

NOTES

After Action: The U.S. Drone Program's Expansion of International Law Justification for Use of Force Against Imminent Threats

Until the 2000s, the United States' attempts to shift international legal norms on imminence to allow for greater use of armed force abroad were largely unsuccessful. In the past two decades, however, drone use and careful legal gamesmanship by U.S. officials have opened an unprecedentedly broad allowance for use of force in imminent self-defense. As drones become increasingly available to state and non-state actors, this permissive regime poses a threat to national and international security. This Note analyzes two decades of international customary law formation around drone use outside of armed conflict through a new lens post U.S.-withdrawal of Afghanistan. It traces the history of the imminence exception to Article 2(4)'s prohibition on use of force, U.S. attempts to expand that exception, and the history of drone use outside of armed conflict. It then analyzes recent opinio juris and state practice to point to the adoption of elongated imminence into customary international law. Finally, it identifies some of the dangers of the current permissive paradigm and presents opportunities for U.S. leadership in forming a more advantageous and secure definition of imminence.

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INTRODUCTION

For more than seventy-five years, global peace and security have been grounded in the United Nation Charter’s (“Charter” or “UN

Charter”) categorical prohibition on unjustified use of force.¹ The Charter’s prohibition, embodied in Article 2, Section 4, expresses the post-World War II aspiration of a world without aggressive war.² In 2010, the Kampala Accords went further, making unjustified use of force a crime for which State officials could be prosecuted before the International Criminal Court (“ICC”).³ Despite these prohibitions, on February 24, 2022, Russia launched a large-scale land invasion of Ukraine.⁴ In its earliest days, the conflict tested the liberal world order,⁵ made demands on international commitments,⁶ and retrenched law of war parameters⁷ challenged by unconventional conflicts in the 2000s.⁸

1. U.N. Charter art. 2, ¶ 4.

2. David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT’L L. 387, 392 (2007) (“The Charter’s drafters were in many ways generals fighting the last war; the Charter regime therefore outlawed aggression, with German armies marching through Europe [as] the paradigm case.”).

3. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute of the ICC].

4. See *Russian Forces Launch Full-Scale Invasion of Ukraine*, AL JAZEERA, <https://www.aljazeera.com/news/2022/2/24/putin-orders-military-operations-in-eastern-ukraine-as-un-meets> (last updated Feb. 24, 2022, 11:40 AM) [<https://perma.cc/DWC8-47F9>] (“Russia has launched an all-out invasion of Ukraine by land, air and sea, the biggest attack by one state against another in Europe since World War II . . .”).

5. See Charlie Campbell, *How Russia’s Invasion of Ukraine Could Change the Global Order Forever*, TIME (Feb. 24, 2022, 4:27 PM), <https://time.com/6150874/world-order-russia-ukraine/> [<https://perma.cc/FG9D-KUCR>] (“[I]s there any hope for the established world order?”); Fiona Hill, *Russia’s Assault on Ukraine and the International Order: Assessing and Bolstering the Western Response*, BROOKINGS (Feb. 2, 2022), <https://www.brookings.edu/testimonies/russias-assault-on-ukraine-and-the-international-order-assessing-and-bolstering-the-western-response/> [<https://perma.cc/HN3S-UGJD>] (“If Putin launches a further incursion into Ukraine on this basis with no international condemnation or backlash, then this will set a global precedent for other countries engaged in territorial disputes and threatening their neighbors’ sovereignty.”).

6. Robert Pszczel, *The Consequences of Russia’s Invasion of Ukraine for International Security – NATO and Beyond*, NATO REV. (July 7, 2022), <https://www.nato.int/docu/review/articles/2022/07/07/the-consequences-of-russias-invasion-of-ukraine-for-international-security-nato-and-beyond/index.html> [<https://perma.cc/2X9U-C5L7>] (explaining how Russia’s invasion of Ukraine is testing Western unity).

7. See Jasmine Aguilera, *Russia Has Killed Hundreds of Civilians. But Has It Committed War Crimes?*, TIME (Mar. 2, 2022, 5:39 PM), <https://time.com/6152798/russia-rules-of-war-crimes-ukraine> [<https://perma.cc/RHA3-ZK2F>] (discussing whether Russia’s actions in Ukraine constitute “war crimes” under international law); *Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights*, HUM. RTS. WATCH (Feb. 23, 2022, 5:25 PM), <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights> [<https://perma.cc/77L6-5FWR>] (discussing the potential application of the laws of war to the Russian occupation of Ukraine).

8. See, e.g., Adam Roberts, *The Laws of War in the War on Terror*, 79 INT’L L. STUD. 175, 184–86, 191 (2003) (stating that U.S. military doctrine in the 2000s was “in tension, but not necessarily in conflict” with the principle of proportionality and specifically noting that “many governments [we]re doubtful about, or opposed to, applying the full range of rules applicable in international armed conflict to operations against rebels and terrorists”); Ellen Policinski & Jovana Kuzmanovic, *Protracted Conflicts: The Enduring Legacy of Endless War*, 101 INT’L REV. RED CROSS 965, 968 (2019) (endorsing the view that “determining the reasonably foreseeable effects of an attack can be more complicated in protracted conflicts” while discussing conflict trends in the 2000s and 2010s).

Russia's recent attack on Ukrainian independence is not the only threat to Article 2(4)'s guarantee.⁹ Global peace and security faces a panoply of trials, including unprecedented cyber threats,¹⁰ rising militarization,¹¹ and an increasingly assertive China.¹²

As these challenges play out, the United States faces the consequences of its own role in establishing broad, permissive international legal rules for new military technologies. Rules

9. Article 2(4) is meant to serve as a guarantee of global peace and security through its general prohibition on use of force by one state against another. *See, e.g.*, John Dehn, *The UN Charter's Original Effect on State Sovereignty and the Use of Force*, JUST SECURITY (Aug. 27, 2020), [https://www.justsecurity.org/72177/the-un-charters-original-effect-on-state-sovereignty-and-the-use-of-force/#:~:text=Article%202\(4\)%20explicitly%20protects,threat%20or%20use%20of%20force](https://www.justsecurity.org/72177/the-un-charters-original-effect-on-state-sovereignty-and-the-use-of-force/#:~:text=Article%202(4)%20explicitly%20protects,threat%20or%20use%20of%20force) [<https://perma.cc/5JEA-6E52>] (“[T]he maintenance of *international* peace and security . . . is the overarching object and purpose of the Charter. . . . Article 2(4) explicitly protects the territorial integrity and political independence of ‘any state,’ not just member States.”). For a summary of past scholarship on threats to Article 2(4)'s legitimacy, see generally Wippman, *supra* note 2, at 388–90.

10. *See* DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 3 (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [<https://perma.cc/9Yh9-YR52>] (“Terrorists, trans-national criminal organizations, cyber hackers and other malicious non-state actors have transformed global affairs with increased capabilities of mass disruption.”); *see, e.g.*, Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html> [<https://perma.cc/27U7-WS4T>] (describing Russian-attributed cyberattack on U.S. systems); Sean Michael Kerner, *Colonial Pipeline Hack Explained: Everything You Need to Know*, TECHTARGET (Apr. 26, 2022), <https://www.techtargget.com/whatis/feature/Colonial-Pipeline-hack-explained-Everything-you-need-to-know> [<https://perma.cc/VMQ9-84MN>] (describing a hack which paused flow in the Colonial Pipeline, attributed to the non-state criminal hacking group “DarkSide”); Andy Greenberg, *Chinese Hackers Have Pillaged Taiwan's Semiconductor Industry*, WIRED (Aug. 6, 2020, 5:30 PM), <https://www.wired.com/story/chinese-hackers-taiwan-semiconductor-industry-skeleton-key/> [<https://perma.cc/J4HA-CKEL>] (describing a hack, attributed to groups linked to the Chinese government, to misappropriate intellectual property in a key Taiwanese industry).

11. World military spending rose to a new high of \$2.113 trillion for 2021. *World Military Expenditure Passes \$2 Trillion for First Time*, STOCKHOLM INT'L PEACE RSCH. INST. (Apr. 25, 2022), <https://www.sipri.org/media/press-release/2022/world-military-expenditure-passes-2-trillion-first-time> [<http://perma.cc/42PQ-UZNX>]. In addition to European 2021 spending prior to the invasion of Ukraine, Nigeria increased its spending by nearly two billion in response to a rise in extremism and insurgency. *Id.* There has also been increased public support for Japanese militarization as a result of fears surrounding Taiwan. Tim Kelly & Nobuhiro Kubo, *Analysis: Japanese Backing for Military Build-Up Likely to Rise After China's Missiles*, REUTERS, <https://www.reuters.com/world/asia-pacific/japanese-backing-military-build-up-likely-rise-after-chinas-missiles-2022-08-05/> (last updated Aug. 5, 2022, 4:24 AM) [<https://perma.cc/SQZ2-P5NP>].

12. Max Colchester, *Heads of FBI, MI5 Issue Joint Warning on Chinese Spying*, WALL ST. J., <https://www.wsj.com/articles/heads-of-fbi-mi5-issue-joint-warning-on-chinese-spying-11657123280?mg=prod/com-wsj> (last updated July 6, 2022, 6:09 PM) [<https://perma.cc/UXW5-PKC5>]; Associated Press, *China Has Fully Militarized Three Islands in South China Sea, U.S. Admiral Says*, GUARDIAN (Mar. 20, 2022, 9:47 PM), <https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says> [<https://perma.cc/9PB6-8SJRJ>].

engineered by the United States to permit its use of novel spyware,¹³ offensive cyber tools,¹⁴ and drones¹⁵ now provide little defense against use of the same tools by adversary states and nonstate actors.¹⁶ Deployment of unmanned aerial vehicles (“UAVs” or “drones”) in the 2022 Russia-Ukraine War—among other high-profile incidents in the 2020s—have brought this challenging paradigm into the spotlight.

The United States now stands at a crossroads: through twenty years of strategic, iterative lawmaking, it has successfully opened a loophole in international law’s prohibition on the use of force that creates a broad license for drone strikes in self-defense against imminent attacks.¹⁷ Facing the consequences of this license, the United States has the opportunity and responsibility to limit its worst effects.¹⁸

UAVs are “powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.”¹⁹ A vital part of the United States’ foreign policy toolkit since at least 2001,²⁰ UAVs face criticism

13. See Edward Snowden: *Leaks That Exposed U.S. Spy Programme*, BBC NEWS (Jan. 17, 2014), <https://www.bbc.com/news/world-us-canada-23123964> [https://perma.cc/9D2X-A4C8] (discussing instances of spyware use by various countries).

14. See P.W. Singer, *Stuxnet and Its Hidden Lessons on the Ethics of Cyberweapons*, 47 CASE W. RESV. J. INT’L L. 79, 82 (2015) (describing the parameters of the Stuxnet cyberattack). See generally KIM ZETTER, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD’S FIRST DIGITAL WEAPON (2014) (describing the United States’ role in developing the Stuxnet virus as a novel offensive tool to compromise Iranian nuclear enrichment facilities).

15. See discussion *infra* Parts 0.0, 0.0.0.

16. See “*The Lazarus Heist*” Explains North Korea’s Wild Hacking Spree, ECONOMIST (June 23, 2022), <https://www.economist.com/culture/2022/06/23/the-lazarus-heist-explains-north-koreas-wild-hacking-spree> [https://perma.cc/5CFX-L2KQ] (discussing North Korea’s use of offensive cyber tools to earn money); Associated Press, *Israel Shoots Down Hezbollah Drones over Mediterranean*, NPR (July 3, 2022, 2:38 AM), <https://www.npr.org/2022/07/03/1109602480/israel-shoots-down-hezbollah-drones-over-mediterranean> [https://perma.cc/TZ3F-2SXB] (describing non-state actor use of unarmed drones). But see Associated Press, *Hezbollah Claims It’s Making Drones and Missiles in Lebanon; Chief Offers Export Opportunity*, DEF. NEWS (Feb. 16, 2022), <https://www.defensenews.com/global/mideast-africa/2022/02/16/hezbollah-claims-its-making-drones-and-missiles-in-lebanon-chief-offers-export-opportunity/> [https://perma.cc/PJB3-2AX4] (quoting Hezbollah’s claims that it will use current drone stocks as precision-guided missiles and will offer to export to other groups); Ronen Bergman & Mark Mazzetti, *The Battle for the World’s Most Powerful Cyberweapon*, N.Y. TIMES MAG., <https://www.nytimes.com/2022/01/28/magazine/nso-group-israel-spyware.html> (last updated Jan. 31, 2022) [https://perma.cc/FEG5-AQTN] (describing the United States’ purchase and subsequent efforts to ban Pegasus, a surveillance tool that has been sold by the Israeli-based NSO Group to a variety of other parties).

17. See *infra* Section 0.

18. See *infra* Section 0.

19. JEREMIAH GERTLER, CONG. RSCH. SERV., R42136, U.S. UNMANNED AERIAL SYSTEMS 1 (2012).

20. See *id.* at 1 (“In today’s military, unmanned systems are highly desired by combatant commanders for their versatility and persistence.” (quoting DEP’T OF DEF., FY2009–2034 UNMANNED SYSTEMS INTEGRATED ROADMAP, at xiii (2009), https://www.globalsecurity.org/intell/library/reports/2009/dod-unmanned-systems-roadmap_2009-2034.pdf)).

on legal and policy grounds. U.S. legal scholars worry the attacks, and the closed-door proceedings used to determine their targets, violate constitutional due process guarantees.²¹ Human rights defenders focus on proportionality, arguing that UAVs overwhelmingly kill “innocent civilians,” noncombatants, or other individuals protected by international law.²² In the policy realm, international relations experts are concerned with drones’ potential to alienate U.S. allies²³ and erode international law norms in ways that could be abused by hostile nations.²⁴

Proponents of drone technology point to its tactical benefits. Drones enable the targeting of enemy forces in remote areas without

[<https://perma.cc/U64D-5YEW>]); Chris Woods, *The Story of America’s Very First Drone Strike*, ATLANTIC (May 30, 2015), <https://www.theatlantic.com/international/archive/2015/05/america-first-drone-strike-afghanistan/394463/> [<https://perma.cc/F7LT-CDQZ>] (dating the United States’ first public use of deadly force via drone to October 7, 2001).

21. See generally William Funk, *Deadly Drones, Due Process, and the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 311 (2013) (summarizing Fourth Amendment concerns regarding drone use in discussion on U.S. and non-U.S. citizens); Joshua Andresen, *Due Process of War in the Age of Drones*, 41 YALE J. INT’L L. 155 (2016) (summarizing international legal norms of due process around drone use); Arielle Klepach, *What OLC Missed: Anwar al-Aulaqi and the Case for Citizenship Forfeiture*, 55 COLUM. J. TRANSNAT’L L. 499 (2016) (discussing the targeting of American citizens by drone programs).

22. Compare COLUM. L. SCH. HUM. RTS. CLINIC, COUNTING DRONE STRIKE DEATHS (2012), <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf> [<https://perma.cc/2AVE-22TT>] [hereinafter COLUM. L. SCH.] (discussing civilian deaths caused by drone strikes and recommending improvements to various organizations), with *The Drone War in Pakistan*, NEW AM., <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-drone-war-in-pakistan/> (last visited Aug. 26, 2022) [<https://perma.cc/CJ9Y-5MRU>] [hereinafter *The Drone War in Pakistan*] (describing the evolution of drone strikes across U.S. presidential administrations and related decrease in civilian deaths over time), and Glenn Kessler, *Murphy’s Misfired Claim that 8 out of 10 U.S. Drones Miss Their Target*, WASH. POST (Sept. 16, 2021, 3:00 AM), <https://www.washingtonpost.com/politics/2021/09/16/murphys-misfired-claim-that-8-out-of-ten-us-drones-miss-their-target/> [<https://perma.cc/EGY9-5W5K>] (describing conflicting accounts of the accuracy of U.S. drone strikes). For a legal analysis, see Ranjana Ferrao, *Drones and the Future of Armed Conflict*, 16 ISIL Y.B. INT’L HUMANITARIAN & REFUGEE L. 270 (2016) (discussing impacts on civilians and the humanitarian concerns therein specific to drones).

23. Alienation-of-allies arguments center on both (i) the damage to sovereignty that drone strikes may inflict if conducted without clearance from the target’s country, and (ii) the damage drone strikes cause to theories and traditions that provide the international system’s framework. See Daniel Brunstetter & Megan Braun, *The Implications of Drones on the Just War Tradition*, 25 ETHICS & INT’L AFFS. 337, 345–55 (2011) (damage to sovereignty); Michael Richardson, *Military Drones Are Changing, as Are the Wars They’re Fighting. Here’s What’s Happening Now*, ABC RADIO NAT’L (Feb. 25, 2021, 2:00PM), <https://www.abc.net.au/news/2021-02-26/military-drones-and-wars-are-changing-heres-whats-happening/13186132> [<https://perma.cc/TYQ9-7X2Q>] (discussing the future of drone wars across nations).

24. This final concern seems to have come to fruition in the imminence realm, as discussed in detail in Sections 0 and 0 of this Note. For a more general predictive concern over drone uses’ capacity to erode international law norms, see Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, GUARDIAN (June 21, 2012, 12:54 PM), <https://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un> [<https://perma.cc/NT5T-CSGC>].

the need for “boots on the ground” engagement²⁵ and can respond quickly to emergent threats or novel intelligence.²⁶ Perhaps more importantly, drone use provides an asymmetrical advantage in counterinsurgency operations²⁷ without risking the lives of American warfighters.²⁸ UAVs are therefore vital to force projection²⁹ in the face of limited economic or human resources,³⁰ complex counterinsurgency operations, and reduced public support.³¹

25. Barack Obama, U.S. President, *Remarks at National Defense University*, 1 PUB. PAPERS 479 (May 23, 2013), <https://www.govinfo.gov/app/details/PPP-2013-book1/PPP-2013-book1-docpg479/summary> [<https://perma.cc/JL2N-F2UN>] [hereinafter *Remarks at NDU*] (explaining how the United States engaged in “lethal, targeted action against Al Qaida” with remotely-operated drones in instances where traditional conflict would “pose profound risks to [U.S.] troops and local civilians” and “boots on the ground may trigger a major international crisis”); Daniel Byman, *Why Drones Work: The Case for Washington’s Weapon of Choice*, 92 FOREIGN AFFS. 32, 32–34 (2013) (defending U.S. drone policy in contrast to “boots on the ground” alternatives).

26. See GERTLER, *supra* note 19, at 1 (noting drones’ “prompt strike capability”).

27. *Id.*

28. See *Remarks at NDU*, *supra* note 25, at 482.

29. Force projection is technically defined as “the movement of military forces from CONUS or a theater in response to requirements of war or operations other than war” and extends from mobilization, through redeployment, to subsequent demobilization. See FRANK R. BOYNTON, FORCE PROJECTION OPERATIONS: LESSONS FROM AMPHIBIOUS WARFARE DOCTRINE 4 (1995) (citing DEP’T OF THE ARMY, FM 100-5 (1993)). In international politics, the term (or its analogues, “power projection” and “hard power projection”) is also frequently used to refer to the ability of the United States to quickly transport its military assets to far-off theaters (and win decisively after doing so). For an example of this usage and discussion of the United States’ current “power projection” capability, see Michael J. Mazarr, *Toward a New Theory of Power Projection*, WAR ON THE ROCKS (Apr. 15, 2020), <https://warontherocks.com/2020/04/toward-a-new-theory-of-power-projection/> [<https://perma.cc/82QJ-HP2M>].

30. See Borsari, *infra* note 56 (“Turkish drones are cheap as well as effective” and citing sales to low-resourced militaries such as Ethiopia and Ukraine.). Even in the United States, death and casualty tolls have exhausted American support for extended involvement and resulted in heavy financial tolls on the Veterans Affairs Administration and other social safety nets for returning troops. Over 7,000 service members and 8,000 U.S. contractors have died in post-9/11 conflicts. *U.S. & Allied Killed*, WATSON INST. FOR INT’L. & PUB. AFFS., <https://watson.brown.edu/costsofwar/costs/human/military/killed> (last updated July 2021) [<https://perma.cc/F3ZR-2MVH>]. Beyond battlefield deaths, 30,177 U.S. service members and veterans have died by suicide since September 11, 2001. *Id.*

31. Extended troop commitments in Iraq and Afghanistan have reduced support for involvement abroad among the American polity. See Amber Phillips, *When and How Americans Started Souring on the War in Afghanistan*, WASH. POST (Aug. 19, 2021, 9:55 AM), <https://www.washingtonpost.com/politics/2021/08/18/when-how-americans-started-souring-war-afghanistan/> [<https://perma.cc/A3LU-MRCK>] (discussing the change in public opinion regarding the United States’ military action in Iraq and Afghanistan). Interestingly, this trend may be reversing as tensions with Iran, with China, and within Ukraine rise. A 2020 survey of public opinion found that Americans generally support maintaining our current troop presence in the Middle East. Dina Smeltz & Craig Kafura, *American Public Support for US Troops in Middle East Has Grown*, CHI. COUNCIL ON GLOB. AFFS. (Feb. 10, 2020), <https://www.thechicagocouncil.org/research/public-opinion-survey/american-public-support-us-troops-middle-east-has-grown> [<https://perma.cc/W4F2-KVX5>]. Notably, more than fifty percent of Americans supported the deployment of U.S. troops to assist Ukraine in repelling Russian aggression as of September 2021. Fosca Majnuni D’Intignano & Craig Kafura, *Half of Americans Support Use of US Troops in Defense of Ukraine*, CHI. COUNCIL ON GLOB. AFFS. (Sept. 14, 2021),

Despite the rapid proliferation and increased use of drones,³² formal international law governing their use remains unsettled.³³ Drone use in state-on-state wars is governed by the prohibitions established in the law of armed conflict for use of *any* weapons system, while parameters for drone use in counterinsurgency efforts outside war zones remain poorly defined.³⁴ In the current grey area, drone-using nations might have license to deploy force against the sovereign territory of another nation without facing legal or kinetic consequences for doing so.

Over the past two decades, the United States attempted to justify the use of UAVs in two ways. The first justification was that each strike was part of a larger international conflict: either the wars in Iraq and Afghanistan or the more amorphous Global War on Terror (“GWOT”).³⁵ The second was a broad interpretation of the “imminence” principle of self-defense under international law.³⁶ Without clear continued license under the 2001 Authorization for Use of Military

<https://www.thechicagocouncil.org/commentary-and-analysis/blogs/half-americans-support-use-us-troops-defense-ukraine> [<https://perma.cc/6JQN-YMDP>].

32. See *infra* Section 0.0.0.

33. Compare Lynn E. Davis, Michael McNerney & Michael D. Greenberg, *Clarifying the Rules for Targeted Killing*, RAND CORP. 13 (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf [<https://perma.cc/D4XL-UH6H>] (claiming to present a clear set of rules for drone engagement “built on the critical elements of international law”), with *The Humanitarian Impact of Drones*, WOMEN’S INT’L LEAGUE FOR PEACE & FREEDOM 8 (2017) (presenting an entirely different legal framework for drone use focusing on “ground[ing] any policy debate” about drone use on “human-centered evidence”).

34. See Davis et al., *supra* note 33, at 12–13, 16–17.

35. Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFFS. 55, 64–65 (Summer/Fall 2003) (discussing how the United States characterizing the War on Terror as an “international armed conflict” in effect “serve[s] as a global waiver of domestic and international criminal and human rights laws that regulate, if not prohibit, killing”).

36. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks of John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws” (Sept. 16, 2011). It is noteworthy that the United States was not alone in its desire to broaden the definition of imminence. Similar statements emerged from the U.K., where the U.K. House of Commons Foreign Affairs Committee responded to the Bush Administration National Security Strategy 2003 report by stating that “the notion of ‘imminence’ should be reconsidered in light of new threats to international peace and security We recommend that the Government work to establish a clear international consensus on [pre-emptive self-defense].” Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 771 (2012) (quoting FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2002–03, HC 196, ¶ t).

Force (“AUMF”)³⁷ or major, direct U.S. participation in armed conflict,³⁸ the United States is now dependent on the imminence argument to justify further UAV operations.

Under the United States’ interpretation of the imminence principle, drone strikes on territories outside of armed conflict zones are legal if carried out in self-defense against imminent threats by nonstate terrorist actors.³⁹ While use of force in self-defense is a paramount right of sovereign nations under international law, its use in anticipation of an imminent attack has been relatively controversial.⁴⁰ The United States’ broad conception of imminence was rejected in 2003.⁴¹ Since then, four administrations have worked to advance customary law adoption of broad imminence.⁴² Only recently, with the killings of Qasem Soleimani and Ayman Al-Zawahiri, has the United States tested the postwithdrawal legality of strikes⁴³ that President Biden suggests are vital to U.S. defense (one-off uses of force against territory of a nonconsenting nation).⁴⁴

37. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). As discussed *infra* Part I.A., further UAV operations may be difficult to justify under the 2001 Authorization for Use of Military Force both because of the attenuated nexus to the persons who planned the September 11th attacks against the United States, and because of the legal grey area posed by the global battlefield the AUMF suggests.

38. While U.S. troops remain engaged in counterinsurgency and deterrence operations abroad, as well as limited combat roles in Syria, Iraq, and parts of Africa, large-scale combat operations have ceased, and President Joe Biden has claimed we are no longer at war. See *Dates and Names of Conflicts*, U.S. DEP’T OF VETERANS AFFS., https://www.va.gov/vetsinworkplace/docs/em_datesnames.asp (last updated July 7, 2021) [<https://perma.cc/GF5E-BZ4D>] (listing all “recent conflicts” as having ended in 2014); Tess Bridgeman & Brianna Rosen, *Introduction to Symposium: Still at War—Where and Why the United States is Fighting the “War on Terror,”* JUST SECURITY (Mar. 24, 2022), <https://www.justsecurity.org/80800/introduction-to-symposium-still-at-war-where-and-why-the-united-states-is-fighting-the-war-on-terror/> [<http://perma.cc/98SH-FLKS>] (describing current dwindling U.S. involvement abroad without referencing any traditional large-scale state-on-state international conflicts); Remarks to the United Nations General Assembly in New York City, 2021 DAILY COMP. PRES. DOC. 7 (Sept. 21, 2021) (“I stand here today, for the first time in 20 years, with the United States not at war. We’ve turned the page.”).

39. Koh, *supra* note 36.

40. See NOAH WEISBORD, *THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS* 137–38, 149–50 (2019) (“[The United States] was pushing to lower the threshold on ‘armed attack’ so that [it] could respond defensively to the tiniest uses of force, while simultaneously raising the threshold on aggression . . .”).

41. See Jorge Alberto Ramírez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT’L L.J. 1, 20–22 (2003) (explaining how, in the aftermath of 9/11, the United States failed to convince other members of the Security Council, with the exception of Great Britain, that Hussein “presented an immediate danger for which no other response but the use of force was available”).

42. The Bush, Obama, Trump, and Biden Administrations have each taken steps to advance customary adoption of broad imminence. See discussion *infra* Section II.

43. See discussion *infra* Section III.B.2-3 (discussing the distinctiveness of the Soleimani and Al-Zawahiri strikes and their role as indicators of shifts in international customary law).

44. See Remarks on the Situation in Afghanistan, 2021 Daily Comp. Pres. Doc. 1 (Aug. 16, 2021):

The success of the United States' promotion of the expanded imminence principle comes at a high potential cost given the rapidly rising use of drone technology. In the wake of the United States' departure from Afghanistan, precision strikes by UAVs are key to future U.S. national security strategy,⁴⁵ despite their potential political cost.⁴⁶ Unfortunately, the features that make drones such a key part of the U.S. national security toolbox also make them attractive to other, potentially hostile actors. The United States is no longer alone in drone use: armed drones are proliferating rapidly,⁴⁷ and the rules the United States crafted for itself now provide expanded license for allies and enemies alike.⁴⁸

Take, for example, drone use in the Russia-Ukraine conflict. Ukrainian Armed Forces' social media accounts have heralded the use of Turkish-made Bayraktar TB-2 drones as a key defense technology.⁴⁹

We conduct effective counterterrorism missions against terrorist groups in multiple countries where we don't have permanent military presence. If necessary, we'll do the same in Afghanistan. We've developed counterterrorism over-the-horizon capability that will allow us to keep our eyes firmly fixed on any direct threats to the United States in the region and to act quickly and decisively if needed.

45. *Id.*; see also Lara Seligman, 'Guidance Is to Just Do It.' Biden Greenlights More Strikes on ISIS-K, POLITICO (Aug. 28, 2021, 10:16 AM), <https://www.politico.com/news/2021/08/28/isis-k-military-expects-additional-retaliatory-strikes-507080> [<https://perma.cc/JPM7-GYEN>] (describing Biden's use of drones to respond to ISIS-K threats at the end of the Afghanistan withdrawal and in retaliation for U.S. service members killed at the Kabul airport); President Biden Is Weighing How Extensively to Use Drones, ECONOMIST (Oct. 7, 2021), <https://www.economist.com/united-states/2021/10/07/president-biden-is-weighing-how-extensively-to-use-drones> [<https://perma.cc/H53M-7KL5>] (explaining potential hesitations the Biden administration indicated in its drone policy, but ultimately concluding that U.S. defense policy would continue to trend towards drone use).

46. One especially controversial line of criticism centers around the number and proportion of drone-strike deaths for targeted "terrorists" versus the numbers of civilians. Critics argue that most drones miss their intended targets or cause disproportionate civilian deaths, whereas proponents of drone programs often argue that they are better able to target terrorists than traditional operations, and that most strikes hit their intended targets, as opposed to collateral civilians. Compare COLUM. L. SCH., *supra* note 22, at 4 (discussing lack of clear information), with *The Drone War in Pakistan*, *supra* note 22 (providing figures showing a higher concentration of militant deaths than civilian deaths), and Kessler, *supra* note 22 (noting a lack of clarity in the numbers of civilian versus militant deaths). For an example of past criticisms from a domestic source, see Kate Martin, *Are U.S. Drone Strikes Legal?*, CTR. FOR AM. PROGRESS (Apr. 1, 2016), <https://www.americanprogress.org/article/are-u-s-drone-strikes-legal/> [<https://perma.cc/46UN-FXCC>]. For a summarization of U.N. reports and international critiques of the U.S. drone program, see Bowcott, *supra* note 24.

47. Michael C. Horowitz, Joshua A. Schwartz & Matthew Fuhrmann, *China Has Made Drone Warfare Global*, FOREIGN AFFS. (Nov. 20, 2020), <https://www.foreignaffairs.com/articles/china/2020-11-20/china-has-made-drone-warfare-global> [<https://perma.cc/U67P-P7H9>] ("Our research shows that 18 countries obtained armed drones from 2011 to 2019.").

48. See *infra* Section III.

49. Operational Armed Forces (@operativno_ZSU), TWITTER (Feb. 27, 2022, 12:58 PM), <https://twitter.com/UkrArmyBlog/status/1498024804967976964> [<https://perma.cc/Y4FR-LU8T>] [hereinafter Operational Armed Forces]; Moshe Schwartz (@YWNReporter), TWITTER (Feb. 27,

Video of a purported drone strike on a Russian convoy is captioned “Have fear, enemies! There will be no peace for you on our earth!” and cheers can be heard in the background as drone payloads hit their target.⁵⁰ Bayraktar drones have also been central to Ukraine’s public relations push against Russian forces. A Twitter page linked to the Ukrainian Land Forces released a song hailing the technology⁵¹ and included a video of front-line soldiers taunting Russians, emphasizing the threat posed by Bayraktars.⁵²

While this is hardly the first use of drones in an armed conflict, the use of Bayraktar drones highlights key advantages for many new acquirers. One such advantage is their ability to inflict disproportionate damage at a low cost and at low risk to front line troops.⁵³ In the case of the Bayraktar, drones are light, cheap, and readily available for sale.⁵⁴ In the past two years alone, Bayraktar drones have been used in Ethiopia, Azerbaijan, Libya, and Syria.⁵⁵ Their sale—often among parties refused by other weapons-exporting nations—is a key element of Turkish foreign policy.⁵⁶ This falls in direct contrast to early drone adopters and developers, who were often hesitant to sell or share drone systems.⁵⁷ The danger of this proliferation is apparent, especially as

2022, 1:10 PM), <https://twitter.com/YWNReporter/status/1498012576390778882> [<https://perma.cc/88LY-MW6N>].

50. Operational Armed Forces, *supra* note 49.

51. Clash Report (@clashreport), TWITTER (Mar. 1, 2022, 10:13 AM), <https://twitter.com/clashreport/status/1498692841526251526> [<https://perma.cc/SA7Q-D8BN>] (playing a video published by Ukrainian ground forces, noting the original was captioned “Punishment of #Bayraktar in the name of #Ukrainian children, Georgians, Syrians, Chechens, and Crimean Tatars”).

52. Callie Patteson, ‘You Are F—ed’: Ukrainian Soldier Issues Warning to Russians in Cheerful Video, N.Y. POST, <https://nypost.com/2022/02/26/ukrainian-soldier-issues-warning-to-russians-in-cheerful-video/> (last updated Feb. 26, 2022, 10:42 AM) [<https://perma.cc/D9JE-Q59C>] (“Do you like our Bayraktars? . . . What do you think—what’s flying above you right now . . . ? Dudes, you are f—ed!”).

53. GERTLER, *supra* note 19, at 3. See generally CHRISTIAN BROSE, THE KILL CHAIN: DEFENDING AMERICA IN THE FUTURE OF HIGH-TECH WARFARE (2020) (describing the relative advantages of novel and emerging war-fighting technologies).

54. Billy Perrigo, *Ukraine’s Secret Weapon Against Russia: Turkish Drones*, TIME (Mar. 1, 2022, 3:40 PM), <https://time.com/6153197/ukraine-russia-turkish-drones-bayraktar/> [<https://perma.cc/BW3F-DVK5>].

55. *Id.*

56. *Id.* (“[T]he drones are widely seen to be an arm of Turkish foreign policy.”); see also Federico Borsari, *Turkey’s Drone Diplomacy: Lessons for Europe*, EUR. COUNCIL ON FOREIGN RELS. (Jan. 31, 2022), <https://ecfr.eu/article/turkeys-drone-diplomacy-lessons-for-europe/> [<https://perma.cc/57ZK-J3M6>] (summarizing the benefits and drawbacks of Turkish drone policy).

57. Perrigo, *supra* note 54 (noting both that the United States and China were hesitant to sell drone technology and that, unlike the United States, “Turkey attached no political conditions to its drone exports”).

Russia stands accused of using Iranian-made drones to attack Ukrainian civilians.⁵⁸

While the ethical and policy tradeoffs of American drone use remain fertile ground for debate, drone technology is poised to play a major role in modern conflicts. China⁵⁹ and Russia⁶⁰ have embraced armed drone programs, as have more than thirty-five other countries.⁶¹ The legal justifications and rules the United States has proffered for its own drone program, imported into international law by customary law via widespread state practice and *opinio juris*, govern these emerging drone programs as well.⁶²

This Note examines key sources of international law to demonstrate that the United States' attempt to broaden the definition of imminence and license its use of drones in states with whom they are not engaged in international armed conflict have been successful. It then examines the consequences of that license—including the broad loophole available to aggressive states and nonstate actors—and the avenues for U.S. leadership to help rein in its own legal doctrine in order to avoid dangerous applications. In the interest of clarity, this

58. Associated Press, *As Battle for Ukraine's Skies Rages, Iran Acknowledges Sending Drones to Russia*, L.A. TIMES (Nov. 7, 2022, 1:51 AM), <https://www.latimes.com/world-nation/story/2022-11-07/iran-acknowledges-sending-drones-russia-war-ukraine> [http://perma.cc/3J8T-TA9U].

59. See Kristin Huang, *Regional Stability 'At Risk' from China's Growing Use of Military Drones*, S. CHINA MORNING POST <https://www.scmp.com/news/china/military/article/3147997/regional-stability-risk-chinas-growing-use-military-drones> (last updated Sept. 11, 2021, 11:06 PM), [https://perma.cc/R5CC-3CKZ] (highlighting China's increasing public use of drones, as well as the responsive development and use of drone technology by China's Pacific neighbors); Bruce Einhorn, *Combat Drones Made in China Are Coming to a Conflict Near You*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-03-17/china-s-combat-drones-push-could-spark-a-global-arms-race> (last updated Mar. 18, 2021, 7:04 AM) [https://perma.cc/Z2GZ-X4YJ] (describing Chinese sales of drones to Nigeria, the United Arab Emirates, Egypt, Saudi Arabia, and other nations for counterinsurgency and traditional military purposes).

60. See David Hambling, *Russia Reveals New Drone Capabilities, Hinting at What It Could Bring to Bear in Ukraine*, FORBES (Dec. 23, 2021, 5:33 AM), <https://www.forbes.com/sites/davidhambling/2021/12/23/russia-reveals-new-drone-precision-bomber-dogfighter-and-more/?sh=7ecbf9032252> [https://perma.cc/DC4T-VTAY] (noting that while Russia's newest drone systems are "clearly not yet in front-line service," the opening of new drone factories point to increased use and "many Russian military drones are already deployed, and may be ready to fly over Ukraine in what may be the largest demonstration of robot airpower yet").

61. *Who Has What: Countries with Armed Drones*, NEW AM., <https://www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-with-armed-drones/> (last visited Nov. 23, 2022) [https://perma.cc/ZE8P-HX6V] [hereinafter *Who Has What: Countries with Armed Drones*]; see also Patrick Tucker, *Every Country Will Have Armed Drones Within 10 Years*, DEF. ONE (May 6, 2014), <https://www.defenseone.com/technology/2014/05/every-country-will-have-armed-drones-within-ten-years/83878/> [https://perma.cc/3RVA-EJEA] (predicting massive proliferation of drones by the year 2024).

62. See generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001) (describing the universally and reciprocally binding nature of customary law norms under what the author dubs traditional custom and modern custom).

analysis is limited to the adoption of the imminence principle in customary international law, leaving due process, targeting, and the postimminence determinations of necessity and proportionality to other scholars.

Part I briefly introduces key international law principles, reviewing major sources of international law, principles of armed conflict law, and the traditional view of the imminence requirement. Part II provides a brief overview of the U.S. drone program and attempts to shift customary law. Part III tracks the acceptance of drone use through acquiescence in customary law, comparing state practice and *opinio juris* in response to drone strikes to that in response to other unjustified uses of force. Finally, Part IV explores the pitfalls of the broadened imminence exception and the opportunities the United States has to curb its most dangerous applications.

I. INTERNATIONAL LAW IN THE WAKE OF THE GLOBAL WAR ON TERROR

International law exists as a system of overlapping rights and duties, imposed by a web of formal and informal law. This Section focuses on key concepts related to use of force analysis in drone strikes, and how customary law and treaty law interact to define those concepts. Part A explains the difference between *jus ad bellum* (the body of law justifying the transition from peace to armed conflict) and *jus in bello* (the body of law applicable to parties to armed conflict), and the relevance of these concepts to determinations of drone strike legality. Part B narrowly focuses on enforcement and consequences for unlawful use of force in international law. Part C gives a baseline definition of imminence, upon which the shifts proposed by the United States and adopted by customary law will build. Finally, Part D explains customary law's relevance to international law generally, and the basic principles for determination of customary international law.

A. Defining the Playing Field: Jus ad Bellum, Jus in Bello, and the Global War on Terror

For the last twenty years, the United States' defense strategy has been routed through the lens of the "War on Terror."⁶³ Despite its name, precisely defining the scope of this "War" has challenged legal scholars, policymakers, and defense department officials. A traditional "war," or international armed conflict, carries with it certain rights and

63. See generally *National Security Strategy Reports*, NAT'L SEC. STRATEGY ARCHIVE, <https://nssarchive.us/> (last visited Nov. 23, 2022) [<https://perma.cc/2DSE-GPUF>] (logging National Security Strategy Reports from the Reagan Administration to present).

duties unavailable to states and their agents off the battlefield, and an ability to separate times of war from times of peace.⁶⁴ By failing to clearly delineate the “battlefield” of the War on Terror, or making it so wide as to render any delineation moot, the United States has made defining this War on Terror lens—in scope and character—particularly challenging.

While the Bush⁶⁵ and Obama⁶⁶ Administrations embraced a worldwide conception of the boundaries or battlefield on which the “Global War on Terror” was fought, the international-armed-conflicts-in-fact in Iraq and Afghanistan provided a lower bar for use of drones in relation to established conflicts.⁶⁷ During the pendency of the Iraq and Afghanistan conflicts, the United States used three main justifications for the legality of their use of force via drone strike: (1) the general license provided for use of force in an armed conflict,⁶⁸ (2) the consent of specific states for use of force on their territory,⁶⁹ and (3) the principle of imminent self-defense.⁷⁰ In the wake of a peace agreement with the Taliban, which (1) removes consent for use of force⁷¹ and (2) ends U.S. armed conflict in Afghanistan,⁷² justification for any

64. See discussion *infra* notes 77–85.

65. See *infra* Part II.B; Rona, *supra* note 35, at 64 (“U.S. officials . . . have asserted that the global War on Terror is an international armed conflict even when it is not a conflict between states, where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end undefinable . . .”).

66. See, e.g., Obama, *supra* note 25 (using the United States’ “war with al Qaeda, the Taliban, and their associated forces” as evidence that worldwide drone strikes are legal).

67. See *infra* note 101 (identifying the Iraq and Afghanistan conflicts as armed conflicts); *infra* note 84–85 (explaining the broadly permissive “military necessity” justification for use of force in an international armed conflict).

68. See Frédéric Mégret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT’L L. REV. 131, 148 (2011) (noting that the “War on Terror” has been “complicated by the fact that the invocation of the battlefield has been used somewhat opportunistically as a familiar trope reinforcing the sense that an actual war is going on, thus legitimizing the use of force in certain contexts”).

69. A key example here is the Strategic Partnership Agreement between the United States and Afghanistan. Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 2, ¶ 4, Sept. 30, 2014, T.I.A.S. No. 15-101 [hereinafter 2014 Afghan Agreement]. While not giving explicit consent for strikes, the Agreement lays the groundwork through an understanding that the United States is permitted to carry out counterterror operations. *Id.* Because states have a monopoly over the use of force within their borders, they implicitly also have the power to give others consent to carry out the use of force. See generally Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1 (2013) (discussing the many dimensions of a country’s consent to the use of force by outside nations and the potentially harmful implications for domestic law).

70. See discussion *infra* Parts II.B–C.

71. See discussion *infra* notes 219–221.

72. Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, Afg.-U.S., pt. 2, Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [<https://perma.cc/M5G8-ZD65>] [hereinafter Agreement for Bringing Peace to Afghanistan]. The

subsequent drone strikes in Afghan territory, or the territory of any other nonconsenting state, is limited to (3) the United States' expanded definition of imminence.

The battlefield is an important scoping consideration in international law of armed conflict, but it is poorly defined for the GWOT. *Jus ad bellum* is the body of law relevant to entry into the battlefield—i.e., at what point a situation becomes an armed conflict.⁷³ Once the threshold of armed conflict has been crossed, *jus in bello* is the body of law that restricts what actors can do during said armed conflict.⁷⁴ Thinking of war as a sports game, the battlefield is the playing field:⁷⁵ teams have to meet basic requirements to enter (wearing uniforms, finding enough players, etc.), and when teams do enter, they must follow specific rules and norms that define conduct. The basic requirements for entry are dictated by *jus ad bellum*. The rules that govern the battlefield include a variety of rights and responsibilities that diverge from behavioral norms (i.e., you can tackle someone at full force on a football field, while similar behavior would be battery off the field). The rights and responsibilities of nations on the battlefield are governed by *jus in bello*. This separation is vital. International humanitarian law recognizes that war is awful but aims to guarantee base protections to limit the worst and most offensive violence.⁷⁶

Agreement notably refused to recognize the Taliban-controlled government as a state. Instead, it referred to “Afghanistan” to indicate the territory and currently recognized state and to the “Afghan” government, which is not a party to the deal, but used a long and nuanced clause in each reference to the Taliban leadership. One especially overwrought clause reads in part:

The Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban will send a clear message that those who pose a threat to the security of the United States and its allies have no place in Afghanistan, and will instruct members of the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban not to cooperate with groups or individuals threatening the security of the United States and its allies.

Id. at pt. 2, para. 2. While odd, this phrasing is especially important to the law of war. States have Article 51 rights to individual or collective self-defense, but non-state actors do not. Annie Himes & Brian J. Kim, *Self-Defense on Behalf of Non-State Actors*, 43 U. PA. J. INT'L L. 241, 262–63 (2021). Nor do non-state actors have recourse to the International Court of Justice. Statute of the International Court of Justice art. 35, ¶ 1 (“The Court shall be open to the states parties to the present Statute.”); see also *Frequently Asked Questions*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/frequently-asked-questions> (last visited Nov. 23, 2022) [<http://perma.cc/UKD2-AZX3>] (“The Court has no jurisdiction to deal with applications from individuals, [NGOs], corporations or any other private entity.”).

73. Rona, *supra* note 35, at 60.

74. *Id.*

75. Mégret, *supra* note 68, at 133–34 (“There is more than a passing analogy between the battlefield and the fields on which sports are played.”).

76. See 1 MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, *HOW DOES LAW PROTECT IN WAR?* 4 (3d ed. 2011):

War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has

Without a clearly defined battlefield, society risks normalizing, in peaceful contexts, the horrors exclusively accepted as an unavoidable part of war. Once on that battlefield, *jus in bello* avoids the worst of those horrors.

All state parties to an international armed conflict are granted *jus in bello* rights and responsibilities.⁷⁷ The principle of specialty—*lex specialis derogat legi generali*—holds that in international law, specific law overrides general law.⁷⁸ Common Article 2 to the 1949 Geneva Conventions states that the Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁷⁹ Whenever there is hostile armed force between two States, there is an international armed conflict.⁸⁰ Even without two-state involvement, conflicts between a state and a non-state actor can rise to the level of a non-international armed conflict.⁸¹

experienced war, particularly the wars of our times, knows that unleashed violence means the obliteration of standards of behaviour and legal systems. Humanitarian action in a war situation is therefore above all a legal approach which precedes and accompanies the actual provision of relief. . . . In other words the idea is to persuade belligerents to accept an exceptional legal order – the law of war or humanitarian law – specially tailored to such situations.

(quoting Frédéric Maurice, *Humanitarian Ambition*, in 289 INT’L REV. RED CROSS 363, 371 (1992)).

77. Named parties to the Geneva Convention agree to follow, and to ensure that others follow, the laws of armed conflict—these are the “responsibilities” that all parties are bound to in any case of armed conflict. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”). Named parties also gain the “right” to take actions in military necessity. *Id.* at art. 143; see *infra* notes 81–85.

78. See FM 6-27/MCTP 11-10C: THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE, DEPT OF THE ARMY & U.S. MARINE CORPS 1-1 (Aug. 2019), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN19354_FM%206-27%20C1_FINAL_WEB_v2.pdf [<http://perma.cc/JSX3-BEBB>] [hereinafter MANUAL].

79. Geneva Convention IV, *supra* note 77, at art. 2.

80. See Rona, *supra* note 35, at 62–63 (highlighting the ease with which armed conflict is identified amongst States).

81. Any conflict between two states grants the full measure of the Geneva Conventions. See discussion notes 77–79. Comparatively, conflict between non-state actors and states or non-state actors with other non-state actors must reach a certain intensity to rise to the level of a Non-International Armed Conflict. MANUAL, *supra* note 78, at 1-4. This requires “protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a [s]tate,” distinct from isolated or sporadic terrorist acts. *Internal Conflicts or Other Situations of Violence – What is the Difference for Victims?*, INT’L COMM. OF THE RED CROSS (Oct. 12, 2012), <https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm> [<http://perma.cc/934Z-YEDG>]. Even if non-state conflict reaches the threshold for NIAC, Common Article 3 (identical in each of the 1949 Geneva Conventions) states that only “baseline” or “minimum” rights and responsibilities apply. See Geneva Convention IV, *supra* note 77, at art. 3 (proscribing the “minimum” standards for “armed conflict not of an international character”); see also MANUAL, *supra* note 78, at 1-4 (stating that “[a] non-international armed conflict (NIAC) is

Therefore, whenever two states are in conflict, or conflict with a nonstate actor reaches sufficient gravity, the Geneva Conventions apply.⁸² These conventions, which define the “rules of the road” in wars, prohibit any attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*.”⁸³ In other words, once in an armed conflict, the *lex specialis* of *jus in bello* permits all measures which are necessary to accomplish a legitimate military purpose,⁸⁴ as long as they do not run afoul of the Conventions’ express prohibitions.⁸⁵

The 2001 Authorization for Use of Military Force (“AUMF”) lends important dimension to U.S. perceptions of the GWOT’s limits. While international law applies to circumstances of armed conflict regardless of whether a formal declaration or authorization has been issued,⁸⁶ the United States has a clear legal framework for war making.⁸⁷ The Senate has the sole power to declare war, and the President directs the implementation of such a declaration as Commander in Chief.⁸⁸ While the constitutional structure is clear, modern American warmaking has departed somewhat from its standards. Congress has not formally declared war since World War II.⁸⁹ Instead, modern uses of U.S. military force have occurred under a

an armed conflict not between States, such as a conflict between a State and a non-State armed group or a conflict between two non-State armed groups” and describing Common Article 3 as “the minimum (baseline) legal standard for humane treatment in armed conflict”).

82. See MANUAL, *supra* note 78, at 1-3.

83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 (emphasis added).

84. “All measures necessary to accomplish military purpose” can be quite broad. See, e.g., MANUAL, *supra* note 78, at 1-7 (listing military necessity as justifying “seizing persons and destroying property[,] . . . violence and destruction, but also alternative means of subduing the enemy[,] . . . certain incidental harms that inevitably result from [justified] actions[,] . . . [and] use of overwhelming force”).

85. Cf. *Military Necessity*, INT’L COMM. OF THE RED CROSS, <https://casebook.icrc.org/printpdf/20549> (last visited Nov. 23, 2022) [<https://perma.cc/KS7Q-GUMW>] (noting that “the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict” while acknowledging the realities of conflict and its tendency to run afoul of humanitarian considerations).

86. *International Armed Conflict*, INT’L COMM. OF THE RED CROSS <https://casebook.icrc.org/printpdf/20560> (last visited Nov. 23, 2022) [<https://perma.cc/R77C-58YT>].

87. See *infra* notes 88–90 (describing the clear constitutional framework and slightly less clear, but still relatively straightforward modern legal framework).

88. U.S. CONST. art. I, § 8, cl. 11 (listing amongst Congress’s enumerated powers the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).

89. JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (2014) (summarizing the state of authorizations in the post-2001 era).

complex regime that follows the contours of the Constitutionally allocated roles without its formalities. The Executive still directs the military as Commander in Chief, but instead of declaration of war, Congress provides tacit approval through authorizations and appropriations.⁹⁰ The AUMF—the domestic legal basis for the GWOT—has been criticized as one of the most vague and broad authorizations in the history of American conflict.⁹¹ Prefaced by an assertion that the President has constitutional authority to take action to prevent acts of international terrorism, its operative clause reads:

... the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁹²

This expansive language is cabined slightly by implementation limits imposed by the War Powers Resolution.⁹³ Despite these limits, the AUMF has been interpreted broadly by each of the four administrations empowered to act under it.⁹⁴

90. *Id.* This lack of formality not only creates administrative complexity, but also has international law implications. The CRS Report states in brief that

Congress and the President have also enacted authorizations for the use of force rather than formal declarations of war. Such measures have generally authorized the use of force against either a named country or unnamed hostile nations in a given region. In most cases, the President has requested the authority, but Congress has sometimes given the President less than what he asked for. Not all authorizations for the use of force have resulted in actual combat. Both declarations and authorizations require the signature of the President in order to become law. In contrast to an authorization, a declaration of war in itself creates a state of war under international law and legitimates the killing of enemy combatants, the seizure of enemy property, and the apprehension of enemy aliens.

Id.

91. For a summary of vague/broad critiques from former Counterterrorism Officials, see *In Case You Missed It: Corker Calls for Updating 2001 Authorization for Use of Force Against Al Qaeda to Address New and Emerging Threats*, FOREIGN RELS. COMM. (Mar. 22, 2013), <https://www.foreign.senate.gov/press/dem/release/in-case-you-missed-it-corker-calls-for-updating-2001-authorization-for-use-of-force-against-al-qaeda-to-address-new-and-emerging-threats> [<https://perma.cc/V355-4AHK>]. For a more recent critique from a Fordham University School of Law professor, see Karen J. Greenberg, *To End a War, Start at the Beginning*, BLOOMBERG L. (Aug. 27, 2021, 4:01 AM) <https://news.bloomberglaw.com/us-law-week/to-end-a-war-start-at-the-beginning> [<https://perma.cc/AXW7-BEGQ>] (comparing the AUMF unfavorably to previous authorizations and declarations).

92. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

93. § 2(b), 115 Stat. at 224–25.

94. 167 CONG. REC. H2899–2900 (daily ed. June 17, 2021) (highlighting expansive use of the Iraq AUMF by multiple presidential administrations).

A clearly defined battlefield is vital to the success of the rules and norms of war.⁹⁵ By authorizing “all necessary and appropriate force” against a large group (here, any parties who “aided” the terrorist attacks occurring on September 11, 2001, since interpreted so broadly as to include organizations which did not exist in 2001),⁹⁶ Congress failed to define a discrete scope for U.S. operations. In other words, it failed to provide the limits of the battlefield on which GWOT was to be fought, and therefore created uncertainty as to which doctrinal paradigm applied: the *lex specialis* of *jus in bello* or the general law prohibiting use of armed force.

Policy following the AUMF did little to narrow the battlefield’s scope. In one case, George W. Bush insisted the GWOT’s battlefield was worldwide.⁹⁷ The international law implications of this statement were massive. Taken at face value, President Bush’s Administration did not have to face the complications of the imminence question. Instead, the United States could merely use force against any person defined as a “combatant” in its worldwide armed conflict, so long as that action was not limited by the Geneva Conventions and other laws of war.⁹⁸ While there has been plenty of disagreement over whether terrorists rise to the level of a combatant (or whether they should be classified as a belligerent or as a civilian participating in hostilities, with the latter being entitled to greater protections⁹⁹), conceptualizing the War on Terror’s battlefield as global reduced the legal justification required for the Bush Administration. As soon as the threshold of armed conflict is met, use of force is permitted with limited restriction, flipping the countervailing norm of use of force as generally restricted with limited exceptions.¹⁰⁰

95. See Mégret, *supra* note 68, at 133–35 (highlighting the importance of the battlefield as an emblem of war’s limitations and constraints).

96. See, e.g., EXEC. OFF. OF THE PRESIDENT, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (2018) (noting that the 2002 AUMF served as legal authorization for combat operations against ISIS, a group not in existence in 2001).

97. Mégret, *supra* note 68, at 132.

98. *Id.* at 146–47 (discussing the potential atrocities that come from a dissolution of the battlefield).

99. See generally Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT’L L. J. 323, 346–47 (2009) (discussing how the ICRC dualist approach defining “civilian” would include unlawful combatants).

100. Rona, *supra* note 35, at 58 (“Therefore, fiddling with the boundaries or, more accurately, with the overlap between humanitarian law and other legal regimes can have profound, long-term, and decidedly ‘un-humanitarian’ consequences on the delicate balance between state and personal security, human rights, and civil liberties.”).

The wars in Afghanistan and Iraq were recognized as armed conflicts under international law.¹⁰¹ There, U.S. operations crossed into the *lex specialis* of armed conflict, the laws of war applied,¹⁰² and any drone strike with an appropriate nexus to their hostilities became a legally justified use of force.¹⁰³ Since the combat area was defined, drone strikes were legal if they met the standards applied to strikes in a combat area (proportionality, necessity, etc.).¹⁰⁴ Now that the United States has withdrawn from conventional battlefields and reached peace agreements with both Iraq and Afghanistan, U.S. action returns to governance under the GWOT's uncertain legal footing, outside both the international and noninternational armed conflict paradigms.¹⁰⁵

Falling outside *jus in bello lex specialis*, the United States must use the principles of *jus ad bellum* to determine whether it is able to enter armed conflict and carry out any given use of force.¹⁰⁶ To do so, it must prove each use of force is justified under international law, specifically under the international law establishing a right to self-defense against imminent attack. Unlike *jus in bello*, which permits a general right to use force with delineated exceptions, *jus ad bellum* presents a general prohibition on the use of force through the United Nations Charter Article 2(4),¹⁰⁷ with a circumspect allowance for use of force aligned with the United Nations' purposes¹⁰⁸ or with self-defense.¹⁰⁹

101. See David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq Since 2003*, 86 INT'L L. STUD. 97, 106, 117 (2010) (characterizing the 2003 Gulf War as an international armed conflict and Iraq post-2003 and Afghanistan post-2005 as a new hybrid form of armed conflict). See generally James D. Kiras, *Modern Irregular Warfare: Afghanistan and Iraq*, in THE PRACTICE OF STRATEGY: FROM ALEXANDER THE GREAT TO THE PRESENT 260 (John Andreas Olsen & Colin S. Gray eds., 2011) (providing an overview of the nature of and strategies employed in the wars in Afghanistan and Iraq).

102. See MANUAL, *supra* note 78, at 1-7.

103. *Id.*; see Mégret, *supra* note 68, at 151-52 (discussing when targeted killings are appropriate given their connection to "a genuine battlefield or its equivalent"); see also *supra* note 82.

104. *Cf.* Rona, *supra* note 35, at 62 (discussing the role identifying combat territory plays in establishing an armed conflict).

105. See *supra* notes 65-79 and related discussion.

106. See discussion *infra* Part I.B.

107. U.N. Charter art. 2, ¶ 4.

108. *Id.* (allowing use of force for purposes aligned with the United Nations); *id.* at art. 42 (permitting the Security Council to license use of force to end a breach of peace if art. 41 non-force-based measures are insufficient to do so).

109. *Id.* at art. 51.

B. Why Imminence Matters: Consequences for Unlawful Use of Force in International Law

The rules of *jus ad bellum* and *jus in bello* do not exist in a vacuum. Without meaningful enforcement, nations would have no reason to be concerned over the paradigms applicable to use of force. To solve this problem, international law introduces a variety of enforcement mechanisms. Use of armed force without legal justification can be deemed an act of aggression—a manifest violation of the United Nations Charter.¹¹⁰ Absent an imminence justification, drone strikes fall squarely within this definition of an unlawful “act of aggression” under international law.¹¹¹

The United Nations Security Council (“UNSC”) is designed to prevent and punish threats to international peace, including acts of aggression.¹¹² The Security Council is a small but powerful organ of the United Nations, composed of fifteen state members (ten rotating, five permanent).¹¹³ Each of the permanent, or “P-5,” states have veto power over substantive Security Council resolutions.¹¹⁴ The Security Council is the only body of the United Nations with the power to pass mandatory rules for UN Member States; under the Charter of the United Nations, all member states are obligated to follow Security Council resolutions.¹¹⁵ More importantly, the United Nations Charter grants the Security Council the authority to take measures needed to

110. G.A. Res. 3314 (XXIX), annex, art. 1 (Dec. 14, 1974) (“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .”). Articles 2 and 3 in the Annex to the General Assembly Resolution further define aggression as including the first use of armed force by a state unless it is justified “in the light of other relevant circumstances,” and as specifically including the “use of any weapons by a State against the territory of another State.” *Id.* at arts. 2, 3(b).

111. *See id.* at art. 3(b); Rome Statute of the ICC, *supra* note 3, at art. 8 (stating that bombardment and “the use of any weapons by a State against the territory of another State” qualify as acts of aggression).

112. *See The UN Security Council*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/un-security-council> (last updated Aug. 12, 2021, 4:30 PM) [<https://perma.cc/B4NF-ZYW4>] (“UN Security Council seeks to address threats to international security.”). *See generally infra* notes 115-118 and related discussion.

113. U.N. Charter art. 23, ¶ 1.

114. *Id.* at art. 27, ¶ 3. Any P-5 member can block non-procedural action by the UNSC through a “no” vote. While the direct text of the U.N. Charter and its original translations suggest that affirmative votes of all parties are required (“concurring votes of all permanent members”), subsequent state practice has held that if a P-5 member abstains from a passing resolution, the resolution will still have binding legal impact. P-5 members do not have vetoes on purely procedural votes. Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 YALE L.J. 209, 210 (1951).

115. U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

“maintain or restore international peace and security” when there is a “threat to the peace, breach of the peace, or act of aggression.”¹¹⁶ In other words, a finding that a use of force is unjustified exposes the “aggressor” state to any measures the Security Council deems necessary to prevent reoccurrence or further aggression. These can include economic sanctions, legal use of force by any state the UNSC chooses, and more.¹¹⁷ The power of the UNSC to act is practically limited by the UNSC’s lack of implementation power—beyond the deployment of UN peacekeepers, the UNSC is dependent on the cooperation of member states to implement its resolutions.¹¹⁸

Because P-5 members can veto any UNSC enforcement mechanism, realist critiques have alleged that P-5 nations could act in violation of international law without consequences.¹¹⁹ However, Russia’s invasion of Ukraine and the subsequent UN response seems to contradict realist skepticism. Russia has unquestionably committed an act of aggression.¹²⁰ While the Security Council cannot act directly against Russia, the United Nations General Assembly (“UNGA”) overwhelmingly passed a resolution deploring Russia’s “aggression against Ukraine.”¹²¹ This political measure was bolstered by economic sanctions and military support to Ukraine.¹²²

Beyond the United Nations system and its ability to coordinate economic and diplomatic responses, international courts provide an enforcement venue for claims against aggressive states. In 2017, the International Criminal Court, which tries individuals accused of committing war crimes and crimes against humanity, added Article 8

116. *Id.* at art. 39.

117. *Id.* at arts. 40–45 (delineating the measures the UNSC is authorized to use to prevent or stop a breach of peace, as well as the obligations of member states to carry out UNSC resolutions with military recommendations).

118. *See id.*

119. *See, e.g.,* JOHN MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001). John Mearsheimer of the University of Chicago is one of the leading proponents of this thinking, which alleges that conventional deterrence is meaningless in a world of great power politics. *Id.*

120. *Compare* G.A. Res. 3314 (XXIX), annex., art. 3 (Dec. 14, 1974) (listing acts qualifying as prima facie evidence of crimes of aggression), *with* John Psaropoulos, *Timeline: Week One of Russia’s Invasion of Ukraine*, AL JAZEERA (Mar. 2, 2022), <https://www.aljazeera.com/news/2022/3/2/timeline-week-one-of-russia-invasion-of-ukraine> [https://perma.cc/NJ7P-AEVC] (listing acts committed by Russian forces against Ukraine’s territorial sovereignty).

121. Humeyra Pamuk & Jonathan Landay, *U.N. General Assembly in Historic Vote Denounces Russia over Ukraine Invasion*, REUTERS (Mar. 2, 2022, 6:25 PM), <https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/> [https://perma.cc/QQR9-LPUJ]. The vote passed with the support of 141 of the Assembly’s 193 members, with only five countries voting “no.” *Id.*

122. *See* Michelle Toh, Junko Ogura, Hira Humayun, Isaac Yee, Eric Cheung, Sam Fossum & Ramishah Maruf, *The List of Global Sanctions on Russia for the War in Ukraine*, CNN, <https://www.cnn.com/2022/02/25/business/list-global-sanctions-russia-ukraine-war-intl-hnk/index.html> (last updated Feb. 28, 2022, 6:12 PM) [https://perma.cc/L7GX-66AS].

bis to its catalog of potential charges.¹²³ This effectively criminalized the planning, coordination, or perpetration of aggressive acts by political, military, or even civic leaders.¹²⁴ The International Court of Justice (“ICJ”) can also provide recourse for states subject to unlawful use of force to demand financial compensation and cessation of infringing action from their aggressors.¹²⁵ While the ICC is focused on assigning individual liability and punishment, the ICJ provides a forum for nations to bring suit against other nations. The same day Russia invaded Ukraine, the Ukrainian government retained the law firm Covington & Burling to launch an ICJ claim.¹²⁶

Given the myriad consequences nations and their leadership face for acts of aggression, legal justification for each use of force is vital. An expanded definition of imminence—shifting drone strikes from an unlawful act of aggression to a lawful act of self-defense—is therefore vital to the success of future U.S. counterterrorism initiatives—in its absence, U.S. drone strikes’ counterinsurgency capabilities would not be worth the risk or sanctions, suits, or reprisals.

C. Imminence Defined

International law surrounding armed conflict is grounded in a blanket prohibition on State use of force.¹²⁷ Article 2(4) of the Charter of the United Nations specifies that “[a]ll members shall refrain in their

123. Rome Statute of the ICC, *supra* note 3, at art. 8; *see also The Crime of Aggression*, COALITION FOR THE INT’L CRIM. CT., <https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> (last visited Dec. 19, 2022) [<https://perma.cc/ZYC6-ZA8S>]:

The adoption of the resolution on the crime of aggression came after 10 days of intense diplomatic negotiation that stretched into the early hours of 15 December 2017. With ICC member states having decided upon the definition of the crime at a review conference in Kampala in 2010, ASP 16 was tasked with activation.

124. *Id.*; *see, e.g.*, THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kress & Stefan Barriga eds., 2016). However, even after the passage of the Kampala Amendments in 2017, which include *8 bis* aggression in crimes for which leaders can be found criminally responsible, questions remain about implementation and loopholes within the text of the crime, including potential exceptions for de minimis acts of aggression and acts which do not rise to the level of use of force (i.e., non-kinetic cyber-attacks). *See generally* WEISBORD, *supra* note 40, at 119–21.

125. *See generally* Victor Stoica, *Compensation*, in REMEDIES BEFORE THE INTERNATIONAL COURT OF JUSTICE: A SYSTEMIC ANALYSIS 108–44 (2021).

126. Cosmo Sanderson, *Ukraine Instructs Covington for ICJ Claim Against Russia*, GLOB. ARB. REV. (Feb. 28, 2022), <https://globalarbitrationreview.com/ukraine-instructs-covington-icj-claim-against-russia> [<https://perma.cc/A9HQ-N664>].

127. This is a slightly surprising, given that the international law governing conflict, or at least treaty-proscribed international law governing armed conflict, largely solidified after World War II and was therefore steeped in the recent memory of German and Japanese aggression. For a concise discussion of this process and its implications, *see* Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT’L L. 109 (2015) (articulating the nuances of post-war politics and their impact on the formation of international humanitarian law).

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.”¹²⁸ There are two exceptions within this blanket prohibition: (1) the right of self-defense, and (2) measures consistent “with the Purposes of the United Nations.”¹²⁹

The right of self-defense is enshrined in Article 51, stating “[n]othing . . . shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹³⁰ Article 51 has been held to implicitly incorporate the customary law right of preemptive self-defense.¹³¹ The customary law right was first articulated in the 1837 case of the *Caroline*.¹³² In the canonical “*Caroline*” Case, an American ship, the *Caroline*, was attacked near Niagara Falls by British soldiers.¹³³ The British claimed self-defense, arguing that the *Caroline*’s passengers were fomenting a Canadian rebellion.¹³⁴ Daniel Webster,

128. U.N. Charter art. 2, ¶ 4. The United Nations Charter serves as a foundational document for both describing the structure and goals of the United Nations, and for conceptions of international law in the post-World War II era, describing the roles, rights, and duties of sovereign nations under a United Nations system. See *United Nations Charter*, UNITED NATIONS, <https://www.un.org/en/about-us/un-charter> (last visited Oct. 13, 2022) [<https://perma.cc/TA8S-J853>]. While the Charter is only technically binding on “Member States” of the United Nations, the 193 Member States are a near-exhaustive list of recognized sovereign polities. See *id.*; *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states> (last visited Oct. 26, 2022) [<https://perma.cc/7JM9-885M>]. Exceptions are made for Palestine and Vatican City—which are Observer states to the UN system—and for polities with disputed political status such as (1) Republic of China (territorially based in Taiwan, claimed by People’s Republic of China), (2) Sahrawi Arab Democratic Republic (Western Sahara, Claimed by Morocco), (3) Turkish Republic of Northern Cyprus (northern Cyprus, Republic of Cyprus), (4) Republic of South Ossetia and Republic of Abkhazia (Georgia, Georgia), and (5) Republic of Kosovo (Serbia, Serbia). See generally Adrian Florea, *De Facto States: Survival and Disappearance (1945–2011)*, 61 INT’L STUD. Q. 2 (2017) (distinguishing UN Member States from those attempting to gain state recognition under international law and analyzing the rise and fall of several polities claiming to be or seeking recognition as states).

129. U.N. Charter art. 2, ¶4.

130. *Id.* at art. 51.

131. Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT’L L. 207, 218 (2002) (“Incorporated in the right of self-defense is the doctrine of anticipatory self-defense.”); Leah Schloss, *The Limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self-Defense and Nuclear Counter-Proliferation*, 43 GEO. J. INT’L L. 555, 558 (2005) (“Article 51 does not disturb the customary international law doctrine regarding the inherent right of self-defense from the *Caroline* case.”).

132. Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 90 (2003).

133. *Id.*

134. *Id.* The *Caroline* very well may have posed a serious threat—it had been used to deliver supplies and arms down the Niagara River to anti-British rebels in Canada. See WEISBORD, *supra* note 40, at 127.

the American Secretary of State charged with handling the subsequent diplomatic fallout, articulated in his letters the standard for anticipatory self-defense in customary law.¹³⁵ He stated that anticipatory self-defense is only justified when the necessity of using force is “instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation.”¹³⁶ This standard is now known as the “imminence” requirement, and continues to restrict states to preemptive self-defense only when they fear an attack is narrowly imminent.¹³⁷ *Caroline*’s core finding has been upheld by the Nuremberg tribunal,¹³⁸ Tokyo tribunal,¹³⁹ and the International Court of Justice.¹⁴⁰

The UNSC considered the bounds of imminence after a preemptive strike devastated Iraq’s nuclear site at Osirak. In 1981, Israel attacked an Iraqi nuclear reactor under the justification that Iraq intended to use the reactor to produce plutonium bombs.¹⁴¹ Within twenty-four hours, the then Prime Minister of Israel Menachem Begin not only claimed responsibility for the strike, but argued that it was justified self-defense given the reactor’s potential weaponization.¹⁴² The Security Council disagreed, finding the strike unjustified because the Iraqi attack was not sufficiently imminent¹⁴³—there was no specific target, time, or weapon, even if conditions seemed to make an attack inevitable. While the UNSC’s formal resolution provided an upper limit on the imminence requirement, its debate showed unprecedented

135. Schloss, *supra* note 131, at 559–60.

136. Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, British Special Minister (Aug. 6, 1842), *reprinted in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906) [hereinafter Webster].

137. Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT’L & COMPAR. L. REV. 1, 9 (2009) (“The requirement of imminence, on the other hand, signifies the temporal facet of self-defence. Traditionally, pleas of self-defence are only accepted when the lethal response of the defendant is immediate, directly following the untoward threats or acts of the aggressor.”); Mark L. Rockefeller, *The Imminent Threat Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard*, 33 DENV. J. INT’L L. & POL’Y 131, 133–134 (2004) (discussing the evolution of the “imminence” standard from *Caroline* and current use).

138. *United States v. Goering*, 6 F.R.D. 69, 99 (Int’l M. Trib. 1946).

139. LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1157–59 (1972).

140. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. REP. 161, ¶¶ 73–77 (Nov. 6); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 146–47 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9).

141. Neil J. Kaplan, *The Attack on Osirak: Delimitation of Self-Defense*, 4 N.Y. L. SCH. J. INT’L & COMPAR. L. 131, 131 (1982).

142. *Id.*

143. S.C. Res. 487 (June 19, 1981).

acceptance of the importation of the customary right to anticipatory self-defense into the text of Article 51.¹⁴⁴

Imminence is not the only potential exception to Article 2(4)'s prohibition on use or threat of force. Article 2(4)'s text itself provides some room for the use of force consistent with "the Purposes of the United Nations."¹⁴⁵ Measures consistent with the Purposes of the United Nations explicitly include Article 42's empowerment that the Security Council may "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."¹⁴⁶ "Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."¹⁴⁷ This empowers the Security Council to authorize a member state or groups of member states to use force in the name of global security.¹⁴⁸ Given the complicated nature of veto politics on the Security Council (as discussed below in Parts I and III) and the weighty implications of authorized use of force, the right to authorize force has been exercised only a few times: in the Korean War¹⁴⁹ and the Iraqi invasion of Kuwait,¹⁵⁰ for example. While many argue that explicit Security Council authorization is the only justification for the use of force outside of self-defense, some have interpreted the phrase "consistent with the Purposes of the United Nations" more broadly. This broader definition includes the "responsibility to protect," a doctrine that suggests that states are not only allowed but obligated to use force

144. *See id.* (adopting the report of Mr. Eklund, noting that Iraq "has accepted [IAEA] safeguards on all of its nuclear activities" and finding that Israel therefore committed a "clear violation of the Charter"); U.N. SCOR., 36th Sess., 2288th mtg. at 2, U.N. Doc. S/PV.2288 (June 19, 1981) (statement of Mr. Sigvard Eklund, Director General of the International Atomic Energy Agency) ("The task of the Agency in the implementation of safeguards is to verify that no safeguarded nuclear material is diverted from peaceful purposes."); Arend, *supra* note 132, at 95–96 ("[O]ther states . . . took a counter-restrictionist approach. They supported the lawfulness of anticipatory self-defense but believed that Israel had failed to meet the necessity requirement.").

145. U.N. Charter art. 2, ¶ 4.

146. *Id.* at arts. 2, 42.

147. *Id.* at art. 42. Article 3 opens "Member State" status to the original members of the United Nations that participated in the San Francisco Conference in 1942. *Id.* at art. 3. Article 4 extends membership to "all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." *Id.* at art. 4. While there are no formal statehood requirements in the Charter, states are assumed to be entities that possess a permanent population, defined territory, government, and capacity to enter relations with other states, often expressed through diplomatic recognition by existing states. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 201 (AM. L. INST. 1987). Currently, 193 states are recognized as Members of the United Nations. *Growth in United Nations Membership*, UNITED NATIONS, <https://www.un.org/en/about-us/growth-in-unn-membership> (last visited Nov. 15, 2022) [<https://perma.cc/5245-363V>].

148. *See, e.g., infra* notes 149–150 (Security Council Resolutions authorizing use of force by member states in line with this power).

149. S.C. Res. 84 (July 7, 1950).

150. S.C. Res. 678 (Nov. 29, 1990).

to prevent atrocities in nations where the government is “unable” to prevent those atrocities themselves.¹⁵¹ Recently, the Biden Administration has paired this “unable” standard with imminence arguments in justifying its strike on Ayman al-Zawahiri.¹⁵²

Traditional “hard” sources of international law, such as the United Nations Charter, Geneva Conventions, and other multilateral treaties, do not explicitly embrace or reject a broad imminence standard for self-defense.¹⁵³ In the absence of defined principles, courts, nations, and international law scholars must look to the shifting norms of customary law to fill in the gaps.

D. Identifying Shifts in Customary International Law

Customary international law is among the primary sources of international law. It is derived from the law of nations, and, like common law principles of domestic law, it is largely based in patterns and practices of states over time. The Statute of the International Court of Justice, which defines the role of the Court in arbitrating disputes between nations, acknowledges the existence of customary international law in Article 38(1)(b):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

[I]nternational custom, as evidence of a general practice accepted as law;

[T]he general principles of law recognized by civilized nations;

151. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 13, U.N. Doc. A/63/677 (Jan. 12, 2009).

152. See Joseph R. Biden, U.S. President, *Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan*, WHITE HOUSE (Aug. 1, 2022, 7:33 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/01/remarks-by-president-biden-on-a-successful-counterterrorism-operation-in-afghanistan/> [<https://perma.cc/3L9X-N9GK>]. (“The United States continues to demonstrate our resolve and our capacity to defend the American people against those who seek to do us harm.”); Press Statement, Anthony J. Blinken, U.S. Secretary of State, *The Death of Ayman al-Zawahiri* (Aug. 1, 2022), <https://www.state.gov/the-death-of-ayman-al-zawahiri/> [<https://perma.cc/95M4-45R5>] [hereinafter Blinken Press Statement] (explaining that “the United States will continue to act resolutely against those would threaten our country”).

153. Imminence is not the only component of self-defense to remain a “grey area” of international law. In the International Court of Justice alone, decisions have established a gravity threshold for self-defense without specifying what that threshold is and have alluded to the possibility that a series of low-scale attacks may pass any gravity threshold without specifying the quantity necessary to tip the scale. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 191, 195 (June 27); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. REP. 161, ¶¶ 51, 63–64, 72 (Nov. 6).

[S]ubject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.¹⁵⁴

While section (a) refers to international law in the form of treaties which bind parties to the dispute, sections (b) and (c) look to “international custom” and “general principles” as primary sources of international law. In other words, both custom and *jus cogens* norms (as “general principles” are often referred to) can be binding in the same way that contract-like treaties between states can be binding.¹⁵⁵ Even treaties are interpreted in the light of state practice.¹⁵⁶

The question for scholars and courts is then how to determine state practice. The Statute of the ICJ asserts that custom is “general practice accepted as law.”¹⁵⁷ This broad definition has been broken down to two elements by courts and scholars: (1) consistent and general international practice by states and (2) *opinio juris*, or the subjective element of acceptance as law by the international community.¹⁵⁸ Evidence of *opinio juris* is drawn not from the statements of international courts, but from statements of law by diplomats and other state representatives.¹⁵⁹ While the combination of consistent state practice and statements of law by public figures may seem like a low hurdle to the creation of binding international rules, context reveals that it is quite steep. “General international practice” and acceptance “by the international community” both require consensus that there is a customary rule—pointed opposition by only a few actors can prevent the emergence of a customary law rule.¹⁶⁰

154. Statute of the International Court of Justice art. 38, ¶1.

155. See David Kennedy, *The Sources of International Law*, 2 AM. U. INT'L L. REV. 1, 24 n.36 (1987).

156. Vienna Convention on the Law of Treaties art. 31, ¶ 3(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (explaining that the interpretation of treaties shall take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

157. Statute of the International Court of Justice art. 38.

158. THOMAS BUERGENTHAL & SEAN MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 27–28 (6th ed. 2013).

159. See *id.* at 28 (“[T]he practice must be one that is accepted by the states directly affected by rule.”).

160. *Id.* at 28–29 (“There must also not have been a significant number of states that have consistently rejected it. Beyond that, it is difficult to be more specific.”).

II. LETTING THE GENIE OUT OF THE BOTTLE: THE U.S. DRONE PROGRAM AND EFFORTS TO SHIFT IMMINENCE

A. *Origins of the Drone Program*

The United States began its use of unmanned aerial vehicles as early as 1917.¹⁶¹ The first use of UAVs in combat came with the AQM-34 Firebee in Vietnam—initially as an aerial gunnery target, and later for intelligence collection.¹⁶² For forty years after this first deployment, however, Firebee and similar UAVs remained unarmed.¹⁶³ It was only in the post-9/11 conflicts in Iraq and Afghanistan that armed UAVs proliferated.¹⁶⁴

B. *Pre-2000 Efforts to Shift Imminence*

The United States' efforts to shift the imminence standards predated the use of drones for targeted killings. Professor Noura S. Erakat has pointed to the rejection of ICJ jurisdiction over self-defense claims and actions during the Reagan Administration as early evidence of a targeted move towards elongated imminence.¹⁶⁵

In her 2014 analysis of the ways the Obama-era targeted killing program advanced a shift in imminence, Professor Erakat argued that the historical development of what she calls “new imminence” (or what would develop by the end of the Obama Administration into “elongated imminence”) began with the United States' rejection of ICJ justiciability on certain self-defense issues in the 1986 case of *Nicaragua v. United States*.¹⁶⁶ Professor Erakat continues to argue that this rejection was a purposeful shift towards the Security Council as a primary review mechanism for self-defense in order to allow the United States to be “a final arbiter of its own use of force.”¹⁶⁷

161. GERTLER, *supra* note 19, at 1. To reiterate, this Note uses the Department of Defense's definition of UAVs: “powered, aerial vehicles that do not carry a human operator, use aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.” *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killing on the Law of Self-Defense*, 56 ARIZ. L. REV. 195, 229–30 (2014).

166. *Id.* at 212–13.

167. *Id.* (citing *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 259, 288–89 (June 27) (Schwebel, J., dissenting)). While Professor Erakat does not explicitly discuss the analysis in *Nicaragua*, it should be noted that the ICJ's majority made a point to note its intent to not take an authoritative stand on the meaning of Article 51, stating instead that since “the issue of the lawfulness of a response to the imminent threat of

Professor Erakat also points to the Reagan Administration's 1986 strikes against Libya as evidence of early imminence.¹⁶⁸ After a terrorist attack allegedly ordered by the Libyan Government, the United States bombed terrorist and government facilities.¹⁶⁹ Justifying the attack over heavy international condemnation, the then Secretary of State George P. Schultz argued that "'passive defense,' or the legitimate use of force in response to an armed attack, does not adequately respond to terrorist threats and that the United States should aim to 'prevent and deter future terrorist attacks.'" ¹⁷⁰ While Secretary Schultz's efforts were met with international distaste (including a GA resolution condemning the attack as a violation of the U.N. Charter),¹⁷¹ in it one can see an early test of the international community's receptiveness to expanded imminence.

C. Bush Administration

In 2000, the United States began using armed drones on surveillance flyovers in Afghanistan. The first targeted killing by drone took place in October 2001,¹⁷² and soon after the first use of the modern predator-type drone occurred on February 4, 2002 when the CIA fired upon the Paktia province in Afghanistan, near the city of Khost.¹⁷³ Though U.S. drone operations during the Bush Administration were implemented intermittently until the final few months of the President's Administration, there were still an estimated fifty-seven strikes carried out in Pakistan, Somalia, and Yemen during his tenure.¹⁷⁴

Despite the covert nature of the Bush Administration's drone program, the justifications for 2003's Operation Iraqi Freedom already pointed to an expanded imminence principle outside *Caroline's* strict

armed attack has not been raised . . . the Court expresses no view on that issue." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.). Judgment, 1986 I.C.J. 14, ¶ 194 (June 27) (merits).

168. Erakat, *supra* note 165, at 212–13.

169. *Id.* at 213–14.

170. *Id.* at 214 (citing Hon. George P. Schultz, U.S. Sec'y of State, Terrorism and the Modern World, The Sherr Lecture 1984, Address Before the Park Avenue Synagogue, New York, N.Y. (Oct. 25, 1984)).

171. *Id.* (citing G.A. Res. 41/38, ¶ 1, U.N. Doc. A/RES/41/38 (Nov. 20, 1986)).

172. See Woods, *supra* note 20 (detailing the Predator strike in Afghanistan, which targeted Taliban leader Mullah Mohammed Omar).

173. John Sifton, *A Brief History of Drones*, THE NATION (Feb. 7, 2012), <https://www.thenation.com/article/archive/brief-history-drones/> [<https://perma.cc/E33B-XHT8>].

174. Jessica Purkiss & Jack Serle, *Obama's Covert Drone War in Numbers: Ten Times More Strikes than Bush*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 17, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush> [<http://perma.cc/7QG9-KRUE>].

bounds.¹⁷⁵ In justifying the invasion of Iraq, the White House rested the crux of its argument on the idea of preventative war,¹⁷⁶ giving an attenuated causal chain between ongoing actions and a potential threat to the United States. The reports states that the use of force against Iraq is vital:

Both because Iraq harbors terrorists and because Iraq could share weapons of mass destruction with terrorists who seek them for use against the United States, the use of force to bring Iraq into compliance with its obligations under UNSC resolutions would be a significant contribution to the war on terrorists of global reach. A change in the current Iraqi regime would eliminate an important source of support for international terrorist activities.¹⁷⁷

This attenuated connection used to justify intervention in Iraq went beyond the imminence principles traditionally espoused by *Caroline* and subsequent state practice. Scholars in the 2000s predicted that Bush policy presaged the development of new extended doctrines of anticipatory self-defense.¹⁷⁸ Despite this, the Bush Administration failed to gain the necessary *opinio juris* to shift the imminence principle through customary law¹⁷⁹—Russia, France, China, and nonpermanent members of the Security Council insisted that the invasion of Iraq was illegal without Security Council authorization.¹⁸⁰ It would take twenty years and three subsequent U.S. administrations for the imminence principle proffered in Bush’s Iraq speeches to gain the necessary customary law support to become binding.¹⁸¹

D. Obama Administration

Scholarly predictions of the emergence of novel anticipatory self-defense doctrines did not come to pass in traditional armed conflicts—the United States would not use anticipatory self-defense to launch major ground invasions after Iraq; however, in the Obama Administration’s “drone wars,” extended conceptions of imminence

175. The Bush Doctrine went so far beyond the *Caroline* conception of imminence that some scholars suggest it rendered the standard irrelevant. See Erakat, *supra* note 165, at 217–18.

176. Ramírez, *supra* note 41, at 3 n.7.

177. 149 CONG. REC. 1959 (2003).

178. See, e.g., John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 354 (2003) (explaining the Bush Doctrine “carv[es] out an exception to the principle of non-intervention”); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT’L L. REV. 69 (2003) (explaining the “right of anticipatory self-defence” is inherent in every state).

179. See Erakat, *supra* note 165, at 219 (“The international community responded to the Bush Administration’s war on Iraq with overwhelming criticism, demonstrating a rejection of . . . new imminence.”).

180. WEISBORD, *supra* note 40, at 92.

181. See discussion *infra* Part II.C–D (describing U.S. efforts), III.B (describing shifts in customary law).

would not only flourish, but become vital legal justifications for covert and overt actions.

As the war in Afghanistan continued, the U.S. drone program did as well. The program was officially acknowledged in former President Barack Obama's 2013 speech at the National Defense University, when he admitted that the United States took "lethal, targeted action against [al-Qaeda] and its associated forces, including with remotely piloted aircraft commonly referred to as drones."¹⁸² The Obama Administration officially used drones in lethal actions over 540 times outside of armed conflict against the territory of Pakistan, Somalia, and Yemen.¹⁸³ The Administration reported between 2,581 and 2,792 combatant deaths and between 65 and 117 noncombatant deaths outside active conflict zones from 2009–2016.¹⁸⁴ In war zones, the Administration is estimated to have carried out thousands more, with estimates suggesting that the Administration licensed more than 1,000 strikes against Afghanistan in 2016 alone.¹⁸⁵ Public pressure for greater transparency resulted in Executive Order 13,732, which required the Director of National Intelligence to collect and publish numbers of strikes for areas of armed conflict on a yearly basis.¹⁸⁶

President Obama and his executive team were artful in defending the legality of the drone program. The first disclosure of the program, by White House Counter Terrorism Advisor John Brennan, carefully distinguished the right of self-defense as a key source of the program's legality, and explicitly stated that international law did not prevent use of lethal force outside of a battlefield.¹⁸⁷ When Obama

182. DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 130 (2012); Obama, *supra* note 25. One public drone strike occurred during the Bush Administration, but a sustained program was never acknowledged, and the strike was criticized on due process grounds as opposed to imminence ones. See Erakat, *supra* note 165, at 219–20.

183. See Purkiss & Serle, *supra* note 174 (563 strikes). But see Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN RELS. (Jan. 20, 2017, 1:14 PM), <https://www.cfr.org/blog/obamas-final-drone-strike-data> [<https://perma.cc/MR5Y-C9FJ>] (542 strikes).

184. DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES 1 (2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> [<http://perma.cc/SA8D-2CFJ>] (areas of active hostilities are listed as Afghanistan, Iraq, and Syria).

185. See Purkiss & Serle, *supra* note 174.

186. Exec. Order No. 13,732, 81 Fed. Reg. 44,483 (July 7, 2016).

187. See *John Brennan Delivers Speech On Drone Ethics*, NPR (May 1, 2012, 1:00 PM), <https://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics> [<https://perma.cc/S96A-2BQE>] (stating that White House Counterterrorism Adviser John Brennan's 2012 speech was "the first formal acknowledgment . . . that the United States conducts drone strikes" and quoting a soundbite of John Brennan saying, "[W]e may also use force consistent with our inherent right of national self-defense. . . . [N]othing in international law . . . prohibits us

himself formally announced the program, he not only carefully circumscribed the legal reasoning for the use of drones—war with Al Qaeda—but delineated between strikes in and out of international armed conflicts,¹⁸⁸ and between unlawful reprisals and lawful self-defense.¹⁸⁹

Harold Koh, Department of State Legal Adviser under the Obama Administration, was also vital in justifying these attacks. Koh developed a third theory of imminence that went beyond not only the narrow temporal scope of the *Caroline* case and the longer “last possible window” analysis articulated in pre-2000s scholarship,¹⁹⁰ but also beyond the articulated UNSC standard in the Iraqi reactors case as well.¹⁹¹ Professor Koh developed a theory of “elongated imminence” during his time at the Obama White House.¹⁹² Under this theory, a consistent pattern of prior activity could justify an act of self-defense without any explicit indication of a specific future attack. For example, use of force would be lawful against a terrorist if they were found to be designing suicide vests, even if the terrorist had not actually built nor boarded a plane with them.¹⁹³ Professor Koh argued that waiting until the actual “last possible window” would require too great of a risk. For Professor Koh, the high likelihood that a terrorist at the vest design stage would carry out that attack, and the diminishing probability of successful U.S. interception at a later stage, create an effective last window to act in a much earlier temporal scope than either *Caroline* or

from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat”).

188. See Obama, *supra* note 25 (“In the Afghan war theater, we must—and will . . . continue to take strikes [not only] against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces.”); *cf. id.* (“Beyond the Afghan theater, we only target al Qaeda and its associated forces. . . . America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.”).

189. See *id.* (“America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”).

190. See, e.g., Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 166 (2000) (“[T]his window of opportunity, under the [*Caroline*] criteria for self-defense, will almost never exist in the context of terrorist attacks. . . . [It is] simply too restrictive to reasonably respond to the threat posed by international terrorism.”).

191. Compare *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the Senate Foreign Relations Committee*, 113th Cong. (2014) (statement of Harold Hongju Koh, Sterling Professor of International Law, Yale Law School) (stating that ending the war with Al Qaeda, narrowing the mandate of, and ultimately repealing the Authorization for Use and Military Force are elements of the Obama “Administration’s counterterrorism policy”), with Webster, *supra* note 136 (explaining that anticipatory self-defense is only justified when the necessity of using force is “instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation”), and S.C. Res. 482, ¶ 1 (Dec. 11, 1980) (extending the stationing of the United Nations peace-keeping force in Cyprus).

192. KLAIDMAN, *supra* note 182, at 219.

193. *Id.* at 219–20.

UNSC Resolution 482 allow.¹⁹⁴ Nonetheless, this “elongated imminence” view made some intuitive sense in the context of the challenges of Afghanistan-era counterinsurgency.

E. The Trump and Biden Administrations

The Trump Administration continued to use drones but revoked many of the Obama-era transparency measures surrounding the drone program. Then President Trump revoked Executive Order 13,732’s reporting requirement in 2019,¹⁹⁵ and while the release of Trump Administration policy standards on targeting show little difference from Obama-era policy guidance,¹⁹⁶ the *New York Times* reported an internal Trump-era policy of making exceptions to the “near certainty” requirement that there would be no civilian casualties.¹⁹⁷ Estimates from investigative reporters indicate that strikes outside war zones remained similar to past Administrations—at roughly 340 over four years—while strikes executed in Afghanistan increased up to tenfold.¹⁹⁸

The Biden Administration seems poised to use drones in new ways. Biden has made drones central to his counterterror strategy,¹⁹⁹ and has not precluded use of drones in Afghanistan despite the express terms of the United States Agreement with the Taliban.²⁰⁰ Unlike his predecessors, however, any use of drones could face increased scrutiny: in the absence of an international armed conflict, drone strikes outside combat zones will no longer be a minority proposition for the United States, but rather the crux of a long-term counterterror policy. This exposes the United States to self-defense measures by enemy states, international tribunals, or international bodies without sufficient customary law shifts towards an imminent view of self-defense.

194. *Id.* at 217–23.

195. Exec. Order No. 13,862, 84 Fed. Reg. 8,789 (Mar. 6, 2019).

196. Compare EXEC. OFF. OF THE PRESIDENT, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) (Obama Policy Standards), with EXEC. OFF. OF THE PRESIDENT, PRINCIPLES, STANDARDS, AND PROCEDURES FOR U.S. DIRECT ACTION AGAINST TERRORIST TARGETS (2017) (Trump Policy Standards).

197. Charlie Savage, *Trump’s Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html> [<https://perma.cc/X5NC-KNLN>].

198. Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 1, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> [<https://perma.cc/EK4A-FFL8>].

199. See discussion *supra* note 45 (discussing Biden’s drone policy).

200. See *US Killing Al-Zawahiri in Kabul a Violation of Doha Pact: Taliban*, AL JAZEERA (Aug. 2, 2022), <https://www.aljazeera.com/news/2022/8/2/us-killing-al-zawahiri-in-kabul-a-violation-of-doha-pact-taliban> [<https://perma.cc/XAM2-SCNW>].

Interestingly, a recent gaffe showed the narrow line that the Biden Administration walks in preserving a U.S. imminence justification for drone strikes that precludes other states using the same imminence justification as license for warmaking. In a news conference on January 19, 2022, President Biden stated that “Russia will be held accountable if it invades, and it depends on what it does . . . It’s one thing if it’s *a minor incursion*, and then we end up having a fight about what to do and not do, et cetera.”²⁰¹ Biden then elaborated, saying that sanctions would arise from “Russian forces crossing the border, killing Ukrainian fighters, et cetera But it depends on what [Putin] does.”²⁰² While Republican lawmakers criticized these statements as sanctioning a move by Putin, viewing them through the tenuous lens of U.S. defense policy makes far more sense. This Note identifies U.S. efforts to shift imminence requirements enough to permit U.S. use of armed force—through drone strikes—on territory without that use of force being called an act of war or an act of aggression. Still, as discussed in Part III, doing so exposes the United States and its allies to now-licit drone strikes by other actors who seek to use imminence justifications to carry out attacks of their own. The critiqued “minor incursion” language continues to carve out precision actions, such as drone strikes, while still pointing out the illegality of unjustified use of force generally.

President Biden’s statement demonstrates the unique paradigm that the United States finds itself in regarding the imminence principle. In the early 2000’s, then President Bush failed to gain sufficient state acceptance for an expanded imminence principle to become customary international law as he tested the limits of the United States’ ability to engage in armed conflict via self-defense.²⁰³ From 2008–2016, the Obama Administration proffered, tested, and negotiated diplomatic acceptance of elongated imminence²⁰⁴ while the United States gained control of the skies as a primary user of drone technology globally.²⁰⁵ In

201. Myah Ward, *White House Looks to Clarify Biden’s ‘Minor Incursion’ Comment on Russia and Ukraine*, POLITICO (Jan. 19, 2022, 7:52 PM), <https://www.politico.com/news/2022/01/19/biden-ukraine-russia-527440> [<https://perma.cc/P3J6-5GD7>] (emphasis added).

202. *Id.*

203. *See* Section III.B.1.

204. *See* Part II.D.

205. The United States has been using drones for lethal operations since 2001. *See supra* note 20. The Bureau of Investigative Journalism tracked U.S. drone strikes from 2010–2020 and found a minimum of 14,040 confirmed strikes in Afghanistan, Somalia, Pakistan, and Yemen. *Drone Warfare*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/projects/drone-war> (last visited Nov. 23, 2022) [<http://perma.cc/XGL5-QQHV>]. British FOI requests show that from 2014–2022, the United Kingdom carried out 11,251 missions in Iraq and Syria. *UK Drone Strike Stats*, DRONE WARS, <https://dronewars.net/uk-drone-strike-list-2/> (last visited Nov. 23, 2022) [<http://perma.cc/XA4A-D4M2>]. Israel, the only other country with a disclosed

former President Trump's Administration, the killing of Qasem Soleimani demonstrated the success of imminence in creating a permissive customary law paradigm for the use of drones outside battlefields.²⁰⁶ Now, as drones proliferate and global powers, like Russia, test the limits of Article 2(4)'s blanket prohibition on aggressive action, President Biden faces the challenge of defining the limits of the permissive regime the United States created.

III. THE HOUSE THE UNITED STATES BUILT: THE IMPACTS OF THE U.S. DRONE PROGRAM ON CUSTOMARY INTERNATIONAL LAW ON IMMINENCE

The United States has not yet licensed its view of imminence in international law through a major multilateral treaty. In this Section, I will explore the ways in which state practice and *opinio juris* suggest that international customary law on imminence has successfully shifted to embrace the United States' view. Therefore, use of drones to deliver lethal force outside of declared conflict is broadly legal in the post-Afghanistan paradigm. The comparison of state practice and *opinio juris* related to twenty years of U.S. and U.K. drone strikes with state practice and *opinio juris* in response to Russian justification of the invasion of Ukraine and the 2003 U.S. invasion of Iraq demonstrates the emergence of generalized and consistent state practice and acceptance through public statements supporting the U.S.-endorsed imminence doctrine for drone strikes. Part A briefly summarizes the ambiguity in treaty law, opening the door for binding customary law to govern drone use. Part B explains how emerging customary law on drone use gives the United States the license they spent twenty years developing.

A. Treaties

Article 38(1)(a) of the Statute of the International Court of Justice, functioning as an integral part of the United Nations Charter, bids courts to turn first to "international conventions, whether general

use of UAVs prior to 2015, has not released data on its drone program, and only admitted to regular UAV use in July 2022. See *Who Has What: Countries That Have Conducted Drone Strikes*, NEW AM., <https://www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-that-have-conducted-drone-strikes/> (last visited Nov. 23, 2022) [<http://perma.cc/N7H5-9UFB>] [hereinafter *Who Has What*] (reporting that the United Kingdom, the United States, and Israel are the only countries with disclosed use prior to 2015); *Israel Military Admits It Uses Armed Drones*, REUTERS (July 20, 2022, 2:21 PM), [https://www.reuters.com/world/middle-east/israel-military-admits-it-uses-armed-drones-2022-07-20/#:~:text=JERUSALEM%2C%20July%2020%20\(Reuters\),aircraft%20and%20have%20used%20them.](https://www.reuters.com/world/middle-east/israel-military-admits-it-uses-armed-drones-2022-07-20/#:~:text=JERUSALEM%2C%20July%2020%20(Reuters),aircraft%20and%20have%20used%20them.) [<http://perma.cc/W6VK-3V88>] (Israeli disclosure).

206. See Section III.B.2.

or particular, establishing rules expressly recognized by the contesting states.”²⁰⁷ Courts primarily interpret this language as referring to bilateral or multilateral treaties to which the relevant states are parties.²⁰⁸ Treaties have effective supremacy in international law—like contracts between individuals, treaties bind state parties to the agreements contained within them.²⁰⁹ There are currently no multilateral treaties that explicitly govern the *use* of UAVs.²¹⁰ The United States is not party to any multilateral treaty that explicitly mentions the use of force rules applicable to UAVs, and U.S. proposals for drone regulation have yet to gain traction in international fora.²¹¹ While scholars have identified elements of treaties, such as the Geneva Conventions,²¹² that *apply* to drones, and have argued that new regimes

207. Statute of the International Court of Justice art. 38, ¶ 1.

208. See Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 652–53 (2013) (describing how Article 38(1)(a)–(c) “lays down exhaustively the formal sources from which legally valid rules of international law may emerge”).

209. The I.C.J. rules use treaties as the preeminent source of state obligations. Statute of the International Court of Justice art. 38, ¶ 1; see also Borda, *supra* note 208, at 652–53 (referencing the primacy of international conventions as a formal source of customary law). As a general matter, state parties are bound by their treaty obligations, though discourse remains in international legal study over some differences in the binding nature of self-enforcing and non-self-enforcing treaties, as well as the nuances of treaty enforcement, especially in the multilateral space. Compare R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 275, 277 (1965) (describing how treaties “may be regarded as declaratory of customary international law”), with Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT’L L. & POL’Y 71, 72 (1996) (explaining that Baxter’s view “is hardly accepted by all”).

210. Treaty Affairs Staff, Office of the Legal Advisor, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020*, U.S. DEP’T OF STATE (2020), <https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf> [<https://perma.cc/K3TZ-3KC9>].

211. Aaron Mehta, *US to Push New Rules for Drone Agreement in November*, DEF. NEWS (Sept. 11, 2018), <https://www.defensenews.com/unmanned/2018/09/11/us-to-push-new-rules-for-drone-treaty-in-november/> [<https://perma.cc/F2GT-6JFB>]. As exemplified by the preceding article, even minor changes to multilateral treaties governing drone *trade* were rejected. *Id.* The Trump Administration attempted to recategorize UAVs to “facilitate the transfer of military technology,” where they had previously been categorized with cruise missiles due to their guidance systems. Daniel Cebul, *Strict Export Regulations May Be Costing US Industry Billions in Foreign Sales*, DEF. NEWS (June 18, 2018), <https://www.defensenews.com/newsletters/unmanned-systems/2018/06/18/strict-export-regulations-may-be-costing-us-industry-billions-in-foreign-sales/> [<http://perma.cc/86J7-5DHE>].

212. See generally INT’L BAR ASSN.’S HUM. RTS. INST., *THE LEGALITY OF ARMED DRONES UNDER INTERNATIONAL LAW* (May 25, 2017), <https://www.ibanet.org/medias/B0B8AF88-FD20-44F8-A920-634484645113.pdf?context=bWFzdGVyfGFzc2V0c3w0Mzg3MDJ8YXBwbGljYXRpb24vcGRmfGxZS9oYjIvODc5NjMzODE5MjQxNC9CMEI4QUY4OC1GRDIwLTQ0RjgtQTkyMC02MzQ0ODQ2NDUxMTMucGRmfGYzMjdhZjRjY2RhMDM0M2Y3NmVlOTFkYzFiZjQ2ODY3OTUwYmQ1MDE0NWUyNTg4OTEzMmI1Y2Q1NmEwOTA4NTU> [<http://perma.cc/2ABU-38HZ>].

such as the Arms Trade Treaty's terms *implicitly* govern UAVs,²¹³ drones continue to evade direct treaty governance.²¹⁴

Article 38(1)(a)'s definition of "international conventions . . . establishing rules expressly recognized by the contesting states" can also be read to extend to United Nations Security Council resolutions.²¹⁵ The Security Council's structure, with five nations granted "vetoes" over any potential vote, seems to have prevented any major resolution on the use of technology surrounding UAV.²¹⁶ Russia, China, and the United States all have the right to veto resolutions in the Security Council, and each has been especially sensitive to resolutions that critique or challenge their military interests.²¹⁷ It is not surprising, therefore, that no binding Security Council resolutions have emerged to define the bounds of drone use under international law. Similarly, no resolution has explicitly embraced or empowered an expansive Koh doctrine conception of the imminence requirement, but rather "there is [still] no clear answer on what facts must [exist] to ensure anticipatory self-defense is lawful."²¹⁸

Binding bilateral treaties to the *specific* parties involved in U.S. conflicts played a key role in avoiding the requirement of the imminence doctrine. Prior to 2020, the United States did not need to depend on an imminence argument to license drone strikes in Afghanistan because it had consent to use lethal force beyond the general allowance imported by international law.²¹⁹ International tribunals, especially in the

213. RACHEL STOHL & SHANNON DICK, THE ARMS TRADE TREATY AND DRONES, STIMSON 3 (2018), https://www.stimson.org/wp-content/files/file-attachments/Stimson_The%20Arms%20Trade%20Treaty%20and%20Drones_August%202018.pdf [<http://perma.cc/TYE4-BAXU>].

214. See *supra* notes 209–210 and accompanying discussion.

215. Statute of the International Court of Justice art. 38, ¶ 1; see also Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879 (2005) (describing the various ways in which Security Council resolutions impact international laws and customs).

216. See *Resolutions*, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/resolutions> (last visited Nov. 22, 2022) [<https://perma.cc/39NH-6ZA4>] (navigating to all formal resolutions passed by the UNSC).

217. See, e.g., Shelby Magid & Yulia Shalomov, *Russia's Veto Makes a Mockery of the United Nations Security Council*, ATL. COUNCIL (Mar. 15, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/> [<http://perma.cc/5HST-3ZQ8>] ("The P5 have frequently wielded their veto power to torpedo resolutions incongruent with their national and foreign policy interests.").

218. Megan C. Mallone & Christine E. Seibert, *Are We There Yet? Applying the Legal Framework of Anticipatory Self-Defense to the Democratic People's Republic of Korea*, JAG REP. 4–5 (Dec. 13, 2018), https://www.jagreporter.af.mil/Portals/88/2018%20Articles/Documents/20181213%20Mallone%20Defense.pdf?ver=H8j_Iv6EJOA9p2fwZgCxCz%3d%3d [<https://perma.cc/8QC7-JKZS>].

219. See 2014 Afghan Agreement, *supra* note 69. While Article 2, paragraph 1 of the agreement states that "[u]nless otherwise mutually agreed, United States forces shall not conduct combat operations in Afghanistan," the context of other clauses makes clear that the United States has broad authority to carry out use of force against Afghanistan's territorial integrity. See *id.* at art.

European Union, likewise have waived the use of force issue in human rights challenges to U.S. strikes when the United States had the explicit consent of the state where the strike was carried out.²²⁰ However, this kind of consent can no longer be assumed.²²¹

In the absence of specific treaty language on drones, they remain governed by broad *jus ad bellum* and *jus in bello* norms. Therefore, UAV legality depends on state practice interpreting the bounds of the UN Charter's Article 51 right of self-defense. Under Article 51, use of force in self-defense is one of the preeminent rights of sovereign states.²²² State practice adopting imminent terrorist attacks as legal justification for Article 51 self-defense would expand the scope of allowable use of force for the United States and the rest of the world.

B. State Practice and Opinio Juris

Customary law serves an important updating and gap-filling function in the landscape of international armed law. Article 38, paragraph 1(b) provides that custom is binding on states when it is expressed as general state practice, accepted as law.²²³ This has been interpreted to include generalized practice among states and *opinio juris*.²²⁴

2. ¶ 2 (“[T]he United States shall undertake supporting activities, as may be agreed, in close cooperation and coordination with Afghanistan, . . . [including] conducting combined military exercises; and other activities”); *id.* at art. 2, ¶ 3 (“Upon request, the United States shall urgently determine support it is prepared to provide ANDSF in order to respond to threats to Afghanistan’s security.”). While the Agreement has a *prima facie* prohibition on unilateral counterterrorism action by the United States, a broad carve out for self-defense largely renders it moot in the context of the United States’ statements on drone legality. *See id.* at art. 2, ¶ 4 (unilateral counterterrorism); *id.* at art. 3, ¶ 2 (“[O]bligations under this Agreement, and any subsequent arrangements, are without prejudice to . . . each Party’s right of self-defense, consistent with international law.”); *supra* Part II.D (discussing the public statements of the Obama Administration, which made clear the U.S. view that drone strikes against “imminent” terrorist threats were lawful self-defense).

220. *See, e.g.*, OVG, Mar. 19, 2019, 4 A 1361.15 (Ger.), https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/4_A_1361_15_Urteil_20190319.html [<https://perma.cc/JA4N-SH54>].

221. *Compare* 2014 Afghan Agreement, *supra* note 69, with Agreement for Bringing Peace to Afghanistan, *supra* note 72, pt. 1, para. F (“The United States and its allies will refrain from the threat or use of force against the territorial integrity or political independence of Afghanistan. . . .”). Unlike the 2014 Agreement, the Agreement for Bringing Peace notably contains no carve outs for U.S. self-defense or exceptions for agreement. *See* Agreement for Bringing Peace to Afghanistan, *supra* note 72.

222. U.N. Charter art. 51.

223. Statute of the International Court of Justice art. 38, ¶ 1.

224. *Supra* note 158 at 27 (citing I.L.C. Conclusions on the Identification of Customary International Law, Conclusion 2, U.N. Doc. A/73/10, ch. V (2018)) (“To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris* . . . [h]ence, a rule reflected in the practice and conduct of states, must be accepted by them”).

Drone use outside armed conflict has, as of the time of writing, been carried out by the United States and the United Kingdom;²²⁵ however, norms and rules surrounding drone use have emerged in customary law as drone technology rapidly proliferates. *Opinio juris* and state practice responding to U.S. drone strikes outside of armed conflict suggests customary law has established the legality of these types of strikes.²²⁶

1. Setting a Baseline: State Practice and *Opinio Juris* on the Use of Force Against Sovereign Territory Outside Declared Conflict

Prior failures to gain customary law acceptance for imminence have plagued U.S. foreign policy. During the Cuban Missile Crisis, the United States faced sharp criticism in the UNSC for “defensive quarantine.”²²⁷ The Reagan Administration faced condemnation in a UNGA resolution in response to its proffered principle of “active defense.”²²⁸ The Bush Administration faced global protests, including in the UN chambers, in response to “preventative war.”²²⁹ These examples, and the recent dramatic rejection of Russian arguments on imminence, provide a baseline from which to analyze acceptance of elongated imminence in the post-Afghanistan era.

a. Russia’s Invasion of Ukraine

The United States’ success in shifting imminence doctrine is made that much clearer by Russia’s failure to shift customary international law through similar efforts. Russia attempted to use genocide prevention and self-determination justifications—similar to the “unwilling or unable” framing in Responsibility to Protect

225. See *supra* Section III (discussing U.S. drone use outside of declared conflict). The United Kingdom claimed credit for drone strikes in Raqqa, Syria on August 21, 2015, which killed two British citizens. *Who, What, Why: When Is It Legal to Kill Your Own Citizens?*, BBC (Sept. 8, 2015) <https://www.bbc.com/news/magazine-34184856> [<https://perma.cc/DSL9-J3F9>]. Inquiry by Parliament into the strike found, inter alia, that the strike was legal under international law through a justification of self-defense which directly imports the elongated imminence principle. See JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING, 2015–16, HC 574, HL 141 at 98 (U.K.) (“Both the Attorney General and the Defence Secretary have suggested in oral evidence that the Government favours a more expansive definition of ‘imminence’ which would entitle the UK to act in self-defence where an identified individual is involved in an ongoing way in plotting terrorist attacks on the UK.”).

226. See *infra* Section III.B.2-4.

227. See Arend, *supra* note 132, at 94.

228. Erakat *supra* note 165, at 214.

229. See *infra* Parts II.C–D.

doctrine²³⁰—to justify their use of force against Ukraine.²³¹ In a nearly unprecedented display of diplomatic rejection, over 100 diplomats walked out on the Russian Foreign Minister’s speech presenting the argument.²³² Further, state practice and *opinio juris* in the three days immediately following Russia’s invasion alone demonstrated Russia’s use of force rises to the level of aggression: Russia has been deemed an aggressor in pending ICJ litigation,²³³ in an overwhelming UNGA resolution denouncing its activities,²³⁴ and in press, sanctions, announcements, and speeches worldwide.²³⁵ The speed, depth, and extent of the reaction to unjustified aggression by Russia—a P-5 nation with deep economic and political entanglements—show that the international community’s comparative lack of response to a twenty-

230. See *supra* note 151 and accompanying text (explaining the Responsibility to Protect doctrine); see also Heather Ashby, *How the Kremlin Distorts the ‘Responsibility to Protect’ Principle*, U.S. INST. OF PEACE (Apr. 7, 2022), <https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle> [<https://perma.cc/469Y-3P2Q>].

231. While the statement has not been digitized in full, Al Jazeera’s reporting suggests that it tracks many of Russia’s previous justifications. See *Dozens of Diplomats Walk Out on Russian Foreign Minister’s Speech*, AL JAZEERA (Mar. 2, 2022), <https://www.aljazeera.com/news/2022/3/2/dozens-of-diplomats-walk-out-on-lavrovs-un-speech> [<https://perma.cc/79BQ-UWPJ>] [hereinafter *Dozens of Diplomats Walk Out on Russian Foreign Minister’s Speech*] (“[T]he Russian foreign minister justified his country’s attack on Ukraine by accusing the Ukrainian side of human rights violations against its Russian minority.”). For a prior statement of Russia’s Responsibility to Protect justifications for aggression against Ukraine, see *Statement by H.E. Mr. Sergey V. Lavrov, Minister of Foreign Affairs of the Russian Federation, at the 69th Session of the General Assembly*, UNITED NATIONS 3 (Sept. 27, 2014), https://www.un.org/en/ga/69/meetings/gadebate/pdf/RU_en.pdf [<https://perma.cc/QMH7-G479>] [hereinafter *Lavrov Statement*].

232. *Dozens of Diplomats Walk Out on Russian Foreign Minister’s Speech*, *supra* note 231.

233. *World Court to Hear Ukraine/Russia Case March 7-8*, REUTERS (Mar. 1, 2022, 2:59 PM), <https://www.reuters.com/world/europe/world-court-hear-ukrainerussia-case-march-7-8-2022-03-01/> [<https://perma.cc/9BCH-R9RB>].

234. Humeyra Pamuk & Jonathan Landay, *U.N. General Assembly in Historic Vote Denounces Russia over Ukraine Invasion*, REUTERS (Mar. 2, 2022, 7:25 PM), <https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/> [<https://perma.cc/J8JE-8H3M>].

235. See, e.g., Emma Coffey, *‘Putin is the Aggressor; Putin Chose this War’: President Biden Addresses Russia’s Attack on Ukraine*, THE DAILY BEACON (Feb. 24, 2022), https://www.utdailybeacon.com/city_news/politics/putin-is-the-aggressor-putin-chose-this-war-president-biden-addresses-russia-s-attack-on/article_d136d4c6-95ab-11ec-bf7c-4f361a8cc06e.html [<https://perma.cc/6RYL-TNRM>] (speech); Elisabetta Povoledo, *The Vatican, For The First Time, Calls Russia the Aggressor in the War*, N.Y. TIMES (Aug. 30, 2022), <https://www.nytimes.com/2022/08/30/world/europe/vatican-pope-russia-invasion.html> [<http://perma.cc/pB8M-FFQ7>] (announcement); Staff, *Sanctions Adopted Following Russia’s Military Aggression Against Ukraine*, EUR. COMM., https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en (last visited Jan. 5, 2022) [<http://perma.cc/P888-PMZG>] (sanctions); Boris Johnson, *Boris Johnson: 6 Steps the West Must Take to Help Ukraine Right Now*, N.Y. TIMES (Mar. 6, 2022), <https://www.nytimes.com/2022/03/06/opinion/boris-johnson-russia-putin-ukraine-war.html?searchResultPosition=15> [<https://perma.cc/MAL9-JXCX>] (British Prime Minister writing in a New York times Guest Essay that “Vladimir Putin’s act of aggression must fail and be seen to fail.”).

year drone program is a display not of apathy, but of generalized, consistent, and purposeful state practice supported by customary international law.

b. U.S. Invasion of Iraq (2003)

The United States is not immune to strong negative diplomatic responses. As discussed in Section III.B.2 and III.B.3, the diplomatic community walks a fine line when critiquing drone strikes: even when diplomats disagree with the circumstances of a particular strike, they rarely reject the imminence license for drone strikes generally.²³⁶ The United States' initial failure to gain full acceptance for its 2003 invasion of Iraq provides a useful counterpoint mark for what rejection of a legal justification for use of force through customary law can look like. It is worth noting that the legality of the 2003 invasion remains controversial—that determination is beyond the scope of this Note. The below reactions are merely presented as examples of *opinio juris* specifically rejecting a U.S.-proffered justification for use of force.

The United States and United Kingdom initially attempted to use a revitalization of UNSC Resolution 678 (authorizing use of force in the 1990s) to justify their use of force in Iraq.²³⁷ The response of the international community expressly rejected the legal authority cited by the United States and United Kingdom: At the UNSC, Russia stated that “[n]ot one of [the cited resolutions] authorizes the right to use force against Iraq outside the Charter of the United Nations; not one of them authorizes the violent overthrow of the leadership of a sovereign State.”²³⁸ The representative of the Syrian Arab Republic pointedly addressed what it perceived to be a legal flip-flop by the United States and United Kingdom:

[R]ecord[s] of meetings of the Security Council [from the 2002 adoption of resolution 1441 which] include comments by those members that are hastening to wage war against Iraq, confirming their belief that that resolution does not allow for international law to be circumvented or to permit a strike against Iraq without first reverting to the Security Council.²³⁹

236. See *infra* Section III.B.1.b.

237. Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 178–79 (2004).

238. U.N. SCOR, 58th Sess., 4721st mtg. at 8, U.N. Doc. S/PV.4721 (Mar. 19, 2003).

239. *Id.* at 9.

Switzerland,²⁴⁰ Indonesia,²⁴¹ and Malaysia,²⁴² among others, made statements rejecting the invasion as an act of war in contravention to the Charter. The League of Arab States addressed a letter to the President of the Security Council including a resolution calling for immediate cessation of the war and withdrawal of forces from Iraq.²⁴³

The explicit rejection of the United States' legal arguments and strong pushback against the use of force in Iraq both show that the United States is not immune to *opinio juris* rejecting its justifications for use of force. By contrast, state practice and *opinio juris* in response to the U.S. drone program show general acceptance in customary law of the U.S. expansion of the imminence principle and growing use of that principle by other states.

2. State Practice and *Opinio Juris* in Response to the U.S. Drone Strike Killing Qasem Soleimani

The drone strike killing Iranian General Qasem Soleimani provides strong evidence of a shift in customary law allowing the United States' broad imminence exception to circumvent the categorical prohibition on use of force. On January 2, 2020, a U.S. airstrike killed Qasem Soleimani, the commander of the Quds force—an Iranian Revolutionary Guard Corps that directs Iran's military operations in the Middle East.²⁴⁴ The next day, January 3, the then President Donald Trump described the attack as justified given that Soleimani was, *inter alia*, “plotting imminent and sinister attacks.”²⁴⁵ Six days later, the U.S. Ambassador of the United Nations submitted an official letter to the

240. U.N. SCOR, 58th Sess., 4726th mtg. at 30, U.N. Doc. S/PV.4726 (Mar. 26, 2003) (“[M]ilitary intervention has been launched against Iraq without the explicit authorization of the United Nations Security Council.”).

241. *Id.* at 19 (“Indonesia has strongly deplored the unilateral action by the United States of America and its allies, who have decided to launch a military attack against Iraq in contravention of international law.”).

242. *Id.* at 7 (“This war is being carried out in violation of the principles of international law and the Charter.”).

243. Permanent Observer of the League of Arab States to the United Nations, Letter dated Mar. 24, 2003 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/365 (Mar. 26, 2003).

244. Press Release, Dep't of Def., Statement by the Department of Defense (Jan. 2, 2020), <https://www.defense.gov/News/Releases/Release/Article/2049534/statement-by-the-department-of-defense/> [<https://perma.cc/4X4X-TXUJ>].

245. Donald J. Trump, *Remarks by President Trump on the Killing of Qasem Soleimani*, U.S. EMBASSY IN GEOR. (Jan. 3, 2020), <https://ge.usembassy.gov/remarks-by-president-trump-on-the-killing-of-qasem-soleimani-january-3/> [<http://perma.cc/K86X-8PNS>]. It is worth noting the precision in the first few lines of the speech—President Trump used the technical language of imminence, and then notes that the United States “caught [Soleimani] in the act”—an evocation of Koh's elongated imminence. *Compare id.*, with KLAIDMAN, *supra* note 182, at 219–20 (describing Koh's imminence theory).

President of the UNSC declaring that the U.S. action was taken “in the exercise of its inherent right of self-defence.”²⁴⁶ The letter’s justification, alongside subsequent U.S. statements, narrowly track the expanded view of imminence as legal justification for the use of force.²⁴⁷ While the United Nations Special Rapporteur on Extrajudicial Killings expressed doubt that the Soleimani killings would meet the standard for anticipatory self-defense,²⁴⁸ state practice and *opinio juris* treated the strike as a justified, if politically improper, use of force. The Rapporteur even walked back her Twitter statements in a report which extensively analyzed the legality of drone strikes, including a case study on the Soleimani killing.²⁴⁹ The report focused on the United States’ failure to bring evidence of a sufficiently imminent attack in response to Article 51’s notification, implicitly endorsing the legality of imminence-based strikes.²⁵⁰

246. Permanent Representative of the United States of America to the United Nations, Letter dated Jan. 8, 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/20 (Jan. 9, 2020).

247. See Eugene Kiely, *Trump Administration’s Shifting Statements on Soleimani’s Death*, FACTCHECK.ORG (Jan. 15, 2020), <https://www.factcheck.org/2020/01/trump-administrations-shifting-statements-on-soleimanis-death/> [https://perma.cc/482S-ZPYR] (“[Soleimani] was actively plotting in the region to take actions . . . that would have put dozens if not hundreds of American lives at risk. We know it was imminent.”); CLAYTON THOMAS, CONG. RSCH. SERV., R46148, U.S. KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 2 (2020) [hereinafter SOLEIMANI FAQ] (“Administration officials claim that Soleimani posed a direct threat and that he was involved in planning an ‘imminent’ attack that would put U.S. lives at risk.”).

248. Agnès Callamard (@AgnesCallamard), TWITTER (Jan. 2, 2020, 8:06 PM), https://twitter.com/AgnesCallamard/status/1212918164453019648?ref_src=twsrc%5Etfw%7Ctwc%5Etfw%7Ctwterm%5E1212918164453019648%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-51007961 [https://perma.cc/UX9R-2Q6N] (“The test for so-called anticipatory [self-defense] is very narrow: it must be a necessity that is ‘instant, overwhelming, and leaving no choice of means, and no moment of deliberation[.]’ This test is unlikely to be met in these particular cases.”).

249. See *id.*; Agnès Callamard (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Use of Armed Drones for Targeted Killings*, at 3–5, 23–40, U.N. Doc. A/HRC/44/38 (Aug. 15, 2020).

250. *Id.* at 16–17. The report is highly critical, but the text of Annex 1 focuses on the United States’ failure to provide evidence of a sufficiently imminent threat to justify the strike, rather than the legality of the U.S. notion of elongated imminence generally. See *id.* at 15–16. This is evident in Article V, paragraph 64 of the report:

It is possible that the US may have had intelligence indicating Iran’s control and direction over [terrorist groups] and the existence of imminent attacks. This intelligence might also have shown that the US had no alternative to intervene to prevent an attack planned by General Soleimani, other than this strike. The divergent public statements by US officials as to the grounds for the attack makes this possibility somewhat remote. Nonetheless, if this were the case, the US should have brought this evidence, in a form that protected its sources, to the Security Council for public examination. Otherwise, Art. 51 becomes a convenient excuse for any use of force

Id. at 34–35 (footnote omitted).

States, in action and word, treated the Soleimani killing as if it was a legal strike. In the days following, the United Nations Security Council met to discuss “Maintenance of International Peace and Security: Upholding the United Nations Charter.”²⁵¹ During this meeting, the President of the UNSC invited ninety-three nations to speak, many of whom took the opportunity to critique specific breaches of peace.²⁵² Despite three days of debate, there was limited pushback on the U.S. strike. Liechtenstein explicitly endorsed imminence as a justification for armed force,²⁵³ as did South Africa.²⁵⁴ The United Kingdom implicitly endorsed the strike, stating that “we recognize the danger and threat that Iran poses to the Middle East, and we recognize the right to [self-defense].”²⁵⁵ Estonia critiqued Iran’s reprisals, not the U.S. strike.²⁵⁶ Mexico raised concerns about a broad imminence doctrine similar to those raised by this Note, but did not reject the invocation of imminence, instead requesting the Security Council consider when it is appropriately invoked.²⁵⁷ Many nations failed to expressly discuss the strike, though some included statements which may have been veiled

251. *Id.* at 15 (indicating that the Soleimani strike occurred on January 3, 2020); *UN Security Council Meetings & Outcomes Tables*, DAG HAMMARSKJÖLD LIBR., <https://research.un.org/en/docs/sc/quick/meetings/2020> (last visited Dec. 20, 2022) [<http://perma.cc/S35L-JN2G>].

252. *See, e.g., infra* notes 253–264, 266–269 and related discussion (describing specific critiques of breaches of the peace).

253. U.N. SCOR, 75th Sess., 8699th mtg. at 37, U.N. Doc. S/PV.8699 (Jan. 9, 2020) [hereinafter U.N. Doc. S/PV.8699] (statement of Liechtenstein) (“In joining the United Nations, we all accepted that the use of force is illegal, except when authorized by the Security Council or carried out in [self-defense]. When invoking Article 51 preventively, States owe the international community a thorough justification, including evidence of the imminence of an external threat and the proportionality of measures to be taken in response.”) While Liechtenstein went on to state that “[e]xcessively expansive and unchecked interpretations of Article 51 are a threat to the international rules-based order,” this statement pushes back on the law as applied to the facts of the Soleimani killing, not the shift in the law itself. *See id.*

254. *Id.* at 11 (statement of South Africa) (“[T]he Charter provides that States may act in [self-defense], including confronting imminent threats; but such threats must be credible, real and objectively verifiable for the use of force without Security Council authorization to be justifiable.”).

255. *Id.* at 19 (statement of the United Kingdom).

256. *Id.* at 8 (statement of Estonia) (“I have condemned the attacks on the United States Embassy in Baghdad and condemn the missile attacks on the two bases in Iraq, which also house Estonian troops.”). For clarification on strike locations and reprisals, see Elena Moore & Roberta Rampton, *Timeline: How the U.S. Came to Strike and Kill a Top Iranian General*, NPR (Jan. 4, 2020, 7:00 AM), <https://www.npr.org/2020/01/04/793364307/timeline-how-the-u-s-came-to-strike-and-kill-a-top-iranian-general> [<https://perma.cc/2LNQ-5RHJ>].

257. U.N. Doc. S/PV.8699, *supra* note 253, at 63 (statement of Mexico):

[I]nvoing . . . Article 51 . . . to address threats to international peace and security by military . . . runs the risk of de facto broadening the exceptions to the general prohibition on the use of force irregularly. Given the importance and seriousness of the issues addressed in the notes that are sent to the Council under Article 51 and the lack of transparency with which they are processed, it is necessary for the Council to review and modify its working methods in order to ensure full compliance with the Charter . . . especially when the [imminent] right of [self-defense] is invoked.

references.²⁵⁸ Only one state explicitly called the strike illegal: the representative of Nicaragua “express[ed] concern and consternation in the face of recent events that violate the sovereignty and territorial integrity of States, including the selective assassination of leaders of countries” and stated that these acts are “illegal and unjustifiable.”²⁵⁹ The representatives from China,²⁶⁰ Russia,²⁶¹ Syria,²⁶² and a speaker on behalf of the European Union²⁶³ critiqued the strike directly, but did not refer to it as an unlawful use of force. Interestingly, Iran itself stated that the United States had carried out “threats and attacks against the people of Iran and other sovereign nations in utter disregard of the Charter of the United Nations,” but, while calling the Soleimani action a “cowardly armed attack” and “a terrorist attack,” endorsed their own reprisal on grounds that resemble extended imminence, stating that their attack on January 8 against the air base in Iraq from which the strike was launched was carried out “in the

258. *See id.* at 33 (statement of Thailand) (“[G]reat Powers always write the rules and then break them. They resort to multilateralism only when it serves their first interest . . . [a]nd unilateralism seems to answer to the first interest and the *schadenfreude* mindset faster, unless there are consequences.”); *id.* at 34 (statement of Japan) (“Japan is following the recent escalation of tensions in the Middle East with great concern. . . . [a]ll unilateral [attempts] to change the status quo by force or coercion should not be tolerated.”); *id.* at 36 (statement of Syria) (critiquing “misuse of the Charter, particularly its Article 51, with a view to justifying aggression against countries, including my country Syria.”); *id.* at 40 (statement of Latvia) (expressing concern about “the latest flare-up of violent confrontations in the Middle East” but later stating that “Russia’s annexation of Ukrainian Crimea . . . violate[s] the fundamental principle of the Charter of the United Nations of territorial integrity”); *id.* at 43–44 (statement of Pakistan) (“Recent events have amplified the multiple and complex threats to peace and security in the Middle East — the denial of self-determination to the Palestinian people and the disruption of the sovereignty and stability of Iraq, Syria and Yemen”); *id.* at 51 (statement of Singapore) (expressing that “Singapore is deeply concerned by recent developments” in the Middle East); *id.* at 53 (statement of Armenia) (expressing concern about “the ongoing situation and the risk of destabilization”); *id.* at 57 (statement of Mongolia) (“[A]ll Members should fulfil[] the obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”).

259. *Id.* at 27 (statement of Nicaragua).

260. *Id.* at 13 (statement of China) (“[T]he United States unilateral military adventurism has led to heightening tension in the situation in the Arabian Gulf region. China supports Secretary-General António Guterres’ call for peace.”).

261. *Id.* at 20 (statement of Russian Federation) (“[T]he extrajudicial killing of an official of a sovereign State in a third country [is an example] of [an] action[] that [has] left wounds on the body of international law and order.”).

262. *Id.* at 36 (statement of Syrian Arab Republic) (“How is it that the Council remains silent on the United States[] criminal assassination of Iranian and Iraqi leaders . . . ?”). *But see id.* (calling out the unlawful use of force elsewhere in the same speech, discussing “aggression and military occupation” conducted against Syria and “aggression of the Turkish regime on Libyan territory”).

263. *Id.* at 61 (statement of the EU) (“The EU is deeply concerned about the latest increase in violent confrontations in Iraq and underlines the need for de-escalation and dialogue and for respecting Iraqi sovereignty. The only way forward is a regional political solution in line with international law.”).

exercise of our inherent right to [self-defense] in accordance with Article 51 of the Charter.”²⁶⁴ Since reprisals outside of armed conflict are forbidden under Article 2(4)’s general prohibition,²⁶⁵ the only justification under Article 51 would be fear of other imminent attacks; Iran seems to endorse the U.S. legal theory while decrying its strike. Where Iran’s *opinio juris* suggests the strike was illegal, its combination of *opinio juris* and state practice together seem to do the opposite.

The limited pushback to the Soleimani killing does not seem to have been caused by a particularly mild mood on the 2020 UNSC. In the same series of three meetings, Lithuania explicitly stated that “the violation of sovereignty and territorial integrity of Georgia” and “ongoing occupation and annexation of Crimea” were “blatant and systemic breaches of the Charter.”²⁶⁶ Russia tepidly critiqued the Soleimani strike but explicitly stated that the denial of a visa to Iran’s Foreign Minister was a “violation of and noncompliance with international law.”²⁶⁷ The representative of the Syrian Arab Republic called out “aggression and military occupation” conducted against Syria and “aggression of the Turkish regime on Libyan territory.”²⁶⁸ Syrian representatives went even further in a January 29th meeting where they declared that the actions of the United States and other United Nations Member States in blockading aid was “a form of terrorism . . . in flagrant violation of international law and the Charter of the United Nations.”²⁶⁹ In contrast to these statements, the pushback to U.S. drone use on non-consenting territory seems minimal.

Acceptance of the legality of the Soleimani killing and the U.S.’s imminence justification was not limited to the UNSC chambers. Examining the public-facing response of G-20 nations, only two countries—Russia and Venezuela—asserted that the strike was illegal.²⁷⁰ While Russia’s Foreign Minister criticized what she called the

264. *Id.* at 45–46 (statement of Iran).

265. See Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 158 (2001) (“Article 2 quite clearly suggests that [non-belligerent] reprisals using force are not permitted under the Charter . . . [though] it may be argued that . . . their functional equivalent could be permitted if characterized as an act of self-defense.”).

266. U.N. Doc. S/PV.8699, *supra* note 253, at 35 (statement of Lithuania).

267. *Id.* at 20 (statement of Russian Federation).

268. *Id.* at 36 (statement of Syrian Arab Republic).

269. U.N. SCOR, 75th Sess., 8707th mtg. at 17, U.N. Doc. S/PV.8707 (Jan. 29, 2020) (statement of Syria).

270. Kenneth Rapooza, *Russia Says Iran General’s Killing ‘Illegal,’* FORBES (Jan. 3, 2020), <https://www.forbes.com/sites/kenrapooza/2020/01/03/russia-says-iran-generals-killing-illegal/?sh=7144c040ba63> [<https://perma.cc/QXQ9-Z7B4>] (quoting statements by Russia’s Foreign Minister and spokesperson for the Foreign Ministry); *Venezuela Condemns U.S. Military Attack*

Bush Administration's "pre-emptive" strike policy, however, no Russian minister stated that the use of force itself was illegal.²⁷¹ China made a carefully worded statement opposing use of force in international relations generally and urging restraint, but did not indicate that it viewed the strike as unlawful and did not include any phrases indicating the act was "aggressive" or rose to the level of the crime of "aggression."²⁷²

While Iraq and Iran invoked accusations of "aggression,"²⁷³ the *opinio juris* they espoused labeling the act as unlawful use of force was inconsistent with subsequent *opinio juris* and state practice.²⁷⁴ It is worth pausing to note the language and actions of Iraqi leaders here, given that the strike was carried out against the sovereign territory of Iraq and also killed an Iraqi national—militia commander Abu Mahdi al-Muhandis.²⁷⁵ A Congressional Research Service report on the killing cites an Iraqi resolution "protest[ing] [the strikes] as breaches of Iraqi sovereignty," but detailed examination of Iraqi statements reveals more legal nuance.²⁷⁶ While the days following the attack saw significant outcry from Iraqi government officials,²⁷⁷ internal political turmoil in Iraq and careful examination of statement wording suggest acquiescence to the legality of the imminence justification. Take, for

in Iraq, TELESURHD (Jan. 3, 2020), <https://www.telesurenglish.net/news/Venezuela-Condemns-US-Military-Attack-in-Iraq-20200103-0015.html> [<http://perma.cc/3HP3-8F5A>] ("This is an action that clearly raises tensions in the region, without any basis in international law, directed directly against a military chief and a group of high-ranking officials of a sovereign country, *in a conflict zone*." (emphasis added)).

271. Rappoza, *supra* note 270.

272. *Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on January 3, 2020*, CONSULATE-GEN. OF THE PEOPLE'S REPUBLIC OF CHINA IN ADELAIDE (Jan. 3, 2020), <https://www.mfa.gov.cn/ce/cgadelaide/eng/wjbfyrth/t1729508.htm> [<https://perma.cc/46HX-HSM7>].

273. *World Reacts to US Killing of Iran's Qassem Soleimani in Iraq*, ALJAZEERA (Jan. 3, 2020), <https://www.aljazeera.com/news/2020/1/3/world-reacts-to-us-killing-of-irans-qassem-soleimani-in-iraq> [<https://perma.cc/8N6X-UNY3>].

274. See notes 262–264 and related discussion (discussing the contrast between Iran's *opinio juris* before the UN and their state practice); *Syria Declares Its Full Solidarity with Iran and Affirms Its Right to Defend Itself In the Face of the American Aggressions*, SYRIAN ARAB REPUBLIC MIN. OF FOR. AFFS. & EXPATRIATES (Jan. 8, 2020), shorturl.at/hpQR8 [<https://perma.cc/R3LX-ABJQ>] (denouncing the U.S.'s use of force but supporting Iran's); see also David Pollock, *Iraqi Reactions to Soleimani's Assassination*, FIKRA F. (Jan. 3, 2020), <https://www.washingtoninstitute.org/policy-analysis/iraqi-reactions-soleimanis-assassination> [<https://perma.cc/GNY3-YMM8>] (discussing some of the nuance surrounding the Iraqi response, which notably did not include seeking recourse for aggression in international fora).

275. Ahmed Abouleine, *Rival Shi'ite Leaders in Iraq Call for U.S. Troop Expulsion in Rare Show of Unity*, REUTERS (Jan. 3, 2020, 2:01 AM), <https://www.reuters.com/article/us-iraq-security-blast-primeminister/iraqi-pm-says-us-killing-of-iranian-commander-will-light-the-fuse-of-war-idUSKBN1Z20JO> [<https://perma.cc/45BX-9KTA>] ("Iraqi militia commander Abu Mahdi al-Muhandis, an adviser to Soleimani, was also killed.").

276. SOLEIMANI FAQ, *supra* note 247, at 9–10.

277. Abouleine, *supra* note 275.

example, the statement of the acting Prime Minister at the time, Adel Abdul-Mahdi.²⁷⁸ Abdul-Mahdi was careful to separate the illegal sovereignty violation of the *assassination* from the strike itself, stating: “[t]he assassination of an Iraqi military commander who holds an official position is considered aggression on Iraq . . . and the liquidation of leading Iraqi figures or those from [an ally] on Iraqi soil is a massive breach of sovereignty.”²⁷⁹ The variation here is important: the strike itself (“liquidation” on Iraqi soil) is a breach of sovereignty, but does not rise to the level of an “act of aggression” in and of itself—only the unlawful “assassination” does so. This statement tracks both the distinction drawn in Iraq’s later letter to the UNSC addressing the strike and the critiques of other nations—the violation of international law narrowly referenced is the *targeting* of the strike, as opposed to its status as an unlawful use of force.²⁸⁰

The *opinio juris* of other commenting nations seems to recognize a customary law shift allowing use of force against imminent terrorist

278. It is important to note that the position of Abdul-Mahdi as a representative of the Iraqi Government at the time of the Soleimani killing is somewhat murky. Abdul-Mahdi formally resigned but was continuing in a “caretaker capacity” pending Parliamentary agreement on his replacement. Colin Dwyer, *How the World is Reacting to the U.S. Assassination of Iran’s Qassem Soleimani*, NPR (Jan. 3, 2020, 11:45 AM), <https://www.npr.org/2020/01/03/793289176/how-is-the-world-reacting-to-the-u-s-assassination-of-irans-qassem-soleimani> [http://perma.cc/BY56-65GT]; see also Scott Neuman, *Iraq’s Prime Minister Resigns After Weeks of Anti-Government Protests*, NPR (Nov. 29, 2019, 9:55 AM), <https://www.npr.org/2019/11/29/783715047/iraqs-prime-minister-resigns-after-weeks-of-anti-government-protests> [https://perma.cc/VJD3-2YEZ]. Similarly, the legislative proclamation by the Iraqi parliamentary body referring the strike to the Security Council has an unclear mandate—Kurdish and Sunni members boycotted the meeting. SOLEIMANI FAQ, *supra* note 247, at 9.

279. See Dwyer, *supra* note 278.

280. See *The Latest: Iraq Seeks Security Council Condemnation of U.S.*, AP (Jan. 6, 2020), <https://apnews.com/article/religion-united-nations-islamic-state-group-tehran-iraq-c4edd3820a971b78394df101952383f1> [http://perma.cc/584P-HVXV].

actions.²⁸¹ Albania,²⁸² Armenia,²⁸³ Australia,²⁸⁴ Brazil,²⁸⁵ Canada,²⁸⁶ Denmark,²⁸⁷ France,²⁸⁸ Georgia,²⁸⁹ Germany,²⁹⁰ Israel,²⁹¹ Italy,²⁹²

281. See *infra* notes 282-300.

282. *Rama on Soleimani's Killing: Albania Supports the USA*, TOP CHANNEL (Jan. 3, 2020), <https://top-channel.tv/english/rama-on-soleimanis-killing-albania-supports-the-usa/> [<https://perma.cc/6FZM-WFFY>] (translating comments by Albanian Prime Minister “strongly approv[ing]” the U.S. strike because of “Iran’s nefarious activity against the free world”).

283. *Qassem Soleimani – Reaction in Azerbaijan, Armenia, Georgia, and the World Community*, JAM NEWS (May 1, 2020), <https://jam-news.net/qasem-suleimani-reaction-in-azerbaijan-armenia-georgia-and-the-world-community/> [<https://perma.cc/9366-JQQL>] (translating statements by the Azeri and Armenian foreign ministers).

284. Rob Harris, *PM Calls for Restraint of US-Iran Tensions as Embassy ‘Locked Down,’* SYDNEY MORNING HERALD (Jan. 4, 2020), <https://www.smh.com.au/politics/federal/pm-calls-for-restraint-of-us-iran-tensions-as-embassy-locked-down-20200104-p530rx.html> [<https://perma.cc/79NF-V6Q7>].

285. Guido Nejamkis, *Jair Bolsonaro Dijo Que el General Iraní Qasem Soleimani Participó en el Atentado a la AMIA*, MUNDO (Jan. 4, 2020), https://www.clarin.com/mundo/jair-bolsonaro-dijo-general-irani-qasem-soleimani-participo-atentado-amia_0_CEIiciv.html [<https://perma.cc/XEC7-RUXK>] (describing then President Jair Bolsonaro’s support for the attack).

286. Global Affairs Canada, *Statement from Minister Champagne Following the Airstrike Carried Out by the U.S. on Iranian Commander Qasem Soleimani in Iraq*, GOV’T OF CAN. (Jan. 3, 2020), <https://www.canada.ca/en/global-affairs/news/2020/01/statement-from-minister-champagne.html> [<https://perma.cc/2DWD-WNJX>] (“Canada has long been concerned by the Islamic Revolutionary Guard Corps’ Qods Force, led by Qasem Soleimani, whose aggressive actions had a destabilizing effect in the region and beyond.”).

287. *Mette F. Viger Uden om Spørgsmål Om USA-Angreb På Iran*, BERLINGSKE (Jan. 5, 2020), <https://www.berlingske.dk/politik/mette-f.-viger-uden-om-spoergsmaal-om-usa-angreb-paa-iran> [<https://perma.cc/QC73-DGTV>].

288. Carl Kinsella, *UK, France and Germany Issue Joint Statements on Assassination of Qasem Soleimani*, JOE (Jan. 3, 2020), <https://www.joe.ie/news/uk-france-germany-issue-joint-statements-assassination-qassem-soleimani-690197> [<https://perma.cc/JK6X-9EDE>] (“We have condemned the recent attacks on coalition forces in Iraq and are gravely concerned by the negative role Iran has played in the region, including through the IRGC and Al-Qods force under the command of General Soleimani.”).

289. JAM NEWS, *supra* note 283 (translating statement by the Georgia Foreign Minister); David Zalkaliani (@DZalkaliani), TWITTER (Jan. 3, 2020, 1:09 PM), <https://twitter.com/DZalkaliani/status/1213190674151071749?s=20> [<https://perma.cc/N42X-G75E>] (“US has the legitimate right to defend its citizens.”).

290. See JAM NEWS, *supra* note 283 (“Germany: ‘The United States reacted to the provocations of Iran, but the escalation reached a dangerous point.’”).

291. Stephen Farrell & Rami Ayyub, *Israel Defends U.S. Killing of Iranian Commander, Puts Military on Alert*, REUTERS (Jan. 3, 2020, 12:33 AM), <https://www.reuters.com/article/us-iraq-security-blast-israel/israel-defends-u-s-killing-of-iranian-commander-puts-military-on-alert-idUSKBN1Z20HB> [<https://perma.cc/HL8K-J8Y9>].

292. See *Iran, Conte: “Obiettivo del Governo è Evitare Ulteriore Escalation, Serve Un’azione Europea.”* FATTO QUOTIDIANO (Jan. 6, 2020), <https://www.iffattoquotidiano.it/2020/01/06/iran-conte-obiettivo-del-governo-e-evitare-ulteriore-escalation-serve-unazione-europea/5653615/> [<https://perma.cc/LV4A-W2YW>] (noting that while Italy did not specifically opine on the Soleimani strike, it did convey its goal as preventing the conflict from further escalating).

Kosovo,²⁹³ Latvia,²⁹⁴ Lithuania,²⁹⁵ the Philippines,²⁹⁶ Saudi Arabia,²⁹⁷ Turkey,²⁹⁸ the U.K.,²⁹⁹ and Yemen³⁰⁰ either expressly endorsed the strike as an act of self-defense or expressed concerns at the *political* justifications for the strike while supporting the *legal* basis with recognition of the terrorist threat posed by Soleimani.

3. State Practice and *Opinio Juris* in Response to the U.S. Drone Strike Killing Ayman al-Zawahiri

On August 1, 2022, the United States carried out another high-profile drone strike, this time targeting Ayman al-Zawahiri, then leader of al Qaeda.³⁰¹ While, at the time of writing, the United States has yet to file an Article 51 letter to the UNSC justifying the use of force, *opinio juris* from President Biden and Secretary of State Antony Blinken seems to suggest an imminence justification could be forthcoming.³⁰²

293. Fatos Bytyci, *Kosovo Arrests Iran Supporter over Comments After Soleimani's Death*, REUTERS (Jan. 7, 2020, 12:02 PM), <https://www.reuters.com/article/us-kosovo-iran-crime/kosovo-arrests-iran-supporter-over-comments-after-soleimanis-death-idUSKBN1Z62AH> [<https://perma.cc/ZM9H-3EU5>].

294. Edgar Rinkēvičs (@edgarsrinkevics), TWITTER (Jan. 3, 2020 11:13 PM), <https://twitter.com/edgarsrinkevics/status/1213161574061551626> [<https://perma.cc/v6UC-58Q3>] (“We stand in solidarity with our ally- the United States [in] exercising the right of self defense . . .”).

295. Linas Linkevičius (@LinkeviciusL), TWITTER (Jan. 3, 2020, 8:48 AM), <https://twitter.com/LinkeviciusL/status/1213125016465891328> [<https://perma.cc/FJ7W-AA5P>] (stating, as foreign minister, that “the #US has the right to defensive actions in response to imminent threat to its citizens”).

296. Darryl John Esguerra, *Duterte to Side with US if Filipinos Are Harmed in Middle East Ruckus*, INQUIRER.NET (Jan. 7, 2020, 1:00 PM), <https://newsinfo.inquirer.net/1209898/breaking-duterte-to-side-with-us-if-filipinos-are-harmed-in-middle-east-ruckus> [<https://perma.cc/J7UT-S9NM>] (quoting President Duterte’s presidential spokesperson as saying “Hindi tayo magiging neutral. (We will not be neutral”).

297. *Saudi Arabia Calls for Restraint After Soleimani Killing*, ARAB NEWS, <https://www.arabnews.com/node/1607896/saudi-arabia> (last updated Jan. 5, 2020) [<https://perma.cc/D4ZX-PPMP>].

298. Said Al-Haj, *Turkey’s Complicated Calculations over Soleimani’s Assassination*, MIDDLE E. MONITOR (Jan. 9, 2020, 1:00 PM), <https://www.middleeastmonitor.com/20200109-turkeys-complicated-calculations-over-soleimanis-assassination/> [<https://perma.cc/2QU9-2GFC>].

299. Kinsella, *supra* note 288.

300. *Yemen Government Backs Soleimani’s Killing: Minister*, REUTERS (Jan. 3, 2020, 12:33 PM), <https://www.reuters.com/article/us-iraq-security-blast-yemen/yemen-government-backs-soleimanis-killing-minister-idUSKBN1Z2209> [<https://perma.cc/JQR5-GA84>] (translating a Twitter comment by Muammar al-Iryani, information minister of Yemen’s internationally recognized government).

301. Blinken Press Statement, *supra* note 152.

302. *See id.* Secretary Blinken stated that the United States made clear that it would act to “protect [its] country and act against terrorist threats emanating from Afghanistan,” articulating a potential imminence argument based on a potential terrorist threat. *Id.* He also stated that “the world is a safer place following the death of Zawahiri, and the United States will continue to act

While President Biden's statements frequently referenced justice for the 9/11 attacks as a primary motivator, reprisals are not permitted under international law.³⁰³ Instead, his statements that “[p]eople around the world no longer need to fear the vicious and determined killer,” “if you are a threat to our people, the United States will find you and take you out,” and al-Zawahiri has been removed from the “battlefield,” point to the likelihood of imminence as justification.³⁰⁴ This imminence justification will be especially important because the Taliban, who now serve as the government of Afghanistan, have explicitly stated that they did not permit the strike.³⁰⁵ While the United States' strike on Soleimani may have been tacitly or explicitly permitted by parts of the Iraqi government, use of force, if unjustified by the imminence principle or some legal justification (for example, the “unwilling or unable” standard suggested by Blinken's statement), would clearly have been in violation of Afghanistan's territorial integrity and international law on use of force.³⁰⁶ Even if, as the United States contends, the Taliban was in violation of the Doha Agreement (the Agreement for Bringing Peace to Afghanistan between the United States and the Taliban) by sheltering al-Zawahiri, the agreement has no breach provision that positively allows use of force in that case—instead, it seems, breach of the agreement would only remove the affirmative covenants the United States made to refrain from use of force against the territorial integrity of Afghanistan.³⁰⁷ In other words, the United States would remain bound by the UN Charter's general provision on use of force, but not the Doha Agreement's specific provision on use of force against Afghanistan in particular.

International response to the incident, however, suggests that the United States has little to worry about. While the Taliban denounced the strike on Twitter, no other nation seems to have joined their condemnation.³⁰⁸ Saudi Arabia stated that it welcomed the strike, as did Canadian Prime Minister Justin Trudeau, who called it “a step

resolutely against those who . . . threaten our country, our people, or our allies and partners,” rhetoric that echoes the right to inherent or collective self-defense. *See id.*

303. *See Mitchell, supra note 265*, at 156 (explaining reprisals and their legal limitations).

304. Biden, *supra note 152*.

305. Amy Cheng, *Killing of Zawahiri Elicits Praise from Bipartisan Lawmakers, Saudi Arabia*, WASH. POST, <https://www.washingtonpost.com/world/2022/08/02/ayman-al-zawahiri-death-global-reactions> (last updated Aug. 2, 2022, 7:56 AM) [<https://perma.cc/D2JX-JS3F>].

306. Blinken Press Statement, *supra note 152*.

307. *See Agreement for Bringing Peace to Afghanistan, supra note 72*, at pt. 2, ¶ 2 (articulating Afghanistan's affirmative duty to clearly convey that those who “post a threat to the security of the United States and its allies have no place in Afghanistan”).

308. Cheng, *supra note 305*.

toward a safer world.”³⁰⁹ In statements at the UNSC and UNGA, comments on the al-Zawahiri strike ranged from neutral (Ghana³¹⁰) to strongly positive.³¹¹ Russia, previously critical of the strike on Soleimani,³¹² stated that the strike was “remarkable news” and “an indisputable success of American special services.”³¹³ An Israeli statement at the UNSC praised the strike and notes the United Nations’ massively positive response thereto.³¹⁴

The killing of Zawahiri serves as a high-water mark for acceptance of drone strikes on imminence principles. Despite being a clear violation of the sovereign territory of Afghanistan and vocally opposed by its leadership, it has been uniformly celebrated by the international community, including countries—like Russia—who previously seemed hesitant to embrace the U.S.’s imminence doctrine.³¹⁵

It is worth taking a moment to address the differences between the Zawahiri and Soleimani strike. Both infringed upon the territorial sovereignty of a state with which the United States had previously been at war, but the global community gave slightly different responses. Some may argue that Zawahiri’s status as a terrorist leader makes the strike killing him exceptional—while it is certainly true that his strike likely faces reduced scrutiny on due process grounds given his position, his position does not change the nature of the territorial infringement against Afghanistan. Instead, I posit that the difference between the two strikes points to the larger contours of the license for UAVs: that imminent action is permissible where it does not pose risk of escalation. If Article 2(4)’s drafters intended to prevent reoccurrence of war, then the internal logic of a self-defense exception must be to nip a potential aggressive action in the bud before it can bloom into full-scale conflict. Allowing UAVs a broader imminence license can fit into that logic because of the precision with which they work: they can carry out a

309. *Id.*

310. U.N. SCOR, 77th Sess., 9107th mtg. at 14, U.N. Doc. S/PV.9107 (Aug. 8, 2022) (statement of Ghana) (noting, in debate on Israel, that Ghana opposes pre-emptive strikes but respects the right to self-defense).

311. U.N. SCOR, 77th Sess., 9108th mtg. at 16–17, U.N. Doc. S/PV.9108 (Aug. 9, 2022) [hereinafter U.N. Doc. S/PV.9108] (statement of Russia)

312. *See supra* note 270 and accompanying discussion; U.N. Doc. S/PV.8699, *supra* note 253, at 20 (statement of Russian Federation).

313. U.N. Doc. S/PV.9108, *supra* note 311, at 16–17 (statement of Russia).

314. U.N. Doc. S/PV.9107, *supra* note 310, at 7 (statement of Israel) (“Just a week ago, a justified strike neutralized Al-Qaida’s leader, Ayman Al-Zawahiri. . . . [W]hen [Al-Zawahiri] was eliminated, this institution, as well as most of the world, gave its full [support].”).

315. *Compare* U.N. Doc. S/PV.8699, *supra* note 253, at 20 (statement of Russia opposing U.S. imminence doctrine), *with* U.N. Doc. S/PV.9108, *supra* note 311, at 16–17 (Russian support for Zawahiri strike).

strike against a terrorist actor plotting to incite violence without risking the escalation that a “boots on the ground” approach would. If this thesis is true, the difference between the Soleimani and Zawahiri response is intuitive: the targeting of a political leader of a sovereign state risks escalation in a way that a typical drone strike does not.

4. Other Relevant State Practice and *Opinio Juris*

Over thirty-eight nations and several nonstate actors have armed drone programs.³¹⁶ Of these, only four nations limit their use of drones to their own territory.³¹⁷ Israel and Azerbaijan have used drone strikes in fighting over disputed territory (Israel in Gaza, and Azerbaijan in Artsakh/Nagorno-Karabakh).³¹⁸ The United Kingdom, Russia, and Iran have all used drones in the context of protracted fighting in Syria.³¹⁹ France first used a targeted drone strike in a 2019 Malian conflict similar to the insurgent-fraught relationship between Afghanistan and the United States.³²⁰ It is worth noting that a 2020 uprising in Mali and a 2022 breach of a Mali-France bilateral defense treaty has put future French drone strikes on Malian territory in the same legal grey area as those of the United States in Afghanistan.³²¹ Mali has withdrawn from its bilateral agreements and declared that there is “no legal basis for France to operate on Malian soil.”³²²

Outside the narrow scope of drone use, other states have joined the United States’ efforts to redefine imminence more broadly. The United Kingdom submitted an Article 51 Declaration to the United Nations Security Council which evoked a broad view of imminent self-

316. *Who Has What: Countries with Armed Drones*, *supra* note 61; *Non-State Actors with Drone Capabilities*, NEW AM., <https://www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities> (last visited Sept. 26, 2021) [<http://perma.cc/X2YA-MU5G>] (listing twenty-three Non-State Actors with Drone Capabilities and five with known use of “Military Grade Drones”).

317. *Who Has What*, *supra* note 205 (Turkey, Iraq, Nigeria, and Pakistan).

318. *Id.*

319. *Id.* (Russia and Iran); Chris Cole, *Overview of UK Air Strikes in Iraq and Syria Since the Territorial Defeat of ISIS in March 2019*, DRONEWARS (Jan. 11, 2021) <https://dronewars.net/2021/11/01/overview-of-uk-air-strikes-in-iraq-and-syria-since-the-territorial-defeat-of-isis-in-march-2019/> [<https://perma.cc/4E6E-E4JU>].

320. *French Army Deploys Drone Strike for First Time in Mali Operation*, GUARDIAN (Dec. 23, 2019, 8:44 AM), <https://www.theguardian.com/world/2019/dec/23/french-forces-kill-40-jihadists-during-operation-in-mali> [<https://perma.cc/Z6EH-R98Z>].

321. *See supra* notes 219–221 (discussing U.S.-Afghanistan developments); *Mali: France Has Lost ‘Legal Basis’ for Military Operations*, AFRICANEWS, <https://www.africanews.com/2022/05/04/mali-france-has-lost-legal-basis-for-military-operations/> (last updated Apr. 5, 2022, 9:24 PM) [<http://perma.cc/NP9L-LQEL>].

322. *Id.*

defense as justification for its use of force.³²³ Turkey also used imminent self-defense as justification for its uses of force in February and July 2015.³²⁴ In December 2015, Germany submitted a brief Article 51 Declaration which acknowledged that terrorist armed attacks in the European Union are sufficient to activate the right of collective self-defense (the right of countries to come together to use force in defense of an ally).³²⁵ Further, while a German High Administrative Court in North Rhine-Westphalia ruled that there must be a narrow temporal link between a threatened or completed terrorist act and a lawful use of force in self-defense, it did acknowledge that imminent self-defense can be a justification for the use of force.³²⁶ This decision does not go as far as Professor Koh's elongated imminence doctrine,³²⁷ but the narrow limits it tracks are nearly impracticable in insurgent contexts: the German standard requires either a use of force occur only immediately after an attack, when actors may be difficult to locate, or the *Caroline* doctrine's "no moment for deliberation" strict requirement timeline.³²⁸

Supporting this *opinio juris* was state practice in response to U.S. use of drones before and after the Soleimani strike. While Presidents Obama, Trump, and Biden admitted to carrying out drone attacks in nations outside of active war zones, the United States has never been the subject of sanctions over drone use.³²⁹ Despite using drones outside of warzones in Somalia since at least 2008, the United

323. See Permanent Rep. of the U.K. of Gr. Brit. and N. Ir. to the U.N., Letter dated Sept. 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015).

324. Permanent Rep. of Turk. to the U.N., Identical Letters dated Feb. 22, 2015 from the Permanent Rep. of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/127 (Feb. 23, 2015); Chargé d'affaires a.i. of the Permanent Mission of Turk. to the U.N., Letter dated July 24, 2015 from the Charge d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015).

325. See Chargé d'affaires a.i. of the Permanent Mission of Ger. to the U.N., Letter dated Dec. 10, 2015 from the Charge d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (Germany explaining rationale for Article 51 Declaration and the validity of self-defense measures).

326. OVG, Mar. 19, 2019, 4 A 1361/15, https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/4_A_1361_15_Urteil_20190319.html [<https://perma.cc/JA4N-SH54>].

327. See KLAIDMAN, *supra* note 182, at 219–20 (explaining Koh's theory of elongated imminence).

328. Webster, *supra* note 136 (articulating standard for anticipatory self-defense under *Caroline* doctrine).

329. Ironically, the United States sanctioned Iran over its *offensive* use of drones. See *Treasury Sanctions Network and Individuals in Connection with Iran's Unmanned Aerial Vehicle Program*, U.S. DEPT OF TREASURY (Oct. 29, 2021), <https://home.treasury.gov/news/press-releases/jy0443> [<https://perma.cc/58TY-TAY4>].

States has not been subject to an ICJ claim by Somalia or any other country in which it has used drones.³³⁰

State practice and *opinio juris* arising out of the Soleimani and al-Zawahiri cases and over twenty years of the U.S. drone program in contrast to other failed attempts by the United States and Russia to shift international law on the use of force show that customary law has shifted sufficiently to include the United States' broad conception of imminence within the framework of Article 51 self-defense. Twenty years of U.S. efforts to legalize their drone program have proven successful.

IV. PUTTING THE GENIE BACK IN THE BOTTLE: IMPLICATIONS AND A PATH FORWARD

A. The Dual Dangers of a Broad Customary Law License for UAV Use Against Imminent Threats

In Section III, this Note analyzes the current state of customary law on the use of force by state actors using UAVs. The analysis shows a distinct shift from a general prohibition on the use of force justified by elongated imminence³³¹ to a broad customary law license for UAV strikes justified on the same grounds,³³² even where the sovereign government of the state against which the strike takes place directly opposes said strike.³³³ This shift poses a dual risk to U.S. policymakers. On the one hand, the acceptance in customary international law is somewhat illusory. On the other, the right created by this illusory license is dangerously broad.

One of customary international law's great strengths is its ability to adapt and shift over time—it is embodied in what states collectively agree to; however, this is also one of its great weaknesses: vocal, focused *opinio juris* critiques of drone use on imminence lines by a few state actors could shift customary international law back towards a general prohibition against imminent use of force.³³⁴ The international legality of one of the United States' keystone tools of

330. See Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 587–89 (2011) (calling Somalia “a place that almost never gets mentioned in discussions of U.S. use of military force”).

331. See *supra* Section III.B.1.

332. See *supra* Section III.B.2–3.

333. See *supra* Section III.B.3.

334. See BUERGENTHAL & MURPHY, *supra* note 158, at 27–28.

national security therefore relies on an ephemeral unity in state practice and *opinio juris* unguaranteed in any binding law.

Even unguaranteed, the broad use of force license poses dangers that may have been unintended when justification for the program was first proffered by U.S. Administrations.³³⁵ When the United States began its drone program, it was one of only a few nations with the technological capability and strategic power to carry out drone strikes.³³⁶ Expanding the definition of imminence only had implications for major powers—at most, the United States, Russia, and China.³³⁷ Each of these nations had, at the time, complex legal regimes and regulatory systems that served as checks and balances on the use of force. Further, each was economically entangled and had important interests in remaining a part of the international community.³³⁸

Between 2000 and 2020, thirty-eight nations developed armed drone programs, twenty-eight additional nations were in the process of acquiring armed drone capability, and eleven nations began actively using armed drones.³³⁹ Of these, the United States³⁴⁰ and Israel³⁴¹ were the largest exporters of drones. Two states, Canada and Iran, exported drone technology to nonstate actors, including Libyan rebels (Canada), Hezbollah (Iran), and Hamas (Iran).³⁴² Between 2020 and 2022, Turkey emerged as a major exporter of drones—an exporter with fewer qualms about military export controls.³⁴³ Turkish drone exports have made drones cheaper and more accessible than ever before.³⁴⁴ With technology more available and drones rapidly proliferating, the expanded definition of imminence now empowers not only large, interconnected nations with interests in maintaining peace, but also states with limited civil-military oversight or states in political

335. See *supra* Section II.

336. Michael C. Horowitz, Sarah E. Kreps & Matthew Fuhrmann, *Separating Fact from Fiction in the Debate over Drone Proliferation*, 41 INT'L SEC. 7, 10–11 (2016).

337. See *id.* at 28–29 (describing several near-misses between these nations).

338. See *id.* (highlighting that none of these near-misses resulted in a military escalation).

339. *Introduction: How We Became a World of Drones*, NEW AM., <https://www.newamerica.org/international-security/reports/world-drones/introduction-how-we-became-a-world-of-drones/#:~:text=The%20United%20States%20and%20Israel,world%20for%20over%20a%20decade> (last visited Nov. 22, 2022) [<http://perma.cc/CV9T-VWL8>].

340. *Id.* (listing 55 countries that the United States sells to).

341. *Id.* (listing 56 countries that Israel sells to).

342. *Id.*

343. See Perrigo, *supra* note 54 (highlighting Turkey's recent emergence as a drone exporter).

344. See Borsari, *supra* note 56; Alper Coşkun, *Strengthening Turkish Policy on Drone Exports*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan 18, 2022), <https://carnegieendowment.org/2022/01/18/strengthening-turkish-policy-on-drone-exports-pub-86183> [<https://perma.cc/DM7E-YNS8>] (detailing Turkey's drone sales and how this contributed to the country's emergence as an exporter in the defense and aerospace industries).

transition to use drones to accomplish their political goals.³⁴⁵ Without concrete limits, the expanded definition of imminence the United States has developed is available for use, and abuse, by rogue actors.

To understand the dangers posed by the expanded definition of imminence, engage with a brief hypothetical. In January 2022, Russia accused Ukrainians of committing genocide against ethnic Russians in Ukrainian territory—this formed the crux of their justification for invasion before the U.N. General Assembly.³⁴⁶ Imagine if instead, Russia took a different strategy: They first label Ukrainians in Donetsk and Luhansk a terrorist organization for defensive attacks made against Russians. They then justify drone attacks on Ukrainian leaders with Article 51 imminent self-defense grounds. Since the United States imminence justification reached an Iranian political official,³⁴⁷ the Russians argue, they are justified in reaching Ukrainian officials who support the fighters in Crimea, or Donetsk. After a series of drone strikes (or cyber-attacks, or other novel offensive methods) taking out anti-Russia ministers, Russian separatists capitalize on the fear engendered by years of strikes (and on population loss in an increasingly dangerous territory) and elect a puppet government. Russia can maintain control through the threat of strikes, and democratic, pro-Western Ukrainians are forced to flee. Unlike the odd and ungrounded justifications proffered by Minister Lavrov in his speech before the United Nations General Assembly, Russian foreign ministers can point to twenty years of consistent state practice allowing these types of drone strikes.

While this counterfactual may have seemed unlikely two years ago, it is increasingly possible in a post-Ukraine-Russia-conflict world. It is certain that the United States has an interest in being able to carry out drone strikes globally—the further the legal reach, the more able U.S. actors are to target enemies of the American people and interdict potential terrorist plots; however, each country has an interest in limiting the potential of other countries to carry out drone strikes on its territory. As much as the United States and proponents of drone strikes claim that drones are precisely able to target potential threats,³⁴⁸ they still cause damage to property and to civilians who may be present at

345. See *Who Has What: Countries with Armed Drones*, *supra* note 61 (examples of countries with armed drone programs, including North Korea).

346. See *Lavrov Statement*, *supra* note 231, at 3 (alleging that Ukrainian actors engaged in criminal behavior that caused a “massive loss of human lives”).

347. See *supra* Section III.B.2.

348. See, e.g., Obama, *supra* note 25.

the target site.³⁴⁹ Further, drone strikes carry less risk for the country carrying them out, given that no citizen of the targeting country must risk life and limb to effectuate the attack.³⁵⁰ This removes some of the disincentives for aggressive action and could increase aggressive action by all parties. Most vitally, countries may be tempted to use drone strikes on violent nonstate actors as a pretext for other types of attacks.³⁵¹

B. Opportunities for Leadership

The United States stands poised at a unique moment in world history. The U.N. system, and especially the Security Council, has struggled to prevent a clear act of aggression by one of its permanent members. However, a broad pro-peace consensus is apparent in unprecedented votes in the United Nations General Assembly and shockingly deep sanctions, including from nations—like Switzerland—previously determined to remain politically neutral.³⁵² In this unique period, framed by the Ukraine crisis, the United States can lead the formation of a new set of demilitarization and disarmament efforts not seen since nuclear disarmament at the end of the Cold War. By negotiating treaty language defining imminence as exclusively available in the targeting of narrowly delineated, internationally recognized terrorist actors, the United States can not only preserve its strategic interests and entrench the legality of its drone program but also prevent future abuse of lawful self-defense as a justification for warmaking.

A treaty defining imminence through the broad brush that the United States uses, as opposed to the narrower *Caroline* conception, would not necessarily overrule prior norms but would serve as a

349. BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 205 (estimating 910 to 2,200 civilians killed and 283 to 454 children killed by U.S. UAV actions between 2010 and 2020).

350. *See supra* notes 25–31 and related discussion.

351. Ramírez, *supra* note 41, at 23–24 (using the 2003 War in Iraq and fabrication of evidence of Weapons of Mass Destruction as an example of the danger that “[f]alse or inaccurate intelligence could easily lead to a justification for a use of force that might not otherwise exist”).

352. *Neutrality*, FED. DEP’T OF FOREIGN AFFS., <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/neutrality.html> (last visited Nov. 22, 2022) [<https://perma.cc/TNX2-VBEZ>] (“Permanent neutrality is a principle of Swiss foreign policy The Federal Constitution provides that the Federal Council and the Federal Assembly must take measures to safeguard Switzerland’s neutrality.”). *But see Ukraine: Switzerland Adopts New Sanctions*, FED. COUNCIL (Mar. 8, 2022), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-89874.html#:~:text=With%20the%20decision%20of%203,these%20goods%20are%20also%20prohibited> [<http://perma.cc/5KQY-XHV3>].

powerful persuasive tool of international law.³⁵³ Similarly, a treaty could be used to add nuance to the current broad definition of imminence under customary international law or override it. The United States faces a major challenge here: the definition would only be legally binding on signatories to the proposed treaty. Attempting to “back-door” the clause into an existing treaty (i.e., by proposing a clarifying amendment to the Geneva Conventions or another widely adopted law of war treaty) would not be effective. Even self-executing treaties typically have amendment procedures that prevent amendments from being binding unless a specific quorum of signatories to the original have also ratified the amendment, or do not bind signatories unless they also sign onto the amendment.³⁵⁴

The treaty solution may work if enough countries sign on—the consensus against Russian aggression provides a narrow window of opportunity to engender a wide tent treaty on this issue. While treaties do not have the same power over non-signatory countries, treaties that are signed by an overwhelming number of nations can be used as *evidence* of customary international law by scholars, the International Law Commission,³⁵⁵ and the ICJ.³⁵⁶ Therefore, having a multilateral treaty with a carefully tailored definition of imminence has the capacity to serve as written evidence of customary law which validates the United States’ preferred definition, beyond case-by-case assessments of

353. See *supra* notes 154–160 and accompanying text (displaying the relationship between customary law and treaties in the creation of international law). See generally Scott & Carr, *supra* note 209 (suggesting that multilateral treaties, while not binding on those not party to the treaty, may become so if the following three criteria are met: (1) “[t]he treaty is accepted by a sufficient number of states,” (2) “a significant number of those states whose interests are most affected by the treaty” are parties thereto, and (3) “[t]he treaty provisions are not subject to reservations by the accepting parties”).

354. Cf. M.J. Bowman, *The Multilateral Treaty Amendment Process: A Case Study*, 44 INT’L & COMPAR. L.Q. 540, 542 (1995) (discussing the prevalence of provisions establishing amendment procedures).

355. ILC is a commission established under the United Nations General Assembly for the purposes of defining and mapping the landscape of customary international law. See *International Law Commission*, UNITED NATIONS, <https://legal.un.org/ilc/> (last visited Nov. 22, 2022) [<https://perma.cc/QKC6-EYJB>] (“The International Law Commission was established . . . to ‘initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.’”). While it has had very little progress in actually defining what is and is not customary law, it has developed useful tools for the interpretation of customary law, in large part working from decisions by the ICC and ICJ. See Memorandum from the U.N. Secretary-General, *Ways and Means of Making the Evidence of Customary International Law More Readily Available*, A/CN.4/6 and Corr.1 104–05 (1949) (listing treaties as a form of evidence used in determining customary international law).

356. See *supra* Memorandum from the U.N. Secretary-General, note 355, at 104–05.

state practice which currently dictate an untenably wide justification.³⁵⁷

Another, potentially less preferable option would be a resolution from the UNGA. Adoption of an imminence definition through the UNGA resolution process may be less feasible than a multilateral treaty but could have more persuasive power over non-signatories. Where multilateral treaties need only the agreement of a set group of signatories, and therefore can be constructed to include countries which are in agreement (in this case, largely developed countries with established drone programs who also perceive themselves as potential victims of terrorist threats from organizations based abroad or in nonallied countries, such as the United States, United Kingdom,³⁵⁸ China,³⁵⁹ Israel, Iran³⁶⁰, U.A.E., South Africa, Italy, and Nigeria³⁶¹ and even developing countries such as Mali and Azerbaijan³⁶²) on a given definition, the adoption of a UNGA resolution requires at least a majority.³⁶³ Given the perception that drone strikes are a tool for developed countries to violate the sovereignty of developing nations without consequence or attribution,³⁶⁴ it is likely that the numerical

357. *See id.*

358. *See* Dan Sabbagh & Amelia Gentlemen, *UK Would be Prepared to Launch Afghanistan Drone Strikes*, *Says Wallace*, *GUARDIAN* (Sept. 9, 2021, 2:26 PM), <https://www.theguardian.com/politics/2021/sep/09/uk-would-be-prepared-to-launch-afghanistan-drone-strikes-says-wallace> [<https://perma.cc/78XW-53FD>] (showing that the United Kingdom would be willing to conduct drone strikes in response to international terrorism).

359. *See* Mike Yeo, *Chinese Airshow Offers Glimpse at Military's New Drones*, *DEFENSENEWS* (Sept. 30, 2021), <https://www.defensenews.com/unmanned/2021/09/30/chinese-airshow-offers-glimpse-at-militarys-new-drones/> [<https://perma.cc/L5U2-D5E3>] (highlighting China's drone technology).

360. As illustrated with Israel and Iran or other pairs of enemy countries (Iran/Saudi Arabia, India/Pakistan, Russia/Ukraine) any of these multilateral agreements would face serious issues in coalition-building. *See* Farrell & Ayyub, *supra* note 291 (designating Israel as Iran's "top regional foe"). Each nation has an incentive to expand their own ability to legally target abroad, but no nation wants their enemy to be able to do the same. Further, an overexpansive definition validated in a binding multilateral treaty may raise pretext concerns, which would likely have to be incorporated into the text of the agreement itself. *See supra* note 351 and accompanying text.

361. *Who Has What: Countries with Armed Drones*, *supra* note 61.

362. *See Who Has What*, *supra* note 205.

363. Gen. Assembly of the United Nations, *Functions and Powers of the General Assembly*, UNITED NATIONS, <https://www.un.org/en/ga/about/background.shtml> (last visited, Nov. 22, 2022) [<https://perma.cc/X432-PCAQ>].

364. *Compare* COLUM. L. SCH., *supra* note 22, at 4–5 (emphasizing the lack of transparent data on drone strikes and stating that New America's methodology for calculating drone-strike deaths contains flaws), *with The Drone War in Pakistan*, *supra* note 22 (providing general information about U.S. drone strikes in Pakistan and giving a calculation of the number of total deaths these strikes caused), *and* Kessler, *supra* note 22 (discussing various sets of data showing the number of civilian deaths associated with U.S. drone strikes). For examples of past criticisms from domestic and international sources respectively, see Martin, *supra* note 46, and Bowcott, *supra* note 24 (summarizing the findings of U.N. reports and international critiques of the U.S. Drone program).

advantage of small developing nations in the UNGA would be able to overrule those interested in a more expansive definition.

One especially ripe avenue for treaty development would be limiting the imminence definition for drone use to exclusively be justified by imminent threats from nonstate, terrorist actors. This type of use is already supported by state practice: the drone program is a centerpiece of the U.S. fight against insurgency, and *opinio juris* on the Soleimani and Zawahiri killings emphasize their responsibility for terrorist acts, not mere breach of peace.³⁶⁵ Currently, the problem of defining terrorism is a thorny one in international law.³⁶⁶ There is not yet treaty language clearly defining terrorism under international law, largely because of the inherent debate over who gets to determine whether an insurgent is a terrorist or a freedom fighter.³⁶⁷ The crisis in Ukraine may pose a unique opportunity to reckon with those definitional concerns—free of many of the cognitive biases and colonial attitudes that prevent European leaders from empathizing with non-Western plights for self-determination,³⁶⁸ civilians in Ukraine provide a recognizable, near-at-hand example of the need to protect those fighting for self-determination. Having this example in mind, as opposed to broad-brush demonization of insurgencies generally, may help developed nations in the global North overcome some of the entrenched biases that prevented definitional compromise in previous attempts to define terrorism.³⁶⁹ With a narrowly tailored definition of

365. See, e.g., Trump, *supra* note 245 (“[T]he United States military successfully executed a flawless precision strike that killed the number-one terrorist anywhere in the world, Qasem Soleimani.”); *supra* Section III.B.3.

366. See Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RESV. J. INT’L L. 375, 376–78 (2004) (highlighting the lack of a national and international consensus on a definition for “terrorism”).

367. See Boaz Ganor, *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?*, 3 POLICE PRAC. & RSCH. 287, 287–88 (2002) (highlighting the lack of an internationally accepted definition of “terrorism”); Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT’L L.J. 491, 491–92 (2003) (exploring the definition of “terrorism”).

368. See generally Commissioner for Human Rights, *European Countries Should Lift the Taboo on Afrophobia and Start Addressing this Phenomenon*, COUNCIL OF EUR. (Mar. 19, 2021), <https://www.coe.int/en/web/commissioner/-/european-countries-should-lift-the-taboo-on-afrophobia-and-start-addressing-this-phenomenon> [http://perma.cc/X66G-VAQM] (describing European antipathy towards those of African descent); Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial, Discrimination, Xenophobia and Related Intolerance, Intolerance and Discrimination Against Arabs and Muslims, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Oct. 14, 2009), <https://www.ohchr.org/en/statements/2010/09/intolerance-and-discrimination-against-arabs-and-muslims-statement-mr-githu> [https://perma.cc/7XPN-CJ67] (addressing European discrimination against Muslims and Arabs).

369. See Jonathan Fine, *Political and Philological Origins of the Term ‘Terrorism’ from the Ancient Near East to Our Times*, 46 MIDDLE E. STUD. 271 (2010); Sabelo J. Ndlovu-Gatsheni, *From a ‘Terrorist’ to Global Icon: A Critical Decolonial Ethical Tribute to Nelson Rolihlahla Mandela of*

permissible terrorist targets, the imminence principle would be sufficiently constricted, allowing the United States to continue its counterterror program without sacrificing the safety of the global order.

CONCLUSION

The Russia-Ukraine conflict has demonstrated the deep consequences of unlawful uses of force—even by global superpowers—as well as the dangers of an increasingly hostile geopolitical environment. Simultaneously, the United States’ twenty-year campaign to establish a legal justification for the use of drones in self-defense under a broad definition of imminence successfully produced sufficient state practice and *opinio juris* to render it binding customary international law. Without careful tailoring through treaty design or precise statements clarifying the bounds of the imminence doctrine, the proliferation of drone technology beyond major actors renders this new customary law license as more of a liability than an asset in the global effort for peace and stability. Multilateral action in the form of a treaty entrenching the imminence definition while narrowly tailoring its application to counterterror contexts has the potential to not only protect U.S. and allied interests, but also to avoid further abuse of self-defense justifications for unlawful warmaking.

*Elodie O. Currier**

South Africa, 35 THIRD WORLD Q. 905 (2014) (discussing Nelson Mandela’s initial image as a terrorist and how this evolved into his image as a humanist icon).

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