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Justification of the US for Drone Strikes in Fighting Against Terrorism Under International Law

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LIST OF ABBREVIATIONS

AUMF	Authorization for Use of Military Force
CIA	Central Intelligence Agency
GBU	Guided Bomb Unit
IAC	International Armed Conflict
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
JDAM	Joint Direct Attack Munitions
NIAC	Non-International Armed Conflict
OAS	Organization of American States
SC	Security Council
UAVs	Unmanned Aerial Vehicles
UAS	Unmanned Aerial System
UK	United Kingdom
UN	United Nation
US	United States
WMD	Weapons of Mass Distraction

1 INTRODUCTION

Imagine that you are living somewhere in Pakistan, Yemen, or Gaza where the United States and its allies suspects a terrorist presence. Day and night, you hear a constant buzzing in the sky. Like a lawnmower. You know that this flying robot is watching everything you do. You can always hear it. Sometimes, it fires missiles into your village. You are told the robot is targeting extremists, but its missiles have killed family, friends, and neighbours. So, your behaviour changes: you stop going out, you stop congregating in public, and you likely start hating the country that controls the flying robot. And you probably start to sympathize a bit more with the people these robots, called drones, are monitoring.¹

In the aftermath of the terrorist attacks of 11 September 2001 (hereinafter 9/11), the United States (US) has initiated military operation, *Operation Enduring Freedom*, together with the United Kingdom (UK) against the *de facto* government of the Taliban in Afghanistan on 7 September 2001 in order to eliminate Al-Qaeda and its associates from the territory of Afghanistan. After the fall of Taliban, a new government was established in Afghanistan in 2002. Upon the invitation of the new government, the US has continued to use its military force against Al-Qaeda and its supporters in the region. However, in this new concept of fight against terrorism, the use of military force has not been limited to the territory of Afghanistan; rather the US expanded its use of drone strikes outside Afghanistan such as Yemen, Pakistan, Somalia and elsewhere with particular focus of attacking against the members of Al-Qaeda and its supporters on an individual basis. In these attacks, which can also be called as targeted killings, the US has largely used its new technologically developed weapons called as drones. Drones (also known as unmanned aerial vehicles –UAVs) are powered aerial vehicles that do not carry a human operator, and can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload. After 9/11, the role of drones evolved from reconnaissance to attack vehicle. Drones can fly for up to forty hours at altitudes greater than 60,000 feet (18.3 km), providing realtime intelligence to commanders. When a target of interest is detected, the same drone can attack it with its missiles.² The use of drones to target and kill members of Al Qaeda, Taliban and associated forces began under the Bush administration in 2002. The US military has controlled these operations in the conflict area of Afghanistan. Elsewhere, in northwest Pakistan, Yemen, and Somalia, the CIA has

¹ Owen, *Drones don't Just Kill. Their Psychological Effects are Creating Enemies*, The Globe and Mail, (13 March 2013), available at: <http://www.theglobeandmail.com/globe-debate/drones-dont-just-kill-their-psychologicAl-effects-are-creating-enemies/article9707992/> (17 April 2014)

² O'Connell, *Unlawful Killing with Combat Drones A Case Study of Pakistan, 2004-2009*, Notre Dame Law School Legal Studies Research Paper No. 09-43,2009, 4 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (16 April 2013)

controlled and still controls operations. The number of CIA drone strikes has intensified since the Obama administration took office in 2009, making targeted killing a key to the administration's counterterrorism efforts. Although the use of drone strikes was efficient in elimination of the members of the terrorist organizations, the high number of civilian deaths and casualties caused a huge debate on the legality of drone strikes. According to Professor O'Connell, an American scholar, drone strikes have been killed 750-1000 unintended victims for the sake of killing nearly 20 leaders of Al-Qaeda by October 2009 in Pakistan. More detailed information on their capabilities and use is given in the following Chapter.

1.1 Subject and Limitations

The legal justification of the US for the use of drone strikes in fighting against terrorism under international law constitutes the main subject of the thesis. In fact, in order to legally justify its counterterrorism effort and particularly the use of drone strikes against terrorists in different countries, the US authorities pursued two alternative arguments. In his speech to the American Society for International Law's Annual Meeting in March 2010, the US State Department Legal Adviser Harold Koh claimed that:

“...as a matter of international law, the United States is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”³

Having considered this contention, this thesis takes the issue of use of force in self-defense and in an armed conflict situation as the legal justification of the use of drone strikes under international law which constitutes the main subject of the thesis. Before delving into the use of force within the context of self-defense and armed conflict under international law, the second Chapter provides information on the historical background of the defense strategy of the US on countering terrorism to see how the US strategy has changed over the course of time, mainly after 9/11. In fact, whereas the counter terrorism strategy has been based on the law enforcement paradigm before 9/11, it has dramatically changed after that time and the US initiated the use of military force in the fight against terrorism. The second Chapter also presents information on the technology of the drones and their capacities particularly to show

³Koh, Legal Adviser, US Department of State, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law (25 March 2010), available at <http://www.State.gov/s/l/releases/remarks/139119.htm> (19 April 2014) [hereinafter Koh Speech]

how these weapons are to be considered as military weapons that cannot be used by the police in peace time within the context of law enforcement effort. The same chapter also covers the historical process of the use of drone strikes by the US in counter terrorism effort.

The third Chapter composes the literature review of the thesis. In this regard, the Chapter firstly focuses on the issue of resort to the use of force under the rules of the United Nation (UN) Charter. Although the prohibition of use of force, articulated in Article 2(4), is a cardinal principle of the UN Charter, States are not totally deprived of the right to use of force under all circumstances. In fact, Article 51 of the Charter provides the State parties with the right of individual or collective self-defense when an armed attack occurs. The first substantive part of the third Chapter seeks to establish, in the light of the debates in the doctrine, whether the concept of self-defense is restrictive or whether it might be widened in certain circumstances.

Other types of resort to use of military force; the use of military force upon authorization of UN Security Council, the use of force under Chapter VII of the UN Charter, the use of force under the concept of military intervention, the use of force upon invitation of another State remain outside the scope of this thesis.

The second substantive part of the third Chapter provides literature review for the use of force under International Humanitarian Law (IHL). In this regard, the Geneva Conventions of 1949 and its Protocols of 1979 are the modern codifications of international humanitarian law which need to be taken into consideration as fundamental sources for the lawful use of force under IHL. However, the focus of this part is not the lawful use of force under IHL but rather whether the principles of the IHL are applicable to the conflict between the enemy parties.

The fourth Chapter is the main part of the thesis which presents how the US justifies its killings with drone strikes of terrorists under international law and critique whether the justification of the US may be legitimized under international law. The first substantive part of the fourth Chapter examines the justification of the use of drone strikes as a right of self-defense in response to the attacks of 9/11. In this regard, the impact of the international response to 9/11, mainly UN Security Council resolutions, will be examined to see if the law of self-defense has been changed or not. The focus then turns on the legal justification of the US as a right of preemptive self-defense.

The second substantive part of the Chapter IV examines the justification of the use of drone strikes under international humanitarian law. In that sense, it particularly focuses on whether there exists an armed conflict between the US and Al-Qaeda and its supporters.

At the outset, however, it is important to note that although the US has used drone strikes in Afghanistan, Pakistan, Yemen, Somalia and elsewhere, the legal justification of the US for the use of drone strikes in Afghanistan does not constitute the particular focus of this thesis. In fact, it is generally accepted by the scholars that the conflict between the US and Afghanistan, the *de facto* government of Taliban, had started in 2001 as an international armed conflict until the fall of Taliban. Upon the invitation of the new Government, established in 2002, the use of drone strikes by the US in Afghanistan can be considered as being used within the context of non-international armed conflict. Therefore, this thesis will focus on the legal justification of the US for the use of drone strikes outside Afghanistan.

1.2 Purpose

The purpose of this thesis is to investigate whether the use of drones (military force) in fighting against terrorism can be justified under international law. In fact, there are quite many studies carried out by the scholars on the legality of the use of drone strikes. The main theme of these studies are whether the killings of the terrorists with drone strikes has been in compliance with the IHL principles of distinction and proportionality. However, it is highly important to note that, in order to discuss the legality of killings with drones of terrorists and to assess the collateral damage there must be either an international or non-international armed conflict between the US and the terrorists so as to the IHL principles be applied to drone strikes. In the absence of an armed conflict the whole discussions on the assessment of IHL principles would mean nothing from the point of view of international law. Therefore, before delving into the legality of drone strikes under the law of armed conflict, one must clearly determine if there exists an armed conflict situation between the parties of the conflict.

On the other hand, fighting against terrorism has always been the matter of law enforcement effort. That's to say, fighting against terrorism is a matter of international human rights law. Therefore, killing the members of terrorist organizations with the military weapons without

warning cannot be justified under international law. At this juncture, the critical question is how the US justifies its use of drone strikes in killing members of Al-Qaeda and its supporters under international law. Hence, the first purpose of this thesis is to clarify the legal justification of the US for its drone strikes against terrorists. The other purpose of the thesis is to evaluate and critique if the justification of the US can be justified in accordance with the international law.

1.3Research Questions

Having considered the fact that fighting against terrorism falls within the ambit of international human rights law and thatthe use of weaponized drones cannot be permissible in times of peace under the law enforcement paradigm, the critical question is how the US justifies its drone strikes in fighting against terrorism under international law? After clarifying the justification of the US,the next question is whether the reasoning of the US can be justified under international law.

1.4Methodology

The second chapter provides relatively detailed information on the US defense strategy as well as the capabilities of drones and its use from the perspective of historical background. The main sources for the US defense strategy are the official documents of the National Security Strategy and the National Defense Strategy of the US. For the introduction of drones, news web sites as well as articles on the use of drones were used as source.

The sources of the third chapter,which provides legal basis for the use of force in international law and in international humanitarian law, are the UN Charter, Geneva Conventions of 1949 and its Protocols as well as the books and articles written by international lawyers.

In the fourth chapter, which explains the US justification for drone strikes, the main sources are the argument and comments by the US leaders and officials. In this regard, the newswebsites as well as official speeches of the US presidents and officers has been used. In

addition to this, articles and comments by the scholars have been used as reference for a better analysis of the US justification.

2 HISTORICAL BACKGROUND

2.1 National Security Strategy of the US

Before the terrorist attacks of 9/11 international terrorism has been also one of the major problem for the US and it “has mounted an aggressive response to terrorism”.⁴ In *A National Security Strategy for a Global Age* promulgated in December 2000 by the then President William Clinton, the US strategy for the goal of *combating terrorism* articulated that:

Our strategy pressures terrorists, deters attacks, and responds forcefully to terrorist acts. It combines enhanced law enforcement and intelligence efforts; vigorous diplomacy and economic sanctions; and, when necessary, military force... Our strategy requires us to both prevent and, if necessary, respond to terrorism... When terrorism occurs, despite our best efforts, we can [never] give up on *bringing its perpetrators to justice*... It is our preventive efforts, such as active diplomatic and military engagement, political pressure, economic sanctions, and bolstering allies' political and security capabilities, that also require strong financial support in order to squeeze terrorists before they act.⁵

It can be clearly seen that before 9/11 preventive measures are the main focus of the US National Security Strategy in combating against terrorism. In any case if a terrorist attack occurs the law enforcement function will come into play so as to bring the perpetrators into justice. However, the US National Security Strategy in combatting against terrorism has changed remarkably nearly one year after the terrorist attacks of 9/11 when the then President Bush promulgated his first *National Security Strategy* on 17 September 2002.⁶ In his introductory letter, President Bush underlines the danger of terrorism after 9/11, by noting that:

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, *that task has changed dramatically*. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us. *To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist*

⁴ *A National Security Strategy For A Global Age*, The White House, December 2000, available at: http://history.defense.gov/docs_nss.shtml (16 May 2014)

⁵ ibid

⁶ The White House, *The National Security Strategy of The United States of America*, (September 2002), available at: http://history.defense.gov/docs_nss.shtml (20 May 2014), [hereinafter National Security Strategy-2002]

financing. The *war against terrorists of global reach* is a global enterprise of *uncertain duration.*⁷ [emphasis added]

It is clear that after 9/11 the US has put the military power into operation in combating against terrorism. In order to justify the use of military power the US brings forward the assumption that there exists a global war against terrorism. Whether the United States is legally at war with terrorism has been a matter of extensive debate within the academic community. Despite this controversy, in the minds of the national political and military authorities of the US there is no doubt that the US is really at war with terrorism.⁸ In this regard, under the goal of "*strengthen alliances to defeat global terrorism and work to prevent attacks against us and our fiends*" the National Security Strategy-2002 expresses that:

The United States of America is fighting a *war against terrorists of global reach...* It will be fought on many fronts against a particularly elusive enemy over an extended period of time... Afghanistan has been liberated; coalition forces continue to hunt down the Taliban and Al-Qaida. But it is not only this battlefield on which we will engage terrorists. Thousands of trained terrorists remain at large with cells in North America, South America, Europe, Africa, the Middle East, and across Asia. Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances. We will disrupt and destroy terrorist organizations by [...] using all the elements of national and international power and by identifying and *destroying the threat before it reaches our borders.*[...] we will not hesitate to act alone, if necessary, to exercise our *right of self-defense by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country...In the *war against global terrorism*, we will never forget that we are ultimately fighting for our democratic values and way of life.⁹ [emphasis added]

Likewise, the other strategy and guidance documents explicitly recognize that the nation is waging a global war on terrorism. For example, the *National Defense Strategy* promulgated in March 2005 begins with express saying that "America is a nation at war."¹⁰ In his introductory remarks to the *National Military Strategy* promulgated in 2004 the Chairman of the Joint Chiefs Staff, Richard Myers, declares that "while protecting the United States we must win the War on Terrorism."¹¹ He also States that the attacks of 9/11 indicated that "the

⁷ ibid

⁸ Dalton, *The United States National Security Strategy: Yesterday, Today, And Tomorrow*, 52 Naval L. Rev. (2005), at 60, 63—64

⁹ National Security Strategy-2002, above note 6, 5

¹⁰ Department of Defense, *The National Defense Strategy of The United States of America* (2005), 1, available at: http://history.defense.gov/docs_nds.shtml (19 May 2014)

¹¹ Chairman of The Joint Chiefs Of Staff, *The National Military Strategy Of The United States Of America-A Strategy For Today; A Vision For Tomorrow*, (2004), available at: http://history.defense.gov/docs_nms.shtml (20 May 2014)

prospect of future attacks, potentially employing weapons of mass destruction, makes it imperative we act now to stop terrorists before they can attack again.”¹²

Moreover, it is also explicit from the remarks of the political and military leadership as well as the strategy documents that in the war against terrorism anticipatory or preemptive actions constitute the basis of the fighting strategy so as to eliminate the threat of terrorist attacks before they come into existence. For example, under the goal of “*prevent our enemies from threatening us, our allies and our friends with weapons of mass destruction*” the National Security Strategy-2002 elaborates that:

We cannot let our enemies strike first...Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents... We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue States and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. The United States has long maintained the option of *preemptive actions* to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking *anticipatory action* to defend ourselves, *even if uncertainty remains as to the time and place of the enemy’s attack*. To forestall or prevent such hostile acts by our adversaries, the United States *will*, if necessary, *act preemptively.*¹³[emphasis added]

For some authors the combination of these goals result in a radical new doctrine of international law on the use of force, a new Bush doctrine.¹⁴ This issue will be examined in details in the fourth Chapter.

2.2 Use of Drones

We can send a UAS to look down alleys, around buildings, in backyards or on a roof to see what’s up there, dramatically increasing Soldier protection and preserving the force—a vital force multiplier in this era of persistent conflict.¹⁵

¹² ibid

¹³ National Security Strategy-2002, above note 6, 15

¹⁴ Gray, *The US National Security Strategy and the New "Bush Doctrine" on Preemptive Self-defense*, Chinese J. Int'l L. (2002), at 437, 438

¹⁵ US Army UAS Center of Excellence, “*Eyes of The Army*” U.S. Army Unmanned Aircraft Systems Roadmap 2010-2035, 1 [hereinafter Eyes of The Army] <http://www-rucker.army.mil/usaace/uas/US%20Army%20UAS%20RoadMap%202010%202035.pdf> (20 May 2014)

James O. Barclay
Major General

In his speech to the US Congress, shortly after 9/11 attacks, President Bush explained how to fight and win the war on terror by noting that “[w]e will direct every resource at our command –every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war– to the disruption and to the defeat of the global terror network.”¹⁶ By referring to this speech some scholars argue that the use of drones plays a significant role in the counter terrorism effort for the Bush and Obama administrations.¹⁷

2.2.1 Drone Technology

The inception of the use of a drones dates back to 1919, when the creator of the gyroscope and autopilot technology, Elmer Sperry, operated a pilotless aircraft to sink a German battleship.¹⁸ From then on the technology of pilotless aircrafts has been progressed and used mainly for the purpose of surveillance.

There are two generations of drones that the US was deploying: the Predator and the Reaper (also known as the Predator B) drone. An early version of the modern drone that is Predator RQ-1 (R for reconnaissance) drones first appeared in the Balkan wars of the 1990s and provided information for US military commanders. A modification in design from RQ-1 to MQ-1 (M for multipurpose) made in 2002 with the equipment of the AGM-114 Hellfire missiles, enabling reaction against intelligence, surveillance, and reconnaissance, close air support, and interdiction targets.¹⁹ Since then, the upgraded Predator, the MQ-1B, have been developed. The MQ-1B Predator is an armed, multi-mission, medium-altitude, long-endurance (ability to stay aloft for forty hours) remotely piloted aircraft that is used primarily as an intelligence-collection asset and secondarily against dynamic execution targets. The Predator

¹⁶ George W. Bush, *Address to Joint Session of Congress Following 9/11 Attacks*, (20 September 2001), available at: <http://www.americanrhetoric.com/speeches/gwbush911jointsessionspeech.htm> (20 May 2014)

¹⁷ Barnidge, *A Qualified Defense Of American Drone Attacks In Northwest Pakistan Under International Humanitarian Law*, 30 B.U. Int'l L.J. (2012), at 409, 416

¹⁸ Eyes of The Army, above note 15, 4

¹⁹ Fact Sheets, *MQ-1B Predator*, US Air Force, 20 July 2010, available at: <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx> (21 May 2014)

equipped with a highly advanced sensor suite, the Multi-Spectral Targeting System, which carries an infrared sensor, color/monochrome daylight TV camera, image-intensified TV camera, laser designator and laser illuminator. The infrared sensor enables it to see at night even in poor weather by sensing heat emissions. The full-motion video from each of the imaging sensors can be viewed as separate video streams or fused by means of which the available data is transmitted to its crew, troops on the ground, operations and intelligence centers, and commanders in real time. The operators can even switch back and forth between the various sources of information.²⁰ Moreover, the Predator can launch two laser-guided Air-to-Ground Missile-114 Hellfire missiles that possess highly accurate, low-collateral damage, and anti-armor, anti-personnel engagement capabilities.²¹ Originally designed for anti-vehicle attacks, the Hellfire missiles that can be launched five miles from the target has a very limited effects radius since its explosive force is designed to penetrate forward into the target it is attacking. This feature hampered the use of Hellfire missiles against individuals “who often escaped harm when located only a short distance”.²² In order to put away this incapacity an anti-personnel version of the weapon has been developed and introduced with enhanced effects radius.²³

In October 2007, the Predator fleet was joined by the newer, faster, much larger and more powerful MQ-9 Reaper (also known as Predator B). MQ-9 Reaper is the first purpose-built hunter-killer drone that can deploy a payload of up to 14 hellfire missiles or a mixture of missiles and bombs.²⁴ MQ-9 Reaper is a highly sophisticated progress built on the experience gained with General Atomics Aeronautical Systems’ (GA-ASI) battle-proven MQ-1B Predator and a major evolutionary leap in overall performance and reliability.²⁵ The Reaper has a loiter capacity of thirty hours, a range of approximately 1000 miles and a speed of 230 miles per hour. Like the Predator, it poses a version of the Multi-Spectral Targeting System and is equipped with a variety of highly sensitive sensors. In addition to the capacities of the Predator, however, the Reaper equipped with a synthetic aperture radar to enable future

²⁰ Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying The Oft Benighted Debate*, 30 B.U. Int'l L.J. (2012), at 595, 598—599

²¹ Enemark, *Drones over Pakistan: Secrecy, Ethics, and Counterinsurgency*, Asian Security, vol. 7, no. 3, (2011), at 218, 220—221; *Predator RQ-1 / MQ-1 / MQ-9 UAV*, United States of America, available at: <http://www.army-technology.com/projects/rq1-predator/> (20 May 2014)

²² Schmitt, above note 20, 599

²³ ibid

²⁴ Enemark, above note 21, 221; Sharkey, *Death Strikes From The Sky: The Calculus Of Proportionality*, IEEE Technology And Society Magazine, Spring 2009, 17

²⁵ General Atomics Aeronautical Aircraft Platform, *Predator B UAS*, available at: http://www.ga-asi.com/products/aircraft/predator_b.php (21 May 2014)

GBU(Guided Bomb Unit)-38 Joint Direct Attack Munitions- JDAM targeting. With respect to weaponry, the Reaper is more varied and advanced than the Predator. Besides the employment capacity of four laser-guided Hellfire missiles, it can be equipped with precision munitions, such as the GBU-38 JDAM and laser guided weapons like the GBU-12 Paveway II. Thanks to the weapons options, the Reaper has greater flexibility than the Predator when engaging targets. For instance, the Paveway can be used when a high degree of accuracy is required and the JDAM results in a greater blast effect than a Hellfire.²⁶

Despite the fact that drone sensors can survey potential targets consistently over long periods of time, providing huge amounts of information, it is nevertheless possible that this drone video footage can miss or fail to delineate some key information. According to Columbia Human Rights Clinic report:

Although some drones may be capable of striking “with pinpoint accuracy from an altitude 25,000 feet,” with cameras that can identify details as minute as whether an individual is missing an arm or wearing a hat, drone strikes can still result in mistakes and civilian casualties if the intelligence and underlying analysis is incorrect. Drones sometimes collect video footage in situations where civilians and targeted individuals co-mingle, in villages and urban areas. Some observers note that drone sensors do not provide a clear enough picture to distinguish individuals in these circumstances... During the later stages of targeting, drone operators may be hampered by what is known as the “soda straw” effect. As a weaponized drone zooms in to pinpoint the target, it loses a wider picture of the area—like viewing a small amount of liquid through a soda straw, instead of the entire glass. The soda straw effect creates a risk that civilians may move into the vicinity of the strike without being noticed by drone operators, and therefore without having been considered as part of a targeting analysis... In one account, drone pilot Matt J. Martin describes the targeting of a truck in Afghanistan, apparently full of “insurgents.” Viewed through Predator footage, the truck appeared to be far enough away from surrounding houses and pedestrians to be lethally targeted. The ground commander, who was also monitoring the Predator footage, gave clearance to take the shot. After the missile had been fired, two young boys unexpectedly appeared on the operator’s screen, riding a bicycle. Martin describes his horror as he could do nothing but wait and watch as the missile killed the two boys together with the occupants of the truck.”²⁷

By 2009, the US had about 100 Predators and 15 Reapers out of about 1000 —combat-ready drones. This supply of drones is increasing rapidly. By early 2012, the Pentagon was said to

²⁶ Schmitt, above note 20, 599; Fact Sheets, *MQ-9 Reaper*, US Air Force, 18 August 2010, available at: <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx> (21 May 2014)

²⁷ Center for Civilians in Conflict and Human Rights Clinic at Columbia Law School, *The Civilian Impact Of Drones: Unexamined Costs, Unanswered Questions*, 2012, 37, available at: <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/civilian-impact-drone-strikes-unexamined-costs-unanswered-questions> (20 May 2014)[hereinafter Columbia Human Rights Clinic Report]

have 7,500 drones of all kinds in its arsenal, representing about one-third of all US military aircraft.²⁸

2.2.2 Drone Strikes

Throughout the twentieth century drones were used primarily for surveillance, most notably during the Gulf War and the conflict in the Balkans in the 1990s.²⁹ The first known use of armed drones were used to attack a target in early October 2001 during *Operation Enduring Freedom* in Afghanistan when the US Air Force used a drone to launch a Hellfire missile to kill Mohamed Atef, a reputed Al-Qaeda leader, in his home near Kabul.³⁰

Drone strikes have been operated by both military and the CIA. In his article, Jane Mayer noted that:

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based. It was initiated by the Bush Administration and [...] Obama has left in place virtually all the key personnel. The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.³¹

On the other hand, Columbia Human Rights Clinic Report suggests otherwise:

Both the CIA and US military forces are involved in drone strikes. A common misconception is that US drone strikes fall neatly into two programs: the military's overt drone strikes in Afghanistan; and the CIA's covert strikes beyond Afghanistan. In fact, US government disclosures—mostly in the form of leaks to the press—suggest that the military and CIA are both involved in covert drone operations around the world.³²

²⁸Casey-Maslen, *Pandora's Box? Drone Strikes Under Jus Ad Bellum, Jus In Bello, And International Human Rights Law*, International Review of Red Cross, Volume 94 Number 886 Summer 2012, 598

²⁹Stanford International Human Rights and Conflict Resolution Clinic and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices In Pakistan*, (September, 2012), 8 [hereinafter Living Under Drones]

³⁰O'Connell, *Remarks: The Resort To Drones Under International Law*, 39 Denv. J. Int'l L. & Pol'y 2010—2011, at 585, 587

³¹ Mayer, *The Predator War: What Are the Risks of the CIA's Covert Drone Program?*, The New Yorker, 26 October 2009, available at: http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (20 May 2014)

³² Columbia Human Rights Clinic Report, above note 27, 11

The CIA allegedly carried out its first drone strike with Predator in Afghanistan, where a strike killed three men suspected of being senior Al-Qaeda lieutenants in the Zhawar Kili cave complex in Southeast Afghanistan in February 2002.³³ On 3 November 2002, the US carried out a drone strike outside of a combat area. Reportedly, the CIA operated the drone from a base on Africa launching Hellfire missiles at a passenger vehicle traveling in Yemen. In the strike all six persons in the vehicle were killed including a suspected top operative in Al-Qaeda believed to have been one of the planners of the USS Cole attack in 2000 as well as a US citizen in his twenties from New York.³⁴ In January 2003, in her report to the United Nations Commission on Human Rights, the Special Rapporteur on extrajudicial summary or arbitrary killing qualified the attack as a “clear case of extrajudicial killing.”³⁵

Starting in 2004, the vast majority of US drone strikes have taken place in Pakistan by the CIA. The US reportedly notified the Pakistani government before launching strikes until 2006 when the Pakistani government has publicly manifested its opposition for drone strikes as a violation of its sovereignty.³⁶ Despite the objection of the Pakistani government, the number of strikes have increased dramatically to about 30 in 2008 and continued to climb in 2009 to about 50 and in 2010 to about 120 times.³⁷ In 2012, on the other hand, the frequency of drone strikes increased again as a result of the concern that the CIA will soon have to stop operations due to the opposition of the Pakistani government.³⁸ In 2006 the US has also conducted drones strikes in Somalia with a view to assisting Ethiopia in the invasion that it carried out to attempt to install a new government in Somalia.³⁹

³³O'Connell, *To Kill or Capture Suspects in The Global War on Terror*, 35 Case W. Res. J. Int'l L. (2003), at 325, 325, 331

³⁴ibid

³⁵ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, UN Doc. E/CN.4/2003/3 (13 January 2003), para 37—39, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/103/27/PDF/G0310327.pdf?OpenElement> (19 May 2014)

³⁶ Columbia Human Rights Clinic Report, above note 27, 14

³⁷O'Connell, above note 30, 588

³⁸ Columbia Human Rights Clinic Report, above note 27, 15

³⁹O'Connell, above note 30, 588

3 USE OF FORCE UNDER INTERNATIONAL LAW

3.1 UN Charter(International Law)

The United Nations Charter, one of the modern codifications of the principles of *jus ad bellum*, aims to maintain international peace and security and develop friendly relations among nations.⁴⁰ To secure this goal it imposes a strict rule against the use of force by member States. As enunciated by the International Court of Justice - ICJ in the *Nicaragua v. United States*⁴¹ case, the UN Charter is based on the fundamental principle outlawing the use of force in international relations but for in limited circumstances.⁴²

Article 2(4),sets forth the Charter's guiding principle on the prohibition of the use of force, provides that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.⁴³

Although Article 2(4) does not include an exception to the guiding principle on the prohibition of use of force, the Charter recognized limited instances in which the use of force would be necessary.

3.1.1 Self-Defense

The main exception to the prohibition on the use of force articulated in Article 2(4) is the right to self-defense which is provided in Article 51 and regulates that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council

⁴⁰ Larson & Malamud, *The United States, Pakistan, The Law of War and The Legality of The Drone Attacks*, 10 J. Int'l Bus. & L. (2011), at 1, 4

⁴¹ Military and Paramilitary Activities (*Nicaragua v. U.S.*), 1986 I.C.J. 14 (Jun. 27, 1986)

⁴² Lee, *Terrorism Prevention and the Right of Preemptive Self-Defense*, 1 J. E. Asia & Int'l L. 291 2008, 295

⁴³ Article 2(4) of the UN Charter

under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.⁴⁴

In fact, there has been an extensive controversy over the scope of the right of self-defense. The main controversy, as a matter of treaty interpretation, has been focused on whether Article 51 is an restrictive statement of the right to self-defense or whether the scope of the right of self-defense might be widened by customary international law that goes beyond the right to counter to an armed attack.⁴⁵ Whereas the supporter of the former maintained that since the self-defense in Article 51 is an exception to the prohibition of use of force in Article 2(4), it should be interpreted as exhaustive and that wider interpretation deprives Article 51 any purpose; that of latter argued that the opening phrase of the Article 51 spelling out that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense” carries a meaning that customary international law preserves a right to self-defense the scope of which is wider than the specific provisions of Article 51 and tolerate self-defense other than against an armed attack.⁴⁶

The ICJ in *Nicaragua* case, on the other hand, having taken a wider interpretation of Article 51 established that there existed an inherent right of self-defense under customary international law as well as under the UN Charter and emphasized that:

On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defense, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter...Moreover, a definition of the ‘armed attack’ which, if found to exist, authorizes the exercise of the “inherent right” of self-defense, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law.⁴⁷

With regard to the concept of armed attack, it can be observed that although the Article 51 explicitly States that an attack which triggers the right of self-defense should be an armed

⁴⁴ Article 51 of the UN Charter

⁴⁵ Gray, “The Use of Force and the International Legal Order”, in Evans (eds.), International Law, Oxford University Press, 2010, 625

⁴⁶ Shaw, *International Law*, Cambridge University Press, 2008, 1132; *ibid*

⁴⁷ Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, p 14, para 176 [hereinafter Nicaragua Case]

attack, it leaves its definition to the customary international law. In this regard, the ICJ in the *Nicaragua* case discussed the notion of an ‘armed attack’ and took the view that:

it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein"... But the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.⁴⁸

As it can be clearly seen from the Court’s dictum, an armed attack which triggers the right of self-defense should not necessarily be carried out by a State itself, it rather can be conducted by non-State actors as well. In the latter case, however, there must be involvement of a State in the attack which exceeds the threshold of mere assistance.

In fact, whereas Article 2(4) of the Charter clearly mentions State actor on both sides in prohibiting the use of force, nothing in Article 51 specifies that the right of self-defense is only exists in response to a threat or use of force by another State, but for the only reference to a State as the potential victim of an armed attack.⁴⁹ In this context, whereas it goes without saying that the right to self-defense applies to armed attack by other States, whether the right of self-defense applies in response to armed attack by non-State actors has been a questionable issue.⁵⁰ Since the perpetrator of the armed attack is not prescribed as a State in the Article 51, it can be concluded by implication that an armed attack can be executed by non-State entities.⁵¹ In fact, where there is an armed attack by non-State actors from the territory of target State, this would probably be a case of non-international armed conflict or domestic terrorism. In that case the Article 51 does not come into play. However, where non-State actors are controlled from outside the target State by another State then the law of self-defense applies.⁵² If non-State actors are only supported, rather than controlled by a State from outside the target State then the right of self-defense may not be utilized by the target

⁴⁸ *ibid*, para 195

⁴⁹ Blank, *Targeted Strikes: The Consequences Of Blurring The Armed Conflict And Self-Defense Justifications*, 38 Wm. Mitchell L. Rev. (2011-2012), at 1655, 1663

⁵⁰ Shaw, above note 46, 1134

⁵¹ Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, 2012, 225

⁵² *ibid*

State against the assisting State unless the threshold laid down by the ICJ in the *Nicaragua* case is achieved.⁵³ The Court in *Nicaragua* case noted that although the assistance, in the form of the provision of weapons or logistical or other support, could constitute a threat or use of force, or amount to intervention in the internal or external affairs of that State, this does not reach to the threshold of armed attack that trigger the right of self-defense against the assisting State pursuant to Article 51.

Another thorny subject is whether the acts of violence not attributable to any State may amounts to an armed attack within the context of Article 51, and thus activates the right of self-defense.⁵⁴ Most of the commentators contended that the expression ‘armed attack’ in Article 51 of the Charter does not refer to armed attack of every kind, irrespective of the source, but only to an armed attack unleashed by or under the control of another State.⁵⁵ Professor Dinstein, on the other hand, argues that, even in cases where the perpetrators are non-State actors maneuvering from a foreign State, an act of violence taken against a State may constitute an armed attack. He further maintains that, in any case, if self-defense is to be exercised by the target State against the non-State actors (terrorists, arm bands or the organized armed groups), any coercive measures will have to take place in the territory of a State where the attackers are headquartered or have taken refuge irrespective of the involvement of that State in the attack.⁵⁶ In effect, this thorny subject became more of an issue among the scholars after the horrifying attacks of 9/11 by non-State actors in the absence of State involvement.⁵⁷ Professor Gray argues that the terrorist attacks of 9/11 have widened the notion of armed attack to cover acts by terrorist groups even in the absence of State involvement in the attack.⁵⁸ This line of argument relies primarily on the response of the UN Security Council when it condemned the terrorist attack in its Resolutions 1368 and 1373 which confirmed the inherent right of individual or collective self-defense.⁵⁹ More detailed discussions and arguments over this controversial matter will be presented in the fourth chapter.

⁵³ Shaw, above note 46, 1134

⁵⁴ Dinstein, above note 51, 227

⁵⁵ ibid

⁵⁶ ibid

⁵⁷ ibid

⁵⁸ Gray, above note 45, 626

⁵⁹ S/RES/1368 (2001), adopted by the Security Council at its 4370th meeting, 12 September 2001; S/RES/1373 (2001), adopted by the Security Council at its 4385th meeting, 28 September 2001

3.1.2 Anticipatory or Pre-emptive Self-Defense

As mentioned above, there has been a longstanding controversy over the scope of right of self-defense, in particular whether there exists a broader customary international law right of anticipatory self-defense independently of the UN Charter.⁶⁰ The basis of the customary international law principle that a State could use necessary and proportional force when threatened with an imminent attack dates back to the famous *Caroline* doctrine.⁶¹ Despite criticism from some scholars over its interpretation, the famous *Caroline* incident of 1837 established that States are not obliged to wait until an actual attack had occurred before exercising the right of self-defense.⁶² After the adoption of the UN Charter in 1945, which provides the State parties with the right of self-defense only if an armed attack occurs, the legitimacy of anticipatory self-defense became less clear but more controversial. In today's world, given the modern weaponry system that can launch an attack with enormous speed and destructive effect, which may give the target State little chance for a successful counter attack against the armed assault, the prominence of the concept of anticipatory self-defense becomes more clear.⁶³

With regard to whether State practices has formulated a customary law of anticipatory self-defense after the adoption of the UN Charter, it has observed that in most of the cases when justifying their actions States did not actually refer to anticipatory self-defense, they rather relied on the right of self-defense in response to an actual armed attack under Article 51. The most significant occasion with regard to an explicit invocation of anticipatory self-defense as a legal justification was in 1981 when Israel bombed an Iraqi nuclear reactor located near Baghdad.⁶⁴ Israel claimed that:

for a long time we have been watching with growing concern the construction of the atomic reactor "Ossirac". From sources whose reliability is beyond any doubt, we learn that this reactor, despite its camouflage, is designed to produce atomic bombs. The target for such bombs would be Israel. This was clearly announced by the ruler of Iraq. After the Iranians had inflicted slight damage on the reactor, Saddam Hussein stressed that the Iranians had attacked the target in vain, since it was being constructed against Israel alone. The atomic bombs which that reactor

⁶⁰Dinstein, above note 51, 196

⁶¹ For detailed information about the *Caroline* case see, Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Int'l L.J. (2003), at 7, 11—12

⁶² Garwood-Gowers, *Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?*, 23 Aust. YBIL (2004), at 51, 53

⁶³ Shaw, above note 46, 1138

⁶⁴ ibid

was capable of producing whether from enriched uranium or from plutonium, would be of the Hiroshima size. Thus a mortal danger to the people of Israel progressively arose.”⁶⁵

When debating in the Security Council, Israel was not able to rely on any clear State practice so as to justify its action that anticipatory self-defense was lawful, except relying only on a series of arguments by scholars.⁶⁶ The action of Israel was described by the Security Council Resolution 487 (1981) as a “clear violation of the Charter of the United Nations” and was condemned by both the UN General Assembly and the Security Council.⁶⁷ However, the resolutions did not make any pronouncement on the fundamental doctrinal debate of anticipatory self-defense; instead, it left the question whether the condemnation should be considered as a total rejection of anticipatory self-defense or just a denial on the facts of the particular case open.⁶⁸ This indicated the divergence of the views on that particular issue. While some States, including Mexico and Egypt, were particularly contested to any notion of anticipatory use of force, France and Italy condemned the Israeli action on the ground that they believed the facts did not establish the presence of a threat of imminent attack by Iraq.⁶⁹ The US, on the other hand, was the only State that unambiguously supported the concept of anticipatory self-defense.⁷⁰ Although the reasoning for condemnation of Israeli action may vary, it is clear that the majority of the States denied the recognition of any right of anticipatory self-defense.⁷¹

The ICJ, in the *Nicaragua* case, based its decision on the norms of customary international law regarding self-defense that was triggered by the actual armed attack and expressed no view on the lawfulness of a response to the imminent threat of armed attack since the issue has not been raised before the Court.⁷² Despite convenient occasions to address the controversial issue of anticipatory or pre-emptive self-defense, the ICJ has not showed any tendency to do that so far.⁷³

⁶⁵ Statement by the Government of Israel on the Bombing of the Iraqi Nuclear Facility (8 June 1981), available at: <http://www.jewishvirtuallibrary.org/jsource/History/BombingJune81.html>, (24 April 2014)

⁶⁶ Gray, *International Law and The Use of Force*, Oxford University Press, 2008, 163

⁶⁷ S/RES/487 (1981), adopted by the Security Council in its 2288th meeting, 19 June 1981; A/RES/36/27 (1981), adopted by the General Assembly in its 56th plenary meeting, 13 November 1981

⁶⁸ Gray, above note 45, 628

⁶⁹ Garwood-Gowers, above note 62, 55

⁷⁰ Gray, above note 67, 164

⁷¹ Garwood-Gowers, above note 62, 55

⁷² *Nicaragua Case*, para 194

⁷³ Dinstein, above note 51, 196

3.1.3 Necessity and Proportionality

The concepts of necessity and proportionality constitute the focal point of the right of self-defense in international law.⁷⁴ Notwithstanding the controversy over the scope of the right of self-defense there is no debate on the fact that, though not explicitly prescribed in Article 51, self-defense must be necessary and proportionate as a matter of customary international law.⁷⁵

In fact, the ICJ in the *Nicaragua* case held that,

the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”⁷⁶ Likewise, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court pointed out that “[t]he submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law” and that “[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.⁷⁷

Depending on the specificity of the case, the concept of necessity raises remarkable evidential as well as substantive issues. It is incumbent on the State to invoke self-defense to establish that, as a reasonable conclusion, on the basis of facts reasonably known at the time, an armed attack has already happened or is reasonably believed to be imminent and that the armed attack was definitively launched by a particular State against which it is forcibly responding. Moreover, the responding State should also substantiate that the armed attack unleashed by a particular State was premeditated rather than accidental or by mistake.⁷⁸

What is more important is that the responding State must ensure that resort to use of force was a necessity as a result of failure in practical or alternative solutions. Put differently, resort to use of force should not be necessary until it has been found out that peaceful measures are beyond reach. However, in cases where the situation offers no pause, it may not be practicable to consider any remedy as a substitute for the use of force in self-defense. In cases where there exists an interval of time, then friendly solutions should be pursued and the use of force should be considered as a last resort.⁷⁹

⁷⁴ Shaw, above note 46, 1140

⁷⁵ Gray, above note 45, 625

⁷⁶ *Nicaragua Case*, para 176

⁷⁷ *Nicaragua Case*, para 41

⁷⁸ Shaw, above note 46, 114; Dinstein, above note 51, 231

⁷⁹ Dinstein, above note 51, 232

On the other hand, the conditions in accordance of which the defensive action would commence according to *Caroline* doctrine is that the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁸⁰ More information in this issue will be provided in the fourth Chapter within the context of the discussions regarding the use of force in anticipatory self-defense by the US against the members of non-State actors.

3.2The Law of Armed Conflict (International Humanitarian Law)

Professor Schmitt perfectly expresses the situation to which the law of armed conflict applies:

Whether States are acting in self-defense, engaging in hostilities in accordance with a Security Council resolution, maintaining or reestablishing internal order or even acting unlawfully, international humanitarian law applies to all parties as long as the threshold of armed conflict is reached. In the absence of an armed conflict, the actions of the parties are governed by rules of conduct set forth in human rights law and any governing domestic legal regime applies.⁸¹

The law of armed conflict, also known as international humanitarian law, applies to armed conflict situations and governs the conduct of hostilities and the protection of persons during conflict.⁸² The Geneva Conventions of 1949 and the Protocols are the modern codification of *jus in bello*. However, in order for Geneva Conventions and its Protocols to be applied to an armed conflict, it is essential to determine the nature of the armed conflict as International Armed Conflict (IAC) or Non-International Armed Conflict (NIAC) since IHL has separated armed conflict into two categories. Whereas the four Geneva Conventions and the Protocol I apply in IAC, only the Common article 3 and the Protocol II apply in NIAC.⁸³

⁸⁰ O'Connell, Lawful Self-Defense to Terrorism, 63 U. Pitt. L. Rev. (2001-2002), at 889, 894

⁸¹ Schmitt, above note 20, 601

⁸² Blank, *After "Top Gun": How Drone Strikes Impact The Law Of War*, 33 U. Pa. J. Int'l L. (2011-2012), at 675, 681

⁸³ ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008, 4—5 , available at: <http://www.refworld.org/docid/47e24eda2.html> (28 April 2014), [hereinafter ICRC Definition of Armed Conflict]

3.2.1 International Armed Conflict

The definition of international armed conflict is embedded in the Common Article 2 to the Geneva Conventions of 1949 which articulates that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁸⁴

It goes without saying that the term in this provision “High Contracting Parties” refers to States, thereby the parties to an international armed conflict would only be States. In the *Tadic* case the International Criminal Tribunal for the former Yugoslavia (ICTY) came up with the conclusion on the definition of international armed conflict and Stated that “an armed conflict exists whenever there is a resort to armed force between States.”⁸⁵

In this regard when one or more States have resorted to use of force against another, then the rules of IAC come into play irrespective of the reason or the intensity of this encounter or of whether the parties to the conflict consider themselves to be at war with each other and how they describe this conflict.⁸⁶ Notwithstanding the notion of war already exists in the oldest treaties of international humanitarian law, the Geneva Conventions of 1949 introduced the concept of armed conflict into this legal regime for the first time.⁸⁷ It is now well established that the application of IHL is neither subject to declaration of a formal state of war by any party of the conflict, nor to the recognition of the state of war by one *or both* parties.⁸⁸ This was confirmed by Pictet in the Commentary of the Geneva Conventions of 1949, which pointed out that,

any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the

⁸⁴ Geneva Conventions of 1949, Common Article 2,

⁸⁵ ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70, available at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [hereinafter *Tadic Case*]

⁸⁶ Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 2008, 46

⁸⁷ Vite, *Typology Of Armed Conflicts In International Humanitarian Law: Legal Concepts And Actual Situations*, Int. Review of Red Cross Volume 91 Number 873, March 2009, at 69, 72

⁸⁸ Fleck, above note 89, 46

Parties denies the existence of a State of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.⁸⁹

On the other hand, in order for the rules of international humanitarian law to be applicable, the conflict should reach to a certain level of intensity, beyond the exceptional incidents such as border clashes and naval incidents, and the attack must be motivated by the intention to harm the enemy rather than involuntarily or accidentally. In any case only the use of force by the organs of a State, rather than by private persons or other isolated groups, will constitute an armed conflict.⁹⁰

3.2.2 Non-International Armed Conflict

The application of international humanitarian law to non-international armed conflicts was only prescribed in treaty form for the first time in the 1949 Geneva Conventions. At present, there are two main instruments which expressly apply to non-international armed conflicts in humanitarian law: Common Article 3 of the Geneva Conventions of 1949 and Article 1 of Additional Protocol II of 1977. Whereas Common Article 3 of the Geneva Conventions contains a series of essential provisions dealing with minimum fundamental humanitarian rights and duties, Additional Protocol II elaborates far more detailed provisions applicable in non-international armed conflicts.⁹¹

Common Article 3 articulates that “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...”⁹² Armed conflicts that are not of an international character are those in which at least one or more non-governmental armed groups are involved in the conflict against the territorial State. Despite the lack of certainty in the text, it is well established that Common Article 3 applies to the hostilities take place only between armed groups within a State as well as between armed group(s) and government forces.⁹³

⁸⁹Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, 32

⁹⁰Fleck, above note 89, 48; Vite, above note 90, 72—73

⁹¹Fleck, above note 89, 55

⁹²The Geneva Conventions, Common Article 3, 12 August 1949

⁹³Fleck, above note 89, 54; Vite, above note 90, 76; “ICRC Definition of Armed Conflict”, 3

In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, specifically situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, the situation must reach a certain level of intensity and organization. These two components of the notion of non-international armed conflict cannot be explained in abstract terms and need to be assessed on a case-by-case basis.

With regard to the level of intensity, it is important to notice that the confrontation must reach a minimum level of intensity and that the threshold of intensity required in that case is higher than that for an international armed conflict. This may be the case when the government is obliged to resort to use military force against the insurgents, as its police forces are no longer able to deal with the situation on their own. In the determination of the level of intensity, in this regard, the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded, displaced persons, etc.) are also pieces of information that needs to be taken into account.⁹⁴

As for the level of organization, it is essential for the non-governmental armed groups to have a minimum level of organization, meaning that these forces have to be under a certain command structure and have the capacity to maintain military operations. In this respect for example, the existence of an organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rule, might be the suggestive pieces of information that need to be taken into consideration.⁹⁵ In cases where these two conditions are not met, a situation of violence may not be described as non-international armed conflict but internal disturbances or internal tensions.⁹⁶

Whereas Common Article 3 applies to any armed conflict not of an international character occurring “in the territory of one of the High Contracting Parties”, AP II applies only to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under

⁹⁴Vite, above note 90, 76

⁹⁵ibid, 77

⁹⁶ibid

responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁹⁷

Furthermore, Additional Protocol II provides that this Protocol “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁹⁸

On the other hand, the definition of non-international armed conflict in the Article 1 of the Additional Protocol II is more restrictive than the definition in the Common article 3, whereas the latter encompasses hostilities take place either between one or more armed group(s) and government forces or merely between armed groups, the former excludes the hostilities occurring only between non-State armed groups.⁹⁹

In the *Tadic* case the ICTY took the view that a non –international armed conflict exists where there exists “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”¹⁰⁰ and that the “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is achieved.”¹⁰¹ This wider perspective by the ICTY made a significant contribution to the establishment of the definition of non-international armed conflict in the sense of Common Article 3 as to include the hostilities where several groups fight each other in the absence of involvement of a governmental force.¹⁰²

In cases where the parties to the non-international armed conflict within the meaning of Common Article 3 and the Additional Protocol II continue their clashes on the territory of one or more third States, the nature of the armed conflict may not automatically change into an international armed conflict as long as there exists an explicit or tacit consent of the State concerned.¹⁰³ In that regard the distinctive character between international armed conflict and non- international armed conflict is not the territorial scope of the armed conflict rather the

⁹⁷ Additional Protocol II, art.1, para 1

⁹⁸ Additional Protocol II, art.1 , para 2

⁹⁹ Fleck, above note 89, 55

¹⁰⁰ *Tadic* Case, above note 88, para 70

¹⁰¹ ibid

¹⁰² ICRC Definition of Armed Conflict, above note 86, 4

¹⁰³ Vite, above note 90, 89

parties involved.¹⁰⁴ According to International Committee of Red Cross(ICRC), on the other hand, “[a]s the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur “*in the territory of one of the High Contracting Parties*” has lost its importance in practice. Therefore, “any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.”¹⁰⁵

¹⁰⁴Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Occasional Paper Series, Harvard University, Winter 2006, 9

¹⁰⁵ ICRC Definition of Armed Conflict, above note 86, 3

4 HOW THE US JUSTIFIES ITS USE OF DRONE STRIKES UNDER INTERNATIONAL LAW

Since the inception of the US drone strikes and its wide range of use in different States' territories particularly outside the Afghanistan such as in Pakistan, Yemen, Somalia and elsewhere, there has been curious debate in the international law community as to the legal justification of the US for its drone operations. After encouraging initiatives by the UN and other relevant organizations for the United States to deliver a legal justification for its drone strikes, the US State Department Legal Adviser Harold Koh addressed the American Society for International Law's Annual Meeting in March 2010 and used the opportunity to present the "considered view" of the Obama Administration in respect to US targeted operations, particularly those carried out with drones.¹⁰⁶

The highlights of the speech can be summarized as follows:

As a matter of international law, our [...] operations rest on three legal foundations. First, we continue to fight a *war of self-defense* against an enemy that attacked us on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, *authorized the use of "all necessary measures"* by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan...

In the same way, in all of our operations involving the *use of force*, including those in the *armed conflict with Al-Qaeda, the Taliban and associated forces*, ... [w]hat I can say is that...U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.

The United States agrees that it must conform its actions to all applicable law. As I have explained, *as a matter of international law*, the United States is in an *armed conflict with Al-Qaeda, as well as the Taliban and associated forces*, in response to the horrific 9/11 attacks, *and may use force consistent with its inherent right to self-defense under international law*. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). *These domestic and international legal authorities continue to this day.*

¹⁰⁶ Vogel, *Drone Warfare and The Law of Armed Conflict*, 39 Denv. J. Int'l L. & Pol'y 101 2010-2011, 103

As recent events have shown, Al-Qaeda has not abandoned its intent to attack the United States, and indeed *continues to attack us*. Thus, *in this ongoing armed conflict*, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level Al-Qaeda leaders who are planning attacks.

Of course, whether a *particular individual* will be targeted *in a particular location* will depend upon considerations specific to each case, including those related to the *imminence of the threat*, the *sovereignty of the other States involved*, and the *willingness and ability* of those States to suppress the threat the target poses...In U.S. operations against Al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- *great care* is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.¹⁰⁷ [emphasis added]

Although the Koh speech provides a detailed information on justification of the US for the use of drone strikes there remain many problematic areas which need to be explored. Hence, I will deconstruct the speech below in an effort to further discuss some of the aforementioned problematic areas. In fact, there are many contradictions in the speech. I will therefore discuss these contradictions related to self-defense and armed conflict in two sections. In the first section, I will firstly examine ‘the impact of international response to 9/11 on the law of self-defense’. Then I will look into the issue of ‘justification for drone strikes in relation to the right of self-defense’. Lastly I will delve into the issue of ‘justification of drone strikes in pre-emptive self-defense’. In the second section I will first explore the justification of the US drone strikes via the notion of ‘Global War On Terrorism’. I will then critique the US justification of the use of drone strikes on the basis of being an ‘armed conflict with Al-Qaeda, Taliban and associated forces’.

4.1 Self-Defense

As touched upon above, the basis of the formulation of the legal justification for the use of drone strikes in the Koh speech includes some contradictory arguments. Whereas on the one hand, he claims that the US “is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks”, on the other hand, he relates that the US “may use force consistent with its inherent right to self-defense under international

¹⁰⁷Koh Speech, above note 3

law.”¹⁰⁸ Professor O’Connell rightly criticizes the formulation the justification in the speech as being ‘mutually contradictory’. She points out that if the US is already in an armed conflict against Al-Qaeda, Taliban and associated forces as a result of armed attacks of 9/11, then the use of military force inclusive of drone strikes govern by the rules of IHL instead of the law of self-defense. In that case, it does not necessary to justify each attack as being in accordance with the law of self-defense.¹⁰⁹ Despite this contradictory remark in the Koh speech, it is nevertheless obvious that the right of self-defense is one of the main arguments for the US authorities in an effort to legally justify the use of drone strikes in fighting against terrorism. Since the US justification basically relies on the assumption that the post 9/11 international response created a remarkable change on the law of self-defense in terms of the attacks by non-State actors in particular, the next section will analyze ‘the impact of international response to 9/11 on the law of self-defense’

4.1.1 The Impact of the International Response to 9/11 on the Law of Self-Defense

The importance of the debate over the scope of the right of self-defense has taken on a new significance and intensified following the terrorist attacks on the World Trade Center and the Pentagon on 11 September 2001 (hereafter 9/11), especially as to the use of force in response to attacks by non-State actors.¹¹⁰ In the attacks of 9/11 almost 3,000 people died, including the 227 civilians and 19 hijackers aboard the planes. It was the deadliest incident for firefighters and for law enforcement officers in the history of the United States, with 343 and 72 killed respectively.¹¹¹ Having considered the gravity of the attacks, the debate has been centralized on whether such a huge scale of an attack by non-State actors can amount to an ‘armed attack’ within the meaning of Article 51 of the Charter so as to trigger the victim State’s right of self-defense even in the absence of State involvement. Before delving into the discussion on this debate I will give a brief account of national and international response to the attacks of 9/11.

¹⁰⁸ ibid

¹⁰⁹ O’Connell, above note 30, 592—593

¹¹⁰ Gray, above note 45, 629

¹¹¹ September 11 Attacks, http://en.wikipedia.org/wiki/September_11_attacks (9 May 2014)

Immediately after the attacks the suspicion fell on the Al-Qaeda organization by the US authorities. In his letter to UN Security Council John D. Negroponte, on behalf of the US Government, claimed to “has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks.”¹¹²

On 12 September 2001, the US Congress issued a joint resolution (Authorization to Use Military Force-AUMF) in an attempt to authorize the President “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.”¹¹³

On the same day, the Security Council adopted resolution 1368. In the preamble of the resolution, the Security Council,

*[d]etermined to combat by all means threats to international peace and security caused by terrorist acts... Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,*¹¹⁴

the Security Council in the operative part;

Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security;

*Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.*¹¹⁵

In its subsequent Resolution 1373 (28 September 2001), the Security Council reaffirmed its express recognition as to “the inherent right of individual or collective self-defense.”¹¹⁶ According to Gray, it was a unique occasion that the Security Council, for the first time, “had

¹¹² UN Security Council, *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, S/2001/946, 7 October 2001, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/567/85/PDF/N0156785.pdf?OpenElement> (20 May 2014)

¹¹³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. (2001), 224, [hereinafter AUMF].

¹¹⁴ ibid

¹¹⁵ ibid

¹¹⁶ S/RES/1373 (2001), adopted by the Security Council at its 4385th meeting, 28 September 2001 [hereinafter SC Res 1373]

implicitly recognized the right to use force in self-defense against terrorist action.”¹¹⁷ Although the Security Council, when condemning the terrorist attack in its Resolutions 1368 and 1373, confirmed the inherent right of individual or collective self-defense, it has nevertheless avoided labeling the attacks as an ‘armed attack’, rather preferred to characterize the attacks as a “threat to international peace and security”.¹¹⁸

On the same day, the members of the NATO alliance, for the first time, invoked Article 5 of the Washington Treaty according to which the parties conformed 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-defense recognized 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.”¹¹⁹

On 21 September 2001 the Organization of American States-OAS adopted a resolution recognizing that the 9/11 attack was an attack “against all American States and that in accordance with [Article 3 of] . . . the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) . . . , all States Parties . . . shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American State ...”¹²⁰ It is further declared by the resolution that “the States Parties shall render additional assistance and support to the United States and to each other . . . to address the September 11 attacks, and also to prevent future terrorist acts”¹²¹ [emphasis added].

Based on these international and domestic authorities, the US launched the *Operation Enduring Freedom* in self-defense against Al-Qaeda and the Taliban in Afghanistan on 7

¹¹⁷ Gray, above note 45, 629

¹¹⁸ S/RES/1368 (2001), adopted by the Security Council at its 4370th meeting, 12 September 2001; SC Res 1373, above note 119

¹¹⁹ See www.nato.int/terrorism/factsheet.htm (28 April 2014)

¹²⁰ OAS Resolution RC.24/RES.1/01, (21 September 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm>. (25 April 2014), Article 3(1) provides that, “The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.”

¹²¹ ibid

October 2001, with a view to disrupting the use of the territory of Afghanistan by terrorists as a base.¹²²

In fact, before the terrorist attacks of 9/11 there was no overwhelming line of argument as to whether the content of Article 51 of the UN Charter can be expanded to cover the right to use force in self-defense against attacks by non-State actors (mainly by terrorist organization), rather the issue was a controversial one. However, the huge universal support by the international community for the US to exercise the right of self-defense in response to 9/11 may be considered as raising the question whether there has been a remarkable change in the law of self-defense.¹²³

Although the Security Council avoided labelling the attacks as an ‘armed attack’, it has been considered by some scholars [Dinstein, (2012); Müllerson, (2002); Blank, (2011—2012); Shaw, (2008)] that the international response to the 9/11 attacks and the gravity of the attacks themselves clearly manifested that an armed attack that would trigger the right of self-defense within the meaning of Article 51 of the Charter may be carried out by non-State actors regardless of the involvement of a State in the attack. Professor Gray, however, took the view that although the international response to the 9/11 indicates that under certain conditions there could be a right of self-defense against non-State actors, there exists some difficulties in establishing the exact scope of this right especially as to whether the terrorist attacks of 9/11 have widened the notion of armed attack to cover acts by terrorist groups even in the absence of State involvement in the attack.¹²⁴ Some other scholars [O’Connell, (2001—2002); Byers, (2002); Greenwood, (2002)], on the other hand, consider that State involvement in the attack is still an indispensable requirement so as to trigger the target State’s right of self-defense and that without State involvement in the attack terrorist attacks would only be considered as a criminal law issue irrespective of the gravity of the attack in question.

In fact, it is the most intricate part of the discussion whether the international response to 9/11 can be construed as if an armed attack by non-State actors may trigger the right to use military force in self-defense even in the absence of State involvement. In order to emphasize the

¹²² Gray, above note 45, 629

¹²³ Gray, above note 67, 198

¹²⁴ ibid, 199

impact of the reaction of the international community on the extent of the Article 51, Professor Dinstein States that,

[n]otwithstanding some rearguard doctrinal adherence to the traditionalist approach, even those who regard as problematic the categorization of terrorist action qua an armed attack (within the meaning of Article 51) are compelled to concede that the response of the international community to 9/11 has left its mark on customary law.¹²⁵

With reference to the gravity of the terrorist attacks of 9/11 he further took the view that,

[t]he fact that these acts amounted to an armed attack – laying the foundation for the exercise of self-defence pursuant to Article 51 – has been fully corroborated by a number of legal measures taken by international bodies [...] in Resolution 1368 (2001) [...] the Security Council recognized and reaffirmed in this context ‘the inherent right of individual or collective self-defence in accordance with the Charter’. Complaining that the Security Council refers to ‘horrifying terrorist attacks’ – without mentioning specifically the expression ‘armed attack’ – stands the argument on its head. If the right of self-defence can be actuated, this ineluctably implies that an armed attack is involved. The whole point about the contention that an armed attack did indeed take place on 9/11 is that this would warrant the exercise of the right of self-defence, a right recognized and reaffirmed by the Security Council in both resolutions.[...] The fact that terrorist attacks qualify as armed attacks means that they are subject to the full application of Article 51: no more and no less.¹²⁶

According to Müllerson, although the phrase in the Security Council Resolution 1373 is different from and runs short of one authorizing the use of all necessary means, its interpretation in specific circumstances may lead to the conclusion that “notwithstanding their specific and even non-traditional features, terrorist attacks originating from abroad can still be qualified as armed attacks giving rise to the inherent right to self-defence.”¹²⁷

Blank takes a similar line of argument and points out that there is no specific mention in Article 51 of the Charter stipulating that the right of self-defense can only be triggered in response to a threat or use of force by another State. Although the ICJ in a series of cases limited the sources of the ‘armed attack’ to States, the issue of which type of actor can trigger the right of self-defense nevertheless remains controversial. However, regarding the States practice in the aftermath of 9/11 as firm support for the use of force in self-defense, he

¹²⁵Dinstein, above note 51, 227—228

¹²⁶ibid

¹²⁷Mullerson, *Jus Ad Bellum: Plus 'A Change (Le Monde) Plus C'est La Meme Chose (Le Droit)?*, 7 J. Conflict & Sec. L. (2002), at 149, 175,178

deduces that there exists a right of self-defense against non-State actors even in the absence of any State involvement.¹²⁸

Shaw, by referring to the Security Council Resolutions, argues that “[s]uch binding Security Council resolutions declaring international terrorism to be a threat to international peace and security with regard to which the right of self-defense is operative as such lead to the conclusion that large-scale attacks by non-State entities might amount to ‘armed attacks’ within the meaning of article 51 without the necessity to attribute them to another State and thus justify the use of force in self-defense by those States so attacked.”¹²⁹

O’Connell, on the other hand, takes a more realistic stand and argues that,

[t]he operative part of the Resolution [...] does not authorize the use of armed force, nor does it explicitly authorize the United States to use armed force in self-defense to the September 11 attacks. Nevertheless, the Resolution does support the conclusion that the September 11 attacks were significant enough to trigger the right of self-defense, if the other conditions of legality are met.¹³⁰

For some other scholars the international response to the 9/11, particularly the Security Council resolutions, had no revolutionary change on the law of self-defense. Therefore the terrorist attacks in the absence of State involvement would be considered as a matter of criminal law. Byers in this regard, by pointing out the necessity of State sponsorship in the attack unleashed by non-State entities considers that,

[i]t will probably be argued that the atrocities of 11 September did not constitute an armed attack since they did not involve the use of force by a State, and that the relevant framework of analysis is instead international criminal law.¹³¹

Greenwood, having the attention to an interesting point argues that the lawful exercise of the right of self-defense does not require any prior authority from the Security Council pursuant to Article 51 of the Charter. Hence, the references to the self-defense in the Resolutions 1368 and 1373, although promoting the argument of the right of self-defense, had no bearing on the justification of the US for using military force in self-defense.¹³²

¹²⁸ Blank, above note 49, 1665

¹²⁹ Shaw, above note 46, 1136

¹³⁰ O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. Pitt. L. Rev. (2001-2002), at 889, 892

¹³¹ Byers, *Terrorism, The Use Of Force And International Law After 11 September*, 51 Int’l & Comp. L.Q. (2002), at 401, 411

¹³² Greenwood, *International Law and The ‘War Against Terrorism’*, 78 International Affairs (2002), at 301, 310

As it can be clearly seen, the considerations over the debate of whether the international response as well as the States practice to the attacks of 9/11 has changed the conventional understanding of the right of self-defense considerably vary. Whereas for some, the Security Council Resolutions authorize the US to use force in self-defense, for some others the Resolutions neither does authorize the US to exercise the right of self-defense nor does it justifies the use of force in self-defense by the US. Likewise, while the endorsement of the former approach may leads to the acceptance of a non-conventional concept of self-defense, conceding of the latter leads to the conclusion that the conventional understanding of the notion of self-defense is still in use.

As a matter of fact, the huge divergence of the opinions on the same issue may be explained as follows:

It has received international recognition that the US was the victim of horrible terrorist attacks of 9/11 with thousands of deaths and casualties. These unforeseen huge-scale of armed attacks in the US soil along with its devastating aftermath effects have been broadcasted and had a shocking impact on the whole world which created an emotional eruption not only within the US but also worldwide. That's may be why, despite nothing exists in their mandate as such, the Security Council as well as NATO, for the first time in their history, recognized by implication the right of self-defense in response to attacks carried out by non-State actors, prior to a State exercised its right of self-defense.

However, as professor Greenwood rightly underlined, in order for a State to use force in self-defense within the ambit of the Article 51 of Charter, there exists no prior consent by the Security Council. By contrast, according to Article 51 "measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter."¹³³ In this regard, once the mandate of the Security Council comes into play as such, the exercise of the right of self-defense can no longer be in question vis-à-vis the conventional understanding of the Article 51 of the Charter. From then on, it is the responsibility of the Security Council to authorize, when necessary, the use of military force which can no longer be deemed as the exercise of the right of self-defense, rather as an action to maintain or restore international peace and security within the context of Chapter VII of the

¹³³ Article 51 of the UN Charter

UN Charter. Therefore, coming up with the conclusion that the international responses, mainly the Security Council Resolutions, have remarkably changed the conventional understanding of the concept of self-defense in a way to include the attacks by non-State actors as an ‘armed attack’ triggering the right of self-defense would not be a realistic approach in the light of the Article 51 of the Charter.

On the other hand, although still a controversial issue, it might be concluded that the State practices and the international support in response to 9/11 introduced a non-conventional understanding of the right of self-defense which lead to the conclusion that an attack by terrorist organizations, because of its seriousness and gravity, may amount to an ‘armed attack’ within the meaning of Article 51 of the Charter and thus trigger the victim State’s right of self-defense. This is more clear and unproblematic where there is State involvement in the attack. However, this conclusion embraces some complications in practice. Namely, if the victim State fails to obtain the consent of other sovereign State where the terrorists responsible for the attack take refuge to then the use of military force in self-defense against terrorist in the territory of that State would violate the prohibition of use of force under the Article 2(4) of the Charter against that sovereign State. This thorny issue, which will be examined in the following section, is of significant importance in terms of the US drone strikes against Al-Qaeda and its associates outside Afghanistan, such as in Pakistan, Yemen, Somalia and elsewhere.

4.1.2 Justification For the Use of Force In Self Defense In Response to Attacks of 9/11 Against Al-Qaeda in Afghanistan (*Operation Enduring Freedom*)

Since the US drone strikes constitute a significant part of the *Operation Enduring Freedom* this section will first examine the justification for the use of force in self-defense within the context of *Operation Enduring Freedom* in Afghanistan and then delve into the issue of justification for the drone strikes in self-defense in response to ongoing attacks by Al Qaeda and associated forces on the US, its embassies, its military, and other USnationals abroad especially outside the Afghanistan such as in Somalia, Yemen and Pakistan.

Whereas some scholars consider that the *Operation Enduring Freedom* against Afghanistan was within the ambit of the lawful self-defense for some others it was not. The divergence of the arguments are due to firstly the different interpretation of the international response to 9/11 mainly the Security Council Resolutions, and secondly as a result of the discrepant assessment of the facts of the case. In other words, whereas some assume that the acting government of the Afghanistan was in one way or another involved in the attacks of 9/11, for some others although the acting government of the Afghanistan was may be responsible for State toleration or support, there was no State sponsorship which would lead to the conclusion that there was State involvement in the attack. For example, according to Paust, permissibility of lawful use of force against the Taliban, *de facto* government of Afghanistan, was ‘highly problematic’ since whether the attacks of 9/11 by Al-Qaeda was controlled by the Taliban has never been proven. In the absence of control that would result in State involvement, the mere tolerating, harboring, endorsing or financing of Al-Qaeda by the Taliban might only be resulted in State responsibility. Despite the this prejudice, he argues that use of military force against Al-Qaeda in Afghanistan was “justified, and justifiable, as self-defense against ongoing process of armed attack on the United States, its embassies, its military, and other US nationals abroad.”¹³⁴ He further argues that,

[n]either the Security Council nor NATO expected that there must be geographic or time limits that might condition permissibility of US measures of self-defense against al Qaeda, nor was there an expectation that measures of self-defense against al Qaeda in Afghanistan would require the consent of the Afghan government or the existence of an armed conflict with the United States.¹³⁵

On the contrary, Byers argues that the Security Council resolutions cannot be regarded as authorizing the US to use force in self-defense in response to attacks of 9/11 and presents the following reasoning:

[Article 51 of the Charter]stipulates that the right of self-defense exists ‘until the Security Council has taken measures necessary to maintain international peace and security’. It could be argued that the adoption of Resolutions 1368 and 1373, rather than reinforcing the right of the US to engage in self-defense against Afghanistan, instead superseded that right. Both resolutions were adopted in direct response to the terrorist acts rather than pursuant to a US report of self-defense action, both were adopted under Chapter VII, and both call upon or require States to take a range of non-forceful measures to combat terrorism. They could thus be

¹³⁴Paust, *Self-Defense Targetings of Non-State actors and Permissibility of U.S. Use of Drones In Pakistan*, 19 J. Transnat'l L. & Pol'y (2009-2010), at 237, 248—249

¹³⁵ibid

seen as constituting ‘measures necessary to maintain international peace and security’.¹³⁶

O’Connell, on the other hand, justifies the use of military force within the concept of the *Operation Enduring Freedom* on the grounds that the Taliban has established such close relationships with Al-Qaeda that it became responsible for its attacks. She further reckons that the US at the initial stage had ‘clear and convincing evidence’ which explicitly manifested the responsibility of Afghanistan for both past and planned future attacks of Al-Qaeda.¹³⁷

Although having parallel views with Byers, Shah attaches attention to the following very important points which cannot be overlooked in order to fathom why the initiation of the use of military force within the context of *Operation Enduring Freedom* and its continuance cannot be considered as a lawful exercise of self-defense.

Firstly, he rightly points to the fact that the Security Council Resolutions, although condemn the terrorist attacks in the strongest of the word, neither declare any involvement of the Afghanistan in the attacks, nor sanction any use of force against any State with a view to restoring international peace and security under Chapter VII of the Charter. In addition to these shortcomings the Resolutions fall short of acknowledging any right to use force in response to the attacks of 9/11.

Secondly, the actual link between the Taliban and Al-Qaeda has not been established concretely in a way that there was a State sponsorship by the Taliban in the attacks of 9/11. Even though the Taliban may be supported the Al-Qaeda during the attacks of 9/11, this can neither be regarded as ‘effective control’ as enunciated in the *Nicaragua*, nor can it be regarded as ‘overall control’ as pronounced in *Tadic* case. Likewise, even if the *de facto* government of Taliban continued to offer a safe haven to the members of Al-Qaeda in Afghanistan and supported their ongoing attacks against the US and its allies, the Taliban nevertheless cannot be held responsible for the armed attacks that have already occurred in the absence of material involvement during their realization.

¹³⁶ Byers, above note 134, 412

¹³⁷ O’Connell, above note 83, 901, 908

Lastly, he touches upon to the importance of the immediacy and the necessity requirements of the self-defense. Having considered the fact that the use of military force in Afghanistan initiated nearly four weeks after the attacks of 9/11, he notes that,

[i]t is hard to fathom how Daniel Webster's formulation relating to the immediacy and necessity requirements of self-defense, under which a State is allowed to respond in legitimate self-defense only when the danger posed to it is "instant, overwhelming, leaving no choice of means, and no moments for deliberation," was met.¹³⁸

4.1.3 Justification For the Use of Drone Strikes in Self Defense Outside Afghanistan

As mentioned in the first chapter, although still a controversial issue, the use of drones inside Afghanistan might be considered as the use of force in an armed conflict situation which started as an international armed conflict along with the commencement of the *Operation Enduring Freedom* on 7 October 2001 and lasted until the fall of Taliban and then changed into non-international armed conflict upon the invitation of the new government in 2002 and still continue today. As mentioned it is not that a clear cut issue but a controversial one which falls outside of the scope of this paper. Therefore, leaving the debate on that issue on its head, I will examine the justification of the use of drones outside the so called 'armed conflict' area of Afghanistan.

Outside Afghanistan the use of drone strikes by the US commenced on 3 November 2002 when a laser-guided Hellfire missiles hit a passenger vehicle in Yemen. Drone attacks in Pakistan began in 2004 and increased dramatically in 2008 and continued to climb in 2009.¹³⁹ As mentioned before the vast majority of drone strikes against Al Qaeda, Taliban and its associated forces conducted in the territory of Pakistan by the CIA. On the other hand, the US carried out its first drone strike in Somalia in 2007. As referred in Chapter II, the US runs two drone programs.¹⁴⁰ Whereas in Afghanistan drone attacks are conducted by the US military, outside Afghanistan drone strikes run by the CIA as a covert operation targeting terror suspects around the world including Yemen, Somalia and mainly Pakistan.

¹³⁸ Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, And The Legality of US Drone Attacks In Pakistan*, 9 Wash. U. Global Stud. L. Rev. (2010), at 77, 103—105

¹³⁹ O'Connell, above note 2, 4

¹⁴⁰ See above note 31

With regard to justification for the use of drone strikes in self-defense outside Afghanistan, the US holds two different lines of argument. As a first claim, assuming the post 9/11 responses as an authorization for the US to use force in self-defense, the US argues that the post 9/11 national and international authorizations to use force in self-defense against terrorists in response to armed attacks of 9/11 still continue in a way to justify drone strikes even today. As a second argument, the US claims that the use of drone strikes are carried out as a right of self-defense in response to ongoing armed attacks by Al-Qaeda and associated forces against the US and its allies. It needs to be borne in mind that there is no evidence in the US documents for the justification of drone strikes outside Afghanistan as being used in self-defense as both the continuation of the post 9/11 authorities or as in response to ongoing armed attacks. However, in the Koh speech there exist some implicit arguments which add up to the same meaning.

With regard to the first argument, Koh brings forward that “the United Nations Security Council has, through a series of successive resolutions, authorized the use of ‘all necessary measures’” and that “[t]hese [...] international legal authorities continue to this day.”¹⁴¹ In addition to this ambiguous argument, in his article, *Use of Unmanned System to Combat Terrorism*,¹⁴² the US Naval War College Professor Raul A. Pedrozo makes great contributions in an effort to elaborate the Koh speech, on the one hand, and firmly endorses his line of argument with intent to justify the US drone strikes outside Afghanistan as the continuation of the 2001 authorities as well as the right of preemptive self-defense, on the other hand. His arguments regarding the preemptive self-defense will be presented in the following section in detail. With regard to the question of whether the post 9/11 ‘so called’ authorizations remain viable until today, and whether they can be extended to apply terrorist acts against the US and its allies outside Afghanistan, Professor Pedrozo argues that,

none of these organizations placed *temporal or geographic restrictions* on the use of force in self-defense. On the contrary, the opposite is true. Resolution 1368 specifically decided that “*any act of international terrorism [is]* ...a threat to international peace and security” [...] Moreover, the resolution expressed a readiness “to take all necessary steps . . . to combat *all forms of terrorism*,” not just the 9/11 attack.¹⁴³ [emphasis added]

¹⁴¹ Koh Speech, above note 3

¹⁴² Pedrozo, *Use of Unmanned Systems to Combat Terrorism*, 87 Int'l L. Stud. Ser. US Naval War Col. (2011), at 217

¹⁴³ ibid, 221—222

Having considered the aforementioned discussion over the impact of the international response to 9/11 on the use of military force against terrorists in Afghanistan, it is hard to fathom how the US authorities rely their use of drone strikes on the right of self-defense as the continuation of the post 9/11 ‘so called’ authorization. In fact, as O’Connell, Greenwood, Byers and Shah rightly argued, the Security Council Resolutions fall short of either authorizing the US to use armed force in self-defense in response to attacks of 9/11, or sanctioning any use of force against any State with a view to restoring international peace and security under Chapter VII of the Charter, let alone to have a continuing effect to justify the use of drone strikes outside Afghanistan, even today.

As for the second argument, this can be inferred by implication from the Koh speech that the use of drone strikes outside Afghanistan is justified as the use of force in self-defense in response to ongoing attacks by Al-Qaeda and its supporters. In his speech given nearly after a decade of 9/11, in 2010, Koh argued that,

we continue to fight a *war of self-defense* against an enemy that attacked us on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States.¹⁴⁴ [emphasis added]

Given that the Security Council avoided labelling the large-scale of horrifying deadly terrorist attacks of 9/11 as ‘armed attack’, it is hard to perceive how might the following attacks launched by Al-Qaeda and its associates against the US and its military constitute an ‘armed attack’ in the absence of State involvement.

Notwithstanding these unconvincing justifications, it nevertheless, needs to be comprehended that even assuming that the US is to use drone strikes in self-defense outside Afghanistan against attacks by non-State actors in the absence of State involvement, the following points of discussions arise. First of all, as mentioned above, in order for the US to exercise lawful self-defense against members of Al-Qaeda in the territory of another State, the attacks should be attributable to that State. If there is no State involvement in the attacks, then the consent of the sovereign State where the terrorists responsible for the attacks take refuge to should be obtained so as to use drone strikes in self-defense against perpetrators in the territory of that State. Where the US failed to obtain the consent of the sovereign State, then the use of force in self-defense against terrorists in the territory of that State would violate the sovereignty of

¹⁴⁴Koh Speech, above note 3

that State as well as the prohibition of use of force under Article 2(4) of the Charter. Although this is what the UN Charter stipulates, the scholars have quite various opinions and approaches concerning the US drone strikes outside Afghanistan. For example, O'Connell touches upon the necessity of State involvement and the issue of State responsibility. She maintains that,

[e]stablishing the need for taking defensive action can only justify fighting on the territory of another State if that State is responsible for the on-going attacks. It may well be that in a world of non-State actors, a group launching significant, on-going armed attacks has no link to a State and so no State can be the target of defensive counter-attack. In those cases, measures other than self-defense on the territory of a State must be taken by the victim.¹⁴⁵

On the other hand, Orr by pointing the likelihood of the military-scale power of terrorist attacks opposing the jurisprudence of the ICJ, which limits the concept of self-defense to the armed attacks by State involvement, by virtue of its being unrealistic and unnatural vis-à-vis the Article 51 of the Charter. In this respect, his argument continues as follows:

Al Qaeda's activities, of course, are not attributable to Pakistan even if Pakistan's intelligence service has turned a blind eye toward their operation. Thus, the drone strikes against al Qaeda in Pakistan are only permissible as self-defensive force against a non-State actor. While the ICJ has famously held that acts constituting armed attacks must be "by or on behalf of a State," this reading of Article 51, is neither natural nor realistic. Read naturally, Article 51 permits the use of self-defensive force in response to hostilities by non-State actors... In an era where non-State groups project military-scale power, the better view is that non-State actors, such as al Qaeda, can carry out armed attacks.¹⁴⁶

Despite Orr reckons that the activities of Al-Qaeda cannot be attributable to the Pakistan, he nevertheless holding the view that as long as a military-scale attacks unleashed by Al-Qaeda, the US can exercise its right of self defense against Al-Qaeda notwithstanding the Pakistani involvement in the attack. A similar line of argument is held by Barnidge who puts forth that,

September 11 demonstrated that a State can suffer an "armed attack" irrespective of whether such an attack can be attributed to another State and that the victim State can lawfully respond in self-defense on this basis. Since September 11, the ICJ has held that a victim State's response in self-defense requires prior State attribution, but this thinking was not without pointed disagreements on the bench¹⁴⁷ and has drawn criticism in the academic literature.

¹⁴⁵ O'Connell, above note 83, 899

¹⁴⁶ Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 Cornell Int'l L.J. (2011), at 729, 739—740

¹⁴⁷ Barnidge, above note 17, 428

Shah, on the other hand, draws the attentions to several points. He firstly points out the importance of State sovereignty by complaining about the evasive responses of the US authorities in response to use of drone strikes in Pakistan and argues that in the absence of the Security Council authorization under Chapter VII of the UN Charter, the only occasion that the US may unilaterally conduct a military operation on the territory of Pakistan without its consent is if the US is legitimately using its right of self-defense.¹⁴⁸

As a second point, he refers to the requirement of sponsorship by the Pakistan in the attacks of Al-Qaeda and provides the following considerations:

By attacking non-State actors on Pakistani soil, however, the United States is carrying out armed attacks on Pakistan, which can only be defended if terrorist acts of such non-State actors residing in Pakistan qualify as armed attacks against the United States under article 51, and if Pakistan itself was guilty of sponsoring such terrorist activities. Such a level of State involvement is necessary as repeatedly indicated in I.C.J. judgments... In fact, even the level of support provided to such outfits by non-State actors of Pakistani origin located within Pakistan-such as Pakistani Taliban and tribal militias does not rise to the level of sponsorship that requires control of Al-Qaeda or the Afghan Taliban. It is, at most, a level of support that involves provision of weapons, logistics and safe haven. Such support under the *Nicaragua* and the *Congo* judgments is not the sort of assistance that would be enough to qualify as an 'armed attack'¹⁴⁹

In a rather different approach, McNab& Matthews draw attention to the law enforcement mechanism by holding the view that,

under the law of self-defense a State's territorial integrity prevails unless the armed attack, which instigated the right to self-defense, is attributable to a foreign State. Only then may the victim State use force in self-defense in the sovereign territory of the foreign State. Should the non-State actor be located in the territory of a State that was not responsible for the armed attack, the victim State must rely solely on law enforcement methods governed by human rights.¹⁵⁰

As a last example, Paust, in an effort to justify the CIA killings of six person with drone strikes in Yemen in 2002, takes a rather unusual approach of self-defense and armed conflict paradigm and argues that,

self-defensetargetingsand captures may occur "outside the geographical region of armed conflict" or "outside the area of hostilities," so long as there is strict compliance with general principles of necessity and proportionality that govern

¹⁴⁸ Shah, above note 141, 115

¹⁴⁹ Shah, above note 141, 119—120

¹⁵⁰ McNab& Matthews, *Clarifying The Law Relating To Unmanned Drones And The Use Of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, And International Humanitarian Law*, 39 Denv. J. Int'l L. & Pol'y (2010-2011), at 661, 679

the permissible use of lawful measures of self-defense... [L]awful measures of self-defense can occur outside of an actual theatre of war against those who are directly participating in an ongoing process of armed attacks against the United States and/or its embassies, military personnel, and other nationals abroad. For this reason, the self-defense paradigm is recognizably different from a war paradigm; the right of self-defense allows the targeting of persons wherever such forms of direct participation occur. Quite clearly, significant armed attacks or attempted armed attacks have emanated from parts of Yemen, thereby permitting self-defense targeting of direct participants in Yemen.¹⁵¹

4.1.4 Justification For Drone Strikes as Pre-emptive Self Defense

In contrast to above justification for drone strikes in self-defense on the grounds of the continuation of the 2001 authorities and of the ongoing attacks by Al-Qaeda, the preemptive self-defense argument, without specifically mentioning the use of drones, explicitly elaborated as a strategy for fighting against terrorism in the National Security Strategy documents (2002 and 2006) promulgated during the Bush Administration. The reason why the US promoted the doctrine of ‘preemptive self-defense’ following the attacks of 9/11, in its official documents, is the proliferation of the Weapons of Mass Distraction-WMD (nuclear, biological and chemical weapons) and their potential diffusion into the hands of terrorist organizations. This ominous contingency is delineated in the National Security Strategy (2002), which spell out that “[w]e must be prepared to stop rogue States and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.”¹⁵² The means and methods of the counter terrorism effort against this threat, on the other hand, as it might be estimated, accentuated in a rather trenchant way in the document, which continuous as follows:

We will disrupt and destroy terrorist organizations by [...] using all the elements of national and international power and by identifying and *destroying the threat before it reaches our borders.*[...] we will not hesitate to act alone, if necessary, to exercise our *right of self-defense by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country.¹⁵³ [emphasis added]

In an effort to elaborate the concept of preemptive self-defense (later called as ‘Bush doctrine of self-defense’ by scholars), the following arguments are put forward in the document:

¹⁵¹Paust, *Permissible Self-Defense Targeting and The Death of Bin Laden*, 39 Denv. J. Int'l L. & Pol'y (2010-2011), at 569, 571—572

¹⁵²National Security Strategy-2002, above note 6, 14

¹⁵³Ibid, 6

We cannot let our enemies strike first... We must adapt the *concept of imminent threat* to the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, *even if uncertainty remains as to the time and place of the enemy's attack*. To forestall or prevent such hostile acts by our adversaries, the United States *will*, if necessary, *act preemptively.*¹⁵⁴ [emphasis added]

As clearly seen, whereas the document refers the necessity of the adoption of ‘concept of imminent threat’, on the other hand, it articulates that so as to defend itself, the US would take anticipatory action against the threat *even if uncertainty remains as to the time and place of the enemy's attack*. In fact, this is such a broader definition of the self-defense that the concept of preemptive self-defense, which might only be justified if there is an imminent threat, is fall far behind this concept. That's may be why this concept is called as Bush doctrine of self-defense so as to differentiate it from the concept that fall within the ambit of *Caroline* doctrine of preemptive self-defense.

With regard to the National Security Strategy promulgated in 2006, although it emphasizes the importance of international diplomacy as an alternative to the use of military force, it is nevertheless obvious that the Bush Administration pursued the same doctrine of preemptive self-defense by the proclamation that “[t]he place of preemption in our national security strategy remains the same” and that “we do not rule out the use of force before attacks occur, *even if uncertainty remains as to the time and place of the enemy's attack.*¹⁵⁵ Moreover, the use of military force appears to be confined to the counter terrorism efforts, rather than against rogue States. This is clearly elaborated in the similar acute way, which states that,

[t]he hard core of the terrorists cannot be deterred or reformed; they must be tracked down, killed, or captured. They must be cut off from the network of individuals and institutions on which they depend for support. That network must in turn be deterred, disrupted, and disabled by using a broad range of tools.¹⁵⁶

¹⁵⁴ National Security Strategy-2002, above note 6, 15

¹⁵⁵ The White House, *The National Security Strategy of The United States of America*, (March 2006), 23, available at: http://history.defense.gov/docs_nss.shtml (20 May 2014), [hereinafter NSS -2006]

¹⁵⁶ ibid,12

It is clear that the Bush Administration's comprehension of preemptive self-defense (known as 'the Bush doctrine of self-defense') is rather separate from that of Daniel Webster's formulation of preemptive self-defense, the *Caroline* doctrine of self-defense. Whereas within the context of the latter, the use of force stipulates "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation", the use of force in self-defense within the context of the former is an option *even if uncertainty remains as to the time and place of the enemy's attack*. In this regard, the Bush doctrine of self-defense, which allows the use of force even in the absence of imminent threat, may be called as 'prerogative self-defense'.

As to the National Security Strategy promulgated in 2010 during Obama Administration, it is obvious that instead of placing the emphasis on the concept of preemptive self-defense, the new strategy document avoided any mentioning of preemption. Whereas the previous strategy was *to disrupt and destroy terrorist organizations by using all the elements of national and international power by acting preemptively*, the newer formulation of the strategy is "to disrupt, dismantle and defeat Al-Qaeda and its affiliates, we are pursuing a strategy that protects our homeland, secures the world's most dangerous weapons and material, denies Al-Qaeda safe haven, and builds positive partnerships with Muslim communities around the world."¹⁵⁷ Only the strategy of 'Deny Safe Havens and Strengthen At-Risk States' includes an implicit reference to the notion of preemptive action which continues as follows:

Wherever Al-Qaeda or its terrorist affiliates attempt to establish a safe haven—as they have in Yemen, Somalia, the Maghreb, and the Sahel—we will meet them with growing pressure. We also will strengthen our own network of partners to disable Al-Qaeda's financial, human, and planning networks; *disrupt terrorist operations before they mature*; and address potential safe-havens before Al-Qaeda and its terrorist affiliates can take root.¹⁵⁸ [emphasis added]

Despite the Obama Administration's lenient pronunciation on the strategy of countering terrorism, the fact that the use of drone strikes, particularly outside Afghanistan, has dramatically increased during Obama Administration, egregiously manifests that the Obama Administration's practice tantamount to the Bush doctrine of preemptive self-defense which crystalized in the phrase '*we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack*'.

¹⁵⁷ The White House, *The National Security Strategy of The United States of America*, (May 2010), available at: http://history.defense.gov/docs_nss.shtml (20 May 2014)

¹⁵⁸ *ibid*, 21

In parallel to this, in his abovementioned speech, Koh has also avoided giving explicit reference the notion of preemptive self-defense. Instead, he referred by implication to this notion stating that,

we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States... As recent events have shown, Al-Qaeda has not abandoned its intent to attack the United States, and indeed *continues to attack us*... [W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the *imminence of the threat*...¹⁵⁹

In a rather similar approach with the Bush Administration, Professor Pedrozo firmly advocates the preemptive self-defense in the presence of imminent threat. In fact, as a war college Professor, Pedrozo reflects the real reasoning of the US justification for the use of drone strikes in fighting against terrorism under the concept of ‘preemptive self-defense’ in response to imminent threat being posed by Al-Qaeda and its terrorist affiliates. In this sense, he opines that “it would be inconsistent with the purposes of the Charter if a nation was required to absorb a first strike, e.g., another 9/11 or a weapon of mass destruction attack, before taking necessary and proportionate military measures to prevent an imminent attack by an armed aggressor.”¹⁶⁰ The determination of imminence of an attack, according to him, requires “an assessment of all facts and circumstances known at the time –real-time intelligence, heightened political tensions, previous and current threats by the aggressor, pattern of aggression/attacks, stated intentions of the aggressor, etc.”¹⁶¹ In order to qualify whether the ongoing activities of Al-Qaeda and its supporters continue to pose an imminent threat to the US and its allies, one should examine past and current acts of aggression committed by Al-Qaeda and its affiliates against the US and its allies, he reckons. After making a long list of past and present acts of aggression by Al-Qaeda and its allies¹⁶² Pedrozo, assumes that,

¹⁵⁹Koh Speech, above note 3

¹⁶⁰Pedrozo, above note 145, 222

¹⁶¹ibid, 223

¹⁶² Some of these may be summarized as follows:

“Since the first attack on the WTC in 1993, there have been over seventy major terrorist attacks against the United States and its allies that have resulted in the deaths of over five thousand people, most of whom were innocent civilians... Over sixty of these incidents have occurred since 9/11, resulting in over sixteen hundred deaths and thousands of others injured. These numbers would be much higher if you count the thousands of innocent civilians that have been killed by Al-Qaeda and the Taliban in Iraq and Afghanistan or had several planned attacks—such as the December 1999 plot to bomb the Los Angeles airport, the December 2001 failed “shoe bomber” attack, the foiled attack on a British airliner in Saudi Arabia in August 2003, the August 2006 plot to blow up ten planes bound for the United States, the June 2007 failed car bombings in London, the

despite the substantial progress that has been made toward eliminating the threat posed by terrorists, Al-Qaeda and its affiliates remain a potent and determined force with the capability and intent to strike the US mainland, its allies and US interests abroad at every opportunity with the most destructive means at their disposal. The militant groups continue to train and equip their fighting forces in order to plan and execute devastating attacks against the United States and its allies around the world.

After reaching to the conclusion that the acts of aggression committed by Al-Qaeda and its supporters pose an imminent threat, he argues that,

[u]nderthese circumstances, international law allows the United States to preemptively use proportionate force in self-defense to eliminate the continuing and imminent threat posed by Al-Qaeda and other terrorist groups... Until the threat is effectively eliminated, the United States can continue to use force in self-defense against Al-Qaeda and its supporters, to include the use of unmanned systems.¹⁶³

In the same vein, Mullerson points out the ineffectiveness of the interceptive measures vis-à-vis the potentiality of irretrievable terrorist attacks that are of devastating effects. In this respect, he takes the view that,

today and in the context of self-defense against terrorist attacks (especially if the latter have access to WMD), I believe, preventive or anticipatory measures are justified. As terrorism is usually a continuous process being carried out in the murky underworld, it would be too late or risky to rely only on the interception of individual attacks that have already been irrevocably launched without attempting to destroy terrorist bases, supply lines, training camps and other similar facilities.¹⁶⁴

December 2009 failed “underwear bomber” attack and the May 2010 failed bombing in Times Square—been successful. It is clear from these incidents that Al-Qaeda continues to pose an imminent threat to the United States and its allies and continues to threaten large-scale attacks against the United States and US interests. For instance,[...] in June 2009, Al-Jazeera television broadcast a message from bin Laden that threatened Americans with revenge for supporting Pakistan’s military offensive to expel the Taliban from Swat Valley. Six months later, a Nigerian man [...] with links to Al-Qaeda attempted to ignite an explosive device on board a Northwest Airlines flight with 278 passengers on board as the plane prepared to land in Detroit on Christmas day. Fortunately, the device failed to ignite, but bin Laden nevertheless claimed responsibility for the attempted bombing... An attack on the [US embassy in Yemen] in 2008 had killed nineteen, including an eighteen-year-old American woman... “[B]etween 100 and 150 Westerners are believed to have traveled to the [Federally Administered Tribal Areas] FATA in 2009” to train with Taliban militants. Arguably, these new recruits will be able to move around the United States and Europe more easily and be more difficult to detect than traditional foreign operatives.

There is also growing evidence that Al-Qaeda’s anti-American/anti-Western ideology has been adopted by a number of Islamist extremist groups in Europe and North America... In June 2010, a federal grand jury in Houston indicted Barry Walter Bujol, a US citizen from Hempstead, Texas, for attempting to provide material support to Al-Qaeda, including personnel, money, prepaid phone cards, SIM cards, global positioning systems, cell phones and restricted publications on the effects of US military weapons (e.g., US) in Afghanistan. On the same day, an Ohio couple from Toledo, [...] dual US-Lebanese citizens, were arrested for conspiring to provide material support to Hezbollah...”

¹⁶³Pedrozo, above note 145, 223—227

¹⁶⁴Mullerson, above note 130, 180

As discussed in previous chapter, academic opinions over the notion of preemptive self-defense are quite diverse. While some argue that there exists no right of self-defense until an armed attack has actually started, some others argue that there is a right of preemptive self-defense against an imminent armed attack. On the other hand, Dinstein, who rejects preemptive self-defense, brings forward that there is a right of "interceptive self-defense", where a State has "committed itself to an armed attack in an ostensibly irrevocable way", an approach that differs but little from that in the *Caroline* case.

In a rather similar approach with the proponents of preemptive self-defense, Professor Greenwood holds that the position of the Judge Higgins cannot be overlooked, who argues that,

in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a State passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence. It is the potentially devastating consequences of prohibiting self-defence unless an armed attack has already occurred that leads one to prefer this interpretation—although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached.¹⁶⁵

From his point of view, considering the realities of the contemporary military situations, the Judge Higgins approach, better exemplifies the State's needs in practice than the more restrictive interpretation of Article 51, which confines the right of self-defense to cases in which an armed attack had already occurred. He, nevertheless, emphasizes the fact that the preemptive self-defense should be confined to instances where the armed attack is imminent.¹⁶⁶

Obviously, the Bush doctrine of self-defense has not received recognition from international lawyers, even from American scholars. Therefore, the proponents of the US use of drone strikes on the basis of preemptive self-defense, justify their arguments in an effort to manifest that there exists an imminent threat posed by Al-Qaeda and its affiliates against the US and its allies. Ironically, in the determination of the presence of an imminent threat, instead of revealing that drone strikes are carried out against a particular individual who posed an imminent threat within the concept of a specific incident, they reach to this conclusion by the assessment of past and present acts of aggression by Al-Qaeda on a cumulative basis. In

¹⁶⁵ Greenwood, above note 61, 15

¹⁶⁶ ibid

effect, this approach fall short of the Webster's formulation of preemptive self-defense, but rather represents the Bush doctrine of 'prerogative self-defense' which allows the use of drone strikes against a target *even if uncertainty remains as to the time and place of the enemy's attack.*

For this reason, although the use of force in preemptive self-defense might be considered as lawful self-defense on condition of presence of an imminent threat, the US drone strikes has been strongly criticized for the following reasons.

First, the use of drone strikes is criticized as being incompatible with the requirement of lawful self-defense, mainly in the absence of imminent threat. In this regard Shah reckons that the use of drone strikes, which are primarily preemptive in nature, fall short of being carried out on the basis of preemptive self-defense in the presence of imminent threat. In this regard, he considers that for purposes of immediacy and necessity, the Daniel Webster formulation which requires *an instant and overwhelming danger leaving no choice of means or moments of deliberation* is not the case for the US drone strikes. By contrast, the US drone strikes in Pakistan are carried out on the basis of 'intensive intelligence gathering and deliberation' that last for years. Therefore, he reckons that there is no instant or overwhelming danger posed by the targeted individuals to the US as long as it does not conduct such attacks. In a rather opposite approach with the proponents of use of drone strikes, he argues that,

These attacks are in fact preemptive strikes that aim to weaken Al-Qaeda and the Taliban in the long-term by neutralizing their leadership, and thus, are just one of the many measures that the United States undertakes to achieve its inchoate long-term objectives that have little to do with self-defense as recognized under international law. This determination is further evinced from the presence of the controversial Bush Doctrine and the 2006 U.S. National Security Strategy, both of which disregard principles of international law constraining the use of force."¹⁶⁷

Second, it is claimed that the US is targeting against wrong groups who do not pose threat against the US and that the US drone strikes are carried out in an attempt to kill senior members of Al-Qaeda and Taliban as well as local tribal leaders in Pakistan with a view to exterminating their leadership so as to eradicate these networks and thereby, prevent future terrorist attacks.¹⁶⁸ Shah argues that, besides Al-Qaeda, there are three different groups in the region (Afghani Taliban, Pakistani Taliban and local tribal militia leaders in Pakistan) with

¹⁶⁷ Shah, above note 141, 116—123

¹⁶⁸ ibid, 115—116

different agenda. All these groups are considered as terrorists by the US and are being targeted by the use of drone strikes. He observes that:

Attacks on Afghani Taliban are carried out to neutralize its leadership, which the United States claims commands and controls insurgents fighting against U.S. forces across the border in Afghanistan. The United States also claims that these commanders often cross back into Afghanistan to engage in hostile operations against U.S. forces. Local tribal militia leaders in Pakistan and Pakistani Taliban commanders are principally targeted by U.S. drones because of the logistical, weapon supply, and safe haven support they provide to the other two groups. The United States classifies all of the groups as terrorists and thus within the purview of its global War on Terror. In reality, however, those targeted have very different agendas and modes of operation, albeit with some overlap at times... Taliban insurgents ostensibly see this as a war of liberation against an unlawful occupation of their country, [...] the fighting between U.S. forces and Taliban insurgents involves Taliban responding to preemptive and proactive attacks initiated by U.S. forces. In light of these facts, it is hard to see how the Taliban actions against U.S. forces could be classified as acts of terrorism against the United States, especially when, unlike September 11, no attacks are conducted on U.S. soil or against U.S. civilians, but are instead against U.S. forces during active combat operations. Consequently, the only group left that the United States might argue for attacking on the basis of preemptive self-defense against terrorism aimed at itself, is genuine Al-Qaeda membership residing in Pakistan.¹⁶⁹

This argument is also supported by the Columbia Human Rights Clinic Report issued in 2012, according to which the military and the CIA carry out drone operations within the context of two concepts: ‘personality strikes’ and ‘signature strikes’. Whereas under the concept of ‘personality strikes’ the US target individuals whose identity is known, within the concept of ‘signature strikes’ the US conduct targeting without knowing the exact identity of the individuals. In the concept of latter, the persons match “a pre-identified ‘signature’ of behavior that the US links to militant activity or association”.¹⁷⁰

According to the report, the majority of the drone strikes in Pakistan have been carried out within the concept of signature strike in a cover operation. The report further informs that the US has killed “twice as many ‘wanted terrorists’ in signature strikes than in personality strikes” and that “most of the people on the CIA’s ‘kill list’ have been killed in signature strikes” according to intelligence provided by an unnamed US official in 2011.¹⁷¹

¹⁶⁹ Shah, above note 141, 116—119

¹⁷⁰ Columbia Human Rights Clinic Report, above note 27, 8

¹⁷¹ Ibid, 9

The US targeted killings of members of Al-Qaeda and its affiliates with drone strikes outside Afghanistan, either in the context of ‘personality strikes’ or ‘signature strikes’ are carried out in accordance with a ‘kill list’. The number of individual on these kill lists, and the process of adding new names to a kill list reportedly vary for CIA and military targets, and continues to evolve over the course of time.¹⁷²

The White House’s involvement in targeting decisions, according to the report, has increased during the Obama Administration. In this sense, the report suggest that:

The President reportedly personally approves every military target in Yemen and Somalia, but reviews only about a third of the CIA’s targets in Pakistan—those that seem particularly controversial. Little has been reported on the CIA’s target selection procedures, which have been described as “insular... A more recent account States that targets are added to the kill list by a Covert Action Review Group, made up of high-ranking CIA staff, and then sent on to the CIA’s Counterterrorism Center, which directs the strikes...

The “kill list” is not the only way the US targets individuals using drones. A significant proportion of the individuals killed in drone strikes are not, by even the US government’s account, militant leaders and thus are unlikely to be on the “kill list.” According to one media account, a White House evaluation of drone strikes in summer 2011 found that “the CIA was primarily killing low-level militants.” Similarly, a 2011 New America Foundation report found that just one out of every seven drone attacks in Pakistan kills a “militant leader.” A Reuters study found that more than 90 percent of the estimated 500 individuals killed in drone strikes in Pakistan were “lower-level fighters,” based on an analysis of data provided by unnamed US officials in May 2010.¹⁷³

Leaving the reliability of this report and the credibility of the information provided by the sources in the report aside, one would suggest that the fact that the US drone strikes has been carried out and is still being carried out in a covert operation, cast substantial doubt on the justifiability of the use of drone strikes in self-defense on the grounds of preemption against an imminent threat posed by Al-Qaeda and its supporters.

Third, even if one were to assume that the way in which the US carry out its drone strikes in a way to compatible with the requirements of the lawful self-defense, the US is nonetheless has to comply with the customary international law requirements of necessity and proportionality under the Caroline paradigm.

¹⁷² Ibid,

¹⁷³ Columbia Human Rights Clinic Report, above note 27, 10

With regard to the necessity requirement, Blank considers that the necessity prong of self-defense paradigm, which plays a substantial role in concept of effective counterterrorism, composed of two main components: imminence and alternatives. For the purpose of former, he observes that in the terrorism paradigm the threat posed by terrorists must be imminent in a way that posing a clear and present threat to the civilians unless it is eliminated. Therefore the threat must not be “an amorphous threat, distant in time; quite the opposite for it indicates that unless specific measures are taken with respect to the person posing the threat harm will befall those not in a position to protect themselves”.¹⁷⁴ He brings forward the following criteria in the assessment of the imminent threat posed by terrorists as an example:

- (1) the intent of the terrorist group and the probability of attack (have they made clear their determination to attack and is there reliable intelligence to suggest they are planning to attack?); (2) capacity (what is their capacity to attack . . . ?); (3) methods of attack (terrorists use deception and stealth and there will likely be no advance warning; thus waiting until an attack is underway will be too late for effective self-defense); (4) gravity of likely harm (given what is known about the terrorists' intent and capacity, what is the likely harm expected from an attack?); and (5) urgency of the threat (is there good reason to believe that the likelihood of attack is increasing, and that acting now is critical to thwarting an attack?).¹⁷⁵

As for the latter, the component of alternatives, he suggests that “there must be no alternatives to the use of force as a means to deter or repel the threat posed by such individual”. He further considers that,

if the State has the option or ability to detain the individual (or seek his arrest by the territorial State's authorities) or otherwise thwart the attack, then the necessity prong will not be satisfied. Thus, as many scholars posit, “the targeting of suspected terrorists must be restricted to cases in which there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim State and no other operational means of stopping those attacks are available.”¹⁷⁶

As pointed out by Blank, the issue of evidence in relation to the right of self-defense against an imminent threat is highly important in that it is open for abuses.

O'Connell, in this respect, takes the view that,

[u]nlike the case where no armed attack has yet occurred, the State, already a victim, may use self-defense even if the next attacks are not yet underway. The

¹⁷⁴ Blank, above note 49, 1666

¹⁷⁵ ibid, 1666

¹⁷⁶ ibid, 1667

defending State need only show by clear and convincing evidence that future attacks are planned.¹⁷⁷

In effect, neither international law has accepted law of evidence nor the ICJ has established such rules of evidence, but for the latter has occasionally referred to a standard of evidence which elaborates "proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt."¹⁷⁸

She further notes that the standard of clear and convincing evidence is also accepted by prominent scholars that in case of resort to military force against terrorist attacks. For example, whereas Greenwood makes reference to 'sufficiently convincing' standard, Lobel refers to the standard of 'stringent' evidence:

Given the potential for abuse of the right of national self-defense, international law must require that a nation meet a *clear and stringent evidentiary standard* designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force. Such a principle is the clear import of the International Court of Justice's decision in *Nicaragua v. United States*.

Henkin, as well, finds that international law "recognize[s] the exception of self-defense in emergency, but limit[s] it to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."¹⁷⁹

According to O'Connell the US authorities invariably make reference to either "convincing" or "compelling" evidence before resort to use military force in response to terrorist attack. For example, when the US launched bombing raids against the training camps in Afghanistan of Osama bin Laden and a factory in Sudan, in response to embassy bombings in Kenya and Tanzania in 1998, the then President alleged that,

the US targets were a terrorist base in Afghanistan and a chemical weapons facility in Sudan. We have convincing evidence these groups played the key role in the embassy bombings in Kenya and Tanzania.... We have compelling information that they were planning additional terrorist attacks against our citizens and others.¹⁸⁰

¹⁷⁷ O'Connell, above note 83, 894—895

¹⁷⁸ Ibid, 895—896

¹⁷⁹ Ibid, 898

¹⁸⁰ Ibid, 897

In its report to the Security Council, the US argued that the attacks had been within the context of self-defense. However, in the following days, when several governments and arms control experts questioned the value of the evidence that linking the factory to bin Laden and to the production of chemical weapons it became evident that the evidence was not clear and convincing. Therefore the US was criticized by the international society for the use of military force based on inadequate evidence.¹⁸¹

Another argument as regards the principle of necessity propounded by Shah is that resort to use of drone strikes by the US is unnecessary in that it exacerbate the threat of terrorism not only from regional perspective but from global perspective as well. He explains why:

U.S. drone attacks have given birth to an unprecedented level of resentment and anger among the tribal populace], and they have provided impetus to extremist recruitment and bolstered the resolve of militants. The resulting aggressiveness is apparent from recent terrorist attacks conducted by extremists in secure metropolises of Pakistan distant from the tribal areas, as retribution for the drone attacks. For instance, Baitullah Mehsud, the deceased leader of Tehrik-e-Taliban, the umbrella organization of all Pakistani Taliban outfits, had threatened that his fighters would continue to undertake terrorist attacks in secure parts of Pakistan on a weekly basis as reprisal for the continuing drone attacks. This proxy fight between the United States and the militants within Pakistan is dangerously destabilizing the country and increasing the dangers of international terrorism to all nations, including the United States. Therefore, the necessity of the drone attacks for eliminating the threat of terrorism emanating out of the tribal areas of Pakistan is highly questionable.¹⁸²

On the other hand, the use of drone strikes is criticized by one of proponents of the US *Operation Enduring Freedom*, O'Connell, who argues that,

members of Al Qaeda are known to be plotting to attack the United States so killing them wherever they are is an act of preemptive self-defense. This argument is completely antithetical of the law of self-defense. The law of self-defense does not permit States to attack before they possess evidence of an armed attack occurring—evidence of plots does not suffice. Moreover, this law does not permit attacks on individuals and small groups lacking State sponsorship even if they are carrying out actual attacks. Even where the U.S. may have permission from Pakistan and is engaging in hostilities along with the authorities of that State, counter-terrorism experts have raised real concerns about the wisdom of drone strikes. Whether attacking with drones is wise, leads us to question the necessity and proportionality of resorting to this sort of military force. Counter-terrorism experts have told us that our drone attacks are actually fueling interest in the insurgency in Afghanistan and in Pakistan and in taking lethal action against the government of Pakistan. As for proportionality, we know the CIA is working from a “kill list.” Most strikes are associated with one person’s name. Yet, every strike

¹⁸¹ Ibid, 898

¹⁸² Shah, above note 141, 124—125

kills a number of persons. It is difficult to make the argument that killing 30, 12, or even six persons is proportional in the killing of one person. So in conclusion, we see that U.S. use of drones is failing the relevant tests of the lawful use of force. It is failing under Article 51; failing under the principle of necessity and failing under the principle of proportionality.¹⁸³

As for the proportionality requirement, Shah asserts that the use of drone strikes is incompatible with the principle of proportionality for several reasons. First, he reckons that drone strikes are far from achieving the US objective, which is to eliminate the actual threat of aggression posed by terrorists, and thereby contradictory vis-à-vis the rule of proportionality. Second, he argues that drone strikes caused extensive number of civilian deaths and injuries as well as unnecessary destruction of infrastructure. According to him, this undesirable outcome comes into existence due to the use of remotely controlled unmanned aircrafts whose strikes are determined by intelligence, which are generally proven faulty, and whose capability of distinguish civilians and militant targets at the time of a strike especially when the targets are in the vicinity of civilians is highly questionable compared to the aircrafts with pilots. In his observation:

This explains why “between January 14, 2006 and April 8, 2009, only 10 [strikes] were able to hit their actual targets, killing 14 wanted Al-Qaeda leaders, besides perishing 687 innocent Pakistani civilians. The success percentage of the U.S. Predator strikes thus comes to not more than six per cent.”¹⁸⁴

Another highly significant issue with regard to the principle of proportionality is that unlike the *jus in bello* principle of proportionality, there is no such collateral damage permissible in the *jus ad bellum* proportionality *per se*.

In the light of above considerations, the following observations may be concluded. First, even the Webster formulation has received a high level of recognition; there are still some debates over the use of force in self-defense against an imminent threat. Second, notwithstanding the controversy over the legality of preemptive self-defense in case of an imminent threat, when justifying the use of drone strikes, the US instead of providing convincing evidence that the particular target posed an imminent threat of attack, it relies on the presupposition that every members of Al-Qaeda and its supporters are potential threat of an armed attack at any time at anywhere, *even if uncertainty remains as to the time and place of the enemy's attack*. This

¹⁸³ O'Connell, *Drones Under International Law*, Washington University Whitney R. Harris World Law Institute, International Debate Series, (8 October 2010), 7

¹⁸⁴ Shah, above note 141, 126

approach which might be considered as ‘prerogative self-defense’, manifests the Bush Administration’s demeanor towards the use of force in self-defense against terrorists and represents the ground of the Obama Administration’s extensive number of drone strikes in self-defense when killing the members of Al-Qaeda and Taliban as well as tribal leaders. Therefore, the use of drone strikes on this ground cannot be justified under international law of self-defense. Third, even assuming that the US has the right to use force within the context of Bush doctrine of anticipatory self-defense, killing members of different groups with different aims who has no intention of posing threat of attack against the US, such as tribal leaders etc., cannot be justified under the necessity requirement of the right of self-defense. Last but not least, even assuming that all those groups can be regarded as posing threat of attack against the US, drone strikes cannot be justified due to the impermissibility of collateral damage for the *jus ad bellum* proportionality.

4.2 Armed Conflict

The other justifying argument of the US for the use of drone strikes is that the US is in an armed conflict with terrorism and therefore may use lethal force against members of terrorist groups who are belligerent and thus lawful targets under international law. In fact, the US officials did not use the term “armed conflict” during the Bush Administration, instead they preferred the rhetoric of “Global War Against Terrorism”. However, since the use of the term “war” abandoned following the adoption of the Geneva Conventions of 1949 and changed into the term “armed conflict”, this argument can be examined under the issue of armed conflict as such.

Although the Bush administration declared a global war against terrorism, when it comes to the applicable law to the conflict between the US and terrorists, the US authorities alleged some contradictory remarks. Whereas they claim that the conflict between the US and terrorists is not an international armed conflict since the terrorists, mainly Al-Qaeda and its associates, are not a State party to the Geneva Conventions, they also claim that it was not a non-international armed conflict since it exceeded the territory of one State, rather it is an international armed conflict in character. In fact, in the White House Memorandum, President Bush declared that “common Article 3 of Geneva does not apply to either al Qaeda or Taliban

detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character". However he also declares that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva".¹⁸⁵

This contradictory line of argument was also examined by the US Supreme Court in *Hamdan v. Rumsfeld* in 2006 which disagreed with the argument of the Bush Administration that the conflict between the United States and Al-Qaeda was a 'global war on terror' which cannot be ruled by the Geneva Conventions. The Court rather considered the conflict as non-international armed conflict. After the observation of the Supreme Court on the issue, the US took the view that the conflict can be characterized as non-international armed conflict during the Obama Administration which has slightly changed that rhetoric of the global war on terror and adopted that the US is *in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces*, in response to the horrific 9/11 attacks.

During the Bush and Administration, officials have made arguments that since the terrorist attacks of 9/11 were remarkable and were preceded and succeeded by terrorist attacks, the US may target and kill al Qaeda members and their affiliates wherever they are found. After the first drone strike outside Afghanistan of 2002 in Yemen, the National Security Advisor, Condoleezza Rice, told to the press that the US is permitted to use military force on the ground that the US is in "a new kind of war."¹⁸⁶ According to the US officials, the battlefield of this new war is not where fighting was occurring but where certain individuals were found. In this regard the Deputy General Counsel for International Affairs of the Department of Defense maintained that the US could target al Qaeda and other international terrorists around the world and those who support them without warning.¹⁸⁷ The officials of the Obama Administration, on the other hand, made the enemy more explicit by pronouncing that the US is *in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces*. These two different manners of approaching will be examined separately in this section in an effort

¹⁸⁵ The White House Memorandum, Humane Treatment of Taliban and Al Qaeda Detainees, 7 February 2002, available at: http://www.pgc.us/archive/White_House/bush_memo_20020207_ed.pdf (20 May 2014) [hereinafter White House Memorandum]

¹⁸⁶ Fox News Sunday with Tony Snow (Fox News Network television broadcast Nov. 10, 2002), available at: <http://www.foxnews.com/story/2002/11/11/transcript-condoleezza-rice-on-fox-news-sunday/> (20 May 2014)

¹⁸⁷ O'Connell, above note 30, 595

to propound whether the justification of the US for drone strikes on the basis of armed conflict can be justified under international law.

4.2.1 Global War On Terrorism

Following the terrorist attacks of 9/11 President George W. Bush pronounced that “our war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide, or run, or plan.”¹⁸⁸ He also Stated that “[o]ur enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”¹⁸⁹ It is clear that the US justification for the use of military force against terrorists, inclusive of use of drone strikes, was declared in the first days after 9/11 attacks by the then President George W. Bush who declared the whole world as a war zone. Within the context of this expansive approach, the war has no geographic constraints, and the battlefield is of a global nature. In other words, the war follows the terrorist enemies and an individual suspected of being an Al Qaeda member may be killed by CIA agents anywhere in the world at any time using UAVs.¹⁹⁰

The legal justification for this proclamation of global war on terror made by the Deputy National Security Adviser Stephan Hadley, who expressed that the legal basis was the attacks of 9/11 on the US soil which was conceived by the American people as “an act of war.”¹⁹¹ Moreover, Professor Ruth Wedgwood, Advisor to the Secretary of Defense, argued that in addition to the acts of war on 9/11 “Al-Qaeda has declared jihad against the United States, and in *fatwa* after *fatwa*, Osama bin Laden has announced that all Americans are valid targets.”¹⁹² The US Justice Department has similarly contested before the US courts that the country is in a global war on terror. Professor John Yoo, a member of the Justice Department and one of a mastermind of the ‘global war’ argument, in one occasion, analyzed the US Supreme Court decisions and concluded that "the Court agreed that the US is at war against

¹⁸⁸ Blank, above note 85, 712

¹⁸⁹ George W. Bush, Address to Joint Session of Congress Following 9/11 Attacks, (20 September 2001), available at: <http://www.americanrhetoric.com/speeches/gwbush911jointssessionspeech.htm> (20 May 2014)

¹⁹⁰ O'Connell, above note 33, 326

¹⁹¹ O'Connell, *The Legal Case Against The Global War On Terror*, 36 Case W. Res. J. Int'l L. (2004), at 349, 350

¹⁹² O'Connell, above note 164, 350—351

the al Qaeda terrorist network and that it is allowed to “use all of the tools of war to fight a new kind of enemy...”.¹⁹³

After the CIA killing with drone of six men traveling in a vehicle in Yemen in 2002, the Deputy General Counsel of the Department of Defense for International Affairs, Charles Allen, argued that since the US is at war with Al Qaeda and its associates, the killings were lawful. That’s to say, the war attaches to the individuals, not the situations, therefore it would be lawful to kill an Al Qaeda suspect “on the streets of a peaceful city like Hamburg, Germany without warning”.¹⁹⁴ Although the justification of the use of force via the notion of global war on terrorism has not been countered by the international lawyers until 2003, it nevertheless found no support from independent scholars as well as judicial authorities.¹⁹⁵ In that sense, it is obvious that the notion of global war against terrorism carries a similar pattern with the Bush doctrine of preemptive self-defense, in a way that it confers the US the right to use military force in counterterrorism effort in a privileged way vis-à-vis the international law. In this regard, whereas the latter justifies the use of drone strikes in the absence of imminent threat, the former justifies killings with drones in the absence of actual hostilities. Indeed, these approaches of the Bush Administration were ardently criticized even by the US scholars. For example, Barnidge denounces the manner of approaching of the Bush Administration to these kinds of thorny issues as being “cowboy diplomacy”¹⁹⁶

With regard to the judicial demeanor towards the notion of global war on terror, in its *Wall Advisory Opinion* (9 July 2004), as to the legal consequences of Israel constructing a security barrier on occupied Palestinian territory, the ICJ undermined the possibility of declaring war against terrorism. The Court noted that,

the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, [...] according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”¹⁹⁷

Referring to the Article 51 of the Charter the Court concludes that,

¹⁹³ ibid

¹⁹⁴ Dworkin, *Law and the Campaign Against Terrorism: The View from the Pentagon*, (16 December 2002), available at: <http://www.globalpolicy.org/component/content/article/163/28224.html> (20 May 2014)

¹⁹⁵ O’Connell, above note 194, 349

¹⁹⁶ Barnidge, 410

¹⁹⁷ *Wall Advisory Opinion*, para. 138

Article 51 of the Charter [...] recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.¹⁹⁸

According to O'Connell, the dictum of the ICJ means that "the right to use armed force is connected with territory –facts of fighting on the ground, not the presence of an individual suspected of being a terrorist."¹⁹⁹

As for the opinion of scholars, O'Connell draws attention to several important points. First,

Whether the U.S. was in fact in a war after September 11 depends on the definition of war in international law... The term "war" fell out of use as a legal term of art with the adoption of the Charter in 1945. The Charter in Article 2(4) prohibits all uses of force, war and lesser actions, except in self-defense or as mandated by the Security Council. Following the adoption of the Charter, treaties relevant to war, such as the Geneva Conventions of 1949 substituted the term "armed conflict" for war... We still use the term "war" to refer to any serious armed conflict. Yugoslavia, Liberia, Sudan and Sri Lanka experienced civil war in the 1990s... The war on drugs does involve the military, but it is not an armed conflict against drugs...

When President Bush first declared war on terrorism, many thought he was using the term war in the sense of the war on drugs... But [...] the Administration has acted as though the US is actually involved in armed conflict against terrorists everywhere. An armed conflict, however, has two important components. It consists of two or more armed groups engaged in armed hostilities. In *Prosecutor v. Tadic* before the International Criminal Tribunal for the Former Yugoslavia, the Tribunal defined "armed conflict" as existing "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."... The Geneva Conventions similarly incorporate a standard of intensity that must be reached to trigger the application of certain minimal rules in certain violent conflicts, namely those conflicts where all parties are not signatories to the Conventions."²⁰⁰

Second, she points out the possible drawbacks of announcing terrorist as 'enemy combatant' and its undesirable consequences. She refers to she refers to the traditional aspect of the issue and maintains that,

the puzzling decision of the Bush Administration to declare a global war on terror and to label terrorists "enemy combatants" has possibly had an unintended consequence for non-State actors. It has lifted certain individuals out of the status of criminal to that of combatant, the same category America's own troops have while engaging in armed hostilities. This move to label terrorists as combatants is

¹⁹⁸ Ibid, 139

¹⁹⁹ O'Connell, above note 194, 356

²⁰⁰ O'Connell, above note 194, 352—354

contrary to strong historic trends. From earliest times, governments have struggled to prevent their enemies from approaching a status of equality. Even governments on the verge of collapse due to the pressure of a rebel advance have vehemently denied that the violence inflicted by their enemies was anything but criminal violence. Governments fear the psychological and legal advantages to opponents of calling them "combatants" and their struggle a "war." Yet, the Bush Administration, within days of the September 11 attacks in the United States,²⁰¹ declared a "global war on terror" and designated terrorists "enemy combatants."²⁰²

As a result, O'Connell considers the decision by US officials to treat the struggle against terrorism as a global war "undermines the prohibition on the use of force, enhancing the status of terrorists and making the world a more dangerous place where human life is ever more de-valued."²⁰³ Therefore it is time "to call off the global war on terror."²⁰⁴

Professor Greenwood shares similar views and notes that:

Terrorism is one of the greatest threats facing humanity today. It is therefore entirely understandable and justifiable that we mark the gravity of that danger and express a commitment to defeating it by using the language of a war on terrorism. That is, however, a far cry from using that language in a technical, legal sense. In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.²⁰⁴

According to Marco Sassoli:

One of the dangerous effects of the U.S. characterization of the "war on terrorism" as a single global international armed conflict is that, if correct, such classification makes deliberate attacks upon members of the "enemy armed forces" lawful worldwide... Thus, the United States justified an unmanned missile strike that hit and killed suspected members of Al-Qaeda in Yemen. Without this qualification under the laws of war, such targeted assassinations not preceded by an attempt to arrest the persons concerned would be classified as extra-judicial executions, which would seriously violate international human rights law. The latter accepts the deliberate killing of even the worst criminal only under the most extreme circumstances... U.S. administration officials have indeed implied that the President's claimed authority to designate as an enemy combatant any individual, including a U.S. citizen within the United States, includes authority to carry out extra-judicial executions, within or outside the United States, of suspects so designated. Under the laws of war, if those persons were combatants, such claims would be correct. This absurd result, permitting targeted assassinations in the

²⁰¹ ibid, 357

²⁰² ibid

²⁰³ O'Connell, above note 194, 357

²⁰⁴ Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. (2004), at 505, 529

midst of peaceful cities, proves once more that all those suspected to be "terrorists" cannot be classified as combatants.²⁰⁵

4.2.2 Armed Conflict with Al Qaeda, Taliban and Associated Forces

Under the Obama Administration, the rhetoric of the "global war against terrorism" has changed. The US is no longer engaged in a global war on terror but rather, in a war against Al-Qaeda, the Taliban, and associated forces. Despite this change in rhetoric the Obama Administration has significantly expanded the use of drone strikes outside Afghanistan in a variety of locations including Pakistan and Yemen and thus followed the Bush Administration's view of the global battlefield. When the use of drone strikes against terrorist operatives in Yemen and Somalia has driven debate about whether those areas fall within the boundaries of the armed conflict with al Qaeda and associated terrorist groups, whether any hostilities in those areas constitute separate armed conflicts, or whether the conflict against terrorists can indeed be a global one the Obama Administration made the same argument as did the Bush Administration that the laws of war apply to the use of drone strikes since the US is engaged in an armed conflict.²⁰⁶

With regard to legal justification, apparently the same argument was pursued by the Obama Administration *vis-à-vis* the Bush Administration. In the Koh speech, it is argued that "the United States is in an armed conflict with Al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks."²⁰⁷ Whether the conflict between the US and Al-Qaeda may be characterized as an armed conflict is a controversial issue. Despite the agreement among the scholars that the state of armed conflict requires two criteria: a certain level of intensity and minimum level of organization. When it comes to whether these requirements have met in the conflict between the US and Al-Qaeda and its associates the opinions varies. For example, in an effort to legally justify the use of drone strikes within the context of armed conflict Orr argues that the hostilities between the United States and al Qaeda constitute an armed conflict. According to him the US drone strikes outside Afghanistan satisfy the intensity prong. In this regard he notes that:

²⁰⁵Sassoli, *Use and Abuse of the Laws of War In the 'War on Terrorism'*, 22 Law & Ineq. (2004), at 195, 212—213

²⁰⁶Sterio, above note 163, 202; Blank, above note 85, 712

²⁰⁷Koh Speech, above note 3

One factor in the *Boskoski* court's evaluation of the conflict was the number of casualties. The ICTY noted that the highest total estimate for the entire period at issue was 168, a tiny fraction of the total number of Americans that al Qaeda has killed. The Boskoski analysis of the intensity prong also considered how the...government treated the hostilities... While not dispositive, the government's assessment and treatment of the situation was highly significant. In this case, the U.S. government has obvious incentives to treat hostilities with al Qaeda as a war, and clearly such treatment should not be dispositive. The American government's response to the danger posed by al Qaeda, however, is evidence of its highly informed perception of that threat, and the Obama administration clearly perceives the threat to be significant. Hostilities between the United States and al Qaeda, then, are sufficiently intense to constitute an armed conflict.”

As for the organization prong he notes that:

“The *Boskoski* court's analysis under the organization prong considered factors including the armed group's "ability to carry out military operations," its "hierarchical command structure," and the existence of corresponding political operations. In the case of al Qaeda, all of these factors demonstrate that al Qaeda is sufficiently organized to satisfy the second prong of the *Boskoski* test. First, al Qaeda is clearly able to carry out military operations. Some of the group's notable attacks include: the attack on American military personnel in Yemen in 1992, the first World Trade Center bombing in 1993, the bombings of the American embassies in Tanzania and Kenya in 1998, the attacks of September 11, 2001, the London bombings in 2005, and the bombing of the Danish embassy in Pakistan in 2008. Second, Al Qaeda has a hierarchical command structure. A former al Qaeda analyst for the CIA recently described al Qaeda as a group with "bylaws, committee structures, [and] rules for succession." The group's governance structure also includes regional commanders who operate in accordance with the "Annual Plan" adopted at the "command council," where Osama bin Laden and Ayman Al-Zawahiri casted “the deciding vote[s].” In addition, al Qaeda has multiple tiers of management, and mid-level officers sometimes move up to replace senior leaders who die in combat. Finally, al Qaeda behaves like a political entity. Before the fall of the Afghan Taliban, cooperation between al Qaeda and that government was readily apparent. Moreover, many of the group's Stated goals, including the replacement of certain secular governments with religious leadership, are political. Therefore, al Qaeda also satisfies the organization prong of the *Boskoski* test.”²⁰⁸

On the other hand in response to the Bush Administration's view that there could be a global armed conflict based on the existence of certain persons, the International Law Association (ILA) undertook a five-year study to help clarify what the definition of armed conflict was in international law. According to ILA report international law defines armed conflict as always involving at least two minimum characteristics: the presence of organized armed groups, and

²⁰⁸ Orr, above note 149, 743—744

engagement in intense inter-group fighting. With reference to the ILA report O'Connell argues that,

the fighting or hostilities of an armed group occurs within limited zones, theater of combat, or combat zones. Ask any member of the U.S. or NATO armed forces where the U.S. is engaged in combat operations today and they will correctly tell you in Afghanistan and Libya.

She also draws attention to particularities of the terrorism that should be considered as a crime and notes that,

[a]lthough in some circumstances it may be carried out so continuously as to be the equivalent of the fighting of an armed conflict... The isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict because armed conflict requires a certain intensity of fighting. This is certainly not the situation in the United States today. Even where the U.S. is using drones on the basis of consent from the territorial State, that State may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities. The legal restriction on the use of military force in such situations is found in human rights law. The major human rights treaties, for example, permit derogation in situations of emergency. Outside emergency, a State may only take human life when absolutely necessary in the defense of persons from unlawful violence - in the case of immediate need to save a human life.²⁰⁹

In fact, outside Afghanistan, characterization of the conflict between the US and Al-Qaeda, Taliban and associated forces as an armed conflict would be problematic within the ambit of the law of armed conflict. As O'Connell rightly argued, the conflict between the US and terrorists has been taken place in Afghanistan. Therefore, killing members of Al-Qaeda and its associates via the use of drone strikes in Afghanistan may be justified under the law of armed conflict. However, outside Afghanistan it is hard to claim that killing terrorists with drone strikes may fall under the scope of IHL. As pointed out before, the ground of the use of drone strikes outside Afghanistan has not been based on the fighting between the US and terrorists, it has rather relied on the assumption that members of Al-Qaeda, Taliban and associated forces may be targeted irrespective of the threshold of armed conflict has been achieved or not. Therefore, justification of the use of drone strikes outside Afghanistan cannot be considered as being legitimate under the rules of IHL. As a result, as UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions Philip Alston rightly noted,

outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State's own territory,

²⁰⁹ O'Connell, above note 30, 596—597

over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.²¹⁰

²¹⁰Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (28 May 2010), para. 85

5 CONCLUSION

Given the fact that the need for use of force may change over the course of time in accordance with the developments in weaponry the State practices in creating customary international law carry a great value. However, since the Article 2(4) of the UN Charter is the most important rule as to the use of force and is binding on all sovereign States the cardinal principle of prohibition of use of force is not possibly changed by contrary State practices. In this regard as long as the Article 2(4) of the Charter exists the US drone strikes cannot be justified as use of force in self-defense provided that it is exercised within the ambit of the Article 51 of the Charter. However, having considered the fact that the US started its right to use of military force in self-defense in response to terrorist attacks of 9/11 more than a decade ago and that most of the drone strikes carried out in a covert operation the justification of drone strikes on the grounds of use of force in self-defense even today without “reporting the measures immediately to the Security Council cannot be considered as a lawful basis in the presence of the Article 2(4) as well as the Article 51 of the Charter.

With regard to the justification for drone strikes of being in an armed conflict with Al Qaeda Taliban and associated forces, it is hard to conclude in the light of the Geneva Conventions, ICTY judgments as well as the arguments by the scholars that the traditional meaning of battlefield can be expanded to the global battlefield and that the level of intensity outside Afghanistan would be amount to the minimum level of threshold for armed conflict.

Having considered the high number of civilian deaths and casualties and the annoying effects of living under drones one would concluded that because of the US covert drone campaign terrorism today poses a much more serious threat to all nations as well as to international peace and security. Therefore, it can be concluded that despite the US had the legal ground for fighting against terrorism, instead of acting together with all nations by means of the involvement of the Security Council to this fight, pursuing a covert drone operations in response to 9/11 undermines its credibility in the eyes of the international community as a result of failure of commitment to international law.

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