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Laurie R. Blank

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The Use of Force to Prevent Recurrence of Conflict

WHERE ARE THE LIMITS OF SELF-DEFENSE?

Laurie R. Blank[†]

INTRODUCTION

In January 2018, then U.S. Secretary of State Rex Tillerson declared that the United States would keep military forces in Syria even after the end of the conflict with ISIS. As Tillerson explained, this continued “military presence in Syria” would be “focused on ensuring ISIS cannot re-emerge.”¹ The backdrop to this decision is the well-accepted determination that the United States’ decision to pull out of Iraq at the end of 2011 created space for ISIS to emerge as a reconstituted version of al-Qaeda in Iraq.² The strategic and policy decision to maintain a military presence so as to prevent a rebirth or reconstitution of one of the most brutal terrorist groups of recent decades appears straightforward. A more complicated question, however, is how to assess the lawfulness of the use of force in the territory of another country in order to prevent the reemergence of violence.

International law provides a comprehensive framework governing the use of force, set forth in the United Nations Charter. In particular, Article 2(4) of the U.N. Charter prohibits the “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.”³ This prohibition is the

[†] Clinical Professor of Law; Director, Center for International and Comparative Law; Director, International Humanitarian Law Clinic, Emory University School of Law. I would like to thank Kayla Polonsky (J.D., Emory Law School 2019); Daniel Miller (J.D., Emory Law School 2019); and Abigail Holt (J.D., Emory Law School 2019) for their outstanding research assistance.

¹ Rex W. Tillerson, Sec’y of State, Remarks on the Way Forward for the United States Regarding Syria at the Hoover Institute at Stanford University (Jan. 17, 2018), <https://www.state.gov/remarks-on-the-way-forward-for-the-united-states-regarding-syria/> [<https://perma.cc/F7Q2-N7XA>].

² Ryan N. Mannina, *How the 2011 US Troop Withdrawal From Iraq Led to the Rise of ISIS*, SMALL WARS J. (Dec. 23, 2018, 4:42 PM), <https://smallwarsjournal.com/jrnl/art/how-2011-us-troop-withdrawal-iraq-led-rise-isis> [<https://perma.cc/7SVQ-6NNU>].

³ U.N. Charter art. 2, ¶ 4.

foundation of the U.N.'s goal of "sav[ing] succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."⁴ International law provides three exceptions to this prohibition against the use of force in or against another state: the consent of the territorial state,⁵ the multinational use of force authorized by the Security Council,⁶ or individual or collective self-defense.⁷ Under the first exception, which is customary in nature, a state engaged in an internal conflict with a rebel group may seek assistance from other states,⁸ or a state may consent to another state using force in counterterrorism operations. The second exception is U.N. Charter-based: Article 42 authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."⁹ For example, the multinational military operation to protect civilians in Libya in the spring and summer of 2011 was in accordance with U.N. Security Council authorization under Article 42.¹⁰

This article focuses on the final exception, self-defense, the most commonly relied-upon justification for the use of force. If the United States maintains a military presence in Syria after the end of the conflict with ISIS, neither of the two above exceptions would apply; there are no suggestions that Syria has consented to the U.S. military currently being in or remaining in Syria and the U.N. Security Council has not authorized—and is unlikely to authorize—a multinational operation in Syria. Indeed, the United States and its coalition partners have used force against ISIS in Syria since September 2014 in individual and collective self-defense.¹¹ More broadly, the United States has relied on self-defense as the overarching justification for military action against

⁴ *Id.* at pmb1.

⁵ Consent is also viewed as not triggering the prohibition on the use of force at all, such that it is not an exception. *See, e.g.*, INT'L LAW ASS'N, USE OF FORCE COMMITTEE REPORT 18 (2018) [hereinafter ILA 2018 Report]; INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 31(5th ed. 2015).

⁶ U.N. Charter art. 42.

⁷ U.N. Charter art. 51.

⁸ *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/M9ZM-EHPD>] ("[I]n Afghanistan, we work as partners with a consenting host government."); Brian K. Landsberg, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 CALIF. L. REV. 515, 523 (1962).

⁹ U.N. Charter, art. 42.

¹⁰ S.C. Res. 1973 (Mar. 17, 2011).

¹¹ *See* Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014); Permanent Rep. of the U.S., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

al-Qaeda and other terrorist groups¹² over the past seventeen years, beginning with military operations against al-Qaeda and the Taliban in October 2001¹³ and stretching across several countries, including Afghanistan, Pakistan,¹⁴ Yemen,¹⁵ Somalia,¹⁶ and, most recently, Syria. However, the stated intention for a continued U.S. military presence is not part and parcel of the existing operations to defeat and end attacks by ISIS or other terrorist groups. Although such operations do pose interesting questions regarding the extent of self-defense against terrorist groups,¹⁷ they do not raise the question of using force—in the form of military forces present in another state’s territory or any other manner—to prevent the *reemergence* or *resurgence* of violence after conflict.

This article examines how international law applies to the use of force in the territory of another state for the purpose of preventing a resurgence of violence after a conflict has ended. Where the territorial state has consented to such use of force, including the presence of military forces, the question of lawfulness under international law does not arise—such as if the government of Afghanistan were to consent to continued U.S. military presence or operations after the defeat of the Taliban

¹² See Mokhtar Belmokhtar: *Top Islamist ‘Killed’ in US Strike*, BBC NEWS (June 15, 2015), <https://www.bbc.com/news/world-us-canada-33129838> [<https://perma.cc/4VUQ-G67J>]; Jim Miklaszewski & Cassandra Vinograd, *U.S. Bombs ISIS Sites in Syria and Targets Khorasan Group*, NBC NEWS (Sept. 23, 2014), <https://www.nbcnews.com/storyline/isis-terror/u-s-bombs-isis-sites-syria-targets-khorasan-group-n209421> [<https://perma.cc/VLA4-PK8A>]; Bill Roggio, *US Airstrikes in Southern Yemen Kill 30 AQAP Fighters: Report*, LONG WAR J. (Sept. 1, 2011), https://www.longwarjournal.org/archives/2011/09/us_airstrikes_in_sou.php [<https://perma.cc/SR5L-WKNF>]; Phil Stewart, *U.S. Strikes al Shabaab Training Camp in Somalia, More Than 150 Killed*, REUTERS (Mar. 7, 2016), <https://www.reuters.com/article/us-usa-somalia-dronestrike/u-s-strikes-al-shabaab-training-camp-in-somalia-more-than-150-killed-idUSKCN0W91XW> [<https://perma.cc/LGA5-22UR>].

¹³ Permanent Rep. of the U.S. to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

¹⁴ *Al-Qaeda Number Three Killed by CIA Spy Plane in Pakistan*, TELEGRAPH (London) (Dec. 4, 2005), <https://www.telegraph.co.uk/news/worldnews/asia/pakistan/1504718/Al-Qaeda-number-three-killed-by-CIA-spy-plane-in-Pakistan.html> [<https://perma.cc/L9Z8-EUZ9>]; Eric Schmitt, *2 Qaeda Leaders Killed in U.S. Strike in Pakistan*, N.Y. TIMES (Jan. 8, 2009), <https://www.nytimes.com/2009/01/09/world/asia/09pstan.html> [<https://perma.cc/AR48-7K4H>]; *Top al-Qaeda Commander Killed*, BBC NEWS (Feb. 1, 2008), http://news.bbc.co.uk/2/hi/south_asia/7220823.stm [<https://perma.cc/QMR7-VWSY>].

¹⁵ *Sources: U.S. Kills Cole Suspect*, CNN (Nov. 5, 2002), <https://www.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html> [<https://perma.cc/X8MQ-VR8G>].

¹⁶ Jeffrey Gettleman & Eric Schmitt, *U.S. Kills Top Qaeda Militant in Southern Somalia*, N.Y. TIMES (Sept. 14, 2009), <https://www.nytimes.com/2009/09/15/world/africa/15raid.html> [<https://perma.cc/C83S-W92F>]; Jeffrey Gettleman & Eric Schmitt, *U.S. Forces Fire Missiles Into Somalia at a Kenyan*, N.Y. TIMES (Mar. 4, 2008), <https://www.nytimes.com/2008/03/04/world/africa/04somalia.html> [<https://perma.cc/NJN2-LRM7>]; *US Targets al-Qaeda in Somalia*, BBC NEWS (Jan. 9, 2007), <http://news.bbc.co.uk/2/hi/africa/6245943.stm> [<https://perma.cc/TG8S-JBJL>].

¹⁷ See Laurie R. Blank, *The Extent of Self-Defence Against Terrorist Groups: For How Long and How Far*, 47 ISR. Y.B. HUM. RTS. 265, 265–66 (2017).

insurgency. Similarly, U.N. Security Council authorization for such continued military presence or operations provides appropriate justification under that recognized exception to the prohibition on the use of force. In the absence of either of those justifications, however, can self-defense constitute a justification for a state to use force to prevent the resurgence of conflict? This article addresses a series of issues that stem from this broader question, including whether the meaning of armed attack remains constant regardless of whether it is assessed in the absence of (i.e., before) conflict or immediately following the end of a conflict, and how necessity and proportionality apply to such uses of force in accordance with the foundational tenets of the international law of self-defense.

Part I addresses introductory issues, including a brief explication of the international law of self-defense, the meaning of the term “use of force” in international law, and the ways in which different types of conflicts end and how to define or identify such endings. These introductory issues help to frame the space in which the central question at hand arises. Part II analyzes the proper trigger for the right of self-defense, i.e., an armed attack or imminent armed attack, and explores whether and how the definition of—and threshold for—an armed attack might differ in post-conflict scenarios. For example, the nature of the enemy may produce different perspectives on whether and when certain acts constitute an armed attack in this phase between the end of a conflict and a potential reemergence of violence, as could the location of the acts, the types of acts, or even the manner in which the conflict ended. Finally, Part III queries how necessity and proportionality, the key criteria for the use of force in self-defense, apply or should apply to this proposed scenario. Understanding the scope and parameters of necessity and proportionality demands an inquiry into the legitimate aims of self-defense, as well as a nuanced look at how these two essential criteria operate and what they are designed to achieve and safeguard. In order to assess the lawfulness of a state’s decision to maintain military forces in the territory of another state after a conflict for the purpose of preventing resurgence of conflict, it is essential to understand not only the international law framework, but also how the definitions and principles in that framework could be applied.

I. INTRODUCTORY ISSUES AND CONSIDERATIONS

A. *The Law of Self-Defense: Brief Background*

The international law of self-defense builds on and helps to establish the basic framework of *jus ad bellum*, the law governing the resort to force. A key exception to the prohibition against the use of force in Article 2(4), self-defense provides that states may use force as an act of individual or collective self-defense in response to an armed attack. Article 51 of the U.N. Charter states: “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.”¹⁸ This provision thus recognizes the preexisting right of states to use force, including in response to another state’s request for assistance, in self-defense against an armed attack.

The prerequisite for any use of force in self-defense is the existence of an armed attack, a category more severe and significant than a use of force.¹⁹ Although the U.N. Charter does not define “armed attack,” the jurisprudence of the International Court of Justice (ICJ) and customary international law focus on the “scale and effects”²⁰ of any particular hostile action directed at a state in order to determine whether it rises to the level of an armed attack. For example, deploying regular armed forces across a border, or sending irregular militias, or other armed groups to accomplish the same purposes, will generally constitute an armed attack. In contrast, providing assistance, such as weapons or other support, to rebels or other armed groups across state borders will not reach the threshold of an armed attack.²¹ Although the precise contours of what type of actor can trigger the right of self-defense remain controversial, there is a general consensus that any actor—state or non-state—can launch an armed attack that triggers the victim state’s right of self-defense. Nothing in Article 51 specifies that the right of self-defense is only available in response to an armed attack by another state,²² and state practice in the nearly two decades

¹⁸ U.N. Charter art. 51.

¹⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 194–95 (June 27).

²⁰ *Id.* ¶ 195.

²¹ *Id.* ¶ 191.

²² The ICJ has continued to limit the right in this manner. *See, e.g., Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 146 (Dec. 19) (holding that “there [was] no satisfactory proof of the involvement in these

since the 9/11 attacks provides firm support for a right of self-defense against non-state actors, including U.S. and coalition operations against al-Qaeda in Afghanistan²³ and against ISIS in Syria, as well as actions by Turkey, Israel, Russia, and other states.²⁴ In addition, notwithstanding significant disagreement regarding what specifically constitutes an imminent attack and when the right of self-defense is triggered in such situations, there is a general acceptance that a state may act in anticipatory self-defense to prevent an attack from occurring.²⁵ In the context of terrorist attacks in particular, prevention of imminent attacks is a common theme of responses in self-defense, such as the U.S. strike against the Khorasan Group in Syria in 2014.²⁶

Once an armed attack triggers a state's right to use force in self-defense, that use of force must comply with three

attacks, direct or indirect, of the Government of the DRC" and therefore no armed attack triggering the right of self-defense); Legal Consequences of Constr. of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) ("Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6); Nicar. v. U.S., 1986 I.C.J. at ¶ 195 (noting that the sending of armed bands "by or on behalf of a State" could constitute an armed attack). In addition, some states and commentators also argue that only states can commit an armed attack triggering the right of self-defense. See, e.g., Am. Soc'y of Int'l Law, *Use of Force Against Non-State Actors*, YOUTUBE, at 24:40 (Apr. 5, 2018), <https://www.youtube.com/watch?v=fi66g4Jg0pA> [<https://perma.cc/YQH5-LTMD>] (presenting Patrick Luna, the Second Secretary to Brazil's Permanent Mission to the UN); Rio Group, *Declaración de la XX Cumbre de Grupo de Río* [Declaration of the XX Rio Group Summit] (Mar. 7, 2008), in EL TIEMPO [Colom.] (Mar. 7, 2008), <https://www.eltiempo.com/archivo/documento/CMS-3991610> [<https://perma.cc/C9JR-5FXE>].

²³ See, e.g., S.C. Res. 1368, ¶ 1 (Sept. 12, 2001); ILA 2018 Report, *supra* note 5, at 14–15; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 204–08 (4th ed. 2005); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 64, 95 (2002); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 31–32 (2010); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 17 (2003); Brendan Pearson, *PM Commits to Mutual Defence*, AUSTRALIAN FIN. REV., Sept. 15, 2001, at 9; Org. of Am. States [OAS], Support for the Measures of Individual and Collective Self-Defense, OAS Doc. OEA/Ser.F/II.24 – CS/TIAR/Res.1/01 (Oct. 16, 2001), http://www.oas.org/OASpage/crisis/follow_e.htm [<https://perma.cc/67CV-KP8J>]; Org. of Am. States [OAS], Terrorist Threat to the Americas, OAS Doc. OEA/Ser.F/II.24 – RC.24/RES.1/01 (Sept. 21, 2001), <http://www.oas.org/OASpage/crisis/RC.24e.htm> [<https://perma.cc/4YSL-VGMC>]; North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; Press Release, N. Atl. Treaty Org. [NATO], Statement by the North Atlantic Council (Sept. 12, 2001), <https://www.nato.int/docu/pr/2001/p01-124e.htm> [<https://perma.cc/SH74-QAFC>]. In addition, the states using force against ISIS have all asserted self-defense (whether individual or collective) as the justification, providing additional contemporary state practice supporting the right of self-defense against non-state actors.

²⁴ See Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 486–87 (2012).

²⁵ See LUBELL, *supra* note 23, at 54–56; CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 277 (2018).

²⁶ Rebecca Kaplan, *Khorasan Was "Nearing the Execution Phase" of an Attack: Pentagon*, CBS NEWS (Sept. 23, 2014), <https://www.cbsnews.com/news/khorasan-was-nearing-the-execution-phase-of-an-attack-pentagon/> [<https://perma.cc/6NPC-HEUV>].

requirements, derived in part from the *Caroline* incident in the nineteenth century: necessity, proportionality, and immediacy. In response to the 1837 British attack on the *Caroline*, a steamer running arms and materiel to insurgents on the Canadian side of the Niagara River, U.S. Secretary of State Daniel Webster declared that the use of force in self-defense should be limited to “cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”²⁷ Furthermore, the force used must not be “unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”²⁸

As a result, as the ICJ and other courts have reaffirmed repeatedly, the central features of the right of self-defense are that the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.²⁹ The third criterion, immediacy, addresses when the right to self-defense matures in the case of an imminent attack, and how soon after an attack the victim state must act.³⁰ Overall, the requirements of necessity and proportionality in particular focus on whether the defensive act is appropriate in relation to the ends sought. Necessity demands that there be no non-forceful means reasonably available to repel or halt the attack and proportionality requires that the amount or degree of force used be proportionate to the objective of ending or repelling the attack.

B. *What Constitutes a Use or Threat of Force?*

Beyond the parameters set forth above for a state to respond lawfully in self-defense to an armed attack or an imminent armed attack, one important foundational question remains—when is a state’s action a “use of force” such that the prohibition in Article 2(4) and the accompanying exceptions or justifications apply to the lawfulness inquiry? If maintaining

²⁷ Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, Special British Minister (Aug. 6, 1842), *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 455 (Hunter Miller ed., 1934).

²⁸ Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton, Special British Minister (July 27, 1842), *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 449 (Hunter Miller ed., 1934).

²⁹ Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 43, 73–74, 76 (Nov. 6); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 237 (June 27); Jus ad Bellum, Ethiopia’s Claims 1–8 (Eri. v. Eth.), Partial Award 1, ¶ 11 (Eri. Eth. Claims Commission (Dec. 19, 2005)) <http://www.pcacases.com/web/sendAttach/763> [<https://perma.cc/29HM-MUJL>].

³⁰ Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in ESSAYS ON LAW AND WAR AT THE FAULT LINES 49, 63–66 (Michael N. Schmitt, ed., 2012).

military forces after the end of conflict does not—or could be argued not to—constitute a use of force, then the *jus ad bellum* and self-defense analysis does not apply. Understanding how international law applies and how a state might present arguments in this regard is therefore essential to any effective interpretation or response to such claims.

For many actions a state may take to prevent resurgence of conflict, such as kinetic operations to disable or destroy an adversary's fighters or military equipment, this would be a relatively simple question with respect to the threshold for the use of force. Such acts would, of course, raise questions on the other end of the spectrum regarding whether such acts constitute an armed attack against the state in which they take place. For example, an attack using military or other armed force inside the territory of another state or against that state's forces is an armed attack and is therefore a use of force, as is an "invasion' by the armed forces of a state into the territory of another state."³¹ A state that has military forces in another state by permission but extends their stay beyond the permission or uses them "in contravention of the conditions provided for in the agreement,"³² also violates the prohibition against the use of force and likely commits an armed attack.³³

At a lower level of activity, however, a brief analysis of what constitutes a use of force is useful to specify the category of actions that fit within the instant analysis. If, in an effort to prevent the resurgence of conflict, a state takes certain steps that do not rise to the level of a use of force, then the self-defense analysis in this article is not relevant because the actions in question would not violate the prohibition in Article 2(4) and would not require an exception or justification.³⁴

Article 2(4) of the U.N. Charter does not define "force" or "use of force" or provide any examples to guide our overall understanding of the term. As a starting point, it is generally accepted that "force" means "armed force" as used elsewhere in the Charter, thus excluding economic pressure or psychological or political coercion.³⁵ The jurisprudence of the ICJ identifies a category of "measures which do not constitute an armed attack

³¹ See HENDERSON, *supra* note 25, at 57.

³² G.A. Res. 3314 (XXIX), at annex art. 3(e) (Dec. 14, 1974).

³³ See DINSTEIN, *supra* note 23, at 189 (calling such activity "a constructive armed attack").

³⁴ Other international law frameworks and prohibitions remain relevant, such as the prohibition on intervention, the principle of non-interference, countermeasures, and sovereignty, but are outside the scope of this article.

³⁵ See DINSTEIN, *supra* note 23, at 86.

but may nevertheless involve a use of force,”³⁶ and differentiates the gravest types of the use of force from “other less grave forms.”³⁷ A use of force therefore does not necessarily involve the same degree, amount, or severity of force as an armed attack and a state might thus breach Article 2(4)’s prohibition on the use of force without triggering the right of self-defense of the victim state.³⁸

Current ICJ jurisprudence does not offer any substantial guidance for identifying the lower threshold of a use of force as prohibited in Article 2(4) of the U.N. Charter. Many argue that there is no gravity or severity threshold for identifying a use of force, relying on the ICJ’s distinction between armed attack and other uses of force to suggest that “forcible acts need not be especially grave to qualify as the use of force.”³⁹ Thus, “[e]ven temporary and limited incursions described as ‘in-and-out operations’ are said to be an infringement of the principle contained in Article 2(4).”⁴⁰ However, state practice and extensive debate among commentators suggests that there may be *de minimus* uses of force that do not violate the prohibition.⁴¹ For example, the Independent International Fact-Finding Mission on the Conflict in Georgia explained that “[t]he prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity,” such that “[o]nly very small incidents lie below this threshold, for instance[,] the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft.”⁴² Other examples of state practice that have been characterized as “insufficiently grave” could “include operations

³⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 210 (June 27).

³⁷ *Id.* ¶191; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6).

³⁸ See, e.g., DINSTEIN, *supra* note 23, at 193 (“[I]t is clear that one State may employ some illegal force against another without unleashing a full-fledged armed attack.”). The United States generally asserts that there is no difference between a use of force and an armed attack and that it can respond in self-defense to any use of force by another state. Ryan Goodman, *Cyber Operations and the U.S. Definition of “Armed Attack,”* JUSTSECURITY (Mar. 8, 2018), <https://www.justsecurity.org/53495/cyber-operations-u-s-definition-armed-attack/> [<https://perma.cc/7NG7-KW2B>].

³⁹ Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 165 (2014).

⁴⁰ See LUBELL, *supra* note 23, at 28.

⁴¹ See, e.g., OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 55 (2010); Mary Ellen O’Connell, *The Prohibition on the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: *JUS AD BELLUM, JUS IN BELLO, AND JUS POST BELLUM* 89, 102 (Nigel D. White & Christian Henderson eds., 2013).

⁴² Report of the Indep. Int’l Fact-Finding Mission on the Conflict in Geor., Vol. II, at 242 n.49 (Sept. 2009), https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf [<https://perma.cc/67EM-FXXE>] [hereinafter Report on the Conflict in Geor.].

aimed at rescuing nationals abroad, 'hot pursuit' operations, small-scale counterterrorist operations abroad, and localized hostile encounters between military units."⁴³

A state retaining military forces in another state after the end of a conflict in which it acted in self-defense—either against that state or against a non-state armed group located in the territory of that state—may present a more difficult question, however. Although the presence of military forces in the territory of another state without that state's permission or consent is generally understood as a use of force, that understanding applies primarily to a state's unilateral or first use of its military in such manner, such as Russia's invasion of Crimea in March 2014,⁴⁴ not to a post-self-defense situation, which is not a common occurrence. In essence, the key question for the instant discussion is whether the fact that a state engaged in military operations in another state's territory as part of legitimate self-defense operations changes how we understand continued military presence, or other low-level acts, after that self-defense operation has ended. If such continued presence is interpreted in the same manner as other situations when one state thrusts its military onto the territory of another state—either through invasion or presence beyond permission or consent—then such continued presence to prevent recurrence of conflict would indeed constitute a use of force.

Alternatively, the fact that the original presence and military operations in that other state's territory were justified by self-defense could be a significant factor in determining whether the continued presence for the sake of preventing a recurrence of that conflict is a use of force or falls below that threshold. If so, the next step would be to consider whether anything beyond the mere continued presence would then cross that threshold—moving from patrols or other demonstrations of force as an initial level, to targeted operations to detain or otherwise disable individuals posing a threat, to more extensive operations against pockets of violence or resistance. Existing jurisprudence and scholarly commentary, as discussed above, suggests that any such activity would meet the threshold of a use of force. Furthermore, although the post-self-defense nature of these acts may have significant consequences for the application of necessity and proportionality in understanding the parameters of lawfulness, it should not change the fundamental qualification of such acts and operations as uses of force, if they would be uses of force in ordinary circumstances.

⁴³ See Ruys, *supra* note 39, at 159.

⁴⁴ See HENDERSON, *supra* note 25, at 57–58.

Even if one were to argue that a decision to maintain military forces in the territory of another state to prevent recurrence of violence by a non-state group in that territory is not a use of force, it could, alternatively, constitute a *threat* of force, which is also prohibited by Article 2(4).⁴⁵ A threat of force occurs when a state communicates its intention to use force, often through “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”⁴⁶ Threats of force are generally understood to involve a communicative element, such as North Korea’s threats to target the U.S. territory of Guam in 2017,⁴⁷ but nonverbal means can, in specific circumstances, also be considered a threat. Although military exercises or weapons tests ordinarily are not sufficient to constitute a threat of force,⁴⁸ on certain occasions an extensive buildup of forces along a border has been condemned as a threat of force.⁴⁹ With respect to acts taken to prevent recurrence of conflict, a state might issue warnings or ultimatums regarding forceful consequences if an adversary state or group were to reengage in violence, which would be threats of force. Although there are no stated exceptions to the prohibition on threats of force—in either treaty or customary law—threats of force are not prohibited if the force threatened would be lawful, such as in self-defense or pursuant to U.N. Security Council authorization. The ICJ thus explained in the *Nuclear Weapons* Advisory Opinion:

Whether a signalled intention to use force if certain events occur is or is not a “threat” . . . depends on various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.⁵⁰

As a result, the analysis throughout this article regarding the application of necessity and proportionality to the use of force to prevent resurgence of conflict applies equally if such actions are considered to be threats of force rather than uses of force. If the

⁴⁵ U.N. Charter art. 2, ¶ 4.

⁴⁶ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 364 (1963).

⁴⁷ See Jesse Johnson, *North Korea Renews Threat to Target Guam Ahead of Joint U.S.-South Korea Military Exercises*, JAPAN TIMES (Oct. 14, 2017), <https://www.japantimes.co.jp/news/2017/10/14/asia-pacific/north-korea-renews-threat-target-guam-ahead-joint-u-s-south-korea-military-exercises/#.Xm7WQm57nxU> [https://perma.cc/8EBA-P4MU].

⁴⁸ See Report on the Conflict in Geor., *supra* note 42, at 232.

⁴⁹ James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT’L L. 285, 296–97 (2011).

⁵⁰ Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

acts would be lawful self-defense as uses of force, then threats to that effect would also be lawful.

C. *Types of Armed Conflicts and How They End*

One final important introductory question is whether the use of force at or after the end of conflict is part and parcel of that original operation or is a new use of force triggering the *jus ad bellum* analysis anew. A brief explication of how different types of armed conflicts end is therefore useful to examine whether and how the ending of a conflict affects the legal analysis regarding the use of force to prevent the recurrence of conflict after that ending. More broadly, questions of when and how the conflict ends have existential consequences for this overall inquiry. If, in fact, the conflict has not yet ended, or a good argument to that effect has been made, then the question of using force in self-defense to prevent recurrence of conflict and how necessity and proportionality guide or cabin that use of force would not arise, because the fact that the conflict is still ongoing means that recurrence of conflict would not be a relevant inquiry. The question of when the conflict ends, therefore, determines whether a state is using force to prevent recurrence of conflict—the topic of this article—or to finish prosecuting the conflict and bring it to an end. Although the end of conflict is normally a law of armed conflict (LOAC) question, seeking to determine when the law ceases to apply, here it also serves as an important marker for this *jus ad bellum* inquiry.

Both international armed conflicts and non-international armed conflicts can present challenges regarding how the end—or potential end—of the conflict affects the application of *jus ad bellum* to any force used to prevent conflict from reemerging. The Geneva Conventions reference the end of international armed conflict with phrases such as “cessation of active hostilities”⁵¹ and “general close of military operations.”⁵² At the time the conventions were drafted, the “general close of military operations” was

⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (referring to the release and repatriation of prisoners of war).

⁵² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the application of the Fourth Geneva Convention in the territory of parties to the conflict ends upon the general close of military operations); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 3(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

considered to be “when the last shot has been fired.”⁵³ This notion of the general close of military operations serves as an objective criterion to determine when the facts on the ground demonstrate that the conflict is over. Noting the risk of a revolving door of applicability and nonapplicability of LOAC if termination were identified too easily, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered “whether at any point . . . the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict . . . in particular whether there was a general close of military operations.”⁵⁴ Nonetheless, doing so can be significantly more complicated than the treaty law appears to foresee.

The classic means of ending international armed conflict is a peace treaty, which “(i) puts an end to a pre-existing state of war and (ii) introduces or restores amicable relations between the parties.”⁵⁵ Other means for ending conflict include mutual consent, armistice, capitulation, surrender, or unilateral declaration.⁵⁶ Although traditionally armistice was considered to be only suspending hostilities rather than terminating the conflict, it is now common for an armistice to be a means of ending conflict. For example, the 1953 Panmunjom Agreement establishing an armistice in Korea declared its objective of ensuring “a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved,”⁵⁷ thus ending the conflict. In this way, an armistice can “put[] an end to the war, and does not merely suspend the combat.”⁵⁸ The nature of contemporary conflict has added another layer of complexity, with international armed conflicts “rarely end[ing] with the conclusion of a peace treaty but [rather] are often characterized by unstable ceasefires, a slow and progressive

⁵³ *Report of Comm. III to the Plenary Assembly of the Diplomatic Conference of Geneva*, in FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, Vol. II–A, 812, 815 (1949).

⁵⁴ *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1694 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), https://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf [<https://perma.cc/C7AL-XQSV>].

⁵⁵ Yoram Dinstein, *The Initiation, Suspension, and Termination of War*, 75 INT’L L. STUD. 131, 135 (2000).

⁵⁶ See JOINT DOCTRINE AND CONCEPTS CTR. (JDCC), U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 10.13–10.32 (2004); DINSTEIN, *supra* note 23, at 42–50.

⁵⁷ *Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, on the Other Hand, Concerning a Military Armistice in Korea*, 47 AM. J. INT’L L. 186, 187 (1953).

⁵⁸ See DINSTEIN, *supra* note 23, at 42.

decrease in intensity, or the intervention of peacekeepers.”⁵⁹ Interestingly, and of particular relevance here, several descriptions of the end of international armed conflict include the possible resumption of hostilities as an important consideration for identifying a stable end to conflict. Thus, the 2016 Commentary to the First Geneva Convention emphasizes that the “general close of military operations” did not only mean the end of active hostilities, “but also the end of military movements of a bellicose nature, including those that reform, reorganize, or reconstitute, so that the likelihood of the resumption of hostilities can reasonably be discarded.”⁶⁰ This framework leaves space for states to argue that any use of force is part of the conflict because such actions aim to prevent a resumption of hostilities.

Non-international armed conflict poses additional challenges, both because of the nature of the parties and the lack of treaty law provisions. Common Article 3 to the four Geneva Conventions of 1949 offers no guidance regarding the end of non-international armed conflict⁶¹ and although Additional Protocol II references the end of conflict with respect to protections for persons detained due to the conflict,⁶² it does not provide any rules or other guidance for identifying the end of conflict. In the same manner, the ICTY offered a general statement in the *Tadić* case that “[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until . . . in the case of internal conflicts, a peaceful settlement is achieved.”⁶³ What constitutes a peaceful settlement, however, is unclear. For the purposes of this article, the end of purely internal conflicts between a state and a non-state group within its own territory is not relevant, because any steps taken to prevent resurgence of such conflict would not trigger the *jus ad bellum* as long as they do not involve the state using force in the

⁵⁹ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶ 276 (2d ed. 2016), <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> [<https://perma.cc/DK5T-ARH6>] [hereinafter 2016 COMMENTARY].

⁶⁰ *Id.* ¶ 278; see also Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT’L REV. RED CROSS 163, 174 (2014); Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts* 3 (Harvard Program on Humanitarian Policy and Conflict Research, Background Paper, 2003), <https://securitypolicy.law.syr.edu/wp-content/uploads/2013/03/Jinks-Derek.Temporal-Scope-of-IHL-in-Contemporary-Conflicts.pdf> [<https://perma.cc/Q99B-9M9L>].

⁶¹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 52, art. 3.

⁶² See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 2, 6, June 8, 1977, 1125 U.N.T.S. 609.

⁶³ Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

territory of another state. This brief discussion will focus instead on non-international armed conflicts in which the state is using force outside its territory, such as spillover conflicts, cross-border conflicts, or conflicts between a state and transnational terrorist group or armed group that take place in or across multiple states.⁶⁴ In recent years, the seemingly endless conflict between the United States and al-Qaeda and associated groups has focused attention on the challenge of identifying the end of non-international armed conflict, with multiple resulting theories or possible mechanisms for the end of such conflicts.

The 2016 Commentary to the First Geneva Convention suggests useful factual indicators of a peaceful settlement or end to the conflict, including “the mere fact that one of the Parties ceases to exist,” or a “lasting cessation of armed confrontations without real risk of resumption” regardless of the existence of a ceasefire, armistice, peace agreement, or unilateral pronouncement.⁶⁵ One obvious approach would be that the end of non-international armed conflict occurs when the state has defeated the non-state armed group, such as in Sri Lanka, but identifying what “defeat” means in a conflict with a terrorist or insurgent group can be extraordinarily challenging.⁶⁶ In 2012, then-U.S. Department of Defense General Counsel Jeh Johnson proposed the idea of

a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.⁶⁷

Another option is to “reverse engineer” the *Tadić* test of intensity and organization for identifying the start of non-international armed conflict, such that when either the intensity of the violence or the level of organization of the non-state group drops

⁶⁴ See INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 9–11, (Oct. 2011), <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf> [<https://perma.cc/49H6-JA77>].

⁶⁵ See 2016 COMMENTARY, *supra* note 59, ¶¶ 489–91; see also Rogier Bartels, *The End of Non-International Armed Conflicts and the Application of IHL*, ARMED GROUPS & INT’L L. (Feb. 19, 2014), <https://armedgroups-internationalallaw.org/2014/02/19/the-end-of-non-international-armed-conflicts-and-the-application-of-ihl/> [<https://perma.cc/AC5T-S8VN>] (noting that fighting has continued in South Sudan notwithstanding various ceasefire agreements).

⁶⁶ For an extensive analysis of this question, see Blank, *supra* note 17.

⁶⁷ Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., Remarks at the Oxford Union, Oxford University: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012), <https://2009-2017.state.gov/documents/organization/211954.pdf> [<https://perma.cc/46BA-LS2F>].

below the threshold of “protracted armed violence” set forth in *Tadić*, the conflict has ended.⁶⁸

The types of non-state groups fighting in non-international armed conflicts add an additional layer of complexity to this already complicated analysis. The nature of terrorist groups in particular—which morph, splinter, and reconfigure—make conclusions regarding defeat extraordinarily difficult. Furthermore, the diffuse geographical nature of most conflicts with terrorist groups and the decentralized nature of such groups generally make traditional temporal concepts unlikely to apply effectively. No less, terrorist groups or other insurgent groups may launch attacks or take other action not because they are in a position of strength, but precisely because they are at a moment of existential danger. Such groups may “have an innate compulsion to act—for example, [they] may be driven to engage in terrorist attacks to maintain support, to shore up [their] organizational integrity, or even to foster [their] continued existence.”⁶⁹ Signs suggesting that an enemy group is getting stronger could actually be signals that it is significantly weakened; in the same way, a lack of attacks or overt action does not mean that a terrorist group is in decline. On some level, therefore, when a state appears to be using force to prevent the recurrence of conflict, it may actually still be working to defeat the group in question. No less, the state and external actors or interlocutors will likely have differing conceptions of the purpose of that force, rendering it extraordinarily difficult to discern whether it is a “new” use of force that triggers the *jus ad bellum* or is part of defeating the group as part of the original conflict.

II. TRIGGERING THE RIGHT OF SELF-DEFENSE TO PREVENT RECURRENCE OF CONFLICT

A state seeking to maintain military forces in the territory of another state after the end of a conflict to prevent resurgence of violence must, as discussed above, rely on self-defense to justify that use of force. It is axiomatic that the right

⁶⁸ See Milanovic, *supra* note 60, at 180; see also Rogier Bartels, *From Jus In Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?*, in *JUS-POST-BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 297, 314 (Stahn et al. eds., 2014) (proposing a framework for identifying when fighting has dropped below the *Tadić* threshold so as to end a non-international armed conflict); Dustin A. Lewis et al., *Indefinite War: Unsettled International Law on the End of Armed Conflict* 97 (Harv. L. Sch. Program on Int'l L. & Armed Conflict, Feb. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923413 [<https://perma.cc/59GU-8YNJ>] (using the notion of a “two-way ratchet theory” for this reverse *Tadić* approach).

⁶⁹ Audrey Kurth Cronin, *How al-Qaida Ends: The Decline and Demise of Terrorist Groups*, 31 INT'L SECURITY 7, 11 (2006).

to use force in self-defense depends on the existence of an armed attack or an imminent armed attack. The use of force to prevent recurrence of conflict presents two possible variations on that theme, however. First, particularly in situations where a conflict has recently ended, a state may consider any use of force to prevent the resurgence of violence as part of the self-defense authority that allowed the original use of force to respond to the armed attack at the start of the conflict. The question of when and how a conflict ends can thus be critical to this analysis by either differentiating a new situation of violence, demonstrating the continued existence of an ongoing conflict, or perhaps leaving a grey area in which identifying the end of a conflict and the space for a new conflict to potentially begin is difficult. Second, and more consequential, a state might assert that the threshold for an armed attack is or should be different in situations where a state seeks to prevent the recurrence of a conflict that recently ended. If the post-conflict environment alters or could alter the conception of the threshold for an armed attack, based on the nature of the group, the location, the nature of the act, or any other factors, the potential for a significant evolution in the law arises, with all of the concomitant risks and concerns such a development could bring.

A. *Is a New Armed Attack Necessary?*

Questioning whether an armed attack is necessary for the use of force in self-defense seems heretical given the foundational nature of the prohibition on the use of force and the established architecture for the self-defense exception to that prohibition. However, the nature of many contemporary conflicts, whether in Syria or other areas, in which an agreed end to the conflict is elusive and one or more non-state armed groups maintains the ideological fervor and some capacity to continue to inflict violence and harm on the local population or the state's military and security forces, requires an examination of this particular question. Pragmatically, states will always see threat and the need to respond to that threat as the primary considerations driving the strategic, operational and tactical calculus at the start of, throughout, and at the end of armed conflict.⁷⁰ At the same time, the architecture of the

⁷⁰ See, e.g., Geoffrey S. Corn, *Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring*, 89 INT'L L. STUD. 77, 82 (2013) ("Armed conflict is a threat-driven concept, arising when the threat necessitates resort to combat power, and extending to wherever the operational and tactical opportunity to produce a militarily valuable effect on the enemy arises.").

international system rests on a balance between, on one side, the prohibition of the use of force and the obligation to seek peaceful resolution of disputes and, on the other, the recognition and preservation of state sovereignty and the right and duty to protect territory, population, and interests from harm. This combination and balancing of imperatives demands clarity and predictability in the rules, both for the state taking or considering action and for external actors—whether they be other states, regional or international organizations, advocacy groups, or the court of public opinion—assessing the lawfulness of state action.

As a starting point, the prohibition of the use of force demands that the armed attack requirement remain the essential threshold for any inquiry into the use of force in self-defense, notwithstanding the fact that the very same parties have fought one or more armed conflicts in the near or distant past. Any other presumption drastically undermines the U.N. Charter framework and the goal of preventing war, by easing the resort to force in a wider range of situations.⁷¹ Nonetheless, it is useful to explore how or when this foundational rule might give way, at least along the edges, to a different interpretation and—equally important—whether it should, in order to prepare for and understand the content and consequences of possible justifications for the use of force to prevent resurgence of conflict.

First, one possible argument is that the use of force to prevent resurgence of conflict, whether against another state or against a non-state group outside one's territory, does not fall within the realm of self-defense at all, but rather is a type of residual armed conflict authority. LOAC includes several rights, authorities and obligations that continue after the end of armed conflict. For example, a number of LOAC's protective rules continue to apply after the end of hostilities in order to ensure humane treatment and protection of persons still at risk as a result of the conflict.⁷² Persons who have fallen into the hands of the enemy, whether protected persons, prisoners of war, or other individuals, continue to benefit from the relevant LOAC

⁷¹ See, e.g., Georg Nolte & Albrecht Randelzhofer, *Article 51, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1397, ¶ 10, at 1403 (Bruno Simma et al. eds., 3d ed. 2012) (“The prevailing view considers Art. 51 to exclude any self-defence, other than that in response to an armed attack, referring, above all, to the purpose of the UN Charter, i.e., to restrict as far as possible the use of force by individual States.”).

⁷² CLAUDE PILLOUD ET AL., *INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* ¶¶ 157–60, at 68–69 (Yvez Sandoz et al. eds., Tony Langham et al. trans., 1987).

protections “until their final release and repatriation,”⁷³ even if such release or repatriation takes place after the end of the conflict or after the Geneva Conventions or Additional Protocols cease to apply.⁷⁴ With respect to a state’s authority to take coercive measures, the Commentary to the Fourth Geneva Conventions recognizes that internment and restrictive measures allowed during conflict may, in some circumstances, continue for some time after the end of hostilities because “[t]he disorganization caused by war may quite possibly involve some delay before the return to normal,”⁷⁵ and such measures are “removed by stages as the law of the country is gradually adjusted to peacetime conditions.”⁷⁶

However, an attempt to translate these continuing protective obligations or reasonable delays on end of conflict obligations into a residual authority to use force, including deadly combat force, is a significant—and problematic—stretch. Although the principle of military necessity provides for the use of force to achieve the complete submission of the enemy as quickly as possible, the principle and its accompanying authorities apply when LOAC is applicable, that is, during armed conflict. The exigency of war justifies the extraordinary nature of LOAC authorities—but once the armed conflict has ended and the exigency no longer exists, extending the permissive use of force authorities of LOAC is a dangerous proposition that opens the door to a significant blurring of legal paradigms with problematic consequences for the protection of persons and the clarity of legal authorities.

Beyond a possible residual armed conflict authority, the nature of the conflict and the manner in which it ended may be significant for examining whether and when a firm requirement for an armed attack as the precursor for self-defense might give way. First, consider most international armed conflicts, which usually end with some form of agreement, whether armistice,

⁷³ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 51, art. 5; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 5, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (“until their final repatriation”).

⁷⁴ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 52 (“Protected persons whose release, repatriation or re-establishment may take place after [the general close of military operations or the end of occupation] shall meanwhile continue to benefit by the present Convention.”); Protocol I, *supra* note 52 (“[P]ersons whose final release, repatriation or re-establishment takes place [after the general close of military operations or the termination of occupation] shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.”).

⁷⁵ OSCAR M. UHLER ET AL., *INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 515 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

⁷⁶ *Id.* at 270.

treaty, or another variation.⁷⁷ Although the disputes and causes of one or more past conflicts may remain even after the most recent conflict has ended, any of the formal ends to conflict described above affirmatively separate the instances of conflict and violence for the purposes of analyzing the resort to force. As a result, even though a “factual nexus link[s] the two periods of hostilities, the interjection of a treaty of peace signifies that legally they must be viewed as separate wars.”⁷⁸ The fact that two states legally remain in a state of war after the imposition of an armistice ending hostilities does not change this result. Thus, for example, notwithstanding the fact that the United States and North Korea have remained in a state of war since the end of the conflict in 1953, any discussions regarding possible U.S. use of force against North Korea in the past year rested firmly on the traditional inquiries of armed attack, imminent armed attack, and self-defense, examining whether North Korean behavior constituted an armed attack or imminent armed attack such that the United States would have the right to use force in self-defense.⁷⁹ Similarly, situations of sequential hostilities or conflicts between two states, such as between India and Pakistan, are commonly treated as separate armed conflicts with fresh justifications for the use of force.⁸⁰

Non-international armed conflicts may well present a different array of possibilities here, however. Although a state will assert its own domestic authority to ensure public order and security after the end of a non-international armed conflict on its own territory—and resurgence of violence within its territory would not present *jus ad bellum* questions regardless—a state emerging from an extraterritorial or cross-border non-international armed conflict does not have that same opportunity to impose law enforcement measures to stifle any disturbances or pockets of possible resistance. Where such conflicts do conclude with a defined end, and in particular when the state on whose territory the non-state group operates is capable of suppressing future acts or resurgence of violence against the state that was

⁷⁷ See, e.g., Joakim Kreutz, *How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset*, 47 J. PEACE RES. 243, 244–45 (2010).

⁷⁸ See Dinstein, *supra* note 55, at 137.

⁷⁹ See, e.g., Michael Schmitt & Ryan Goodman, *Best Advice for Policymakers on “Bloody Nose” Strike Against North Korea: It’s Illegal*, JUSTSECURITY (Jan. 23, 2018), <https://www.justsecurity.org/51320/advice-policymakers-bloody-nose-strike-north-korea-illegal/> [<https://perma.cc/568V-FV4H>].

⁸⁰ See, e.g., Ellen Barry & Salman Masood, *India Claims ‘Surgical Strikes’ Across Line of Control in Kashmir*, N.Y. TIMES (Sept. 29, 2016), <https://www.nytimes.com/2016/09/30/world/asia/kashmir-india-pakistan.html> [<https://perma.cc/AY43-5WQW>] (describing Indian strikes in Kashmir as responding to terrorist attacks and noting that Pakistan asserted its right to respond in self-defense).

engaged in the conflict, the analysis will be similar to that above regarding international armed conflicts; once the conflict ends, any new violence and possible use of force by the state gives rise to the ordinary *jus ad bellum* analysis of armed attack and self-defense anew. Most conflicts of this type do not have a well-defined end, however, as discussed above, leaving open the possibility for a state to assert that it can use force without pointing to an armed attack that would justify the use of force in self-defense.

One argument a state might proffer is that repeated instances of conflict are part of one overarching and ongoing conflict that ebbs and flows with periodic “hot” engagements and less intense engagements in between. For example, Israel takes this approach with regard to the conflict with Hamas, such that “Israel’s military actions during the 2014 Gaza Conflict were part of an ongoing armed conflict involving attacks against Israel by Hamas and other terrorist organizations in the Gaza Strip for over 14 years” and the “2014 Gaza Conflict was simply the latest in a series of armed confrontations, precipitated by the continuing attacks perpetrated by Hamas and other terrorist organisations against Israel.”⁸¹ Under this theory, the use of force to prevent resurgence of conflict is designed to prevent flare-ups of active hostilities during a long-running conflict, in essence preventing a simmering conflict from boiling over, and therefore is not a self-defense engagement at all.

Second, a state might assert that an armed attack would not be necessary if the state’s original self-defense authority extended to include preventing violence or attacks after the conflict ends. Preventing future attacks is a frequent aim of self-defense, particularly in the context of states facing threats from terrorist groups or other non-state entities outside their borders. Indeed, the very nature of terrorist attacks as singular attacks on civilian sites or events—where the attackers are far away or die as planned in the attack and the leaders are far from the point of attack at all times—mean that the classic notion of repelling an attack as the justification for self-defense falls short. States responding to completed attacks thus commonly point to the need to defend against future attacks and future threats, even if undefined, in justifying action in self-defense.⁸²

⁸¹ STATE OF ISRAEL, *THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS* 28-29 (2015); see also Pnina Sharvit Baruch, *Operation Protective Edge: Legality and Legitimacy*, INST. FOR NAT’L SEC. STUDIES (July 22, 2014), <http://www.inss.org.il/publication/operation-protective-edge-legality-and-legitimacy/> [<https://perma.cc/Q6PV-55S6>].

⁸² President Clinton’s statement announcing U.S. strikes in response to the 1998 Embassy bombings illustrates this point, declaring that “[w]ith compelling evidence that the bin Ladin network of terrorist groups was planning to mount further attacks against Americans and other freedom-loving people, I decided America must act.”

In the aftermath of the 9/11 attacks, there is a growing recognition that, rather than looking at each terrorist attack or potential attack as an armed attack in isolation and examining the necessity, proportionality, and immediacy criteria for each such attack separately, terrorist groups now should be “viewed as conducting campaigns” and once “an ongoing campaign is underway, acts of self-defense are acceptable throughout its course.”⁸³ Under this approach, the self-defense authority triggered by the original armed attack thus extends to acts taken to prevent future attacks until the danger of such attacks is over. The key question for the instant analysis, however, is whether this same extended understanding of the original self-defense authority applies when the hostilities or engagements between the state and the non-state armed group constitute a non-international armed conflict, rather than a series of acts in self-defense. That is, the question is whether the armed conflict between the state and the non-state group swallows or severs the self-defense authority such that violence or attacks after the armed conflict would not be part of a terrorist group’s “ongoing campaign” for purposes of the state’s self-defense authority. To the extent there is a recognized end to the conflict, particularly by the state, any new use of force by the state should not fall within the original self-defense authority.

Finally, a state would not need to rely on an armed attack as the trigger for the use of force in self-defense if preventing recurrence of conflict fits within the conception of defeating the non-state armed group. Just as a state attacked by another state may seek to defeat the attacking state as the means of repelling or halting the attack in certain circumstances, so a state may seek to defeat or destroy a non-state armed group in self-defense.⁸⁴ However, it is unclear what defeat of a terrorist group or other types of insurgent groups looks like. Even a cursory familiarity

President William J. Clinton, Address to the Nation on Military Action against Terrorist Sites in Afghanistan and Sudan, 34 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1643, 1643 (Aug. 20, 1998), <https://www.gpo.gov/fdsys/pkg/WCPD-1998-08-24/pdf/WCPD-1998-08-24-Pg1642.pdf> [<https://perma.cc/25DS-2836>].

⁸³ Michael N. Schmitt, MARSHALL CTR. PAPERS NO. 5, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 66 (2002), https://www.marshallcenter.org/mcpublicweb/mcdocs/files/College/F_Publications/mcPapers/mc-paper_5-en.pdf [<https://perma.cc/5D2N-3F7M>].

⁸⁴ For example, the United States seeks to “ensure a lasting defeat of al Qaeda and violent extremist affiliates.” See Johnson, *supra* note 67. Similarly, it seeks to “to degrade and ultimately destroy ISIS.” President Barack Obama, Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization (Sept. 10, 2014), <https://www.govinfo.gov/content/pkg/DCPD-201400654/pdf/DCPD-201400654.pdf> [<https://perma.cc/HW4T-HWBB>]; see also 602 Parl Deb HC (6th ser.) (2015) col. 1489 (remarks by Prime Minister David Cameron at House of Commons); Blank, *supra* note 17, at 285–89.

with al-Qaeda or other terrorist groups demonstrates that conventional physical manifestations of defeat simply do not exist or even make sense in the transnational terrorism environment. Different conceptions of defeat lead to vastly different understandings of the permissible extent of force in self-defense against such groups; defeating a terrorist group could mean the existing group can no longer launch attacks or it could mean no terrorist attacks or attempted attacks by any terrorists—an extraordinarily broad conception of defeat.⁸⁵ The elasticity of the meaning of defeat in these types of conflicts, combined with the state’s near monopoly of information regarding the nature of the ongoing threat, suggests that a state could continually expand the notion of defeat to include preventing recurrence of violence, even after a conflict has seemingly ended. Doing so would mean that any use of force to prevent such recurrence of violence would be removed from the *jus ad bellum* and self-defense paradigm and squeezed into the armed conflict paradigm by extending the outer boundaries of that armed conflict with each recurrence of violence.

Each of these arguments offers a state possible legal justifications to argue that it does not need to wait for a new armed attack in order to trigger its right to use force in self-defense. Each argument also presents a problematic broadening of the parameters for a state’s use of force and thus must be assessed with careful attention to ensure appropriate protection of the goals of the *jus ad bellum*. Understanding how a state might seek to justify the use of force to prevent recurrence of conflict, including and in particular, arguments that stretch the law to near or beyond the breaking point, is essential to preserving the law’s fidelity and preventing interpretations that render the law ineffective or irrelevant.

B. Defining Armed Attack in the Aftermath of Conflict

As classical international law demands, an armed attack therefore remains the essential trigger for the use of force in self-defense even in preventing recurrence of conflict. It is then critical to explore whether the definition of armed attack is the same in the post-conflict scenario or, alternatively, whether a state could finesse the definition and threshold as a way to more easily trigger the right of self-defense. An armed attack is generally understood to be more severe than a use of force, based

⁸⁵ See Blank, *supra* note 17, at 293 (noting that “this broader conception of defeat renders the necessity and proportionality criteria for lawful self-defence effectively toothless without some more specific metrics to guide the analysis”).

on the gravity or the “scale and effects”⁸⁶ of the act, such that “the notion of force is broader in scope than armed attack or aggression and . . . various minor incidents that do not qualify as aggression may nevertheless constitute a use of force.”⁸⁷ When a state seeks to prevent the resurgence of violence after conflict, the nature and types of threats or acts it might encounter and rely on to demonstrate the existence of an armed attack could place new stresses on our understanding of the framework of use of force and armed attack. If so, such pressures could present long-term risks to the effective application of the *jus ad bellum*.

Several factors might offer states possible opportunities to argue for altering the meaning of armed attack—primarily by lowering the threshold in some way—so as to trigger the right to use force in self-defense more easily, including the nature of the individual or group engaging in the relevant act, the location of the act or actors, and the nature and types of acts in question. In addition, the concept of anticipatory self-defense may change to some degree based on the nature of the conflict and the actors involved, allowing for the use of force sooner or for less grave acts than might be ordinarily expected or accepted in a situation where a previous conflict did not color the parties’ intentions or analyses or the perspectives of external actors and observers. One overarching factor that might weigh more heavily on these considerations is the timeframe of the possible resurgence in violence, such that acts that take place long after the end of conflict are less likely to be viewed differently than stand-alone attacks or violence, whereas the immediate weeks or months after the end of conflict may inherently add the intangible effects of the recently-ended conflict to any analysis. The following discussion will focus on the nontemporal factors, while noting the effects of the timeframe where significant.

First, the nature of the actor whose violence or attacks the state seeks to suppress with the use of force after conflict could have a significant effect on the meaning of armed attack in such circumstances. State practice in the aftermath of international armed conflict suggests that the possibility of another state restarting the violence does not alter the meaning of armed attack, regardless of whether the conflict ended with a formal peace treaty or an armistice or similar type of agreement. In this way, the demands for order and predictability in the international system reinforce the application of the generally accepted

⁸⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

⁸⁷ See Ruys, *supra* note 39, at 164.

conception of armed attack when considering the interaction between two states, even after those two states have already fought one conflict. However, one area where the existence of a prior armed conflict might enable a state to justify altering the conception and attribution of an armed attack to a state is with the use of proxy groups. A state that has recently fought a conflict with another state may be quicker to attribute the acts of proxy groups to that state, or to claim that state controls such proxy groups, with respect to assigning responsibility to that state for purposes of responding in self-defense.

Non-state armed groups offer a more complex picture, as might be expected. Some non-state groups that seek to hold and govern territory—i.e., have state-like aspirations, in effect—may function like states in this analysis, because they have a range of activities and opportunities for interaction with the state apart from violence. Most such groups, however, are engaged in armed conflicts inside the territory of the state, thus removing those situations from the instant analysis because they do not implicate the *jus ad bellum*. For extraterritorial or cross-border conflicts, particularly when a state is fighting a terrorist group, the very nature of such groups introduces the possibility that the state might take a more expansive view of armed attack when it recently fought a conflict against that very group. This lowering of the threshold would seem to be a natural consequence of the non-state group's sole focus on violence against civilians as the means of interaction with the state to achieve its goals—the essence of a terrorist group.⁸⁸ The state would have suffered an earlier armed attack or faced an imminent armed attack by the terrorist group and used force in self-defense, leading to an armed conflict to defeat the group or otherwise end the attacks and threat of future attacks. In the aftermath of that conflict, the state may be prepared or motivated to interpret lower level acts as triggering the right to self-defense so as to prevent an escalation and recurrence of violence. In essence, because a terrorist group has only one type and degree of engagement—spectacular attacks against civilians—

⁸⁸ See U.S. DEP'T OF DEF., JOINT PUB. 3-07.2, ANTITERRORISM vii (2010) (defining terrorism as “the unlawful use of violence or threat of violence to instill fear and coerce governments or societies”); S.C. Res. 1566, ¶ 3 (Oct. 8, 2004) (defining terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act”); N. Atl. Treaty Org. [NATO] Glossary of Terms and Definitions, at 2-T-5, Apr. 3, 2013, NATO Doc. AAP-06 (defining terrorism as “[t]he unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives”).

the fact that it is that same group from a prior conflict that is engaging in certain acts involving violence or anticipated violence could be significant in leading the state to have a quicker response threshold and thus a less stringent definition of armed attack. Moreover, the fact that the enemy in the previous conflict was a terrorist group could lead to the question framed above of whether an armed attack is needed at all for the state to use force to prevent a resurgence of violence. One might seek to argue that a resurgence of violence or recurrence of conflict is automatically expected with a terrorist group, because as long as the group exists, it has only one purpose—to engage in violence against civilians for political ends. Thus, as long as the group exists, even if the conflict has ended, the state would be justified in using force against that group to prevent any resurgence of violence—a highly problematic assertion but one that must be anticipated in order to fully understand the ramifications of a state’s plan to maintain military forces to prevent resurgence of conflict.

A second and equally consequential factor a state might look to is the type of acts that meet the threshold for an armed attack. Although there is considerable debate regarding the precise threshold for armed attack, some general consensus exists that the effects of the act in question and the severity of those effects are the central consideration; that is, whether it causes harm to persons or property through kinetic violence or other means with comparable effects.⁸⁹ Notwithstanding the seeming clarity of international law’s framework of armed attack, use of force, or not a use of force, “the space between war and peace is not an empty one—but a landscape churning with political, economic, and security competitions that require constant attention.”⁹⁰ Indeed, both states and commentators have paid increased attention in recent years to “hybrid warfare,” the blending of multiple and varied means to gain an advantage, destabilize an adversary, or accomplish other strategic goals. “[A] state engaging in hybrid warfare foments instability in another state’s domestic affairs, prioritizing non-kinetic military means such as cyber and influence operations in concert with economic pressure, support for local opposition

⁸⁹ As the ICJ held in the *Nicaragua* case, an armed attack is the gravest form of a use of force. *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 191. A use of force can be identified or analyzed based on the consequences or effects of the act in question. See Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 914–16 (1999).

⁹⁰ Nadia Schadlow, *Peace and War: The Space Between*, WAR ON THE ROCKS (Aug. 18, 2014), <https://warontherocks.com/2014/08/peace-and-war-the-space-between/> [<https://perma.cc/L3DH-YQ6C>].

groups, disinformation, and criminal activity.”⁹¹ The acts commonly employed in hybrid warfare or similar operations ordinarily do not meet the threshold for an armed attack or perhaps even a use of force, but have significant effects nonetheless either on their own or by creating openings or vulnerabilities for other operations. Thus, “[o]ne of the characteristic features of hybrid warfare . . . is that it is designed to operate ‘under [an adversary’s] reaction threshold.’”⁹²

Viewing such acts through the lens of a recently ended conflict may lead a state to different conclusions about the severity, gravity, or consequence of such acts, producing a different understanding of armed attack and thus lowering the trigger for self-defense. Consider, for example, cyber acts comparable to those perpetrated against Estonia in 2007, which are generally accepted as not rising to the level of an armed attack.⁹³ If such acts were to occur in the aftermath of a conflict between the same two parties, one could imagine that the target of such cyber operations would view such acts through the lens of the prior conflict and attach greater gravity to them, perhaps asserting that they rise above the threshold of an armed attack. Other below-the-threshold acts regularly employed in hybrid warfare could also be viewed differently in the aftermath of armed conflict, including “[c]riminal activity . . . [which] either further destabilizes local government or abets the insurgent or irregular warrior by providing resources . . . [such as through] smuggling, narcoterrorism, illicit transfers of advanced munitions or weapons, or the exploitation of urban gang networks.”⁹⁴ Such acts do not meet the threshold for an armed attack,⁹⁵ but a state seeking to prevent the recurrence of conflict with a fellow state might take a more generous view of armed attack if its former adversary were to arm insurgents within its territory or otherwise facilitate instability or violence. Recognizing that impetus and considering the validity of such arguments and how to counterargue is therefore essential.

Such below-the-threshold attacks could also find purchase in the definition of armed attack in the context of the

⁹¹ Douglas Cantwell, *Hybrid Warfare: Aggression and Coercion in the Gray Zone*, AM. SOC’Y. INT’L L. INSIGHTS (Nov. 29, 2017), <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone> [<https://perma.cc/9NFL-6ZKW>].

⁹² Aurel Sari, *Legal Aspects of Hybrid Warfare*, LAWFARE (Oct. 2, 2015), <https://www.lawfareblog.com/legal-aspects-hybrid-warfare> [<https://perma.cc/R7EV-BBNY>].

⁹³ Nicholas Tsagourias, *Cyber Attacks, Self-Defence and the Problem of Attribution*, 17 J. CONFLICT & SECURITY L. 229, 232 (2012).

⁹⁴ Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCE Q. 34, 35 (2009).

⁹⁵ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶195 (June 27).

accumulation of events theory of armed attack. According to this approach, “incidents that would in themselves merely constitute ‘less grave uses of force,’ can, when forming part of a chain of events, qualitatively transform into an ‘armed attack’ triggering the right of self-defence.”⁹⁶ Note that the acts forming part of the traditional accumulation of events are nonetheless uses of force—raising the question of whether acts not rising to the level of a use of force might, with added severity as perceived through the lens of preventing recurrence of conflict, be seen as contributing factors in such a chain of events. In effect, each act receives a gravity or severity “boost” as a result of the state’s focus on preventing the resurgence of violence after a conflict, meaning that less grave acts will then meet the thresholds for both use of force and armed attack. Alternatively, perhaps fewer events would suffice to constitute an accumulation of events in the aftermath of conflict, in the state’s view, in comparison to a situation with no prior conflict or risk of resurgence of violence.

A third consideration that might affect the meaning or threshold of armed attack in the aftermath of conflict is the location of the potential armed attack, the use of force, and the object of that force. For example, would the state seek to use force against a non-state group in the same territory as the original conflict or in the territory of another state, unrelated to the original conflict, where it has relocated?⁹⁷ Here, the most likely question is whether the act’s location in the same area as the previous conflict adds to the gravity of the harm in considering whether it is of sufficient scale and effects to meet the test for an armed attack. Considerations of gravity generally include whether there was harm to persons or destruction of property, and the nature and extent of that harm, such as how many persons were killed or injured, whether property was destroyed, whether the property was critical national infrastructure, and other similar factors.⁹⁸ If the location of the attack in the area of previous conflict adds to the gravity or scale and effects of the attack, the necessary severity of these other

⁹⁶ TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 168 (2010); *see also* DINSTEIN, *supra* note 23, at 230–31.

⁹⁷ ISIS and al Qaeda’s relocations or reemergence in other countries have all occurred during the ongoing armed conflicts but nonetheless offer examples of this possibility after the end of the conflict. Todd South, *ISIS, al-Qaida ‘Regrouping’ in Libya, What’s US Strategy? Congress Asks*, MILITARYTIMES (Apr. 23, 2018), <https://www.militarytimes.com/news/your-military/2018/04/23/isis-al-qaida-regrouping-in-libya-whats-us-strategy-congress-asks/> [<https://perma.cc/U6VJ-L76R>].

⁹⁸ *See* DINSTEIN, *supra* note 23, at 196; Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT’L L. 207, 221–29 (2002) (describing factors to determine whether a computer network attack is a use of force that triggers a right to self-defense).

traditional factors might decrease, thus changing the definition of armed attack.

Finally, the desire to prevent the recurrence of conflict may change perspectives on anticipatory self-defense because of a different conception of imminence in the aftermath of conflict. Where an armed attack is imminent but has not yet occurred, there is general acceptance that a state may act in anticipatory self-defense to prevent the attack from occurring—notwithstanding significant disagreement about what specifically constitutes an imminent attack and when the right of self-defense is triggered in such situations.⁹⁹ Anticipatory self-defense inherently relies in significant part on how the state discerns the intention of the apparent attacking state or non-state actor, to determine whether an armed attack is indeed imminent. Both the nature of the adversary actor and the manner in which the conflict ended could thus nudge a state closer to the belief that the fact of a prior conflict means that the adversary from that conflict automatically poses an imminent threat of attack. If the conflict ended in a somewhat uncertain manner or without a comprehensive commitment from the other state, the post-conflict period could seem more like an interlude rather than a path to peaceful relations and greater stability. Similarly, the extraordinary uncertainty regarding the end of conflict with transnational terrorist groups could cause a state to view any action by such a group after the apparent end of conflict as an imminent attack. The perspective of preventing recurrence of conflict therefore places pressure on both the meaning of imminence and the types of acts that could constitute such an imminent armed attack.

All of these factors have the potential to place pressure on the definition of and the threshold for armed attack, the foundational element in determining the right to use force in self-defense. If the threshold is lower or more acts fit within the definition in the specific context of using force to prevent recurrence of violence, this greater elasticity will not only enable the use of force in self-defense more quickly in such situations, but will also then likely translate into other situations of potential self-defense. The consequence could be a dramatic change in our understanding of armed attack and self-defense and a lessening of constraints on the use of force, a highly problematic result.

⁹⁹ See LUBELL, *supra* note 23, at 54–56; HENDERSON, *supra* note 25, at 277.

III. UNDERSTANDING THE SCOPE AND PARAMETERS: NECESSITY AND PROPORTIONALITY

Once an armed attack triggers the state's right to use force in self-defense, the use of force must comply with the requirements of necessity and proportionality. Regardless of whether the threshold for an armed attack changes in any way in the context of a state seeking to prevent recurrence of violence, as examined above, the necessity and proportionality requirements remain essential to the analysis of any action in self-defense. However, just as the post-conflict scenario may alter the triggering components of self-defense, it also may produce varying understandings and applications of necessity and proportionality. To explore the application of necessity and proportionality comprehensively, it is first essential to understand the state's goals when acting in self-defense. This section therefore first examines the legitimate objectives when acting in self-defense and then analyzes the particular challenges and considerations in applying necessity and proportionality in the context of using force in self-defense to prevent recurrence of conflict.

A. *Legitimate Objectives of Self-Defense*

Overall, the requirements of necessity and proportionality focus on whether the defensive act is appropriate in relation to the ends sought when acting in self-defense. Any assessment of self-defense must therefore start with the victim state's aim or objective in using force in response to the armed attack or imminent armed attack. Necessity focuses on whether force is the only means available to achieve that objective; proportionality looks to the relationship between the force used and the objective sought. How decision makers in the victim state "define the aims of such [self-defense] force and assess the scope of the force and the means necessary to achieve those aims"¹⁰⁰ is therefore critical to understanding any determination or analysis of the lawfulness of the state's action. A first question, before identifying specific issues with respect to necessity and proportionality in using force to prevent recurrence of conflict, is whether preventing the recurrence of conflict is a legitimate aim of acting in self-defense or, alternatively, how well it matches with other accepted aims of self-defense.

¹⁰⁰ David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT'L L. 235, 267 (2013).

The fundamental premise of self-defense is that a state is not rendered helpless when faced with an attack, but rather can respond to protect its territory, sovereignty, nationals, and interests. The most basic and widely-supported aim of self-defense therefore is to halt or repel an attack: “In the case of self-defence against an armed attack that has already occurred, it is the repulsing of the attack giving rise to the right that is the criterion against which the response is measured.”¹⁰¹ If, for example, one state attacks another, repelling the attack would naturally include military operations not only to halt the aggressor, but also to push it back across the border. However, this limited concept of the legitimate aims of self-defense does not comport with the realities of the international system and does not provide sufficient protection for victim states if an aggressor state faces no consequences beyond a repulsed attack, leading states to highlight the need to prevent future attacks as well.¹⁰² These disconnects are only magnified in the case of terrorist attacks, where there is generally no one for the state to repel at the moment of attack, contributing to the reliance on preventing future attacks as a justification for acting in self-defense.

Beyond these objectives, a state may also seek to defeat the attacking entity completely, whether state or non-state group, raising the question of whether the destruction of the attacking force’s capability is a legitimate objective of force in self-defense. Analyzing defeat as an objective of self-defense can arise in two different ways. First, if halting or repelling an attack is a legitimate objective, one can ask whether it is “proportionate to take action that is designed to prevent such an attack occurring again and restore the security of the State,”¹⁰³ including the total defeat of the attacking entity’s forces if necessary. Here, the question is how elastic the degree of force to achieve the more conservative objective of halting or repelling can actually be—that is, whether the objective of halting or repelling an attack can include defeating the adversary. Alternatively, the second possibility is to ask whether the destruction of the attacking force’s capability itself is a legitimate objective of force in self-defense. Current state practice, in which the United States operates with the stated objective of defeating or destroying al-Qaeda and ISIS in two

¹⁰¹ JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 156 (2004).

¹⁰² For example, President Clinton presented this argument in announcing U.S. strikes in response to the Embassy bombings. See Clinton, *supra* note 82. Similarly, the United States declared in October 2001, upon the launch of airstrikes in Afghanistan, that it was using force against al Qaeda to “prevent and deter further attacks on the United States.” See Permanent Rep. of the U.S. to the U.N., *supra* note 13.

¹⁰³ See GARDAM, *supra* note 101, at 165.

concurrent counterterrorism conflicts, suggests at a minimum that defeating or destroying an attacking entity is an acceptable aim of using force in self-defense if such defeat or destruction is the means by which the state can end or prevent attacks.¹⁰⁴

The use of force to prevent recurrence of conflict introduces significant questions regarding the legitimate aims of using force in self-defense. The objectives discussed above progress from narrow (repelling or halting a specific attack) to broader (preventing future attacks) to the most expansive (defeat or destruction of the attacker). Preventing recurrence of conflict appears to correlate with the more permissive end of that spectrum, fitting somewhere along the range from preventing future attacks to defeat of the potential adversary, depending on how one understands the overall strategic goals.

At a tactical level, the use of force in self-defense to prevent the recurrence of conflict could mean one-off uses of force to halt or prevent attacks by disgruntled individuals or reconstituted units of the adversary, or periodic uses of detention for the same purposes. Fitting such aims into the existing framework could be feasible, depending on the specific factual circumstances. A look at the goals the United States stated for remaining in Syria, however, suggests a far broader set of goals for the planned continued military presence in Syria. At a minimum, “U.S. military officials have underscored the need to ensure against the emergence of power vacuums in ISIS-liberated areas to prevent the extremist group’s return.”¹⁰⁵ But beyond that, a continued military presence in Syria would seek to achieve a larger set of purposes: “ensuring ISIS cannot re-emerge” and “that Syria never again serves as a platform or safe haven for terrorists to organize, recruit, finance, train and carry out attacks on American citizens at home or abroad or against [its] allies.”¹⁰⁶ At an even broader level, the United States also seeks to “counter both the Assad regime and Iranian

¹⁰⁴ See Blank, *supra* note 17, at 288, 295. For example, by 2015, the United Kingdom had broadened its stated objective in using force against ISIS to the goal of degrading and defeating ISIS. 602 Parl Deb HC (6th ser.) (2015) col. 1489–90 (remarks by Prime Minister David Cameron at House of Commons). In addition, Turkey launched Operation Sun against the Kurdistan Worker’s Party (PKK) in 2008 to “destroy PKK camps and hunt rebels of the Kurdistan Workers Party (PKK).” Paul de Benden, *Turkey Launches Major Land Offensive into Northern Iraq*, REUTERS (Feb. 22, 2008), <https://www.reuters.com/article/us-turkey-iraq-idUSANK00037420080222> [<https://perma.cc/62R4-3AHH>]. Turkey’s objective was generally justified and accepted by the international community “as a broad response that would finally weaken [the] PKK for good.” Christian. J. Tams & James G. Devaney, *Applying Necessity and Proportionality to Anti-Terrorist Self-Defense*, 45 ISR. L. REV. 91, 103 (2012).

¹⁰⁵ Mona Yacoubian, *A New U.S. Strategy Will Keep American Troops in Syria*, U.S. INST. OF PEACE (Jan. 18, 2018), <https://www.usip.org/publications/2018/01/new-us-strategy-will-keep-american-troops-syria> [<https://perma.cc/6NSJ-W3NF>].

¹⁰⁶ See Tillerson, *supra* note 1.

influence,”¹⁰⁷ possibly by using U.S. military outposts in Syria to “monitor[] the movement and repositioning of the jihadists, and also interdict[] Iranian Revolutionary Guard Corps plans to establish a direct land corridor from Iraq to Syria.”¹⁰⁸

The legitimacy of these stated, or presumed, objectives for using force to prevent the recurrence of conflict depends on how well they track the fundamental idea that force can be used in self-defense to halt or repel attacks. The variety of objectives described in the earlier part of this discussion all relate, in some manner, to preventing or halting attacks—with significant debate regarding which are appropriate and which stretch the notion of self-defense too far. In contrast, the objectives in using force to prevent recurrence of conflict are much more attenuated, as a starting point, from the core self-defense purpose of repelling or halting attacks. To the extent that such use of force seeks to achieve objectives directly related to the adversary in the previous conflict, a state might effectively present it as fitting within the overall framework of self-defense and many of the considerations examined above with respect to the need for and definition of armed attack would apply. However, objectives that stretch beyond the adversary in the previous conflict are harder to shoehorn into a paradigm for the use of force in self-defense to prevent recurrence of conflict. Those that can still be connected to the adversary in the previous conflict in some manner—perhaps because the object of the force would support or facilitate the adversary’s resurgence—may be legitimate aims, although meeting the requirements of necessity and proportionality would be challenging, as discussed below. In contrast, objectives that seek to prevent another party entirely from using the post-conflict environment to its advantage will be much harder to justify on self-defense grounds, absent an effective argument that necessity and proportionality with respect to a more direct self-defense claim can encompass such objectives. No less, these broader objectives pose a significant challenge to the self-defense framework overall, and risk eroding its central role as a constraint on the use of force.

B. Necessity

As a general rule, necessity focuses on whether there are adequate non-forceful options to repel or halt an attack that

¹⁰⁷ See Yacoubian, *supra* note 105.

¹⁰⁸ Michael Weiss & Hassan, *Here’s What the Trump Administration is Really Plotting in Syria*, DAILY BEAST (Apr. 4, 2018), <https://www.thedailybeast.com/is-trump-serious-about-syria-do-we-stay-do-we-go-and-who-pays> [<https://perma.cc/K26A-ETKK>].

triggered the right of self-defense, including, as possible examples, diplomatic measures, enhanced defensive posture, or reparations. To this end, “acts done in self-defense must not exceed in manner or aim the necessity provoking them.”¹⁰⁹ The *Caroline* formula of “no choice of means” guides the application of necessity with an underlying goal of minimizing or prohibiting the resort to force except in situations where it is unavoidable to protect the state’s essential interests. If a state can “achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force.”¹¹⁰ Necessity thus serves as a critical gatekeeper enforcing the overall prohibition on the use of force. Importantly, the requirement of necessity rests on reasonableness, and therefore “does not require victim states to exhaust *all* non-forcible responses before resorting to self-defence, but only those alternatives that are likely to be effective.”¹¹¹ The necessity analysis applies not only to action taken to halt and repel an initial attack, but to all possible aims of self-defense, including broader action to eliminate a continuing threat. Many of the considerations that pose interesting questions regarding the definition of armed attack, for example, will equally challenge the application of the requirement of necessity. Thus, while it may seem that preventing the recurrence of conflict is simply a matter of preventing future attacks and accordingly lies squarely within a traditional necessity analysis, the possible objectives of force to prevent the recurrence of conflict suggest a range of complex considerations for the necessity analysis.

In considering the viability of a state’s claim to self-defense to prevent recurrence of conflict, the overarching issue with respect to necessity is whether the existence of a prior conflict accelerates or otherwise changes the necessity calculation. In other words, in determining whether there are non-forcible means available to prevent an attack—understood here as the recurrence of conflict—a state might argue that the very fact of the prior conflict between the same two parties means that force is obviously necessary. In effect, if force was the result in the past, the state can assume that non-forcible measures will not work on future occasions. Although international law does not explicitly include a graduated concept of necessity based on the history of the interactions between the

¹⁰⁹ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 132 (1986).

¹¹⁰ Robert Ago, *Addendum to the Eighth Report on State Responsibility*, [1980] 2 Y.B. Int’l L. Comm’n 13, ¶ 120, U.N. Doc. A/CN.4/318/Add.5-7.

¹¹¹ See Tams & Devaney, *supra* note 104, at 96.

relevant parties, the nature of necessity suggests that a past conflict may well prove significant in any analysis. Any assessment of necessity will be based on the expectations and understandings of the potential adversary's intentions and capabilities—it is not unreasonable to presume that a prior conflict would affect that assessment accordingly.¹¹² Here, the manner in which the previous conflict ended could be significant. A conflict with a more formal ending, such as an international armed conflict that ends based on a peace treaty or armistice, likely produces an environment in which more non-forceful means to prevent a resurgence of violence are available because of the framework in place for diplomatic engagement, negotiations and solutions not involving force. At the other end of the spectrum, after a conflict that ends with the state comprehensively defeating a non-state group such that it disbands and its fighters reintegrate into the population, the state may not have information about or access to any leadership or other organizational elements with whom to engage in any negotiations, such that the only method the state has to communicate is force.

One particularly significant concern is that the nature of the potential adversary in a renewed conflict and the breadth of potentially-asserted objectives of self-defense in preventing the recurrence of conflict could result in the necessity requirement losing its force in the face of an ever-expanding justification for the use of force in some manner. The necessity requirement is fundamental to the effective operation of the law of self-defense and the faithful adherence to the purposes of the U.N. Charter in minimizing the resort to force—stretching it beyond recognition erodes constraints on the use of force, allowing for greater instability and harm to civilians and others caught in the zone of combat. First, the nature of the potential adversary or attacker can undermine the necessity requirement by making it too easy—or even automatic—to satisfy. As suggested above, a state that has emerged from a conflict with a terrorist group and believes that at least some of the group's operatives remain alive and retain their radical ideology can effectively argue that the group's existence is sufficient evidence of imminent attacks, because a terrorist group's entire *modus operandi* is to engage in attacks against civilians, and therefore force is the only means by which to prevent those attacks because terrorist groups by their nature do not respond productively to non-forceful

¹¹² See, e.g., HENDERSON, *supra* note 25, at 230 (highlighting the role of reasonableness in the necessity inquiry).

measures.¹¹³ Although the role of the territorial state in exercising its authority to stop attacks by the non-state group on its territory is critical to any assessment of necessity,¹¹⁴ the fact of the previous conflict may enable the state claiming self-defense to dismiss any reliance on the territorial state due to its failure or inability in the past. These arguments could be well-substantiated in a particular circumstance; however, the overall effect of a rule accepting that the very existence of some members of a terrorist group after a conflict justifies the use of force to prevent a recurrence of that conflict is highly problematic given the fundamental goals of the *jus ad bellum*.

The goals the United States had stated for the future of its operations in Syria introduce other questions as well, including whether the use of force in self-defense to prevent the recurrence of conflict applies only to the state or other group that was the adversary in the prior conflict or whether it can also be addressed to other groups that might take advantage of the post-conflict chaos, groups that form from operatives remaining from the group defeated in the previous conflict, proxy groups in the aftermath of a conflict with another state, or any others. In essence, does necessity encompass force to prevent *any* new conflict or only a recurring conflict? And, if the latter, does a recurring conflict mean only the same state or group as the previous conflict or would it also include conflict with a proxy group, reconstituted non-state armed group or other group with some type of links to the original state or group? The potential for nearly infinite expansion and elasticity in the parameters of self-defense is troubling indeed. In the classical conception, the necessity requirement serves to balance the exigency of responding to an armed attack—or imminent armed attack—against the foundational prohibition against the use of force as a means to ensure stability and minimize violence. A broad view of what preventing the recurrence of conflict entails—either with regard to the breadth of actors involved or the imminence or likelihood of conflict recurring—will ultimately render necessity a requirement in name only, substantially loosening the constraints on the use of force. Preserving the normative

¹¹³ AUDREY KURTH CRONIN, U.S. INST. OF PEACE, WHEN SHOULD WE TALK TO TERRORISTS? 3 (2010), https://www.usip.org/sites/default/files/SR240Cronin_3a.pdf [<https://perma.cc/579F-XZKX>] (noting, in examining options for negotiating with terrorist groups, that “negotiations between states and terrorist groups are historically rare: the vast majority of terrorist groups do not negotiate at all”).

¹¹⁴ See LUBELL, *supra* note 23, at 46 (explaining that attempts at non-forceful measures with the non-state attacker are not sufficient for necessity; the victim state must also request or demand that the territorial state “exercise its jurisdiction and take measures to prevent the hostile activities by the non-state actor”).

force of self-defense, and the necessity requirement in particular, therefore demands that necessity be applied stringently to any claims of the use of force in self-defense to prevent the recurrence of conflict.

C. *Proportionality*

The criterion of proportionality operates to limit the amount, nature, and degree of force used to only that force needed to achieve the objective of acting in self-defense. The requirement of proportionality measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. Proportionality does not address whether force may be used at all—the main focus of the necessity criterion—but looks at how much force may be used, with an eye to “minimi[zing] . . . the disruption of international peace and security.”¹¹⁵ Scholars have historically presented various methods or formulas for understanding proportionality, including the idea that the force used must be “what is required for achieving [the] object,”¹¹⁶ that the response must be proportionate to the danger posed,¹¹⁷ or that the defensive action “is proportionate, in nature and degree, to the prior illegality or the imminent attack.”¹¹⁸ Ultimately, proportionality requires not some measure of symmetry between the original attack and the use of force in response, but that the measure of counterforce used is proportionate to the needs and goals of repelling or defeating the original attack.¹¹⁹ As a report to the International Law Commission explains,

It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by

¹¹⁵ See GARDAM, *supra* note 101, at 16; see also Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE*, 273, 278 (Yoram Dinstein ed., 1989).

¹¹⁶ Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RECEUIL DES COURS* [COLLECTED COURSES HAGUE ACAD. INT'L L.] 455, 464 (1952).

¹¹⁷ D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 269 (1958).

¹¹⁸ ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 201 (1963).

¹¹⁹ See DINSTEIN, *supra* note 23, at 275; Michael N. Schmitt, “*Change Direction*” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 *MICH. J. INT'L L.* 127, 154 (2008).

the “defensive” action, and not the forms, substance and strength of the action itself.¹²⁰

The idea of using force in self-defense to prevent the recurrence of conflict poses two particular sets of challenges for the proportionality requirement. The first is, in essence, existential: if preventing a recurrence of conflict is a legitimate aim of self-defense, then one could argue that nearly any amount of force is proportionate to that goal. An armed conflict is significantly more extensive and consequential than a single attack—indeed, preventing conflicts is one of the central purposes of both the U.N. Charter and the modern framework of international law—thus creating a nearly open-ended space for the proportionate use of force.¹²¹ Consider the difficulties of arguing that any particular use of force in such a situation is disproportionate given the lack of identifiable parameters and the ability of the state using force to present the grave danger of a renewed armed conflict as the risk it seeks to prevent. Any use of force could be argued to be justifiable as proportionate if the alternative—not acting or using less force—would mean a full-blown conflict. If, as recent state practice appears to demonstrate, the aim of preventing attacks can include defeating or destroying the attacking state or group entirely, then extending that theory to include preventing a renewed conflict is not unlikely.

Apart from that first existential question, applying proportionality to the use of force to prevent recurrence of conflict poses operational challenges as well. Preventing a recurrence of conflict in a post-conflict environment, before any actual resurgence of violence occurs, offers few metrics or indicators to identify how much force is needed and whether it is successful because it is also possible that there would have been no violence or recurrence of conflict without the use of force. If the state has intelligence regarding attacks being planned or some attacks that have occurred, then the use of force would fit within the traditional notion of self-defense to end an attack and prevent future attacks, matching the current *modus operandi* in this area and offering a model for understanding proportionate force. Where the state seeks to occupy the potential space—both physical and figurative—for the previous adversary or other actors to nurture and engage in violence, the use of force in self-defense is operating one or more steps in advance of the usual conceptual framework. If the state is successful, no plans or

¹²⁰ See Ago, *supra* note 110, ¶ 121.

¹²¹ See DINSTEIN, *supra* note 23, at 237–38 (describing the difficulty of calculating an appropriate defensive armed reprisal).

other suggestions of attacks or violence would emerge, leaving no way to consider how much force is acceptable and how much goes too far.

The use of force to prevent recurrence of conflict with non-state actors also introduces the question of against whom such force can be used. If the United States were to maintain a military presence in Syria after the end of the conflict with ISIS, on the basis of self-defense to prevent a recurrence of conflict, the first question is whether the use of force in the form of uninvited military presence in the territory of Syria is proportionate to the objective of preventing a recurrence of conflict with ISIS. Unlike other situations in which a state uses force against a non-state actor, even in the territory of a state, here the use of force is against only the territorial state by dint of presence without consent, and the state has no option for arguing that the use of force is only against the non-state actor, because the non-state actor does not have sovereignty or territorial independence that the mere presence of military forces can violate. In this scenario, the location of the military forces would be relevant to the proportionality analysis—if the United States limits its military presence to areas where ISIS operatives remain or are most likely to reconstitute, it could at least make a better proportionality argument than if it expands its military presence to other areas within Syria, thus extending beyond areas directly related to the previous conflict and beyond the potential recurrence of conflict. If the military presence in the areas frequented by ISIS were accepted as a proportionate use of force, any geographic expansion would require additional information demonstrating that such new locations were necessary for achieving the objective of preventing the recurrence of conflict.

Geographical expansion beyond the territorial state where the risk of conflict resides stresses the proportionality requirement yet further. Consider two possibilities: one regarding a potential conflict with another state and the other a conflict with a non-state actor. First, imagine a state seeking to prevent recurrence of conflict with another state positions its military, without consent, in the territory of the state geographically in between itself and the former adversary state, to prevent that state from using its neighbor to stage attacks. Although this example appears to harken back to the days of maneuver warfare, such conflicts remain possible and the example offers a useful lens for analysis. It is difficult to imagine that the international community would consider this use of force in the territory of a neighboring state to be proportionate without solid information that the neighboring

state was playing a role in the threatened resumption of conflict. As a second example, a state seeking to prevent recurrence of conflict with a non-state armed group in another state positions its military in the territory of a third state to prevent the non-state armed group from seeking a foothold in that third country to restart its violent efforts. Here, although the example involves the same use of force in the territory of a third state, state practice regarding the use of force against non-state actors suggests that the proportionality rule might be somewhat more flexible, whether due to the notion of unwilling or unable,¹²² or other considerations. In either case, however, asserting that the use of force in a third state to prevent conflict with another state or a non-state group is proportionate to that objective, opens the door to significant erosion of the proportionality requirement.

Finally, the nature of the acts involved in the use of force to prevent recurrence of conflict demand greater scrutiny and are likely to have a greater effect on the proportionality analysis than in more classical examples of using kinetic force to deter or prevent attacks. Traditional *jus ad bellum* proportionality discussions generally center on how much kinetic force is used and for how long—because halting an attack or preventing future attacks involves fighting back against attacks and destroying the attacker’s capabilities. Here, in contrast, the proportionality assessment would likely narrow to much more detailed issues of gradation, such as whether military presence alone is proportionate, whether patrols as a show of force without any direct engagements are proportionate, and so on through seemingly tiny steps along a continuum below any kinetic force. It is not clear that the *jus ad bellum* proportionality criterion is designed for such a step-by-step analytical demand, which could result in states losing confidence in the effectiveness of the legal principles because they simply no longer make operational sense. These operational challenges, along with the broader conceptual considerations above, present significant concerns about the short- and long-term consequences for the international law of self-defense resulting from an assertion of the right to use force to prevent recurrence of conflict.

¹²² “Unwilling or unable” refers to the idea that a state seeking to use force in self-defense against a non-state armed group in the territory of another state must assess whether the territorial state is “unable or unwilling” to suppress the threat from that non-state armed group itself. See Deeks, *supra* note 24, at 499. It is also often understood to justify a state’s use of force in self-defense against such an armed group precisely *because* of the territorial state’s inability or unwillingness. In the instant discussion, such inability or unwillingness could provide greater elasticity to the proportionality assessment by supporting a more robust use of force by the state.

Understanding how a state might present arguments about the application of the law and how those arguments could alter accepted applications and interpretations of the law is therefore essential to protecting the law against inappropriate expansion and preserving the law's overarching objectives.