defense, against another state without the presence of state sponsorship.¹²⁷ Therefore, absent state sponsorship, any resulting use of force on the basis of self defense on the territory of another state to neutralize terrorists without the consent of the attacked state is a violation of article 2, section 4 of the U.N. Charter, and can only be justified if the Charter itself is amended.

118. *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (“*Congo*”), 2005 I.C.J. 1, 147 (Dec. 19); *see also* Ronzitti, *supra* note 98, at 349.

119. *Nicaragua*, 1986 I.C.J. at 126–27.

120. *Id.* at 65 (emphasis added). *See* Vincent-Joel Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT’L L. 615, 620 (2005).

121. *Prosecutor v. Tadić*, July 15, 1999, 38 I.L.M. 1518.

122. Proulx, *supra* note 120, at 621; *Tadić*, 38 I.L.M. at 1545 (stating that no specific instructions for directing individual operations or selection of concrete targets are needed to determine overall control by the foreign state).

123. *Nicaragua*, 1986 I.C.J. at 110; DINSTEIN, *supra* note 74, at 193.

124. *Nicaragua*, 1986 I.C.J. at 110.

125. *See* DINSTEIN, *supra* note 74, at 194.

126. *Oil Platforms*, 42 I.L.M. 1334, 1355.

127. *See id.*, 42 I.L.M. at 1334. A state acting in self defense has to not only fulfill the high burden of proof concerning the commission of an armed attack against it, but it also has to establish that the other (belligerent) state had acted with knowledge regarding the nature of its sponsorship. *See* DINSTEIN, *supra* note 74, at 209 (an attack must be strictly aimed at another country). The Taliban lacked such cognition. *See* DINSTEIN, *supra* note 74, at 236; Eric Margolis, *Bombing Pakistan Back to the Stone Age*, LewRockwell.com, Oct. 3, 2006, <http://www.lewrockwell.com/margolis/margolis52.html>.

Historically, the S.C. has passed numerous resolutions holding terrorist acts as threats to international peace and security.¹²⁸ It has condemned acts of terrorism and called upon states to refrain from providing support to terrorist organizations, prevent and suppress terrorist activities and their financing, and actively coordinate with each other to prevent acts of terrorism emanating from within their borders.¹²⁹

However, no S.C. Resolution has affirmed the right to use force against another state on the basis of terrorism.¹³⁰ For instance, S.C. Resolution 1368 was adopted a day after, and in response to, the attacks of September 11, 2001.¹³¹ It was not passed under Chapter VII, and it referenced in its preamble that both the right of self defense and terrorism were threats to international peace and security.¹³² In the non-operative preamble of Resolution 1373, adopted on September 28, 2001 and passed under Chapter VII,¹³³ the S.C. recognized again that both the right of self defense and terrorist acts were threats to international peace and security, without express reference to Chapter VII.¹³⁴ Neither resolution determined that an armed attack transpired that would authorize the use of force.¹³⁵ Subsequent S.C. resolutions have also focused on tackling international terrorism by peaceful means.¹³⁶ This assertion can be substantiated by analyzing all recent S.C. resolutions passed in relation to terrorism, subsequent to September 11, 2001.¹³⁷ Apart from condemning acts of

128. See GRAY, *supra* note 44, at 227.

129. See, e.g., S.C. Res. 53/1189, ¶ 5, U.N. Doc. S/RES/1189 (Aug. 13, 1998); S.C. Res. 54/1269, ¶ 4, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

130. See GRAY, *supra* note 44, at 227.

131. S.C. Res. 56/1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

132. See *id.*

133. S.C. Res. 56/1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). DINSTEIN, *supra* note 74, at 285; Myjer & White, *supra* note 42, at 10.

134. S.C. Res. 56/1373, *supra* note 133 (“*Reaffirming further* that such acts, like any act of international terrorism, constitute a threat to international peace and security, *Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001) . . .”).

135. See DINSTEIN, *supra* note 74, at 207.

136. See GRAY, *supra* note 44, at 227.

137. See, e.g., S.C. Res. 57/1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002) (concerning the Bali night club); S.C. Res. 1440, *supra* note 73 (concerning Moscow hostage taking); S.C. Res. 58/1465, U.N. Doc. S/RES/1465 (Feb. 23, 2003) (concerning Colombia bomb attack); S.C. Res. 58/1516, U.N. Doc. S/RES/1516 (Nov. 20, 2003) (concerning Istanbul bomb attacks); S.C. Res. 57/1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002) (concerning terrorist actions in Kenya); S.C. Res. 58/1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (general resolution on tackling terrorism with peaceful means); S.C. Res. 59/1530, U.N. Doc. S/RES/1530 (Mar. 11, 2004) (concerning Madrid bombings); S.C. Res. 60/1611, U.N. Doc. S/RES/1611 (July 11, 2005) (concerning London terrorist attacks); S.C. Res. 60/1618, U.N. Doc. S/RES/1618 (Aug. 4, 2005) (concerning terrorist attacks in Iraq); S.C. Res. 60/1617, U.N. Doc. S/RES/1617 (July 29, 2005).

terrorism and determining them to be threats to international peace and security, the resolutions made no reference to the right to use force in self defense, even when al-Qaeda had admitted responsibility for the commission of the attacks.¹³⁸

The General Assembly has taken a similarly peaceful approach in combating terrorism. It has passed or adopted numerous resolutions,¹³⁹ declarations,¹⁴⁰ and conventions¹⁴¹ pertaining to terrorism before,¹⁴² after,¹⁴³ and in response to the attacks of September 11.¹⁴⁴ The General Assembly has condemned international terrorism strongly and has on numerous occasions adopted measures to help eliminate it.¹⁴⁵ It has called for international cooperation between states to prevent, combat, and eliminate terrorism through peaceful means.¹⁴⁶ The General Assembly, like the S.C., has not condoned the use of force against other states on the basis of terrorism. It has on numerous occasions stated that reprisals are unlawful.¹⁴⁷ Importantly, in its resolutions the General Assembly has distinguished between terrorism and the right of people against foreign occupation.¹⁴⁸

138. See, e.g., S.C. Res. 1450, *supra* note 137.

139. See, e.g., G.A. Res. 62/71, U.N. Doc. A/RES/62/71 (Jan. 8, 2008).

140. See Declaration Concerning Friendly Relations, *supra* note 97, at 121, 123; Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

141. See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; see also International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256.

142. G.A. Res. 32/147, ¶ 2, U.N. Doc. A/RES/32/147 (Dec. 16, 1977).

143. G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

144. Condemnation of Terrorist Attacks in the United States of America, G.A. Res. 56/1, U.N. Doc. A/RES/56/1 (July 12, 2001). See GRAY, *supra* note 44, at 193.

145. G.A. Res. 61/40, U.N. Doc. A/RES/61/40 (Dec. 6, 2006).

146. G.A. Res. 62/172, U.N. Doc. A/RES/62/172 (Dec. 18, 2007).

147. See Declaration Concerning Friendly Relations, *supra* note 97, at 122; see generally Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. Doc. A/6014 (Dec. 21, 1965); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981). See also Declaration on the Enhancement of the Effectiveness of the Principle of Non-use of Force in International Relations, G.A. Res. 42/22, U.N. Doc. A/42/766 (Nov. 18, 1987).

148. See GRAY, *supra* note 44, at 235; see also G.A. Res. 46/51, U.N. Doc. A/46/49 (Dec. 9, 1991).

Likewise, state practice and *opinio juris*¹⁴⁹ do not suggest that a state can attack another state on the basis of harboring terrorists,¹⁵⁰ especially when a state acts anticipatorily or preemptively.¹⁵¹ Attacks committed in response to past actions have overwhelmingly been viewed by the community of states as forcible reprisals.¹⁵²

A few states, like the United States and Israel, on the premise of acting in self defense, have utilized force and attacked other states both preemptively and for the commission of past attacks, on the basis that the states harbor or have harbored alleged terrorists.¹⁵³ As a permanent member of the S.C., the United States has been successful in preempting the materialization of any S.C. resolution under Chapter VII that might condemn such U.S. aggression, through either the exercise or threat of its veto.¹⁵⁴ The community of nations, however, has been quite critical of non-permanent member states when they indulge in similar armed aggression.¹⁵⁵ Many states abstain from formally condemning the United States in such circumstances because they fear loss of privileges and assistance from the United States or economic and non-economic punitive retaliatory measures from the sole hegemonic power in the world.¹⁵⁶ Therefore, the somewhat muted world response to such military adventurism should not be viewed as passive acceptance of the U.S. position on the matter.¹⁵⁷

149. “[O]pinion that an act is necessary by rule of law The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.” BLACK’S LAW DICTIONARY 1125 (8th ed. 2005).

150. See GRAY, *supra* note 44, at 195–96.

151. See, e.g., the international condemnation of Israel’s attack on Osirak nuclear reactor in Iraq in 1981, S.C. Res. 36/487, U.N. Doc. S/RES/487 (June 19, 1981).

152. GRAY, *supra* note 44, at 197–98.

153. Some examples: Israeli raid of Beirut Airport in 1968; Israeli preemptive strikes on Palestinian camps in Lebanon in 1975; Israeli attacks on PLO headquarters in Tunis in 1985; U.S. attacks for past attacks and to deter future attacks on Tripoli in 1986; U.S. attacks on Afghanistan and Sudan in response to the attacks on U.S. embassies in Kenya and Ethiopia in 1999. CASSESE, *supra* note 74, at 472–73.

154. See, e.g., the vetoes by the United States, the United Kingdom, and France of a draft resolution condemning U.S. attacks on Tripoli in 1986, CASSESE, *supra* note 74, at 473. See also U.N. Charter art. 27, para. 3 (allowing permanent Security Council members to veto any decisions under Chapter VII even if it is a party to the dispute).

155. S.C. Res. 262 (XXIII), U.N. Doc. S/RES/262 (Dec. 31, 1968) (condemnation of Israel over Beirut airport attack in 1968); see CASSESE, *supra* note 74, at 473 (unanimous condemnation of Israel over 1975 attacks on Palestinian camps in Lebanon); S.C. Res. 40/573, U.N. Doc. S/RES/0573 (Oct. 4, 1985) (condemnation of Israeli attacks on PLO headquarters in Tunis).

156. Shah, *supra* note 87, at 169–70.

157. However, even then there has been moderate condemnation of the United States’ expansive use of force on the basis of self defense, and those states that have refrained from such condemnation

It is in light of this phenomenon that one must critique the level of international recognition of U.S. attacks on Afghanistan in response to the attacks of September 11. The grave nature of the September 11 attacks and the level of devastation caused to the only hegemon in the global community of states rendered it practically impossible for nearly all world nations to openly criticize and question the legality of U.S. actions in Afghanistan, unless the concerned state already had an extremely hostile relationship with the United States.¹⁵⁸ There was immense pressure on the U.S. government by the American populace to stigmatize the perpetrators and substantiate government authority.¹⁵⁹ Most of the world community was willing to accept this outcome as a consequence of geo-political realities; this acceptance, however, is not synonymous with the assertion that the world community recognized the legality of U.S. actions or the principles on which they were based.¹⁶⁰ This was an isolated case of non-legal acquiescence at best by the world order, which is verified by the fact that subsequent to September 11, 2001, an overwhelming majority of states condemned states, including the United States, when force was used in response to past actions or preemptively against nations alleged to have harbored or have had links to alleged terrorists.¹⁶¹

It was not surprising that the United Kingdom and France, traditional U.S. Western allies and concurrent members of NATO, aligned with the United States and actively supported its mode of operation in Afghanistan.¹⁶² What was groundbreaking, however, was the fact that the

have been careful not to adopt the U.S. understanding of self defense. *See* GRAY, *supra* note 44, at 198.

158. *See* GRAY, *supra* note 44, at 193 (“Only Iraq directly challenged the legality of the military action [in Afghanistan].”).

159. *See* DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE ‘WAR ON TERROR’ 25 (Oxford 2008).

160. *See* Shah, *supra* note 87, at 169; *see also* GRAY, *supra* note 44, at 208–09.

161. *See* GRAY, *supra* note 44, at 212 (highlighting opposition of states towards the legality of Operation Iraqi Freedom on the basis of preemptive self defense relative to terrorism); *id.* at 236 (international rejection of the legitimacy of the use of force by Israel when it attacked Syrian positions in Lebanon in 2001 and inside Syria in 2003 on the basis of harboring terrorists); *see also* S.C. Res. 64/1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009); GRAY, *supra* note 44, at 241 (outlining that most states condemned Israeli use of force in Lebanon on the basis of exercising the right of self defense against Hezbollah in 2006 as disproportionate). *See* Press Release, General Assembly, General Assembly Demands Full Respect For Security Council Resolution 1860, U.N. Doc. GA/10809/Rev. 1 (Jan. 16, 2009) (statement of Maria Rubiales De Chamorro, Nicaragua) (General Assembly demanding the “full withdrawal of Israeli forces [from the Gaza strip] and unimpeded provision of humanitarian assistance” to its inhabitants).

162. There are serious conflicts of interest and impartiality concerns when permanent S.C. members make determinations concerning acts of aggression and breach of peace when they are also members of collective security arrangements, such as NATO, which have also been invoked. *See* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. In principle, however, the

other two remaining permanent members of the S.C., Russia and China, were uncharacteristically supportive of the initiation of the U.S. armed campaign in Afghanistan.¹⁶³ Historically these two nations have taken a contrary position to the United States in matters pertaining to foreign policy and international relations and therefore provided the requisite balance of power within the S.C.¹⁶⁴ However, both states were highly supportive of U.S. actions in Afghanistan because of an extraordinary alignment of strategic interests since both Russia and China continue to grapple with secessionist movements from within their own territories in the proximity of Afghanistan.¹⁶⁵ The insurgents belong to ethnically distinct groups that subscribe to the Muslim faith and have been fighting or demanding their inherent right to self-determination for a long period of time.¹⁶⁶ Both Russia and China classify these secessionist movements as embedded with terrorism that enjoy the support of the Taliban and al-Qaeda,¹⁶⁷ and which pose a threat to their territorial integrity.¹⁶⁸

Finally, the S.C.'s acquiescence in the attacks on Afghanistan can also perhaps be attributed to the fact that none of its permanent members officially recognized the Taliban regime, nor were any of them financially or politically invested in Afghanistan sufficiently.¹⁶⁹ Unlike other states in the region, Afghanistan's natural resources, such as oil and gas, cannot be easily exploited due to "civil war and poor pipeline infrastructure."¹⁷⁰ Had it been otherwise, the Taliban would have had considerable leverage in dealing with powerful states of the S.C.

NATO Charter explicitly subordinates itself to the U.N. Charter on such matters. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3, 5 (1999).

163. Paul Dibb, *The Future of International Coalitions: How Useful? How Manageable?*, WASH. Q., Spring 2002, at 131, 139 (2002).

164. See GRAY, *supra* note 44, at 363–64.

165. Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 871 (2000); Sean Yom, *Uighur Muslims in Xinjiang*, FOREIGN POLICY IN FOCUS, Dec. 31, 2001, <http://selfdetermine.irc-online.org/listserv/011213.html>.

166. Yom, *supra* note 165; Johanna Nichols, *Who Are the Chechen?* (1995), http://iseees.berkeley.edu/sites/default/files/u4/bps/_caucasus/_articles/_nichols_1995-chechen.pdf (last visited Nov. 19, 2009).

167. Grant, *supra* note 165.

168. *Id.* (Chechnya for Russia); Xing Guangcheng, *China's Foreign Policy Towards Kazakhstan*, in THINKING STRATEGICALLY: THE MAJOR POWERS, KAZAKHSTAN, AND THE CENTRAL ASIAN NEXUS 107, 111 (Robert Legvold ed., 2003); Seva Gunitskiy, *In the Spotlight: East Turkestan Islamic Movement*, Ctr. for Def. Info., Dec. 9, 2002, <http://www.cdi.org/terrorism/etim.cfm> (Xinjiang Province for China).

169. But see generally Andy Rowell, *Route to Riches*, GUARDIAN, Oct. 24, 2001, <http://www.guardian.co.uk/society/2001/oct/24/warinafghanistan2001.afghanistan>.

170. *Id.*

Predictably, however, muted international criticism of the U.S. attacks on Afghanistan, which were carried out on the basis of self defense in response to terrorism, has had tremendous negative ramifications for both respect for international law and global peace and stability. For instance, it has provided an impetus to many states to freely and disproportionately attack other states on the basis of terrorism either on whim or pretext,¹⁷¹ and it has perpetuated the development of unacceptable attitudes such as the Bush Doctrine, which also allows for use of force against non-imminent threats.¹⁷² For example, the United States justified the long drawn “Operation Iraqi Freedom” on the basis of terrorism.¹⁷³ Disproportionate Israeli armed attacks and incursions in Lebanon¹⁷⁴ and Gaza,¹⁷⁵ which caused immense civilian casualties and suffering, were also based on the same self defense and terrorism connections.¹⁷⁶ These developments greatly endangered international peace and security. What is more disturbing is that this espoused framework of preemptive and retaliatory acts, when justified on the basis of a terrorist connection, however tenuous the connection might be, has serious potential to ignite a much more dangerous armed conflict involving the use of nuclear weapons, for instance between Pakistan and India.¹⁷⁷

171. See GRAY, *supra* note 44, at 212. See also Ban ‘Appalled’ by Gaza’s Damage, BBC NEWS, Jan. 20, 2009, http://news.bbc.co.uk/2/hi/middle_east/7839863.stm (Secretary General of U.N., Ban Ki Moon, critical of Israel for disproportionate use of force); see also Stephanie Nebehay, *U.N. Rights Chief Calls for Gaza War Crimes Probe*, REUTERS U.K., Jan. 9, 2009, <http://uk.reuters.com/article/UKNews1/idUKTRE50851M20090109>; see also *Mystery Over Sudan ‘Air Strike’*, BBC NEWS, Mar. 26, 2009, <http://news.bbc.co.uk/2/hi/africa/7966627.stm> (“Israel’s Prime Minister, Ehud Olmert, did not confirm any raid but said Israel hit everywhere to stop terror. ‘That was true in the north,’ said Mr. Olmert, ‘and it was true in the south . . . Those who need to know, know there is no place where Israel cannot operate.’”). See also GRAY, *supra* note 44, at 237–44 (outlining that Israeli use of force in Lebanon in 2006 on the basis of self defense against Hezbollah was excessive, disproportionate, and beyond legality).

172. GRAY, *supra* note 44, at 212.

173. See GRAY, *supra* note 44, at 217–18, 345 (quoting President Bush in 2003 stating that Iraq was now the “central front on the war against terrorism”); see RASHID, *supra* note 54, at XLIX (“You can’t distinguish between al Qaeda and Saddam when you talk about the war on terror.” (quoting President Bush in 2002 before the Iraqi invasion.)).

174. See GRAY, *supra* note 44, at 241.

175. Richard Falk, *Israel’s War Crimes*, TRANSNAT’L INST., Mar. 1, 2009, <http://www.tni.org> (under the “People” tab, follow “Contributors” hyperlink, then follow “Richard Falk” hyperlink, then follow “Israel’s War Crimes” hyperlink); *Security Council Calls on Israel, Palestinians to End Violence Immediately*, UN NEWS CENTRE, Dec. 28, 2008, <http://www.un.org/apps/news/story.asp?NewsID=29427&Cr=Palestin&Cr1>; *World Leaders React to Israel’s Operation in Gaza*, ANTI-DEFAMATION LEAGUE, Dec. 31, 2008, http://www.adl.org/main_International_Affairs/World_Reactions_Israel_Gaza.htm?Multi_page_sections=sHeading_4.

176. GRAY, *supra* note 44, at 237–38.

177. See JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 137 (2005).

Though some international law scholars would differ,¹⁷⁸ the concept of terrorism remains elusive in international law¹⁷⁹ and continues to be defined in normative ways.¹⁸⁰ This is an extremely important observation as article 51 of the U.N. Charter recognizes a state's inherent right to use force in self defense when an armed attack occurs.¹⁸¹ Therefore, without a definition of terrorism, the determination of whether and which acts of terrorism qualify as armed attacks for purposes of article 51 becomes meaningless.

B. The Legality of U.S. Attacks on Afghanistan

U.S. and British forces commenced their aerial campaign on Afghanistan on October 7, 2001, with the United States proclaiming that it was exercising its inherent right of self defense.¹⁸² What followed was a disproportionate use of force employed by the United States that cannot find a basis in either the U.N. Charter or norms of customary international law. By attacking Afghanistan, the U.S. violated article 2, section 4 of the U.N. Charter.

It is pertinent to note that the S.C. resolutions adopted in the backdrop of September 11¹⁸³ neither mention Afghanistan nor, under Chapter VII of the U.N. Charter, sanction any use of force against any state involved in acts of terrorism.¹⁸⁴ Moreover, although the General Assembly resolution adopted in response to the attacks of September 11 condemned these attacks in the strongest of words, it did not acknowledge any right to use force in response.¹⁸⁵

178. CASSESE, *supra* note 74, at 449.

179. See MOECKLI, *supra* note 159, at 24, 44–48. The Draft Comprehensive Convention on International Terrorism has not progressed due to disagreement between states over the definition of terrorism. *Id.* at 47.

180. *Id.*

181. U.N. Charter art. 51.

182. See Letter Dated 7 October 2001 from [John D. Negroponte] the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); S.C. Res. 1373, *supra* note 134 (the United States reporting its exercise of self defense to the S.C. as required under article 51); Christopher B. Hynes et al., *National Security*, 41 INT'L LAW 683, 685 (2007).

183. S.C. Res. 1368, *supra* note 131; S.C. Res. 1373, *supra* note 134.

184. In contrast, under S.C. Res. 45/678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990), the S.C., acting under Chapter VII, authorized "Member States cooperating with the Government of Kuwait . . . to use all necessary means . . . to restore international peace and security in the area" and achieve Iraq's withdrawal from Kuwait. This mandate has been understood to clearly authorize the use of force against Iraq in case of its non-compliance.

185. G.A. Res. 1, *supra* note 144.

The attacks of September 11 ended that day, but the U.S. reactionary assault on Afghanistan endured for four weeks in the nature of an unlawful reprisal.¹⁸⁶ There was no state sponsorship by the Taliban, the de facto government of Afghanistan, of al-Qaeda and its operations when al-Qaeda was wholly responsible for carrying out the September 11 attacks on U.S. soil.¹⁸⁷ One cannot therefore classify the attacks on the United States as an armed attack carried out by the Taliban regime for purposes of article 51 of the U.N. Charter.¹⁸⁸ The Taliban administration was perhaps guilty of “state toleration” or “state support”¹⁸⁹ of al-Qaeda and its activities,¹⁹⁰ but it neither exercised “effective control,”¹⁹¹ as outlined in *Nicaragua*, nor “overall control,”¹⁹² as presented in the *Tadić* judgment.

Many eminent Western scholars of international law somewhat impetuously determined the Taliban’s responsibility for the events of September 11, either on the basis of dubious facts or unsound reasoning that, generally speaking, ran the risk of fomenting armed aggression globally.¹⁹³ For instance, one prominent international law scholar, though acknowledging the non-involvement of the Taliban regime in any manner in the planning or commission of the attacks of September 11,¹⁹⁴ still determined that the Taliban became accomplices to the attacks because by “refusing to take any measures against al-Qaeda and bin Laden—and continuing to offer them shelter within its territory—Afghanistan endorsed

186. See *Nuclear Weapons*, 1996 I.C.J. 226, 246.

187. John Mueller, *How Dangerous Are the Taliban?*, FOREIGN AFFAIRS, Apr. 15, 2009, <http://www.foreignaffairs.com/articles/64932/john-mueller/how-dangerous-are-the-taliban?page=show>.

188. See *Nicaragua*, 1986 I.C.J. 18, 103–04; see *Wall Construction*, 43 I.L.M. 1009, 1049–50; Ronzitti, *supra* note 98, at 348 (“It is interesting to note that the ICJ *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territories* stated that an armed attack should be attributable to a State to fall under the law of self-defence.”).

189. Shah, *supra* note 21, at 158.

190. See generally *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9) (holding that there is international responsibility towards another state if a state allowed one’s own territory to be knowingly used against the other).

191. *Nicaragua*, 1986 I.C.J. at 64–65.

192. *Tadić*, 38 I.L.M. 1518.

193. GRAY, *supra* note 44, at 194; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 237, 243–44 (2002); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 541 (2003) (“[T]here was virtually no criticism of the 2001 incursions [by the U.S.] into Afghanistan to strike at al-Qa’ida after the Taliban failed to comply with U.N. and U.S. demands to surrender Osama bin Laden and his lieutenants.”); Byers, *supra* note 78, at 408 (stating unequivocally that the Taliban refused to hand over Bin Laden when this was a contestable determination). For an alternative view, see *The Military Campaign*, BBC NEWS, Oct. 23, 2001, <http://news.bbc.co.uk/2/hi/1597509.stm> (“The United States rejects a Taleban offer of talks on handing Osama Bin Laden over to a third country if the bombing stops.”).

194. DINSTEIN, *supra* note 74, at 236.

the armed attacks against the U.S. [and the] . . . Taliban led government assumed responsibility of the terrorist acts,"¹⁹⁵ which was sufficient reason for the United States to invoke the right of self defense against Afghanistan.

According to the author, however, it is contestable that the Taliban regime was completely unwilling to negotiate with the United States either directly or indirectly, such as through a third country like Pakistan, or was also blatantly refusing to take any measure against al-Qaeda or its leadership.¹⁹⁶ It is plausible that the United States had, subsequent or even antecedent¹⁹⁷ to the events of September 11, decided to take armed action against Taliban-Afghanistan, and had no desire to negotiate with the Taliban whatsoever after it was attacked on September 11.¹⁹⁸ Yet, even if the Taliban regime continued to offer a safe haven to al-Qaeda members after September 11, and moreover, had endorsed the terrorist attacks on U.S. soil, these actions for purposes of article 51 of the U.N. Charter do not amount to committing the September 11 attacks themselves. In other words, a state cannot be responsible, post facto and via imputation, for armed attacks against another state that have already occurred without having any material involvement during their commission, when by definition such a priori state involvement is a requirement not only for according blame to a state, but also for the advent of an armed attack under international law.

An interesting question arises at this juncture: did the Taliban regime qualify as a government capable of sponsoring al-Qaeda and its terrorist activities for the purpose of committing an armed attack under international law? Under international law, the existence of a state is determined under two competing theories respectively known as the Constitutive and Declarative Theories of Statehood.¹⁹⁹ The Declarative Theory of Statehood was codified under the Montevideo Convention of

195. *Id.*

196. *See, e.g.,* Shah, *supra* note 21, at 172–74 (The Taliban had requested from the United States credible evidence concerning al-Qaeda's and Osama bin Laden's involvement in the attacks of September 11 and were open to discussing handing over Osama bin Laden to a neutral Muslim country such as Jordan, right after the commencement of U.S. strikes.).

197. George Arney, *U.S. 'Planned Attack on Taleban'*, BBC NEWS, Sept. 18, 2001, http://news.bbc.co.uk/2/hi/south_asia/1550366.stm; David Leigh, *Attack and Counter-Attack*, GUARDIAN, Sept. 26, 2001, <http://www.guardian.co.uk/Archive/Article/0,4273,4264545,00.html>.

198. Daniel Lak, *Analysis: Decoding Taleban's Message*, BBC NEWS, Sept. 30, 2001, http://news.bbc.co.uk/2/hi/middle_east/1571891.stm.

199. CASSESE, *supra* note 74, at 73–74; *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 86–88 (2008).

1933,²⁰⁰ which was ratified by the United States. Furthermore, as opposed to the Constitutive Theory, the Declarative Theory is widely recognized in international law.²⁰¹ State recognition by other states, under the Declarative Theory in contrast to under the Constitutive theory, is not a necessary element in determining the existence of statehood.²⁰²

The question presented, however, is not whether Afghanistan fulfills the requirement of a state, because apart from being a recognized state in the international community of nations, Afghanistan has always been an established member of the U.N. The question presented here is whether the Taliban authorities qualified, or were thus capable of being classified, as the Afghani government when their authority was officially recognized by only three states,²⁰³ albeit regionally important, prior to the attacks of September 11. The response to this query would be in the affirmative, especially when determined under the widely recognized Declarative Theory of Statehood, because the Taliban regime exercised effective control and sovereignty over ninety percent of Afghani territory and population.²⁰⁴ However primordial, the Taliban had in place the only functional system of government in Afghanistan.²⁰⁵ In effect, the Taliban possessed “a central structure capable of exercising effective control over a human community living in a given territory,”²⁰⁶ and indeed enjoyed “effective possession of, and control over, a territory.”²⁰⁷ Therefore, the Taliban as an entity was legally capable of committing armed attacks against other nations.²⁰⁸

200. BROWNLIE, *supra* note 199, at 87 n.10. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 (“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”).

201. BROWNLIE, *supra* note 199, at 88.

202. Convention on Rights and Duties of States art. 3, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 (“The political existence of the state is independent of recognition by the other states.”); *see also* Matthew N. Bathon, Note, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT’L L. 597 (2001).

203. Pakistan, Saudi Arabia, and United Arab Emirates. JAMES J. F. FOREST, COUNTERING TERRORISM AND INSURGENCY IN THE 21ST CENTURY: LESSONS FROM THE FIGHT AGAINST TERRORISM 117 (2007); JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 17 (2002).

204. KAMAL MATINUDDIN, THE TALIBAN PHENOMENON: 1994–1997, at 140 (1999).

205. *Id.* at 140, 144.

206. *See* CASSESSE, *supra* note 74, at 73.

207. *Id.*

208. In fact, absent the commission of an armed attack by the Taliban regime against the United States, the United States’ arming and support of the Northern Alliance rebels and contras would be illegal, as determined by *Nicaragua*. Myjer & White, *supra* note 42, at 7–8.

Additionally, under the Draft Articles on State Responsibility²⁰⁹ adopted by the International Law Commission (“I.L.C.”) and supported by a General Assembly resolution,²¹⁰ the Taliban government would be liable for international wrongful acts perpetrated by it even if its authority was not internationally recognized.²¹¹ The Draft Articles, however, “excludes forcible measures from the ambit of permissible countermeasures”²¹²

Likewise, both the initiation of the U.S. armed campaign in Afghanistan and its continuance were unlawful acts of self defense under customary international law. The U.S. assault on Afghanistan came four weeks after the attacks of September 11. It is hard to fathom how Daniel Webster’s formulation relating to the immediacy and necessity requirements of self-defense, under which a state is allowed to respond in legitimate self-defense²¹³ only when the danger posed to it is “instant, overwhelming, leaving no choice of means, and no moments for deliberation,”²¹⁴ was met.

Additionally, an aerial bombardment campaign throughout Afghanistan employing heavy-handed weaponry causing thousands of civilian

209. Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR Int’l L. Comm’n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001) [hereinafter Draft Articles on State Responsibility].

210. G.A. Res. 56/83, Annex, Agenda Item 162, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (the General Assembly resolution commended the articles “to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.”).

211. Draft Articles on State Responsibility, *supra* note 209, art. 8; moreover, under *Corfu Channel* as determined by the I.C.J., the Taliban regime would be in breach of its obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States,” *Corfu Channel*, 1949 I.C.J. 4, 22. Such a breach, however, does not translate into an armed attack for purposes of article 51. *See also* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29–30, 33–36 (May 24) (upholding Draft Articles on State Responsibility for adopting or approving actions of private persons or entities).

212. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 50, ¶ 4, *in* Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles], available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Actions undertaken by states on the basis of a valid exercise of self defense or necessity preclude wrongfulness under the Draft Articles. States, however, cannot utilize armed reprisal as countermeasures for punishing wrongfulness. *See* DINSTEIN, *supra* note 74, at 226; *see also* Draft Articles, art. 25, ¶ 21 (“[A]s embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of ‘military necessity.’”).

213. *See* Myjer & White, *supra* note 42, at 8 (“[I]mmediacy appears to have been lost . . . [in] the current crisis the attack was over and the response appeared more in the shape of punitive reprisals, actions that are generally viewed as illegal in international law.”).

214. Caroline Paradigm, *supra* note 106.

casualties,²¹⁵ millions of refugees, large-scale destruction of the already decrepit public infrastructure, and tremendous suffering was hardly “necessary.”²¹⁶ A well-planned, targeted ground offensive with commando units would have been more effective in battling al-Qaeda and sympathetic armed militias, and would have kept collateral damage, including civilian casualties, to a minimum.²¹⁷ Moreover, the non-deployment of U.S. ground forces in Afghanistan in order to both minimize troop casualties and cost resulted in the escape of top al-Qaeda and Taliban leaders and the preventable massacre of thousands of Taliban prisoners at the hands of the Northern Alliance forces.²¹⁸ This hardly affected the primary purpose of the United States in attacking Afghanistan—neutralizing the al-Qaeda leadership.

A full-fledged war was also unnecessary because the United States did not earnestly pursue and exhaust all peaceful means of resolution.²¹⁹ Even a staunch consequentialist would find this war unnecessary and counterproductive as both the military campaign and its mode of operation fueled and strengthened the cancer of global terrorism rather than neutralizing it or al-Qaeda. Today, terrorism poses a much more serious threat to all nations, both in the proximity of Afghanistan and elsewhere, and to international peace and security.

215. See RASHID, *supra* note 54, at 97–98.

216. Shah, *supra* note 87, at 176–77.

217. *Id.* at 177.

218. RASHID, *supra* note 54, at 91, 95 (The systematic commission of atrocities by Northern Alliance forces after winning the war in Afghanistan on the Pashtun community in the presence of U.S. silence fueled the re-insurgence of the Taliban.).

219. Although correct initiatives were undertaken in trying to resolve the dispute amicably, S.C. Res. 54/1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (demanding the handover of Osama bin Laden and halting the provision of sanctuary to terrorists) as well as through S.C. Res. 55/1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (mandating the closure of terrorists camps, seizure of Taliban assets abroad and an arms ban) and S.C. Res. 56/1363, U.N. Doc. S/RES/1363 (July 30, 2001) (authorizing monitors for enforcing the arms embargo), more effective measures that might have produced real results were ignored. For instance, Pakistan, which wielded a lot of influence and control over the Taliban, was not adequately pressured to reign in on the Taliban by the United States or the Security Council before the events of September 11. RASHID, *supra* note 54, at 16. Moreover, cultural sensitivities were ignored and tribal custom and the Pashtunwali code of behavior were ridiculed rather than effectively utilized by the United States. President Bush’s message to the Taliban that he would “smoke [the Taliban] out of their holes” if they did not unilaterally meet his demands blatantly challenged Nang (honor) and Ghairat (pride) of the Pashtunwali code of behavior. Naomi Wax, *Ideas & Trends: Notes from Underground*, N.Y. TIMES, Nov. 25, 2001, § 4 (Week in Review), at 6; Nic Robertson, *Afghan Taliban Spokesman: We Will Win the War*, CNN NEWS, May 5, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/05/04/robertson.interview.zabiullah.mujahid/index.html?ir ef=mpstoryview> (“Not long after 9/11, one senior Taliban official told me Osama bin Laden was a pain in the backside. Hard to control, intent on doing his own thing. The only reason they didn’t turn him over was out of fearsome ethnic tribal loyalty known as Pashtunwali.”).

To anyone familiar with the Afghan region and its complexities, the adverse ramifications of Operation Enduring Freedom were expected, given the manner in which it was implemented. To root out terrorism emanating from Afghanistan, vital state and nation-building initiatives were required; a full-scale war was counterproductive and unnecessary. Exacerbating the situation is the U.S. administration's continued avoidance, while occupying Afghanistan, of its obligation to adequately promote effective state- and nation-building.²²⁰ In fact, in order to sustain a cheap war in Afghanistan by deploying insufficient U.S. ground troops, the U.S. administration has funded, promoted, and relied upon ruthless and corrupt local warlords, whose oppressive rule had prompted the original inception of the Taliban from within the lower classes, to defeat al-Qaeda and the Taliban.²²¹ As a result, the Afghan federal government is bankrupt, and its authority virtually non-existent, at the expense of filling up the coffers of these criminal warlords with reconstruction funding.²²² The return of the warlords and their abhorrent rule with U.S. support, coupled with the lack of promised development, has once more left the hapless population of Afghanistan dejected, and has yet again ignited the resurgence of the Taliban movement.²²³

In addition, U.S. operations in Afghanistan were neither proportional in relation to the wrong it suffered, or the nature and intensity of the force it employed to achieve its objectives.²²⁴ First, to retaliate against the events of September 11, the United States launched an all-out war against arguably the least developed nation in the world, and continues to occupy Afghanistan indefinitely under Operation Enduring Freedom, primarily on the same basis of self defense for what transpired on a single day nearly a decade ago. U.S. aerial bombing might have been effective in minimizing military casualties, but came at the cost of massive loss of civilian life and related suffering. Hospitals, mosques, old homes, and even buildings belonging to international aid agencies were bombed, creating millions of Afghan refugees.²²⁵ The weaponry utilized was also controversial; carpet and cluster bombs²²⁶ used were not precision-guided, and daisy cutters, weighing around fifteen thousand pounds each, destroyed everything in a

220. RASHID, *supra* note 54, at 133–34.

221. *Id.* at 129.

222. *Id.* at 136.

223. *Id.* at 135, 137.

224. See ERICKSON, *supra* note 99, at 145.

225. Shah, *supra* note 21, at 176–77.

226. RASHID, *supra* note 54, at 98 (“The United States dropped 1,228 cluster bombs, which released a quarter of a million bomblets that continued to kill or maim civilians years later.”).

six hundred-yard radius.²²⁷ This was hardly a proportional use of weaponry to the Taliban's use of small arms and launch of small-group guerilla tactics.²²⁸

Some see the U.S. war in Afghanistan justifiable on the basis of either humanitarian or democratic intervention, or on the basis of regime change.²²⁹ However, use of force on such grounds is not firmly recognized under international law.²³⁰ Recognition is even more doubtful when states act either unilaterally or with the support of only their allies because of the potential for abuse, rather than according to a multilateral initiative that is undertaken with international consensus.²³¹

II. OCCUPATION OF AFGHANISTAN: ISAF AND OPERATION ENDURING FREEDOM

It is true that the S.C. welcomed regime change in Afghanistan, as evinced from the adoption of S.C. Resolution 1386 on December 20, 2001.²³² Earlier, S.C. Resolution 1378, adopted while the demise of the Taliban was not yet complete, condemned the Taliban for their involvement in terrorism and was supportive of "the efforts of the Afghan People to replace the Taliban regime."²³³ These occurrences, however, are not synonymous with either the view that the basis on which the U.S. used force against Afghanistan was legal per se, or the belief that there was international recognition that U.S. action in Afghanistan was a legitimate exercise of self defense.

227. Associated Press, *U.S. Dropping Huge Bomb on Taliban*, Nov. 6, 2001, available at <http://www.commondreams.org/headlines01/1106-02.htm>.

228. Shah, *supra* note 21, at 176–77. See also MICHAEL VINAY BHATIA & MARK SEDRA, *AFGHANISTAN, ARMS AND CONFLICT: ARMED GROUPS, DISARMAMENT AND SECURITY IN A POST-WAR SOCIETY* 38, 56 (2008); see generally *Two Canadians Die in Afghan Clash*, CNN NEWS, Oct. 15, 2006, <http://edition.cnn.com/2006/WORLD/asiapcf/10/14/afghan.kidnap.nato/index.html>.

229. Similarly, Belgium argued for humanitarian intervention in Kosovo. Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT'L L. 10, 15 (2002). The United Kingdom based its enforcement of the no-fly zones in Iraq for protecting the Kurds in the North and the Shia's in the south of the country on humanitarian intervention. *Id.* at 9–10.

230. See Declaration Concerning Friendly Relations, *supra* note 97 (excludes the right of intervention); see Definition of Aggression, G.A. Res. 3314 (XXIX), art. 5, ¶ 1, Annex, U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) (outlining invalid justifications for committing aggression); see U.N. Charter art. 2, para. 7 (prohibiting U.N. intervention relative to matters essentially within domestic jurisdiction); see *Nicaragua*, 1986 I.C.J. 14, 100. *But see* GRAY, *supra* note 44, at 58–59 (Pro-democratic intervention was explicitly authorized by the Security Council in Haiti, and humanitarian and pro-democratic intervention was condoned by the Security Council in Sierra Leone.).

231. See GRAY, *supra* note 44, at 58–59.

232. S.C. Res. 56/1386, ¶ 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

233. S.C. Res. 56/1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

Deciding whether a lawful exercise of self defense has been employed is a legal and objective determination made in light of the surrounding facts. In making this determination, international state recognition of the resulting state of affairs from the exercise of such use of force is of ancillary, at best, evidentiary value. Furthermore, the belief that there was international state recognition of U.S. action as a valid exercise of self defense is questionable given that most states accepted regime change in Afghanistan on other bases, such as any combination of political, strategic, or human rights considerations.²³⁴ At best, the acceptance of the global community of the resulting state of affairs in Afghanistan was based on non-legal justifications.²³⁵ This acceptance was not of the method that brought about the regime change in Afghanistan—the U.S. military’s use of force in Afghanistan as self defense. Likewise, when the United States and United Kingdom invaded Iraq under Operation Iraqi Freedom in 2003 and toppled the government of Saddam Hussein, the S.C. and other nations accepted the status quo even when this time, all other permanent S.C. members (France, China and Russia) and the overwhelming majority of states had clearly found the war in Iraq to be illegal under international law.²³⁶

While the Taliban regime was collapsing, the S.C. accepted the change of circumstances in Afghanistan and subsequently acted by recognizing and welcoming the U.N.-brokered Bonn Agreement,²³⁷ under which an interim governmental authority in Afghanistan was instituted.²³⁸ On December 20, 2001, under S.C. Resolution 1386, the S.C., acting under Chapter VII, authorized “the establishment for 6 months of an International Security Assistance Force [(“ISAF”)] to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.”²³⁹ The ISAF mandate was subsequently extended for an additional six months,²⁴⁰ but its jurisdiction was not expanded to other areas of Afghanistan because of U.S. opposition.²⁴¹ This was possibly

234. GRAY, *supra* note 44, at 231–32; Rachel Reid, *For Afghan Women, Rights Again at Risk*, HUMAN RIGHTS WATCH, Aug. 18, 2009, <http://www.hrw.org/en/news/2009/08/18/afghan-women-rights-again-risk>; see, e.g., RASHID, *supra* note 54, at 31–32 (discussing Pakistan’s decision to side with the United States for strategic reasons).

235. Shah, *supra* note 87, at 169–70.

236. GRAY, *supra* note 44, at 364.

237. See Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT’L L. 1, 49–51 (2006); S.C. Res. 1373, *supra* note 134.

238. See S.C. Res. 56/1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

239. S.C. Res. 1386, *supra* note 232, ¶ 1.

240. S.C. Res. 57/1413, ¶ 1, U.N. Doc. S/RES/1413 (May 23, 2002).

241. Ahmed Rashid, *U.S. Placing Greater Emphasis on Economic Stabilization in Afghanistan*,

because the United States felt that such expansion of ISAF jurisdiction would cause interference to Operation Enduring Freedom and the capture of al-Qaeda members.²⁴² In August 2003, NATO took command of ISAF.²⁴³ Eventually, however, in October 2003 under S.C. Resolution 1510,²⁴⁴ ISAF jurisdiction was extended beyond Kabul²⁴⁵ and then extended to the whole of Afghanistan by October 2006.²⁴⁶ Periodically, numerous S.C. resolutions have extended the ISAF mandate for additional periods of time.²⁴⁷

ISAF is a U.N.-mandated peacekeeping force charged with providing security and assistance in state- and nation-building by facilitating the reconstruction of Afghanistan.²⁴⁸ ISAF has, however, been extensively involved in aggressive and proactive combat operations against Taliban insurgents. Numerous questions arise regarding the creation of ISAF and its course of conduct. Is ISAF, by involving itself in full-scale combat operations, overreaching the confines of its mandate?²⁴⁹ If ISAF's mandate allows for aggressive use of force beyond self defense under Chapter VII, then is such afforded authority legal under the U.N. Charter? In other words, can peacekeeping or peacemaking forces be given Chapter VII enforcement functions? If so, then is such a course of action advisable, keeping in mind the negative experiences and serious problems faced in Yugoslavia and Somalia where similar peacekeeping and enforcement operations were underway contemporaneously?²⁵⁰ Though such queries

EURASIANET, Sept. 6, 2002, <http://www.eurasianet.org/departments/business/articles/eav060902.shtml>.

242. Rashid, *supra* note 241.

243. Harris, *supra* note 237, at 52.

244. S.C. Res. 58/1510, ¶ 1, U.N. Doc. S/RES/1510 (Oct. 13, 2003).

245. Press Release, Security Council, Security Council Seeks Expansion of Role of International Effort in Afghanistan, To Extend Beyond Kabul, U.N. Doc. SC/7894 (Oct. 13, 2003).

246. Security Council, *Report of the Security Council Mission to Afghanistan, 11 to 16 November 2006*, ¶ 13, U.N. Doc. S/2006/935 (Dec. 4, 2006).

247. See S.C. Res. 1386, *supra* note 232, ¶ 1; S.C. Res. 1413, *supra* note 240, ¶ 1; S.C. Res. 57/1444, ¶ 1, U.N. Doc. S/RES/1444 (Nov. 27, 2002); S.C. Res. 1510, *supra* note 244, ¶ 3; S.C. Res. 59/1563, ¶ 1, U.N. Doc. S/RES/1563 (Sept. 17, 2004); S.C. Res. 60/1623, ¶ 1, U.N. Doc. S/RES/1623 (Sept. 13, 2005); S.C. Res. 61/1659, U.N. Doc. S/RES/1659 (Feb. 15, 2006); S.C. Res. 61/1707, ¶ 1, U.N. Doc. S/RES/1707 (Sept. 12, 2006); S.C. Res. 62/1776, ¶ 1, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

248. RASHID, *supra* note 54, at 173 (quoting Kofi Annan who describes the objective of U.N. peace-keeping operations to integrally include state and nation building).

249. NATO has conducted thousands of airstrikes on Taliban positions as part of its counterinsurgency measures. For example, NATO launched Operation Medusa in September 2006 to clear Panjwai. RASHID, *supra* note 54, at 363; see also *US Opens 'Major Afghan Offensive'*, BBC NEWS, July 2, 2009, http://news.bbc.co.uk/2/hi/south_asia/8129789.stm (NATO's major offensive in Helmand province against the Taliban).

250. See GRAY, *supra* note 44, at 289–92.

are extremely important to analyze, discussion of them is outside the ambit of this Article.

In contrast to ISAF, Operation Enduring Freedom was never authorized by the S.C.²⁵¹ The United States, however, justifies the continued and indefinite presence of its forces and its actions under this operation on Afghan soil on the basis of exercising its right of self defense against terrorists responsible for the September 11 attacks.²⁵² Routinely, U.S. forces preemptively attack insurgents or other militants classified by them as al-Qaeda members or their sympathizers, with the claimed objective of rooting out global terrorism.²⁵³ Collateral damage and civilian deaths in such military action and armed exchanges continue to be alarmingly high.²⁵⁴ The United States has been consistently criticized, at times even by the weak Afghan government that it helped institute, for wanton and reckless attacks that have to date claimed the lives of scores of innocent civilians.²⁵⁵ Moreover, U.S. forces working under the auspices of Operation Enduring Freedom have been accused of involvement in the extrajudicial killings of al-Qaeda members and Taliban fighters.²⁵⁶

Numerous U.S. military prisons have been established in Afghanistan, with the Bagram Air Base facility alone holding over six hundred prisoners, the majority of whom are Afghan nationals.²⁵⁷ All of these

251. See Saura, *supra* note 42 (concluding that “notwithstanding the attacks against the United States there can be no legal justification for Operation Enduring Freedom without the Council’s explicit consent”).

252. That the presence of U.S. forces in Afghanistan under Operation Enduring Freedom is justified on the basis of consent of the Afghanistan government, see Ronzitti, *supra* note 98, at 352, 357–58. See Christine Gray, *The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA*, 5 CHINESE J. INT’L L. 555, 557 (2006) (“[I]t is not entirely clear whether the Security Council . . . accept[s] the legality of Operation Enduring Freedom because of the consent of the Afghan government to its presence and operations.”); Saura, *supra* note 42, at 22, 26–27.

253. *U.S. Military Claims 10 Taliban Killed in Afghanistan Clashes*, KHALEEJ TIMES ONLINE, Nov. 26, 2008, http://www.khaleejtimes.com/DisplayArticleNew.asp?section=international&xfile=data/international/2008/november/international_november1911.xml.

254. *US to Review Afghan Air Strikes*, BBC NEWS, May 11, 2009, http://news.bbc.co.uk/2/hi/south_asia/8042642.stm.

255. *Id.*; *Afghanistan: US Investigation of Airstrike Deaths ‘Deeply Flawed’*, HUMAN RIGHTS WATCH, Jan. 15, 2009, <http://www.hrw.org/en/news/2009/01/15/afghanistan-us-investigation-air-strike-deaths-deeply-flawed>.

256. Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J. CONFLICT & SECURITY L. 37, 62–67 (2002).

257. *Foreign Detainees ‘Have US Right’*, BBC NEWS, Apr. 2, 2009, <http://news.bbc.co.uk/2/hi/americas/7979885.stm>; Ben Farmer, Philip Sherwell & Dean Nelson, *Afghanistan’s ‘Guantanamo’ Poses New Prison Problem for Barack Obama*, TELEGRAPH, Jan. 24, 2009, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/4332499/Afghanistans-Guantanamo-poses-new-prison-problem-for-Barack-Obama.html>. Other similar facilities established by the United States include the Kandahar detention center at the Kandahar airport and at least a dozen sub-jails at U.S. fire bases in the mountains. See RASHID, *supra* note 54, at 298.

prisoners are being held without charge and without being accorded any due process of law.²⁵⁸ Many such detainees have been routinely subjected to torture,²⁵⁹ resulting in some reported deaths,²⁶⁰ while the culprits responsible for carrying out such abuses have escaped real accountability.²⁶¹ Additionally, many private contractors have been given the authority to carry out interrogations of prisoners and run jails.²⁶² Many of these individuals were bounty hunters and have been found guilty of torturing and murdering many Afghans who were in their custody.²⁶³ In violation of the Geneva Conventions, the United States avoids according these captives “prisoner of war” status by classifying them as unlawful enemy combatants.²⁶⁴

The practice of torture and extrajudicial killing is even more prevalent in the vast number of secret CIA prisons that are present in Afghanistan and elsewhere.²⁶⁵ These prisons are known as “Black Sites” because of the complete lack of accountability and transparency of what transpires there.²⁶⁶ The occupation of Afghanistan by U.S. forces under the aegis of Operation Enduring Freedom, which many Afghans and critics view as a

258. Farmer, Sherwell & Nelson, *supra* note 257.

259. Duncan Campbell & Suzanne Goldenberg, *Afghan Detainees Routinely Tortured and Humiliated by US Troops*, GUARDIAN, June 23, 2004, <http://www.guardian.co.uk/world/2004/jun/23/usa.afghanistan3>; see, e.g., Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. TIMES, Aug. 5, 2008, at A6; *HRCF Blasts US for Afia’s Custody*, DAWN NEWS, Aug. 6, 2008, <http://www.dawn.com/2008/08/06/nat10.htm>.

260. At least eight Afghan prisoners have died in U.S. custody. RASHID, *supra* note 54, at 301–02; *U.S. Military Pledges Afghan Prison Reform*, BALT. SUN, June 15, 2004, <http://www.baltimore.sun.com/news/bal-te.afghan15jun15,0,3216889.story>.

261. *US: Failure To Provide Justice to Afghan Victims*, HUMAN RIGHTS WATCH, Feb. 14, 2007, <http://www.hrw.org/en/news/2007/02/14/us-failure-provide-justice-afghan-victims>.

262. RASHID, *supra* note 54, at 304.

263. *Id.*

264. Under article 4, section 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, the Taliban qualifies as an integral part of the armed forces. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see AMNESTY INT’L, UNITED STATES OF AMERICA: MEMORANDUM TO THE U.S. GOVERNMENT ON THE RIGHTS OF PEOPLE IN U.S. CUSTODY IN AFGHANISTAN AND GUANTANAMO BAY 32 (2002), available at <http://www.amnesty.org/en/library/info/AMR51/053/2002>; see also John Cerone, *Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings*, ASIL INSIGHTS, Jan. 2002, at n.4, http://www.asil.org/insigh81.cfm#_edn6 (“The lack of recognition of the Taleban by the U.S. would not appear to deprive Taleban fighters of POW status. Article 4(A)(3) includes ‘Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.’”).

265. RASHID, *supra* note 54, at 303–04; *Secret Prison: Obama’s Order to Close ‘Black Sites’*, GUARDIAN, Jan. 23, 2009, <http://www.guardian.co.uk/world/2009/jan/23/secret-prisons-closure-obama-cia>.

266. Examples include: the secret detention center located at the former Ariana hotel in central Kabul and the Salt Pit located at the brick factory on the outskirts of Kabul. See RASHID, *supra* note 54, at 303–04.

belligerent occupation, is in violation of the law of occupation under international humanitarian law.²⁶⁷ U.S. forces are also guilty of blatantly disregarding and systematically contravening the international law of human rights.²⁶⁸

The legality of Operation Enduring Freedom can also be challenged on the basis of article 51 of the U.N. Charter. Article 51 allows a state to act in self defense only until “the S.C. has taken measures necessary to maintain international peace and security.”²⁶⁹ With the establishment of a large and multilateral ISAF in Afghanistan mandated by the U.N. that exercises both peacekeeping and enforcement functions, the “necessary measures” requirement relative to article 51 has been fulfilled. Therefore, the continued presence of U.S. forces in Afghanistan under Operation Enduring Freedom is unwarranted under the U.N. Charter.²⁷⁰

With the progression of time, the mandates of peacekeeping and stabilization of ISAF, NATO, and the inchoate Operation Enduring Freedom are increasingly appearing façade-like, veiling attempts to neutralize insurgents who are opposed to the West-backed government in Afghanistan.

III. THE LEGALITY OF U.S. DRONE ATTACKS IN PAKISTAN

As part of its global War on Terror, U.S. Predator drone planes carry countless sorties over Pakistan and regularly bomb the Federally Administered Tribal Areas of Pakistan with Hellfire missiles.²⁷¹ Credible

267. Hague Convention IV (1907) art. 42 (“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”); Third Geneva Convention, *supra* note 264, art. 13 (“Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”); *see generally* Harris, *supra* note 237.

268. AMNESTY INT’L, UNITED STATES OF AMERICA: CRUEL AND INHUMAN: CONDITIONS OF ISOLATION FOR DETAINEES AT GUANTÁNAMO BAY (2007), available at <http://www.amnestyusa.org/document.php?id=ENGAMR510512007&lang=e>; *see generally* AMNESTY INT’L, UNITED STATES OF AMERICA: NO SUBSTITUTE FOR *HABEAS CORPUS*: SIX YEARS WITHOUT JUDICIAL REVIEW IN GUANTÁNAMO (2007), available at <http://www.amnesty.org/en/library/asset/AMR51/163/2007/en/e7d8e267-d35e-11dd-a329-2f46302a8cc6/amr511632007en.html>.

269. *See* U.N. Charter art. 51.

270. Hynes, *supra* note 182, at 686.

271. RASHID, *supra* note 54, at 97; Jeremy Page & Zahid Hussain, *Obama Urged to Escalate Drone Bombing Raids Deep Into Pakistan*, TIMES ONLINE, Mar. 19, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article5934041.ece>; Tom Coghlan, Zahid Hussain & Jeremy Page, *Secrecy and Denial as Pakistan Lets CIA Use Airbase to Strike Militants*, TIMES ONLINE, Feb. 17, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article5755490.ece>.

recent reports suggest that the U.S. administration is seriously considering expanding the scope of such attacks to other parts of Pakistan.²⁷² The United States claims that these attacks effectively weaken the strength and resolve of Taliban insurgents and al-Qaeda fighters. While such targeted strikes have resulted in the killing of numerous high level operatives of al-Qaeda,²⁷³ they have also resulted in the deaths of scores of innocent civilians, including women and children.²⁷⁴

The Prime Minister of Pakistan, Yousuf Raza Gilani, has on numerous occasions officially condemned such attacks, and has termed them a violation of the sovereignty of Pakistan and a dangerous course of action that fuels militarism.²⁷⁵ He has urged the U.S. administration to immediately bring a halt to such operations.²⁷⁶ Recently, while responding to reports claiming that Pakistan had privately backed such operations and allowed the use of its airfields,²⁷⁷ the Prime Minister categorically denied any such agreement between the two nations.²⁷⁸ The legislative Parliamentary Committee on National Strategy echoed the same sentiment, calling for an immediate end to U.S. attacks on Pakistani soil and terming them a violation of the nation's territorial integrity.²⁷⁹

272. Page & Hussain, *supra* note 271.

273. *CIA Drone Said to Kill Al-Qaida Operative*, NBC NEWS, May 14, 2005, <http://www.msnbc.msn.com/id/7847008/>; see *U.S. Airstrikes in Pakistan Called 'Very Effective'*, CNN NEWS, May 18, 2009, <http://edition.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/index.html>.

274. Aislinn Simpson, *Pakistani Fury as Suspected US Drone Attack Kills 12*, TELEGRAPH, Sept. 12, 2008, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/2827257/Pakistani-fury-as-suspected-US-drone-attack-kills-12.html>.

275. Simon Hooper, *Pakistan: U.S. Must Halt Drone Attacks*, CNN NEWS, Jan. 29, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/01/28/davos.pakistan.pm/index.html>; *'Militant Deaths' in US Drone Hit*, BBC NEWS, July 3, 2009, http://news.bbc.co.uk/2/hi/south_asia/8131938.stm.

276. *Id.*

277. Coghlan, Hussain & Page, *supra* note 271.

278. *Pakistan: U.S. Must Halt Drone Attacks*, *supra* note 275 (“‘I want to put on record that we do not have any agreement between the government of the United States and the government of Pakistan,’ Gilani told CNN’s Christiane Amanpour in an interview . . .”). Even if the Pakistani military covertly acquiesces or collaborates with the Central Intelligence Agency (“C.I.A.”) in the commission of the drone attacks, this contingency would not translate into an approval of such initiatives by the Government of Pakistan, which, in fact, vehemently opposes such operations. *Pakistan Anger at US Drone Attack*, SKY NEWS, Nov. 20, 2008, <http://news.sky.com/skynews/Home/World-News/Pakistan-Condemns-US-Drone-Attacks-As-Taliban-Leader-Warns-Of-Reprisals-Within-The-Country/Article/200811315156495?f=rss>. In any case, the Pakistan Military and its intelligence agencies have a history of double dealings, covertly supporting Islamic fundamentalism and extremism in the region and working against the national interest of Pakistan and moreover constitutionally do not possess the legal capacity to enter into such tacit agreements. See PAK. CONST. (1973) art. 70(4) (“External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.”).

279. *NA Committee Calls for End to Drone Attacks*, DAWN NEWS, Apr. 7, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/na-committee-calls-for-immed>

Furthermore, U.S. drone attacks are hugely unpopular in the eyes of the Pakistani public. This public sentiment is on the rise as militant extremists from the tribal areas, including foreigners, have recently launched and threatened to launch serious acts of terrorism.²⁸⁰ These retaliatory acts to U.S. drone attacks in the frontier belt region of Pakistan²⁸¹ have created havoc in the major metropolises of Pakistan, which have, until recently, been unaffected in the aftermath of the September 11 attacks.²⁸²

A. Justifications for the Drone Attacks in Relation to the Right of Self Defense

Whenever confronted by international media on the issue of the drone attacks as a violation of the sovereignty of Pakistan, the U.S. administration has generally been evasive in its response, but has stated that it would take out al-Qaeda members wherever they might be hiding.²⁸³ Under the U.N. Charter, without a decision of the S.C. to use force under article 42, the only way the United States can unilaterally conduct armed operations on Pakistani soil, without the latter's consent, is if it is legitimately acting in self defense.²⁸⁴ However, the United States has not reported its carrying out of drone attacks on Pakistani territory to the S.C. as an exercise of this right of self defense as mandated by article 51.²⁸⁵

The justifications for the U.S. drone attacks on Pakistan are convoluted and are hard to sustain under international law. They are primarily based on arguments supporting preemptive or reactionary attacks against non-state actors.²⁸⁶ Interestingly, as enunciated earlier, both preemptive attacks

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280. Lahore, *supra* note 58; Pakistan: U.S. Must Halt Drone Attacks, *supra* note 275.

281. Lahore, *supra* note 58.

282. See, e.g., United States Commission on International Religious Freedom, *USCIRF Annual Report 2008—Pakistan*, May 1, 2008, <http://www.unhcr.org/refworld/docid/48556999c.html> (last visited Nov. 22, 2009) (“Hundreds of people have been killed, including in the city of Lahore, which until recently was largely unaffected by extremist violence.”).

283. Obama Continues Bush Policy of Deadly Air Strikes in Pakistan, DEMOCRACY NOW, Jan. 30, 2009, http://www.democracynow.org/2009/1/30/obama_continues_bush_policy_of_deadly.

284. U.N. Charter art. 51.

285. See *Nicaragua*, 1986 I.C.J. at 105 (“[F]or the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.”). See DINSTEN, *supra* note 74, at 216 (“[T]he duty of reporting becomes a substantive condition and a limitation on the exercise of self-defence.”); see also P.S. Reichler & D. Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT’L L. 462, 471 (1986).

286. Sheharyar Khan, *US Drone Attacks Destabilizing Pakistan: Winning Hearts and Minds Has Failed*, IslamOnline.net, July 30, 2009, http://www.islamonline.net/servlet/Satellite?c=Article_C&pagename=Zone-English-Muslim_Affairs%2FMAELayout&cid=1248187501549; see Timothy

and reprisals, especially in the context of terrorism, have not received international recognition as a legitimate use of force for self defense.²⁸⁷

The primary purpose of the United States in carrying out these drone attacks is, as seen by many, an attempt to kill senior members of both al-Qaeda and Afghanistan's Taliban leadership, who hide in the mountainous frontier region of Pakistan and are provided safe haven by homegrown Pakistani Taliban or tribal militia leaders sympathetic to their cause.²⁸⁸ Even though the drone attacks have often targeted senior members of Pakistani-based Taliban and tribal militias,²⁸⁹ it is only now becoming clear that such membership is also being systematically targeted in its own right.²⁹⁰

At this juncture, it is necessary to closely examine the basis of U.S. targeted strikes in Pakistan against all three delineated groups under Operation Enduring Freedom. U.S. targeted strikes on al-Qaeda membership, including foreign militants of Central Asian and Middle Eastern origin associated with al-Qaeda in Afghanistan, are primarily preemptive in nature, with the aim to exterminate their leadership in order to extirpate these networks and thus prevent future terrorist attacks.²⁹¹ However, the attacks on the top brass of al-Qaeda are also viewed as reprisals for the original attacks of September 11, 2001 on U.S. soil.²⁹²

Attacks on Afghani Taliban are carried out to neutralize its leadership, which the United States claims commands and controls insurgents fighting

Stafford, *The Pre-Emption Consensus*, HENRY JACKSON SOCIETY, June 8, 2008, <http://www.henryjacksonsociety.org/stories.asp?id=680>.

287. See GRAY, *supra* note 44, at 197–98, 212.

288. Bobby Ghosh & Mark Thompson, *The CIA's Silent War in Pakistan*, TIME, June 1, 2009, at 38; Bakhtiyorjon U. Hammidov, *The Fall of the Taliban Regime and Its Recovery as an Insurgent Movement in Afghanistan*, at 44 (1996) (unpublished masters thesis, U.S. Army), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA428904&Location=U2&doc=GetTRDoc.pdf>.

289. *Pakistani Taliban Chief Dodged Missile*, MSNBC, June 24, 2009, <http://www.msnbc.msn.com/id/31529016/ns>.

290. Ismail Khan, *Baitullah Mehsud is Dead*, DAWN NEWS, Aug. 8, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/04-intelligence-sources-have-confirmed-baitullah-death-fm-qureshi-qs-06>.

291. Gareth Porter, *Pakistan: US Drone Attacks Weaken Government's Hold*, HUFFINGTON POST, Apr. 16, 2009, http://www.huffingtonpost.com/2009/04/15/pakistan-us-drone-attacks_n_187305.html (“Ambassador James Dobbins, the director of National Security Studies at the Rand Corporation . . . told IPS in an interview that the drone strikes in Pakistan are aimed ‘in the short and medium term’ at the counter-terrorism objective of preventing attacks on Washington and other capitals.”).

292. Romesh Ratnesar, *The Hunt for Osama bin Laden*, TIME, Nov. 26, 2001, at 40 (“American F-15Es, unmanned Predator drones and commando ground troops killed scores of Taliban and al-Qaeda lieutenants, including bin Laden deputy Mohammed Atef, the reputed architect of the Sept. 11 attacks.”); *16 Killed in US Drone Attack*, SAMAA NEWS, July 7, 2009, http://www.samaa.tv/News10239-16_killed_in_US_drone_attack.aspx.

against U.S. forces across the border in Afghanistan.²⁹³ The United States also claims that these commanders often cross back into Afghanistan to engage in hostile operations against U.S. forces.²⁹⁴ Local tribal militia leaders in Pakistan and Pakistani Taliban commanders are principally targeted by U.S. drones because of the logistical, weapon supply, and safe haven support they provide to the other two groups.²⁹⁵

The United States classifies all of the groups as terrorists and thus within the purview of its global War on Terror. In reality, however, those targeted have very different agendas and modes of operation, albeit with some overlap at times.²⁹⁶ The real objective of foreign militants of Middle Eastern or Central Asian citizenship affiliated with al-Qaeda or other sister organizations is grounded in a civilizational and ideological battle against U.S. forces wherever possible as part of the perceived holy war or Jihad.²⁹⁷ The primary objective of Taliban insurgents and their leadership, who had previously controlled most of Afghanistan, is to regain power in Afghanistan and re-institute their purist version of an Islamic state.²⁹⁸ Pakistan-based militant extremists and insurgents are sympathetic toward the ousted Taliban regime and support its fight to rid Afghanistan of U.S. occupation, but the extremists' main goal is to create a purist state within the state of Pakistan similar to Afghanistan's government under Taliban control. They plan to govern and control such a state under a system of government derived from an amalgamation of Islamic radicalism, fundamentalism, and Pashtunwali tribal customs.²⁹⁹

293. Pir Zubair Shah & Sabrina Tavernise, *Strike Reportedly Missed Chief of Pakistani Taliban by Hours*, N.Y. TIMES, June 25, 2009, at A8; David Sanger & Eric Schmitt, *U.S. Weighs Taliban Strike Into Pakistan*, N.Y. TIMES, Mar. 18, 2009, at A1.

294. *Tehreek-e-Taliban to Keep Fighting Foreign Forces in Afghanistan*, DAILY TIMES, May 24, 2008, http://www.dailytimes.com.pk/default.asp?page=2008%05%24%story_24-5-2008_pg7_57.

295. RASHID, *supra* note 54, at 265; *U.S. Drone Attack Kills Militant in Pakistan*, N.Y. TIMES, Oct. 16, 2008, <http://www.nytimes.com/2008/10/16/world/asia/16iht-pakistan.1.17008373.html>.

296. *On the Loose Taliban Would Boost International Terrorism: Intelligence Officials*, ANI, Oct. 13, 2009, <http://trak.in/news/on-the-loose-taliban-would-boost-international-terrorism-intelligence-officials/13818/>.

297. Thomas H. Johnson, *On the Edge of the Big Muddy: The Taliban Resurgence in Afghanistan*, 5 CHINA AND EURASIA FORUM Q. 93, 118 (2007); Seth G. Jones, *Going the Distance*, WASH. POST, Feb. 15, 2009, at B1 ("Some, like al-Qaeda, have a broad global agenda that includes fighting the United States and its allies (the far enemy) and overthrowing Western-friendly regimes in the Middle East (the near enemy) to establish a pan-Islamic caliphate.").

298. Jones, *supra* note 297 ("Others, like the Taliban and the Haqqani network, are focused on Afghanistan and on re-establishing their extremist ideology there.").

299. See *supra* notes 8–11; Editorial, *Taliban, Pakistan and Modernity*, DAILY TIMES, Mar. 29, 2006, http://www.dailytimes.com.pk/default.asp?page=2006/03/29/story_29-3-2006_pg3_1 ("The 'Taliban' had announced their government under the sharia earlier this month although the government has been in denial.").

Though al-Qaeda and the Taliban have an alliance of sorts, their modes of operation are actually quite distinct from one another. Whereas al-Qaeda's aim is to inflict maximum harm upon the United States anywhere in the world by whatever means possible even if it involves the killing of innocent civilians,³⁰⁰ Taliban insurgents are principally engaged with U.S. forces in an armed conflict involving guerilla warfare and recently, even conventional warfare, in an effort to regain control over Afghanistan.³⁰¹ Frequently, however, the Taliban have kidnapped or killed foreign aid workers and contractors, and have often utilized tactics that would be classified as terrorism, such as suicide attacks that also kill scores of innocent Afghani civilians.³⁰² It does not seem, however, that the Afghan Taliban are systematically involved in carrying out, or even have the capacity to carry out, terrorist, or for that matter, any attacks on U.S. soil, against U.S. civilians not present in Afghanistan, or against U.S. assets abroad.³⁰³ Moreover, the Afghan Taliban's hostile engagement with U.S. forces and other foreign troops under ISAF is localized within the Pak-Afghan region.³⁰⁴

Taliban insurgents ostensibly see this as a war of liberation against an unlawful occupation of their country, quite similar to their perception of the Soviet occupation of Afghanistan a few decades back, when they were actively supported by the United States.³⁰⁵ Often the fighting between U.S.

300. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 225 (2003) ("Osama bin Laden and Al Qaeda had, prior to September 11, 2001, attacked the US and killed many Americans several times. They had also announced their intention to attack US nationals and targets until the US withdrew its forces from Saudi Arabia. Bin Laden issued a *fatwa* purporting to authorize (or even to mandate) the killing of Americans."); Sean D. Murphy (ed.), *Terrorist Attacks on World Trade Center and Pentagon*, 96 AM J. INT'L L. 237, 239 (2002) ("In February 1998 he [Osama bin Laden] issued and signed a 'fatwa' which included a decree to all Muslims: ' . . . the killing of Americans and their civilian and military allies is a religious duty for each and every Muslim to be carried out in whichever country' . . .").

301. *Taliban Using Guerrilla Tactics Against US, UK*, NATION, July 4, 2009, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/International/04-Jul-2009/Taliban-using-guerrilla-tactics-against-US-UK>; see generally Saeed Shah & Nancy A. Youssef, *Are Taliban Abandoning Guerrilla Tactics in Pakistan Conflict?*, MCCLATCHY WASH. BUREAU, May 15, 2009, <http://www.mcclatchydc.com/world/story/68314.html>.

302. *Taliban Kidnap 23 South Koreans in Afghanistan*, DAILY TIMES, July 21, 2007, http://www.dailytimes.com.pk/default.asp?page=2007%5C07%5C21%5Cstory_21-7-2007_pg7_1; *Suicide Bomber Kills Five, Wounds 17 in Afghanistan*, DAILY TIMES, Apr. 10, 2009, http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C10%5Cstory_10-4-2009_pg7_48.

303. See *On the Loose Taliban Would Boost International Terrorism: Intelligence Officials*, *supra* note 296.

304. See *id.*; see generally RASHID, *supra* note 54, at 349–73.

305. Donald L. Barlett & James B. Steele, *The Oily Americans*, TIME, May 13, 2003, <http://www.time.com/time/magazine/article/0,9171,450997,00.html>; ANGELO RASANAYAGAM, *AFGHANISTAN: A MODERN HISTORY: MONARCHY, DESPOTISM OR DEMOCRACY? THE PROBLEMS OF GOVERNANCE IN THE MUSLIM TRADITION*, 105 (2003).

forces and Taliban insurgents involves Taliban responding to preemptive and proactive attacks initiated by U.S. forces.³⁰⁶ In light of these facts, it is hard to see how the Taliban actions against U.S. forces could be classified as acts of terrorism against the United States, especially when, unlike September 11, no attacks are conducted on U.S. soil or against U.S. civilians, but are instead against U.S. forces during active combat operations.

U.S. drone attacks carried out in Pakistan against al-Qaeda members, both Afghani and Pakistani Taliban, and militia leadership as preemptive self defense against terrorism rest on a justification unrecognized in international law. On the other hand, if these attacks are acts of reprisal, they are unlawful under international law.³⁰⁷ As discussed, it is quite tenuous to argue that the Afghan Taliban are engaged in terrorism against the United States when they are guilty of terrorism against Afghan civilians. In the same vein, Pakistani Taliban are guilty of terrorism against Pakistan and not the United States. As will be discussed subsequently, one must reject any U.S. justifications for attacking such groups unilaterally on the premise of fighting global terrorism. Consequently, the only group left that the United States might argue for attacking on the basis of preemptive self defense against terrorism aimed at itself, is genuine al-Qaeda membership residing in Pakistan.

By attacking non-state actors on Pakistani soil, however, the United States is carrying out armed attacks on Pakistan, which can only be defended if terrorist acts of such non-state actors residing in Pakistan qualify as armed attacks against the United States under article 51, and if Pakistan itself was guilty of sponsoring such terrorist activities. Such a level of state involvement is necessary as repeatedly indicated in I.C.J. judgments.³⁰⁸ Besides, when the United States carries out drone attacks in Pakistan preemptively or as reprisals, it is quite incongruent to argue that the United States is acting in self defense, because, in the case of preemptive attacks no armed attack has been committed, and with regard to reprisals armed attacks have already ended.

306. Ijaz Hussain, Editorial, *An Unwinnable War?*, DAILY TIMES, Oct. 22, 2008, http://www.dailytimes.com.pk/default.asp?page=2008%5C10%5C22%5Cstory_22-10-2008_pg3_2 (“[I]nsurgency in Afghanistan is not terrorism, but a war of national liberation as seen by the Pashtun population on both sides of the Durand Line.”); Rasul Bakhsh Rais, Editorial, *War for Peace?*, DAILY TIMES, Feb. 17, 2009, http://www.dailytimes.com.pk/default.asp?page=2009%5C02%5C17%5Cstory_17-2-2009_pg3_2.

307. See *supra* note 147.

308. *Nicaragua*, 1986 I.C.J. 14, 103; *Wall Construction*, 43 I.L.M. 1009, 1050.

The State of Pakistan has not indulged in the necessary level of sponsorship of al-Qaeda or Afghani Taliban operations by directing, controlling, or commanding the juntas.³⁰⁹ It does not exercise “effective control”³¹⁰ or “overall control”³¹¹ over such outfits. In fact, even the level of support provided to such outfits by non-state actors of Pakistani origin located within Pakistan—such as Pakistani Taliban and tribal militias—does not rise to the level of sponsorship that requires control of al-Qaeda or the Afghan Taliban. It is, at most, a level of support that involves provision of weapons, logistics and safe haven. Such support under the *Nicaragua* and the *Congo* judgments is not the sort of assistance that would be enough to qualify as an “armed attack.”³¹²

Both *Nicaragua* and *Congo* set forth the level of state involvement required to effectuate an armed attack by expounding upon the requisite intensity of actual control over non-state actors, such as contras and rebels, by the state itself.³¹³ In a situation, as in the present case, where non-state actors provide assistance to one another, the nexus between these two groups is irrelevant for purposes of determining an armed attack, as there is an absence of state involvement, which is a necessary condition for the presence of an “armed attack” as determined by the I.C.J. Though historically both Pakistan and the United States have condoned the Taliban and arguably elements within al-Qaeda in the not too distant past,³¹⁴ Pakistan is not at present *sponsoring* the activities of al-Qaeda as per the international law of armed conflict. In fact, Pakistan formally took a belligerent stance towards the Afghan Taliban after September 11 and has recently overtly moved against domestic Taliban. Though initially hesitant, Pakistani armed forces are currently in the process of conducting an intense and aggressive armed operation to neutralize local Taliban insurgents and other extremist groups within the country’s territory.³¹⁵

309. Shah, *supra* note 21, at 159. Factual determinations aside, logically speaking it would be absurd to argue that Pakistan, while *directly* sponsoring al-Qaeda, would concurrently be termed and be seen by the United States as an important ally in its war on terror as has been the case in the last decade.

310. *Nicaragua*, 1986 I.C.J. at 64–65.

311. *Tadić*, 38 I.L.M. 1518, 1518.

312. *Nicaragua*, 1986 I.C.J. at 126–27; *Congo*, 2005 I.C.J. 1, 53.

313. *Nicaragua*, 1986 I.C.J. at 126–27, 64–65; *Congo*, 2005 I.C.J. 1, 53.

314. RASHID, *supra* note 54, at 14–17.

315. Abdul Sami Paracha, *Taliban Stronghold in Orakzai Shelled*, DAWN NEWS, July 4, 2009, <http://www.dawnnews.tv/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/03-army-heli-copters-attack-militants-near-crash-site-ss-02>; *Pakistani Forces Drive Taliban From Key Town*, CNN NEWS, Apr. 29, 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/04/29/pakistan.taliban.fighting/index.html?iref=newssearch>. Pakistan lacks overall control over local Taliban and insurgents blamed for providing safe haven to al-Qaeda, and is far from exercising overall control over al-Qaeda and its

Recently, C.I.A. reports indicate that some operatives of Pakistan's Inter-Services Intelligence agency ("ISI") have re-established links with Afghan militants of the 1990s and are, for instance, tipping off militants before U.S. drone attacks are carried out on Pakistani soil.³¹⁶ Such claims are based on assertions that raise concerns of divided loyalties within the Pakistani military establishment and its intelligence agencies.³¹⁷ Yet others opine that the Pakistani military is institutionally and strategically compelled to support the Taliban movement at a particular level and therefore continues to assist it in covert ways.³¹⁸ There might be some

sister organizations under the *Tadić* test. Carin Zissis, *Pakistan's Tribal Areas*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/publication/11973/pakistans_tribal_areas.html (last visited Nov. 20, 2009) ("Islamabad historically has had minimal control over the fiercely independent Pashtuns.").

316. See *supra* note 272. However, some scholars, like the prominent Pakistani journalist, Ahmed Rashid, are of the view that the ISI is guilty of duplicity concerning the War on Terror and has provided unstinted and systematic support to Taliban and other extremists all along.

317. Gary Thomas, *US Pressure Deepens Divide Between Pakistan's Military and Civilian Leadership*, VOA NEWS, Oct. 1, 2008, <http://www.voanews.com/english/index.cfm> (search "US Pressure Deepens", then choose the options for articles older than thirty days and "Exact Match", then change search dates to include Oct. 1, 2008 and follow "Search VOA English"). Many in the top brass of the Pakistan armed forces are deeply religious and conjecturally sympathetic to Islamic fundamentalism. Anwar Iqbal, *US Generals Turn Their Guns on ISI*, DAWN NEWS, Mar. 29, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/us-generals-turn-their-guns-on-isi>. Moreover, a large segment of the Pakistani military and intelligence establishment distrusts the real motives of the United States and feels that their own involvement in cracking down on radicals will greatly undermine the Kashmir cause. Many still feel that a Taliban-run Afghanistan would provide the necessary strategic depth to counter India and view it, rather than the Taliban, as the biggest national security threat to Pakistan. See *Taliban's Is Pakistan Best Bet to Counter India's Increasing Regional Influence: US Experts*, THAINDIAN NEWS, Apr. 9, 2009, http://www.thaindian.com/newsportal/south-asia/taliban-is-pakistans-best-bet-to-counter-indias-increasing-regional-influence-us-experts_100177386.html; Simon & Stevenson, *supra* note 20; RASHID, *supra* note 54, at 25.

318. Many Pakistani generals and higher-ranking intelligence officers saw the United States' commencement of and concentration on the war in Iraq as an indication of its disinterest in dealing with the Taliban effectively. For these officers, this behavior was reminiscent of how the United States deserted Afghanistan after the Soviet withdrawal from the country in the 1980s. RASHID, *supra* note 54, at 335. Thus, for strategic reasons many in the military and the intelligence establishment feel a need to maintain back channels with the Taliban, who they feel will continue to play a pivotal role in the running of Afghanistan in the near future. This belief can be substantiated by the fact that recently, even the U.S. administration has expressed a serious desire to engage with the Taliban militants in Afghanistan in order to achieve a political compromise. Anwar Iqbal & Masood Haider, *US Willing to Hold Talks with Taliban, Says Report*, DAWN NEWS, Oct. 29, 2008, <http://www.dawn.com/2008/10/29/top4.htm>; Hannah Cooper, *Obama Announces Intention to Negotiate with the Taliban*, OPENDEMOCRACY.NET, Mar. 9, 2009, http://www.opendemocracy.net/terrorism/article/security_briefings/090309. The assertion that Pakistan maintains ties with certain Afghani militant leaders is credible in the case of certain militants of Pashtun descent who have historically been supported and loyal to the Pakistan military. For instance, the case of the former prime minister of Afghanistan, Gulbuddin Hekmatyar, who is fighting to end the U.S. occupation of Afghanistan and has been termed a terrorist by the United States, comes to mind. Mark Mazzetti & Eric Schmitt, *Afghan Strikes by Taliban Get Pakistan Help, U.S. Aides Say*, N.Y. TIMES, Mar. 29, 2009, <http://www.nytimes.com/2009/03/26/world/asia/26tribal.html>. Moreover, the massive presence of Indian forces and intelligence

truth to these claims;³¹⁹ however, the level and quality of assistance that Pakistan is currently accused of furnishing to the Taliban is not qualitatively of the sort that can be termed as an armed attack by Pakistan against the United States under international law. Moreover, as indicated earlier, it is tenuous to argue that the status of Afghani and local militants or insurgents is equivalent to that of al-Qaeda members for purposes of proclaiming the right of self defense on the basis of terrorist acts against the United States.

B. U.S. Drone Attacks in Pakistan and the Customary International Law of Self Defense

The United States cannot justify the legitimacy of its drone attacks on Pakistani territory on the basis of self defense. Even if one were to assume that such use of force is legitimate, the United States is still required to comply with the customary international law requirements of immediacy, necessity, and proportionality under the *Caroline* paradigm.³²⁰ For purposes of immediacy and necessity, the customary rule laid out by Daniel Webster requires an instant and overwhelming danger leaving no choice of means or moments of deliberation for a state to respond.³²¹

The United States does not yet find itself in such threatening circumstances when it conducts drone attacks in the Pakistani tribal belt region. In fact, such attacks are conducted after intensive intelligence gathering and deliberation and have continued for years.³²² There is no instant or overwhelming danger posed to the United States if it does not conduct such attacks in Pakistan. These attacks are in fact preemptive

units in Afghanistan threatens most in the Pakistan army who suspect India's nefarious designs to destabilize or even fragment Pakistan. *Proof of India's Involvement in Militancy Found*, DAWN NEWS, Nov. 3, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/13+proof+of+indian+hand+south+waziristan+army-za-02>; *Rehman Malik Presents 'Proof of Indian Hand in Unrest'*, DAWN NEWS, Apr. 24, 2009, <http://www.dawn.com.pk/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/malik-presents-proof-of-indian-hand-in-unrest-bi>. Many believe that India is arming and actively assisting terrorists and insurgents in order to foment separatism in Baluchistan and the North-West Frontier Province ("N.W.F.P."). RASHID, *supra* note 54, at 283, 286. *Analysts Say India Fanning Unrest in Balochistan*, DAILY TIMES, Apr. 7, 2009, http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C07%5Cstory_7-4-2009_pg7_30. See, e.g., Salik Malik, *The Real Story Behind Islamabad Marriott Hotel Attack*, PAKISTAN DAILY, Sept. 23, 2008, <http://www.daily.pk/politics/politicalnews/7434-the-real-story-behind-islamabad-marriott-hotel-attack.html>.

319. RASHID, *supra* note 54, at 337.

320. Caroline Paradigm, *supra* note 106.

321. *Id.*

322. Asif Haroon Raja, *The Real Story Behind Marriott Attack*, ASIAN TRIBUNE, Sept. 22, 2008, at 2, available at http://www.ahmedquraishi.com/article_detail.php?id=465 ("The phenomenon of missile attacks by drones commenced in January 2006 . . .").

strikes that aim to weaken al-Qaeda and the Taliban in the long-term by neutralizing their leadership, and thus, are just one of the many measures that the United States undertakes to achieve its inchoate long-term objectives that have little to do with self defense as recognized under international law. This determination is further evinced from the presence of the controversial Bush Doctrine and the 2006 U.S. National Security Strategy,³²³ both of which disregard principles of international law constraining the use of force.³²⁴

The U.S. use of force in self defense in the form of targeted drone strikes on Pakistan is impermissible because they are unnecessary, as other, peaceful means of facing the threat have not been exhausted given the time parameters involved. After years of bombing FATA with the Government of Pakistan officially and consistently protesting such attacks, the U.S. administration has only recently formally shown a willingness to conduct joint operations with Pakistan in these tribal areas.³²⁵ Even though Pakistan has rejected this particular offer with its lopsided terms, it has confirmed that it is more than willing to conduct such targeted strikes itself when provided with the requisite intelligence, drones, and missiles.³²⁶ The United States, however, has ignored this proposition and continues to violate the territorial integrity of Pakistan without showing any real willingness to negotiate a compromise under which Pakistan is given a real chance to effectively deal with militarism thriving within its borders, absent U.S. armed unilateralism.

323. Both the Bush Doctrine and the 2006 U.S. National Security Strategy sanction a level of preemptive self defense that allows the right to use force against non-imminent threats against both state and non-state actors contrary to international law. Such use of force has proven to be “extremely controversial” and overwhelmingly regarded as unlawful reprisals. GRAY, *supra* note 44, at 208. Moreover, the 2006 U.S. National Security Strategy does not mention international law on the use of force and shows “a lack of respect for international law . . . [fails] to acknowledge a role for the U.N. and [allows for the] express identification of rogue states.” Gray, *supra* note 252, at 564. See GRAY, *supra* note 44, at 212, 218.

324. See generally Gray, *supra* note 252.

325. Posting of Bridget Johnson to *Report: Pakistan Rejects U.S. Plan, Wants Drones*, <http://thehill.com/leading-the-news/report-pakistan-rejects-u.s.-plan-wants-drones-2009-04-08.html> (Apr. 8, 2009, 11:56 EST).

326. *President Asif Ali Zardari Replies to Questions from The Independent*, INDEPENDENT NEWS, Apr. 8, 2009, <http://www.independent.co.uk/news/world/asia/president-asif-ali-zardari-replies-to-questions-from-the-independent-1665034.html>; see also ‘No’ to Joint Operation in Tribal Areas, DAWN NEWS, Apr. 8, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/us-to-respect-pakistans-sovereignty-qaureshi-ha>. For a discussion of U.S. hesitancy in sharing such drones, missiles and associated technology, see *Pakistan Foreign Minister Pushes US for Drones*, BAY LEDGER NEWS ZONE, Apr. 25, 2009, http://www.blz.com/news/2009/02/25/Pakistan_foreign_minister_pushes_drones_5124.html.

As has been historically proven, the United States also has the capability of coercing the Pakistani Government, and more importantly, its armed forces,³²⁷ which have until recently tackled the Taliban threat rather sluggishly, to deal more effectively with militarism. The Pakistani Government and military are heavily dependent on U.S. economic and military aid for survival.³²⁸ The United States holds immense diplomatic sway with Pakistan, and it also can successfully use the S.C. mechanism to pressure Pakistan into using force more aggressively against militant extremists under the mandate of international law, such as through the promulgation of a binding S.C. resolution under Chapter VII.

The use of force is unnecessary in self defense when, rather than diminishing the dangers involved, the gravity of the threat posed is augmented by the use of force. U.S. drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensely strengthen militancy and insurgency in the troubled Pak-Afghan region. The War on Terror that prompted U.S. military adventurism in the region has proven to be a blessing in disguise for extremist and militants groups. U.S. attacks have given birth to an unprecedented level of resentment and anger among the tribal populace, which has been craftily exploited by fanatical factions through organized propaganda to successfully recruit thousands of disillusioned and impressionable young fighters for their causes. Consequently, these burgeoning violent movements embedded in religious fanaticism have dangerously engulfed many parts of Pakistan propagating insurgency, civil unrest, and terrorism.

U.S. drone attacks are no different in causing this level of resentment and anger, and they have provided impetus to extremist recruitment and

327. As discussed earlier, there are many reasons why military and intelligence agencies are hesitant to move forcefully against the Taliban. The presence of rogue elements within such institutions cannot be discounted. *Kayani has Purged Rogue Elements from ISI*, REDIFF NEWS, May 22, 2009, <http://news.rediff.com/report/2009/may/22/us-kayani-cleared-isi-of-rogues.htm>. Additionally, another reason for inaction is blamed on the military and intelligence agencies looking out for their own interest rather than that of the nation. See generally *Ex-official: US Has Rogue Elements in ISI*, PRESS TV, Aug. 5, 2008, <http://www.presstv.ir/detail.aspx?id=65653§ionid=351020401>. For all these reasons, it is imperative that the U.S. administration deal with the democratic and civilian government of Pakistan rather than empowering the military and its intelligence outfits that have a history of misusing authority.

328. See RASHID, *supra* note 54, at 31; Manzur Ejaz, Op-Ed., *Washington Diary: Conditional Aid*, DAILY TIMES, Jan. 14, 2009, http://www.dailytimes.com.pk/default.asp?page=2009/01/14/story_14-1-2009_pg3_3. The Obama administration has appropriately attached conditions on the disbursement of aid in the amount of 1.5 billion over the next five years based on how effectively Pakistan deals with Taliban and al-Qaeda, among other benchmarks. Anwar Iqbal, *New Conditions Incorporated into Pakistan Aid Bill*, DAWN NEWS, Apr. 10, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/new-conditions-incorporated-into-pakistan-aid-bill>.

bolstered the resolve of militants. The resulting aggressiveness is apparent from recent terrorist attacks conducted by extremists in secure metropolises of Pakistan distant from the tribal areas, as retribution for the drone attacks.³²⁹ For instance, Baitullah Mehsud, the deceased leader of Tehrik-e-Taliban,³³⁰ the umbrella organization of all Pakistani Taliban outfits, had threatened that his fighters would continue to undertake terrorist attacks in secure parts of Pakistan on a weekly basis as reprisal for the continuing drone attacks.³³¹ This proxy fight between the United States and the militants within Pakistan is dangerously destabilizing the country and increasing the dangers of international terrorism to all nations, including the United States. Therefore, the necessity of the drone attacks for eliminating the threat of terrorism emanating out of the tribal areas of Pakistan is highly questionable.

It must also be understood that U.S. drone operations in Pakistan are not proportional in relation to the wrong it suffered.³³² It is inappropriate to measure the wrong suffered by the United States on the fateful day of September 11 in relation to the drone attacks being carried out in Pakistan today nearly a decade later, not only because of intervening events and the long passage of time, but also because of the partial disconnect between those responsible for the September 11 attacks and those being targeted. In any case, the attacked state of Pakistan was not itself involved in the commission of the September 11 attacks on the United States. If the wrong suffered is being measured in terms of the costs borne by the United States and its armed forces associated with its occupation embattling insurgents and militants in the restive regions of Afghanistan bordering Pakistan, then the author is highly skeptical on whether such wrong could be classified as legally sufficient for purposes of a legitimate exercise of the right of self defense against Pakistan under international law.

329. Saeed Shah, *Pakistani Taliban Claim Police Academy Attack*, GUARDIAN, Apr. 1, 2009, at 1 of “international pages” (internet version of article available at <http://www.guardian.co.uk/world/2009/mar/31/pakistan-taliban-lahore-police-attack>); *Peace Deal to Remain Intact, But Revenge Attacks Likely: Taliban*, DAILY TIMES, Nov. 21, 2008, http://www.dailytimes.com.pk/default.asp?page=2008%5C11%5C21%5Cstory_21-11-2008_pg7_28.

330. RASHID, *supra* note 54, at 386 (Baitullah Masud was appointed as the Amir (leader) of the Tehrik-e-Taliban in December, 2007 by the consensus of 40 militia–extremist commanders).

331. *Taliban Threaten 2 Attacks Per Week in Pak*, TIMES OF INDIA, Apr. 6, 2009, available at <http://timesofindia.indiatimes.com/World/Pakistan/Taliban-threaten-2-attacks-per-week-in-Pak/article-show/4364184.cms>. Baitullah Mehsud was killed in a U.S. drone attack. Declan Walsh, *Pakistan’s Top Taliban Leader Baitullah Mehsud Killed in US Drone Attack*, GUARDIAN, Aug. 7, 2009, <http://www.guardian.co.uk/world/2009/aug/07/taliban-leader-baitullah-mehsud-killed>.

332. ERICKSON, *supra* note 111, at 146.

Additionally, if the U.S. drone attacks are carried out on a preemptive basis against the amorphous threat of global terrorism, then the wrong has yet to come into existence or is at best conceptual in nature. Moreover, global terrorism is, by definition, a wrong suffered by the entire world community, and if any one state was allowed to use it as a basis to attack other states then the whole system of international relations would risk disintegration.

U.S. drone attacks are also not proportional “in terms of the nature and amount of force employed to achieve the objectives and goals.”³³³ First, goals and objectives must be valid and relate to the removal of an actual danger posed. As mentioned, the goals alluded to by the U.S. administration as justification for carrying out drone attacks are both undefined and incapable of achievement through armed aggression.³³⁴

Second, the intensity and frequency with which these drone attacks have been carried out over the past three years have resulted in the unnecessary killing of hundreds of civilians and needless destruction of infrastructure.³³⁵ Importantly, drone attacks are carried out by unmanned robotically controlled planes whose targeted strikes are determined by intelligence, which has often proved quite faulty in retrospect.³³⁶ Without a pilot, who potentially has a better ability to distinguish between civilian and militant targets at the time of a strike, drones lack the capability to, on site, factor in the fact that civilians and militants reside coterminously in the vicinity of the planned attack. This explains why “between January 14, 2006 and April 8, 2009, only 10 [strikes] were able to hit their actual targets, killing 14 wanted al-Qaeda leaders, besides perishing 687 innocent Pakistani civilians. The success percentage of the U.S. Predator strikes thus comes to not more than six per cent.”³³⁷

333. Shah, *supra* note 21, at 176; ERICKSON, *supra* note 111, at 46.

334. White House, National Strategy for Combating Terrorism 22 (Feb. 14, 2003), available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/counter_terrorism/goals.pdf; MOECKLI, *supra* note 159, at 47 (U.S. justification is to eradicate the threat of international terrorism, which is an undefined concept under international law). Moreover, drone attacks have increased rather than reduced the threat of armed retaliation from Taliban and al-Qaeda members. Lahore, *supra* note 58. See Hooper, *supra* note 275.

335. *Suspected U.S. Strike Kills 13 in North Waziristan*, DAWN NEWS, Apr. 4, 2009, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/nwfp/13-killed-in-suspected-us-drone-attack--il>.

336. Gareth Porter, *Errant Drone Attacks Spur Militants in Pakistan*, IPS, Apr. 15, 2009, <http://ipsnews.net/news.asp?idnews=46511>; *60 Drone Hits Kill 14 Al-Qaeda Men, 687 Civilians*, NEWS, Apr. 10, 2009, http://www.thenews.com.pk/top_story_detail.asp?ld=21440.

337. *60 Drone Hits Kill 14 Al-Qaeda Men, 687 Civilians*, *supra* note 336.

CONCLUSION

The dangers from the Taliban movement are real. Fostering an environment of repression and intolerance, the Talibanization of society in the Pak-Afghan regions has created a level of anarchy that challenges the very fabric of society and must be halted before irreparable harm results. One must be absolutely clear that the dangers of this transformation in a moderate society are most damaging not only for Afghanistan and Pakistan, but also for the adjoining states in the region.

Recognizing the problem, however, is part of the solution. Tackling Talibanization requires a multi-faceted approach that apart from recognizing the reasons behind the process, also mandates addressing all root causes fueling such radicalism and militarism³³⁸ comprehensively, and as much as possible, peacefully. Such an approach is consonant with the newly conceptualized human security paradigm that focuses on the protection of the person, rather than the state, through promotion of sustainable development, equality, political and economic security, and the alleviation of poverty in troubled regions.³³⁹ Support from the international community in this endeavor would go far in stabilizing radicalized tribal societies and would, in turn, make it practically impossible for the anathema of terrorism to thrive in this part of the world. This is the only way to win the so-called “War on Terror.” Therefore the situation in Afghanistan and Pakistan mandates an approach primarily centered on the peaceful resolution of all disputes, the fostering of nation-building through political dialogue and compromise,³⁴⁰ the strengthening of democracy, and the supremacy of the rule of law.³⁴¹

338. For instance, among other things, the rise of fundamentalism and revivalism in Islamic society is a manifestation of post- and neo-colonial policies and tendencies. Western support of monarchies and military dictatorial regimes in the Muslim world, which have perpetuated repression and have severely curtailed democratic forces within such societies have provided major impetus to radical movements. Some examples include neo-colonialism in Algeria and U.S. support in instituting the Shah of Iran in 1953 by undermining democracy forces in Iran. Robert A. Mortimer, *The Algerian Revolution in Search of the African Revolution*, 8 J. MOD. AFR. STUD. 363 (1970) (“For Algeria, neo-colonial intervention was a grave reality retarding the independent development of the continent. These attitudes placed Algeria squarely among the revolutionary states”); Shahshahani, *supra* note 46, at 415, 416.

339.

Human security can be said to have two main aspects. It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs, or in communities. Such threats can exist at all levels of national income and development.

UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1994, at 23, available at http://hdr.undp.org/en/media/hdr_1994_en_chap2.pdf; MOECKLI, *supra* note 159, at 7–8.

340. In fact, both U.S. and U.K. administrations have partially recognized this reality and have

Use of force, which is surely required in particular instances, must be applied as a last resort and must also be limited in duration and scope. Such use of force should remain the prerogative of the domestic state unless its refusal to act is proving to be a threat to international peace and security as determined by the whole international community multilaterally, for only the domestic state is accountable for its actions to democratic institutions and its citizens. Moreover, armed force generally targets the symptoms of a diseased state of affairs rather than tackling the root causes themselves and, as has been historically witnessed, causes more damage in the long-run.³⁴² The situation in the Pak-Afghan tribal region is no different where violence begets even more violence, especially when use of force was employed by foreign powers that were driven by their own vested interests.³⁴³

The domestic criminal system of the states should be employed to punish reprehensible behavior carried out by non-state actors rather than inter-state use of force that has historically been reserved to deal with belligerent states. Such a course of action would strengthen and reinforce

expressed a willingness to reconcile and negotiate with the so-called moderate elements within Taliban to achieve a political compromise. *Talk to Taliban, Miliband Urges*, BBC NEWS, July 27, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/8169789.stm; Iqbal & Haider, *supra* note 317; *Official: Pakistan Can Help Broker U.S.-Taliban Talks*, CNN NEWS, July 11, 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/07/10/pakistan.taliban.omar/index.html> (“[S]enior U.S. officials have told CNN the Obama administration is willing both to talk to top Taliban leaders Holbrooke also did not discount the possibility of talks with the Taliban.”); Helene Cooper & Sheryl Gay Stolberg, *Obama Ponders Outreach to Elements of Taliban*, N.Y. TIMES, Mar. 8, 2009, at A1.

341. For instance, the senseless Swat peace deal between the Swat Taliban and the government of Pakistan requiring application and enforcement of the Islamic Sharia Law. In the particular case, it imposed the Taliban’s purist and inaccurate rendition of Sharia law in the Malakand division in the N.W.F.P., and was actively publicized on the slogan of the accessibility of speedy justice to appeal to the common man. Daud Khattak, *NWFP Govt Unveils Nizam-e-Adl*, DAILY TIMES, Feb. 17, 2009, http://www.dailytimes.com.pk/default.asp?page=2009%5C02%5C17%5Cstory_17-2-2009_pg1_1; *Swat Accord to Ensure Peace, Speedy Justice*, NATION, Apr. 19, 2009, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Regional/Karachi/19-Apr-2009/Swat-accord-to-ensure-peace-speedy-justice>; Ben Arnoldy, *Pakistan Accepts Islamic Law in Swat Valley*, CHRISTIAN SCIENCE MONITOR, Feb. 17, 2009, <http://www.csmonitor.com/2009/0217/p06s04-wosc.html>. Such appeal exists because the State of Pakistan has miserably failed to provide any access to justice through a functional court system, a phenomenon that the Taliban wanted to effectively exploit to pursue its own agenda. *Despite Pact, Pakistan Attacks Taliban*, CBS NEWS, Apr. 26, 2009, http://www.cbsnews.com/stories/2009/04/26/world/main4969708.shtml?source=related_story; Arnoldy, *supra*. The deal culminated in the promulgation of an order to implement Sharia law, but the order was termed, ‘The Nizam-e-Adl’ Regulation, 2009, which literally means the ‘Order of Justice’. This order was recently passed by the Parliament of Pakistan and approved by President Zardari. *President Signs Nizam-e-Adl After NA Nod*, DAILY TIMES, Apr. 14, 2009, http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C14%5Cstory_14-4-2009_pg1_1.

342. See generally Victor Kattan, *Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 HUM. RTS. BRIEF 26 (2006).

343. Aryn Baker, *Pakistan’s Growing Chain of Violence*, TIME, Sept. 3, 2008, at 3.

the rule of law in the troubled state and also would lower inter-state conflict. There is no reason to believe that the ordinary criminal justice system of Pakistan is ill-equipped to handle crimes that are of a terrorist nature.

From a global institution-building perspective, unilateralist behavior from powerful states to achieve their objectives while violating the territorial sovereignty of weaker states is extremely damaging to the interstate paradigm. Ascribing to multilateralism and peaceful modes of resolving disputes would force powerful state actors to develop other constructive modes of engagement for addressing matters that are more heavily focused on diplomacy, political dialogue, and compromise. Such an approach would also provide the necessary impetus for furthering the development and recognition of multilateral judicial institutions such as the International Criminal Court, which, when accorded the optimal level of authority and jurisdiction, would most appropriately adjudicate international crimes of a grave nature.³⁴⁴

344. Currently, powerful states such as the United States, Russia, China and India are critical of the International Criminal Court ("I.C.C.") and have not ratified the treaty of its creation. I.C.C.'s jurisdiction is limited to crimes of genocide, war crimes, crimes against humanity and crimes of aggression. Currently its jurisdiction does not include the crimes of terrorism because of the inability of the global community of states to agree upon a definition. United Nations Department of Public Information, *The International Criminal Court*, Dec. 2002, <http://www.un.org/News/facts/iccfact.htm>. I.C.C. can only exercise jurisdiction when national courts are unwilling or are unable to investigate or prosecute the related crimes. Rome Statute of I.C.C. art. 17, para. 1, U.N. Doc. A/CONF.183/9 (July 17, 1998) (as corrected 1999).