

ARTICLE

Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace

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Introduction

Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands.

—President Barack Obama, May 23, 2013¹

As major U.S. combat operations in Afghanistan draw to an end in 2014,² President Obama projects a cautious optimism that the United States

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¹ Barack Obama, *Remarks by the President at the National Defense University* (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/S7ZT-393X>] [hereinafter Obama, *Remarks at the National Defense University*].

² See Barack Obama, *State of the Union Address* (Jan. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> [<http://perma.cc/Y3HK-87YT>] [hereinafter Obama, *State of the Union*]; Press Release, The White House, Office of the Press Secretary, *Readout of President*

will soon enter an era without war—or at least without a declared area of active hostilities—for the first time since 2001.³ The end of large-scale American participation in the armed conflict in Afghanistan represents a mark in time at which the U.S. government intends to reduce its kinetic activities and transition to an era that resembles something closer to peace than war.⁴ President Obama has certainly left room for the United States

Obama's Call with President Karzai (Feb. 25, 2014), <http://www.whitehouse.gov/the-press-office/2014/02/25/readout-president-obama-s-call-president-karzai> [<http://perma.cc/P36X-LS2G>] [hereinafter *Obama's Call with Karzai*].

³ The President has not specified publicly what “areas of active hostilities” means or which areas are affected—despite establishing the term as an important reference point in “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.” See Fact Sheet, The White House, Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [<http://perma.cc/3VNG-QGNE>] [hereinafter Fact Sheet: U.S. Policy Standards and Procedures]. Nevertheless, at present, operations in Afghanistan are clearly excluded from these policy standards.

⁴ The International Criminal Tribunal for the former Yugoslavia’s Appeals Chamber announced an armed conflict standard in *Tadić* that is designed to apply to both international and non-international armed conflict, asserting, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). *Tadić* also considers the intensity of fighting and the organization of the parties to the conflict.

Meanwhile, Common Article 2 to the Geneva Conventions explains the Conventions’ applicability to international armed conflict as arising “between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. Non-international armed conflict is described in Common Article 3 to the Geneva Conventions as “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” *Id.* art. 3. Non-international armed conflict is commonly accepted as involving non-state actors or non-state armed groups.

Lastly, the International Committee of the Red Cross (ICRC) classifies armed conflict in two categories: international armed conflict and non-international armed conflict. See INT’L COMM. OF THE RED CROSS [ICRC], INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (Oct. 2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> [<http://perma.cc/R2BG-XR46>]. All other instances of armed violence, according to the ICRC, constitute “other situations of violence below the threshold of armed conflict.” Telephone Interview with Daniel Cahen, Legal Advisor, ICRC Regional Delegation for the United States and Canada (Mar. 11, 2014). The category of “other situations of armed

and the North Atlantic Treaty Organization (NATO) to continue to conduct some degree of military operations in Afghanistan in the future.⁵ He has also maintained that he may resort to force outside Afghanistan pursuant to the United States' right to self-defense.⁶ Yet the President has further made clear his belief that the transnational armed conflict against al Qaeda,⁷ the Taliban, and associated forces must end for America to preserve its values and prosper as a nation.⁸

To that end, this Article assumes that the U.S. government intends to end major combat operations in Afghanistan and to accept publicly (at some point in the future⁹) that the United States is no longer a participant in an

violence below the threshold of armed conflict" seems to align relatively well with a subset of the state of affairs which I describe as *jus extra bellum*—"the state's right outside of war." *Jus extra bellum* can apply to instances when armed violence does or does not occur.

⁵ See Obama, *State of the Union*, *supra* note 2 (announcing that the United States will do no more than partner "with NATO allies to carry out two narrow missions: training and assisting Afghan forces, and counterterrorism operations to pursue any remnants of al Qaeda").

⁶ See *id.* ("As Commander-in-Chief, I have used force when needed to protect the American people, and I will never hesitate to do so as long as I hold this office.")

⁷ Although most international legal scholars consider armed conflict divisible into international armed conflict and non-international armed conflict, the U.S. government recognizes its war against al Qaeda, the Taliban, and associated forces as constituting a type of non-international armed conflict referred to as a "transnational armed conflict." See ICRC, *supra* note 4, at 8–10 (recognizing that a "seventh type of [non-international armed conflict] believed by some to currently exist is an armed conflict taking place across multiple states between Al Qaeda and its 'affiliates' and 'adherents' and the United States ('transnational')"); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (recognizing the conflict with al Qaeda as a "conflict not of an international character" despite being "international in scope"); see generally Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 1 (2009) (reviewing the emergence of the transnational armed conflict archetype in international law). I use the term "transnational armed conflict" throughout this Article, recognizing transnational armed conflict as a contemporary form of non-international armed conflict that occurs across sovereign borders and is supported by international and U.S. domestic law—although I acknowledge that the archetype is controversial, particularly amongst the international legal community.

⁸ See Obama, *Remarks at the National Defense University*, *supra* note 1 (recalling "James Madison's warning that 'No nation could preserve its freedom in the midst of continual warfare'" and espousing a goal of ending the "fight against terrorism" for his administration and those that will follow).

⁹ It is not clear when this point in time might be. The President clearly wants to end the transnational armed conflict at an appropriate date, stating: "I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the [2001 Authorization for the Use of Military Force]'s mandate. And I will not sign laws designed to expand this mandate further. . . . [T]his war, like all wars, must end." *Id.* Nevertheless,

armed conflict against the Taliban, al Qaeda, and associated forces.¹⁰ Alternatively, if circumstances prevent the President from terminating the transnational armed conflict, the war on terror may still enter its twilight as U.S. counter-terrorism operations abroad dissipate in frequency and intensity until the conflict ends *de facto*.¹¹

In either circumstance, future U.S. national security actions will have to rely on an alternative legal regime. If the transnational armed conflict ends, international humanitarian law will no longer serve as *lex specialis* for U.S. national security activities.¹² The robust authority provided to states to undertake “those measures which are indispensable for securing the ends of war”¹³ will be replaced by a peacetime legal architecture. That architecture cannot ignore the realities of global threats, of course.¹⁴ Rather, it must afford states the means through which to act in national self-defense while “sav[ing] succeeding generations from the

political, legal, strategic, operational, and tactical circumstances should be expected to weigh on such a determination. As a result, the U.S. government could accept the end of the transnational armed conflict close in time to the end of major U.S. combat operations in Afghanistan or weeks, months, or years later.

¹⁰ This assumption is supported by the President’s comments in both his May 23, 2013 National Defense University remarks, *id.*, and his January 28, 2014 State of the Union Address, Obama, *State of the Union*, *supra* note 2.

¹¹ As discussed in Section IV.E. of this Article, under international law, whether an armed conflict exists is evaluated both according to objective factual criteria and also according to pronouncements of states—including those by the President of the United States.

¹² Note, however, that as a matter of policy, the U.S. Department of Defense’s Law of War program requires the U.S. military to apply international humanitarian law to all military operations, including those conducted outside of armed conflict. See DEP’T OF DEFENSE, DIRECTIVE 2311.01E: DoD LAW OF WAR PROGRAM 2 (May 9, 2006; certified current as of Feb. 22, 2011), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [<http://perma.cc/72GK-5CND>]. This requirement is designed to ensure that protections afforded under international humanitarian law, as well as core principles such as distinction, necessity, proportionality, and humanity, are complied with in all instances. The policy should not be mistaken for a prohibition on U.S. military activities outside of armed conflict.

¹³ FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LIEBER CODE) art. 14 (1863), *available at* <http://www.icrc.org/ihl/INTRO/110> [<http://perma.cc/CWM7-RGLB>] [hereinafter Lieber Code] (defining “military necessity”).

¹⁴ Although reasonable minds can disagree as to how imminent of a threat the Taliban, al Qaeda, associated forces, affiliates, adherents, and other violent extremists present to U.S. national security, as discussed later in this Article, it is clear that successful U.S. and partner nation counter-terrorism strikes have not eliminated the significant threat of terrorism against the United States, its citizens, and its broader national security interests.

scourge of war” and “unit[ing] our strength to maintain international peace and security.”¹⁵

Thus, the United States’ legal right to engage in national security activities outside of armed conflict will be paramount. Furthermore, if the U.S. government wants to preserve its standing as a supporter of the international system and an adherent of international law—or at least demonstrate a desire to be viewed as a rational actor among states—then it should be prepared to provide an articulable, cogent argument as to how its national security actions do not violate international law and how they are consistent with human rights obligations. As the United States increases its reliance on activities of foreign partners, the global community will also demand a credible legal basis by which to justify its actions.¹⁶

This Article explains the international legal basis for national security activities outside of armed conflict through a legal architecture that I refer to as “*jus extra bellum*”—“the state’s right outside of war.”¹⁷ *Jus*

¹⁵ U.N. Charter preamble 2, available at <https://www.un.org/en/documents/charter/> [<http://perma.cc/4ATH-9V7A>].

¹⁶ See, e.g., Nick Hopkins, *Huge Swath of GCHQ Mass Surveillance is Illegal, Says Top Lawyer*, GUARDIAN (Jan. 28, 2014), <http://www.theguardian.com/uk-news/2014/jan/28/gchq-mass-surveillance-spying-law-lawyer> [<http://perma.cc/T2FF-JMDT>] (reporting that a British barrister working in an advisory capacity to the British government opined that the Government Communications Headquarters’ “mass surveillance spying program[s] are probably illegal and have been signed off by ministers in breach of human rights and surveillance laws,” and if the British government “knows it is transferring data that may be used for [U.S.] drone strikes against non-combatants in countries such as Yemen and Pakistan, that is probably unlawful.” The Guardian report suggests that the barrister’s analysis deemed (reported) U.S. drone strikes outside of Afghanistan to be conducted pursuant to American anticipatory self-defense, outside of international armed conflict, and without legal justification, thereby making British officials who transfer intelligence to the U.S. government “in the knowledge that it would or might be used for targeting drone strikes . . . accessor[ies] to murder for the purposes of [British] domestic law”); Mark Corcoran, *Drone strikes based on work at Pine Gap could see Australian charged, Malcolm Fraser says*, ABC NEWS (Apr. 29, 2014), <https://au.news.yahoo.com/a/23036784/drone-strikes-based-on-work-at-pine-gap-could-see-australians-charged-malcolm-fraser-says/> [<http://perma.cc/4GGU-YN3L>] (reporting that “Australian military and intelligence personnel involved in controversial US drone targeting operations could face crimes against humanity charges, according to former [Australian] prime minister Malcolm Fraser”).

¹⁷ *Jus extra bellum* is not an established term in international law. There is a significant gap in the field of international law relating to national security activities conducted below the threshold of armed conflict. The gap is not adequately addressed by historic conceptions of war and peace or legal models that the author has uncovered. See generally Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J.

extra bellum does not imagine that the end of war results in an entirely peaceful, safe planet. It does not feign ignorance of threats to national security nor erase states' obligations to protect their citizens. It recognizes that a peaceful world is one in which states continue to conduct national security activities outside of armed conflict. *Jus extra bellum* accepts that such activities occur within a generally permissive international legal regime and are shaped by domestic legal authorities and obligations. It presents a legal archetype that would permit, for example: diplomacy; intelligence collection and sharing; influence operations that do not intrude on sovereignty, territory, or political independence as a matter of law, but inform and shape the perspectives of foreign populations; cyber defense and other cyber activities not rising to the level of a use of force; criminal law enforcement action undertaken with the consent and/or assistance of the government of the state in which the activities occur; security assistance and related activities to improve partner security capacity; advice and assistance against other states' internal security challenges; economic measures like sanctions and seizures of assets; counter-proliferation efforts targeting weapons of mass destruction and improvised explosive devices; protection of natural resources; pandemic disease prevention and response; freedom of navigation and overflight assertions; peacekeeping operations; other national security actions undertaken pursuant to a UN Security Council resolution or other international legal authorization (e.g., counter-piracy operations); and certain discrete capture or lethal operations when required as a matter of national self-defense. For the purposes of this Article, the concept of *jus extra bellum* also provides an analytical framework for addressing hard questions about how the United States and its international partners will seek refuge from war while addressing the significant national security threats that persist in the future.

Following this introduction, this Article explains the dilemma faced by the U.S. government as it seeks to reconcile obligations to provide security against the desire to transition to an era without war. It expands on that tension in Section II by providing an overview of global threats. Section III reviews the historic and legal foundations of statecraft affecting

985, 985–88 (2008) (considering U.S. constitutional implications of the theory of “perfect and imperfect war” developed by Grotius and Burlamaqui and noting that imperfect war “is fought with limited, particular means and that it may be waged without disturbing civil society in general”; that it seeks “reprisals and obtaining justice from a foreign government or person for a specific injury” (preconditions not required for national security activities supported by *jus extra bellum*); and that “as in defensive wars, the sovereign is not required to declare war”).

national security.¹⁸ Section IV addresses the legal bases for U.S. operations in Afghanistan and in the broader transnational armed conflict. Finally, Section V introduces emerging U.S. government policies and offers a future perspective on national security activities conducted pursuant to *jus extra bellum*. It explains why *jus extra bellum* will be critical to combatting terrorism and containing other global threats as the world works towards reconstructing “the ordinary, realistic conditions of peace.”¹⁹

I. Hard Questions

Now, make no mistake, our nation is still threatened by terrorists. From Benghazi to Boston, we have been tragically reminded of that truth. But we have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience now to draw from, this is the moment to ask ourselves hard questions—about the nature of today’s threats and how we should confront them.

—President Barack Obama, May 23, 2013²⁰

The U.S. government faces a very real problem. On the one hand, the Executive Branch seeks to end the armed conflict in Afghanistan, conclude the broader war on terrorism, ensure compliance with law, and conciliate critics of U.S. counter-terrorism and intelligence activities. Political and economic factors create a contemporary environment in which the U.S. government will not protect its national security interests at all

¹⁸ Here, “statecraft” refers to the exercise of all instruments of national power, including military power. See Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT’L SEC. J. 349, 353–56 (2014).

¹⁹ KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S ADDRESSES ON NATIONAL SECURITY LAW 152–53 (full publication forthcoming 2014; excerpts available at <http://www.lawfareblog.com/speaking-the-law-the-obama-administrations-addresses-on-national-security-law/> [http://perma.cc/38BS-RMDP]) (reviewing President Obama’s remarks at the National Defense University, Washington, D.C. (May 23, 2013) and explaining that the President’s vision of a “return to normalcy contemplates a return to [an American] historical norm” that is not entirely peaceful, involves “small-scale military or paramilitary actions using tools of hostilities,” and seeks to reduce “threat levels [to where they can be] managed without large-scale warfare and, crucially, without need for the legal application of ‘armed conflict’”).

²⁰ Obama, *Remarks at the National Defense University*, *supra* note 1.

costs.²¹ The tragedy of 9/11 united Americans and segments of the international community in a common cause to defeat terrorism.²² However, that unified era has since been replaced by a battle-weary, sporadically interested, and often polarized political will in the United States and abroad.²³ Political debate about the costs of war now has less to do with

²¹ See DICK K. NANTO, CONG. RES. SERVICE, ECONOMICS AND NATIONAL SECURITY: ISSUES AND IMPLICATIONS FOR U.S. POLICY (2011), *available at* <http://www.fas.org/sgp/crs/natsec/R41589.pdf> [<http://perma.cc/3BRL-XAQD>] (describing the politics of America's national security debate as being shaped by factors including victory in war, economic constraints, and a changing world); Cheryl Pellerin, *Hagel: Severe Budget Cuts Will Compromise National Security*, AM. FORCES PRESS SERV. (Mar. 5, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=121777> [<http://perma.cc/M8LA-MRUP>] (reporting Defense Secretary Chuck Hagel's warning against another round of sequestration for fear of "a military that could not fulfill its defense strategy, putting at risk America's traditional role as guarantor of global security and, ultimately, our own security"); Chuck Hagel, *Secretary of Defense Speech: FY15 Budget Preview* (Feb. 24, 2014), <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1831> [<http://perma.cc/TR7F-RLBM>] ("[A]s a consequence of large budget cuts, our future force will assume additional risks in certain areas."); Siobhan Gorman, *For Spy Agencies, Another Trim in Latest Obama Budget*, WASH. WIRE (Mar. 7, 2014), <http://blogs.wsj.com/washwire/2014/03/07/for-spy-agencies-another-trim-in-latest-obama-budget/> [<http://perma.cc/6MGC-DJAM>]; see generally COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT, (Mar. 2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/full_2014_economic_report_of_the_president.pdf [<http://perma.cc/R6LX-9VZN>]; OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015 (2014), *available at* <http://www.whitehouse.gov/omb/budget/overview> [<http://perma.cc/NLQ7-9K7M>].

²² See generally S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm> [<http://perma.cc/AB2S-YXHA>]; Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, ORG. OF AM. STATES RES. 1/01 (Sept. 21, 2001); Joseph M. Siracusa, *John Howard, Australia, and the Coalition of the Willing*, 1 YALE J. OF INT'L AFFAIRS 39 (2006); *War on Terrorism*, GALLUP (last visited Mar. 30, 2014), <http://www.gallup.com/poll/5257/war-terrorism.aspx#1> [<http://perma.cc/9W82-FB2K>] (showing that 89% of those polled between November 8–11, 2001, and 93% of those polled between January 7–9, 2002, viewed "U.S. military action in Afghanistan that began in October 2001" as not constituting a mistake).

²³ See Richard Wike, *From Hyperpower to Declining Power: Changing Global Perceptions of the U.S. in the Post-Sept. 11 Era*, PEW RES. CTR. GLOBAL ATTITUDES PROJECT (Sept. 7, 2011), <http://www.pewglobal.org/2011/09/07/from-hyperpower-to-declining-power/> [<http://perma.cc/FNG4-JZEM>]; *War on Terrorism*, *supra* note 22 (showing that 75% of those polled in 2002 were very or somewhat satisfied "with the way things are going for the U.S. in the war on terrorism" while only 52% were very or somewhat satisfied in 2008; 44% of those polled between March 7–10, 2013, and 49% of those polled between February 6–9, 2014, viewed "U.S. military action in Afghanistan that

lives lost than treasure expended.²⁴ The costs of global security must be shared amongst states, but states, including the United States, are struggling with how much they can afford to pay financially and politically.²⁵

On the other hand, terrorists present a very real threat to American national security today, and terrorism is only one of many threats to the nation. Presumably the United States will not lie idle while significant threats persist. The Commander-in-Chief has not promised to stop the fighting altogether. Instead he vows to combat global threats “smartly and proportionately,”²⁶ relying less on the use of force and more on “diplomacy, financial action, intelligence . . . law enforcement,” and the counter-terrorism efforts of foreign partners.²⁷ Some amount of transnational

began in October 2001” as a mistake.); *Public Sees U.S. Power Declining as Support for Global Engagement Slips: America’s Place in the World 2013*, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Dec. 3, 2013), <http://www.people-press.org/2013/12/03/public-sees-u-s-power-declining-as-support-for-global-engagement-slips/> [<http://perma.cc/3DLY-UBK3>] (“[S]upport for U.S. global engagement, already near a historic low, has fallen further. The public thinks that the nation does too much to solve world problems, and increasing percentages want the U.S. to ‘mind its own business internationally’ and pay more attention to problems here at home.”).

²⁴ See, e.g., JOINT ECON. COMM. MAJORITY STAFF, *WAR AT ANY PRICE?: THE TOTAL ECONOMIC COSTS OF THE WAR BEYOND THE FEDERAL BUDGET* (2007), available at <http://www.jec.senate.gov/archive/Documents/Reports/Iraq%20JEC%202007.pdf> [<http://perma.cc/5JJN-9745>].

²⁵ See generally COUNCIL ON FOREIGN REL., *THE GLOBAL REGIME FOR TERRORISM* (June 19, 2013), <http://www.cfr.org/terrorism/global-regime-terrorism/p25729> [<http://perma.cc/ED7Y-EK2S>] (examining international efforts to combat terrorism since 9/11); AFG. STUDY GROUP, *A NEW WAY FORWARD: RETHINKING U.S. STRATEGY IN AFGHANISTAN* 1 (2010), available at http://www.afghanistanstudygroup.org/NewWayForward_report.pdf [<http://perma.cc/FWM9-G2AN>] (reporting that the war in Afghanistan “will cost the U.S. taxpayers nearly \$100 billion per year . . . [t]housands of American and allied personnel have been killed or gravely wounded . . . [and] U.S. interests at stake in Afghanistan do not warrant this level of sacrifice”); ASHLEY J. TELLIS, *CARNEGIE ENDOWMENT FOR INT’L PEACE, PAKISTAN AND THE WAR ON TERROR: CONFLICTED GOALS, COMPROMISED PERFORMANCE* (2008), available at http://carnegieendowment.org/files/tellis_pakistan_final.pdf [<http://perma.cc/8VSX-VRUR>] (considering Pakistan’s approach to terrorism, financial investments of the United States towards Pakistani security and economic development, and Pakistan’s political environment); Beth Elise Whitaker, *Compliance among Weak States: Africa and the Counter-Terrorism Regime*, 36 REV. OF INT’L STUDIES 639 (2010) (reviewing counter-terrorism efforts in Africa and comparing Kenyan, Tanzanian, and Ugandan counter-terrorism activities in relation to domestic politics).

²⁶ Obama, *Remarks at the National Defense University*, *supra* note 1.

²⁷ Lisa Monaco, *Remarks As Prepared for Delivery By Assistant to the President for Homeland Security and Counterterrorism* (Nov. 19, 2013), <http://www.whitehouse.gov/the->

national security activities remain necessary to protect the United States, its allies and partners, and their common interests. American statecraft will necessarily rely heavily on diplomacy to shape foreign affairs, but statecraft in the shadows²⁸—including covert, clandestine, and low-visibility operations,²⁹ and robust intelligence practices—will prove equally critical to national security.

The impending end of America's participation in the war in Afghanistan signals a transition away from large-scale U.S. military combat operations. The U.S. government and NATO continue to negotiate for the Afghan government's renewed consent to military operations in Afghanistan.³⁰ Yet regardless of whether or not the Bilateral Security Agreement for Afghanistan and NATO Status of Forces Agreement will be concluded,³¹ U.S. military operations will change dramatically: the United

press-office/2013/11/19/remarks-prepared-delivery-assistant-president-homeland-security-and-coun [<http://perma.cc/DK2A-HN24>].

²⁸ Activities may, of course, remain out of the eye of acting states' domestic populations but be very visible to affected populations. *See, e.g.*, COLUMBIA LAW SCHOOL & CTR. FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS (2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf> [<http://perma.cc/4W76-RL8Y>].

²⁹ Covert action is "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly"; it does *not* include a wide range of statutorily-specified activities rooted in historic state practice. 50 U.S.C. § 3093 (2012). 50 U.S.C. § 3093 is discussed in greater detail in Section III.C.2 of this Article. A clandestine operation is "sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities." DEP'T OF DEFENSE, JOINT PUB 1-02: DICTIONARY OF MILITARY AND ASSOCIATED TERMS 38 (2014), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf [<http://perma.cc/G4AZ-3NK7>]. Low visibility operations are "[s]ensitive operations wherein the political-military restrictions inherent in covert and clandestine operations are either not necessary or not feasible; actions are taken as required to limit exposure of those involved and/or their activities. Execution of these operations is undertaken with the knowledge that the action and/or sponsorship of the operation may preclude plausible denial by the initiating power." *Id.* at 162.

³⁰ *See* Obama's Call with Karzai, *supra* note 2.

³¹ *See* Stephen J. Hadley, Op-Ed, *In Afghanistan, an Alternate Approach to a Security Pact*, WASH. POST (Jan. 14, 2014), <http://www.washingtonpost.com/opinions/in-afghanistan-an-alternate-approach-to-a-security-pact/2014/01/14/2be7dd50-7d34-11e3-93c1->

States will provide a much smaller troop presence to conduct what will likely be a much narrower mission.³² According to the President:

More than 60,000 of our troops have already come home from Afghanistan. With Afghan forces now in the lead for their own security, our troops have moved to a support role. Together with our allies, we will complete our mission there by the end of this year, and America's longest war will finally be over.³³

The President's decision on Afghanistan caps a year in which the Executive Branch also turned its sights towards revising the laws and policies that have guided U.S. operations against the Taliban, al Qaeda, and associated forces, and against broader threats to U.S. national security since 9/11. As the United States supposedly progressed towards a tipping point in the war on terrorism,³⁴ the President implemented counter-terrorism targeting guidelines that restrict U.S. operations more than does international humanitarian law.³⁵ U.S. counter-terrorism operations outside areas of active hostilities are now reviewed through a more deliberate interagency process that adds policy restrictions not required under international humanitarian law.³⁶ Future signals intelligence (SIGINT) activities will face similar scrutiny after President Obama announced a SIGINT policy that extends privacy safeguards to persons from all nations³⁷ and changes the

0e888170b723_story.html [http://perma.cc/USM8-FQ4L]; Alissa J. Rubin, *NATO Cites Urgency in Reaching Pact Between U.S. and Afghanistan*, N.Y. TIMES (Dec. 4, 2013), <http://www.nytimes.com/2013/12/05/world/asia/time-is-of-the-essence-nato-head-says-urging-afghanistan-deal.html> [http://perma.cc/G2UE-RBVM].

³² See Obama, *State of the Union*, *supra* note 2 (declaring that the United States will do no more than partner “with NATO allies to carry out two narrow missions: training and assisting Afghan forces, and counterterrorism operations to pursue any remnants of al Qaeda”).

³³ *Id.*

³⁴ See Jeh C. Johnson, (then) General Counsel of the Dep't of Defense, *The Conflict Against Al Qaeda and its Affiliates: How Will It End?* (Nov. 30, 2012), *available at* <https://www.commondreams.org/node/89097> [http://perma.cc/CRZ2-SVW5] (describing gains in the transnational armed conflict and a future “tipping point” in the fight against al Qaeda).

³⁵ See Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3 (providing a public, summarized version of the President's policy). The targeting guidelines were designed to force more deliberate, critical reviews of operations to capture or employ lethal force against terrorist targets.

³⁶ See generally *id.*

³⁷ See Fact Sheet, The White House, Office of the Press Secretary, *Review of U.S. Signals Intelligence* (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/fact->

long-standing order that provided such protections only for categories of United States persons.³⁸

These policies focus on regions outside Afghanistan, directly affecting the broader transnational armed conflict and other U.S. national security activities. They seem designed to institutionalize the conduct of particularly sensitive national security activities through processes formulated to preserve America's global standing. They add procedural and analytical rigor that better consider whole-of-government viewpoints but also make it substantively less likely that the Executive Branch will get to the point of executing certain actions. The policies also seek to build transparency in an effort to increase perceptions of legitimacy. Foremost, they align with the President's plan to lead the nation to the tipping point in the transnational armed conflict through a more measured interagency and partnered approach. Only then might the Commander-in-Chief finally assert an end to the war³⁹—even as discrete kinetic strikes and other national security activities continue.

Still, against a backdrop of continuing threats to national security, several critical questions remain unanswered. Will the end of major combat operations by U.S. forces in Afghanistan eliminate the international legal bases for other U.S. counter-terrorism operations both inside and outside Afghanistan? Would the repeal of the 2001 Authorization for the Use of Military Force (AUMF)—or the President's decision not to apply the 2001 AUMF—actually terminate the United States' transnational armed conflict under international and domestic law? Would the end of major combat operations by U.S. forces in Afghanistan and the repeal of the 2001 AUMF—or the President's refusal to employ the powers granted by the 2001 AUMF—create geographical and temporal restrictions on U.S. government activities abroad and place U.S. national security at risk? What rights do states have outside of armed conflict to engage in a category of defense-related, transnational activities without violating international

sheet-review-us-signals-intelligence [http://perma.cc/3VVA-WPD5] [hereinafter Fact Sheet: Review of Signals Intelligence]. The SIGINT policy seeks to preserve some amount of intelligence collection activities while prescribing principles and procedures to expand civil liberty protections globally.

³⁸ See Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), *amended by* Exec. Order 13470, 73 Fed. Reg. 45325 (July 30, 2008) [hereinafter E.O. 12333].

³⁹ Such assertion may be achieved through legislation with Congress, explicitly in his statements, or implicitly through his actions.

law?⁴⁰ Are emerging U.S. government policies that would restrict counter-terrorism operations or intelligence activities reflective of legal requirements or based purely on political considerations? What are the implications under criminal and international human rights law? Could policy decisions to end major combat operations by U.S. forces in Afghanistan and/or the transnational armed conflict exacerbate the quandary of unsatisfying long-term disposition options for detainees who continue to pose a threat to the United States? This Article seeks to explore these questions and others while analyzing whether law and policy can and should support some degree of continuing U.S. counter-terrorism and other national security activities outside areas of active hostilities.

II. The Enemy Gets a Vote

Looking back over my now more than half a century in intelligence, I've not experienced a time when we've been beset by more crises and threats around the globe.

—*Director of National Intelligence James Clapper, January 29, 2014*⁴¹

The best laid plans for peace must still account for the enemy. A disciple of Clausewitz, Field Marshall Helmuth von Moltke has been credited with establishing the combat tenet that “no plan survives first contact with the enemy.”⁴² Boxer Mike Tyson—presumably no expert in macro-level warfare but certainly one experienced in dynamic environments and the challenges they offer—said similarly, “Everybody has a plan until they get punched in the mouth.”⁴³ Both assertions recognized truths that are

⁴⁰ This Article does not address the question of whether international law provides non-state actors with recognized or inherent rights outside of armed conflict to engage in a category of defense-related, transnational activities.

⁴¹ James R. Clapper, Director of National Intelligence, testimony before the Senate Select Committee on Intelligence in presenting his Statement for the Record, Worldwide Threat Assessment of the U.S. Intelligence Community, Senate Select Committee on Intelligence (Jan. 29, 2014), *available at* http://www.dni.gov/files/documents/WWTA%20Opening%20Remarks%20as%20Delivered%20to%20SASC_11_Feb_2014.pdf [<http://perma.cc/89UA-2ZZJ>].

⁴² Kennedy Hickman, *Franco-Prussian War: Field Marshall Helmuth von Moltke the Elder*, ABOUT.COM (last visited Mar. 30, 2014), <http://militaryhistory.about.com/od/1800sarmybiographies/p/vonmoltke.htm> [<http://perma.cc/5DMJ-V252>]. Although von Moltke apparently offered a more extensive and less definitive articulation of this point, military planners recognize this abbreviated phrasing as the encapsulation of the lesson that von Moltke’s offered.

⁴³ Mike Berardina, *Mike Tyson explains one of his most famous quotes*, SUNSENTINEL (Nov. 9, 2012), <http://articles.sun-sentinel.com/2012-11-09/sports/sfl-mike-tyson-explains->

equally applicable to the U.S. government's plan to transition away from war. Plans rarely work as designed; actions of opposing forces require plans to change.

Noble plans for peace must be measured against the realities of the world. Global threats will not stagnate nor merely succumb to designs laid before them. The ground-breaking agreement to dispose of Syria's chemical weapons⁴⁴ has not erased the logistical difficulties in disposing of the weapons,⁴⁵ nor has it created an enduring ceasefire⁴⁶ or prevented foreign fighters from flowing across Syria's borders.⁴⁷ The optimism and unity displayed at the Sochi Olympics did not carry over into neighboring Ukraine,⁴⁸ nor did that peaceful sentiment prevent Russia from sending troops into the Crimean peninsula.⁴⁹ The world remains a very dangerous place, and the costs of conflict are shared both by aggressors and those who are compelled to defend against them.⁵⁰

one-of-his-most-famous-quotes-20121109_1_mike-tyson-undisputed-truth-famous-quotes [http://perma.cc/8AVS-PJ5V].

⁴⁴ See Michael R. Gordon, *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, N.Y. TIMES (Sept. 14, 2013), <http://www.nytimes.com/2013/09/15/world/middleeast/syria-talks.html?pagewanted=all> [http://perma.cc/XRZ8-ZQH8].

⁴⁵ See *Weekend Edition Sunday: Security, Logistics Problems Plague Syria's Weapons Removal*, NAT'L PUB. RADIO (Dec. 29, 2013), <http://www.npr.org/2013/12/29/258048832/security-logistics-problems-plague-syrias-weapons-removal>.

⁴⁶ See *Fighting rages in Syria despite peace talks*, AL JAZEERA (Feb. 12, 2014), <http://www.aljazeera.com/news/middleeast/2014/02/fighting-rages-syria-despite-peace-talks-201421215161928169.html> [http://perma.cc/8ND3-KB3P].

⁴⁷ See *Hundreds of Europeans Fighting in Syria, Says EU Expert*, BBC NEWS (Apr. 23, 2013), <http://www.bbc.com/news/world-middle-east-22275456> [http://perma.cc/JRH5-BYE9]; see generally SHARON L. CARDASH, FRANK J. CILLUFFO & JEAN-LUC MARRET, FONDATION POUR LA RECHERCHE STRATEGIQUE, *FOREIGN FIGHTERS IN SYRIA: STILL DOING BATTLE, STILL A MULTIDIMENSIONAL DANGER* (Aug. 2013), available at <http://www.frstrategie.org/barreFRS/publications/notes/2013/201324.pdf> [http://perma.cc/N2PS-Z6AM].

⁴⁸ See Will Englund, *Ukraine's President Open to Early Vote, Polish Leader Says; Scores Reported Killed in Clashes*, WASH. POST (Feb. 21, 2014), http://www.washingtonpost.com/world/despise-truce-some-fighting-reported-in-kyiv/2014/02/20/71b5025e-99bd-11e3-b88d-f36c07223d88_story.html [http://perma.cc/GM2-KR87].

⁴⁹ See Shaun Walker, Harriet Salem & Ewen MacAskill, *Russian 'Invasion' of Crimea Fuels Fear of Ukraine Conflict*, GUARDIAN (Feb. 28, 2014), <http://www.theguardian.com/world/2014/feb/28/russia-crimea-white-house> [http://perma.cc/LQY9-K6XZ].

⁵⁰ See generally THE COSTS OF WAR: AMERICA'S PYRRHIC VICTORIES (John V. Denson ed., 2d ed. 1999).

Since 9/11, terrorists have presented the most immediate, deadly national security threat to U.S. citizens. Despite the U.S. government's significant successes in the transnational armed conflict and against core al Qaeda in particular,⁵¹ terrorism remains a significant, lethal threat.⁵² Bin Laden's al Qaeda morphed into al Qaeda 2.0.⁵³ The organization

⁵¹ See, e.g., Barack Obama, Remarks by the President on Osama Bin Laden (May 2, 2011); Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader Al-Zarqawi Killed in Iraq*, WASH. POST (June 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060800114.html> [<http://perma.cc/3XVV-5XM4>]; Jena Baker McNeill, James Jay Carafano & Jessica Zuckerman, *39 Terror Plots Foiled Since 9/11: Examining Counterterrorism's Success Stories*, The Heritage Foundation (May 20, 2011), <http://www.heritage.org/research/reports/2011/05/39-terror-plots-foiled-since-911-examining-counterterrorism-s-success-stories> [<http://perma.cc/T4JR-98KR>]; Fact Sheet, U.S. Dep't of Justice, *Justice Department Counter-Terrorism Efforts Since 9/11* (Sept. 11, 2008), <http://www.justice.gov/opa/pr/2008/September/08-nsd-807.html> [<http://perma.cc/EQC5-PKX2>]; Fact Sheet, U.S. Dep't of Treasury, *Combatting the Financing of Terrorism, Disrupting Terrorism at its Core* (Sept. 8, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tg1291.aspx> [<http://perma.cc/4L5A-53RT>].

⁵² Reasonable minds can disagree as to whether the world is safer from terrorism today than it was before 9/11. See e.g., Obama, *Remarks at the National Defense University*, *supra* note 1 (“So that’s the current threat—lethal yet less capable al Qaeda affiliates; threats to diplomatic facilities and businesses abroad; homegrown extremists [T]he scale of this threat closely resembles the types of attacks we faced before 9/11.”); Michael Hirsh, *The Next Bin Laden*, THE ATLANTIC (Nov. 15, 2013), <http://www.theatlantic.com/international/archive/2013/11/the-next-bin-laden/281538/> [<http://perma.cc/R4S3-6DER>] (“The truth is much grimmer. Intelligence officials and terrorism experts today believe that the death of bin Laden and the decimation of the Qaeda ‘core’ in Pakistan only set the stage for a rebirth of al-Qaeda as a global threat. Its tactics have morphed into something more insidious and increasingly dangerous as safe havens multiply in war-torn or failed states”); Cynthia Lum, Leslie W. Kennedy & Alison J. Sherley, *The Effectiveness of Counter-Terrorism Strategies*, Campbell Systematic Reviews, summary (Jan. 17, 2006; updated Oct. 12, 2009), available at www.campbellcollaboration.org/lib/download/53/ [<http://perma.cc/UNX8-CBJ7>] (“There is almost a complete absence of high quality *scientific* evaluation evidence on counterterrorism strategies. What evidence there is does not indicate consistently positive results—some counter terrorism interventions show no evidence of reducing terrorism and may even increase the likelihood of terrorism and terrorism-related harm.”); National Security Preparedness Group, *Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations*, Bipartisan Policy Center (Sept. 2011), available at <http://bipartisanpolicy.org/sites/default/files/CommissionRecommendations.pdf> [<http://perma.cc/5H8U-9QRR>] (“[C]ontinued and nascent threats mean that we must not become complacent, but remain vigilant and resolute. We have significantly improved our security since 9/11, but the work is not complete.”).

⁵³ See Kimberly Dozier, *Special Ops Chiefs Warns of Al Qaeda 2.0*, ASSOCIATED PRESS (July 28, 2011), http://news.yahoo.com/spec-ops-chief-warns-al-qaida-2-0-051439458.html?soc_src=copy [<http://perma.cc/4RAD-E3V4>].

diversified, and other groups and individuals took up like-minded extremist ideologies and activities.⁵⁴ Some proved the ever-increasing ability of small groups and individuals to unleash lethal capacity and to make fewer areas of the world truly safe.⁵⁵ Others grew too vicious even for al Qaeda, proving that in the contemporary world the enemy of my enemy can prove to be my enemy as well.⁵⁶ Today, “threats emanate from a diverse array of terrorist actors, ranging from formal groups to homegrown violent extremists . . . and ad hoc, foreign-based actors.”⁵⁷ Core al Qaeda may not be the threat that it once was,⁵⁸ but “continuing, imminent” terrorist threats persist.⁵⁹

Furthermore, the U.S. intelligence community recognizes that other global threats combine to present an even greater risk to U.S. national security. Global threats include: cyber attacks, intrusions, espionage, intellectual property theft, other intelligence threats (i.e., capabilities and activities through which foreign entities—both state and non-state actors—

⁵⁴ Obama, *State of the Union*, *supra* note 2 (“The threat has evolved, as al Qaeda affiliates and other extremists take root in different parts of the world.”).

⁵⁵ See, e.g., Gabriella Blum, *Invisible Threats*, Hoover Institution, Koret-Taube Task Force on National Security and Law (2012), http://media.hoover.org/sites/default/files/documents/EmergingThreats_Blum.pdf [<http://perma.cc/U5UU-95MW>] (describing “the democratization of threat” as individuals use technology to increase their capacity to commit harm domestically and internationally); The National Counterterrorism Center, Counterterrorism 2014 Calendar, Terrorist Groups, <http://www.nctc.gov/site/groups>.

⁵⁶ See Ben Hubbard, *Al Qaeda Breaks With Jihadist Group in Syria Involved in Rebel Infighting*, N.Y. TIMES (Feb. 3, 2014), http://www.nytimes.com/2014/02/04/world/middleeast/syria.html?_r=0 (reporting that al Qaeda disavowed the terrorist group known as the Islamic State of Iraq and Syria (ISIS), and, according to one Brookings scholar, “ISIS is now officially the biggest and baddest global jihadi group on the planet . . . Nothing says ‘hard-core’ like being cast out by Al Qaeda”).

⁵⁷ James R. Clapper, Director of National Intelligence, Statement for the Record, Worldwide Threat Assessment of the U.S. Intelligence Community, Senate Select Committee on Intelligence 4 (Jan. 29, 2014), http://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WFTA%20%20SF_R_SSCI_29_Jan.pdf [<http://perma.cc/57B6-EYS4>]. The U.S. intelligence community assesses significant terrorist threats to exist in the homeland and overseas, including homegrown violent extremists, al Qaeda in the Arabian Peninsula, core al Qaeda, persistent threats to U.S. interests overseas, extremists in Syria, and Iran and Hizballah. *Id.* at 4–5.

⁵⁸ See Obama, *Remarks at the National Defense University*, *supra* note 1 (“Today, Osama bin Laden is dead, and so are most of his top lieutenants. There have been no large-scale attacks on the United States, and our homeland is more secure . . . In sum, we are safer because of our efforts . . . Core al Qaeda is a shell of its former self.”).

⁵⁹ See Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3 (establishing a “continuing, imminent threat” standard for U.S. counter-terrorism lethal and capture operations outside of areas of active hostilities).

seek to obtain U.S. national security information), terrorism, proliferation of weapons of mass destruction, threats to space assets and services routed through space, transnational organized crime, economic trends, depletion of national resources, health risks, and mass atrocities.⁶⁰ Regional threats are equally concerning. U.S. national security is pressured by: “destabilizing violence” in the Middle East and North Africa; the armed conflict in Afghanistan; evolving political dynamics across South Asia; political turmoil and “deadly asymmetric attacks” in Sub-Saharan Africa; Chinese national policies and “China’s pursuit of a ‘new type of power relations’ with Washington”; North Korea’s nuclear weapons program; Vladimir Putin’s Russia; Eurasia’s political volatility and economic struggles; and the destabilizing influences of poverty, governance deficiencies, volatile economies, and extreme ethnic, nationalist, and religious ideologies.⁶¹ Meanwhile, the Syrian crisis had mostly internal and regional implications at its outset, but foreign fighters now present a significant concern for the global community.⁶² Furthermore, the Russia-Ukraine standoff demonstrated that internal riots and disturbance can quickly elevate into more substantial international security concerns.⁶³

In short, irrespective of the United States’ efforts in pursuit of peace, the fierce international arena will continue to stress U.S. national security and states’ obligations to provide for their citizens’ safety.⁶⁴

⁶⁰ See Clapper, *supra* note 57, at ii. Note that the Director’s written report demonstrates a recent historic pattern of presenting global threats in order of significance to U.S. national security interests. For 2014, the three most significant threats were: 1) cyber; 2) counterintelligence; and 3) terrorism. Previous years’ reports announced 2013 threats as: 1) cyber; 2) terrorism and transnational crime; 3) weapons of mass destruction proliferation; 2012 threats as: 1) terrorism; 2) proliferation; 3) cyber; 2011 threats as: 1) terrorism; 2) proliferation; 3) global challenges; and 2010 threats as: 1) cyber; 2) the global economy; 3) terrorism.

⁶¹ See *id.*, at 12–27.

⁶² See Cardash, Cilluffo & Marret, *supra* note 47, at 2–4.

⁶³ See Samuel Charap & Keith Darden, *Russia’s unclear motives in Ukraine*, The International Institute for Strategic Studies, Politics and Strategy, THE SURVIVAL EDITORS’ BLOG (Mar. 3, 2014), <https://www.iiss.org/en/politics%20and%20strategy/blogsections/2014-d2de/february-1d08/ukraine-russia-088f> [<http://perma.cc/6HWX-88EE>] (“Russia has taken deeply disturbing steps following the breakdown of the 21 February negotiated settlement. It is too early to say with any confidence how this will end, but it is clear that moves to take control over key installations on the Crimean peninsula . . . might well be a prelude to war, long-term occupation, partition, or some combination thereof.”).

⁶⁴ For analysis of “the rapid and vast geopolitical changes characterizing the world [in December 2012] and possible global trajectories during the next 15–20 years” see Office of

III. Statecraft in the Shadows: Historic & Legal Foundations of State Practice

Small-scale military or paramilitary actions using tools of hostilities have been a feature of American peacetime for most of its history, and the same is true of many other great powers. The idea of an absolute binary in international or domestic law, between “armed conflicts” conceived as full-on war and all other extraterritorial situations being necessarily governed by human rights law and law enforcement tools, is by far the historical novelty, not the norm.

—Kenneth Anderson & Benjamin Wittes, *Speaking the Law*⁶⁵

A. In History

History presents the most compelling evidence that states conduct national security activities as a matter of right. Since the first states emerged, governments have been called upon to provide protection for their citizenry.⁶⁶ Early states employed whatever means available to secure territory, identify foreign threats, and project power.⁶⁷ The interaction of

the Director of National Intelligence, *Global Trends 2030: Alternative Worlds*, National Intelligence Council (Dec. 2012), http://www.dni.gov/files/documents/GlobalTrends_2030.pdf [<http://perma.cc/PMK8-7BEX>].

⁶⁵ See ANDERSON & WITTES, *supra* note 19, at 152.

⁶⁶ “Early sovereignty writings focused on powers of rulers to make decisions affecting a state’s internal governance and dictating its external actions.” Michael J. Adams, *Six Degrees of Sovereignty: Understanding Sovereignty and Jurisdiction in the Physical, Informational, and Cognitive Dimensions of the Information Environment* 12 (May 30, 2013) (unpublished LL.M. long paper, Harvard Law School) (on file with Harvard Law School Library) (explaining that “Bodin focused on the power of the king to rule and defined sovereignty as ‘the absolute and perpetual power of a commonwealth’”) (quoting JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* 1 (Julian H. Franklin ed., 1992) (1576).

⁶⁷ See, e.g., RICHARD A. GABRIEL, *THE GREAT ARMIES OF ANTIQUITY* 48–58 (2002) (recounting the armies of Sumer and Akkad that battled—and provided security for their respective citizenries—as early as 3000 B.C.); JOHN KEEGAN, *INTELLIGENCE IN WAR* 7–17 (2002) (highlighting examples in history of those who gathered or relied on intelligence in support of state interests, including Scipio, Alexander the Great, Caesar, the Teutonic Knights, English kings, Native Americans, Frederic the Great, Wellington, and Indian harkaras); MICHAEL EVANS, *AMPHIBIOUS OPERATIONS: THE PROJECTION OF SEA POWER ASHORE* (1990).

states and their citizens led directly to the development of international law.⁶⁸ Over time, international law and politics have refined the means through which states interact. Yet as statecraft has grown increasingly important—and practiced—in the ever more interconnected international arena, states continue to conduct national security activities as sovereign right and responsibility.⁶⁹

There may be no better example of this phenomenon than the Cuban Missile Crisis. The United States employed the tools of national power to defend against Soviet emplacement of nuclear missiles in Cuba.⁷⁰ President Kennedy turned to statecraft to build international opposition to Soviet actions, collect intelligence necessary to provide for the national defense, project power, and “quarantine” Cuba.⁷¹ Then, at the height of what had escalated into a diplomatic and military standoff, Adlai Stevenson, U.S. Ambassador to the United Nations, revealed Soviet missile sites to the United Nations, the watching world, and the stunned Soviet ambassador in a brilliant act of diplomacy.⁷² The Soviets, embarrassed on the international stage, caved to international pressure and withdrew the nuclear threat.⁷³ Thus, American statecraft outside of armed conflict—both overt and in the shadows—proved critically important to the avoidance of nuclear war.

⁶⁸ “According to Blackstone, international law emerged from the will of the people to support transactions between both states and people.” Adams, *supra* note 66, at 13. Blackstone wrote: “The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.” SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FOURTH 66 (15th ed. 1982) (1809).

⁶⁹ Certainly it is debatable whether states generally accept such activities, acquiesce to them in discrete instances for political reasons, or cannot stop such activities from occurring. Nevertheless, international law has not developed a general prohibition to these types of state practice.

⁷⁰ See, e.g., U.S. Department of State, Office of the Historian, *Milestones: 1961-1968, The Cuban Missile Crisis, October 1962*, <https://history.state.gov/milestones/1961-1968/cuban-missile-crisis> [<http://perma.cc/9VC-P7ZU>]; Adams, *supra* note 66.

⁷¹ See U.S. Department of State, *supra* note 70.

⁷² Stevenson’s remarks are recorded at Adlai Stevenson, Permanent U.S. Representative to the United Nations, *Remarks to Soviet Ambassador Valerian Zorin and the United Nations* (Oct. 25, 1962), http://infoshare1.princeton.edu/libraries/firestone/rbnc/mudd/online_ex/stevenson_speech/ [<http://perma.cc/A2A9-NNFC>].

⁷³ See U.S. Department of State, *supra*, note 70.

Whether one looks to the range of activities employed by the U.S. government during the Cuban Missile Crisis or whether one looks back further in history to the diplomatic efforts of the Congress of Sparta,⁷⁴ to the intelligence networks of English kings,⁷⁵ or to the economic statecraft of the Central Eurasian empires along the Silk Road,⁷⁶ states have created enduring space to conduct a range of national security activities outside of armed conflict both through continuing and recurring state practice and through their refusal to create more significant international legal restrictions that would impede their national security interests.⁷⁷ History should speak for itself: in short, states have shaped the international arena through their conduct,⁷⁸ but also through their refusal to craft international law obstructions to their national security interests⁷⁹—particularly when

⁷⁴ See SIR HAROLD GEORGE NICOLSON, *DIPLOMACY* 1 (3d ed. 1977).

⁷⁵ See Keegan, *supra* note 67, at 13–17.

⁷⁶ See generally CHRISTOPHER I. BECKWITH, *EMPIRES OF THE SILK ROAD: A HISTORY OF CENTRAL EURASIA FROM THE BRONZE AGE TO THE PRESENT* (2011).

⁷⁷ While it is beyond the scope of this Article to detail the full history of international statecraft outside of armed conflict, other examples include information conveyed through as diverse of means as bonfires, African drums, and the telegraph, see generally JAMES GLEICK, *THE INFORMATION: A HISTORY, A THEORY, A FLOOD* (2012), and militaries deployed in missions ranging from humanitarian assistance to full-scale war, see generally JOHN KEEGAN, *A HISTORY OF WARFARE* (1994). Evidence of states' security practices outside of armed conflict can also be viewed through the contemporary U.S. government Diplomacy, Information, Military, Economics (DIME) model. See generally JOINT CHIEFS OF STAFF, DEP'T OF DEFENSE, *JOINT PUBLICATION: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES I-11–I-14* (Mar. 25, 2013), available at http://www.dtic.mil/doctrine/new_pubs/jp1.pdf [<http://perma.cc/B5XD-JQ9D>]. Diplomatic, informational, military, and economic levers of national power have been employed by states in furtherance of their national interests throughout history. The challenge is not so much in demonstrating that states have conducted various forms of statecraft to protect their national security interests, but in recognizing historic practice and sovereign right in a manner that considers reciprocal conduct (both occurring and contemplated), enhances security, and provides a better framework for the international community going forward.

⁷⁸ See generally CHARLES W. FREEMAN, *ARTS OF POWER: STATECRAFT AND DIPLOMACY* (1997) (presenting a historical perspective on international examples of statecraft, including diplomatic, informational, military, economic, political, and cultural activities).

⁷⁹ While this Article focuses on the legal bases and policy considerations relating to state action and attempts to explain how extant laws and emerging policies can support a pragmatic approach to combating global threats, the author does not delve into motivations for state action other than national security. For such discussion, see, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) (“States do not comply with norms of [customary international law (CIL)] because of a sense of moral or legal obligation; rather, their compliance and the

acting for benign defensive purposes.⁸⁰

norms themselves emerge from the states' pursuit of self-interested policies on the international stage. In addition, the behaviors associated with CIL do not reflect a single, unitary logic. Instead, they reflect various and importantly different logical structures played out in discrete, historically contingent contexts."); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 200 (1996) (arguing that "law forms a crucial part of the background against which the complex web of interactions among self-interested nations transpires"; asserting that state conduct results from a "repeated process of interaction and internalization" with international legal norms as part of the "transnational legal process").

⁸⁰ It should also be pointed out that states' national security practices outside of armed conflict have sometimes involved the use of force—whether sanctioned by U.N. Security Council Resolution or not. As discussed in the ensuing section, international law does place constraints on the use of force or the threat of the use of force, but states have conducted limited, discrete kinetic actions abroad in history. *See, e.g.*, Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL'Y 559, 559–90 (2001) (recounting that, prior to October 7, 2001, "previous uses of force by the United States against terrorist-supporting states have received varying responses from the international community, given rise to some criticism, and raised a number of international legal questions involving the right of guaranteed self-defense under Article 51 of the U.N. Charter"). U.S. counter-terrorism strikes into Afghanistan and Sudan in 1998 provide an example of direct action that was intended to occur outside of armed conflict, but certainly rose to the level of the use of force and had implications under international law. *See U.S. missiles pound targets in Afghanistan, Sudan*, CNN (Aug. 21, 1998), <http://www.cnn.com/US/9808/20/us.strikes.02/> [<http://perma.cc/U9EE-LYQM>] (reporting "American cruise missiles pounded sites in Afghanistan and Sudan . . . in retaliation for the deadly bombing of U.S. embassies in Kenya and Tanzania . . . U.S. officials say the six sites attacked in Afghanistan were part of a network of terrorist compounds near the Pakistani border that housed supporters of millionaire Osama bin Laden"). This action included "short duration strikes and other small-scale offensive actions conducted as a special operation in hostile, denied, or diplomatically sensitive environments and which employ specialized military capabilities to seize, destroy, capture, exploit, recover, or damage designated targets." *See* JOINT CHIEFS OF STAFF, DEP'T OF DEFENSE, JOINT PUBLICATION 3-05: SPECIAL OPERATIONS GL-7 (Apr. 18, 2011) (defining "direct action") and II-5 (explaining the term in more depth and providing examples of techniques employed during direct action) [hereinafter JP 3-05]. The United States explained its actions in both pragmatic and international legal terms. *See* Federal Document Clearing House, *There Can Be No Safe Haven for Terrorists*, excerpts from briefing and news conference by William S. Cohen, Secretary of Defense, & Gen. Henry H. Shelton, Chairman of the Joint Chiefs of Staff (Aug. 21, 1998) (according to Secretary of Defense William Cohen, "We recognize these strikes will not eliminate the problem. But our message is clear. There will be no sanctuary for terrorists and no limit to our resolve to defend American citizens and our interests—our ideals of democracy and law—against these cowardly attacks"); Letter from Bill Richardson, Permanent Representative of the United States to the U.N., to Danilo Turk, President, U.N. Security Council, U.N. Doc S/1998/780 (Aug. 20, 1998) ("[T]he United States has acted pursuant to the right of self-defense confirmed by Article 51 of the United Nations Charter. The targets struck, and the

B. Under International Law

International law explicitly accepts states' right to self-defense.⁸¹ Certain prohibitions in the U.N. Charter and other subject-specific rules, norms, and principles certainly shape the bounds of lawful state conduct, but they do not go so far as to prohibit in all cases long-established state practice like diplomacy, intelligence, security assistance and related activities to improve partner security capacity, and other forms of statecraft. Furthermore, the sources of international law⁸² leave a great deal of state conduct to the self-determination of sovereign states and, other than the use of force, states may employ the instruments of state power with a great degree of freedom, checked largely by states' own political discretion. Within the confines of international law, principles of sovereignty,⁸³ non-

timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.”). Thus, the discrete use of force in this instance was explained in terms of *jus ad bellum* and *jus in bello*. Beyond the U.S. Government's assertions in those particular circumstances, as a legal matter direct action would not normally present such intensity to implicate armed conflict under international law, or war under the U.S. Constitution, absent a series of sustained direct action operations. This is particularly true in relation to transnational armed conflict or non-international armed conflict, since *Tadić* considers the intensity of fighting under such circumstances (as opposed to any resort to force initiating international armed conflict). Therefore, discrete instances of direct action may or may not cross the threshold of armed conflict—even if the same activities constitute the use of force under the terms of the U.N. Charter. Certainly the state in which direct action occurs might have a different vantage point than the state conducting the activity in those instances where the host nation does not request assistance or grant consent for the activity, and the potential for long-lasting effects and diplomatic difficulties (e.g., capture or arrest of a foreign national) should be considered as a practical matter.

⁸¹ See U.N. Charter art. 51.

⁸² Article 38 of the Statute of the International Court of Justice is often cited as the leading authority for sources of international law. Article 38 specifies four sources: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice art. 38 (June 26, 1945). For analysis of the sources of international law and how they are applied, see generally David Kennedy, *Sources of International Law*, 2 AM. U.J. INT'L L. & POL'Y 1 (1987).

⁸³ “Sovereignty” has been defined many ways. See, e.g., *Island of Palmas Case*, 2 R.I.A.A. 829, 838 (1928) (defining sovereignty as the “point of departure in settling most questions that concern international relations”).

intervention,⁸⁴ jurisdiction,⁸⁵ and state responsibility⁸⁶ help to shape determinations of what constitutes lawful state conduct. Yet statecraft, and

⁸⁴ The International Court of Justice summarized the principle of non-intervention in *Nicaragua v. United States*. “[I]n view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of sovereignty, to decide freely. One of these is the choice of political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 205 (June 27). Other methods of persuasion below coercion, however, would appear to remain valid instruments of national power without violating the non-intervention principle. Furthermore, the principle of non-intervention does not apply to activities undertaken in another state’s territory when that other state (host nation) has requested assistance in the form provided and/or consented to the activities conducted. As an example, foreign internal defense (FID) is normally conducted in assistance to a host nation, with that host nation’s consent, and in great reliance upon that nation’s resources and actions “to free and protect its society from subversion, lawlessness, insurgency, terrorism, and other threats to its security.” Joint Chiefs of Staff, Dep’t of Defense, Joint Publication 3-22: Foreign Internal Defense GL-7 (July 12, 2010) [hereinafter JP 3-22] (defining “foreign internal defense”). “While historically, the United States provided notable, and largely unconditional, assistance to friendly foreign nations following World War II . . . FID as conducted today has its genesis in the post-Vietnam era when U.S. policy shifted to emphasize that the United States would assist friendly nations, but would require them to provide the manpower and be ultimately responsible for their own national defense.” *Id.* at ix (describing the evolution of “foreign internal defense”).

⁸⁵ Although jurisdiction has been defined many ways, scholars explain that “‘jurisdiction’ has two related meanings: (1) . . . the State’s right under international law to regulate conduct in matters not exclusively of domestic concern It is a problem, accordingly, that is entirely distinct from that of internal power or constitutional capacity or, indeed, sovereignty” JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 321 (3d ed. 2009) (citing F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 HAGUE RECUEIL 1 at 9–13 (1964); *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. (Supp.) 435 (1935)); and “. . . (2) In relation to international organizations, and especially international courts and tribunals, jurisdiction means competence.” GRANT & BARKER, PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 321 (citing HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 155–62 (4th rev. ed. 2003). Jurisdiction also has three categories: prescriptive (or legislative), adjudicative (or judicial), and executive (or enforcement). LORI F. DAMROSCH, LOUIS HENKIN, SEAN D. MURPHY & HANS SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 755 (5th ed. 2009).

⁸⁶ The doctrine of state responsibility provides for states to assert claims on behalf of their citizens when individuals are “unable to obtain redress under the legal system of that state” Damrosch, *supra* note 85, at 448. “As a general matter, if a state by its act or omission breaches an international obligation, it incurs what is commonly referred to as ‘international responsibility.’ If the consequence of the breach is an injury to another state, the delinquent state is responsible to make reparation for the breach to the injured state”

statecraft relating to national security in particular, remains largely guided by historic practice in the absence of international restrictions particular to the conditions or actions at hand.

Historically, those who study international law relating to armed conflict focus on international humanitarian law.⁸⁷ International humanitarian law implicitly recognizes *jus ad bellum* (the state's right to war) and restricts the means and methods of warfare as *jus in bello* (the state's right in war). Yet international humanitarian law is not relevant to determining the legal bounds of state conduct *outside* of armed conflict.⁸⁸ Instead, national security activities falling below the threshold of armed conflict are shaped by the aforementioned custom, tradition, and state practice and are supported by the *Lotus* principle⁸⁹ and *jus extra bellum*.⁹⁰

A state injured by a violation may seek redress by claims made through diplomatic channels or through a procedure of dispute settlement to which the states concerned have agreed Under some circumstances, the injured state may take measures of self-help or countermeasures not involving use of force.” *Id.* at 498. Consequently, the state responsibility principle may be a useful tool for shaping state conduct in certain instances. It may also be worthy of continuous review as future international legal norms emerge. For now, however, the principle serves mostly as a reminder to consider relevant sources of law for potential obligations when considering national security activities. It does little to change the generally permissive international legal environment in which most national security activities occur. For a survey of state responsibility rules, see *id.* at 498–555; JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* (CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW) (2013).

⁸⁷ The law that regulates armed conflict is generally divided into two bodies of law: *jus ad bellum* (the right to war) and *jus in bello* (the right in war). Those categories govern the international legal bases for initiating war and the conduct of warfare, respectively. *Jus in bello* is also referred to as “international humanitarian law,” the “law of war,” or the “law of armed conflict.” See OPERATIONAL LAW HANDBOOK 1–4, 11 (Maj. Andrew Gillman, USAF & Maj. William Johnson eds., 2012).

⁸⁸ Note, however, that Article 11 of the Lieber Code states: “The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace” Lieber Code, *supra* note 13, art. 11.

⁸⁹ “[T]he *Lotus* principle [is] that States have the right to do whatever is not prohibited in international law” Armin von Bogdandy & Markus Rau, *The Lotus*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated June 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e162?rskey=4o2bzy&result=1&prd=EPIL> [<http://perma.cc/WQ4Y-6VY7>].

⁹⁰ The author defines *jus extra bellum* as “the state’s right outside of war” and describes *jus extra bellum* as “the sovereign right of states manifested in a historic pattern of state conduct based on a sense of international legal freedom and pursuant to domestic law and obligations.”

Indeed, state custom illustrates that national security activities conducted outside of armed conflict occur, and have historically occurred, with regularity, creating or reflecting the existence of a customary international norm.⁹¹ Furthermore, international law does not distinguish between apparent or publicly acknowledged state action, and statecraft that may be covert, clandestine, low in visibility, or otherwise unapparent. Remaining silent on the matter, states often turn to smaller-scale and low-visibility statecraft to better understand global environments or when such activities are deemed to be most effective for addressing a particular set of conditions.⁹² Such activities provide states powerful options to shape international affairs without resorting to war.⁹³ States turn to low-visibility

⁹¹ Customary international law provides an important arm of international law in shaping state conduct. However, it also makes plain one of the deficiencies in asserting the importance of state practice: state practice, in and of itself, is generally not considered to create *opinio juris*. However, recurring state practice undertaken out of a sense of legal obligation can create customary international law. Thus, states might engage in a recurring course of conduct without objection—and perhaps even with universal consent—but customary international law would not normally develop unless that historic practice was somehow supported by a sense of legal obligation or obligations (e.g., the right of freedom of navigation that arguably existed prior to the development of international standards such as the United Nations Convention on the Law of the Sea). That is one of the challenges resident in this Article. While I argue that states engage in national security activities in a generally permissive international legal environment, I am not prepared to argue that there is an overriding, particular sense of international legal obligation that states have complied with so as to permit the historic national security practice of others that this Article discusses. Nevertheless, I do not consider this deficiency to make *jus extra bellum* any less important or accurate as a legal architecture. Rather, this dilemma demonstrates that existing paradigms of international law, including customary international law, do not address the full range of states' rights presently at play in the international arena.

⁹² The specific nature of the activities will ultimately determine whether such activities comply with international law or might constitute acts of war. Nevertheless, depending on how they are conducted, espionage, computer network exploitation, preparation of the environment, sabotage, direct action, and foreign internal defense demonstrate the wide range of activities that could be employed in smaller-scale and low visibility forms without violating international law or initiating armed conflict. See PHILLIP KNIGHTLEY, *THE SECOND OLDEST PROFESSION: SPIES AND SPYING IN THE TWENTIETH CENTURY* (1986); TERRY CROWDY, *THE ENEMY WITHIN: A HISTORY OF ESPIONAGE* (2006); Col. Matthew M. Hurley, USAF, *For and from Cyberspace: Conceptualizing Cyber Intelligence, Surveillance, and Reconnaissance*, AIR & SPACE POWER J. 14 (Nov.–Dec. 2012); Gary D. Brown & Owen W. Tullos, *On the Spectrum of Cyberspace Operations*, SMALL WARS J. (Dec. 11, 2012), <http://smallwarsjournal.com/jrnl/art/on-the-spectrum-of-cyberspace-operations> [<http://perma.cc/52WD-V2UQ>]; JP 3-05, *supra* note 80, at GL-12 (defining “special operations”); JP 3-22, *supra* note 84.

⁹³ Those options continue to evolve. As an example, for discussion of cyber activities, warfare, and armed conflict, see generally INTERNATIONAL GROUPS OF EXPERTS AT THE INVITATION OF THE NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE,

statecraft when it is deemed to be most effective for the circumstances at hand.⁹⁴

1. The *Lotus* Principle

Statecraft is supported by a generally permissive international legal regime reflected in the *Lotus* principle. *Lotus* recognized that “[r]estrictions upon the independence of states cannot . . . be presumed.”⁹⁵ Simply put, “the *Lotus* principle [is] that states have the right to do whatever is not prohibited in international law.”⁹⁶ Thus, states may face a general international legal prohibition on the initiation of armed conflict,⁹⁷ subject to certain exceptions,⁹⁸ but they do not face a similar general international legal prohibition against all uses of state or military power. Of particular relevance to this Article is international law’s silence on countless low-

TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013).

⁹⁴ What is most effective, however, is not always consistent with international law. Relatedly, “unconventional warfare” describes those “[a]ctivities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.” JP 3-05, *supra* note 80, at GL-13–GL-14. Unconventional warfare and some forms of covert action can violate international law’s principle of non-intervention, *see* Schmitt & Wall, *supra* note 18, at 353–56; *Nicaragua*, *supra* note 85, ¶ 205, or international obligations “in conformity with the Charter of the United Nations, to refrain . . . from the threat or use of force against the sovereignty, territorial integrity or political independence of any State . . .”, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Preamble (Protocol I) (June 8, 1977). Unconventional warfare and covert action also raise questions about whether and under what circumstances involvement in another state’s affairs might draw the acting state into a conflict as a co-belligerent.

⁹⁵ S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10, ¶ 48 (Sept. 7) [hereinafter *Lotus*]; *see* Regina v. Gul, (2013) UKSC 64.

⁹⁶ Bogdandy & Rau, *supra* note 89.

⁹⁷ *See* U.N. Charter art. 2, para. 4 (prohibiting states “in their international relations from the threat or use of force against the territorial integrity or political independence of any state”).

⁹⁸ International law provides three traditional bases for the use of force by states outside of their borders. States may resort to force pursuant to a United Nations Security Council resolution (*see* U.N. Charter Chapter VII), as a matter of self-defense (*see* U.N. Charter art. 51; note that, under certain circumstances, the United States considers the right of self-defense to include the right to preemptive self-defense and the right to act in self-defense when another state is unwilling or unable to do so (*see generally* Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012))), or with the consent of the host nation (*see generally* Ashley Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013)).

visibility national security activities, including forms of intelligence collection, clandestine activities, covert action, and low visibility operations.⁹⁹ Such tools are generally permissible under international law and, according to the *Lotus* principle, states possess the right to utilize them.

Transnational intelligence activities provide an example. Throughout history, states have employed intelligence assets to collect information in support of national security and broader national interests.¹⁰⁰ Information represents a potentially decisive advantage in international affairs.¹⁰¹ Intelligence is an especially valuable asset in matters of national

⁹⁹ This is not to suggest that any and all state activities not explicitly prohibited by international law *should* be allowed. Rather, *jus extra bellum*—while acknowledging the generally permissive international legal environment—provides an architecture for assessing what sorts of activities *should* be prohibited and for creating normative standards and rules with which to regulate state conduct. For example, the United States, China, and Russia offer competing perspectives on cyber activities and challenges in the cyber domain. See KIEER GILES & WILLIAM HAGESTAD II, *DIVIDED BY A COMMON LANGUAGE: CYBER DEFINITIONS IN CHINESE, RUSSIAN AND ENGLISH* (2013). Yet the countries are engaging in diplomatic efforts to address cyber threats and, presumably, each has an interest in greater cyber security in its cyber networks. See Tara Maller, *Enhancing the Cyberdiplomacy Arsenal*, *BLOGS OF WAR* (2013), <http://blogsofwar.com/2013/10/04/tara-maller-enhancing-the-cyberdiplomacy-arsenal/> [<http://perma.cc/ML43-FLH4>]; see generally FRANZ-STEFAN GADY & GREG AUSTIN, *RUSSIA, THE UNITED STATES, AND CYBER DIPLOMACY: OPENING THE DOORS* (2010). The *jus extra bellum* framework would allow a tool for considering states' national security rights in the cyber realm outside of armed conflict and for the United States, Russia, and China to work towards a normative cyber framework that might regulate their activities, and potentially the activities of others who might sign on, while targeting particularly egregious cyber activities that all parties agree must be combated.

¹⁰⁰ See, e.g., STRATEGIC INTELLIGENCE 215–16 (Loch K. Johnson & James J. Wirt eds., 2006) (recounting President Theodore Roosevelt's use of intelligence "to incite a revolution in Panama to justify annexing the Panama canal" and "as justification to launch the worldwide cruise of the 'Great White Fleet' as a display of U.S. naval force"; and British and German intelligence exploits designed to sway American decisions about entering World War I and ultimately resulting in Britain producing the "Zimmerman Telegram" and the United States joining the British in their war fighting efforts); *Legal Aspects of Reconnaissance in Airspace and Outerspace*, 61 COLUM. L. REV. 1074 (1961) (presenting a perspective on intelligence and law at the time the U-2 reconnaissance aircraft piloted by Gary Powers was shot down over the Soviet Union).

¹⁰¹ See, e.g., Ashley Deeks, *East Timor's Case in the ICJ: Will the Court Decide Whether Spying Violates International Law?*, *LAWFARE BLOG* (Jan. 22, 2014), <http://www.lawfareblog.com/2014/01/east-timors-case-in-the-icj-will-the-court-decide-whether-spying-violates-international-law/> [<http://perma.cc/C3ZR-GFNU>] (reporting a developing case before the International Court of Justice in which "East Timor alleges that Australia bugged an East Timorese cabinet office during bilateral negotiations about an important maritime treaty . . . between the two countries, in order to gain intelligence about East Timorese strategy and negotiating positions"); Jack Goldsmith, *The U.S. Corporate*

security—whether at the strategic, operational, or tactical level.¹⁰²

International law has not created an explicit prohibition against intelligence activities,¹⁰³ whether in or outside of armed conflict.¹⁰⁴ In fact states regularly engage in transnational intelligence collection, returning to the idea that one of the core responsibilities of national intelligence collection is to identify threats emanating from outside a state's territory.¹⁰⁵ Therefore, although domestic law may prohibit espionage and particular actions undertaken to gather intelligence (e.g., trespass or theft), international law has not prohibited intelligence collection as a means of

Theft Principle, LAWFARE (May 21, 2014), <http://www.lawfareblog.com/2014/05/the-u-s-corporate-theft-principle/> [<http://perma.cc/8YRK-4VVE>] (discussing U.S. indictments of members of China's People's Liberation Army for alleged cyber espionage, expounding on the U.S. Government's "attempts to justify cracking down on cyber-theft of intellectual property of U.S. firms while at the same time continuing to spy on non-U.S. firms for different purposes," and asserting that the United States adheres to a "corporate theft principle" in which "[s]pying on foreign firms is presumptively allowed, but not on behalf of a particular U.S. firm, and the information cannot be given to a U.S. firm").

¹⁰² See generally STRATEGIC INTELLIGENCE, *supra* note 100.

¹⁰³ See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 621–22 (2012).

¹⁰⁴ Professor Robert Chesney explains that not everyone is of this opinion. He offers that some international legal scholars suggest that states do not violate international law by gathering intelligence abroad (citing A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 597 (2007)), but emphasizes that others assert that transnational intelligence collection can violate state responsibilities (citing Craig Forcese, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SEC. L. & POL'Y 179, 198 (2011)). Chesney, *supra* note 103, at 622. Chesney articulates his own related, practical perspective on the competing legal arguments thusly: "One might argue that the very fact that such activities are conducted on a secret and unacknowledged basis evidences awareness on the part of states that they are not lawful, but that argument is difficult to maintain in the face of the much more obvious explanation that they are kept secret so that they can actually succeed and remain unacknowledged in order to minimize retaliation and embarrassment." *Id.* at 622 n. 336.

¹⁰⁵ In 2012, U.S. intelligence costs totaled approximately \$80 billion. See Gregory Marchwinski, *2012–2013 Entry-Level Analyst Hiring Projections for the U.S. Intelligence Community*, INSTITUTE OF INTELLIGENCE STUDIES AT MERCYHURST UNIVERSITY, at 4 (Apr. 13, 2013), <http://www.iismu.org/uploads/National%20Security%20Entry%20Level%20Intel%20Analyst%20Hiring%20Projections%20for%202012-2013.pdf> [<http://perma.cc/7CQS-3Q9M>]. This money was spent on running seventeen intelligence agencies, see Office of the Director of National Intelligence, *A Complex Organization United Under a Single Goal: National Security* (last viewed May 5, 2014), <http://www.intelligence.gov/mission/structure.html>, and flying more than 6,000 unmanned aircraft, see National Public Radio Staff, *Why America's Spies Struggle to Keep Up*, NAT'L PUB. RADIO (Jan. 11, 2012), <http://www.npr.org/2012/01/11/144322791/why-americas-spies-struggle-to-keep-up>.

statecraft.¹⁰⁶

2. *Jus Extra Bellum*

In fact, states conduct *most* national security activities as a matter of sovereign right. Below the threshold of armed conflict, states gather intelligence, conduct activities to improve partner nation security capacity,¹⁰⁷ create cyberspace effects,¹⁰⁸ influence foreign populations,¹⁰⁹ and even detain suspected terrorists abroad¹¹⁰ without necessarily violating international law.¹¹¹ These actions, which can occur outside of the responsible state's borders and may produce effects across boundaries, rarely trigger *jus ad bellum* or *jus in bello* analysis when conducted away from hot battlefields. International humanitarian law is simply not applicable to a wide range of transnational security activities, including military activities.¹¹²

¹⁰⁶ See Chesney, *supra* note 103. But see Deeks, *supra* note 101.

¹⁰⁷ Partner capacity-building is accomplished through various means, including security assistance and training (terms defined in law) and security cooperation, security force assistance, and other support to foreign security forces (terms established through policy). See, e.g., Foreign Assistance Act of 1974, 22 U.S.C. §§ 2151–2349 (2000) (sanctioning development, humanitarian, and security assistance; assigning the State Department with responsibility for supervision of programs; and permitting delivery of defense articles, services, and training); Arms Export Control Act, 22 U.S.C. §§ 2751–2796 (1997) (assigning the State Department with responsibility for continuous supervision and general direction over arms export and allowing for the delivery of defense articles, services, and training through programs other than those covered under the Foreign Assistance Act); 10 U.S.C. § 2010 (2011) (combined exchanges with developing countries); 10 U.S.C. § 2011 (2011) (Joint Combined Exchange Training); National Defense Authorization Act for Fiscal Year 2013, PUB. L. NO. 112–239, § 1004 (counter narco-terrorism); *id.* at § 1206 (global training and equipping, capacity building); *id.* at § 1208 (support to surrogate forces supporting U.S. counter-terrorism).

¹⁰⁸ See Brown & Tullos, *supra* note 92.

¹⁰⁹ See, e.g., COLD WAR BROADCASTING: IMPACT ON THE SOVIET UNION AND EASTERN EUROPE, A COLLECTION OF STUDIES AND DOCUMENTS 17–48, 67–102, 147–68 (A. Ross Johnson & R. Eugene Parta eds., 2010).

¹¹⁰ See, e.g., Sealed Indictment, United States v. Abdulkadir Warsame, 11 Cr. 559 (S.D.N.Y. 2011) (unsealed on July 5, 2011); Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES (July 6, 2011), http://www.nytimes.com/2011/07/07/world/africa/07detain.html?_r=0 [<http://perma.cc/3LZT-QD96>].

¹¹¹ Depending, of course, upon the specific manner of conducting the particular activity in question.

¹¹² Other obvious examples would be U.S. military humanitarian assistance and disaster response provided outside of armed conflict. Recall, however, that as a matter of policy, the U.S. Department of Defense's Law of War program requires the U.S. military to provide

Instead, in the context of national security, the *Lotus* principle can be viewed through the lens of *jus extra bellum*—“the state’s right outside of war.” While strictures of customary international law develop from a historic pattern of state conduct based on a sense of legal obligation, *jus extra bellum* might be viewed as the sovereign right of states manifested in a historic pattern of state conduct based instead on a sense of international legal freedom and pursuant to domestic law and obligations.

Jus extra bellum serves important functions not addressed adequately under other bodies of international law. First, *jus extra bellum* makes clear that national security activities outside of armed conflict can be consistent with international law. Political considerations may shape which levers of power states elect to pull and how hard they do so, but states nevertheless enjoy broad discretion to engage in statecraft.

Furthermore, *jus extra bellum* provides a framework of analysis with opportunities for more meaningful review of state activities and, therefore, more precise, predictive, and pragmatic global dialogue. *Jus extra bellum* provides means of identifying where state responsibilities exist under international law but also to what degree sovereign rights might overcome other international considerations.¹¹³ The construct gives deference to established state national security practices but does not accept history as the sole consideration of international legality. *Jus extra bellum* also recognizes that states’ domestic legal regimes and political obligations bear on national security. Emerging international norms and proposed national security activities will need to account for domestic variables.

International law will continue to evolve and will likely create new international obligations and constraints on state activities over time. In the interim, national security activities will require case-by-case analyses to identify when and to what degree international law might limit particular activities that would otherwise be permitted by the generally permissible regime. As that analysis develops, the *jus extra bellum* framework provides an opportunity for promoting normative conduct that supports global security interests.¹¹⁴ By acknowledging sovereign rights, *jus extra bellum*

protections guaranteed under international humanitarian law during all military operations, including those conducted outside of armed conflict. See U.S. DEP’T OF DEFENSE, *supra* note 12.

¹¹³ Claims of sovereign rights would be more likely to overcome international norms or principles than, for example, treaty-based rules.

¹¹⁴ “But the social order is a sacred right which serves as a basis for all other rights. And as it is not a natural right, it must be one founded on covenants. The problem is to determine

supports the development of transactional standards in the international arena.¹¹⁵ Space in the permissive international legal regime can be filled in those instances where rules, principles, norms, or other constraints align with states' self-interests and those of other actors in the arena.

Therefore, *jus extra bellum* provides a legal architecture with which to justify national security actions, but also against which to judge states' assertions and to work towards normative standards and rules that the international community finds acceptable. *Jus extra bellum* should not rest as an abstract concept. It should provide a legal architecture for necessary and proportionate action—action taken to provide for states' national security and for the betterment of the international community.

3. The U.N. Charter

Within the generally permissive international legal regime, the U.N. Charter stands as the most significant check against state action that threatens global security. The Charter accepted sovereign boundaries as safeguards against state aggression. It created legal, political, and procedural impediments to war. Ultimately, the Charter aspired to create international collaboration that would preserve peace and foster social and economic progress.¹¹⁶

In seeking to preserve peace, the Charter focuses heavily on *jus ad bellum*. It creates rules and procedures designed to slow the march to war, including a firm denial of the state's right to war absent Security Council action or the need to self-defend. It also prohibits the threat or use of force in the absence of either a supporting U.N. Security Council resolution or in response to an armed attack.¹¹⁷ However, international law does not provide a definitive list of activities that constitute a use of force.¹¹⁸

what those covenants are." JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 50 (1958) (1762).

¹¹⁵ "[W]e have progressed from a legal theory split between incompatible (and unsatisfying) philosophical explanations for the existence of international law . . . to a more pragmatic attitude about philosophical explanation in general, and increased disciplinary attention to what is useful, or functions, for real actors in concrete situations." David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 *NORDIC J. INT'L L.* 385, 387 (1996).

¹¹⁶ See U.N. Charter preamble, art. 1.

¹¹⁷ U.N. Charter art. 51.

¹¹⁸ *But see* Schmitt & Wall, *supra* note 18, at 374–75 (identifying "what foreign support to insurgents" the authors deem to be permissible under international law). Note that this

Beyond these foremost considerations of law, the Charter's prescription of responsibilities to states, the U.N. General Assembly, and the U.N. Security Council also creates a multi-faceted, collaborative approach¹¹⁹ to preserving peace. Within that construct, the Charter does not generally prohibit national security activities outside of armed conflict—particularly when such activities may prevent the outbreak of hostilities or align with the Charter's other benign principles. Security Council resolutions demonstrate a pattern of U.N. endorsement of unilateral and multilateral state action on global security issues.¹²⁰ History also proves that states may act in their national security interests without necessarily relying on a supporting Security Council resolution.¹²¹ Thus, while the Charter does

author is not inclined to agree with all of the authors' conclusions, including that provision of "actionable intelligence" to a party in an armed conflict constitutes intervention and also the use of force against the party opposing the recipient of the intelligence. This assertion is not established in international law and could constrain important partnering activities that serve to combat malevolent actors and preserve or restore security—without resorting to another state's intervention or use of force. Note also that, unlike the authors and most states, the U.S. government does not recognize a material difference between the use of force under article 2(4) of the U.N. Charter and an armed attack under article 51. *See* Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 92-93 (1989) ("The United States has always assumed that [the use of force under article 2(4) and an armed attack under article 51] . . . make clear that 'force' means physical violence, not other forms of coercion [and] . . . has long assumed that the inherent right of self defense potentially applies against any illegal use of force . . .").

¹¹⁹ Including unilateral action where appropriate.

¹²⁰ *See, e.g.*, Council on Foreign Relations, *Issue Brief: The Global Nuclear Nonproliferation Regime*, <http://www.cfr.org/arms-control-disarmament-and-nonproliferation/global-nuclear-nonproliferation-regime/p18984> [<http://perma.cc/7FG2-2PKK>] (last updated June 25, 2013) (describing international efforts to combat nuclear proliferation based on U.N. Security Council resolutions); Foreign Affairs, Trade and Development Canada, *Building Peace and Security for all: Canada's Action Plan for the Implementation of United Nations Security Council Resolutions on Women, Peace and Security*, http://www.international.gc.ca/START-GTSR/women_canada_action_plan_action_femme.aspx [<http://perma.cc/3K4P-W6WA>] (last updated Mar. 12, 2014) (outlining an action plan "intended to guide the Government of Canada in the implementation of a group of United Nations Security Council Resolutions . . . on Women, Peace and Security which recognize and address the experiences of women and girls in conflict and post-conflict situations"); S.C. Res. 2117, ¶ 2, U.N. Doc. S/RES/2117 (Sept. 26, 2013) (reminding states of "their obligation to comply fully and effectively with Council-mandated arms embargoes" aimed at the "illicit transfer, destabilizing accumulation and misuse of small arms and light weapons [that] . . . cause significant loss of life around the world").

¹²¹ In fact, Article 33 of the Charter obligates "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security . . . [to] first of all, seek a solution by . . . peaceful means of their own choice." Whilst Article 33 may be read to suggest that states should normally engage in a form of judicial and/or

recognize states' "inherent right of individual or collective self-defen[s]e if an armed attack occurs . . .",¹²² history suggests that states often interpret the right to self-defense broadly, have differing views over what constitutes an armed attack, and disagree on whether a state must suffer an attack before taking necessary measures in self-defense.

In sum, the Charter provides a substantial check on states resorting to the threat or use of force or armed attack, but it does little to place "restrictions upon the independence of states" to conduct national security activities that do not initiate armed conflict.¹²³

C. Under U.S. Domestic Law

While states enjoy significant liberty under the inherently permissive international legal regime, U.S. domestic law presents a different paradigm. U.S. domestic law requires positive legal authority in support of federal government action. Those powers not granted to the federal government in the U.S. Constitution are reserved to the states.¹²⁴ Of course, the massive size of today's federal government makes clear that federal powers are not difficult to identify. Moreover, the U.S. Constitution and federal statutes not only grant the requisite positive legal authority, but they create legal and political obligations on the federal government to provide for U.S. national security. U.S. domestic law also recognizes explicitly the United States' right to engage in the sort of statecraft that international law silently allows.

diplomatic dispute resolution (e.g., "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements"), the Charter does not require states to turn to such mechanisms in place of other forms of statecraft. U.N. Charter art. 33.

¹²² U.N. Charter art. 51. Note that the Charter places conditions on when and for what duration states may act in self-defense under the terms of the Article, and also requires that states report to the Security Council. *Id.* In full, Article 51 states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." *Id.*

¹²³ *Lotus*, *supra* note 95, ¶ 48.

¹²⁴ U.S. CONST. amend. X.

1. Executive Authority

The U.S. Constitution empowers the President to provide for the United States' national security and protect important national interests. The "independent authority of the President, which exists at least insofar as Congress has not specifically restricted it . . . derives from the President's 'unique responsibility,' as Commander in Chief and Chief Executive, for 'foreign and military affairs,' as well as national security."¹²⁵ Furthermore, the President's authority to conduct national security activities below the threshold of war—including military activities—is well established: "[T]he historical practice of presidential military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates."¹²⁶ Instead, the Executive Branch analyzes proposed activities through "a fact-specific assessment of their 'anticipated nature, scope, and duration'" to determine whether the President has constitutional authority to act unilaterally.¹²⁷

The Constitution also establishes the President's legal obligation to protect the United States. At a minimum, the Commander-in-Chief must take such actions as necessary to "preserve, protect and defend" the United States and its citizens.¹²⁸ Notably, this function requires more than merely

¹²⁵ Caroline D. Krass, *Authority to Use Military Force in Libya*, Memorandum for the Attorney General, at 6 (Apr. 1, 2011) (quoting *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992), available at <http://www.lawfareblog.com/wp-content/uploads/2013/10/Memorandum-Opinion-from-Caroline-D.-Krass-Principal-Deputy-Assistant-Attorney-General-Office-of-Legal-Counsel-to-the-Attorney-General-Authority-to-Use-Military-Force-in-Libya-Apr.-1-2011.pdf> [<http://perma.cc/Z67D-7CW4>]).

¹²⁶ Krass, *supra* note 125, at 8.

¹²⁷ *Id.* When considering the scope of the President's authority pursuant to the U.S. Constitution to conduct activities short of war, the Office of Legal Counsel opined that the threshold of war would be reached "only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." *Id.* But see Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE BLOG (June 16, 2011), <http://www.lawfareblog.com/2011/06/problems-with-the-obama-administration's-war-powers-resolution-theory-2/>.

¹²⁸ See U.S. CONST. art. II, § 1 (establishing the President's Oath or Affirmation as "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States"); see also THE FEDERALIST No. 78 (Alexander Hamilton) ("The Executive not only dispenses the honors, but holds the sword of the community.").

responding to armed attacks to the nation.¹²⁹ Indeed, a reasonable interpretation of the obligation requires the President to take all necessary and lawful measures to preserve important national security interests.

Thus, outside of armed conflict, the President's Article II legal authorities and obligations create an environment in which he will necessarily direct national security activities that may be based on his responsibility to "act in external affairs without congressional authority"¹³⁰ and his "independent authority 'in the areas of foreign policy and national security.'"¹³¹ The Commander-in-Chief also directs specific activities and operations that rely upon more general congressional authorization.¹³² This last point reflects the constitutional system of checks and balances that ensures that national security is not the "exclusive, preclusive" domain of the President.¹³³ The Constitution creates political obligations to work with the legislative and judicial branches in providing for national security.

2. Congressional Grants of Authority, Appropriations, and Regulatory Regimes

Congress retains significant powers over national security affairs. The Constitution empowers Congress to "declare War," "make Rules concerning Captures on Land and Water," "raise and support Armies," and "provide and maintain a Navy," in addition to giving Congress authority to make other rules for the armed forces and to grant appropriations necessary to fund activities and operations.¹³⁴ Congressional legislation authorizes¹³⁵

¹²⁹ It is well established that responding to attacks is also an obligation that the President bears. *See* *Prize Cases*, 67 U.S. 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.").

¹³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring).

¹³¹ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

¹³² *See, e.g.*, Barack Obama, *Message to the Congress—Report Consistent with War Powers Resolution* (Dec. 13, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/13/message-congress-report-consistent-war-powers-resolution> [<http://perma.cc/CH85-9ALG>] (supplemental consolidated report to Congress "consistent with the War Powers Resolution (Public Law 93-148), as part of [the President's] efforts to keep the Congress informed about deployments of U.S. Armed Forces equipped for combat").

¹³³ *Youngstown Sheet & Tube Co.*, 343 U.S. at 579 (Jackson, J., concurring).

¹³⁴ *See* U.S. CONST. art. II, § 8.

and regulates¹³⁶ national security activities. It governs diplomacy, exports, sanctions, intelligence, counter-intelligence, law enforcement, operational security, traditional military activities, covert action, and every governmental instrument of U.S. national power.¹³⁷ The vast majority of these activities occur outside of armed conflict and each presents itself in forms of low-visibility statecraft.¹³⁸

Congress utilizes its power of the purse to provide appropriations for national security activities. Appropriations empower Executive Branch activities while constraining those activities for which appropriations do not exist. U.S. national security lawyers often speak of this paradox by describing two distinct categories of authorities required for operations:

¹³⁵ Congress's authorizations include Standing Joint Resolution 23 (Authorization for Use of Military Force), S.J.RES. 23 (107th) (Pub. L. No. 107-40) (Sept. 14, 2001).

¹³⁶ Congress's regulatory regimes include the War Powers Resolution. *See* War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012); *see generally* Captain John C. Cruden, *The War-Making Process*, 69 MIL. L. REV. 35 (1975). The War Powers Resolution embodies long-standing disputes between the Executive and Legislative Branches as to what war powers were rightly executed by the President or were appropriately left to Congress. Presidents' repeated objections to the provisions of the Act were similarly reflective of executive concerns about Congressional overreaching. Nevertheless, presidents continue to report under the terms of the War Powers Resolution. Written reports must be provided to Congress within forty-eight hours of U.S. Armed Forces entering "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"; "into the territory, airspace or waters of a foreign nation, while equipped for combat"; or "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." The Resolution further requires follow-on reporting every six months "so long as such armed forces continue to be engaged in such hostilities or situation." Practically speaking, the War Powers Resolution serves as a check on executive action, provides Congress greater insight into and oversight of national security, and serves as an administrative encumbrance on those charged with planning and executing national security activities. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2012).

¹³⁷ Statutes affecting U.S. national security are voluminous. They range from the National Security Act of 1947, the Intelligence Reform and Terrorism Prevention Act of 2004, the Central Intelligence Agency Act of 1949, the National Security Act of 1959, the Foreign Intelligence Surveillance Act, and so on in seeming perpetuity. Their subjects are equally diverse. *See generally* U.S. Code Titles 10—Armed Forces; 14—Coast Guard; 18—Crimes and Criminal Procedure; 19—Customs Duties; 22—Foreign Relations and Intercourse; 31—Money and Finance; 32—National Guard; and 50—War and National Defense.

¹³⁸ *See, e.g.*, JUAN C. ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* (2013) (describing the U.S. Department of Treasury's role in combatting threats to American national security through "financial warfare" targeting al Qaeda, North Korea, Iran, Iraq, and Syria—actions that in some instances supported war fighting efforts and in others occurred entirely outside of armed conflict).

operational and fiscal authorities.¹³⁹ These divisions emphasize that executive power to act is limited when Congress does not provide funding for the necessary activity or when an appropriate “pot of money” is not available.¹⁴⁰

In addition to authorizations and appropriations, Congress has created regulatory regimes designed to constrain Executive Branch national security activities. One of the more widely discussed domestic legal regimes for low-visibility statecraft is 50 U.S. Code § 3093—often referred to as “the covert action statute”—which regulates the President’s Article II constitutional authority to conduct covert action.¹⁴¹ The statutory regime creates at least two significant effects. First, the covert action statute requires the President to make “findings” that certain national security

¹³⁹ U.S. government partnering activities provide an example. Congress has provided the Departments of State and Defense, among others, specific authorities and appropriations that can be utilized for partnered activities and building foreign partner capacity. *See* Foreign Assistance Act of 1974, 22 U.S.C. § 2151–2349 (2000); the Arms Export Control Act, 22 U.S.C. § 2751–2796 (1997). Similarly, the Department of Defense enjoys additional partnering authorities and authorizations such as joint combined exchange training, 10 U.S.C. § 2011 (2011), and support to “foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism.” National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1208. Both the State and Defense statutes provide congressional-level operational and fiscal authority, which is then executed through specific instructions or orders issued by the respective departments within the Executive Branch.

¹⁴⁰ “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollum*, 426 U.S. 317, 321 (1976).

¹⁴¹ “The term ‘covert action’ means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include—

- (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
- (2) traditional diplomatic or military activities or routine support to such activities;
- (3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or
- (4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.”

50 U.S.C. § 3093(e) (2013).

activities are “necessary to support identifiable foreign policy objectives of the United States and [are] important to the national security of the United States”¹⁴² The President must make this determination personally—a significant restriction in America’s modern bureaucracy—and the activities must be tailored to meet the elevated, albeit generalized, standards of the statute. Second, Congress specifies those forms of statecraft that are *not* covert action, implicitly acknowledging that a wide range of executive activities are lawful, necessary to preserve important national interests, and established state practice.

The statutory definition of covert action lists both what covert action is and what it is not.¹⁴³ This list recognizes the traditional role and combined efforts of multiple U.S. Government departments and agencies that engage in statecraft, including national security activities. It also makes clear that statecraft in the shadows is not covert action merely because it may occur out of the public’s view.¹⁴⁴

¹⁴² 50 U.S.C. § 3093(a) (2013). The covert action statute is limited to instances when “the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States” and requires a Presidential finding subject to certain conditions. *Id.*

¹⁴³ The exemption for “activities the primary purpose of which is to acquire intelligence . . . [and] traditional counterintelligence activities,” 50 U.S.C. § 3093(e)(1), from the covert action statute applies to operations by the Central Intelligence Agency or any other department or agency of the U.S. government that conducts intelligence or counterintelligence. For example, the Secretary of Defense is charged with “ensur[ing] that the budgets of the elements of the intelligence community with the Department of Defense are adequate to satisfy the overall intelligence needs of the Department of Defense,” 50 U.S.C. § 403-5(a)(4), “ensur[ing] . . . the continued operation of an effective unified organization,” 50 U.S.C. § 403-5(b)(1), including the “National Security Agency for the conduct of signals intelligence activities,” “National Geospatial-Intelligence Agency for imagery collection, processing, exploitation, dissemination,” “National Reconnaissance Office for operation of overhead reconnaissance systems,” and “Defense Intelligence Agency for the production of timely, objective military and military related intelligence,” 50 U.S.C. § 403-5(b)(1)–(5), and “ensur[ing] that the military departments maintain sufficient capabilities to collect and produce intelligence to meet requirements of the Director of National Intelligence, Secretary of Defense, Chairman of the Joint Chiefs of Staff, and Combatant Commanders,” 50 U.S.C. § 403-5(b)(6). The Secretary “may use such elements of the Department of Defense as may be appropriate for the execution of those functions, in addition to, or in lieu of, the elements identified in this section [i.e., the National Security Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and Defense Intelligence Agency].” 50 U.S.C. § 403-5(d).

¹⁴⁴ Through Executive Order 12333 the President implements the requirements of the covert action statute and also provides direction for the conduct of U.S. intelligence activities. *See generally* E.O. 12333, *supra* note 38.

These exempt categories are not addressed directly by international law, of course; however, their inclusion in the covert action statute evidences state practice relevant for both domestic and international legal analysis. Under international law, these historic practices, while not undertaken out of a sense of legal obligation, demonstrate continuing state practice and preserve the ability of states to engage in the particular forms of statecraft until international law develops specific prohibitions against the activities. Under U.S. domestic law, the activities reflect historic state practice plus U.S. domestic legal obligations to provide for national security. The obligations are further supported by statutory authorizations and appropriations previously discussed.

The statute's history provides a record of Congress's efforts to expand oversight of Executive Branch activities while preserving means and methods of conducting statecraft in the shadows.¹⁴⁵ The congressional record details negotiations clearly concerned with preserving state practice designed to create international effects.¹⁴⁶ Congress impliedly endorsed

¹⁴⁵ The covert action statute is also considered a tool of statecraft through which the U.S. government can engage in activities that its partners support but cannot admit participation in, knowledge of, or support for—or that support U.S. interests but may violate international law. One view suggests that the covert action statute can be read to accept that states may sometimes act knowing that they will be violating traditional principles of international law but may not want other states to engage in similar or reciprocal conduct. Utilizing other than overt means helps to preserve future assertions that others' actions are unlawful. *See* 50 U.S.C. §§ 412(b), 442.

¹⁴⁶ The legislative history provides persuasive authority as to the drafters' intent to exempt certain forms of statecraft from being categorized as "covert action." For example, "traditional military activities" are understood to include those forms of military action that were not considered covert action at the time that the statute was written as well as military activities "under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities [i.e., President and Secretary of Defense] for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving U.S. military forces are ongoing, and where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly." Conference Report for FY 1991 Intelligence Authorization Act, H.R. Rep. No. 102-66, at H5905 (1991) [hereinafter Conf. Rep.]. The Department of Defense subsequently explained, "Traditional military activities' encompass almost every use of uniformed military forces, under the direction and control of a United States military commander, including actions taken in time of declared war or where hostilities with other countries are imminent or ongoing. The term also includes military contingency operations to rescue hostages, to accomplish other counterterrorist objectives, such as assisting in the extraterritorial apprehension of a known terrorist, to support counternarcotics operations in other countries, or to achieve other limited military objectives, where the United States intends to

certain forms of statecraft as permissible executive action under U.S. law and pushed those brands of Executive Branch activities from Youngstown Category two into Youngstown Category one.¹⁴⁷

In total, Congress has developed a domestic statutory framework under which Congress creates, funds, and constrains institutions and activities, and under which the President is left to execute the business of those same organizations within the restraints set forth in law.

3. Judicial Review

The judiciary has shown great deference to the President and Congress on security issues throughout the nation's history.¹⁴⁸ Still, while the courts are not charged with authorizing or executing statecraft, their oversight of national security activities can have lasting effects.

Recent court decisions have proven particularly significant to the transnational armed conflict. The courts have considered international and domestic law in deciding to: accept the transnational armed conflict paradigm,¹⁴⁹ opine that detainees have a right to challenge their detention,¹⁵⁰ grant *habeas* review to detainees held at Guantanamo Bay,¹⁵¹ require application of Common Article 3 of the Geneva Conventions to enemy combatants in the armed conflict,¹⁵² interpret the 2001 AUMF's authorization to use all necessary and appropriate force against al Qaeda, the Taliban, and associated forces,¹⁵³ promulgate a "functional approach" for deciphering whether an individual is "part of" al Qaeda,¹⁵⁴ and defer to

acknowledge its sponsorship at the time the military contingency operation takes place. Traditional military activities also include operational security and deception programs and techniques designed to provide security for DoD and other US government agencies personnel, activities and facilities. . . . [C]landestine military operations are traditional military activities, and do not constitute covert action." Undersecretary of Defense Stephen A. Cambone, Letter to The Honorable Ted Stevens, Chairman, Subcommittee on Defense, Committee on Appropriations (July 22, 2003). "[R]outine support to traditional military activities" is considered to describe "unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged." Conf. Rep. at 54.

¹⁴⁷ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37 (Jackson, J., concurring).

¹⁴⁸ Often deflecting cases based upon a lack of standing, national security, or state secrets.

¹⁴⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁵⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁵¹ See *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁵² See *Hamdan v. Rumsfeld*, 548 U.S. at 557.

¹⁵³ See *Al-Bihani v. Obama*, 590 F.3d 866, 619 F.3d 1 (D.C. Cir. 2010).

¹⁵⁴ See *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010).

the Executive Branch in the instance of targeting an American citizen.¹⁵⁵ These opinions remind us that, even at war, “the interpretation of the laws is the proper and peculiar province of the courts.”¹⁵⁶ The judiciary has shaped much of the foundations of the transnational armed conflict as it exists today.

Ultimately international law’s permissive regime and U.S. domestic law’s specific authorizations combine to support a robust U.S. national security apparatus that facilitates transnational activities that can be part of and/or independent from armed conflict. Much of this legal framework existed before 9/11, but the transnational armed conflict against the Taliban, al Qaeda, and associated forces has established more than a decade of precedent supporting the argument that states may engage in a range of national security activities both inside and outside of armed conflict as a matter of right. Nevertheless, challenges persist about the international legal foundations of the United States’ transnational armed conflict.

IV. The Transnational Armed Conflict: Legal Bases

Legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter-terrorism operations leaves dangerous latitude for differences of practice by States. This . . . fails to provide adequate protection for the right to life; poses a threat to the international legal order; and runs the risk of undermining international peace and security.

–U.N. Special Rapporteur Ben Emmerson, Feb. 28, 2014¹⁵⁷

International law requires statecraft to show consistency with “usages generally accepted as expressing principles of law.”¹⁵⁸ Most principles of law governing armed conflict and warfare, however, were designed to regulate state conduct and the conduct of those acting as agents

¹⁵⁵ See *Al-Aulaqi v. Obama* 727 F. Supp. 2d 1 (D.D.C. 2010).

¹⁵⁶ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁵⁷ Ben Emmerson, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/25/29 (Feb. 28, 2014) (Advance Unedited Version).

¹⁵⁸ *Lotus*, *supra* note 95, ¶ 48.

of the state.¹⁵⁹ Terrorists have not been directly addressed in the core international humanitarian law texts. Instead, those principles that focus on smaller groups like rebels, militias, and guerrillas seem to presume that states were best positioned to deal with such threats internally; non-state armed groups find their protections in Common Article 3 and Additional Protocol II.¹⁶⁰ Furthermore, international humanitarian law fails to address non-state actors that purport to declare war against states in which they do not reside and that use force in transnational acts of terrorism. Consequently, the codes, conventions, and protocols applicable to armed conflict are not easily squared with the abiding threat presented by the Taliban, al Qaeda, and associated forces. The United States has pressed forward under the transnational armed conflict archetype, but experts disagree as to whether this legal paradigm is valid under international law and, if it is valid, whether the end of major U.S. combat operations in Afghanistan will terminate the legal justification for the transnational armed conflict *writ large*. The following subsections address those concerns head-on.

¹⁵⁹ See ICRC, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS*, 89 INT'L REV. OF THE RED CROSS 719, 725 (2007) (explaining that international humanitarian law "does not envisage an international armed conflict between States and non-State armed groups for the simple reason that States have never been willing to accord armed groups the privileges enjoyed by members of regular armies").

¹⁶⁰ The United States is not a party to Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) or Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) due in part to the additional protections the Protocols provide to those persons who do not meet prisoner of war status. See Michael Matheson, U.S. Dep't of State Deputy Legal Advisor, *Remarks to the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) ("We do not support the relaxation of requirements contained in the Third Geneva Convention concerning POW treatment for irregular forces. We do not believe persons entitled to combatant status should be treated as prisoners of war in accordance with the 1949 Geneva Conventions; combatant personnel must distinguish themselves from the civilian population while engaged in military operations."); see also Letter of Transmittal from President Ronald Reagan, 81 AM. J. OF INT'L L. 912 (1987); Letter of Submittal from Secretary of State George Shultz, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at VII, IX (1987) (explaining the rationale for not submitting Additional Protocol I for Senate ratification and proposing reservations and understandings applicable to Additional Protocol II).

A. International Legal Bases for Armed Conflict in Afghanistan

America's first salvo in the transnational armed conflict was launched into Afghanistan in partnership with the British on October 7, 2001.¹⁶¹ The United States and members of NATO invaded Afghanistan pursuant to the Washington Treaty's Article 5 collective self-defense provisions¹⁶² and expressly invoked Article 51 of the U.N. Charter.¹⁶³ Coalition nations further justified their actions with language contained in U.N. Security Council Resolutions 1368 and 1373.¹⁶⁴ However, U.S. military forces have been operating in Afghanistan with the written consent of the Afghan government since 2003,¹⁶⁵ as the Afghan government has been fighting a non-international armed conflict with the support of NATO's International Security Assistance Force and other supporting U.S. forces.¹⁶⁶

¹⁶¹ See Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price'*, N.Y. TIMES (Oct. 8, 2001).

¹⁶² In relevant part, Article 5 states: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defen[s]e recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." The North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

¹⁶³ See Letter from Ambassador John Negroponte, Permanent Representative of the United States to the United Nations in New York, to the President of the Security Council, S/2001/946 (Oct. 7, 2001); Letter from Stewart Eldon, Chargé d'Affaires, U.K. Mission to the United Nations in New York, to the President of the Security Council, S/2001/947 (Oct. 7, 2001).

¹⁶⁴ The United States pointed to the language of U.N. Security Council Resolutions 1368 and 1373 citing "threat[s] to international peace and security caused by terrorist acts" and relied on Resolution 1373's support for "international efforts to root out terrorism." See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N.Doc. S/RES/1373 (Sept. 28, 2001).

¹⁶⁵ Pursuant to an exchange of diplomatic notes initiated by the Embassy of the United States of America on September 26, 2002 and concluded by Afghanistan's Minister of Foreign Affairs on May 28, 2003.

¹⁶⁶ ICRC, *supra* note 4, at 10–11. The Red Cross classifies the current conflict in Afghanistan as a "multinational NIAC," a category of non-international armed conflict "in which multinational armed forces are fighting alongside the armed forces of a 'host' state—in its territory—against one or more organized armed groups. As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at time be significant." *Id.* at 10.

Recent developments call into question whether the Bilateral Security Agreement between the United States and Afghanistan and the NATO Status of Forces Agreement will provide continuing legal bases for counter-terrorism operations in Afghanistan,¹⁶⁷ but the 2003 diplomatic note remains in effect. Even if that note did not exist however, the United States might turn to other legal bases for continuing military operations in the country if there were political will to do so. The United States might rely on the right of self-defense based on continuing, imminent threats to the United States emanating from Afghanistan or on verbal or other non-public consent from Afghan officials. If the government of Afghanistan withdraws its consent, U.S. operations in Afghanistan could conceivably continue pursuant to the international legal bases for armed conflict outside Afghanistan, discussed below.

B. International Legal Bases for Armed Conflict outside Afghanistan

Outside Afghanistan, what was once called the “Global War on Terrorism” continues to challenge traditional perspectives of war as “a state of armed hostility between sovereign nations or governments.”¹⁶⁸ The international legal bases for U.S. operations outside Afghanistan, and operations to capture or employ lethal force against terrorist targets in particular, have been subject to much debate.¹⁶⁹ The U.N. Security Council

¹⁶⁷ See Obama’s Call with Karzai, *supra* note 2 (“With regard to the Bilateral Security Agreement [BSA] . . . President Obama told President Karzai that because he has demonstrated that it is unlikely that he will sign the BSA, the United States is moving forward with additional contingency planning. Specifically, President Obama has asked the Pentagon to ensure that it has adequate plans in place to accomplish an orderly withdrawal by the end of the year should the United States not keep any troops in Afghanistan after 2014. At the same time, should we have a BSA and a willing and committed partner in the Afghan government, a limited post-2014 mission focused on training, advising, and assisting Afghan forces and going after the remnants of core Al Qaeda could be in the interests of the United States and Afghanistan. Therefore, we will leave open the possibility of concluding a BSA with Afghanistan later this year.”); Rubin, *supra* note 31.

¹⁶⁸ Lieber Code, *supra* note 13, art. 20.

¹⁶⁹ See, e.g., Micah Zenko, *Reforming U.S. Drone Strike Policies*, Council on Foreign Relations, Council Special Report No. 65 (Jan. 2013); Remarks by Ben Emmerson, U.N. Special Rapporteur on Counter-Terrorism and Human Rights, Remarks at Harvard Law School concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency, Harvard Law School (Oct. 25, 2012), <http://www.lawfareblog.com/2012/10/u-n-rapporteur-says-drone-strikes-in-pakistan-may-be-war-crimes-and-announces-investigation/> [<http://perma.cc/QU95-85VG>]; Gideon Rose & Peter G. Peterson, *Generation Kill, A Conversation With Stanley McChrystal*, FOREIGN AFFAIRS (Mar./Apr. 2013) (General Stanley McChrystal explaining, “The initial reaction

has not provided explicit authorization for the use of force in worldwide counter-terrorism operations. U.S. self-defense assertions have been viewed critically,¹⁷⁰ in part because there have been no successful foreign terrorist attacks within the borders of the United States since 9/11.¹⁷¹ Assuming *arguendo* that some states may have quietly consented to U.S. activities within their borders, states continue to assert publicly that certain U.S. activities have violated their sovereignty.¹⁷² Finally, there are questions as to whether the end of hostilities in Afghanistan will reduce the intensity of fighting and organization of the parties to the conflict in a way that fundamentally changes *Tadić* analysis and, therefore, calls into question whether the transnational armed conflict exists.¹⁷³

that says, ‘We will simply operate by drone strikes’ is also problematic, because the inhabitants of that area and the world have significant problems watching Western forces, particularly Americans, conduct drone strikes inside the terrain of another country. So that’s got to be done very carefully, on occasion. *It’s not a strategy in itself; it’s a short-term tactic*” (emphasis added)).

¹⁷⁰ See DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* (2008) (asserting that counter-terrorism policies and practices have infringed upon civil rights without creating an appreciable impact against terrorists and inflaming tensions in the process). *But see* MICHAEL N. SCHMITT, *ESSAYS ON LAW AND WAR AT THE FAULT LINES* 49–86 (2012) (arguing that “self-defense is a legitimate ground for actions against non-State actors such as terrorist groups, even when such groups are located in another State’s territory. However, strict conditions apply as to when and how they may be conducted”).

¹⁷¹ There have been numerous attacks planned against the United States by foreign terrorists since 9/11. Fact Sheet, U.S. Dep’t of Justice, *supra* note 51. However, the only successful acts of terrorism in the United States since 9/11 have been conducted by homegrown violent extremists. *See, e.g.,* Billy Kenber, *Nidal Hasan sentenced to death for Fort Hood shooting rampage*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1_story.html [<http://perma.cc/8JMP-E55L>]; Milton J. Valencia, *US cites enormity of attack in seeking death penalty*, THE BOSTON GLOBE (Jan. 30, 2014), <http://www.bostonglobe.com/metro/2014/01/30/federal-prosecutors-seek-death-penalty-against-marathon-bombing-suspect-dzhokhar-tsarnaev/ePoqvnDKEpkvfjrv3CwOeK/story.html>. These results suggest some degree of efficacy for U.S. counter-terrorism policies and practices.

¹⁷² The public record has not been sufficiently developed to conclude that the U.S. government has consent to use force in states other than Afghanistan.

¹⁷³ The *Tadić* opinion also addressed, for purposes of evaluating the Tribunal’s jurisdiction, the end of armed conflict, asserting that “[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” *Tadić*, *supra* note 4. Determinations regarding whether a “cessation of hostilities” has occurred or “a general conclusion of peace [has been]

Notwithstanding such scrutiny, the United States has been waging its transnational armed conflict—often with the assistance of allies and partner nations—inside and outside of declared war zones for more than a decade.¹⁷⁴ As compelled by national security, the U.S. government resorts to methods of war while applying traditional international legal theories and principles, styling the resulting conflict a “transnational armed conflict.” Despite understandable reservations about the potential for far-reaching and never-ending war, the U.S. counter-terrorism model is arguably designed “with a view to the achievement of common aims” and rooted in principles of international law.¹⁷⁵ The international community generally supports the defeat of the Taliban, al Qaeda, and associated forces, and the U.S. government acts in self-defense and/or with the consent of states on whose territory operations are conducted to achieve these aims. Continuing global operations and more than a decade of state practice¹⁷⁶ suggest that, as a matter of international law, the transnational armed conflict paradigm may have staying power unless or until such time as the United States ends the armed conflict, the enemy capitulates, or the international community agrees to create tighter restrictions on state conduct.

C. *The Twilight Between War and Peace*

All the same, it has been suggested that the end of major combat operations by U.S. forces in Afghanistan could terminate the international

reached” would necessarily require fact-specific analysis of the status of the “protracted armed violence.” *Id.*

¹⁷⁴ ICRC, *supra* note 4, at 10–11 (while emphasizing that “the ICRC does not share the view that a conflict of global dimensions [the transnational armed conflict] is or has been taking place,” the report acknowledges that the “fight against terrorism” “involves a variety of counter-terrorism measures on a spectrum that starts with non-violent responses—such as intelligence gathering, financial sanctions, judicial cooperation and others—and includes the use of force at the other end”).

¹⁷⁵ *Lotus*, *supra* note 95, ¶ 48.

¹⁷⁶ Counter-terrorism strikes purportedly involving lethal operations by U.S. forces have been reported in Afghanistan, Pakistan, Iraq, Somalia, Yemen, and perhaps elsewhere. According to the Council on Foreign Relations, “George W. Bush authorized more nonbattlefield targeted killing strikes than any of his predecessors (50), and Barack Obama has more than septupled that number since he entered office (350).” Zenko, *supra* note 169, at 8. Reportedly, as of February 2013 the United States had killed 4,700 people with drone strikes alone. *US senator says 4,700 killed in drone strikes*, AL JAZEERA (last modified Feb. 21, 2013), <http://www.aljazeera.com/news/americas/2013/02/201322185240615179.html> [<http://perma.cc/A898-C4KA>] (quoting Senator Lindsey Graham). The pace of drone strikes appears to have slowed, but the United Nations Special Rapporteur reports that they continue in several countries. *See* Emmerson, *supra* note 157.

legal bases for the transnational armed conflict.¹⁷⁷ This argument generally proffers that the end of major combat operations will reduce the intensity of fighting and organization of the parties to the conflict so as to constitute an end to the conflict that began on 9/11.¹⁷⁸ International law may support the use of force against the Taliban and al Qaeda in Afghanistan, but it does not provide broader authority to pursue those individuals outside of the borders of the state from which they attacked.¹⁷⁹ Nor does international law provide legal bases to target those individuals as they move across the globe or to target associated forces or other groups or individuals who take up arms with the Taliban or al Qaeda, or who harbor or provide other material support to them.¹⁸⁰ At least that is how the argument goes.

That argument is intellectually flawed and not supported by international law. The end of major combat operations within the borders of Afghanistan has limited bearing on the international legal bases for the transnational armed conflict *writ large*. As a non-international armed conflict that crosses international borders, even an end to all U.S. operations in Afghanistan would not necessarily end the transnational armed conflict in

¹⁷⁷ See Deborah Pearlstein, *Law at the End of War*, Faculty Research Paper No. 406 (Oct. 2013), <http://www.cardozolawreview.com/content/Symposium/SSRN-id2334326.pdf> [<http://perma.cc/ZUQ9-V24F>] (addressing the duration of laws that have contributed to American efforts in the transnational armed conflict, how U.S. courts might view the end of war in relation to detention, and how factors such as the end of major U.S. combat operations in Afghanistan weigh on the legal status of war and the bases for detaining enemy belligerents).

¹⁷⁸ *But see* Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining 'Organized Armed Group'*, 89 INT'L L. STUD. 54, 54–55 (2013) (advocating for a “broad interpretation of the definition of ‘organized armed group’” and seeking to demonstrate that “terrorist groups generally, and Al Qaeda in particular, reveal a surprising degree of organization”).

¹⁷⁹ See Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. 1165, 1165–1234, 1166 (2013) (while proposing an international humanitarian law framework that differentiates between hot battlefields and other areas of the world, the author recognizes that “European allies, human rights groups, and other scholars, fearing the creep of war, counter that the conflict and related authorities are geographically limited to Afghanistan and possibly northwest Pakistan. Based on this view, state action outside these areas is governed exclusively by civilian law enforcement, tempered by international human rights norms”). *But see* Steven Groves, *Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad*, THE HERITAGE FOUNDATION (Apr. 10, 2013) (opining that “[b]ecause the United States is currently engaged in an armed conflict with al-Qaeda and its associated forces, whose operatives continue to pose an imminent threat, U.S. armed forces may target them with lethal force wherever they may be found, whether on the ‘hot’ battlefield of Afghanistan or operating from other nations, such as Pakistan and Yemen”).

¹⁸⁰ See Daskal, *supra* note 179, at 1165–1234, 1166.

locations where enemy belligerents continue to wage war against the United States—particularly in the absence of “a general conclusion of peace” or a “peaceful settlement.”¹⁸¹

Al Qaeda, the Taliban, and associated forces have not surrendered and they continue to plan and carry out armed attacks against the United States and its allies and partners.¹⁸² They present a persistent threat to important national security interests.¹⁸³ The intensity of their operations and the organization of their belligerency have not changed so manifestly as to present a *de facto* end to the transnational armed conflict.¹⁸⁴

Furthermore, the U.S. government has not proclaimed the war over or asserted that U.S. operations against al Qaeda, the Taliban, and associated forces will end by 2015.¹⁸⁵ The 2001 AUMF—despite its many critics and constant discussion about revising or repealing the authorization—remains extant statutory authority to continue the transnational armed conflict.¹⁸⁶ While continuing to emphasize the importance of someday ending the transnational armed conflict, the President has yet to set a date for its termination or even to suggest that the end of U.S. participation in the war in Afghanistan correlates to an end of the transnational armed conflict.¹⁸⁷ Certainly the two conflicts are

¹⁸¹ *Tadić*, *supra* note 4.

¹⁸² See *Al-Qaida timeline: Plots and attacks*, NBC NEWS, http://www.nbcnews.com/id/4677978/ns/world_news-hunt_for_al_qaida/t/al-qaida-timeline-plots-attacks/ [<http://perma.cc/DFW3-ZQZ7>]; *American al Qaeda member planning terror attacks*, ASSOCIATED PRESS (Feb. 10, 2014), <http://nypost.com/2014/02/10/american-al-qaeda-member-planning-terror-attacks/> [<http://perma.cc/3N68-5J5W>].

¹⁸³ See Clapper, *supra* note 41.

¹⁸⁴ See Michael Hirsch & James Oliphant, *Will Obama End the War on Terror?*, NAT’L J. (Feb. 28, 2014) (“Just because we got Osama bin Laden doesn’t mean the organization went away When someone is shooting at you, and you stand up and decide the shooting is over, that doesn’t mean they stop shooting at you. And it is incredibly naïve to believe that because you say the war on terror is over, [the terrorists] believe it is over.”).

¹⁸⁵ Although U.S. government decisions and U.S. domestic law are not factors in analyzing the end of armed conflict under international law, they do offer common-sense considerations for assessing the state of affairs and create consequences (e.g., the withdrawal of troop, the end of offensive operations) that bear on international legal analysis.

¹⁸⁶ See the next section for discussion of the 2001 AUMF.

¹⁸⁷ Relatedly, the end of major combat operations by U.S. forces in Afghanistan will not eliminate the international legal bases for other U.S. counter-terrorism operations in the country. If the Afghan government consents to U.S. operations in support of their internal armed conflict, the United States can rely on that consent as its *jus ad bellum* and continue to employ international humanitarian law as *lex specialis* when executing missions,

interrelated, but there may not be a direct correlation between the end of one and the end of the other. Rather, in a best-case scenario, the end of major combat operations by U.S. forces in Afghanistan will push the United States closer to the end of the transnational armed conflict and into a period more closely resembling the “twilight between war and peace.”¹⁸⁸

D. Domestic Legal Basis for the Transnational Armed Conflict

While U.S. operations in the transnational armed conflict are routinely criticized by some as failing to comply with international law, debate surrounding the domestic legal bases for the transnational armed conflict tends to focus more on when the war should end and whether the statutory authorization for the conflict accurately and adequately addresses

whether partnered or unilateral. If Afghanistan does not consent to U.S. operations, then the United States could only conduct lawful counter-terrorism operations in Afghanistan pursuant to a U.N. Security Council resolution or in self-defense. Assuming no resolution would be forthcoming, international law still would support the use of force in self-defense against attacks (*see* Negroponte Letter, *supra* note 163; Eldon Letter *supra* note 163) or imminent threats that are manifest, instant, and overwhelming (*see* 2 John Bassett Moore, A DIGEST OF INTERNATIONAL LAW note 3, § 217, at 412 (1970) (1906)). Note that the U.S. military analyzes the imminent use of force “based on an assessment of all facts and circumstances known to U.S. forces at the time” and operates under the principle that “[i]mmminent does not necessarily mean immediate or instantaneous.” OPERATIONAL LAW HANDBOOK, *supra* note 87, at 91 (reproduction of Joint Staff instruction 3121.01B, Standing Rules of Engagement for U.S. Forces, Enclosure A (June 13, 2005)). The United States might further assert an “unwilling or unable” self-defense basis as circumstances warrant. *See* Deeks, *supra* note 98 (outlining the United States’ political arguments and bases in international law for asserting that it may lawfully act in self-defense inside another state’s borders against threats that are not presented by the state itself when the state has neither the inclination nor the capacity to address adequately the threat emanating from within its sovereign territory).

¹⁸⁸ *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950). It remains to be seen whether the twilight phase might transform at some point into a different archetype entirely. For example, the U.S. government might dispose of the transnational armed conflict model in exchange for an approach that recognizes the more geographically limited categories of non-international armed conflicts that are commonly recognized by the International Committee of the Red Cross. The United States might offer support to partners in those fights, or continue to provide assistance already underway, while still preserving America’s right to act in discrete instances of self-defense against states or non-state actors. Depending upon the manner in which such discrete actions are conducted (including whether the United States resorts to force and whether the intensity of fighting produces protracted violence), they could produce new and perhaps (very) limited in duration international armed conflicts or non-international armed conflicts. Regrettably, it is beyond the scope of this Article to address such a transformative approach in greater detail.

terrorist threats.¹⁸⁹ Americans remain divided on whether the transnational armed conflict should continue,¹⁹⁰ reflecting a popular fatigue and calling to mind, during “America’s longest war,”¹⁹¹ the still apt remarks of General William Tecumseh Sherman following one of the country’s deadliest conflicts: “I am tired and sick of war. Its glory is all moonshine . . . War is hell.”¹⁹²

Meanwhile, the interpretation and application of the statutory legal basis for the transnational armed conflict—the 2001 AUMF—is challenging for those government officials and military members who prosecute the conflict. Commonly known as the authority for U.S. operations in the war in Afghanistan and the war against al Qaeda, the Taliban, and associated forces, the joint resolution provides congressional authorization to use military force, while also expressly recognizing that the President has some independent authority and responsibility to combat threats to the nation. The 2001 AUMF provides an explicit recognition of the President’s “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States”¹⁹³ and sets forth the general scope of the war to be conducted. In pertinent part, it provides:

¹⁸⁹ See *Repeal the Military Force Law*, N.Y. TIMES (Mar. 9, 2013) (petitioning for a full repeal of the 2001 AUMF and depicting it as “the basis for a vast overreaching of power by one president, Mr. Bush, and less outrageous but still dangerous policies by another, Barack Obama”); Andrew Rosenthal, *The Forever War*, N.Y. TIMES (May 17, 2013) (describing competing perspectives of whether the 2001 AUMF should be repealed or revised, remain unchanged, or provide greater authority and reporting on “widespread disagreement over what the A.U.M.F. actually authorizes”).

¹⁹⁰ See Charlie Savage, *Debating the Legal Basis for the War on Terror*, N.Y. TIMES (May 16, 2013) (describing a rift in the American public, special interest advocates, and government officials whereby “[h]uman rights groups that want to see the 12-year-old military conflict wind down fear that a new authorization would create an open-ended ‘forever war’” and “[s]ome supporters of continuing the wartime approach to terrorism indefinitely fear that the war’s legal basis is eroding and needs to be bolstered”); *War on Terror Update: 30% Think Terrorists Are Winning War on Terror*, RASMUSSEN REPORTS (Jan. 20, 2014) (reporting that “39% of Likely U.S. Voters think the United States and its allies are winning the War on Terror. . . . Thirty percent (30%) now believe the terrorists are winning the war”).

¹⁹¹ Obama, *State of the Union*, *supra* note 2.

¹⁹² General William Tecumseh Sherman, Address to the Michigan Military Academy (June 19, 1879), in J. WINTLE, THE DICTIONARY OF WAR QUOTATIONS 91 (1989).

¹⁹³ Standing Joint Resolution 23, *supra* note 135. This verbiage echoed the argument Executive Branch officials have made throughout American history. The Executive Branch asserted that Article II of the Constitution established independent powers for the President to defend the nation. See, e.g., John C. Yoo, *Re: Constitutionality of Amending Foreign*

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁹⁴

The text of the 2001 AUMF presents operational flexibility through its broad delegation of authority, lack of geographic scope, and lack of time constraints. It also seems to recognize implicitly that the enemy is not a traditional enemy, that the United States is fighting a new kind of war, and that the President needs broad discretion to fight the war.¹⁹⁵

However, those aspects of the resolution that provide operational flexibility also create analytical challenges for those tasked with interpreting and applying the resolution and have led to much debate about the utility of the 2001 AUMF in its current form. Public criticism of the resolution has focused on its broad terms, lack of geography, potential for expansive targeting interpretations, inadequacy for addressing certain terrorism threats, and potential to stand in perpetuity.¹⁹⁶

Ultimately, the 2001 AUMF's continued significance may turn on whether the President follows through on his stated goal of "refin[ing], and ultimately repeal[ing]" the resolution.¹⁹⁷ Whether political conditions permit or not, operational circumstances suggest that the time is ripe to "discipline our thinking, our definitions, our actions . . . [in order to avoid being] drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states."¹⁹⁸ Certainly, however, any amendments must ensure that the Commander-in-Chief retains adequate authorities to defend the

Intelligence Surveillance Act to Change the "Purpose" Standard for Searches, Memorandum for David S. Kris, Associate Deputy Attorney General (Sept. 25, 2001), at 6.

¹⁹⁴ Standing Joint Resolution 23, *supra* note 135, § 2(a).

¹⁹⁵ *But see* Joint Resolution 114 (Authorization for Use of Military Force Against Iraq), H.J.RES. 114 (107th) (Oct. 16, 2002).

¹⁹⁶ For a thoughtful analysis of the 2001 AUMF, including the challenges it faces in remaining relevant and options for a new legal framework that might better address future threats, see Robert Chesney, Jack Goldsmith, Matthew C. Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats*, Hoover Institution/Stanford University Task Force on National Security and Law (2013).

¹⁹⁷ Obama, *Remarks at the National Defense University*, *supra* note 1.

¹⁹⁸ *Id.*

nation against evolving threats.¹⁹⁹ Until then, the 2001 AUMF remains broad positive legal authority to employ “all necessary and appropriate force” in prosecuting the transnational armed conflict.²⁰⁰

E. The End of the War as We Know It

Another difficult question is whether a decision by the President not to exercise the powers granted by the 2001 AUMF necessarily ends the conflict as a matter of international or domestic law or terminates the congressional authorization. While it seems more likely that, in the near term, President Obama will seek to amend the 2001 AUMF and leave the repeal of the resolution as a long-term goal, the consequences of eliminating the 2001 AUMF are significant and must be carefully considered.²⁰¹

As a matter of U.S. constitutional law, presidential proclamations may terminate armed conflict *de jure*.²⁰² On the other hand, international

¹⁹⁹ Absent the 2001 AUMF, the President might still rely on his Article II authority to defend the nation. However, Article II does not grant the President unilateral powers to direct prolonged and recurring kinetic activities free of Congressional and judicial oversight nor does Article II provide independent legal justification for continuing long-term detention of persons who are no longer enemy belligerents when armed conflict ends. This gap in authorities between the 2001 AUMF and Article II raises practical concerns about whether the President would maintain sufficient discretion to target and/or detain individuals and groups that threaten U.S. national security if the 2001 AUMF were revised or repealed.

²⁰⁰ Standing Joint Resolution 23, *supra* note 135, § 2(a).

²⁰¹ This seems a practical necessity in light of persistent, lethal threats. *See* Obama, *Remarks at the National Defense University*, *supra* note 1 (“So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic efforts to dismantle terrorist organizations must continue. But this war, like all wars, must end.”); Obama, *State of the Union*, *supra* note 2 (“For while our relationship with Afghanistan will change, one thing will not: our resolve that terrorists do not launch attacks against our country. The fact is, that danger remains. While we have put al Qaeda’s core leadership on a path to defeat, the threat has evolved, as al Qaeda affiliates and other extremists take root in different parts of the world. In Yemen, Somalia, Iraq, and Mali, we have to keep working with partners to disrupt and disable these networks. In Syria, we’ll support the opposition that rejects the agenda of terrorist networks. Here at home, we’ll keep strengthening our defenses We have to remain vigilant. . . . As Commander-in-Chief, I have used force when needed to protect the American people, and I will never hesitate to do so as long as I hold this office.”).

²⁰² *See* David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 101 (forthcoming 2014) (concluding that “the President must play a role in the constitutional termination of war,” *id.* at 190, and that “Congress’s abdication of its war termination authority after World War II has contributed to an imbalance of power, and thereby privileging the President’s role in

law, at least as articulated in *Tadić*, makes factual battlefield questions—not political decisions—determinative of when war begins and ends. International law employs a *de facto* test to discern when non-international armed conflict exists. That test considers the organization of parties to the conflict and the intensity of fighting.²⁰³ It is not clear precisely what scope and magnitude of warfare is required for armed conflict to endure. *Tadić*

ending war,” *id.* at 197-98). As a domestic matter, absent a presidential proclamation, the President’s decision not to apply the 2001 AUMF would also likely need to be considered relative to:

- 1) The manner in which the President gives notice of his decision (e.g., the President directing in a classified document that he will not approve lethal strikes outside Afghanistan, the President announcing publicly that he will not utilize the 2001 AUMF because it no longer reflects threats at hand);
- 2) Whether the President subsequently decides again to resort to methods of war (e.g., if the enemy were to conduct further significant attacks, prompting the President to again invoke the 2001 AUMF in authorizing a military response); and
- 3) How Congress responds (e.g., whether Congress repeals the AUMF or otherwise expresses its own judgment that the armed conflict is over).

Obviously the response of the enemy would also bear on the analysis. It is difficult to end a war against an enemy that refuses to stop fighting. The concept of a “*de jure*” beginning or end to armed conflict was coined by my colleague Michael d’Annunzio during personal conversation as a posited alternative to the *de facto* test applied by the ICTY in *Tadić*. The *Tadić* approach was developed in a situation in which a member of a state party to a conflict challenged the jurisdiction of an international war crimes tribunal by denying that certain alleged conduct occurred in the context of armed conflict. In contrast, where a state party proclaims itself to be involved in armed conflict, and resorts to methods of war against a non-state armed group, international humanitarian law applies to the state’s actions from the outset of its resort to armed force (not only after the violence has reached some critical threshold of intensity), and international humanitarian law continues to apply so long as the state resorts to methods of war.

²⁰³ See *Tadić*, *supra* note 4; ICRC, *supra* note 4, at 8–9 (explaining that “[i]nternational jurisprudence has developed indicative factors on the basis of which the ‘organization’ criterion may be assessed. They include the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group’s ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as cease-fire or peace accords, etc.” and further articulating that similar factors of intensity have developed in international law and that “indicative factors for assessment include the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and caliber of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the U.N. Security Council may also be a reflection of the intensity of a conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) has deemed there to be a NIAC in the sense of Common Article 3 whenever there is *protracted* (emphasis added) armed violence between governmental authorities and organized armed groups or between such groups within a state”).

proffers that armed conflict ends after the “cessation of hostilities [and upon] a general conclusion of peace,” depending upon the type of conflict at hand.²⁰⁴ When both parties to a conflict intend to keep fighting and continue to resort to force in some substantial amount, however, it would be difficult to consider the conflict concluded.

Nevertheless, seeking to apply *Tadić*’s objective criteria for recognizing armed conflict in relation to a presidential decision not to exercise the authorities granted him under the 2001 AUMF, the relevant questions are as follows.

First, would the President’s decision or subsequent actions alter the organization of forces so as to terminate the conflict? For U.S. forces, that seems exceedingly unlikely. U.S. armed forces—despite the shrinking defense budget and overall size of the U.S. military²⁰⁵—will remain a robust, structured global force for some time to come. And while it is difficult to predict the future of al Qaeda, the Taliban, and associated forces, intelligence experts offer a nearly universal opinion that the enemy will continue to exist as, at a minimum, a loosely affiliated, ideologically aligned, networked, persistent, and lethal threat.²⁰⁶

Second, would the President’s decision or subsequent actions reduce the intensity of fighting to a level below the threshold of armed conflict? If the President withdraws U.S. troops from Afghanistan *and* refuses to employ the powers granted in the 2001 AUMF, then it seems unlikely that the intensity of violence produced by a presumably small and increasingly

²⁰⁴ *Tadić*, *supra* note 4.

²⁰⁵ See generally Hagel, *supra* note 21; Jim Garamone, *Dempsey: Budget Balances Security, Fiscal Responsibility*, AM. FORCES PRESS SERV. (Mar. 13, 2014).

²⁰⁶ See J.M. Berger, *War on Error: We’re fighting al Qaeda like a terrorist group. They’re fighting us as an army.*, FOREIGN POLICY (Feb. 5, 2014), http://www.foreignpolicy.com/articles/2014/02/04/war_on_error_al_qaeda_terrorism [<http://perma.cc/E7M2-4GQC>]; Thomas M. Sanderson & Rick “Ozzie” Nelson, *Confronting an Uncertain Threat: The Future of Al Qaeda and Associated Movements*, Center for Strategic & International Studies (Sept. 7, 2011), *available at* http://csis.org/files/publication/110826_Nelson_%20ConfrontingAnUncertainThreat_Web.pdf [<http://perma.cc/B8AX-M7NH>]; Thomas Joscelyn, testimony before the House Committee on Foreign Affairs, Subcommittee on Terrorism, Nonproliferation, and Trade, Global al Qaeda: Affiliates, Objectives, and Future Challenges, testimony to the House Committee on Foreign Affairs Subcommittee on Terrorism, Nonproliferation, and Trade (July 18, 2013), *available at* <http://docs.house.gov/meetings/FA/FA18/20130718/101155/HHRG-113-FA18-Wstate-JoscelynT-20130718.pdf> [<http://perma.cc/3CWL-U32U>].

infrequent number of discrete kinetic strikes undertaken in self-defense will be viewed as a continuation of the armed conflict—particularly if such strikes are not publicly apparent or acknowledged. Yet if those defensive measures, presumably employed under the President’s Article II constitutional powers, merely deflect a continuing pattern of potentially lethal attacks by an organized enemy force, then it remains a possibility that international law would recognize some form of continuing armed conflict—whether the controversial American transnational armed conflict, another form of non-international armed conflict, or perhaps isolated instances of international armed conflict²⁰⁷—and provide further legal justification for applying international humanitarian law as *lex specialis*. Then, the conflict might endure under international law despite the U.S. government’s best intentions and efforts. The answer to this second question will necessarily require fact-specific considerations that are much too speculative for today.

Accepting for the sake of argument, however, that the President might announce that the United States is only fighting “remnants of al Qaeda” in Afghanistan,²⁰⁸ such a proclamation would give Taliban detainees a basis for arguing that the United States is no longer engaged in armed conflict against them and that they must be released.²⁰⁹ The concern applies both to Guantanamo Bay and Afghanistan, although the United States might find continuing authority to detain in Afghanistan based on the consent of Afghanistan’s government.²¹⁰ This practical dilemma would be expected to weigh heavily on any decision by the President. If the United States becomes obligated to release members of the Taliban who pose continuing and imminent threats, one can only imagine the questions that

²⁰⁷ ICRC, *supra* note 4, at 8–11.

²⁰⁸ See Obama, *State of the Union*, *supra* note 2.

²⁰⁹ One would expect a significant percentage of detainees to then petition for release under the requirements of international law based upon assertions of Taliban allegiance, as well as under Guantanamo Bay’s Periodic Review Board standards—presently “[c]ontinued law of war detention is warranted . . . if it is necessary to protect against a significant threat to the security of the United States.” Executive Order 13567 § 2. It should also be pointed out that military commissions presently have jurisdiction over only those acts “committed in the context of and associated with hostilities.” 10 U.S.C. § 950p(c). Prosecution in federal criminal courts would remain as a disposition option subject to statutory constraints that have been or may be enacted.

²¹⁰ *But see* Government of the Islamic Republic of Afghanistan, Presidential Decree (Feb. 23, 2014), <http://oaacoms.gov.af/fa/news/29767> [<http://perma.cc/Y4WM-YAJK>] (emphasizing the sovereignty of Afghanistan and declaring the intent of President Karzai that the state’s future international agreements and arrangements ensure that “[N]o foreign country has the right to capture a detainee or to have a detention facility in Afghanistan”).

will be raised by the American public and the magnitude of political bickering that will ensue in Washington—to say nothing of the risk that might be assumed by the government.

Moreover, if the U.S. government does conclude the transnational armed conflict—whether through actions that terminate the conflict *de facto* under international law or via a Presidential declaration or congressional repeal of the 2001 AUMF that ends the war from a domestic standpoint²¹¹—the legal consequences will be even more significant.²¹² International humanitarian law will lose its standing as *lex specialis* absent a new conflict. The rights to use force as a first resort will disappear, as will the international legal justification to detain enemy belligerents who are not incarcerated under criminal law or another internationally recognized legal basis for detention.²¹³

The detention dilemma posed under any scenario should compel the U.S. government finally to develop a comprehensive and implementable plan to address long-term detainee disposition options.²¹⁴

No matter whether the transnational armed conflict ends, however, the United States could still engage in various forms of statecraft outside of the conflict to provide for U.S. national security as a matter of sovereign right, including employment of various intelligence capabilities such as

²¹¹ Although a Presidential declaration of the end of war or congressional repeal of the 2001 AUMF might not technically end the conflict under international law, each would terminate the domestic legal authority for continuing the transnational armed conflict and likely make a return to arms unviable absent a catastrophic event.

²¹² To be clear, this Article rejects the proposition that any existing legal bases for the global armed conflict against the Taliban, al Qaeda, and associated forces will disappear upon the end of major U.S. combat operations in Afghanistan.

²¹³ The Supreme Court previously suggested in *Hamdi's* plurality that perpetual war might “unravel” the legal justification for continuing detention. *Hamdi v. Rumsfeld*, 542 U.S. at 521. But a termination of the armed conflict would certainly end the basis for continued detention of members of al Qaeda, the Taliban, and associated forces under international humanitarian law.

²¹⁴ For further discussion of the practical difficulties in transferring or prosecuting, either in federal courts or via military commissions, the remaining detainees held in Guantanamo Bay, Cuba, see Final Report: Guantanamo Review Task Force (Jan. 22, 2010) (concluding that of 240 detainees reviewed: “126 detainees were approved for transfer,” 44 detainees “were referred for prosecution either in federal court or a military commission” (very few have actually been prosecuted in either venue to date), “48 detainees were determined to be too dangerous to transfer but not feasible for prosecution,” and “30 detainees from Yemen were designated for ‘conditional’ detention based on the . . . security environment in that country”).

human intelligence and signals intelligence to identify threats emanating from abroad. These activities would occur regardless of whether the 2001 AUMF is repealed or amended and irrespective of the status of the Afghan war or the transnational armed conflict.

V. Seeking Peace

I am not referring to the absolute, infinite concept of universal peace and good will of which some fantasies and fanatics dream. . . . Let us focus on a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions—on a series of concrete actions and effective agreements which are in the interest of all concerned. . . . For peace is a process, a way of solving problems.

—President John F. Kennedy, June 10, 1963²¹⁵

Although international and U.S. domestic law could support continuing combat operations in Afghanistan and the broader transnational armed conflict, the U.S. government is in the process of constraining national security activities in ways that demonstrate a preference for scaling down U.S. combat operations and other activities abroad in favor of non-kinetic and less politically sensitive forms of statecraft.²¹⁶ While the future of Afghanistan and the transnational armed conflict are highly speculative, belligerent war fighting seems likely to give way to greater reliance on diplomacy and unified action that is not part of the transnational armed conflict.²¹⁷ The U.S. government is turning to methodologies and resources that have been developed throughout history and refined since 9/11, while

²¹⁵ John F. Kennedy, Address at American University: Towards a Strategy of Peace (June 10, 1963), available at <http://www.fordham.edu/halsall/mod/1963kennedy-peacestrat.html> [<http://perma.cc/67WK-YPMA>].

²¹⁶ This Article recognizes that U.S. government policy has created constraints, particularly on U.S. counter-terrorism and intelligence activities, and future policies and/or direction for implementation could eventually require U.S. national security activities to transition to a law enforcement paradigm or, as an exceptional measure, turn to the use of force only in self-defense, as a last resort, and in response to a continuing, imminent threat. This Article also acknowledges that the mostly permissive international legal regime may be largely superseded by U.S. domestic political considerations and decisions that narrow the aperture of U.S. national security activities conducted.

²¹⁷ “Unified action” refers to “[t]he synchronization, coordination, and/or integration of the activities of governmental and nongovernmental entities with military operations to achieve unity of effort.” JOINT CHIEFS OF STAFF, *supra* note 77, at GL-12.

continuing to build partnerships and partner capacity, develop contemporary and future capabilities, and identify and combat threats so as to reduce the likelihood of resorting to large-scale combat operations in the future.²¹⁸ Some of these activities will certainly be overt. Others will constitute an expansion of traditional statecraft in the shadows.²¹⁹ Each presents an opportunity to preserve national security in ways that respect international law and foster international partnerships.

A. Policy as the Continuation of War

1. Counter-Terrorism Policy Standards and Procedures

The U.S. government appears poised to turn away from the special operations and activities counter-terrorism models built over more than a decade.²²⁰ Within the transnational armed conflict, President Obama has expressed a policy preference for capturing terrorists who could also be lawfully targeted with lethal means and for bringing those individuals to

²¹⁸ See generally Hagel, *supra* note 21; Amaani Lyle, *Winnefeld: Budget Request Balances Security, Fiscal Realities*, AM. FORCES PRESS SERV. (Feb. 27, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=121737> [<http://perma.cc/J7ZY-ZE4C>].

²¹⁹ I use “statecraft in the shadows” as a colloquial method of describing a subset of low visibility state activities that may not be apparent or publicly acknowledged, including clandestine activities, covert action, low visibility operations, and other forms of low visibility state action that occur both inside and outside of armed conflict.

²²⁰ General Stanley McChrystal (Retired; formerly Commander of Joint Special Operations Command, Director of the Joint Staff, and Commander of NATO’s International Security Assistance Force and U.S. Forces—Afghanistan) described part of the U.S. Government’s counter-terrorism network that he commanded:

When the counterterrorist effort against al Qaeda started, it was narrowly focused and centralized That worked well for the pre-9/11 environment, but in the post-9/11 environment the breadth of al Qaeda and associated movements exploded. . . . So the first thing we did when I took over in late 2003 was realize that we needed to understand the problem much better. To do that, we had to become a network ourselves—to be connected across all parts of the battlefield, so that every time something occurred and we gathered intelligence or experience from it, information flowed very, very quickly. The network had a tremendous amount of geographical spread. At one point, we were in 27 countries simultaneously. . . . People hear most about the targeting cycle, which we called F3EA—‘find, fix, finish, exploit, and analyze.’ You understand who or what is a target, you locate it, you capture or kill it, you take what intelligence you can from people or equipment or documents, you analyze that, and then you go back and do the cycle again, smarter.

Rose & Peterson, *supra* note 169.

criminal trial for prosecution.²²¹ This policy applies to activities conducted “outside the United States and outside areas of active hostilities.”²²² It does not apply to U.S. military operations in Afghanistan, nor would it be expected to apply to a new armed conflict in which the United States is a principal belligerent.²²³ Combatants outside areas of active hostilities shall not be killed if capture is feasible—a requirement not found in international humanitarian law.²²⁴ The President’s policy guidelines further mandate that, even if capture is not feasible, belligerents shall not be killed unless they constitute continuing, imminent threats to U.S. persons.²²⁵

The President’s counter-terrorism policy seems a clear marker guiding the path away from war and back towards an era in which senior policy makers attending interagency meetings, as opposed to military officers forward deployed in battle, make national security decisions. While there are critics of this approach,²²⁶ the policy does resemble national security decision-making processes before 9/11. It recalls a time when the U.S. government operated as if it had time to deliberate over the best way to address malevolent actors in almost all instances.²²⁷ The policy places prudence as the hallmark of national security affairs and assumes that more viewpoints and interagency dialogue will produce better results. It also

²²¹ See Obama, *Remarks at the National Defense University*, *supra* note 1; Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3. Note, however, that the author was only able to uncover one publicly reported capture since the announcement of this policy—Abu Anas al-Libi (discussed in the next section).

²²² Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3.

²²³ As opposed to an armed conflict in another state in which the United States participates at the request of, and with the consent of, the host nation and may become a co-belligerent, but would not otherwise be principally involved.

²²⁴ Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3.

²²⁵ *Id.*

²²⁶ See, e.g., Eli Lake, *Congressman: Obama’s Drone War Rules Let Terrorists Go Free*, THE DAILY BEAST (Feb. 4, 2014), <http://www.thedailybeast.com/articles/2014/02/04/congressman-obama-s-drone-war-rules-let-terrorists-go-free.html> [<http://perma.cc/5C3J-RVP5>] (reporting that Chairman of the House Permanent Select Committee on Intelligence Representative Mike Rogers stated, “It’s very clear that there have been missed opportunities that I believe increased the risk of the lives of our soldiers and for disrupting operations under way”).

²²⁷ Note that even in the tragedy of 9/11, the U.S. government had known about threats from al Qaeda years before 9/11 and, in 1998, had launched Tomahawk missiles at Osama bin Laden’s home and indicted him and other members of al Qaeda for conspiracy to kill Americans. See generally LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 (2007); The National Commission on Terrorist Attacks, Final Report of the National Commission on Terrorist Attacks Upon the United States (The 9/11 Commission Report) 339-60 (July 22, 2004) (discussing U.S. government decision-making processes relating to al Qaeda and terrorism before 9/11).

relies on legal bases for action outside of armed conflict and *jus extra bellum*.

2. Lethal Force as a Last Resort

The counter-terrorism policy presents an opportunity to explore how policy decisions can alter the hierarchy of applicable legal regimes. Consider the policy requirement to capture—not kill—whenever “feasible.”²²⁸ I refer to this component of the policy as “lethal force as a last resort.”²²⁹ Lethal force as a last resort is normally required under law enforcement and international human rights law (IHRL) regimes, but it is *not* required in armed conflict by the *lex specialis* applicable in the transnational armed conflict—international humanitarian law.²³⁰ Yet the President chose to narrow the range of U.S. lethal activities at war as a matter of political discretion. The capture requirement reads:

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist

²²⁸ See Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3.

²²⁹ Although I refer to this component of the policy as “lethal force as a last resort,” the policy does not create as significant of a restriction on the use of force as might criminal law or, certainly, as does international human rights law (IHRL). IHRL permits international lethal force only where strictly necessary to address an imminent threat, and where there are no other less than lethal options. Meanwhile, the “feasible” and “continuing, imminent threat” requirements could still permit the use of force when capture might be technically possible but involves unacceptable risk. See Kenneth Anderson, *The More You Attempt Capture Operations, the Less Feasible They Become*, LAWFARE (Nov. 1, 2013), <http://www.lawfareblog.com/2013/11/the-more-you-attempt-capture-operations-the-less-feasible-they-become/> [<http://perma.cc/RTT5-EELP>]. As a result, there is a spectrum of use of force standards at play between international humanitarian law, this policy, criminal law (and its various international and domestic incarnations), and IHRL (listing these four regimes from most permissive to most restrictive). However, the difference between the use of force standard under international humanitarian law and the other three categories is significant. The President’s policy, criminal law, and IHRL each represent a standard of lethal force as a last resort to varying degrees—accepting that the President’s intent is to require sufficient scrutiny of targeting proposals to that effect. Therefore, I describe the policy, criminal law, and IHRL each through the lens of “lethal force as a last resort.”

²³⁰ See generally Robert Chesney, *The Capture-or-Kill Debate #11: Goodman Responds to Ohlin*, LAWFARE (Mar. 20, 2013), <http://www.lawfareblog.com/2013/03/the-capture-or-kill-debate-11-goodman-responds-to-ohlin/> [<http://perma.cc/Z39-AK65>] (providing links to eleven comments from distinguished academics and practitioners on the topic of whether international law requires capturing instead of killing—circumstances permitting).

plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.²³¹

Some might believe that the capture first requirement aligns with international humanitarian law's principle of necessity,²³² but the policy is better understood as stepping outside of the *lex specialis* altogether. Instead of narrowing rules of engagement at war, the President created a policy preference to adopt a law enforcement paradigm where feasible or to rely on other, less lethal means where available. In effect, as a matter of policy, the Executive Branch made international humanitarian law a legal regime of last resort outside of areas of active hostilities in those instances where capture is feasible—even when prospective targets constitute “continuing, imminent threats.”²³³

a. The Criminal Law Paradigm

The most striking differences between international humanitarian law and criminal law involve the use of force and deprivation of liberty.

²³¹ Fact Sheet: U.S. Policy Standards and Procedures, *supra* note 3. The “preference for capture” is justified, in part, through a tactical and operational justification that, in principle, is consistent with contemporary counter-terrorism operations’ reliance on intelligence exploitation and analysis post-capture in order to find, fix, and finish follow-on targets. See Mitch Ferry, *F3EA—A Targeting Paradigm for Contemporary Warfare*, AUSTRALIAN ARMY J. (May 30, 2013), <http://www.army.gov.au/Our-future/Publications/Australian-Army-Journal/Past-editions/~media/Files/Our%20future/LWSC%20Publications/AAJ/2013Autumn/06-F3eaATargetingParadigmF.pdf> [<http://perma.cc/DS4V-7CN9>].

²³² For discussion of military necessity, see INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79 (Nils Melzer ed., 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [<http://perma.cc/G5F-26XV>] (recognizing that the principle of military necessity is derived from Article 14 of the Lieber Code but that “[t]oday, the principle of military necessity is generally recognized to permit ‘only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources’” (quoting U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), section 2.2 (Military necessity))).

²³³ This policy choice did not diminish America’s legal *jus ad bellum*, *jus in bello*, or *jus extra bellum*.

Law enforcement operations generally require employing escalatory rules for the use of force and resorting to lethal force only as a necessary measure of last resort.²³⁴ Such operations also result in arrest, not capture, thereby triggering certain individual and procedural rights.²³⁵ The law enforcement paradigm is also important to the broader range of global threats such as nuclear proliferation, international kidnapping, piracy, threat finance, cyber attacks and cyber espionage, and other forms of transnational crime. International criminal law, specific international agreements or arrangements, and U.N. Security Council resolutions can support transnational law enforcement activities.²³⁶

Furthermore, as a practical matter, the law enforcement approach generally results in fewer targeted persons killed and decreases the likelihood of collateral damage—while still offering opportunities to question those detained and gather intelligence and evidence from the point

²³⁴ See, e.g., Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (Aug. 27 to Sept. 7, 1990); Louis J. Freeh, Policy Statement: Use of Deadly Force, U.S. Dep't of Justice, Office of Investigative Agency Policies (Oct. 16, 1995). There can be some variation from general rules for the use of force—particularly when operations seek an end-state of criminal prosecution but rely on non-law enforcement assets that may employ more robust legal authorities. For example, U.S. military counterterrorism operations in support of law enforcement would need to be reviewed to determine whether operations would rely exclusively on law enforcement authorities and escalatory rules for the use of force or whether there might be a basis to apply international humanitarian law and to employ force pursuant to rules of engagement that can allow the enemy to be shot on sight. Even under the more permissive regime of international humanitarian law, however, a policy choice might be made to constrain when and how force may be employed.

²³⁵ Suspected criminals brought to trial in U.S. federal criminal courts (not military commissions) are provided rights that apply in Article III courts regardless of whether they are enemy belligerents. Note, however, that such rights do not necessarily apply abroad. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (indicating that the Fourth Amendment does not attach to nonresident aliens abroad).

²³⁶ The recent capture of Abu Anas al-Libi provides an example of a U.S. military operation that could have been conducted completely consistent with a legal framework outside of armed conflict and under a law enforcement paradigm. Reportedly, al-Libi was captured by U.S. military forces and transferred to the Federal Bureau of Investigation pursuant to a 2001 criminal indictment. See Thomas Joscelyn, 'Core' al Qaeda member captured in Libya, *LONG WAR JOURNAL* (Oct. 5, 2013); Grand jury indictment S(9) 98 Cr. 1023 (LBS) (S.D.N.Y.). Yet al-Libi was also a member of core al Qaeda and thus targetable as an enemy combatant in the ongoing armed conflict under international humanitarian law and under the 2001 AUMF. There may have been a policy choice to detain al-Libi for prosecution, but he could have been targeted for lethal action under international humanitarian law as well.

of arrest. Lethal operations offer the advantage of permanently removing enemy forces from the fight, but captured persons—whether arrested by law enforcement authorities or detained by military forces or other state agents—can provide information that enables the disruption of other criminal activities and threat streams. The law enforcement paradigm also necessarily requires arrest to occur in-person (as opposed to a standoff kinetic strike), whereby questioning and sensitive site exploitation may produce statements about the detained person’s criminal acts and the culpability of his or her associates, and those conducting sensitive site exploitation can gather intelligence and evidence on-site.

Another major change from international humanitarian law to U.S. criminal law involves the broad constitutional and procedural protections provided for the accused in American criminal courts, including, for example, rules regarding admissibility of evidence. International humanitarian law’s protections are bare bones in comparison.

Public reports of the Federal Bureau of Investigation’s (FBI) interrogation teams bring to light this distinction. Reportedly, suspected enemy combatants can remain under military or FBI custody and undergo military or FBI-led intelligence interviews of extended duration.²³⁷ Detainees are not entitled to Miranda warnings while undergoing intelligence questioning.²³⁸ Once intelligence questioning ends, the public record suggests that detained persons receive a break in questioning called an “attenuation period.” After the attenuation period, what were once called FBI “clean teams” (i.e., FBI or law enforcement personnel who have not reviewed or otherwise been exposed to the information obtained during the intelligence interviews) read detained persons their Miranda rights and ask

²³⁷ See, e.g., Jason Ryan & Luis Martinez, *New Terror War Tactic? Alleged Al Qaeda-Linked Operative Secretly Held 2 Months on Navy Vessel*, ABC NEWS (July 5, 2011), <http://abcnews.go.com/Blotter/ahmed-abdulkadir-warsame-secretly-held-months-navy-ship/story?id=14004812> (reporting that Ahmed Abdulkadir Warsame, suspected of being a conduit between terrorist organizations al Shabaab and al Qaeda in the Arabian Peninsula, was captured at sea and interrogated aboard a U.S. Navy ship by the FBI’s High Value Detainee Interrogation Group “for more than two months before he was read his Miranda rights”).

²³⁸ At this stage of the process, persons detained as enemy combatants would not be entitled to Miranda warnings or the full panoply of U.S. criminal due process rights normally required to be provided to suspects facing possible Article III prosecution. Additionally, while it is beyond the scope of this Article to discuss military commissions in depth, it is not clear that all of the constitutional and procedural protections that would be expected to apply in Article III criminal prosecutions would necessarily apply in military commissions—regardless of the suspect’s citizenship.

if they wish to waive them and voluntarily agree to be interviewed again (most likely on some of the same topics).²³⁹

The break in questioning, clean team, and Miranda waiver are designed to present an alternative long-term disposition option for suspected terrorists and other malevolent actors. This process seeks to ensure that any statements from law enforcement interviews will be admissible in Article III criminal proceedings.²⁴⁰ Although the political viability of the counter-terrorism law enforcement approach remains subject to continuing congressional scrutiny,²⁴¹ where possible, the Obama Administration

²³⁹ See Ryan & Martinez, *supra* note 237 (quoting a “letter filed with the U.S. District Court by the U.S. Attorney’s office in New York not[ing], ‘The defendant was interviewed on an all but a daily basis by certain United States officials, who were acting in a non-law enforcement capacity. Thereafter, there was a substantial break from any questioning of the defendant, of four days. After this break the defendant was advised of his Miranda rights and, after waiving those rights, spoke to law enforcement agents’”). A substantial break in questioning is a long-standing tool of law enforcement officials known as “attenuation.” Attenuation is a means of avoiding the suppression of evidence that might otherwise be tainted. See *Wong Sun v. United States*, 371 U.S. 471 (1963). Historically, the FBI, when conducting interrogations with military personnel or other governmental intelligence entities, recognized that “the purpose of attenuation is both to enhance the likelihood that any resulting statement would be admissible in a judicial proceeding and to assure the credibility and accuracy of statements obtained from detainees who have previously been subjected to non-FBI techniques, regardless of whether the goal is to use the statement in a judicial proceeding. . . . [M]ultiple means of ‘attenuation’ [are utilized], including changing the interview location, allowing a lapse of time, and avoiding the use of information derived from previous interrogations.” Office of the Inspector General, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq*, Dep’t of Justice, Oversight and Review Division (May 2008), at 148. “Clean teams” or their current incarnation have been employed against al Qaeda and other terrorists since well before 9/11. See Roberto Suro, *FBI’s ‘Clean’ Teams Follow ‘Dirty’ Spy Work*, WASH. POST (Aug. 16, 1999), <http://www.washingtonpost.com/wp-srv/national/daily/aug99/dirty16.htm> [<http://perma.cc/RR5S-VVXK>]; Josh White, Dan Eggen & Joby Warrick, *U.S. to Try 6 on Capital Charges Over 9/11 Attacks*, WASH. POST (Feb. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/11/AR2008021100572.html>; Benjamin Weiser, *Interview Was ‘Clean,’ F.B.I. Agent Testifies*, N.Y. TIMES (Dec. 23, 2011), http://www.nytimes.com/2011/12/24/nyregion/mohamed-ibrahim-ahmed-had-clean-interview-agent-testifies.html?_r=0 [<http://perma.cc/E3PE-MGUW>].

²⁴⁰ But see Josh Gerstein, *Failed Somali pirate prosecution fuels terror trial fears*, POLITICO (Feb. 10, 2014), <http://www.politico.com/story/2014/02/somali-pirate-prosecution-103328.html> [<http://perma.cc/V2JU-PZQF>] (“The failed prosecution of an alleged Somali pirate—and the fact that that failure could leave him living freely, and permanently, inside U.S. borders—is highlighting anew the risks of trying terror suspects in American courts.”).

²⁴¹ See, e.g., Brief of *Amici Curiae* Senators John McCain, Lindsey Graham, and Kelly Ayotte in Support of Appellants, *Hedges v. Obama* (S.D.N.Y. 2012).

remains committed to pursuing federal prosecution in place of indefinite detention or prosecution at military commissions.²⁴²

Despite the success of the al-Libi and Warsame operations footnoted in this Article,²⁴³ the lethal force as a last resort model remains unlikely to provide the sole tool to combat terrorists moving forward. It may actually prove an important but rarely used tool.²⁴⁴ Indeed, it will not replace, but may need to complement, more frequently utilized levers of national power such as intelligence-sharing with partner nations and surrogates, partner nation capacity-building, and other security force assistance initiatives. Yet if the U.S. government ends major U.S. combat operations in Afghanistan

²⁴² See Obama, *Remarks at the National Defense University*, *supra* note 1 (reaffirming the Administration's "strong preference for the detention and prosecution of terrorists" in Article III courts). Should important U.S. national interests warrant U.S. law enforcement activities that may not comply with international law (e.g., intruding on the territorial sovereignty of another state to arrest a criminal suspect without that state's consent or other justification under international law), the President's preference for criminal prosecution may have to be reconciled with any policy preference for complying with international law. As a U.S. domestic criminal matter, Article III criminal proceedings do not necessarily require compliance with international law. See Office of Legal Counsel, U.S. Department of Justice, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 U.S. Op. Off. Legal Counsel 163 (O.L.C.) (Jun. 21, 1989), http://www.fas.org/irp/agency/doj/fbi/olc_override.pdf [<http://perma.cc/KA4C-46HX>] (explaining O.L.C.'s long held view that U.S. government extraterritorial law enforcement activities need not comply with international law in order to meet the requirements of the Fourth Amendment).

²⁴³ See *supra* notes 235 and 236.

²⁴⁴ As Harvard Law School Professor Jack Goldsmith explains:

The back end of this counterterrorism model—prosecuting the captured terrorist in the United States for material support, or a related crime—is the easiest part. The ultimate success of the model . . . turns on two issues: (i) Will the administration be able in fact to capture and extract terrorists in foreign countries, consistent with its commitment to troop and civilian protection, and international law?; and (ii) Will the administration be able to extract adequate intelligence—from shipboard interrogations, followed by a criminal process that promises a plea deal for cooperation—so as [to] make long-term detention unnecessary? . . . [I]t is hard to see how U.S. capture operations, if done on a regular basis, do not result in U.S. troop or civilian casualties, followed by serious domestic or international controversy.

Jack Goldsmith, *Thoughts About the Obama Administration's Counterterrorism Paradigm in Light of the Al-Liby and Ikrima Operations*, LAWFARE (Oct. 13, 2013), <http://www.lawfareblog.com/2013/10/thoughts-about-the-obama-administrations-counterterrorism-paradigm-in-light-of-the-al-liby-and-ikrime-operations/> [<http://perma.cc/UYX7-YZSW>].

and also the transnational armed conflict, in the near term, the nation will need every remaining tool at its disposal.

b. The International Human Rights Law Paradigm

International human rights law presents similar considerations to criminal law.²⁴⁵ When applicable, IHRL permits intentional lethal force only where strictly necessary to address an imminent threat, and where there are no less than lethal options (i.e., arrest as a first resort).²⁴⁶ This requirement is based on IHRL's firm commitment to the right to life. IHRL also establishes a host of other rights that are captured in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and elsewhere.²⁴⁷ The U.S. government does not apply IHRL extraterritorially—having made clear that the International Covenant on Civil and Political Rights “by its very terms does not apply outside of the territory of a State Party” and that “States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction”; but emphasizing that “the Covenant rights find expression . . . in the numerous protections available under U.S. laws and policies.”²⁴⁸

²⁴⁵ One significant difference between criminal law and IHRL, however, is that criminal law provides more robust domestic and international legal frameworks that tend to have more teeth than some provisions of IHRL.

²⁴⁶ Human Rights Watch explains:

International human rights law permits the use of lethal force outside of armed conflict situations if it is strictly and directly necessary to save human life. In particular, the use of lethal force is lawful if the targeted individual presents an imminent threat to life and less extreme means, such as capture or non-lethal incapacitation, are insufficient to address that threat.

Human Rights Watch, *Q & A: US Targeted Killings and International Law* (Dec. 19, 2011) <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>.

²⁴⁷ See generally International Covenant on Civil and Political Rights [ICCPR], Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention on Human Rights [ECHR], as amended by Protocols Nos. 11 and 14, as supplemented by Protocols Nos. 1, 4, 6, 7, 12, and 13 (Sept. 3, 1953).

²⁴⁸ Matthew Waxman, Principal Deputy Dir. of Policy Planning, U.S. Dep't of State Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR) (July 17, 2006), <http://2001-2009.state.gov/g/drl/rls/70392.htm> [<http://perma.cc/G2VR-XG6Q>]. The U.S. government affirmed this position before the United Nations Human Rights Committee in March 2014. See Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html?_r=0 (quoting U.S. State Department acting legal adviser

The U.S. government's position, however, will not stop the current push to recognize IHRL as an obligation on all states domestically and extra-territorially.²⁴⁹ The debate has involved prominent members of the U.S. government as indicated by recently disclosed legal memoranda from the U.S. Department of State's former legal adviser Harold Koh.²⁵⁰ Koh advocated for a change in U.S. government policy that would acknowledge more extensive extraterritorial IHRL obligations.²⁵¹ Meanwhile, some

Mary McLeod: "The United States continues to believe that its interpretation—that the covenant applies only to individuals both within its territory and within its jurisdiction—is the most consistent with the covenant's language and negotiating history").

²⁴⁹ See Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010), <http://justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> [<http://perma.cc/GTZ3-SVAW>]; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict (Jan. 21, 2013), *available at* <http://s3.documentcloud.org/documents/1053901/state-department-cat-memo.pdf> [<http://perma.cc/L443-D4U3>].

²⁵⁰ See Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0; Koh, Memorandum Opinion on the Geographic Scope of the ICCPR, *supra* note 249; Koh, Memorandum Opinion on the Geographic Scope of the Convention Against Torture, *supra* note 249.

²⁵¹ For now, the applicability of international human rights law to future U.S. counterterrorism operations and other extraterritorial activities remains subject to much debate. Of particular significance for this Article, it remains to be seen whether the end of major combat operations by U.S. forces in Afghanistan and/or the amendment or repeal of the 2001 AUMF will be considered a *de jure* end to the transnational armed conflict (as discussed in Section IV.E. *infra*) or otherwise reduce the intensity and organization of fighting such that it constitutes a *de facto* end of the armed conflict. If the armed conflict is over, then criminal law and IHRL would warrant greater consideration.

The other salient shift from international humanitarian law to IHRL would be the potential obligation to consider other human rights norms. Of particular importance, IHRL is generally viewed as preserving individual privacy interests. No such interests exist between belligerents in armed conflict, and, as discussed previously, international law does not generally prohibit intelligence collection. Yet modern technologies renew questions about whether intelligence collection through technological means can violate privacy rights under IHRL or whether privacy interests may be overcome by states' rights to provide for their national defense. Although it is beyond the scope of this Article to delve too deeply into that issue, there is not a clear consensus amongst states as to precisely when and to what degree privacy might trump national security. As examples, the American position not to apply IHRL extraterritorially (and to create domestic legal restrictions on monitoring American communications that are generally not as restrictive against government activities targeting foreign communications) stands in contrast to the European

human rights advocates see the end of major U.S. combat operations in Afghanistan as an opportunity to disclaim the transnational armed conflict archetype—arguing that the United States will no longer conduct counter-terrorism operations of sufficient intensity to constitute armed conflict or that U.S. operations that persist will be in support of other states' internal armed conflicts and not permissible under America's own *jus ad bellum*.²⁵²

If the U.S. government *were* to accept the proposition that IHRL must be applied outside Afghanistan in all instances, then as a matter of law U.S. activities would be constrained by the full panoply of IHRL obligations, including, for example, the right to privacy.²⁵³ Although the U.S. government has implemented procedures to safeguard privacy interests of foreign persons, it should be wary of accepting an international right to privacy or any other international rights that are not clearly understood,²⁵⁴ subject to international legal determinations that might be inconsistent with

Convention on Human Rights' Article 8 privacy rights (which apply transnationally, but are not clearly defined), which is also inconsistent with Chinese views on state authority to monitor and control communications mediums. *See, e.g.,* Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate Between the Cyberspaces*, 4 INT'L J. COMM. L. & POL. 1, 3 (Winter 1999/2000). What is clear is that the global community has been much more aware of national security activities that might impact transnational privacy interests—particularly post-Snowden—and the Executive Branch has recalibrated at least one policy out of respect for those concerns. Nevertheless, technical collection capabilities that have proven critical to national security would face even greater scrutiny if the U.S. accepted an IHRL regime that presumably would incorporate the ICCPR's Article 17 right to privacy. For discussion of the practical ramifications that could affect one of America's closest allies, see Hopkins, *supra* note 16.

²⁵² This second argument would still allow the United States to apply international humanitarian law as *lex specialis* in other states with their consent—subject possibly to IHRL or other legal restrictions applicable to the host nation. Again, it is unclear that such obligations would necessarily attach to the United States, but that issue requires further exploration.

²⁵³ *See* ICCPR, *supra* note 247, art. 17; ECHR, *supra* note 247.

²⁵⁴ The general terms of the International Covenant on Civil and Political Rights and European Convention on Human Rights, as well as a relative paucity of detailed case law or other substantial guidance that reflects contemporary security practices and technologies, make it unclear exactly what the scope of IHRL privacy rights might be and, significantly, what constraints they could conceivably place upon the U.S. government if it was to accept that all of IHRL applies extraterritorially. The U.S. government should seek to understand better how the international right to privacy would be applied under IHRL before committing to its extraterritorial application as a matter of law.

U.S. interests and existing sovereign rights, and, most importantly, that could cost lives.²⁵⁵

Of course the United States would be hard-pressed to refute growing consensus that the right to life has become a matter of customary international law; however, it is not clear that the United States intends to pursue that debate or needs to do so. Rather, the right to life can be respected and ensured in most instances, while still recognizing that it may be overcome in those instances where international law allows for the use of force as a matter of first resort—principally through *jus ad bellum* or *jus in bello*, but also in those instances where U.N. Security Council resolutions, self-defense, or host nation consent may provide legal justification.

Relatedly, when the United States acts in another state with that state's consent but outside of the transnational armed conflict, it is unclear whether and to what degree the United States must comply with international human rights law obligations that would normally attach to the host nation.²⁵⁶ It is true that IHRL will be more of a relevant consideration

²⁵⁵ IHRL's core principle—the right to life—is difficult to reconcile with the right to privacy in the context of national security. States employ intelligence assets and capabilities in ways that challenge conceptions of privacy, yet those activities are routinely designed to combat threats and save lives. While IHRL does not establish a hierarchy of rights (e.g., that the right to life—and state activities protecting the right to life—is of greater importance than privacy), the President's SIGINT review reflects American efforts to balance states' obligations to protect their citizens with a reasonable degree of privacy protections. States do not have an obligation to save every life in every instance, but they should preserve the ability to protect their citizens when appropriate without feeling constrained as a matter of law.

²⁵⁶ Although the U.S. government does not accept that IHRL is applicable extraterritorially, it may be forced to apply IHRL in some instances when it acts in another state, with that state's consent, and that state is bound by IHRL. This issue can be considered through examples of states' seeking assistance from the U.S. government outside of armed conflict or within an armed conflict paradigm. Libya provides an example *outside* of armed conflict for consideration. Under *Tadić* analysis, the government of Libya did not appear to be a party to an armed conflict at the time of the reported al-Libi operation. For the purpose of this analysis, I will assume that the government of Libya was not party to any armed conflict. Therefore, international humanitarian law would not have applied to activities of the government of Libya. Libyan law enforcement officials could have applied domestic criminal law and IHRL as prescribed in the ICCPR (to which Libya is a party) to any operation to capture al-Libi and could have requested participation by U.S. forces in such an operation. But if the United States sought to engage in counter-terrorism activities inside of Libya at the invitation of the government of Libya, the U.S. government would have needed to assess separately whether those U.S. activities would have been bound by Libya's obligations under IHRL or if the United States would have applied international humanitarian law as *lex specialis* while targeting al-Libi in the prosecution of the U.S.

for partner nations than the U.S. government in most instances—at least until the U.S. government makes a policy choice to apply IHRL extraterritorially. Yet, at a minimum, the U.S. government should consider host nation IHRL obligations in advance of operations in order to understand partners’ legal obligations and potential legal, political, and diplomatic consequences of U.S. operations.

c. Towards a Renewed State of Peace

To a large degree the United States is returning to a pre-9/11 law enforcement approach to combatting terrorism and other global threats in a vessel reinforced with processes, networks, technology, and interagency and partner capabilities that have been tacked on since 9/11.²⁵⁷ America’s course is being steered with consideration for the right to life that is reflected in IHRL, and the President’s lethal force as a last resort policy seems an easing turn away from the transnational armed conflict paradigm and methodologies of war and towards a new strategy for American statecraft. As the Executive Branch seeks to move past the war template, if America will travel down that path, then law enforcement actions, military support to law enforcement, advice and assistance to partner nations, and the whole-of-government approach will be critical.

transnational armed conflict. A second scenario involves states that are *parties to* an armed conflict and request assistance from the United States. Mali is considered by the ICRC to be engaged in a non-international armed conflict. See ICRC, *Internal conflicts or other situations of violence—what is the difference for victims?* (Oct. 12, 2012), <http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm> [<http://perma.cc/7ZMC-QCV6>] (listing Mali and Syria as “[e]xamples of recent non-international armed conflicts”). Imagine that the government of Mali requests U.S. assistance to combat armed groups conducting attacks within its territory and groups that threaten state security and regional stability. The government of Mali might assert that international humanitarian law applies as *lex specialis* in such a situation. Under such circumstances, the United States would have to consider whether Mali’s assertion that international humanitarian law is applicable as *lex specialis* was objectively reasonable or whether the United States had an independent basis to apply international humanitarian law as *lex specialis*. Absent a basis to apply international humanitarian law, the United States might still assert that IHRL does not apply to its actions since they would be conducted extraterritorially. However, the host nations’ IHRL obligations, such as the ICCPR (to which Mali is a party), would likely represent responsibilities that the United States might want to avoid breaching or being perceived as breaching.

²⁵⁷ See generally Robert Chesney, *Postwar*, 5 HARV. NAT’L SEC. J. 305, 305 (2014) (reviewing approaches to combatting terrorism and asserting that “shifting from the armed-conflict model to a postwar framework would have far less of a practical impact than” those who speak in terms of the “status quo” tend to assume).

Of course there is risk in the counter-terrorism policy and the lethal force as a last resort approach.²⁵⁸ Interagency deliberations foster consensus and provide an opportunity to consider departmental and agency institutional perspectives while deconflicting U.S. government activities. But they also take time. Governmental deliberations rarely move at the speed of war; while the U.S. government debates proposals for counter-terrorism action, the enemy may strike or the opportunity to attack the enemy may pass. America's approach to war-fighting should be more agile and adaptable than its foes. Furthermore, for all of the advantages offered in tapping into interagency expertise, it is less than clear that interagency consensus-building is an effective means of prosecuting a war. Certainly experts in diplomacy and Constitutional law have important roles to play in shaping policy and making strategic level choices about American interests. However, when it comes time to execute U.S. national security decisions to resort to war or covert action, this is best accomplished by entrusting accomplished professionals in warfare and covert action to find and fix the enemy and to develop and implement means of defeating it.²⁵⁹ There is also the practical consideration of whether more deliberate, less lethal, less frequent operations to take the enemy out of action will be able to keep pace with the threat the enemy presents.²⁶⁰

²⁵⁸ These counter-terrorism standards and procedures have been in place or transitioning into place since May 2013. Unfortunately it is much too soon to know whether this increased rigor is consistent with mitigating the terrorist threat or whether it leaves important national security interests overly vulnerable.

²⁵⁹ As a matter of law, the Executive Branch is also obligated to ensure that new bureaucratic processes align with statutory requirements for executing matters of national security. *See, e.g.*, 10 U.S.C. § 162(b) (1996) (requiring as a matter of law that “[u]nless otherwise directed by the President, the [military] chain of command runs . . . from the President to the Secretary of Defense . . . and . . . from the Secretary of Defense to the commander of the combatant command”).

²⁶⁰ “I think the al-Liby episodes will continue to be the exception, not the rule. The USG will likely continue to prefer (a) working to assist foreign governments to deal with the terrorist threats within their borders themselves, and (b) using drones on occasion (but at a reduced rate overall) when necessary. Capture operations in foreign countries will only be attempted when the foreign government consents (or its non-consent will not be a large political problem), and the target is high-value, and the threat of troop and civilian casualties is quite low. They will be attempted, in other words, very rarely, and thus the Article III criminal process for foreign terrorists will be used very rarely. A related implication is this: Drone operations might well continue to decrease because of the Afghanistan exit and a new assessment of the strategic costs of drones, but we should not expect capture operations followed by Article III trials to grow in response to still-extant foreign counterterrorism threats. The big question, of course, is whether the reduced use of

The end of major combat operations in Afghanistan will produce another chorus of voices claiming that international law requires an end to the broader war on terrorism. While those critics may be incorrect as a matter of law, the President seeks eventually to end the conflict and has begun implementing policies designed to move the United States into an era without war and in which national security activities are conducted exclusively outside of armed conflict. Such is our history:

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.²⁶¹

America does seek a renewed state of peace, but peace is not likely in our time—certainly not an absolute peace in which all conflict ends, the threat or use of force against the United States and its allies is no longer a concern, and bellicose U.S. national security activities are not required.²⁶² Even when major U.S. combat operations conclude, the United States may sometimes need to resort to discrete kinetic operations in self-defense. America's allies and partners will be expected to take a similar approach as their national security obligations require. States will continue to employ their instruments of national power—both overt and through less obvious means—and will occasionally use force, whether as a first or last resort or something in between. Yet a world in which global threats persist does not necessarily need to be a world at war. America will, however, need to preserve the ability to detect and disrupt threats before they strike.²⁶³

drones, without a robust incapacitation mechanism to replace it, will be adequate to meet the threat.” Goldsmith, *supra* note 244.

²⁶¹ Lieber Code, *supra* note 13, art. 29.

²⁶² ICRC, *supra* note 4, at 5 (explaining that in the four years preceding the report “well over 60 countries were the theatre of armed conflicts—whether inter-state or non-international—with all the devastation and suffering that these entailed”).

²⁶³ The worst-case-scenario likely remains the use of some form of weapon of mass destruction—whether chemical, biological, radiological, nuclear, or some other form that the world may not have yet designed. States will need to continue to engage in counter-proliferation efforts of various forms and seek to ensure that states and non-state actors that threaten global security are combatted through a host of lawful means ranging from diplomacy, sanctions, and embargos to tailored forms of pathway defeat like sabotage or even direct action when appropriate.

3. Review of U.S. Signals Intelligence

U.S. intelligence practices are undergoing their own revisions. Although intelligence collection is not prohibited by international law and is explicitly provided for in U.S. domestic law,²⁶⁴ the Obama Administration regards certain intelligence activities as a violation of the international community's trust.²⁶⁵ Following disclosures by Private Manning²⁶⁶ and Edward Snowden,²⁶⁷ and exacerbated by reports of collection activities against foreign government officials,²⁶⁸ President Obama commissioned the Review Group on Intelligence and Communications Technologies to consider how technical intelligence collection can be utilized to protect U.S. national security and foreign policy interests, respect citizens' privacy, and mitigate risk that collection activities will be revealed.²⁶⁹

After considering the Group's conclusions and recommendations, President Obama decided to implement a new SIGINT policy through which he promised to refine SIGINT practices in order to "maintain the trust of the American people, and people around the world."²⁷⁰ The SIGINT policy recognizes that technology-driven intelligence collection is necessary in an era of transnational activities, digital communications, and persistent threats. It "appl[ies] to signals intelligence activities conducted in order to

²⁶⁴ See, e.g., the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511 (1978).

²⁶⁵ See, e.g., Michael Birnbaum, *Germans launch probe into allegations of U.S. spying*, WASH. POST (Oct. 24, 2013), http://www.washingtonpost.com/world/uproar-in-germany-continues-over-accusations-that-us-tapped-merkels-phone/2013/10/24/39e4c618-3c96-11e3-b0e7-716179a2c2c7_story.html [<http://perma.cc/XSX9-A7RN>].

²⁶⁶ See Julie Tate, *Judge sentences Bradley Manning to 35 years*, WASH. POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html [<http://perma.cc/62DN-7J79>].

²⁶⁷ See Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html> [<http://perma.cc/KVT6-W89P>].

²⁶⁸ See Geir Moulson & John-Thor Dahlburg, *Angela Merkel's Cell Phone Tapped By NSA? U.S. Accused of Spying on German Chancellor*, HUFF. POST (Oct. 23, 2013), http://www.huffingtonpost.com/2013/10/23/merkel-phone-tapped_n_4150812.html [<http://perma.cc/SEB2-S469>].

²⁶⁹ See The President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* (Dec. 12, 2013). For an overview of the group's findings, see Benjamin Wittes, *The Very Awkward President Review Group Report*, LAWFARE (Dec. 18, 2013), <http://www.lawfareblog.com/2013/12/the-very-awkward-president-review-group-report/> [<http://perma.cc/6JFV-QKVE>], and his series of subsequent posts on the same subject.

²⁷⁰ Fact Sheet: Review of Signals Intelligence, *supra* note 37.

collect communications or information about communications”²⁷¹ The policy balances “ . . . [U.S.] security requirements, but also [U.S.] alliances; [U.S.] trade and investment relationships . . . ; and [the United States’] commitment to privacy and basic liberties.”²⁷² To that end, the policy provides overarching principles of collection,²⁷³ limits bulk collection of SIGINT,²⁷⁴ changes interagency review processes,²⁷⁵ creates reporting requirements and general provisions,²⁷⁶ and alters long-established intelligence practices regarding those who are not “United States persons” pursuant to Executive Order 12333.²⁷⁷ As the President explained, “The bottom line is that people around the world, regardless of their nationality, should know that the United States is not spying on ordinary people who don’t threaten our national security, and that we take their privacy concerns into account in our policies and procedures.”²⁷⁸

Of course, the U.S. intelligence community is not concerned with the conversations of ordinary people. It seeks to identify global threats and trends in order to support the President’s obligation to preserve, protect, and defend the United States. Consequently, the SIGINT policy allows for SIGINT collection “where there is a foreign intelligence or counterintelligence purpose”²⁷⁹ It also provides a significant caveat to the privacy safeguards of Section Four of PPD-228. Following the model of E.O. 12333, PPD-28 limits “the term ‘personal information’ . . . [to] the same types of information covered by ‘information concerning U.S.

²⁷¹ The White House, Office of the Press Secretary, Presidential Policy Directive/PPD-28, Signals Intelligence Activities (Jan. 17, 2014), n. 3 at 2, <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [<http://perma.cc/QG9P-RMV3>] [hereinafter PPD]. Such communications are also referred to as communications intelligence or COMINT. COMINT is “[t]echnical information and intelligence derived from foreign communications by other than the intended recipients.” Joint Chiefs of Staff, Joint Publication 3-13.1, Electronic Warfare (Jan. 25, 2007), at GL-5, <http://www.fas.org/irp/doddir/dod/jp3-13-1.pdf> [<http://perma.cc/H7W2-96N7>]. PPD-28 “ . . . shall not apply to signals intelligence activities undertaken to test or develop signals intelligence capabilities.” PPD-28, n. 3 at 2.

²⁷² Fact Sheet: Review of Signals Intelligence, *supra* note 37.

²⁷³ PPD, *supra* note 271, at section 1.

²⁷⁴ *Id.* at section 2.

²⁷⁵ *Id.* at section 3.

²⁷⁶ *Id.* at sections 5–6.

²⁷⁷ *Id.* at section 4. See E.O. 12333, *supra* note 38 (listing categories of “United States persons” and delineating procedures for handling information pertaining to them).

²⁷⁸ Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence> [<http://perma.cc/B9ZH-J9LE>].

²⁷⁹ PPD, *supra* note 271, Section 1(b).

persons' under section 2.3 of Executive Order 12333."²⁸⁰ Therefore, as a practical matter the SIGINT policy allows the U.S. intelligence community "to collect, retain, or disseminate information concerning [*all*] persons"²⁸¹ so long as the information is:

- (a) Information that is publicly available or collected with the consent of the person concerned;
- (b) Information constituting foreign intelligence or counterintelligence . . . ;
- (c) Information obtained in the course of a lawful foreign intelligence, counterintelligence, international drug or international terrorism investigation;
- (d) Information needed to protect the safety of any persons or organizations, including those who are targets, victims, or hostages of international terrorist organizations;
- (e) Information needed to protect foreign intelligence or counterintelligence sources, methods, and activities from unauthorized disclosure. . . . ;
- (f) Information concerning persons who are reasonably believed to be potential sources or contacts for the purpose of determining their suitability or credibility;
- (g) Information arising out of a lawful personnel, physical, or communications security investigation;
- (h) Information acquired by overhead reconnaissance not directed at specific United States persons;
- (i) Incidentally obtained information that may indicate involvement in activities that may violate Federal, state, local, or foreign laws; and

²⁸⁰ *Id.* at n. 7, Section 4.

²⁸¹ E.O. 12333, *supra* note 38, Section 2.3, at 29, <http://www.archives.gov/federal-register/codification/executive-order/12333.html> [<http://perma.cc/AG2T-TM98>]. Note that I replace the phrase "United States persons" with the emphasized "*all*" to reflect PPD-28's change in policy.

(j) Information necessary for administrative purposes.²⁸²

In short, the SIGINT policy created privacy safeguards but not at the expense of an extraordinarily wide swath of intelligence activities. In the transnational armed conflict, for example, enemy belligerents and direct participants in hostilities do not enjoy privacy protections—even if U.S. policy extends them to foreign civilians.²⁸³ Moreover, outside of the transnational armed conflict, the U.S. intelligence community retained a great deal of freedom to conduct intelligence activities targeting terrorists and other global threats.²⁸⁴ The political sensitivities and sensibilities of such operations may undergo greater scrutiny but they remain permissible under international and U.S. domestic law, as well as under the President’s new policy.

Still, the SIGINT policy change should not be overlooked. It sacrifices some degree of state autonomy in deference to diplomatic and political capital and out of respect for global privacy interests.²⁸⁵ The policy does not assert that the U.S. government has any less legal right to collect SIGINT. But it might stoke the arguments of those who claim that the United States has no legal right to collect intelligence outside of Afghanistan and those who might go further to assert that American practices must accept privacy as a universal human right that applies globally and trumps the state’s right to conduct intelligence.²⁸⁶ On the other

²⁸² *Id.* at 29–30.

²⁸³ The 2001 AUMF and *Hamdan* establish and affirm, respectively, that members of al Qaeda, the Taliban, and associated forces are enemy belligerents in the transnational armed conflict. Which individuals or groups might qualify as direct participants in the hostilities, however, is less than clear and requires case-by-case analysis. *See generally* ICRC, *supra* note 232; W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010).

²⁸⁴ *See* Benjamin Wittes, *The President’s Speech and PPD-28: A Guide for the Perplexed*, LAWFARE (Jan. 20, 2014), <http://www.lawfareblog.com/2014/01/the-presidents-speech-and-ppd-28-a-guide-for-the-perplexed/> [<http://perma.cc/D55E-LVUA>].

²⁸⁵ The policy has also received some positive reviews from foreign partners. *See Brussels welcomes Obama’s review of US spying programs*, EURACTIV (Jan. 20, 2014), <http://www.euractiv.com/infosociety/commission-welcomes-obama-review-news-532871> [<http://perma.cc/M3PJ-JWM2>] (reporting that the “European Commission has welcomed President Barack Obama’s remarks and presidential directive on the review of US intelligence program[s]”).

²⁸⁶ *See* Testimony of John B. Bellinger III to the Privacy and Civil Liberties Oversight Board 1 (Mar. 19, 2014), http://justsecurity.org/wp-content/uploads/2014/03/Bellinger_PCLOB_comment_3-17-14.pdf [<http://perma.cc/F3CF-MDU3>] (stating “In recent months, some scholars and human rights advocates have argued

hand, the policy could better harmonize U.S. and partner intelligence policies or at least aid in bridging some legal divides. Relatedly, even if not expressions of *opinio juris*, these standards might also play a role in expressing some best practices against which the United States expects its conduct and that of others to be judged. Perhaps this might play a role in helping to explain and justify American practices, while also increasing political and diplomatic pressure on other states that violate them.

It should also be emphasized that the SIGINT policy, like the counter-terrorism policy standards and procedures, is not based on a sense of legal obligation. Whatever legal principles may be woven into the policies, these particular U.S. practices should not be misconstrued as *opinio juris* for the purpose of assessing the content of customary international law. Even after major U.S. combat operations in Afghanistan and the transnational armed conflict end, circumstances may eventually require the United States to renew certain SIGINT practices that may not be politically viable at this time. Should such a time come, absent a more restrictive international legal regime, SIGINT will be collected pursuant to *jus extra bellum*.

B. Implementing Jus Extra Bellum: From Military Finish to Interagency Implementation

In announcing his plan to shape the U.S. Department of Defense to combat future threats in a more constrained fiscal environment, Secretary of Defense Hagel emphasized the importance of realism and suggested that stale paradigms (and old airplanes) are not compatible with the nation's future national security requirements.²⁸⁷ The Secretary's plan looks beyond present conflicts and brings to mind an old special operations axiom "run past the gunfire." This mantra trains America's elite to see past the ongoing battle and over the ridge line and to steer towards future opportunities to

that NSA surveillance of foreign nationals violates a so-called 'universal right to privacy' recognized by international law. They base their argument on Article 17 of the [International Covenant on Civil and Political Rights], which provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'" (citations omitted).

²⁸⁷ In discussing the current fiscal environment and evolving national security challenges, Secretary Hagel declared that "Americans must 'act in the world as it is, and not in the world as we wish it were.'" Robert Burns, *Chuck Hagel Says U.S. Military Must Shrink To Face 'More Unpredictable' World*, HUFF. POST (Feb. 24, 2014), http://www.huffingtonpost.com/2014/02/24/chuck-hagel-military_n_4849677.html [<http://perma.cc/RR4P-PKNG>] (quoting Secretary Chuck Hagel).

impact the course of history. Not surprisingly, American special operations forces (SOF) have been looking past Afghanistan and considering post-2001 AUMF paradigms for several years.

Through that lens, the special operations community is exploring opportunities to build upon lessons learned since 9/11. While continuing to hone their capture/kill finish capabilities, SOF seek to also build a model for unified action that leverages the full complement of combined, joint, and interagency assets, capabilities, and authorities to conduct non-lethal statecraft. The Find, Fix, Finish, Exploit, Analyze (F3EA) model continues to create positive effects on the battlefield.²⁸⁸ However, it has evolved into what some forward-thinking SOF professionals now call the Identify, Integrate, Implement, Exploit, Analyze (I3EA) methodology.²⁸⁹

The I3EA process provides the U.S. government unique opportunities to combat a wide range of threats, such as terrorism, transnational crime, proliferation of weapons of mass destruction, cyber intrusion and attacks, and anti-access/area denial.²⁹⁰ Reflecting its more deliberate approach, I3EA begins with the analysis phase of the targeting process as interagency and partner networks consider all-source information and employ diagnostic tools to better understand particular threats. In the post-transnational armed conflict world, I3EA then seeks to identify threat

²⁸⁸ The Find, Fix, Finish, Exploit, Analyze (F3EA) targeting cycle, developed by U.S. special operations forces and now employed by the U.S. military and its coalition partners, is geared towards direct action in the form of capture/kill (often lethal) operations. *See* Ferry, *supra* note 231.

²⁸⁹ I3EA focuses on non-lethal, whole of government, and partnered activities. The phases of I3EA are explained as: identify opportunities and vulnerabilities; integrate with the appropriate partner; implement a tool, action, or process; and exploit and analyze the effects.

²⁹⁰ “Anti-access/area denial” (A2AD) refers to the activities of a state or non-state actor that are designed to prevent a foe or competitor from gaining entry into, or transit across, an area or domain. *See* Admiral Jonathan Greenert, *Projecting Power, Assuring Access*, CHIEF OF NAVAL OPERATIONS’ LOGBOOK (May 10, 2012), <http://cno.navylive.dodlive.mil/2012/05/10/projecting-power-assuring-access/> [<http://perma.cc/8VXX-QNNW>] (explaining that a “goal of A2AD strategy is to make others believe it can close off international airspace or waterways and that U.S. military forces will not be able (or willing to pay the cost) to reopen those areas or come to the aid of our allies and partners. In peacetime, this gives the country with the A2AD weapons leverage over their neighbors and reduces U.S. influence. In wartime, A2AD capabilities can make U.S. power projection more difficult. The areas where A2AD threats are most consequential are . . . ‘strategic maritime crossroads.’ These include areas around the Straits of Hormuz and Gibraltar, Suez Canal, Panama Canal or Malacca Strait—but strategic crossroads can also exist in the air, on land, and in cyberspace”).

vulnerabilities to enable the whole of government to build an integrated plan of action. I3EA also allows for reaching out to partner nations and private entities to leverage those assets and capabilities best positioned to provide the necessary placement and access or skill set for the environment in which the threat exists. Decision-makers can then implement a tool, action, or process that meets the President's intent to employ "smart and proportionate" responses to global threats.²⁹¹ Finally, recognizing the critical role that the exploit and analyze phases played in F3EA's success, I3EA exploits the effects generated through action and feeds analytical tools that look for the next opportunity,²⁹² thereby renewing the process cycle.²⁹³

Consider the potential of I3EA against global threats. The process might identify opportunities for the Department of Defense to provide military support to law enforcement actions against terrorists abroad and for the State Department to support extradition efforts. I3EA could employ partner nation access to pathways that facilitate smuggling of nuclear weapons components and utilize Department of Homeland Security authorities and relationships to prosecute proliferators or notify International Atomic Energy Agency inspectors of concerning indicators. I3EA could provide prospects to analyze malevolent cyber activities emanating from other states and enable willing, able partners to address particular events or the U.S. government to take necessary unilateral defensive measures. I3EA also presents an approach to pinpoint vulnerabilities in anti-access/area denial efforts—whether manifested

²⁹¹ Obama, *Remarks at the National Defense University*, *supra* note 1.

²⁹² The next opportunity may be a branch opportunity off of the current effort or an entirely new threat stream or line of operations that was identified during the I3EA process.

²⁹³ The I3EA targeting process can be viewed through a potential civilian application. Imagine a private equity firm using repeated cycles of I3EA to buy or take a controlling stake in a company. As a result of market analysis, the firm might identify a potential buyout company based on existing client relationships (integration from a previous I3EA cycle) or through its business development team sourcing new opportunities (analysis). The firm could then integrate with an investment bank and law firm for advisory services. Next, it might implement a deal that facilitates due diligence review prior to a buyout. Implementation could occur through the support of the bank's financial resources and contracts generated by the law firm. Supporting contracts might provide new or enhanced access to the buyout company's operations, infrastructure, and management for exploitation. This access would allow for another round of analysis to identify whether the potential buyout is a sound business opportunity or whether there might be better opportunities in the market, thereby enabling the private equity firm to proceed with the buyout, cancel its efforts because of deficiencies in the buyout company, or pursue a competitor business.

through legal assertions²⁹⁴ or technological or military prowess²⁹⁵—and to challenge those obstacles through appropriate means.

Of course, I3EA is only one methodology for leveraging the instruments of national and partner power.²⁹⁶ The point is not that I3EA is the solution for all of the world's problems. Rather, I3EA provides an example of how American national security professionals continue to provide for the nation's defense—and enable other partners in their efforts to provide for U.S. and global security—without having to resort to force or necessarily relying on international humanitarian law. Instead, consistent with *jus extra bellum*, they identify, integrate, implement, exploit, and analyze through actions that are lawful under the generally permissive international legal regime and supported by U.S. legal authorities, obligations, regulatory schemes, and appropriations.

The desired end-state, of course, is not a perpetual targeting process but a means by which to combat and bracket global threats as other instruments of power are employed in pursuit of an enduring peace. As explained by former Secretary of State Hillary Clinton:

We need a new architecture for this new world. . . . We have to be smart about how we use our power. Not because we have less of it—indeed the might of our military, the size of our economy, the influence of our diplomacy, and the creative energy of our people remain unrivaled. No, it's

²⁹⁴ See generally Peter Dutton, *Three Disputes and Three Objectives: China and the South China Sea*, 64 NAVAL WAR COLLEGE REVIEW 42 (Autumn 2011) (explaining maritime and territorial claims in the South China Sea and China's expansive claims of sovereignty).

²⁹⁵ See Brendan I. Koerner, *Inside the New Arms Race to Control Bandwidth on the Battlefield*, WIRED (Feb. 18, 2014), <http://www.wired.com/threatlevel/2014/02/spectrum-warfare/> [<http://perma.cc/53ML-XDM7>] (addressing the growing significance of controlling the electromagnetic spectrum for matters of national security and asserting that China will be America's "most formidable opponent in the spectrum"); RONALD O'ROURKE, CONG. RESEARCH SERV., CHINA NAVAL MODERNIZATION: IMPLICATIONS FOR U.S. NAVY CAPABILITIES—BACKGROUND AND ISSUES FOR CONGRESS (April 10, 2014), <http://www.fas.org/sgp/crs/row/RL33153.pdf> [<http://perma.cc/LXR5-CWMU>] (providing an overview of China's expanding and increasingly more modernized navy and explaining that the Chinese government intends to employ its navy as an anti-access/area denial maritime force).

²⁹⁶ Other departments and agencies of the U.S. government could apply the same, similar, or entirely different approaches, as might partner states. The benefit of the I3EA process is not that it is a panacea, but that it creates an architecture upon which solutions can be developed, discussed, implemented, reviewed, and improved.

because as the world has changed, so too have the levers of power that can most effectively shape international affairs.²⁹⁷

The conduct of statecraft—its manner, timing, and frequency—will bolster or detract from I3EA and the *jus extra bellum* concepts. The U.S. government constantly reconstructs its national security architecture in order to better protect American security interests. I3EA may prove an important methodology going forward by offering new and constructive opportunities, and operationally and cost-effective means, to combat global threats. In that regard, I3EA not only supports the goals of the President, it is shaping the future of U.S. national security.

Conclusion

States conduct national security activities in a generally permissive international legal environment. U.S. domestic law creates legal authorities, obligations, and regulatory schemes that, combined with appropriations, support a broad range of U.S. national security activities. Significant global threats persist. The world may or may not be safer than it was before 9/11, but the potential for malevolent actors to create catastrophic consequences has increased since then. Throughout history states have combatted threats through statecraft—both overt and in the shadows. While some have questioned the legal bases for the transnational armed conflict, continuing global operations and more than a decade of state practice suggest that, as a matter of international law, the transnational armed conflict paradigm could be supportable for the foreseeable future.

In the end, so long as significant threats persist, the U.S. government seems unlikely to abrogate its responsibility to defend U.S. national security interests. American values favoring an end to war will have to be reconciled with the realities of global trends and still lethal, diverse, and more widely dispersed risks of terrorism and of other global threats. Similarly, the President will be challenged to assuage allies' and partners' concerns over U.S. intelligence activities while protecting the state's right to identify and combat malevolent actors and events—both to the United States and to those same allies and partners. Congress certainly has a role to play in shaping national security practices, and the legal challenges will continue to go before the courts. Still, if the United States seeks to end and avoid

²⁹⁷ Hillary Clinton, U.S. Secretary of State, Remarks on American Leadership at the Council on Foreign Relations (Jan. 31, 2013), www.cfr.org/world/remarks-american-leadership/p29885 [<http://perma.cc/GAW9-3D7S>].

further major combat operations, then the U.S. government must be prepared to employ the architecture best suited to protect U.S. national security interests.

The end of armed conflict does not terminate states' rights to conduct national security activities. Instead, *jus extra bellum* will provide a framework for transforming the tension between security obligations and the desire for peace into smart and proportionate national security activities. Hard questions remain. Circumstances will change and the U.S. government will be forced to adapt. In a new world, with new levers of power and constantly evolving threats, the best hope may be something short of perfect—something closer to “the ordinary, realistic conditions of peace.” Undoubtedly, such a peace will only be attained, and can only be preserved, through the continuing exercise of states' rights outside of armed conflict—*jus extra bellum*.

