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## Is U.S. Operational Self-Defense a State Practice Creating New Customary International Law?

Major Yevgeny S. Vindman

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IS U.S. OPERATIONAL SELF-DEFENSE A STATE PRACTICE CREATING NEW CUSTOMARY  
INTERNATIONAL LAW?

**IS U.S. OPERATIONAL SELF-DEFENSE A STATE PRACTICE CREATING NEW  
CUSTOMARY INTERNATIONAL LAW?\***

MAJOR YEVGENY S. VINDMAN

INTRODUCTION

In the near future, well past the eleventh year of combat in Afghanistan, U.S. forces remain engaged in armed conflict with a determined, crafty, and sophisticated enemy. The conflict continues over a decade after it started. Coalition forces and civilian casualties already numbering in the thousands continue to climb, and the path to victory remains tenuous.

Under pressure from its own citizens (and the Taliban), the Afghan government is becoming increasingly strident in its calls to restrain the use of force by coalition forces. The Afghan government demands greater recognition of its sovereignty and the right to control the use of force in Afghanistan,<sup>1</sup> and proposes implementation of a multi-lateral international agreement between itself and its coalition partners.<sup>2</sup>

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\* Judge Advocate, U.S. Army. Presently assigned as the Senior Trial Counsel for III Corps and Fort Hood, Fort Hood, Texas. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2009, University of Georgia; M.S.A., 2005, Central Michigan University; B.A., 1997, State University of New York - Binghamton. Previous assignments include Brigade Judge Advocate, 172d Infantry Brigade, Grafenwoehr, Germany; Operational Law Attorney, Headquarters, U.S. Forces – Iraq, Baghdad, Iraq, 2011; Operational Law Attorney, Headquarters, XVIII Airborne Corps, Fort Bragg, North Carolina, 2010-2011; Battle Major, Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia, 2007 – 2010; Commander, Headquarters, Headquarters Company, 2125th Garrison Support Unit, Decatur, Georgia, 2005 – 2007; Battle Captain/ Deputy, Secretary General Staff/ Executive Officer to the Deputy Commanding General, Headquarter, U.S. Army Forces Command, Fort McPherson, Georgia, 2002 – 2005; Assistant Operations Officer, Headquarter, 2125th Garrison Support Unit, Fort Bragg, North Carolina, 2001 – 2002; Platoon Leader, Charlie Company/ Delta Company, 3rd Battalion, 325th Airborne Infantry Regiment, 82nd Airborne Division, Fort Bragg, North Carolina, 1998 – 2000. Member of the bars of Georgia and the Army Court of Criminal Appeals. This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

<sup>1</sup> See Alissa J. Rubin, *Karzai Call for Meeting of Elders Questioned*, N.Y. TIMES (Nov. 15, 2012), <http://www.nytimes.com/2011/11/15/world/asia/questions-cloud-meeting-of-afghan-elders-called-by-hamid-karzai.html?scp=2&sq=Karzai%20Call%20for%20Meeting%20of%20Elders&st=cse>; Phil Stewart, *U.S. Carried Out Unilateral Air Strikes in Iraq*, REUTERS (Aug. 16, 2011), <http://www.trust.org/alertnet/news/us-carried-out-unilateral-air-strikes-in-iraq> (noting that Secretary of Defense Panetta warned during a trip to Iraq in July that the

Following a pattern familiar to both the U.S. military and diplomatic communities, this agreement proposes that all coalition “military operations” be conducted “with the agreement of the Afghanistan government and fully coordinated with Afghan authorities.”<sup>3</sup> In effect, such provisions grant the Afghan government a veto on coalition offensive operations. To U.S. commanders, the most troubling aspect of the proposed agreement is the host nation’s likely lack of cooperation in targeting insurgents known to have friends in the local government but who pose a significant threat to coalition forces.<sup>4</sup> The single caveat to this veto, which is identical to

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United States would take unilateral action when necessary to deal with Iran-backed militants who made June the deadliest month for U.S. forces in Iraq since 2008).

<sup>2</sup> See, e.g., Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Security Agreement], available at <http://www.state.gov/documents/organization/122074.pdf>. In this hypothetical, Afghanistan proposes an agreement modeled on the Security Agreement. The Security Agreement was a bilateral international agreement between Iraq and the U.S. signed by the Ambassador to Iraq and binding U.S. Forces operating in a sovereign state. Although not a treaty *per se*, this international agreement was binding upon the parties under its terms.

<sup>3</sup> *Id.* This proposed provision is similar to article four of the Security Agreement. Since the U.S. Government agreed to such provisions previously in the Security Agreement with Iraq, it is conceivable that the U.S. Government would do so again in a similar agreement with Afghanistan. In relevant part, Article 4 states:

Section 1. The Government of Iraq requests the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.

Section 2. All such military operations that are carried out pursuant to this Agreement shall be conducted with the agreement of the Government of Iraq. Such operations shall be fully coordinated with Iraqi authorities.

Section 5. The Parties retain the right to legitimate self-defense within Iraq, as defined in applicable international law.

<sup>4</sup> E.g., Alissa J. Rubin, *Karzai Details Vision for Long-Term Partnership with U.S.*, N.Y. TIMES (Nov. 17, 2011) <http://www.nytimes.com/2011/11/17/world/asia/karzai-pushes-partnership-with-us-as-afghan-elders-convene.html?scp=1&sq=Karzai%20Details%20Vision%20for%20Long-Term%20Partnership%20with%20U.S.&st=cse> 2011. President Karzai has already expressed concern about certain coalition operations and seeks to limit or eliminate these types of operations.

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the language in the U.S. – Iraqi Security Agreement, is the “retention by the parties of the right to legitimate self-defense as defined in applicable international law.”<sup>5</sup>

What is this “right to legitimate self-defense as *defined in applicable international law*?” During the two years that U.S. forces operated in Iraq under the Security Agreement, senior commanders<sup>6</sup> (and their attorneys) repeatedly struggled with this question.<sup>7</sup> Ultimately, U.S. Forces’ legal advisors, in conformity with U.S. policy,<sup>8</sup> interpreted the Security Agreement self-defense provisions to allow for both individual and unit self-defense.<sup>9</sup> It was unclear at the time which international law applied to the exercise of this right to self-defense *in bello*. This article proposes that the self-defense operations conducted by U.S. Forces at the operational level of war constitute state practice, that this state practice is based on a sense of legal obligation, derived in part from the Security Agreement itself, and that this state practice, based on self-defense principles in international law, may be generating new customary international law.

This article proceeds in six sections. Section II defines key terms and describes the continuum of self-defense. Section III discusses the intersection of self-defense in *jus ad bellum* and *jus in bello*, and describes how self-defense operations at the operational level of war are

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<sup>5</sup> Security Agreement, *supra* note 2.

<sup>6</sup> *Id.* In this article, senior commanders are defined as those senior uniformed military leaders that have access to all forms of intelligence and surveillance platforms, experienced advisors, and the resources to respond to a threat anywhere in their battle space. These commanders will likely be two, three, or four star generals, or flag officers at the highest levels of command in a theater.

<sup>7</sup> Captain Russell E. Norman & Captain Ryan W. Leary, *Making a Molehill out of a Mountain*, in THE ARMY LAWYER 22, 39-40 (Captain Ronald T.P. Alcala et al. eds., 27-50-444 ed. May 2010), available at [http://www.loc.gov/r/r/frd/Military\\_Law/pdf/05-2010.pdf](http://www.loc.gov/r/r/frd/Military_Law/pdf/05-2010.pdf) (stating that one aspect of the security agreement that caused lawyers and commanders significant concern was the need for Iraqi involvement in the approval of U.S. military operations).

<sup>8</sup> Joint Chiefs of Staff, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, NSTR. 3121.01 at A-2 (Jun. 13 2005),

<https://www.jagcnet.army.mil/DocLibs/TJAGLCSDocLib.nsf/xsp/.ibmmodes/domino/OpenAttachment/doclibs/tjaglcscdoclib.nsf/8400639488825BD385257549006019A4/Body/Chapter%205%20%20ROE.pdf>. [hereinafter SROE].

<sup>9</sup> See Norman & Leary, *supra* note 7, at 40.

based on U.S. policy derived from principles in international law.<sup>10</sup> Section IV discusses operational self-defense in practice. Section V discusses how operational self-defense as state practice may be creating new customary international law. Section VI is the conclusion.

#### I. OPERATIONAL SELF-DEFENSE AND THE SELF-DEFENSE CONTINUUM

This section defines the concept of operational self-defense and defines other important self-defense terms that may have conflicting meanings in scholarship. It also provides a rubric for understanding key concepts in self-defense.

Operational self-defense refers to self-defense operations authorized by senior military commanders that are executed with resources and intelligence available only to commanders at the operational level of war.<sup>11</sup> Operational self-defense is distinguishable from unit self-defense in both quality and legal basis.

Despite falling under the penumbra of unit self-defense when executed *in bello*, operational self-defense is not constrained by *ad bellum*<sup>12</sup> limitations on use of force and is authorized primarily in policy embodied in the SROE.<sup>13</sup> The legal distinction stems from the inapplicability

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<sup>10</sup> See generally SROE, *supra* note 8. The SROE explicitly authorizes and describes unit self-defense. Operational self-defense is implied throughout the SROE although not explicitly described.

<sup>11</sup> Joint Chiefs of Staff, *Joint Operations*, JOINT PUB. 3.0, at GL-12, GL-14, GL-16 (Aug. 11, 2011), available at [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_0.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf). The following is an excerpt from the glossary describing the tiers of military strategy in war: Tactical level of war is the level of war at which battles, engagements or strikes are planned and executed to achieve military objectives assigned to tactical units or task forces; Operational level of war is the level of war at which campaigns and major operations (a series of tactical actions conducted by combat forces, coordinated in time and place, to achieve strategic or operational objectives in an operational area) are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas; Strategic level of war is the level of war at which a nation, often as a member of a group of nations, determines national or multinational strategic security objectives and guidance, then develops and uses national resources to achieve those objectives. Operational self-defense occurs at the operational level of war. Individual and Unit reactive self-defense occurs at the tactical level of war. National self-defense generally occurs at the strategic level of war.

<sup>12</sup> At its simplest, *ad bellum* are criteria for evaluating when a war is just BEFORE engaging in war whereas *in bello* applies to whether war is conducted justly (initial hostilities were just).

<sup>13</sup> See Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126-27 (1998).

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of *ad bellum* restrictions on use of force to military operations by forces in the midst of ongoing conflicts. In contrast to *ad bellum* national self-defense, self-defense *in bello* is not governed by customary law or U.N. Charter restrictions on the use of force, because the law generally recognizes and restricts national self-defense.<sup>14</sup> Consequently, modern state practice in unit self-defense, especially during the decade of conflict following 9/11, is an evolution of customary law, designed to fill the gaps demonstrated in modern conflicts.<sup>15</sup>

The distinction in quality between unit self-defense and operational self-defense stems from the different capabilities, operational assets, and intelligence resources a senior military commander utilizes in the conduct of self-defense at the operational level of war. The nature of these capabilities and assets, especially intelligence capabilities (which help the commander perceived a threat much further from maturation than a tactical commander may perceive), change the point along the self-defense continuum where self-defense is both possible and justifiable. Typically, tactical units, divisions, and subordinate organizations will exercise unit self-defense in reaction to an attack or temporally proximate threat of attack.

However, senior operational commanders with significant resources at their disposal may exercise self-defense against more temporally remote threats, which may appear harmless to a

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<sup>14</sup> See Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 34 (1987) (stating, "For the use of force in self-defense to be permissible under the Charter, such force must . . . be immediately subsequent to and proportional to the armed attack to which it was an answer. If excessively delayed or excessively severe it ceased to be self-defense and became a reprisal which was an action inconsistent with the purposes of the United Nations."); see Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 181 (2002) ("Immediacy requires that the threat of armed attack has occurred close in time to the exercise of self-defense."); but see Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 372 (2009) (discussing the U.S. attack on Libya in 1986, writes, "It does not come as a surprise that states, even when they took anti-terrorist measures the real aim of which was to retaliate hardly ever portrayed their conduct as an 'armed reprisal,' but instead invoked self-defense, even where that on the facts seemed less plausible.").

<sup>15</sup> See Stephens, *supra* note 12, at 126-27.

commander with less intelligence resources at their disposal.<sup>16</sup> Perceived through indirect “senses,<sup>17</sup>” operational self-defense brings to bear resources that identify and respond to threats faced by similar nations. Consequently, operational self-defense is more likely to occur than typical unit self-defense against a more temporally remote threat. Additionally, operational self-defense is focused on the force as a whole rather than protecting a particular unit. Therefore, although operational self-defense is not burdened by the legal restrictions of national self-defense, operational self-defense enjoys many of the same resources and utilizes similar deliberative processes that national self-defense does.

#### A. Definitions

Scholars have used various definitions to explain key terms in the self-defense continuum.<sup>18</sup> Some scholars differentiate between anticipatory self-defense and preemptive self-defense,<sup>19</sup> while others equate anticipatory self-defense with preemptive self-defense.<sup>20</sup> For instance, Sean

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<sup>16</sup> These resources include surveillance platforms, intelligence collection, imagery, etc., that leaders at lower levels do not readily have at their disposal.

<sup>17</sup> *Id.*

<sup>18</sup> *E.g.*, Niaz A. Shah, *Self-Defence, Anticipatory Self-Defense and Pre-Emption: International Law's Response to Terrorism*, 12 J. CONFLICT & SEC. L. 95, 111-12 (2007) (discussing numerous sources writes, “Professor Reisman defines pre-emptive self-defense as ‘a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost’.

Making a distinction between anticipatory and preventive self-defense, Professor O’Connell states that pre-emptive self-defense refers to cases where a party uses force ‘to *quell any possibility of future* attack by another state, even where there is *no reason to believe that an attack is planned* and where no prior attack has occurred’. Anticipatory self-defense is a narrower doctrine that would authorize armed responses to attacks that are on the brink of being launched, or where an enemy attack has already occurred and the victim learns that more attacks are planned.”).

<sup>19</sup> *E.g.*, *id.* at 112 (“The requisite threshold for reactive self-defense is “actual armed attack”, for anticipatory self-defense “palpable and imminent threat of attack” and for preemptive self-defense “conjectural and contingent threats of possible attack”. The goal of pre-emptive self-defense is to prevent “more generalized threats from materializing” rather than trying to “preempt specific, imminent threat”).

<sup>20</sup> *E.g.*, 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 (2004). Under customary international law, a state may use preemptive military force only if faced with an imminent threat. The concept of imminence is

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Murphy defines anticipatory or interceptive self-defense as “acting in self-defense when there is convincing evidence that an armed attack is occurring even though the attacker has not yet penetrated the defending state’s frontier.”<sup>21</sup> Given the conflicting definitions, a brief definition of self-defense terms as applied in this article will provide clarity.

First, the term reactive self-defense (RSD) refers to self-defense in response to an armed attack or a hostile act.<sup>22</sup> This is self-defense in its purest form. RSD occurs very close in proximity to the hostile act, and the victim responds in order to prevent further injury or to reverse the progress of the attacker. Here, the aggressor has landed the initial blow, and the victim responds after suffering injury.

Second, interceptive self-defense is self-defense in response to an incipient attack.<sup>23</sup> Whereas RSD is a response to an attack that has occurred, interceptive self-defense is a response to an attack<sup>24</sup> that is in progress, but where the inevitable victim may not have felt the effects or even perceived an attack.<sup>25</sup> For example, when the aggressor initiates an attack by firing a missile, the victim need not wait for the missile to land before responding in self-defense, but may destroy the missile in flight or destroy the battery that fired the missile. In another example,

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traditionally understood in a temporal sense--that is, imminent is nearly synonymous with immediate. Thus, a preemptive strike may generally only take place immediately prior to the attack it is intended to thwart. Put another way, the nearness of the impending attack determines the appropriateness of a preemptive strike.

<sup>21</sup> Sean D. Murphy, *Protean Jus Ad Bellum*, 24 BERKLEY J. OF INT’L L. 1 (2009) (contrasting this type of self-defense with his definition of preemptive or preventative self-defense which is self-defense against a future threat months or years in advance from the threat occurring).

<sup>22</sup> E.g., W. Michael Reisman, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141, 142 (2003), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2040&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2040&context=fss_papers).

<sup>23</sup> E.g., Yoram Dinstein, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141, 148 (2003).

<sup>24</sup> E.g., Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 325 (2004) (writing, “While there is much disagreement amongst legal scholars as to the meaning (and subsequently, timing) of words such as “planning to attack,” the doctrine of active self-defense would enable the State to undertake all operational measures required to protect itself.”).

<sup>25</sup> E.g., David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 COLUM. J. TRANSNAT’L L. 134, 154 (2005) (Uncertainty among commentators tends to involve timing—they question the point at which anticipation is too early and, therefore, would constitute an unlawful use of force.

the potential victim who perceives the threat may act in self-defense to defeat the suicide attacker who is traveling to his target because the hostile act is inevitable without intervention.<sup>26</sup>

Notably, this attacker would be a valid target under the U.S. SROE and the ICRC guidance in addition to being a valid objective in the exercise of self-defense.<sup>27</sup> Both the SROE and ICRC interpretive guidance consider geographic deployment prior to an attack to be direct participation in hostilities integral to the act of attack, making the individuals deploying valid targets.<sup>28</sup> The question is not whether the attack is a future threat, but whether the potential victim can accurately perceive when the attack was initiated and whether they can intercept the attack. If the victim can accurately perceive the attack and act accordingly, then the use of force is interceptive self-defense rather than initial aggression.

The next category of self-defense is preventative self-defense.<sup>29</sup> In this case, the aggressor is in the preparatory stages of launching the attack, but has not initiated the actual hostile act. For example, the aggressor is conducting missile launch preparations, marshalling his or her forces for an attack, or preparing suicide vests. Having previously declared his or her intent to attack and possessing the current capability to attack, the enemy need only select the moment of opportunity most favorable for him or her to execute. This situation clearly constitutes a threat, especially where there are ongoing hostilities during a conflict. Once again, the critical element becomes the victim's perception. When the victim can perceive this imminent threat with a high degree of confidence, he or she may respond in preventative self-defense. Although not

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<sup>26</sup> See INT'L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 12 (2009) [hereinafter INTERPRETIVE GUIDANCE], available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>

<sup>27</sup> *Id.*; SROE, *supra* note 8.

<sup>28</sup> See INTERPRETIVE GUIDANCE, *supra* note 23; see SROE, *supra* note 8.

<sup>29</sup> *E.g.*, Shah, *supra* note 15, at 111-12.

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immediate or instantaneous, the threat would be considered imminent under U.S. policy,<sup>30</sup> and such preventative or anticipatory self-defense would be authorized.

The closer threats are to rising to the level of becoming attacks, preventative self-defense is more likely to occur than is preemptive self-defense.<sup>31</sup> In the case of preemptive self-defense, the potential aggressor states his or her intention to attack and continues to develop the capability to attack but currently lacks this capability.<sup>32</sup> Here, a prospective enemy threatens to conduct suicide attacks, but has no means to do so because no suicide bombers have been recruited and no suicide bombs have been constructed. Exercise of self-defense against such a threat at this stage would be preemptive.<sup>33</sup>

*B. Self-Defense Continuum*

Since “[t]he essence of self-defense decision making lies in the perception of a decision maker that an adversary has attacked or will soon attack,” understanding how close an imminent threat is to fruition becomes critical.<sup>34</sup> Visualizing self-defense along a continuum provides a framework to judge the perceived threat in relation to the attack.<sup>35</sup> The categories of self-defense previously described represent different points along the continuum. As depicted in Figure 1 below, the first point is where the impact of the armed attack or hostile act occurs on the victim. The individual receiving the effects of the attack may respond in reactive self-defense.<sup>36</sup> If the attack leads to death or incapacitating injury, there may be no opportunity to act in self-defense.

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<sup>30</sup> See SROE, *supra* note 8, at A-2.

<sup>31</sup> See generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 183 (4th ed. 2005).

<sup>32</sup> See *Id.*

<sup>33</sup> See *Id.*

<sup>34</sup> Kaye, *supra* note 22, at 153 (“Decisions to use force in self-defense are often made in an atmosphere of crisis involving a number of elements, including the perception of threat, heightened anxieties on the part of decision-makers, the expectation of possible violence, the belief that important or far-reaching decisions are required and must be made on the basis of incomplete information in a stressful environment.”).

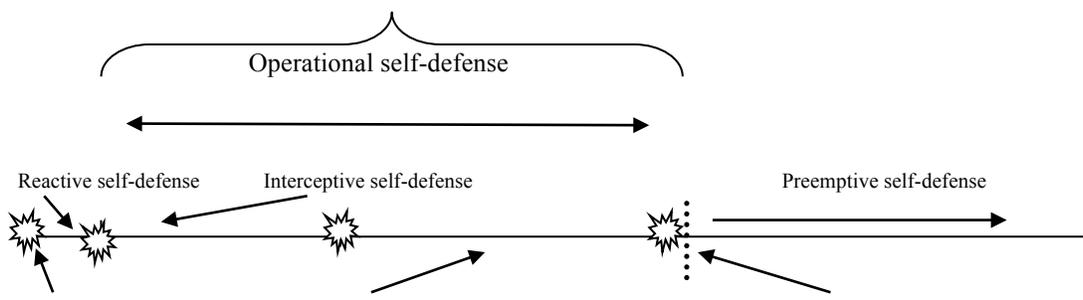
<sup>35</sup> See generally Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 *YALE J. INT’L L.* 541, 542 (2009).

<sup>36</sup> See Reisman, *supra* note 19, at 142.

The next point just prior to impact is the point of initiation. The attack is in progress because the final act required to initiate the attack has already occurred. However, the victim has not felt the impact. If the inevitable victim perceives the attack in progress, he or she may act in interceptive self-defense. However, because this realization that an attack is underway may occur in very close in time to the attack, an individual may be too late to prevent the attack.

The next point along the continuum is the point of mobilization or movement. Here, the attack is in the process of occurring. All the moving pieces are in transit. The weapon is primed, and the aggressor has chosen the moment.<sup>37</sup> Unlike points one and two along the continuum, the actions of the aggressor constitute a threat of the use of force or hostile intent. Barring any intervening act, the attack will occur. An individual perceiving the threat at this point, through any means (directly or through other “senses”), will have only moments to act in self-defense. A senior commander with the resources available to him or her may perceive the threat earlier on the continuum from the point of initiation and may respond in self-defense as well.<sup>38</sup>

At the next point along the continuum of self-defense, the threat is significantly further from the point of mobilization and is conceptual in nature. The potential aggressor clearly states his intention to attack when he has the capability to do so; however, at present, this capability does not exist, so self-defense at this stage would be preemptive.



<sup>37</sup> Like in criminal law, this choice may be akin to an attempt to commit a crime, to which most States would attach criminal liability.

<sup>38</sup> See Kaye, *supra* note 22, at 160 (“Judgment is afforded state decision makers because of the recognition that self-defense is typically available within a certain window of time.”).

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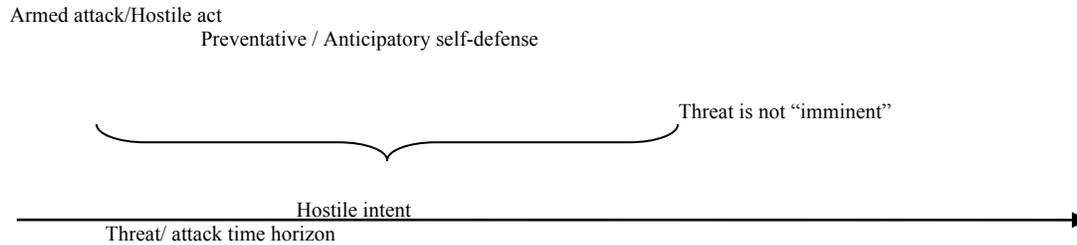


Figure 1. The line graph depicts the continuum of self-defense<sup>39</sup>

## II. SELF-DEFENSE UNDER INTERNATIONAL LAW: *AD BELLUM* AND *IN BELLO* INTERSECT

The law recognizes two forms of self-defense.<sup>40</sup> These forms of self-defense are *jus ad bellum* national self-defense, recognized in international law, and individual self-defense, recognized in domestic criminal law.<sup>41</sup> No other body of law seems to recognize any other form of self-defense.<sup>42</sup>

Historically, *jus ad bellum* national self-defense was developed as a just basis for armed conflict in response to threats or acts of aggression from another State.<sup>43</sup> The United Nations Charter<sup>44</sup> continues to recognize national self-defense as a just basis for armed conflict in modern international treaty law.<sup>45</sup> According to many international law scholars, self-defense continues to exist as a valid basis for armed conflict in customary international law as well.<sup>46</sup> However,

<sup>39</sup> The first point (explosion) on the continuum represents reactive self-defense. The second explosion represents interceptive self-defense. The third explosion represents preventative self-defense. The fourth explosion represents preemptive self-defense.

<sup>40</sup> See Amos N. Guiora, *Self-Defense -- From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L.J. 631, 636 (2008) ("Self-Defense -- whether personal or state -- is a universal concept.").

<sup>41</sup> See DINSTEIN, *supra* note 28, at 176 ("The legal notion of self-defense has its roots in inter-personal relations and is sanctified in domestic legal systems since time immemorial.")

<sup>42</sup> See Shah, *supra* note 15, at 95. ("The right to self-defense is a natural one known and recognized since time immemorial. It is available to individuals and, after the emergence of states, to states as sovereign entities. Individual actors historically have reserved the right to use force unilaterally to protect and vindicate legal entitlements.")

<sup>43</sup> See DINSTEIN, *supra* note 28, at 181.

<sup>44</sup> See generally U.N. Charter.

<sup>45</sup> DINSTEIN, *supra* note 28, at 177.

<sup>46</sup> See Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/ Protocol I Marriage*, in THE ARMY LAWYER, DEPARTMENT OF THE ARMY PAMPHLET (Alison M. Tulud et al. eds., 2007), available at

customary law conflicts with treaty law in the area of national self-defense.<sup>47</sup> The friction between the customary regime and the U.N. Charter regime<sup>48</sup> centers on when States may exercise national self-defense in an emerging conflict.<sup>49</sup> Despite this friction, national self-defense as a general concept appears to be *jus cogens*.<sup>50</sup>

Individual self-defense allows a person to defend him or herself against direct and immediate threats.<sup>51</sup> This self-defense concept is drawn from other bodies of law, including natural law and domestic criminal law.<sup>52</sup> Despite nuances and peculiarities between individual States' domestic criminal law, the basis for individual self-defense is well-established and need not be further discussed for the purposes of this article.<sup>53</sup>

Although individual and national self-defense are conceptually similar, there are significant differences that become readily apparent when it becomes necessary to execute each form of

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[http://www.loc.gov/frd/Military\\_Law/pdf/07-2007.pdf](http://www.loc.gov/frd/Military_Law/pdf/07-2007.pdf). The Janin part is included in that larger document “[T]he extent to which the United Nations Charter displaces pre-existing customary international law remain the subject of robust legal debate. [M]any states, including the U.S. argue... that the customary-law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not ‘negotiated’ away under the Charter . . . the right, which existed as a matter of customary international law before the Charter was adopted, was incorporated into the Charter and continues to exist independently of the Charter.”; *see also* Emanuel Gross, *Thought is Self-Defense Against Terrorism -- What Does it Mean?: The Israeli Perspective*, 14 TEMP. POL. & CIV. RTS. L. REV. 579, 583 -85 (2005).

<sup>47</sup> *See* Janin, *supra* note 43, at 89.

<sup>48</sup> *See* DINSTEIN, *supra* note 28, at 183.

<sup>49</sup> *See generally* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 495 (2010) (referring to the appropriate use of self-defense along the continuum from reactive to preemptive self-defense against actual aggression or a future threat).

<sup>50</sup> *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 7 (2d ed. 2010) (defining *jus cogens* as a peremptory norm of international law, which may not be derogated from by treaty); *see also* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 703-06 (2005); *see also* Eustace C. Azubuike, *Probing the Scope of Self-Defense in International Law*, 17 ANNUAL SURVEY OF INT'L & COMP. L. 129, 144 (2011) “[T]he right to self-defense has attained the status of *jus cogens* in international law, and both the customary law and UN Charter are relevant in a consideration of this right.”

<sup>51</sup> *See* Onder Bakircioglu, *The Right to Self-Defense in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT'L & COMP. L. REV. 1, 20 (2009) (citing to PAUL ROBINSON, CRIMINAL LAW DEFENCES 56-57 (1984) (treatise on self-defense in criminal law)).

<sup>52</sup> *See* DINSTEIN, *supra* note 28, at 176 (noting self-defense has its roots in inter-personal relations and is sanctified in domestic legal systems since time immemorial).

<sup>53</sup> *See* Bakircioglu, *supra* note 48, at 9.

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self-defense. The most significant differences include: resources available for a response, time frame in which self-defense may be a reasonable justification for action,<sup>54</sup> means by which each entity perceives a threat,<sup>55</sup> and the deliberative process<sup>56</sup> each entity employs. Whereas individual self-defense deals with risk to a single life, national self-defense is qualitatively different because it addresses the risk posed to many lives. Using means of perception and resource availability as evaluation criteria, it becomes clear that unit self-defense (in a tactical setting) is more akin to individual self-defense, because here the threat to life is direct. To elaborate, in individual self-defense and low level unit self-defense, the threat is perceived directly through the five human senses, and the response is instantaneous to the perceived threat without much deliberation or delay. Alternatively, operational self-defense is qualitatively more like national self-defense. Operational self-defense and national self-defense both perceive the threat through different sensors and devote substantial time to analysis, deliberation, and preparation to neutralize the threat. Given the trends in modern times, the evolution of operational self-defense fills a critical gap exposed by asymmetric warfare between the tactical level, which is individual and unit self-defense, and the strategic level embodied in national self-defense. Regardless of the practical rationale for operational self-defense, as a matter of law, the legal basis for this type of operation is established below.

*A. The Right of Self-Defense In Bello*

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<sup>54</sup> See Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 533 (2003).

<sup>55</sup> See Kaye, *supra* note 22, at 153.

<sup>56</sup> See *id.* When a nation decides to act in self-defense numerous authorities and power centers will need to be consulted in what can be a time consuming, bureaucratic exercise. This is not the case in the individual decision to act in self-defense.

There is no international law regime for executing self-defense *in bello*.<sup>57</sup> Historically, armed conflicts involved conventional, uniformed armies facing organized enemy formations on a linear battlefield.<sup>58</sup> Uniformed military personnel enjoyed combatant's privilege – the ability to *attack* and destroy each other, without resort to self-defense.<sup>59</sup> In this environment, military commanders could respond offensively to perceived threats without constraints on offensive operations, making self-defense *in bello* unnecessary.<sup>60</sup> Traditionally, conventional armed conflicts did not involve frequent engagements between civilians and military forces.<sup>61</sup> Consequently, an international legal regime for unit self-defense *in bello* never developed and only individual self-defense principles were recognized. Moreover, when civilians engaged military forces in the past,<sup>62</sup> the response usually came from individual soldiers or low-level military units that were directly under attack or that perceived the threat and responded instantaneously to neutralize the enemy belligerent.<sup>63</sup>

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<sup>57</sup> E.g., DINSTEIN, *supra* note 28, at 220; *but see* Stephens, *supra* note 12, at 127. Unit self-defense exists as a positive right under customary international law. To the extent that this right does exist in customary law, this right is not governed by *ad bellum* principles such as the *Caroline Doctrine*, but is just informed by those principles. The customary norms continue to develop as illustrated by state practice during conflicts when unit self-defense and operational self-defense are exercised. Critically, commanders (informed by their legal advisors) will need to discern when unit or operational self-defense is exercised in an *ad bellum* versus *in bello* situation because different rules will apply to the use of force in each situation.

<sup>58</sup> See SOLIS, *supra* note 46, at 3.

<sup>59</sup> See *id.* at 41-42.

<sup>60</sup> See generally *id.*

<sup>61</sup> See INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES: QUESTIONS & ANSWERS (2009), available at <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [hereinafter DPH Q&A] (“[T]he ICRC has realized that the unclear distinction between civilian and military functions and the increasing involvement of civilians in military operations have caused confusion as to who is a legitimate military target and who must be protected against direct attack. As a result of this confusion, civilians are more likely to fall victim to erroneous, unnecessary or arbitrary attacks, while soldiers, unable to properly identify their enemy, face an increased risk of being attacked by persons they cannot distinguish from civilians.”).

<sup>62</sup> Although partisans and other irregular forces have been present on the battlefield for a long time, these forces were typically in support of their states forces only behind enemy lines. They also had a command structure and usually had some distinctive markings; therefore, they could be distinguished from civilians. Modern armed conflicts typically involve insurgent and terrorists forces who lack any distinguishing elements from the civilian population, particularly when these forces represent non-state armed groups rather than States.

<sup>63</sup> See SOLIS, *supra* note 46.

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Modern warfare is different.<sup>64</sup> The conflicts in Iraq and Afghanistan principally involved conventional military forces engaged in combat with individuals typically described as civilians, under the law of war.<sup>65</sup> Despite being well-armed, well-trained, well-financed, and organized into groups,<sup>66</sup> certain criteria for classification as combatant still may not be met; therefore, the unprivileged belligerents remain classified by many as civilians.<sup>67</sup> The law of war restricts use of force against individuals classified as “civilians.”<sup>68</sup> Under these constraints, self-defense

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<sup>64</sup> Brigadier General Mark Martins, Keynote Address at the American Bar Association’s 21st Annual Review of the Field of National Security Law (Dec. 1, 2011) (“In the current conflict with al Qaeda and its associated forces, we face unconventional non-state actors who: repudiate all rules and operate in the shadows; conceal themselves among and purposefully endanger civilian populations; respect no national boundaries while cynically using such boundaries to establish sanctuary and shake pursuers; leverage information technology ingeniously to coordinate, plan, and recruit, and to intimidate governments and their citizens; adapt and morph and metastasize continuously; and join efforts with likeminded entrepreneurs of terrorism to deploy the latest asymmetric weapons against the United States homeland and our interests overseas.”); *see also* Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 68-72 (2010).

<sup>65</sup> DPH Q&A, *supra* note 58 (“Over recent decades, the nature of warfare has changed significantly, and several factors have contributed to blur the distinction between civilians and combatants. Military operations have moved away from distinct battlefields and are increasingly conducted inside population centers . . . Civilians have become more involved in activities closely relating to actual combat. Combatants do not always clearly distinguish themselves from civilians, preferring for example to operate as “farmers by day and fighters by night.” Moreover, in some conflicts, traditional military functions have been outsourced to . . . civilians working for . . . organized armed groups.”).

<sup>66</sup> *See* Ed O’Keefe & Joby Warrick, *Weapons Prove Iranian Role in Iraq, U.S. Says*, WASH. POST (Jul. 5, 2011), [http://www.washingtonpost.com/world/war-zones/weapons-prove-iranian-role-in-iraq-us-says/2011/07/05/gHQAUnkmzH\\_story.html](http://www.washingtonpost.com/world/war-zones/weapons-prove-iranian-role-in-iraq-us-says/2011/07/05/gHQAUnkmzH_story.html) (“Iranian-backed militias in Iraq are using more sophisticated weapons than in the past to target U.S. troops and military installations in Iraq, according to senior U.S. officials. . . James F. Jeffrey, the U.S. ambassador to Iraq, said Tuesday that fresh forensic testing on weapons used in the latest deadly attacks in the country bolsters assertions by U.S. officials that Iran is supporting Iraqi insurgents with new weapons and training. . . “We’re seeing more lethal weapons, more accurate weapons, more longer-range weapons,” Jeffrey added. “And we’re seeing more sophisticated mobile and other deployment options, and we’re seeing better-trained people . . .” U.S. officials have previously accused Iran of supplying weapons and training to Iraqi insurgents although details have been scant. In a 2009 report on global terrorism, the State Department accused Iran of providing Iraqi militant groups with “advanced rockets, sniper rifles, automatic weapons and mortars” for use against coalition forces. The report also accused Iran of increasingly the lethality of the roadside bombs, or IEDs, that militants were using to blow up U.S. military vehicles.”).

<sup>67</sup> *See* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 INT’L L. POL. 831, 841-42 (2010) (describing how certain individuals are by definition civilians because according to the Law of War they do not qualify as combatants) (internal citations omitted); *see also* DPH Q&A, *supra* note 58.

<sup>68</sup> *See* Melzer *supra* note 64, at 835.

becomes critically important.<sup>69</sup> The gap in the law of war<sup>70</sup> created by the complexities of modern warfare<sup>71</sup> can be partially addressed by the practice of operational self-defense. However, analogies to other concepts and bodies of law provide an incomplete explanation of operational self-defense, which is distinct from individual self-defense and national self-defense.

*B. In the Absence of Law, Policy Provides the Basis for U.S. Operational Self-Defense*

Derived from the Standing Rules of Engagement (SROE), mission specific Rules of Engagement (ROE) are directives issued by civilian policymakers and a competent military authority that delineate “the circumstances and limitations under which U.S. forces can initiate combat or can continue to engage in combat.”<sup>72</sup> Commanders are obligated to comply with ROE and the applicable law of war.<sup>73</sup> ROE may not be more expansive than the international law on which they are based;<sup>74</sup> accordingly, when the law is silent, the ROE provide the outer limit for

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<sup>69</sup> See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NAT'L SEC. J. 16 (2010) (referring to classification of civilians as combatants stemming from direct participation in hostilities, Schmitt writes, “Experts concerned with the “for such time” limitation had previously worried about the incongruity that would result from the lack of analogous temporal limitation for members of the armed forces. After all, if irregular forces benefited from the limitation, they would enjoy greater protection from attack than regular forces, which would thereby disrupt the general balance of military necessity and humanity that permeates IHL.”).

<sup>70</sup> Murphy, *supra* note 18, at 37 (discussing the gaps in international law states, “Any normative system has gaps and uncertainties, but the list of challenges to the *jus ad bellum* – on rescue of nationals, humanitarian intervention, indirect aggression, responses to coercion not considered an “armed attack,” responses to coercion by non-state actors, anticipatory self-defense, preemptive self-defense – is rather long.”).

<sup>71</sup> Blank & Guiora, *supra* note 61, at 68-72.

<sup>72</sup> SOLIS, *supra* note 46, at 495 (“ROE are the primary means of regulating the use of force in armed conflict, and in situations short of armed conflict. They are akin to a tether, with which senior commanders control the use of force by individual combatants. They are the commander’s rules for employing armed force, arrived at with the help of military lawyers and implemented by those who execute the military mission.”).

<sup>73</sup> See SROE, *supra* note 8, at A-2; U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter LAW OF WAR PROGRAM] (requiring all members of the armed forces to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”); see *id.* SOLIS, *supra* note 46, at 495 (ROE are “based upon three pillars – national policy, operational requirements and law. The foundations of ROE are customary law and LOAC/IHL, along with considerations of political objectives and the military mission.”).

<sup>74</sup> See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 30 (2d ed. 2010) (“As long as a belligerent party is acting within its purview of LOIAC, it may at its discretion indulge in a degree of self-restraint. However, under no circumstances can a belligerent party– through ROE or otherwise–

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U.S. operations. Since there is no law regarding self-defense *in bello*, U.S. policy embodied in the SROE provides the sole guidance for self-defense operational practice by U.S. forces.<sup>75</sup> So despite the lack of explicit written authorities, anyone versed in this area of law can tell that U.S. policy is clearly based on principles drawn from international law.<sup>76</sup>

In addition to legal and policy constraints, there may also be mission specific constraints on military operations. The Security Agreement is one such mission constraint because the United States agreed to restrict military operations further than was required in the mission specific ROE.<sup>77</sup> The following figure depicts regulatory and legal framework for U.S. military operations under a Security Agreement and illustrates how U.S. military operations in Iraq were nested and constrained by numerous layers of law and authorities:

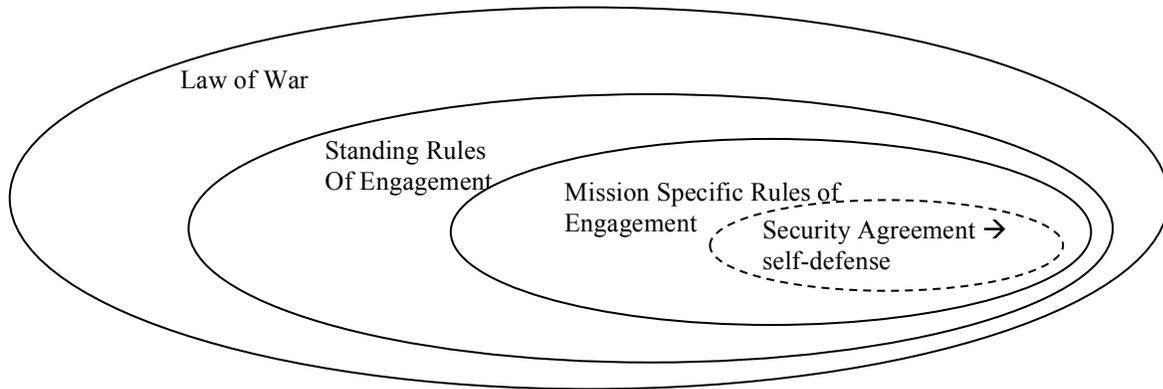


Figure 2. This chart illustrates the restrictions applicable to U.S. Military operations under a Security Agreement structure.<sup>78</sup>

C. *Jus Ad Bellum* Concepts Influence U.S. Self-Defense Operational Practice

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authorize its armed forces to commit acts which are incompatible with international obligations..."); see SOLIS, *supra* note 46, at 495.

<sup>75</sup> See SOLIS, *supra* note 46, at 502 (“Self-defense language in the SROE has been included in all revisions of this document since its inception”).

<sup>76</sup> See generally DINSTEIN, *supra* note 28; see generally SOLIS, *supra* note 46.

<sup>77</sup> See generally Security Agreement, *supra* note 2.

<sup>78</sup> The figure depicts the legal and regulatory constraints under which U.S. military operation were conducted in Iraq after the implementation of the Security Agreement.

Self-defense is a central concept in ROE.<sup>79</sup> ROE never limit the right and obligation of commanders to exercise self-defense.<sup>80</sup> However, explicit in the SROE is the caveat that when the individual service-member is a part of the unit, the commander controls individual self-defense.<sup>81</sup> For example, the famous directive of “Don’t shoot until you see the whites of their eyes” can operate as such a control mechanism.

The SROE obligate commanders at all levels to exercise self-defense on behalf of their forces if such action is necessary and proportional.<sup>82</sup> If time and circumstances permit, U.S. forces should attempt to de-escalate prior to engaging the threat.<sup>83</sup> The components of necessity, proportionality, and de-escalation are prerequisites to the use of force in self-defense.<sup>84</sup> Necessity, the central component in self-defense, requires the act be in response to a hostile act<sup>85</sup> or demonstrated hostile intent, which is also defined as “the threat of the use of force against U.S. forces.”<sup>86</sup>

The use of force in response to a hostile act is generally less controversial. The hostile act is objectively verifiable, removing the need to subjectively perceive the threat. Self-defense, in response to a hostile act, is reactive, occurring after the first blow.<sup>87</sup> The objective is to prevent further injury, rather than to avoid harm in the first place. This reactive concept closely

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<sup>79</sup> See generally SROE, *supra* note 8, at A-2.

<sup>80</sup> See generally *id.*

<sup>81</sup> See SOLIS, *supra* note 46, at 495 (“ROE *never* limit the right and obligation of combatants to exercise self-defense.”).

<sup>82</sup> See SROE, *supra* note 8, at A-2 (“Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”).

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> This response closely resembles the use of force as understood by conservative adherents to U.N. Charter, Article 51, once an armed attack has occurred.

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resembles modern *ad bellum* international law, regarding response to “armed attack” under the U.N. Charter and self-defense under Article 51.<sup>88</sup>

The execution of self-defense in response to demonstrated hostile intent is more controversial because the perception of demonstrated hostile intent can be subjective. Self-defense at this stage occurs before the impact of the attack; therefore, the response is anticipatory to the attack. This form of self-defense is prospective, preventing injury in the first place, rather than limiting damage post attack. Imminence is the key factor in demonstrated hostile intent.<sup>89</sup> The SROE defines imminent as not necessarily “immediate or instantaneous.”<sup>90</sup> The imminent nature of the threat generally satisfies the necessity element required in U.S. policy. This anticipatory concept has been closely associated with the customary international law *Caroline* doctrine. Whereas the *Caroline* doctrine, discussed *infra*, infers that self-defense is an inherent right, the SROE explicitly states this position in U.S. policy.<sup>91</sup>

1. *Imminence: Qualitative vs. Temporal*

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<sup>88</sup> See U.N. Charter art. 51; see Tams, *supra* note 13, at 372 (concisely describing the UN Charters prohibition on the use of force and the two exceptions to this prohibition writes, “Article 2(4) UNC obliges UN members 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”. In Articles 42, 43, and 51, the Charter recognizes two exceptions to this prohibition: forcible enforcement measures within the framework of the organization’s collective security system, and the right of self-defense against armed attacks.”). Note that some scholarship on this issue argues that Article 51 permits the use of force against armed aggression and not just armed attack reflecting the difference in the English version of the charter and the French version. It is unclear whether the difference in language is semantics or substantive.

<sup>89</sup> See SROE, *supra* note 8, at A-3.

<sup>90</sup> *Id.*

<sup>91</sup> See *id.* (“Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”); see Janin, *supra* note 43, at 89; see Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 533 (2003) (discussing Hugo Grotius’ and De Vattel’ view of self-defense under natural law).

Ultimately, discussion of self-defense that is not in response to an “armed attack” or “hostile act” revolves around the concept of imminence.<sup>92</sup> *Black's Law Dictionary* defines imminent as, “an immediate, real threat to one's safety that justifies the use of force in self-defense” and connotes some temporal (instantaneous) element to an imminent threat.<sup>93</sup> Despite this temporal definition, imminence is still quite difficult to judge in modern conflicts.<sup>94</sup> For example, what appears to an individual soldier or low-level commander on patrol as a harmless passing local truck, may be recognized by a geographically removed senior commander with significant intelligence resources as a Vehicle Borne Improvised Explosive Device (VBIED) en route to attack another unit, and as an imminent threat to his or her force. In the scenario just described, the imminence of the threat is in the eye of the beholder. The ability to accurately perceive the threat and react in a timely manner lays out a reasonable argument of how operational self-defense can be justified as necessary. When classic offensive operations are limited this justification becomes critical.<sup>95</sup>

The standard for imminence, based on the *Caroline* doctrine, is that self-defense is only justified if the necessity of that self-defense is instant, overwhelming, leaves no choice of means, and no moment for deliberation. Stemming from an incident in 1837 between the U.S. and Great Britain, the doctrine, articulated by U.S. Secretary of State Daniel Webster, was the first

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<sup>92</sup> 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, 182 (2007) (stating “Undoubtedly, the concept of imminence is the most problematic variable of . . . self-defense and one that has no precise definition in international law. It is currently rather unclear when an attack is sufficiently “imminent” to justify military action in self-defense and it may indeed be very difficult to ever express the imminence of a particular threat “in a legally robust fashion.”).

<sup>93</sup> BLACK'S LAW DICTIONARY 450 (9th ed. 2009).

<sup>94</sup> See Blank & Guiora, *supra* note 61, at 68-72.

<sup>95</sup> See Security Agreement, *supra* note 2, art. 4. Recall that classic military operations, not in self-defense, “must be agreed to and coordinated with the host nation government” or the operation constitutes a violation of the Security Agreement.

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generally acknowledged customary international law position regarding national self-defense.<sup>96</sup> Scholars continue to disagree as to whether the U.N. Charter and its general prohibitions of the use of force supplant the customary doctrine.<sup>97</sup> The majority minimalist opinion seems to be that Article 51 of the U.N. Charter<sup>98</sup> narrowed the use of self-defense, making it permissible only in the event of an armed attack.<sup>99</sup>

U.S. policy for self-defense *in bello* is informed, if not controlled by the recognition that temporal imminence is the standard for national self-defense in customary and treaty law.<sup>100</sup> However, as emerging scholarship in this area indicates, to the extent that *Caroline* is informative in providing guidelines for unit self-defense or operational self-defense, it is applicable only to the temporal, not the qualitative, standard of imminence. Advocates of an emerging view of self-defense ascribe a qualitative, rather than temporal standard for imminence.<sup>101</sup> In assessing a self-defense response to a qualitative threat the *Caroline* doctrine is not helpful. As discussed above, the continuum of threats can range from instantaneous to tangible but indeterminate. All points prior to the preemptive position on the continuum can justify action in self-defense. Identification of threats along the continuum clearly affects the type of self-defense applicable to the threat. Operational practitioners (and policymakers) will be more comfortable with self-defense as a justification for an operation if the action is closer to

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<sup>96</sup> See Amos N. Guiora, *Anticipatory Self-Defense and International Law -- A Re-evaluation*, 13 J. CONFLICT & SEC. L. 3, 8-9 (2008) (“The Caroline Doctrine limits the right to self-defense to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted.”).

<sup>97</sup> See, e.g., Yoram Dinstein, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141, 148 (2003).

<sup>98</sup> See U.N. Charter art. 51.

<sup>99</sup> See Guiora, *supra* note 93, at 8-9 (providing a succinct recount of the principle and the facts of the incident).

<sup>100</sup> See Bakircioglu, *supra* note 48, at 9; see also Rockefeller, *supra* note 17, at 131; but see Stephens, *supra* note 12, at 135. In a somewhat dated, pre-9/11 analysis, Stephens argues that *Caroline* principles provide the legal boundaries of the right to unit self-defense under customary law.

<sup>101</sup> See Bakircioglu, *supra* note 48, at 9; see also Rockefeller, *supra* note 17, at 131.

reactive self-defense rather than to preemptive self-defense. The following example illustrates how imminence can be perceived based on qualitative factors rather than temporal factors.

The sailor's dilemma forms the best analogy for the qualitative perception of imminence.<sup>102</sup> In Paul Robinson's leaking ship hypothetical, the crew of a vessel discovers a slow leak shortly after leaving the port for a long journey. The captain of the ship unreasonably refuses the crew's request to abandon the voyage. Without intervention, the slow leak will capsize the vessel within two days. Therefore, although the leak does not pose a temporally immediate or instantaneous danger, it definitely poses a certain future risk to the lives of the crew and is arguably imminent. In this scenario, factors other than time, such as the inevitability without a change in circumstances, provide a qualitative perception to imminence. The question is whether the sailors should mutiny in their own defense to gain control of the vessel while they are close to the shore and have the chance to survive or wait, even though waiting means they will be too far away from the port and their chance of survival would be slight.<sup>103</sup>

The SROE defines imminent as "not necessarily... immediate or instantaneous"<sup>104</sup> which most practitioners generally interpret to be constrained along temporal lines. However, the intentionally vague wording of the policy reveals, especially in light of state practice,<sup>105</sup> that U.S. policy on imminence may not necessarily be tied to temporal standards. Given that U.S. policy is based on principles of international and customary law, it is not surprising that the customary temporal aspects of imminence are a key factor to determine imminence.<sup>106</sup> Nonetheless, the vague wording indicates that although time is an important factor, it may not be the only factor to

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<sup>102</sup> See Bakircioglu, *supra* note 48, at 9 (providing an articulation of the sailor's dilemma).

<sup>104</sup> SROE, *supra* note 8, at 88.

<sup>105</sup> See *infra* Part IV.

<sup>106</sup> Bakircioglu, *supra* note 48, at 9 ("The requirement of imminence, on the other hand, signifies the temporal facet of self-defense. Traditionally, pleas of self-defense are accepted when...directly following untoward threats or act of the aggressor. A time lag between illegal threat or act and the response usually undermines the validity of self-defense claims.").

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determine whether a threat is imminent. If time was the only aspect of imminence, the SROE would clearly constrain imminence to time and succinctly state “imminent means nearly instantaneous or immediate.” However, the SROE is not so restrictive and implies that U.S. military commanders may consider more than just the temporal aspects of imminence. In practice, qualitative elements, such as those implied in the sailors’ dilemma, enter the analysis.<sup>107</sup> Despite being based on concepts found in international law, U.S. self-defense policy (including Operational self-defense) is not constrained by the same restrictions as national self-defense.

2. *Operational Self-Defense is Distinct from National Self-Defense*

The resort to the use of force by States is severely restricted in modern international law under UN Charter, Article 2(4).<sup>108</sup> One exception to this restriction is self-defense under Article 51 of the UN Charter.<sup>109</sup> However, self-defense operational practice *in bello* circumvents the controversy of when and whether self-defense may be used in conformity with the U.N. Charter because *ad bellum* concepts are inapplicable *in bello*.<sup>110</sup> Once a legal conflict is initiated, the regulation of force must come from *in bello* international norms not *ad bellum* norms. Therefore, other than the analogy to concepts regarding the continuum of self-defense or when “armed attack” occurs, the *ad bellum* limitations in the UN Charter are not controlling.

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<sup>107</sup> These factors will be addressed later in the article but at this point it is sufficient to note that such factors do exist as demonstrated in the sailors’ dilemma.

<sup>108</sup>U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>109</sup>*Id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

<sup>110</sup>*See generally* SOLIS, *supra* note 46, at 163; *See generally* U.N. Charter.

Some scholars consider unit self-defense (and by extension operational self-defense) a subset of national self-defense;<sup>111</sup> however, *ad bellum* principles clearly do not govern unit self-defense *in bello*. Therefore, although unit self-defense is “always ultimately practiced by the state,” when practiced *in bello*, it is not subject to *ad bellum* limitations and arguably a separate category of self-defense. Unit, or operational self-defense is also its own separate concept because it is distinct from individual self-defense.

Another distinction between unit and operational self-defense, stems from who sets the boundaries for use of self-defense. The state sets the boundaries through policy for operational self-defense *in bello*. The international community and international law set the boundaries for national self-defense.<sup>112</sup> Despite the differences between national self-defense and operational self-defense, it is important to study the similarities because the similarities provide a conceptual basis of how commanders utilize resources, address risks to the group, and perceive the threat.

### 3. *U.S. Policy Fills the In Bello Gap with Operational Self-Defense.*

When inhibited from conducting an offensive operation by a Security Agreement structure, senior commanders may resort to self-defense to alleviate a threat to the force. However, senior commanders may not employ individual self-defense on behalf of their units if they are removed from direct threat. Therefore, unit and operational self-defense fill the gap created by *in bello* law and addresses the needs of senior commanders. Command responsibility in general and arising under U.S. policy mandate operational self-defense as described in this article.

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<sup>111</sup>See DINSTEIN, *supra* note 28, at 220 (“[u]nit self defense’ – i.e. ‘[t]he act of defending elements or personnel of a defined unit’ or those ‘in the vicinity thereof’ – in contradistinction to ‘[n]ational self defense’... It must be grasped that, from the standpoint of international law, all self defense is national self-defense. There is a quantitative but no qualitative difference between a single unit responding to an armed attack and the entire military structure doing so... Ultimately, self defense is always exercised by the State.”).

<sup>112</sup>See Janin, *supra* note 43, at 89 (Arguing that the rights of nations, including the right of self-defense are delegated to commanders on the battlefield.).

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Commanders and especially senior commanders, are responsible for accomplishing the mission while safeguarding the resources and individual soldiers granted to them to the maximum extent possible.<sup>113</sup> Senior commanders within a combat theater have awesome responsibilities and are responsible for tens of thousands of soldiers. In many regards, the resources and capabilities available to senior commanders are akin to those of a state. The money, offensive capability, precision targeting, and intelligence<sup>114</sup> resources that constitute the most sophisticated resources accessible to the U.S. government, are available to senior U.S. commanders in combat. These resources and capabilities available to senior commanders are significantly greater than those available to states like Iraq and Afghanistan and thus allow those with greater capabilities to reasonably exercise self-defense where others may not.

III. U.S. STATE PRACTICE OF SELF-DEFENSE IN IRAQ

A. *The Current Operating Environment*<sup>115</sup>

At present, modern warfare is more legally complex than any other time in history.<sup>116</sup> The U.S. is engaged in armed conflicts with numerous non-state actors around the globe.<sup>117</sup> Enemy

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<sup>113</sup> See generally Solon Solomon, *Targeted Killings and the Soldiers' Right to Life*, 14 ILSA J. INT'L & COMP. L. 99, 120 (2007).

<sup>114</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 2-0, INTELLIGENCE paras. 1-2, 1-3 (23 Mar. 2010) [hereinafter FM 2-0] ("The primary focus of the intelligence warfighting function is to provide timely, relevant, accurate, predictive, and tailored intelligence that focuses missions and operations... Intelligence is the product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations.") Intelligence resources in particular are important and will be addressed in greater detail later in this article because intelligence resources influence how a commander perceives the threat.

<sup>115</sup> *Id.* para. 1-1 ("An operational environment is a composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander. An operational environment encompasses physical areas and factors of the air, land, maritime, and space domains. It also includes all enemy, adversary, friendly and neutral systems that may affect the conduct of a specific operation.")

<sup>116</sup> DPH Q&A, *supra* note 58 ("Over recent decades, the nature of warfare has changed significantly, and several factors have contributed to blur the distinction between civilians and combatants. Military operations have moved away from distinct battlefields and are increasingly conducted inside population centers, such as Gaza City, Grozny or Mogadishu. Civilians have become more involved in activities closely relating to actual combat. Combatants do not always clearly distinguish themselves from civilians, preferring for example to operate as "farmers by day and fighters by night."")

<sup>117</sup> See generally SOLIS, *supra* note 46, at 163.

forces such as insurgents and terrorists, who are indistinguishable from the civilian populace and who disregard the law of war, characterize these conflicts with non-state actors.<sup>118</sup> The inability to identify friends or foes on the battlefield has become a significant challenge for conventional forces. Thus, those committing hostile acts or directly participating in hostilities constitute a continuing<sup>119</sup> and likely imminent threat to the military force which may justify self-defense operations against these hostile actors and direct participants in hostilities.<sup>120</sup>

Frequently, the enemies in contemporary U.S. conflicts take refuge and receive safe harbor in adjacent countries.<sup>121</sup> In these adjacent countries, enemy forces frequently receive support including sophisticated weapons systems, money, training, and personnel.<sup>122</sup> Harboring the enemy constitutes a considerable operational threat, capable of producing significant casualties to U.S. and coalition forces. Although other ROE may preclude cross border operations, commanders may be able to address this heightened threat by other means soon after the threat enters the conflict zone. Consequently, when restrained by a Security Agreement from

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<sup>118</sup> Martins *supra* note 61; *see generally* SOLIS, *supra* note 46.

<sup>119</sup> Operational self-defense against an already declared hostile individual target maintaining a continuous combat function in an armed group or directly participating in hostilities against the force is straightforward and potentially obviates the need for Law of War target validity analysis. These categories of individuals are known hostile persons in a continuous armed conflict. However, individuals not within the categories noted above would certainly require full target analysis to ensure that they are indeed valid military targets under the law of war and valid targets for Operational self-defense.

<sup>120</sup> Laurie Blank, *Blurring the Legal Lines on Targeted Strikes*, JURIST - FORUM, Feb. 1, 2012, *available at* <http://jurist.org/forum/2012/02/laurie-blank-targeted-strikes.php> (“First, the law of war allows for targeting of enemy personnel on the basis of status as a first resort; questions of imminence and threat do not come into play. In contrast, outside of armed conflict — and even when using force in self-defense — international law does not provide for the use of force as a first resort. Thus, targeting in self-defense depends entirely on the application of key principles of imminence, necessity and alternatives, in addition to the obligations of distinction, proportionality and precautions.”).

<sup>121</sup> Charley Keyes, *U.S. Military Leader Says Iranian Weapons Killing Americans in Iraq*, CNN.COM (July 7, 2011), *available at* <http://www.cnn.com/2011/WORLD/meast/07/07/iraq.militias.iran.support/index.html?iref=allsearch> (“‘They are shipping high-tech weapons in there -- RAMS, EFPs -- which are killing our people and the forensics prove that,’ Mullen said. ‘From my perspective, that has to be dealt with, not just now because it is killing our people, but obviously in the future as well.’ ‘There is never a formal end to self-defense. Being able to respond and defend yourself is very much a part,’ Mullen said. ‘Anything we do would be very clearly focused on the inherent right of self-defense.’”).

<sup>122</sup> *Id.*

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deliberate pre-planned targeting, senior commanders may execute their obligation to defend the force by utilizing Operational self-defense.

*B. The Security Agreement Self-Defense Exception*

U.S. Forces interpreted the Article 4 self-defense exception, which requires “prior agreement and coordination” for “all military operations”<sup>123</sup> as allowing them to conduct unilateral intelligence based self-defense operations against particularly serious threats. These threats were those that the host nation would not or was reluctant to address.<sup>124</sup> The following hypothetical scenario illustrates the type of situation in which operational self-defense might apply.

U.S. bases located in a particularly violent and tenuously controlled province recently received several indirect fire attacks from a new and more lethal weapon system causing three mass casualty events.<sup>125</sup> The enemy ingeniously modified large conventional rockets to create these weapon systems known as an improvised rocket assisted munitions (IRAM).<sup>126</sup> The modifications added several hundred pounds of explosive to the warhead by welding a large barrel onto the conventional rocket motor and adding a pressure plate to the end of the barrel so it may detonate on impact. The conventional rocket would normally travel several miles, by

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<sup>123</sup> Security Agreement, *supra* note 2.

<sup>124</sup> Tim Arango, *In Shadow of Death, Iraq and U.S. Tiptoe Around a Deadline*, N.Y. TIMES, July 15 2011, <http://www.nytimes.com/2011/07/15/world/middleeast/15iraq.html?scp=1&sq=In%20Shadow%20of%20Death,%20Iraq%20and%20U.S.%20Tiptoe%20Around%20a%20Deadline&st=cse> (noting, “[F]or the same Iraqi government that wants the Americans to stay is also tacitly condoning attacks by Shiite militias on American troops, by failing to respond as aggressively to their attacks as it does to those of Sunni insurgent groups like Al Qaeda in Mesopotamia” ... [and that] [t]he unequal response by the Iraqi security forces to the threats from Sunni and Shiite insurgent groups is a legacy of the sectarian violence that was unleashed by the American invasion eight years ago.”).

<sup>125</sup> See, e.g., Jack Healy & Michael S. Schmidt, *Political Role for Militants Worsens Fault Lines in Iraq* N.Y. TIMES, January 5, 2012, <http://www.nytimes.com/2012/01/06/world/middleeast/iraqi-moves-to-embrace-militia-opens-new-fault-lines.html?scp=1&sq=Political%20Role%20for%20Militants%20Worsens%20Fault%20Lines%20in%20Iraq&st=cse> (describing the Iraqi governments reconciliation with an armed group which had conducted rocket attacks on U.S. Forces in June 2011, which resulted in the death of thirteen soldiers and made June 2012? the worst month for U.S. combated deaths in Iraq since 2008).

<sup>126</sup> Keyes, *supra* note 118 (“Weapons such as IRAMs -- improvised rocket-assisted munitions -- and specially shaped explosives called EFPs -- enhanced explosive penetrators -- have taken a deadly toll on U.S. forces in Iraq, Mullen said, and investigations have tied the weapons directly to Iran.”) (Internal citations omitted).

contrast, the IRAM flies clumsily for no more than a few hundred yards. However, because the technique the enemy uses is to lob the projectile over the wall of a base, this reduction in range is unimportant. Where the unmodified conventional rocket would have caused comparatively few casualties, these IRAMs hit two dining facilities and a field hospital killing and wounding several hundred U.S. and coalition soldiers. The IRAM attacks have caused the worst casualties in the conflict to date. The senior force commander is very concerned.

Only one enemy armed group is known to have the necessary technical knowledge, resources, and raw material to conduct such attacks.<sup>127</sup> This group recently claimed responsibility for the attacks and announced its intentions to continue to “rain fire” on the American occupiers. Intelligence confirms that the group has at least a few more devices. The force commander has also learned from new intelligence that the enemy will complete final assembly of these devices in the next forty-eight hours and initiate the next round of attacks within ninety-six hours. The intelligence also provides the location of the senior weapons expert and armed group cell leader who will complete assembly.<sup>128</sup>

Under U.S. policy, this cell leader would likely qualify as a valid mission target.<sup>129</sup> This individual would also be a valid target under the International Committee of the Red Cross (ICRC) interpretive guidance.<sup>130</sup> Under the interpretive guidance, the cell leader constitutes an

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<sup>127</sup> See, e.g., Healy & Schmidt, *supra* note 122 (describing the Iraqi government's reconciliation armed groups which had conducted rocket attacks on U.S. Forces in June 2011, resulting in the death of thirteen soldiers and making June the worst month for U.S. combat deaths in Iraq since 2008).

<sup>128</sup> See SOLIS, *supra* note 46, at 542 (referring to those who may be subject to targeted killing writes, “Civilians who take up arms and directly participate in hostilities, and those with a continuous combat function, may be [targeted for attack].”).

<sup>129</sup> See generally SROE, *supra* note 8.

<sup>130</sup> DPH Q&A, *supra* note 58.

Examples of causing military harm to another party include capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example through sabotage, erecting road blocks or interrupting the power supply of radar stations. Interfering electronically with military computer networks (computer network attacks) and transmitting tactical targeting intelligence for a specific attack are also examples. The use of time-delayed weapons such as mines or booby-traps,

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integral part of the armed group's leadership and in conjunction with other members causes direct harm to U.S. Forces.<sup>131</sup> U.S. Forces and coalition forces have been after this individual for months and have attempted to persuade the host nation to detain the cell leader or conduct its own operations against the cell; however, the host nation authorities have refused to coordinate or agree to any operation against him or her.<sup>132</sup> Thus, the senior U.S. commander must act unilaterally or risk additional mass casualty events. The commander must also consider whether another mass casualty attack will further undermined already tenuous U.S. domestic support and perhaps force the premature withdrawal of U.S. forces, making the enemy's tactical victory into a strategic defeat. The commander must balance this strategic concern against the sovereignty of the government and the need to support a fledgling democracy.

Ultimately, due to Security Agreement constraints and lack of host nation cooperation, the commander decides that despite being a direct participant in hostilities<sup>133</sup> and a member of a

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remote-controlled weapon systems such as unmanned aircraft, also "directly" causes harm to the enemy and, therefore, amounts to direct participation in hostilities.

"Indirect" participation in hostilities contributes to the general war effort of a party, but does not directly cause harm and, therefore, does not lead to a loss of protection against direct attack. This would include, for example, the production and shipment of weapons, the construction of roads and other infrastructure, and financial, administrative and political support.

The difference between "direct" and "indirect" participation can be difficult to establish but is vital. For example, the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and would therefore constitute direct participation in hostilities. However, transporting ammunition from a factory to a port far from a conflict zone is too incidental to the use of that ammunition in specific military operations to be considered as "directly" causing harm. Although the ammunition truck remains a military objective subject to attack, driving it would not amount to direct participation in hostilities and, therefore, the civilian driver could not be targeted separately from the truck.

<sup>131</sup> *Id.* Additionally, the interpretive guidance seems to indicate that proximity, both in time and in geographic location to the attack make the cell leader a valid target.

<sup>132</sup> *See generally* Keyes, *supra* note 118. This lack of cooperation may occur for many reasons such as tribal affiliations, political and security concerns, or pressure from the adjacent State supporting the armed group.

<sup>133</sup> DPH Q&A, *supra* note 58 (According to the ICRC's Interpretive Guidance, all persons who are not members of State armed forces or of organized armed groups belonging to a party to an armed conflict are civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities. It can be difficult to tell the difference between members of organized armed groups and the civilian population. Civilians support insurgencies in many different ways including, at times, by directly participating in hostilities in spontaneous, sporadic, or unorganized ways. However, civilians cannot be regarded as members of an organized armed group unless they assume a "continuous combat function," i.e., unless they assume continuous function involving their direct participation in hostilities. Members of organized armed groups do not have the same

declared hostile group, he will not engage the target under mission imperatives.<sup>134</sup> Therefore, the commander will act unilaterally in self-defense.<sup>135</sup> Those familiar with recent U.S. military operations may realize that the scenario above is based on real-world operational concerns and enemy capabilities.<sup>136</sup>

*C. How Commanders Perceive and Judge that Self-Defense is Necessary*

As previously discussed, U.S. policy authorizes self-defense in response to an imminent threat from demonstrated hostile intent.<sup>137</sup> Front-line foot soldiers usually perceive an imminent threat through their “five-senses.” The soldier sees the threat, hears the threat, and may even touch or smell the threat. Therefore, this response is nearly instantaneous. The only time necessary is the few microseconds it takes for the mind to recognize the threat or threatening pattern and send instructions to the motor system to neutralize or take other appropriate measures against the threat. While the soldier perceives only threats to themselves or their small group, the commander perceives threats to the whole force; therefore, the number of lives at stake is much higher.

Commanders perceive the imminent threat indirectly. In fact, the more senior the commander, the more unlikely it is that he or she will directly perceive the threat. Senior commanders will usually be inside secure headquarters facing a wall of monitors in large operations center miles away from the battle or direct threat.<sup>138</sup> The threat in this environment is perceived through operational reports from subordinate organizations, assessments from

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privileged status as combatants of state armed forces and, therefore, can be subject to domestic prosecution even for simply taking up arms.)

<sup>134</sup> SOLIS, *supra* note 46, at 540 (noting, “The justification for targeted killing rests in the assertion of national self-defense.”). More accurately, when the threat is to the military force rather than the nation as a whole, the justification for this targeted killing is operational self-defense.

<sup>135</sup> Security Agreement, *supra* note 2 at art. 4 para. 5.

<sup>136</sup> See, e.g., Healy & Schmidt, *supra* note 122.

<sup>137</sup> See *supra* Part III.C.

<sup>138</sup> Kaye, *supra* note 22, at 160. Recall the famous photo of President Obama and his national security teams inside the situation room of the White House during the Osama Bin Laden operation.

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experienced senior officers, and intelligence briefings based on synthesized intelligence from numerous platforms all viewed through the prism of a senior commander's years of experience.<sup>139</sup> Therefore, the reaction is not and cannot be instantaneous, but it is self-defense nonetheless.

U.S. policy is clear on the commander's affirmative obligation to exercise self-defense.<sup>140</sup> A senior commander's response to a perceived imminent threat, although perhaps approaching preventative self-defense on the continuum, is as justifiable under U.S. policy as individual self-defense is for a front-line soldier.<sup>141</sup> Self-defense at this operational level requires deliberation and mobilization of resources for an effective response to be summoned, which approach the level of deliberation and mobilization required in national self-defense. Not altogether disassociated from time, self-defense at this level is also based on a risk determination, similar to that discussed in the sailors' dilemma paradigm.<sup>142</sup> Ultimately, the commander's perception and response may be hours, days, or even weeks prior to the actual enemy attack. Finally, from their broad operational rather than narrow tactical perspective, senior commanders are likely to be in a better position to perceive the threat across the entire force, conduct a holistic assessment of the risk, and exercise self-defense in a proportional manner.<sup>143</sup>

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<sup>139</sup> See generally FM 2-0, *supra* note 111.

<sup>140</sup> See *supra* Part III.C.

<sup>141</sup> See generally SROE *supra* note 8.

<sup>142</sup> See *supra* Part III.C.

<sup>143</sup> See generally SOLIS, *supra* note 46, at 530 ("Military forces employ strict protocols in making targeting decisions."). The attorney advising the commander on this topic must, therefore, fully understand what is within the bounds of self-defense and whether the quantum of proof is present for a legitimate self-defense operational decision. For example, the Operational self-defense targeting process may proceed as follows: The Command's sensors or subordinates perceive a significant threat to the force. Unit intelligence synthesizes the details of the threat to allow the commander to make a judgment as to the imminent nature of the threat (including such factors as risk to target, strategic and operational impacts of successful attack, probability of success, and time horizon for attack), and threat profile (enemy tactics, techniques and procedures; last opportunity to engage, etc.). Next, unit intelligence coordinates with unit operations and the fires coordinator to determine the means and method of engagement (mission design) as well as windows of opportunity for and location for interdiction. A legal advisor

### *1. Risk to the Force is Qualitatively Different from the Risk to the Individual*

While each life is significant and immeasurably valuable, a single life cannot equate to the lives of many.<sup>144</sup> This is especially true when a military unit has a mission to accomplish. Consequently, the loss of one life may not hinder the mission; the loss of many lives may impede the operation.<sup>145</sup> Individual self-defense safeguards the right of the individual to life. If an individual fails to respond in self-defense appropriately, he or she may lose his or her life. Operational self-defense is a means by which senior commanders exercise their obligation to preserve the force, save many lives, and conserve resources to ensure that the mission is accomplished. If a commander fails to respond appropriately, many more people may die and thereby jeopardize the mission, which is the primary objective of any military organization. Commanders must factor in the magnitude of risk to the force when analyzing a threat to the unit.<sup>146</sup> When the risk is great Operational self-defense is justifiable with sufficient intelligence against the imminent threat.

### *2. Operational Self-Defense: Preventative not Preemptive*

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reviews the packet for legal sufficiency (not approval) to ensure compliance with the Law of War and ROE. The review should focus on whether the target represents an actual and imminent threat and whether the target represents a valid military target (as opposed to a protected civilian). Finally, intelligence and operations officers brief the packet to the commander for decision and the mission is executed per the commander's directive.

<sup>144</sup> See generally Michael Skopets, Comment, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 779-80 (2006) (discussing magnitude of harm to a nation [large group] versus the magnitude to a battered woman [individual] as being qualitatively different because those responsible for the safety of the group are responsible for the well-being of the group and thus have a more significant responsibility).

<sup>145</sup> This is especially true when one considers the downstream effects of many casualties. This includes logistical support to care for and transport casualties, drain on resources, and potential negative psychological effects on soldiers.

<sup>146</sup> The magnitude of the threat may come from understanding such factors as the types of weapons the enemy employs, the means by which the enemy employs them, the types of targets the enemy chooses to attack, and the projected casualties from such an attack. The risks to the force include such factors as size and type of weapon to be used, methods of employment and target. Intelligence provides information as to identity of the threat, location of attack, enemy means and methods of attack, indications of and degree of certainty of attack, and windows of time in which the threat may be engaged. When dealing with an elusive threat that frequently blends in with the populace windows of engaging the threat become transient and may be lost when the enemy completes all preparations and submerges to conduct the attack. Finally, the quantity and quality of intelligence on the threat is critical in determining whether to act in self-defense or continue normal force protection operations.

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The nature of a commander's exercise of self-defense is preventative, not preemptive or anticipatory, because there are ongoing hostilities in a combat zone, and the enemy maintains the capability and intent to attack. The commander's action in self-defense is not initiating hostilities but in response to previous hostilities and to the imminent threat of additional attacks against his or her force.

Operational self-defense is least controversial when applied in such an interceptive context. Consider the following illustration: a commander in an operations center determines through Intelligence Surveillance and Reconnaissance (ISR) platforms that two persons appear to be in an attack position for an emplaced Improvised Explosive Device (IED).<sup>147</sup> His or her subordinate unit traveling down the road is unaware of both the IED and the threat from the attackers. The targeted unit cannot act in self-defense because the unit is not personally aware of the imminent threat. Here, the commander in the operations center can notify the unit of the threat and allow them to maneuver to destroy the threat and act in their own defense. Alternatively, the commander may execute self-defense on behalf of the unit without ceding control by ordering an aerial platform to destroy the threat without ever involving the ground unit. Either option is appropriate self-defense. In the latter action, the commander responds to intercept the potential attack on his or her unit in a legitimate act of operational self-defense. This operational self-defense is interceptive because the attack is incipient. All planning and preparation is complete. The ambush is set. The IED is ready to detonate. The enemy awaits the inevitable arrival of the military convoy, which will pass through the "kill zone," predictably

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<sup>147</sup> Technical means exist in order to determine to a high probability that an IED is present and in conjunction with synthesized intelligence and previous attack profiles commander can certainly reach the level of confidence necessary in order to determine that an imminent threat to his or her forces exists.

causing the death of the soldiers.<sup>148</sup> Clearly, the commander is not required to take the first blow and allow the death of these soldiers prior to acting in self-defense. Undoubtedly, the commander's actions in self-defense would be justifiable.<sup>149</sup>

The more difficult and perhaps controversial application of operational self-defense is to act against objectives further removed from the attack, such as weapons in transit, improvised weapons under construction, or against the specialists involved in manufacturing those weapons. These weapons experts are High Value Target (HVT)<sup>150</sup> individuals with specialized training and expertise. Without their contribution, there could be no IRAM construction. Although they may not trigger the explosive or lie in ambush, they fulfill a critical combat function for the insurgents.<sup>151</sup> These "bomb makers" are direct participants in hostilities (even by ICRC standards)<sup>152</sup> and, therefore, valid targets under U.S. policy. They are no longer civilians or those who only provide general support to the war. Consequently, these bomb makers may be legally targeted under the Law of War, U.S. policy and the Interpretive Guidance offensively. However, if these bomb makers constitute a verifiable, imminent threat to the force there may be a valid operational self-defense justification as well. However, before engaging either the ambush team or the "bomb maker," the commander must be able to perceive the threat and be in

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<sup>148</sup> Stewart, *supra* note 1 (quoting Major General Jeffrey Buchanan, the senior spokesman for U.S. Forces – Iraq and the U.S. commander ultimately responsible for the conduct of operational self-defense who stated when referring to a unilateral attack on two militants who had planted and planned to detonate a roadside bomb targeting a U.S. Convoy "We attacked and killed them rather than waiting (for the convoy) to drive through the ambush and get attacked.").

<sup>149</sup> Self-defense as executed by U.S. commanders is an affirmative act to remove the imminent threat or in immediate response to an attack. This is distinct from force protection, another type of passive military operation, on guard type activity, executed by all military units in which the general threat is indistinct or unidentified.

<sup>150</sup> FM 2-0, *supra* note 111, para. 1-104 ("HVT's are people, organizations, or military units the threat commander requires for successful completion of the mission.").

<sup>151</sup> See generally Melzer, *supra* note 64, at 868.

<sup>152</sup> See generally DPH Q&A, *supra* note 58 (Distinguishing those civilians which support the combat efforts by working in a munitions plant far from the combat zone the ICRC seemingly indicating that such work in a combat zone may subject the "civilian" to lawful targeting. Additionally, it is important to note that the "bomb maker" in the combat zone is the key node in creating the munitions and is likely the expert in how that munitions should be employed; therefore, that individual is much closer to the combat function nexus than a worker at a munitions plant.).

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a position to take action against that threat. In order to do this, he or she needs input from their intelligence resources and must take care to ensure that the intelligence is sufficient to justify the operational self-defense mission.<sup>153</sup>

3. *Intelligence*

Intelligence is the critical component in every Operational self-defense mission. Unlike individual self-defense and unit self-defense against a direct threat, intelligence is the only way a commander could gain prior knowledge of a threat to his or her force.<sup>154</sup> Intelligence platforms sufficient to provide warning of a threat are not available to all units. The more temporally remote the threat, the more certain the intelligence needs to be. However, as in all operational self-defense actions, special care must be taken to ensure that unreliable intelligence or improper identification do not result in collateral damage or targeting a civilian who is not a lawful military target.<sup>155</sup> Therefore, in order to apply Operational self-defense appropriately, the intelligence must provide a high level of fidelity that the threat is real and imminent.

Intelligence assets of all varieties are generally limited resources that are expensive and very sensitive. All assets are included in one of the platforms: Signal Intelligence (SIGINT),<sup>156</sup> Human Intelligence (HUMINT),<sup>157</sup> OSINT (Open-Source Intelligence),<sup>158</sup> MASINT (Measures

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<sup>153</sup> See generally Blank & Guiora, *supra* note 61, at 68-72 (2010) (While not the point of this article, a reasonable standard of certainty may be based on a “preponderance of available reliable intelligence indicates that a significant attack will be conducted by a positively identified enemy threat to inflict significant casualties on the force in the near future,” no other means of addressing the threat are feasible and the action in self-defense is not disproportionate to the threat.).

<sup>154</sup> See generally Skopets, *supra* note 141, at 780 (describing actions in self-defense as “based on a multitude of intelligence indicating an overwhelming likelihood of future harm.”) (internal citations omitted).

<sup>155</sup> See generally SOLIS, *supra* note 46, at 510 (U.S. policy requires positive identification, defined as reasonable belief, that the target attacked is the designated target).

<sup>156</sup> FM 2-0, *supra* note 111, para. 1-111 (Signals Intelligence: SIGINT is produced by exploiting foreign communications systems and non-communications emitters. SIGINT provides unique intelligence and analysis information in a timely manner. The discipline comprises communications intelligence (COMINT), electronic intelligence (ELINT), and foreign instrumentation signals intelligence (FISINT)).

<sup>157</sup> *Id.* para. 1-104 (Human Intelligence: HUMINT is the collection of foreign information by a trained HUMINT collector. It uses human sources and a variety of collection methods, both passively and actively, to collect information including multimedia on threat characteristics).

Intelligence),<sup>159</sup> IMINT (Imagery Intelligence),<sup>160</sup> TECHINT (Technical Intelligence),<sup>161</sup> GEOINT (Geospatial Intelligence),<sup>162</sup> and synthesized intelligence.<sup>163</sup> Any combination of intelligence from these platforms that provides a high level of reliability and certainty regarding the potential threat is a basis for justifiable Operational self-defense. The intelligence must provide adequate indicia of the existence of a particularized threat<sup>164</sup> and provide information on how to neutralize the threat in a proportionate and discriminatory manner.<sup>165</sup> Finally, in order to ensure that Operational self-defense is not misused or misapplied, a formal staff process must be developed to detect, assess, and verify all objectives.

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<sup>158</sup> *Id.* para. 1-110 (Open-Source Intelligence: (1) 1-108. OSINT is produced from publicly available information collected, exploited, and disseminated in a timely manner to an appropriate audience for addressing a specific intelligence requirement; (2) 1-109. Expressed in terms of the Army intelligence process, OSINT is relevant information derived from the systematic collection, processing, and analysis of publicly available information in response to intelligence requirements; and (3) 1-110. The Army does not have a specific military occupational specialty (MOS), additional skill identifier (ASI), or special qualification identifier (SQI) for OSINT. With the exception of the Asian Studies Detachment, the Army does not have base tables of organization and equipment (TOEs) for OSINT units or staff elements. OSINT missions and tasks are embedded within existing missions and force structure or accomplished through task organization.).

<sup>159</sup> *Id.* para. 1-107 (Measurement and Signature Intelligence: MASINT is technically derived intelligence that detects, locates, tracks, identifies, or describes the specific characteristics of fixed and dynamic target objects and sources. It also includes the additional advanced processing and exploitation of data derived from IMINT and SIGINT collection. MASINT collection systems include but are not limited to radar, spectroradiometric, electro-optical, acoustic, radio frequency, nuclear detection, and seismic sensors. MASINT collection also includes techniques for collecting CBRN and other materiel samples.).

<sup>160</sup> *Id.* para. 1-106 (Imagery Intelligence: IMINT is derived from the exploitation of imagery collected by visual photography, infrared sensors, lasers, multispectral sensors, and radar. These sensors produce images of objects optically, electronically, or digitally on film, electronic display devices, or other media.).

<sup>161</sup> *Id.* para. 1-112 (Technical Intelligence: TECHINT is derived from the collection and analysis of threat and foreign military equipment and associated materiel for the purposes of preventing technological surprise, assessing foreign scientific and technical capabilities, and developing countermeasures designed to neutralize an adversary's technological advantages.).

<sup>162</sup> FM 2-0, *Id.* para. 1-105 (Geospatial intelligence: GEOINT is the exploitation and analysis of imagery and geospatial information to describe, assess, and visually depict physical features and geographically referenced activities on the Earth. Geospatial intelligence consists of imagery, imagery intelligence, and geospatial information).

<sup>163</sup> *Id.* para. 1-102 (Synthesized Intelligence: All-source intelligence is the products, organizations, and activities that incorporate all sources of information and intelligence, including OSINT, in the production of intelligence. All-source intelligence is both a separate intelligence discipline and the name of the process used to produce intelligence from multiple intelligence or information sources.).

<sup>164</sup> Stephens, *supra* note 12, at 150 (“The contemporary commander has an obligation to exercise “due care” when assessing a potential threat, having regard to all relevant objective indicia. The commander is to take into account all information reasonably available at the relevant time, and “satisfied that a threat is hostile, [the commander] is not precluded from exercising [the] right of self defense.”) (internal citations omitted).

<sup>165</sup> See generally SOLIS, *supra* note 46, at 167, 542-43.

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*D. Control Measures for Operational Self-Defense to Prevent Abuse*

One significant critique of Operational self-defense is that it is susceptible to abuse. However, the innate controls in operational practice and rigor in the process would likely eliminate most potential abuse.

Operational self-defense should only be used in limited circumstances. Therefore, oversight by the employing force's own government is imperative.<sup>166</sup> The U.S. already provides a mechanism for such oversight in its current policy. The SROE already provides guidance on self-defense and implicitly covers Operational self-defense.<sup>167</sup> Second, host nation caveats in the implementing agreement provide controls on Operational self-defense. Other than the self-defense language, the Security Agreement has provision allowing either party to terminate the agreement and therefore cause the removal of invited forces.<sup>168</sup> This particularly serious break in inter-state relations is likely the biggest incentive to limit Operational self-defense in quantity and scope. These two control measures along with rigorous implementation of the operational practice would likely provide sufficient controls.

Operational self-defense needs to be executed in accordance with all applicable<sup>169</sup> laws of war.<sup>170</sup> Conducting operational self-defense in accordance with the four principles ensures that a

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<sup>166</sup> See generally SROE *supra* note 8. This can occur through command directives or by including Operational self-defense as a supplemental measure in the SROE. Civilian policy makers and commanders senior to the operational chain-of-command would simply eliminate or directly pre-approve such operations.

<sup>167</sup> *Id.*

<sup>168</sup> Security Agreement, *supra* note 2 at art. 24.

<sup>169</sup> See SOLIS, *supra* note 46, at 167. Although there is some dispute whether this means that applicable law of war, principles are applied to certain conflicts or the entire body of law of war applies, generally, U.S. military organizations conduct operations in accordance with the four principles, military necessity, proportionality, distinction, and humanity, regardless of the type of conflict. For example, under international law, during a common article two conflict, the entire body of the Geneva conventions applies; whereas during a common article three conflict, under international law only the "mini conventions" of common article three of the Geneva conventions apply.

<sup>170</sup> LAW OF WAR PROGRAM, *supra* note 70; CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, JOINT PUB., INSTR. 5810.01D, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (30 Apr. 2010) [hereinafter JOINT PUB. 5810.01D] (The Chairman of the Joint Chiefs of Staff has issued further guidance on the matter which implements the DoD Law of War Program, similarly states that "the Members "[t]he Armed Forces of the DOD Components

command takes the time to evaluate objectives in a more formal and deliberate manner.<sup>171</sup> U.S. policy allows individuals and commanders reacting instantaneously in self-defense to conduct a curtailed proportionality review.<sup>172</sup> However, the nature of operational self-defense allows military organizations to have sufficient time to conduct an analysis of the self-defense objective.

Operational self-defense in Iraq constituted U.S. state practice. Given the existence of this state practice, based on a sense of legal obligation, it appears that operational self-defense may begin to take root as customary law.

#### IV. CUSTOMARY INTERNATIONAL LAW IMPLICATIONS

State practice and *opinio juris* (belief the state practice is obligatory under a rule of international law) are the two required elements for the creation of customary international law.<sup>173</sup> Under the Security Agreement, U.S. state practice and the belief that this practice was obligatory under a rule of international law introduced Operational self-defense to potential acceptance as customary international law. This section will discuss the two components of

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United States comply with the law of war during all armed conflicts, however . . . characterized, and in all other military operations.”); SOLIS, *supra* note 46, at 167.

<sup>171</sup> See generally SOLIS, *supra* note 46, at 542-43. Solis provides several prerequisites for targeted killing which are also applicable to the concept of operational self-defense. These factors are: (1) the existence of an ongoing armed conflict which provides the combatants the privilege to kill the enemy; (2) positive identification (to satisfy distinction) of the specific individual who is the target (or threat to the force); (3) the targeted individual (or threat) is beyond the reasonable possibility of arrest (will not be arrested by the host nation); (4) only a senior military commander representing the targeting state may authorize the targeted killing (likely because only such a senior individual will be able to perceive and action, with the resources available to him, the threat or target); (5) requirement as a military necessity (eliminating or reducing the threat); and (6) proportionality (minimizing collateral damage).

<sup>172</sup> See CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, JOINT PUB., INSTR. 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter 3160.01] (differentiating dynamic targeting situation involving self-defense, requiring only a hasty collateral damage estimate, from deliberate targeting, requiring a formal collateral damage estimate.).

<sup>173</sup> See DINSTEIN, *supra* note 28, at 147-4993; Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523, 534 (2004) (quoting from the court's judgment in the *North Sea Continental Shelf* cases, Kammerhofer writes, “Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. . . is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.”) (emphasis in the original) (internal citations omitted).

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customary international law: how long a practice must exist before it becomes customary law, and how generally accepted the practice must be to become customary law. This section will also briefly describe how the state practice of operational self-defense in the future may ensure that operational self-defense becomes customary law.

*A. Continued State Practice and Opinio Juris: New Customary Law*

According to Tullio Treves, Customary rules are the result of a process whose character has been qualified by a number of authors as “mysterious,” through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the subjects of international law.<sup>174</sup> As a practical matter, some states are more active than others, so although many states may make statements as to *opinio juris*, only some will actually have complementary state practice.<sup>175</sup>

The U.S. and a few of its allies have engaged in protracted extraterritorial conflicts for most of the last decade. During this period, the U.S. and its allies have engaged in extensive state practice. Arguably, this high level of activity puts these elements of practice on a sliding scale, so that when states are very active, only modest *opinio juris* is necessary.<sup>176</sup> Further, commentators have argued that state acts should carry greater weight than *opinio juris*, given that statements as mere words do not as accurately illustrate the true belief of a state without more

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<sup>174</sup> TULLIO TREVES, CUSTOMARY INTERNATIONAL LAW, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2012), available at [www.mpepil.com](http://www.mpepil.com). (The empirically determined facts are derived from objectively observed, state practice and from statements or other communications of subjective belief that the state practice is a legal obligation *opinio juris*. Both state practice and *opinio juris* are required or accession to customary international law); Murphy, *supra* note 18, at 24 (“Customary international law, of course, is also built upon the idea that contemporary state practice, in conjunction with *opinio juris*, serves to establish the law, even if that law was different at some earlier time.”).

<sup>175</sup> Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 EUR. J. INT’L L. 21, 30 (2002) (referring to self-defense noted that even prior to the last Iraq war, the U.S. in its previous dealings with this state, “engaged in the progressive development of this area of international law”) (internal citations omitted).

<sup>176</sup> TREVES, *supra* note 171.

resource intensive acts to back up those statements.<sup>177</sup> Another emerging view is that states that act should carry more weight in the creation of customary law than states that only make statements.<sup>178</sup> The following section delves deeper into what the elements of customary international law are, and how the U.S. has expressed these elements.

### *1. Opinio Juris*

In the international system, sovereign states exhibit their intentions through public policy statements. These statements of *opinio juris* constitute consent to, and recognition of, principles of international law that the state accepts.<sup>179</sup> Policy statements by senior leaders and U.S. accession to the Security Agreement arguably constitute one form of *opinio juris*.

First, the Security Agreement was a bilateral international agreement between Iraq and the U.S. signed by the Ambassador to Iraq and binding U.S. Forces operating in a sovereign state. Although not a treaty *per se*, this international agreement was binding upon the parties under its terms. The statement in article 4, regarding self-defense as “defined in international law,”<sup>180</sup> at least in part constitutes *opinio juris* for the U.S.; otherwise, this treaty provision is rendered practically meaningless. Additionally, Iraq is a second sovereign state that recognizes this type of self-defense and considered this practice *opinio juris*; otherwise, this would be a meaningless

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<sup>177</sup> Kammerhofer, *supra* note 170, at 525-26 (noting that the majority view is that statements are a form of state practice, constituting verbal acts, and disputing that statements of a state may conflict with its actions because different acts may conflict with each other as well).

<sup>178</sup> Byers, *supra* note 172, at 31-32 (“However, it is possible that we are witnessing something more than just a continued effort to degrade the influence of resolutions and the relative weight of statements as opposed to acts. The United States, and some authors from the United States, may also be seeking a degree of formal recognition for the greater influence of the actions and opinions of powerful states in the formation of customary international law.”).

<sup>179</sup> Kammerhofer, *supra* note 170, at 532 (writing, “[L]aw-making normally requires some form of intentional activity, an act of will. In the international system, great value has traditionally been placed in the state’s agreement or consent to create obligations binding upon them; ‘no state can be bound without its will’ might be a typical statement.”).

<sup>180</sup> Security Agreement, *supra* note 2, at 4 (“The Parties retain the right to legitimate self defense within Iraq, as defined in applicable international law.”).

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provision to Iraq without such an understanding of the provision.<sup>181</sup> Arguably, according to Kammerhofer, the silence of the ‘inert mass’ is inferred consent or acquiescence to law of self-defense, recognized by the U.S. and Iraq in the Security Agreement.<sup>182</sup>

Second, numerous statements to the American press by senior officials in the Department of Defense constitute confirmation and reiteration of the U.S. *opinio juris* on Operational self-defense.<sup>183</sup> These statements by the Chairman of the Joint Chiefs of Staff and the Secretary of Defense offer perhaps the best insight into operational practice and the U.S. position on the developing customary rule.<sup>184</sup> Additionally, the U.S. has recently deployed a small contingent of special operations troops to Uganda in order to facilitate the capture of an international war criminal.<sup>185</sup> As in Iraq, U.S. Forces would be operating with the consent<sup>186</sup> of the Ugandan government while conducting military operations within a sovereign state. Although these operations have been described as non-combat support operations, President Obama specifically

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<sup>181</sup> MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 196 (1985) (“General and abstract rules can also be found in bilateral treaties and may then provide a basis for the generation of new customary law.”) (internal citations omitted).

<sup>182</sup> Kammerhofer, *supra* note 170, at 533 (Kammerhofer qualifies this statement by noting that only states that knew or might have been expected to know of the practice can be said to have acquiesced to it. However, although the Security Agreement is a published and public agreement it remains unclear exactly which states may be said to have acquiesced).

<sup>183</sup> Keyes, *supra* note 118 (referring to the Security Agreement, Former Chairman of the Joint Chiefs of Staff, Admiral Mullen denied that the formal end to U.S. combat activities in Iraq (misstated in the article as Iran) would prevent American response against Iranian-supported attacks. Mullen noted, “There is never a formal end to self-defense. Being able to respond and defend yourself is very much a part,” Mullen said. “Anything we do would be very clearly focused on the inherent right of self-defense.”).

<sup>184</sup> VILLIGER, *supra* note 178, at 196 (“[S]tate practice on the *international plane* may include diplomatic correspondence..., general declarations of foreign or legal policy, opinions of national legal advisors, and instructions given to State representatives.”) (emphasis in original) (internal citations omitted).

<sup>185</sup> Thom Shanker & Rick Gladstone, *Armed U.S. Advisers to Help Fight African Renegade Group*, N.Y. TIMES (Oct. October 15, 2011), <http://www.nytimes.com/2011/10/15/world/africa/barack-obama-sending-100-armed-advisers-to-africa-to-help-fight-lords-resistance-army.html>. (“They will be providing assistance and advice to their African hosts, Mr. Obama said, and “will not themselves engage LRA forces unless necessary for self-defense.”).

<sup>186</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 H. The 2012 National Defense Authorization Act (NDAA) provides a domestic legal basis for U.S. military authority to detain enemy personnel engaged in hostilities against U.S. Forces in a Non-International Armed Conflict (NIAC). This authority provides a legal basis for Commanders to act in any armed conflict worldwide under the auspices of U.S. domestic law. Extending the logic, the authorization arguably provides an Operational self-defense justification for targeting individuals constituting a threat to U.S. forces during a NIAC when detention is not an option.

noted that they would have the right to self-defense.<sup>187</sup> These pronouncements by the U.S. president arguable amount to a statement of *opinio juris*, and the deployment and exercise of self-defense by those forces would reinforce U.S. state practice.

## 2. State Practice

State practice is “what states do and say, what they want or consent to, and what they believe.”<sup>188</sup> As described in detail in the previous sections, the U.S. engaged in operational self-defense in Iraq as state practice. The organ of that state practice was the U.S. military in Iraq.<sup>189</sup> While unilateral self-defense operations in Iraq under the Security Agreement were one form of state practice, the numerous public statements made by senior leaders regarding these operations were also state practice.<sup>190</sup>

### i. Time Factor

How much time does it take to create new customary international law? In the modern age of lightning fast communication, twenty-four hour news, and huge volumes of open information about what takes place in almost any part of the world, a generation of new international norms

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<sup>187</sup> Scott Wilson & Craig Whitlock, *Small U.S. Force to Deploy to Uganda, Aid Fight Against Lord's Resistance Army*, WASH. POST (Oct., October 14, 2011), [http://www.washingtonpost.com/world/national-security/small-us-force-to-deploy-to-uganda-aid-fight-against-lords-resistance-army/2011/10/14/gIQAyDOvK\\_story.html](http://www.washingtonpost.com/world/national-security/small-us-force-to-deploy-to-uganda-aid-fight-against-lords-resistance-army/2011/10/14/gIQAyDOvK_story.html). (“In a letter to Congress on Friday, Obama outlined a strictly advisory role for U.S. forces, whom he said would engage in combat only in self-defense.”).

<sup>188</sup> VILLIGER, *supra* note 178, at 4 (“General and abstract rules can also be found in bilateral treaties and may then provide a basis for the generation of new customary law”) (internal citations omitted) (noting “[S]tate practice includes any act, articulation or other behavior of a State, as long as the behavior in question discloses the State’s conscious attitude with respect to – its recognition of – a customary rule.”) (internal citations omitted); TREVES, *supra* note 171 (elaborating further, “Such practice may in some cases be attributable to States taken singularly and in other cases to States taken in groups.”).

<sup>189</sup> TREVES, *supra* note 171 at 31 (explaining, “[t]he organs of States whose contributions to practice are relevant are all the organs for whose behavior States bear responsibility...”).

<sup>190</sup> Stewart, *supra* note 1 (noting that Secretary of Defense Panetta warned during a trip to Iraq in July 2011 that the U.S. would take unilateral action when necessary to deal with Iran-backed militants who made June 2011 the deadliest month for U.S. forces in Iraq since 2008.); Keyes, *supra* note 118, (referring to the Security Agreement, Former Chairman of the Joint Chiefs of Staff, Admiral Mullen denied that the formal end to U.S. combat activities in Iraq (misstated in the article as Iran) would prevent American response against Iranian-supported attacks. Mullen noted, “There is never a formal end to self-defense. Being able to respond and defend yourself is very much a part,” Mullen said. “Anything we do would be very clearly focused on the inherent right of self-defense.”).

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has developed quickly.<sup>191</sup> Traditionally, the duration of state practice over a long period of time has been considered a prerequisite for the formation of customary international law.<sup>192</sup> However, in this modern age, this may no longer be the case.<sup>193</sup> For example, customary law regarding genocide, crimes against humanity in internal conflicts, and the prosecution of human rights transgressions has seen a significant transformation in the last two decades.<sup>194</sup> The rapid change in customary norms after the terrorist attacks on the U.S. on September 11, 2001 is another example.<sup>195</sup> According to Lunderfalk, “a right of self-defense could be exercised only on the occasion of an armed attack carried into effect *by one state as against another*. ...[A]t some point during the period of 11 September–7 October the contents of customary international law developed” to allow military operations in Afghanistan to occur based upon an attack by non-state actors.<sup>196</sup> These modern examples indicate that the length of practice before customary law is created is situationally dependent. Thus, even limited practice may generate new customary norms.<sup>197</sup> In the case of operational self-defense operations in Iraq, U.S. state practice had occurred for a period of two years during the course of operations under the Security Agreement. The practice continues today in Uganda.

*ii. How General Must the State Practice Be?*

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<sup>191</sup> Byers, *supra* note 172, at 33 (“It is true that technology has accelerated the process of information gathering, and thus one aspect of the formation and dissemination of state positions on international legal issues.”).

<sup>192</sup> Kammerhofer, *supra* note 170, at 530 (“...most jurists would rather think that a practice has become customary law over another practice if it exhibited longer and more consistent usage by more states than a practice which had been in use for a shorter time, and with less repetition...”) (however, conceding that modern international society needs less time and repetition than was required in the past) (internal citations omitted); TREVES, *supra* note 171175.

<sup>193</sup> Kammerhofer, *supra* note 170171, at 530 (“No-one imposes exact limits on the amount of state practice needed to create law.”); Byers, *supra* note 172, at 33 (“We may also be witnessing efforts to reduce the time necessary for the development of customary international law.”).

<sup>194</sup> TREVES, *supra* note 171; *but see* Byers, *supra* note 172, at 33 (Discussing France and Germany’s evolving opposition on the Iraq war notes, “[G]overnmental policy-making, and especially inter-governmental policy-making on fundamental issues, still takes considerable time.”).

<sup>195</sup> Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT’L L. 853, 861-62 (2007) (noting that this change occurred through the behavior and non-behavior of states during this period).

<sup>196</sup> SOLIS, *supra* note 46, at 163; Linderfalk, *supra* note 192, at 862.

<sup>197</sup> SOLIS, *supra* note 193; Linderfalk, *supra* note 193. *Id.*

Treves defines the majority view as “the practice relevant for establishing the existence of a customary international law must neither include all states nor be completely uniform.”<sup>198</sup> According to Villiger, general practice “refers to the number of States which have to contribute, actively or passively, towards the customary rule, and hence, introduces a quantitative dimension into the ascertainment of customary law.”<sup>199</sup> However, there is a category of “specially affected states” without which a “customary rule could not arise, nor continue to exist”.<sup>200</sup> Perhaps the U.S. is such a “specially affected state” in the sense that only the U.S. and a few of its allies have been engaged in modern armed conflicts in which such legal constraints as a security agreement apply. Additionally, only the U.S. and a few other countries are currently engaged in internal conflicts in third party countries and operating on a consensual basis in those countries. Finally, only the U.S. and a handful of other countries have the capability to leverage national resources in such a way as to execute operational self-defense. Therefore, operational self-defense customary norms may be forming based on ongoing operational practice. Further state practice in Uganda or Afghanistan will continue to demonstrate U.S. state practice and move operational self-defense closer to full recognition as customary international law if such recognition has not already occurred.

## CONCLUSION

U.S. policy on self-defense is based on a pragmatic recognition that modern conflicts have created new and different threats than may have not been considered during the formation of the Law of War. Based on existing U.S. policy and legal principles of self-defense, operational self-

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<sup>198</sup> TREVES, *supra* note 171 (States need not explicitly state agreement, but through non-opposition demonstrate acquiescence.).

<sup>199</sup> VILLIGER, *supra* note 178, at 13.

<sup>200</sup> *Id.* at 196 (Villiger refers to the case in which coastal state make customary coastal law, in which land locked states may not be able to participate.) (internal citations omitted).

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defense is an evolution of unit self-defense that allows senior commanders to leverage the enormous resources available to them to reduce or eliminate threats to the force as a whole. By occupying this operational space in war between tactical and strategic, operational self-defense executed *in bello* is not limited by use of force restrictions imposed on national self-defense *ad bellum*. Therefore, operational self-defense provides significant force protection capabilities to commanders on the battlefield. The decade of state practice following 9/11 has contributed tremendously towards enshrining operational self-defense in customary law.