

of existing laws can permit a state (hereafter the “victim state”)⁸ to use force in self-defense against a transnational terrorist organization⁹ operating from another state (hereafter the “territorial state”),¹⁰ which has not consented to a use of force within its territory and which is unwilling or unable to address the terrorist threat to the victim state. This discussion is necessary because the “‘war on terrorism’ is being conducted---by both states and non-states---in a relative vacuum of international law.”¹¹ In order to overcome the contention among states concerning the use of force against terrorists, this article seeks to fill that vacuum with existing law in novel ways.

Part I addresses the existing legal standards and how anti-interventionist sentiment has deterred national security prerogatives, allowing conditions conducive to conflict to accrue. *Part II* discusses expanding the designation of *hostis humani generis* to apply to terrorists in a manner beyond the traditional criminal framework, providing states with legal justification for the use of force. *Part III* addresses how normative principles can serve as limits to the justification for the use of force and prevent abuse by a state.¹² This article concludes with the assertion that designating terrorists as *hostis humani generis* grants states the authority to use force and that such action will limit the scope of conflicts, minimize the infringement of state sovereignty, and enable effective military action against terrorism.

I. The International Legal Framework

This Part first addresses anti-interventionist sentiments among the international community and the changes to such sentiments in recent years, particularly regarding the use of force against terrorists. It will then briefly address the circumstances under which a use of force is currently permitted under international law. Particular attention is directed to the doctrine of self-defense which becomes the basis for justifying the use of force against terrorists.

⁸ This term is used to designate the state under threat of an armed attack by the terrorist organization in question.

⁹ For the working definition used by this article see *infra* note 94 and accompanying text.

¹⁰ This term is used to designate the state from whose territory the terrorist threat originates.

¹¹ See, e.g., Stanley Fish, *Don't Blame Relativism*, 12 RESPONSIVE COMMUNITY 27, 30 (2002).

¹² Scholars have described three ways that international law can affect policy decisions as: a constraint on actions, a basis of justification action, and organizational structures, procedures, and forums. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 17 (1974). This article undertakes a discussion of justification in order to mitigate interference by the international community in a state's security prerogatives.

A. Anti-interventionist Sentiments and Recent Changes

In the post-World War II era, the international community embraced restrictive analysis, “an approach seeking to limit the availability of military force to the largest possible extent,” as part of the *jus contra bellum* doctrine.¹³ Subsequent interpretations of use of force and *jus ad bellum* principles caused the international community to view the use of anti-terrorist force with skepticism.¹⁴ Despite challenges to this perception and a degree of change in recent decades, many states still adhere to a restrictive view.¹⁵

There is a danger in inaction when action is warranted. The discomfiture concerning the use of force discourages military action and enables criminals in committing atrocities.¹⁶ This truth is not exclusive to addressing terrorist threats, but is evident in many circumstances. Examples include the international community’s delayed response to conflicts in Rwanda and the subsequent genocide of an estimated one million Tutsis, and more recently a reluctance¹⁷ to intervene in the Syrian war which has seen almost half a million deaths and over five million refugees.¹⁸ By seeking to chill the use of force among states, the international community has inadvertently exacerbated the consequences of conflict.¹⁹

¹³ Christian J. Tams, *Use of Force against Terrorists*, 20 EUR. J. INT’L L. 359, 363 (2009).

¹⁴ *Id.* at 364; See Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT’L L. 149 (2006); Patrick Goodenough, *Stellar Cast of Critics Slams U.N. As Anti-American, Anti-Israel*, CNS NEWS (Sept. 23, 2011)

<https://www.cnsnews.com/news/article/stellar-cast-critics-slams-un-anti-american-anti-israel>; Rachel Alexander, *Anti-Americanism Increasing at the United Nations*, TOWNHALL (May 07, 2013), <https://townhall.com/columnists/rachelalexander/2013/05/07/antiamericanism-increasing-at-the-united-nations-n1590060>.

¹⁵ See Tams, *supra* note 13, at 374.

¹⁶ See Prime Minister of India Modi’s Comments at the Heart of Asia Summit on Dec 04, 2016 indicating that “silence and inaction against terrorism only embolden terrorists and their masters.”

¹⁷ Jo Cox et al., *The Cost of Doing Nothing: The Price Of Inaction in the Face of Mass Atrocities*, POLICY EXCHANGE (2017), https://policyexchange.org.uk/wp-content/uploads/2017/01/Intervention-01-17_v8.pdf; see also Kyle Almond, *Why the World isn’t Intervening in Syria?*, CNN (Feb. 23, 2012), <http://www.cnn.com/2012/02/23/world/syria-intervention/index.html> (answering its own question as to why there hasn’t been any intervention in the Syrian conflict with the poignant response: There is no international consensus.).

¹⁸ *Syrian Civil War Fast Facts*, CNN (Oct. 17, 2017)

<http://www.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html>; HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/syria> (last visited Oct. 30, 2017).

¹⁹ See Minter, *supra* note 7; Richard Norton-Taylor, *Global Armed Conflicts Becoming More Deadly, Major Study Finds*, GUARDIAN (May 20, 2015), (“International Institute for Strategic Studies says despite fewer wars number of deaths has trebled since 2008 due to an ‘inexorable intensification of violence.’”) <https://www.theguardian.com/world/2015/may/20/armed->

The exacerbation of conflicts calls into question the wisdom of anti-interventionism.²⁰ As a result, “the legal rules governing the use of force have been re-adjusted”²¹ in recent decades to “permit forcible responses against terrorism under more lenient conditions.”²² Although these changes are a step in the right direction, additional adjustments are still needed.²³ This article proposes an adjustment to anti-terrorism strategies to weave together the traditionally separate approaches of criminal prosecution and military targeting.²⁴ This discussion is necessary because antiquated conceptualizations are insufficient to address modern non-state threats which are capable of bringing to bear financial and human resources comparable to that of a state.²⁵ The concept of terrorists as permissible targets, absent a military operation, is predicated upon a liberal construal of the doctrine of self-defense and the existing legal framework of *hostis humani generis*.

B. Use of Force in Self-Defense

The United Nations Charter placed significant restraints on a Member State’s ability to resort to the use of force.²⁶ However, the Charter also incorporated exceptions to the prohibition against force,²⁷ including: the use of force under the direction of the Security Council and the rights of individual and collective self-defense.²⁸ The Security Council has abstained from or been slow to authorize the use of force against terrorists.²⁹

conflict-deaths-increase-syria-iraq-afghanistan-yemen; *but cf.* Trends in Armed Conflict, 1946–2014, 01 Conflict Trends 1 (2016), (optimistically observing “long-term trends nevertheless driving the waning of war are still at work”) http://file.prio.no/publication_files/prio/Gates,%20Nyg%C3%A5rd,%20Strand,%20Urdal%20-%20Trends%20in%20Armed%20Conflict,%20Conflict%20Trends%201-2016.pdf

²⁰ See generally Tams, *supra* note 13, at 373–75.

²¹ Tams, *supra* note 13, at 361.

²² *Id.*

²³ *Id.* at 394–97.

²⁴ *Id.* at 396.

²⁵ *Infra* notes 4104–4105 and accompanying text.

²⁶ U.N. Charter art. 2, ¶ 4.

²⁷ See Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539, 549 (2002) (“Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior.”).

²⁸ See U.N. Charter art. 2, ¶ 4, art. 42, 43, 51.

²⁹ See Tams, *supra* note 13, at 359.

²⁹ Julian Borger & Bastien Inzaurrealde, *Russian Vetoes are Putting UN Security Council’s Legitimacy at Risk, Says US*, GUARDIAN (Sept. 23, 2015), <https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us>; see also *id.* (“Syria is a stain on the conscience of the security council. I think it is the biggest failure in recent years, and it undoubtedly has consequences for the standing of the security council and indeed the United Nations as a whole.” Quoting Matthew Rycroft, British Ambassador to the United Nations). It is also

Thus, states have resorted to the right of self-defense to justify³⁰ their use of force.³¹

To be justified as an act of self-defense, a use of force must satisfy the principles of *jus ad bellum*.³² There is some variation as to the exact application of the criteria, but for the purposes of this article, *jus ad bellum* requires that the use of force must be both necessary and proportional to be justified.³³ This means to justify a state's decision to use force in self-defense, the action must be both necessary to defend the state and the use of force must be proportional to that objective.³⁴ This article is not concerned with measuring proportionality, nor the evaluation of the different types of force which may be used. That discussion is left for others to undertake. Rather, this article is concerned with the necessity of self-defense as a key component justifying the use of force at all. Under current views, necessity is satisfied when a state

worth noting that the United States has been prolific with their veto power in protecting Israel from scrutiny for action in Palestine.

³⁰ See, e.g., Letter dated 23 September 2014, from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc S/2014/695 (2014); Letter dated October 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, 56th Sess. at 1, U.N. Doc. S/2001/946 (2001), <http://www.un.int/usa/s-2001-946.htm> ("In accordance with Article 51 of the Charter of the United Nations, I wish ... to report that the United States of America ... has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States.").

³¹ Though there is some debate that the United Nations Charter governs only state-to-state relations and cannot justify the use of force in self-defense against terrorists, it is a minority position dismissed by two rationales. First, states exercising the use of force against terrorists in other nations have found themselves to be acting pursuant to Article 51 which contains the right to self-defense. Secondly, the argument is negated by the fact that the doctrine of self-defense still exists in international customary law and did not cease to exist merely because it was written into a treaty. For a discussion on why Art. 51 includes non-state actors see Carsten Stahn, *Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 54 (2003). The challenge is offered because it seems contrary to the premise of the Charter which was to govern state-to-state relations. But, it remains consistent with the purposes and objectives of the document which, simply stated, are to preserve international peace and security. See U.N. Charter art. 1.

³² See Statute of the International Court of Justice, art. 38 ¶ 1. Treaty law especially the U.N. Charter art. 2, ¶ 4 restraint on the use of force, is often invoked as an argument against using force. But, even when treaty law is used to justify the use of force, such as under U.N. Charter art. 51 allowing force in self-defense, the discussion inevitably turns to customary law to identify, define, and apply the relevant principles. This customary international law is the primary source of concern for the current discussion.

³³ Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. OF INT'L L. 563, 563 (2013).

³⁴ "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law." Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I. C. J. Rep. 245, ¶41 (July 8).

suffers an armed attack³⁵ or a state is exposed to an imminent threat.³⁶ Additionally, a few states hold the view that the certainty of a threat, regardless of its imminence, also establishes the necessity of using force.³⁷

It is important to recognize that the three situations under which a state may seek to justify the use of force in self-defense are of varying utility. First, no state can rightfully be expected to wait to be victimized before taking action.³⁸ So, the justification derived from suffering an armed attack is not ideal because it necessarily requires a state to sustain some harm. Next, the justification in response to an imminent threat is also not ideal. Imminence is difficult to define and determine.³⁹ Some states hold imminence to restrain responding with force until the need is “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁴⁰ This entails delaying the

³⁵ “[S]elf defence would warrant only measures which are proportional to the armed attack and necessary to respond to it” as “a rule well established in customary international law” Case concerning Military and Paramilitary Activities in and against Nicaragua [hereinafter “*Paramilitary Activities*”], 1986 I. C. J. Rep. 94, ¶176 (June 27).

³⁶ See Akande, *supra* note 33, at 563–66.

³⁷ This view is often referred to as the Bush Doctrine. It is not widely accepted as it is currently articulated. See Dietrich Murswiek, *The American Strategy of Preemptive War and International Law*, INST. PUB. L. 1 (Mar. 2003), <https://ssrn.com/abstract=397601> or <http://dx.doi.org/10.2139/ssrn.397601> (“By claiming a right to preemptive action, the U.S. government is pushing a change in public international law. If other States don't object a beginning practice of preemptive war, there could emerge a new rule of public international law that allows preemptive wars.”); 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, 284 (2003) (discussing the historical development of the Bush Doctrine) (quoting Thomas Powers, *The Man Who Would Be President of Iraq*, N.Y. TIMES, Mar. 16, 2003, at Week in Review, 1, 7.); Dominika Svarc, *Redefining Imminence: The Use of Force against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 183 (2006) (“If the ultimate goal of international law is to preserve State's right to effective self-defence, the standard of imminence may need to be read more broadly.”); see also Adil Ahmad Haque, *Imminence and Self-Defense Against Non-State Actors: Australia Weighs In*, JUST SECURITY (May 30, 2017), <https://www.justsecurity.org/41500/imminence-self-defense-non-state-actors-australia-weighs/> (observing that some consider Australia to have embraced the Bush Doctrine).

³⁸ See Cf. Mary E. O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002) (interpreting self-defense to require the occurrence of an attack or an attack underway).

³⁹ Debates still arise as to how imminent a threat must be before a state may act in self-defense. See, e.g., Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972) (“It was never the intention of the Charter to prohibit anticipatory self-defense and the traditional right certainly existed in relation to an 'imminent' attack.”). But see IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278 (1963) (stating that Article 51 prohibits anticipatory self-defense).

⁴⁰ This is commonly known as the Caroline Doctrine. See Webster, Daniel. ‘Letter to Henry Stephen Fox’, in THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843 at 62 (1983).

use of force until the last opportunity for an aggressor to change its course has passed, and diminishes the victim state's ability to effectively defend itself.

This is particularly true in asymmetric conflicts where the foreseeability and imminence of an attack is more difficult to determine.⁴¹ Attacks are predicted through the use of warnings and indicators in traditional conflicts.⁴² These traditional measures of imminence are well established by intelligence agencies which have observed enemy operations, troops compositions, and doctrine,⁴³ allowing them to intuit precursory actions necessary for the deployment of military forces. However, terrorists do not have traditional military structures, nor do they pursue traditional military objectives.⁴⁴ Furthermore, terrorists often work in compartmentalized cells,⁴⁵ severely negating the utility and accuracy of indicators and warnings. However, preparations for an attack can be confirmed with reasonable certainty by other intelligence strategies, but their imminence is less predictable.⁴⁶

The differences between traditional conflicts and attacks conducted by asymmetric actors highlight the utility of justifying the use of force when a threat is certain, as opposed to waiting to be victimized or gambling with predictions of imminency. Because using force in response to threats that are certain is the most advantageous for the purposes of self-defense, this article proposes that this approach be used. Although the necessity of acting in self-defense when a threat is certain is currently recognized by only a few states,

⁴¹ For more on the difficult posed by asymmetric challenges see Charles J. Dunlap, Jr., *Preliminary Observations: Asymmetrical Warfare and the Western Mindset*, in CHALLENGING AMERICA SYMMETRICALLY AND ASYMMETRICALLY: CAN AMERICA BE DEFEATED? 1-17 (Lloyd J. Matthews, ed., 1998).

⁴² Warnings and indicators comprise a "specialized intelligence effort for advanced strategic early warning" which "seeks to discern in advance any...intent to initiate hostilities." Thomas J. Patton, *Monitoring of War Indicators*, STUD. INTELLIGENCE 55 (Sept. 18, 1995).

⁴³ Order of Battle analysis is used to "to scrutinize all information pertaining to a military force to determine his capabilities, vulnerabilities, and probable course(s) of action." *Introduction to Order of Battle*, GLOBAL SECURITY (accessed Nov. 10, 2017),

<https://www.globalsecurity.org/military/library/policy/army/accp/is3001/lesson-1.htm>. See also Patton, *supra* note 42, at 65-67 (noting order of battle as a factor in predicting an attack).

⁴⁴ Traditional military objectives are objects which "by their nature, location, purpose or use make an effective contribution to military action, and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Military Objectives*, INT'L COMMITTEE OF THE RED CROSS (accessed on Nov. 09, 2017), <https://casebook.icrc.org/glossary/military-objectives>. There are, of course, outliers and exceptions to this observation. Some terrorist organizations follow models akin to traditional military structures, such as Hezbollah. However, the operations of these organizations remain distinct because they maintain additional capacities not common to traditional militaries. See Eitan Azani, *The Hybrid Terrorist Organization: Hezbollah as a Case Study*, 36 STUD. CONFLICT & TERRORISM 889 (2013).

⁴⁵ MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 166 (Univ. of Penn. Press 2011).

⁴⁶ See, e.g., THOMAS FINGAR, REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY 67-88 (Stanford Univ. Press 2011) (addressing estimative analysis).

under certain circumstances, more states may be willing to accept it as a legitimate justification.

Prior to the drafting of the U.N. Charter, western powers adopted the practice of declaring war in official acts prior to the outset of hostilities,⁴⁷ as codified in the Convention Relative to the Opening of Hostilities.⁴⁸ After a war was declared, a state did not need to suffer an attack, nor wait for an attack to become imminent, before it could use force against the declaring state. The declaration of war created the certainty of a threat forthcoming which justified a state in acting, even preemptively.⁴⁹ Therefore, in circumstances when a declaration of war is made, a state is justified in using force because the threat has become certain and the necessity of using force in self-defense is no longer questioned. This is the circumstance under which states find themselves in the War on Terror. States which are at war with terrorists⁵⁰ need not delay actions necessary for the preservation of their security and may preemptively act to prevent attacks which are certainly forthcoming, even if specific terrorist attacks cannot be deemed imminent.

⁴⁷ While this practice persists, “declarations of war have largely fallen into disuse since World War II” because “the establishment of the United Nations largely obviates the need for individual nations to declare war. Other than acts of immediate self-defense in conformance with the U.N. Charter it is the collective action of the Security Council, rather than the individual acts of states, that ordinarily authorizes ‘the use of force to maintain or restore international peace and security.’” Charles J. Dunlap, Jr., *Why Declarations of War Matter*, HARV. NAT’L SECURITY J. (Aug. 30, 2016), <http://harvardnsj.org/2016/08/why-declarations-of-war-matter/>. For example, the United States has not officially declared war since World War II.

⁴⁸ Hague Convention (III) on the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 C.T.S. 263, art. 1 (“The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.”), http://avalon.law.yale.edu/20th_century/hague03.asp.

⁴⁹ “[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.” Jennifer Elsea & Matthew Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CONG. RES. SERV. at i (April 18, 2014), <https://www.fas.org/sgp/crs/natsec/RL31133.pdf>; *see id.* at 23 (“States likely still retain a right to issue declarations of war, at least in exercising the right of self-defense; and such a declaration seemingly would still automatically create a state of war”); Dunlap, *supra* note 47 (“[B]y automatically establishing a state of war, perhaps in circumstances where the level of violence would not otherwise create it, a declaration of war could control the timing of the application of the laws of war and influence other aspects of international law, including neutrality law. Depending on the circumstances, this ability could be quite significant from a strategic and tactical perspective”).

⁵⁰ *See infra* section II.270.

However, justifying the use of force in a war against a non-state actor⁵¹ is more tenuous given the intrusion it permits on the sovereignty of the territorial state. Therefore, complementary restrictions are needed to ensure the use of force is necessary and not abusive. This is accomplished in two ways. First, organizations against which force may be used in self-defense is limited to terrorists classified as *hostis humani generis*. Secondly, restrictions on when and where such organizations may be attacked limits the intrusion upon the sovereignty of the territorial state wherein the terrorists operate. This allows a victim state to defensively exercise force against a non-state actor while simultaneously restricting a use of force which intrudes on the sovereignty of a territorial state to the narrowest circumstances.

II. Justification for the Use of Force against *Hostis Humani Generis*

The designation of *hostis humani generis* justifies the use of force against terrorists while simultaneously reducing the need for the use of force.⁵² There is a reduced need for force because the designation permits all states to criminally prosecute the group by exercising universal jurisdiction. Universal jurisdiction gives courts authority to try criminals when the court otherwise lacks authority because the crime was committed beyond the recognized jurisdictional reach of the court.⁵³ This is important because the use of the legal system to apprehend and punish terrorists entails a decrease in the need for the use of force.⁵⁴ However, where criminal prosecution is not practicable, the

⁵¹ A non-state actor means any organization within a state which is not representative of, nor responsible to that state's government.

⁵² The Separate Opinion of Vice-president Weeramantry, in the Gabcikovo-Nagyoros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25) (separate opinion by Weeramantry, J.), observed that an advancement of international law is accomplished by drawing in benefits of the insights available and looking to the past. He finds that seeking out principles *a posteriori* from the experience of the past, rather than setting out new principles *a priori* is in keeping with the formation of international law dating back to Grotius, who followed a similar practice.

⁵³ "The term 'universal jurisdiction' refers to the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State's territory or against its nationals, or the State's own national interests are not adversely affected." *Universal Jurisdiction*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited Nov. 11, 2017).

⁵⁴ See *id.*