*Clancey S. Henderson**

TAKING OFF THE GLOVES: TERRORISTS AS *HOSTIS HUMANI GENERIS*[1]

Abstract

Terrorists are self-admitted enemies to all peoples and States and are at war with the world. They do not confine themselves to operating within the same limiting spheres of humanitarian and human rights law, to which States subject themselves. They are unconcerned with the stability of the international community and ignore the foundation of State-to-State relations. Because terrorists are independent and unconstrained actors on the global stage, a special response is needed to wage an effective conflict against them. This response is accomplished by recognizing terrorists as hostis humani generis, an enemy to mankind. The classification of terrorists as hostis humani generis is justified because terrorists, as unique non-state actors, cause all States to suffer from their universally condemned actions, and only through a coordinated response can the international community overcome the terrorists' egregious conduct. By designating terrorists as hostis humani generis, a State reinforces the use of force as a legitimate means to address this special class. A collaborative effort by States to persecute terrorists wherever they are found will reduce safe havens and diminish their ability to deal violence to the world, thereby preventing the terrorists from engaging in future human rights abuses.

Annotasiya

Terroristlər insanlığın və dövlətlərin bariz düşməni olub, bütün dünya ilə müharibə edirlər. Onlar öz fəaliyyətlərini dövlətlərin müdafiəsini özləri üçün məcburi hesab etdikləri insan hüquqları və humanitar hüququn müvafiq sahələri ilə məhdudlaşdırmırlar. Terroristlər beynəlxalq cəmiyyətin stabilliyinə laqeyd yanaşır və dövlətlərarası münasibətlərin əsaslarını gözardı edirlər. Beynəlxalq arenada müstəqil və sərbəst aktor olmaqları səbəbilə onlarla mübarizə aparmaq üçün xüsusi cavab tədbirləri zəruridir. Bu cavab tədbirlərinə terroristlərin hostis humani generis, bəşəriyyətin düşməni kimi tanınması yolu ilə nail olunur. Terroristlərin hostis humani generis kimi tanınmağının səbəbi bütün dövlətlərin onların beynəlxalq səviyyədə qınanan hərəkətlərindən əziyyət çəkməsidir. Yalnız razılaşdırılmış cavab tədbirləri vasitəsilə beynəlxalq cəmiyyət terroristlərin təhlükəli hərəkətlərinə cavab verə bilər. Terroristləri hostis humani generis qismində müəyyən edərək, dövlətlər güc tətbiqini bu xüsusi sinfə qanuni təsir vasitəsi kimi əsaslandırır. Dövlətlərin terroristləri olduqları yerdə cəzalandırmaqda birgə səyləri təhlükəsizlik sığınacaqlarını

* Clancey Henderson is a J.D. Candidate at the University of Utah, S.J. Quinney College of Law and former All-Source Intelligence Analyst with the United States Army. The author wishes to thank Professor Amos Guiora for his mentorship in crafting this article, his friends at the college of law who provided valuable insights in organizing the content, and his wife for her constant support.

[1] *Hostis humani generis* is a Latin phrase meaning "enemy of mankind" and is used as a legal term of art. It was traditionally used to describe the unique legal status of pirates in admiralty law. It "is neither a [d]efinition, [n]or as much a [d]escription of a [p]irat [sic], but a [r]hetorical [i]nvective to shew the [o]diousness of that [c]rime." Matthew Tindall, *The Law of Nations* 25–26 (1694).

azaldıb, onların dünyaya zərər yetirmək qabiliyyətini azaldacaq, nəticə etibarilə gələcəkdə terroristlər tərəfindən insan hüquqlarının pozulmasının qarşısını alacaqdır.

CONTENS

Introduction 2
I. The International Legal Framework 4
A. Anti-interventionist Sentiments and Recent Changes 5
B. Use of Force in Self-Defense 6
II. Justification for the Use of Force against *Hostis Humani Generis* 11
A. Terrorists as Hostis Humani Generis 12
B. Policy Considerations 14
C. At War against the World 24
III. Respecting Sovereignty and Preventing Abuse 28
A. The Unwilling or Unable Test 30
B. Locational Restraints 32
Conclusion 33

Introduction

Since the early twentieth century the United States has practiced total fire suppression, a concept under which the government seeks to quickly extinguish every forest fire. Unfortunately, this practice has proven detrimental.[2] The suppression of fires inadvertently causes forests to remain cluttered with the debris which was previously consumed by naturally occurring fires. The debris now accumulates until a tipping point is reached and the fires, feeding on the plentiful fuel load, quickly spread to become intense and uncontrollable.

Although the practice of total fire suppression permits fewer fires, it also results in occasional unmanageable fires which have become increasingly

[2] "Over 60 years of total fire suppression policy led to more intense fires that are more dangerous and difficult to extinguish." Stefanie Haeffele, *Burned Up: Government Wildfire Policy Has Actually Made Fires Worse* (Dec. 5, 2016), https://www.usnews.com/opinion/economic-intelligence/articles/2016-12-05/wildfire-policy-has-made-fires-worse. *See also* Irfan, *infra* note 2 (observing that fire prevention practices "paradoxically increase fire risk"); U.S. DEPT. OF AGRIC., FOREST SERV., CONTROLLED BURNING https://www.fs.usda.gov/detail/dbnf/home/?cid=stelprdb5281464 (last visited Nov. 20, 2017) ("The absence of these low intensity fires has increased the risk of large fire events and has negatively impacted the health of our forests.").

devastating and deadly.[3] In response, practices are employed to limit the naturally occurring fuel loads, such as prescribed burns, the purposeful burning of consumable debris under controlled circumstances.[4] Although the practice risks starting or exacerbating a fire event,[5] it has been successfully employed to help contain fires and save lives.[6]

While not the subject of this article, the firefighting practices mentioned above provide an interesting parallel to the principles of international law which will be discussed. Comparable to the practice of total fire suppression is the international community's restraint on the use of force which inadvertently fosters conditions fueling conflict.[7] But, similar to the practice of prescribed burns, international law can be applied in a manner than alleviates these conditions. In light of this imagery, this article will discuss how the international community's effort to suppress the use of force has allowed the "debris" to accumulate and how a deliberate, measured application of the use of force, akin to a controlled burn, can mitigate unmanageable conflicts in the long run. Ultimately, the question this article answers is: how can a state adapt the existing international legal framework to justify the use of force against an international terrorist threat in its nascent stage, in order to preclude the exacerbation of a full-scale war?

The solution discussed below is not a silver bullet; it is appropriate only for certain circumstances. Specifically, this article addresses how the application

[3] Umair Irfan, *California's Wildfires Aren't "Natural" — Humans Made Them Worse at Every Step*, VOX MEDIA (Oct 16, 2017), https://www.vox.com/energy-and-environment/2017/10/12/16458242/risk-wildfires-worse-climate-change-california-san-francisco-los-angeles.

[4] Also referred to as planned, controlled, fuel-reduction, or hazard-reduction burning. *See* Prescribed Fire, https://www.fs.fed.us/fire/management/rx.html (last visited on Nov. 09, 2017); David Bowman, *Explainer: Back Burning and Fuel Reduction*, CONVERSATION (Aug. 7, 2014), https://theconversation.com/explainer-back-burning-and-fuel-reduction-20605.

[5] Bowman, *supra* note 4.

[6] Paulo M. Fernandez et al., *A Review of Prescribed Burning Effectiveness in Fire Hazard Reduction*, 12 Int'l J. of Wildland Fire 117, 117–18 (2003), https://www.fs.fed.us/rm/pubs/rmrs_gtr292/2003_fernandes.pdf ("[T]his fuel management tool facilitates fire suppression efforts by reducing the intensity, size and damage of wildfires.").

[7] "The United Nations, created to end wars, now prolongs and enlarges them." Richard Miniter, *Why Is The U.N. In The War-Making Business?*, FORBES (Apr. 22, 2011), https://www.forbes.com/2011/04/18/united-nations-libya.html#4458edab427b. *See* Walter Enders, *Domestic Versus Transnational Terrorism: Data, Decomposition, and Dynamics*, 48 J. PEACE RES. 319, 319 (May 2011) ("A key finding is that shocks to domestic terrorism result in persistent effects on transnational terrorism; however, the reverse is not true. This finding suggests that domestic terrorism can spill over to transnational terrorism, so that prime-target countries cannot ignore domestic terrorism abroad and may need to assist in curbing this homegrown terrorism.").

of existing laws can permit a state (hereafter the "victim state")[8] to use force in self-defense against a transnational terrorist organization[9] operating from another state (hereafter the "territorial state"),[10] which has not consented to a use of force within its territory and which is unwilling or unable to address the terrorist threat to the victim state. This discussion is necessary because the "'war on terrorism' is being conducted---by both states and non-states---in a relative vacuum of international law."[11] In order to overcome the contention among states concerning the use of force against terrorists, this article seeks to fill that vacuum with existing law in novel ways.

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

I. The International Legal Framework

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

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

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

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

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

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

A. Anti-interventionist Sentiments and Recent Changes

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

There is a danger in inaction when action is warranted. The discomfiture concerning the use of force discourages military action and enables criminals in committing atrocities.[16] This truth is not exclusive to addressing terrorist threats, but is evident in many circumstances. Examples include the international community's delayed response to conflicts in Rwanda and the subsequent genocide of an estimated one million Tutsis, and more recently a reluctance[17] to intervene in the Syrian war which has seen almost half a million deaths and over five million refugees.[18] By seeking to chill the use of force among states, the international community has inadvertently exacerbated the consequences of conflict.[19]

---

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

[14] *Id.* at 364; *See* Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149 (2006); Patrick Goodenough, *Stellar Cast of Critics Slams U.N. As Anti-American, Anti-Israel*, CNS NEWS (Sept. 23, 2011) https://www.cnsnews.com/news/article/stellar-cast-critics-slams-un-anti-american-anti-israel; Rachel Alexander, *Anti-Americanism Increasing at the United Nations*, TOWNHALL (May 07, 2013), https://townhall.com/columnists/rachelalexander/2013/05/07/antiamericanism-increasing-at-the-united-nations-n1590060.

[15] See Tams, *supra* note 13, at 374.

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

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

[18] *Syrian Civil War Fast Facts*, CNN (Oct. 17, 2017) http://www.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html; HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2017/country-chapters/syria (last visited Oct. 30, 2017).

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

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

B. Use of Force in Self-Defense

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

---

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

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

[21] Tams, *supra* note 13, at 361.

[22] *Id.*

[23] *Id.* at 394–97.

[24] *Id.* at 396.

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

[26] U.N. Charter art. 2, ¶ 4.

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

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

[29] *See* Tams, *supra* note 13, at 359.

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

Thus, states have resorted to the right of self-defense to justify[30] their use of force.[31]

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

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

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

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

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

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

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

suffers an armed attack[35] or a state is exposed to an imminent threat.[36] Additionally, a few states hold the view that the certainty of a threat, regardless of its imminence, also establishes the necessity of using force.[37]

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

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

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

[37] This view is often referred to as the Bush Doctrine. It is not widely accepted as it is currently articulated. *See* Dietrich Murswiek, *The American Strategy of Preemptive War and International Law*, INST. PUB. L. 1 (Mar. 2003), https://ssrn.com/abstract=397601 or http://dx.doi.org/10.2139/ssrn.397601 ("By claiming a right to preemptive action, the U.S. government is pushing a change in public international law. If other States don't object a beginning practice of preemptive war, there could emerge a new rule of public international law that allows preemptive wars."); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 284 (2003) (discussing the historical development of the Bush Doctrine) (quoting Thomas Powers, *The Man Who Would Be President of Iraq,* N.Y. TIMES, Mar. 16, 2003, at Week in Review, 1, 7.); Dominika Svarc, *Redefining Imminence: The Use of Force against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 183 (2006) ("If the ultimate goal of international law is to preserve State's right to effective self-defence, the standard of imminence may need to be read more broadly."); *see also* Adil Ahmad Haque, *Imminence and Self-Defense Against Non-State Actors: Australia Weighs In*, JUST SECURITY (May 30, 2017), https://www.justsecurity.org/41500/imminence-self-defense-non-state-actors-australia-weighs/ (observing that some consider Australia to have embraced the Bush Doctrine).

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

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

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

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

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

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

---

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

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

[43] Order of Battle analysis is used to "to scrutinize all information pertaining to a military force to determine his capabilities, vulnerabilities, and probable course(s) of action." *Introduction to Order of Battle*, GLOBAL SECURITY (accessed Nov. 10, 2017), https://www.globalsecurity.org/military/library/policy/army/accp/is3001/lesson-1.htm. *See also* Patton, *supra* note 42, at 65–67 (noting order of battle as a factor in predicting an attack).

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

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

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

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

Prior to the drafting of the U.N. Charter, western powers adopted the practice of declaring war in official acts prior to the outset of hostilities,[47] as codified in the Convention Relative to the Opening of Hostilities.[48] After a war was declared, a state did not need to suffer an attack, nor wait for an attack to become imminent, before it could use force against the declaring state. The declaration of war created the certainty of a threat forthcoming which justified a state in acting, even preemptively.[49] Therefore, in circumstances when a declaration of war is made, a state is justified in using force because the threat has become certain and the necessity of using force in self-defense is no longer questioned. This is the circumstance under which states find themselves in the War on Terror. States which are at war with terrorists[50] need not delay actions necessary for the preservation of their security and may preemptively act to prevent attacks which are certainly forthcoming, even if specific terrorist attacks cannot be deemed imminent.

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

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

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

[50] *See infra* section II.270.

However, justifying the use of force in a war against a non-state actor[51] is more tenuous given the intrusion it permits on the sovereignty of the territorial state. Therefore, complementary restrictions are needed to ensure the use of force is necessary and not abusive. This is accomplished in two ways. First, organizations against which force may be used in self-defense is limited to terrorists classified as *hostis humani generis*. Secondly, restrictions on when and where such organizations may be attacked limits the intrusion upon the sovereignty of the territorial state wherein the terrorists operate. This allows a victim state to defensively exercise force against a non-state actor while simultaneously restricting a use of force which intrudes on the sovereignty of a territorial state to the narrowest circumstances.

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

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

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

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

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

[54] *See id.*

designation as *hostis humani generis* also justifies a state's use of force to eliminate the organization.[55]

A. Terrorists as Hostis Humani Generis

In order to justify the use of force against terrorists the *hostis humani generis* designation must first be applied to them.[56] The idea of expanding *hostis humani generis* to include terrorists, largely in reference to pirates, the first class to be so distinguished,[57] was discussed in *Hostis Humani Generi: Piracy, Terrorism and a New International Law* by Dr. Doug Burgess.[58] Dr. Burgess's proposition focuses on the comparison for the benefit of criminal prosecution under universal jurisdiction.[59] This article will expand on that discussion for its utility in justifying military action, not a first recourse, but only where criminal prosecution is impractical. But, the analysis of both historical relevance and criminality is useful for the current undertaking as well and some relevant points are highlighted below.

The designation of *hostis humani generis* was initially applied to pirates by Cicero and the Roman Empire.[60] It encompassed two concepts: that piracy occurred beyond the jurisdiction of any one state, making pirates an enemy to the entire human race, and that the right to prosecute pirates was

---

[55] *See* Section II.A.

[56] *See* Elimma C. Ezeani, *The 21st Century Terrorist:* Hostis Humani Generis, 3 BEIJING L. REV. 158, 169 (2012) (arguing that modern terrorism is different and should now be classified as *hostis humani generis*). The idea was advocated decades ago by Professor Thomas Opperman (Fed. Rep. of Germany), who boldly stated that "[t]he modern terrorist has to be outlawed as "*hostis humanis generis*." International Terrorism, 57 INT'L L. ASS'N REP. CONF. 119, 128 (1976).

[57] Traditionally, the class of crimes subject to universal jurisdiction and universal condemnation under the designation of *hostis humani generis* included only piracy. United States v. Yousef, 327 F.3d 56 (6th Cir. 2003). Universal jurisdiction was expanded to include other crimes, including: slavery, genocide, and torture. However, some of these were only recently recognized. For example, violations of the laws of war was not suggested until the Second World War. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 572 (1995) (citing Hersh Lautherpacht, *The Law of Nation and the Punishment of War Crimes*, 2 BRIT. Y.B. INT'L L. 58, 65 (19944), as the first to propose universal jurisdiction over war criminals). Similarly, prohibition on torture were only solidified in international law in the years following World War II under the Universal Declaration of Human Rights and other subsequent international and regional human rights treaties. *See The Legal Prohibition Against Torture*, *infra* note 71. This demonstrates the evolving nature and growing scope of universal jurisdiction and the *hostis humani generis* designation.

[58] Doug R. Jr. Burgess, *Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 342 (2006).

[59] *See Id.* at 294 ("I will argue that the existing international common law regarding piracy, particularly as a crime of universal jurisdiction, is the most useful framework for defining terrorism and determining a legitimate state response.").

[60] Burgess, *supra* note 58, at 301 (citing ALFRED P. RUBIN, THE LAW OF PIRACY 17 n.61., 18 (2nd ed. 1998)).

consequently common to all nations.[61] Even though "[t]he idea of pirates as *hostis humani generi*…may be two thousand years old…it has taken almost all of that time for that conception to gain ultimate acceptance in international law."[62] This is in part due to the practice of privateering, the employment of pirates by nations to achieve state objectives, which created political and legal conflicts among nations as to the legitimacy of piracy.[63] It was not until the Declaration of Paris in 1856, that piracy was found to be too heinous a crime to be used by states as a tool of achieving their political objectives.[64]

Dr. Burgess draws the conclusion that "[s]ince piracy and terrorism share a *mens rea*, *actus reus*, and *locus*, we may conclude that they are, in effect, the same crime."[65] At the risk of oversimplifying his conclusions, he offers that the *mens rea*[66] of piracy is one of intent,[67] the *actus reus*[68] of piracy includes, among other acts, acts of homicide and destruction,[69] and the *locus*[70] of piracy, once confined to the high seas, now encompasses acts "committed on state territory by 'descent from the sea.'"[71] He further offers that because they are the same crime, "[t]hey must also, accordingly, share a legal definition. Terrorists, like pirates, are *hostis humani generi* under international law."[72]

---

[61] *Id.* at 302 (citing BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42 (1980)).

[62] *Id.* at 298.

[63] *Id.*

[64] ALFRED P. RUBIN, THE LAW OF PIRACY 203 n.255 (2nd ed. 1998) (signatories of the Paris Declaration agreed "[p]rivateering is, and remains, abolished"); Ivan Shearer, *Piracy*, *in* MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., online edition (2010), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?rskey=01IRon&result=1&prd=EPIL (last visited Dec. 5, 2017) ("Privateering was formally abolished by the Paris Declaration of 1856. The right to attack merchant ships in time of war is now governed by the modern law of armed conflict, including international humanitarian law.").

[65] Burgess, *supra* note 58, at 323.

[66] "*Mens Rea* refers to criminal intent. The literal translation from Latin is 'guilty mind'…. A *mens rea* refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime….The *mens rea* requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct…." *Mens Rea*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/mens_rea (last visited Nov. 09, 2017).

[67] Burgess, *supra* note 58, at 322 (quoting the U.N. Conference on the Law of the Sea, Montego Bay, 10 December 1982, art. 101, 21 I.L.M. 1245.).

[68] "The act or omissions that comprise the physical elements of a crime as required by statute." *Actus Reus*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/actus_reus (last visited Nov. 09, 2017).

[69] Burgess, *supra* note 58, at 322.

[70] "Latin for 'place,' or the location where something occurred." *Locus*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/locus (last visited Nov. 09, 2017).

[71] Burgess, *supra* note 58, at 322 (quoting Harvard Draft Convention of 1932, also known as Harvard Research in International Law, *Draft Convention on Piracy, with Comment,* 26 AM. J. INT'L L. SUPP. 739, 775 (1932), 775.).

[72] Burgess, *supra* note 58, at 323.

Although parallel criminal elements are a strong indicator of and justification for extending the designation to terrorism, Dr. Burgess also explores the practical and historical similarities, relevant to the current discussion:

> [P]irates and terrorists…share the same means, the same motivations, and the same extraterritorial identity…. [T]errorism, like piracy, is not a legitimate political tool; second…states…may not use it as a means of political coercion; third, that all instances of terrorism…are equally unlawful,…fourth, that terrorism, like piracy, is therefore an international crime *sui generis*… fifth, that this crime is by nature international in scope…and sixth, that terrorists, as *hostis humani generis*, are likewise subject to universal jurisdiction.[73]

Against the backdrop of previous works arguing that terrorists are *hostis humani generis*, this discussion now turns to policy similarities which contemplate justification for action beyond criminal prosecution.

B. Policy Considerations

The author posits that there are several unique policy considerations prompting the designation of a group as *hostis humani generis*, and which serve to justify the use of force against them.[74] Similar to the criminal elements previously mentioned, the policy considerations are present in both piracy and terrorism. These considerations are satisfied where: (1) a universally condemned action, (2) by a non-state actor, (3) is conducted from an ungoverned area, (4) which affects multiple states, and (5) necessitates a cooperative response. These five policy considerations embody the justification for a literal interpretation of the notion of being at war with the world. They are addressed below as a necessary pretext to establishing the justification for the use of force against *hostis humani generis*, a group at war with the world.

1. The Conduct is Universally Condemned

First, the unlawful conduct of the group to be classified as *hostis humani generis* must be universally condemned.[75] To be universally condemned, no state can properly advocate a right to engage in the practice, nor oppose its eradication.[76] This is not to say that every state must have an identical law

[73] *Id.*, at 315–17.

[74] *See infra* notes 77–175 and accompanying text.

[75] *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 44 (2011).

[76] *See The Legal Prohibition Against Torture*, HUMAN RIGHTS WATCH (visited Oct. 19, 2017), https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture (noting that torture is universally condemned because "no country publicly supports torture or opposes its eradication"); *Universal Jurisdiction*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/U/UniversalJurisdiction.aspx (last visited on Oct.

prohibiting the conduct. Although, treaties and domestic laws may aid in identifying conduct which is widely condemned. Universally condemned conduct has also been held as conduct contrary to *jus cogens*.[77] Thus, only "the most serious crimes" merit universal condemnation.[78] This consideration personifies the two-fold purpose of criminal law which proscribes conduct and delineates a state's responsibility to affect the capture, trial, and punishment of offenders.

The international community hesitated to universally condemn piracy because states engaged in the practice of employing privateers, corsairs, or buccaneers, who were state sponsored pirates; parties commissioned by the government to use armed ships to seize primarily merchant ships of hostile states.[79] However, states realized this practice was a double-edged sword because it "created a beast [states] could no longer control," as "corsairs continued their attacks…long after peace was concluded…" they became a serious threat to the economic prosperity of the imperial powers.[80] This prompted the consensus reached in the Declaration of Paris, after which states no longer advocated for piracy as a legitimate form of government action.[81]

Terrorism shares a similar background in that state sponsored terrorism deterred its acceptance as a universally condemned action. However, recent developments indicate any reservations have been overcome, notwithstanding potential covert state-sponsored practices. Among these are the creation in 2017 of the United Nations Office of Counter-Terrorism, tasked

20, 2017) ("Jurisdiction over the offender of a heinous crime that is universally condemned internationally even though neither offender nor victim may be citizens.").

[77] "*Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted." *Jus Cogens*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/jus_cogens (last visited Nov. 9, 2017). Meaning that crimes prescribed under international law, or crimes committed against internationally recognized rights, are universally condemned. *See* Regina v. Bartle and the Commissioner of Police for the Metropolis and other Ex Parter Pinochet, House of Lords 1999: (identifying on criteria of universal jurisdiction under customary international law is that the conduct be contrary to *jus cogens*). *See The Legal Prohibition Against Torture*, *supra* note 76 (indicating that acts violating *jus cogens* or acts embodied in *jus cogens* as criminal are subject to universal jurisdiction).

[78] *See* R. v. Hape, [2007] 2 SCR 292, 2007 SCC 26 (CanLII); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (noting pirates are *hostis humani generis* because their crimes are so heinous). Examples of universally condemned crimes include the genocides perpetrated during the holocaust. Despite the absence of uniform laws, the conduct was so egregious and horrific that it was universally condemned by all nations as an act of evil. *See* G.A. Res. 60/7, ¶ (2005) U.N. Doc A/RES/60/7.

[79] *Privateer*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/privateer

[80] Burgess, supra note 58 at 314.

[81] *See supra* note 64.

to prevent and combat terrorism.[82] Also of note are the numerous United Nations Security Council resolutions which consistently reaffirm "that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable…."[83] Additionally, at least 140 states have passed counterterror laws since 2001.[84] Terrorism is universally condemned, at least in word, notwithstanding the adage that "one man's terrorist is another man's freedom fighter,"[85] a saying which is as erroneous as the literal interpretation of the idiom that "all is fair in love and war."[86] There is no state that openly advocates for the right to use terrorist tactics,[87] indeed such practices directly conflict with established human rights laws and the Laws of Armed Conflict.[88]

---

[82] Established through the adoption of G.A. Res. 71/291 (June 15, 2017). http://www.un.org/en/counterterrorism/; Pillar II of the U.N. Global Counter-Terrorism Strategy, https://www.un.org/counterterrorism/ctitf/un-global-counter-terrorism-strategy.

[83] S.C. Res. 2370 (2017); S.C. Res. 2368 (2017); S.C. Res. 2354 (2017); S.C. Res. 2341 (2017); S.C. Res. 2322 (2016); S.C. Res. 2199 (2015); Statement by the President of the Security Council S/PRST/2013/1; G.A. Res. 70/291 (1 July 2016), U.N. Doc. A/RES/70/291.

[84] *Global: 140 Countries Pass Counterterror Laws since 9/11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-9/11.

[85] *See* President Ronald Regan's Radio Address to the Nation on Terrorism May 31, 1986, available at http://www.presidency.ucsb.edu/ws/?pid=37376 ("Effective antiterrorist action has also been thwarted by the claim that—as the quip goes—'One man's terrorist is another man's freedom fighter.' That's a catchy phrase, but also misleading. Freedom fighters do not need to terrorize a population into submission."); Boaz Ganor, *Defining Terrorism - Is One Man's Terrorist Another Man's Freedom Fighter?*, INT'L INST. FOR COUNTER TERRORISM (Jan. 01, 2010) (distinguishing terrorists from revolutionaries and guerilla fighters).

[86] The saying conveys the idea that "in love and war you do not have to obey the usual rules about reasonable behavior." *Definition of "All's Fair in Love and War"*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/all-s-fair-in-love-and-war (last visited Nov. 10, 2017). While true to a degree, taken at face value it is a false assertion. For example, the killing of enemy combatants under peace time laws would be considered murder, but under the Laws of Armed Conflict and International Humanitarian Law, such killings are permissible. However, intentionally killing civilians is always prohibited, even in times of war.

[87] Even states accused of state sponsorship of terrorism decry terrorism as condemnable, voicing "unequivocal condemnation of all acts of terrorism in all its forms and manifestations, including State terrorism, economic terrorism wherever, against whoever and by whoever may be committed." International Conference on the Global Fight against Terrorism, Tehran, 25-26 June 2011. This is a critical first step in realizing a full and actual condemnation wherein states completely abandon the practice of their own accord.

[88] "The most important general prohibition of State sponsored terrorism may be traced back to the U.N. General Assembly's Friendly Relations Declaration (1970) (G.A. Res. 2625 (XXV)), according to which '[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'"). Christian Walter, *Terrorism*, *in* MAX PLANCK ENCYCLOPEDIA OF PU. INT'L L., online edition (2011), *available at*. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-

In opposition to the proposition that terrorism is universally condemned is the argument that terrorism cannot be universally condemned because it is not universally defined.[89] It is proper to concede that working definitions fluctuate among states. However, it would be disingenuous to say that a base understanding of what conduct constitutes terrorism remains elusive.[90] Rather, the contention of variable definitions is rooted in the inconsistency of applying the term "terrorist" to specific groups.[91] This is not so much an issue of ill definition, but one of politics.[92] The lack of a standard definition is overcome by two concepts.

First, there is a basic understanding of what conduct constitutes terrorism.[93] Terrorism, for the purposes of this article, include activities by non-state actors "intended to cause death or serious bodily harm to civilians…with the purpose of intimidating a population or compelling a government…to do or abstain from doing any act."[94] Even if a state does not accept this definition

9780199231690-e999?rskey=aEwP4K&result=1&prd=EPIL (last visited Dec. 2, 2017). *See also*, RYAN DOWDY ET. AL., LAW OF ARMED CONFLICT DESKBOOK 136 (David Lee ed., 5th ed. 2015) ("The essence of the principle [of distinction] is that military attacks should be directed at combatants and military targets, and not civilians or civilian property."); Protocol Additional To The Geneva Conventions of 12 August 1949, art. 48–51 (protecting civilians by prohibiting indiscriminate attacks); *Civilians Protected Under International Humanitarian Law*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm ("The protection of civilians during armed conflict is therefore a cornerstone of international humanitarian law.").

[89] *See* United States v. Yousef, 327 F.3d 56 (6th Cir. 2003); *Agreed Definition of Term 'Terrorism' Said to be Needed for Consensus on Completing Comprehensive Convention Against It*, GA/L/3276 (Oct. 07, 2005), https://www.un.org/press/en/2005/gal3276.doc.htm; Burgess, *supra* note 58 at 342 ("The hackneyed adage that 'one man's terrorist is another man's freedom fighter' renders any attempt at definition virtually impossible, dividing states on ideological lines and convoluting the situation all the more.").

[90] *See infra* note 94 and accompanying text for a basic definition.

[91] "Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both." Judge Rosalyn Higgins, *The General International Law of Terrorism*, *in* INT'L L. & TERRORISM 28 (London Routledge 1997).

[92] *See* Tams, *supra* note 13, at 374 (noting that "[t]here is still no comprehensive anti-terrorism convention, but special sectoral treaties have mushroomed, and have been complemented by far-reaching anti-terrorism rules enacted as part of secondary United Nations law.")

[93] *In the Name of Security Counterterrorism Laws Worldwide since September 11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11 ("While there is no single definition of terrorism under international law, definitions put forward in various international treaties typically center on the use of violence for political ends."). *See supra* note 94 and accompanying text for a definition of terrorism.

[94] Report of the Secretary-General "In Larger Freedom. Towards development, security and human rights for all", U.N. Doc. A/59/2005, at ¶91; *see also* S.C. Res. 1566 (2004) ("Recalls that

verbatim, there is an underlying definition to which states ascribe the meaning. Evidence of this intangible definition is apparent in the act of designating groups as terrorists. For example, the United Nations designation of the Islamic State and Al-Qaida as terrorists shows those groups satisfy whatever definition of terrorism was used in considering whether to classify them as such.[95]

Secondly, the universal condemnation of terrorism is nascent and a cogent definition is not to be expected in its formative years. This was the case for piracy, which lacked a comprehensive definition for over 100 years after it was abolished as a state practice.[96]At the risk of putting the cart before the horse, the international community's determination to defeat terrorism shows the community has a general understanding of terrorism, even if it fails to articulate which "terrorism" is to be defeated. For the time being, "[d]efinitions of 'terrorism' …are the prerogative of Member States…."[97] While a "definition may also help to confine the scope of U.N. Security Council resolutions…which have encouraged states to pursue unilateral and excessive counter-terrorism measures,"[98] the impasse in defining terrorism is a perfect representation of Voltaire's ominous observation that "the best is the enemy of the good."[99] Given the limitations to be discussed below, the ambiguity of defining "terrorism" is permissible for the time being and does not hinder it from being universally condemned.

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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature").

[95] The United Nations Global Counter-Terrorism Strategy Plan of Action to Prevent Violent Extremism Report of the Secretary-General, A/70/674; G.A. Res. 70/291 (July 1, 2016), U.N. Doc. A/RES/70/291.

[96] *See*, Shearer *supra* note 64. ("Piracy received its first comprehensive definition by an international convention in Art. 15 Geneva Convention on the High Seas of 1958. That definition, and the ancillary provisions relating to piracy in Arts 14 and 16 to 21, were based on the preparatory work of the United Nations International Law Commission, which, in turn, drew on the Draft Convention on Piracy prepared by the Harvard Research in International Law published in 1932.").

[97] Geneva Conference on Preventing Violent Extremism – The Way Forward Organized by the United Nations in partnership with the Government of Switzerland 7 & 8 April 2016 Geneva, Switzerland Concept Note at 4, https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/Geneva%20PVE%20Conference%20Concept%20Note%20Final.pdf.

[98] Ben Saul, *Defining Terrorism in International Law*, OXFORD SCHOLARSHIP ONLINE (Jan. 2010).

[99] VOLTAIRE, PHILOSOPHICAL DICTIONARY, (H.I. Wolf Translator) (2010).

2. Conduct by a Non-State Actor

The second consideration is that the conduct must be perpetrated by a non-state actor. This denotes an absence of state sanction or advocacy.[100] It also removes the designated group from applications of international law that would otherwise apply and provide suitable remedies.[101] The absence of a responsible state precludes the international community from responding in ways other than the use of force. For example, to deter state sponsored terrorism by Iran, North Korea, Cuba, Syria, Libya, and Sudan, the United States implements four main sets of actions: bans on arms-related exports and sales; controls over the export of dual-use items, which might increase the military capability of the state; prohibitions on economic assistance; and miscellaneous financial restrictions.[102] Sanctions, restricting diplomatic ties, or other avenues of political pressure are all useless in the face of non-state actors because they are not concerned with their presence or legitimacy on the international stage; nor do they need legitimate political channels to thrive.[103]

This is particularly relevant given the power that non-state actors have acquired. The most powerful pirate in history was Cheng I Sao, who operated in the South China Sea. Her fleet has been estimated to comprise 1500 ships, exceeding the size and power of most states' navies at the time.[104] Similarly, terrorist organizations have obtained notable power. ISIS was estimated to be capable of spending $900 million to $3 billion (USD) a year on military expenditures, ranking the organization within the top sixty nations for

[100] Admittedly, there may be some state-sponsored activity, though practiced without an affirmation of a right to so do. *See supra* note 88 and accompanying text.

[101] As has been mentioned, much of international law is concerned with state-to-state relations. It is the absence of state participation which places the conduct in a distinct position restricting the responses available under international law. For example, if the conduct were by a state then it may be more appropriately subjected to political recourse or the doctrine of state responsibility. *See* MATH NOORTMANN ET AL, NON-STATE ACTORS IN INTERNATIONAL LAW 118-20 (2015) (discussing the ICJ's advisory opinion in Reparations for Injuries which may have opened the door to subjecting non-state actors to international law despite a lack of international legal personality, and subsequently discussing previous mitigation of this issue by use of the *hostis humani generis* designation).

[102] US Dept. of State, *State Sponsors of Terror Overview*, in COUNTRY REP. ON TERRORISM 2014, at 171.

[103] *See* Sara Malm, *How ISIS is Funded by Black-Market Oil Trading, Illegal Drugs and Internet cafes*, DAILY MAIL (Feb. 22, 2015), http://www.dailymail.co.uk/news/article-2964028/oil-drugs-internet-ISIS-funded.html.

[104] *See, e.g.*, Maggie Koerth, *Most Successful Pirate Was Beautiful and Tough*, CNN (Aug. 28, 2007), http://www.cnn.com/2007/LIVING/worklife/08/27/woman.pirate/index.html; Urvija Banerji, *The Chinese Female Pirate Who Commanded 80,000 Outlaws*, ATLAS OBSCURA (Apr. 06, 2016), https://www.atlasobscura.com/articles/the-chinese-female-pirate-who-commanded-80000-outlaws ("The Red Flag Fleet under Ching Shih's [Cheng I Sao] rule went undefeated, despite attempts by Qing dynasty officials, the Portuguese navy, and the East India Company to vanquish it. After three years of notoriety on the high seas, Ching Shih finally retired in 1810 by accepting an offer of amnesty from the Chinese government.").

"defense" spending, alongside the Philippines, Sudan, and Peru.[105] The power and influence of non-state actors makes them a unique threat necessitating a unique response by the whole of the international community.

3. Effects Suffered by the International Community

Thirdly, the universally condemned conduct perpetrated by the group to be designated as *hostis humani generis* must affect multiple states. It is insufficient that the harm be realized among one state. Rather, the harm must correspond to the reprehensibility. Widespread harm justifies intervention by multiple victims under an objective territorial interest.[106] Additionally, crimes of such magnitude harm more than the immediate victims, an idea embodied by the phrase "crimes against humanity."[107] A crime is not merely of great effect for its resultant body count, but also for the adverse impact it has upon the world.[108] To wit, piracy was condemned because a pirate was a "ruthless savage whose existence was not only in conflict with the nation's laws, but

[105] George Arnett and Sylvia Tippman, *Iraq Crisis: How do Isis's Cash and Assets Compare with Other Military Spending?*, GUARDIAN (June 16, 2014), https://www.theguardian.com/news/datablog/2014/jun/16/iraq-isis-cash-and-assets-compare-military-spending. Equally terrifying is a non-state actor's ability to control a region and subject a population to systematic oppression and subservience. This has been seen by the implementation of shadow governments in Iraq, Afghanistan, and Somalia, which are responsible for gross human rights violations and countless murders. See ….

[106] "Under the objective aspect of territorial jurisdiction a sovereign is recognized as having the power to adopt a criminal law that applies to crimes that take effect within its borders even if the perpetrator performs the act outside of its borders." *Two Aspects of the Territorial Principle* available at http://www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_16_Text.htm (last visited Nov. 10, 2017).

[107] Crimes Against Humanity include genocide, torture, and slavery. *Crimes Against Humanity*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT (last visited on Oct. 21 2017), http://www.un.org/en/genocideprevention/crimes-against-humanity.html; Flartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); *See* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW chapter 6 (2012); Elizabeth Borgwardt, *Commerce and Complicity: Human Rights and the Legacy of Nuremburg*, *in* MAKING THE AMERICAN CENTURY: ESSAYS ON THE POLITICAL CULTURE OF TWENTIETH CENTURY AMERICA (ed. Bruce J. Schulman, 2014). Terrorism has also been presented as a crime against humanity. *See, e.g.*, James D. Fry, Note, *Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 169–170 (2002).

[108] "Genocide devalues individuals by depriving them of membership in groups in such a way that it also renders impossible the keeping of the promise of equality to all humans." LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 72, (Cambridge Univ. Press 2010). The infliction of torture deprives all involved of the sense of the "inherent dignity of the human person." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987. Slavery violates the "equal and inalienable rights of all members of the human family…." The Universal Declaration of Human Rights (1948).

with civilization itself."[109] Similarly, terrorism affects every state through its impact on the financial sector,[110] international relations,[111] domestic laws and policies,[112] and the psychological impact.[113] Consequently, these crimes violate the very essence of humanity and inflict a harm beyond the borders of any one state.

4. Necessity of a Cooperative Response

If the conduct and harm occurred within only one state, it would be unnecessary to involve other states. But, the versatility of the conduct makes any single state incapable of eliminating it. So, prosecution of the conduct and

[109] Burgess, *supra* note 58, at 313 (c*iting* David J. Starkey, *Pirates and Markets,* in BANDITS AT SEA: A PIRATES READER 111 (C.R. Pennell ed., 2001)).

[110] Sean Ross, *Top 5 Ways Terrorism Impacts the Economy*, Investopedia (Aug. 21, 2016), http://www.investopedia.com/articles/markets/080216/top-5-ways-terrorism-impacts-economy.asp (Direct Economic Destruction, Increased Uncertainty in the Markets, Insurance, Trade, Tourism and FDI, Surrendering Economic Freedom for Security, and Increased Nationalism and Foreign Skepticism); Impact of Global Terrorism, Ambassador Francis X. Taylor, Coordinator for Counterterrorism, Remarks to Executives Club of Chicago Leadership Symposium in Chicago, IL March 14, 2002 (addressing costs of infrastructure replacement, economic losses, job losses, and insurance instability).

[111] Daniel Wagner, *Terrorism's Impact on International Relations*, INT'L RISK MANAGEMENT INST. (March 2003), https://www.irmi.com/articles/expert-commentary/terrorism's-impact-on-international-relations/ (noting the "significant shift in bilateral relations between the United States and Europe, Russia, and China as a result of the debate on the war on Iraq.").

[112] *In the Name of Security: Counterterrorism Laws Worldwide since September 11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11 (finding "more than 140 countries enacted or revised one or more counterterrorism laws" since the 9/11 terrorist attacks); COUNCIL OF STATE GOVERNMENTS, THE IMPACT OF TERRORISM ON STATE LAW ENFORCEMENT at 7 (Apr. 2005) http://www.csg.org/knowledgecenter/docs/Misc0504Terrorism.pdf (noting changes in response to the 9/11 terrorist attacks in the United States which resulted in the "creation of the new Department of Homeland Security and shifting priorities within the Federal Bureau of Investigation and other federal law enforcement agencies."); *see* Kenneth Wainstein, *The Changing Nature of Terror: Law and Policies to Protect America*, HERITAGE FOUND. (Sep. 18, 2013), http://www.heritage.org/terrorism/report/the-changing-nature-terror-law-and-policies-protect-america; Taylor M. Scimeaca, Note, *The European Immigration Crisis: An Analysis of how Terror Attacks have Affected Immigrant and Refugee Populations in Western Europe*, UNIV. CENT. FLA. (2017) (analyzing how terrorism has affected migrant populations).

[113] Nehemia Friedland and Ariel Merari, *The Psychological Impact of Terrorism: A Double-Edged Sword*, 6 POL. PSYCHOL. 591, 591, 598 (Dec. 1985) (finding terrorism is highly effective in causing fear); Saiqa Razika, Thomas Ehringbc, Paul M.G. Emmelkamp, *Psychological consequences of terrorist attacks: Prevalence and predictors of mental health problems in Pakistani emergency responders*, 207 PSYCHIATRY RES. 80, 80-85 (May 15, 2013), (observing prevalence rates of post-traumatic stress disorder and other mental health problems in emergency personnel exposed to terrorist attacks).

prevention of the harm necessitate a cooperative response.[114] Without cooperative action safe havens would arise to which perpetrators could resort. Havens are created either by complicit states[115] or states which lack the power to enforce the rule of law. A single state which chooses not to cooperate in prosecuting the *hostis humani generis* creates a haven and obstructs other states from eliminating the threat.

Havens were used by pirates to repair ships, acquire supplies, and unload their spoils.[116] Among the most well-known pirate havens was Port Royal. The harbor's association with piracy began in the mid-1600s, after the Jamaican governors offered it as a haven in return for protection from the Spanish.[117] The town became a major staging ground for British and French privateers.[118] Early American colonists also enabled piracy and provided a type of haven through the practice of trading with pirates.[119] More recently, Somali pirates have found haven in the port of Eyl, where an impoverished populace tolerated crime to benefit from the wealth it generates.[120] Such havens facilitate and perpetuate the conduct.

Similarly, terrorists enjoy the protection and other advantages offered by havens in the absence of a cooperative response. Among the most well-known examples of terrorist havens are the areas of Pakistan to which Taliban and Haqqani fighters travel in order to avoid U.S. military operations in Afghanistan[121] and ungoverned areas of Somalia where Al-Shabab resides and from which they plan and conduct horrific attacks against Kenya.[122] In order

---

[114] Robert Alfret, Jr., *Hostis Humani Generis: An Expanded Notion of U.S. Counter-Terrorist Legislation*, 6 EMORY INT'L REV. 171, 171 (1992).

[115] Complicit states provide a community, a sense of acceptance of the conduct as legitimate, and protection under from persecution by other states.

[116] Wombwell, *infra* note 141, at 4–6.

[117] Evan Andrews, *6 Famous Pirate Strongholds*, HIST. CHANNEL (Jan. 21, 2014), http://www.history.com/news/history-lists/6-famous-pirate-strongholds; Wombwell, *infra* note 141, at 10.

[118] Andrews, *supra* note 117.

[119] Bruce Elleman, *Historical Piracy and its Impact*, *in* HISTORIES OF TRANSNAT'L CRIME 14 (G. Bruinsma ed. 2015).

[120] *See* Mary Harper, *Life in Somalia's Pirate Town*, BBC (Sep. 18, 2008), http://news.bbc.co.uk/2/hi/africa/7623329.stm.

[121] DEP'T DEF. REP. TO CONGRESS, ENHANCING SECURITY AND STABILITY IN AFGHANISTAN, (Dec. 2016), (finding the Taliban, Haqqani, and Al-Qaeda retain safe havens inside Pakistani territory used to regenerate and conduct attack planning).

[122] U. S. DEP'T STATE, BUREAU COUNTERTERRORISM & COUNTERING VIOLENT EXTREMISM, COUNTRY REPORTS ON TERRORISM 2015 at 307, ("Al-Shabaab's capacity to rebound from counterterrorism operations is due in large part to its ability to maintain control of large swaths of rural areas and routes in parts of Somalia. The Federal Government of Somalia and its regional administrations lacked the capacity and resources to fill security voids left in the wake of AMISOM's operations with civilian law enforcement. These gaps allowed al-Shabaab to retain the freedom of movement necessary to establish new safe havens and re-infiltrate areas that AMISOM cleared but could not hold.").

to effectively combat a global problem, like piracy or terrorism, states must act together. For this reason, the Security Council passes resolutions "[s]tressing that the active participation and collaboration of all States…is needed to impede, impair, isolate, and incapacitate the terrorist threat"[123] and "underlining the need for Member States to act cooperatively…."[124] This approach is necessary because terrorists "know how to take advantage of failed or failing states and ungoverned spaces…."[125]

5. Operating from Ungoverned Areas

Lastly, the action must arise from an ungoverned area, an area for which no single state is responsible. If the conduct occurred in a governed area, the conduct would be subject to the jurisdiction of the controlling state. It is the lack of a controlling government in the operational area which sets *hostis humani generis* apart.

Ungoverned areas include areas of non-appropriation, like the high seas,[126] as well as areas bereft of governance, such as ungoverned spaces within failed states.[127] This includes both areas where the government itself refuses to enforce the law[128] and areas where the it lacks the capacity to do so.[129] In either

[123] S.C. Res. 2370 (2017), U.N. Doc S/2017/2370.

[124] S.C. Res. 2250 (2015), U.N. Doc S/2015/2250.

[125] Deeks, *infra* note 182, at 548.

[126] Grotius asserted the world's oceans were incapable of acquisition by a state in his work *Mare Liberum*. HUGO GROTIUS, THE FREEDOM OF THE SEAS (reprinted 1952).

[127] Matthew Hoisington, *International Law and Ungoverned Space*, 1 INDON. J. INT'L & COMP. L. 424, 456–60 (2014). *But cf.* Jennifer Keister, *The Illusion of Chaos: Why Ungoverned Spaces Aren't Ungoverned, and Why That Matters*, 776 CATO INST. POL'Y ANALYSIS (Dec. 2014)

[128] This idea is present in the use of universal jurisdiction against crimes of torture, war crimes, and genocide. Despite the presence a government, when these crimes are committed they overcome the presumption that the responsible government is functioning properly. Because these crimes are not derogable, any violation of them inherently shows that a government is not inconformity with international law and unable to enforce the laws. Even though sovereign immunity and *jus cogens* are like ships passing in the night as distinctly procedural and substantive rules, where no conflict arises, violations of *jus cogens* are punished by the international community rather than by the state in which they were committed. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 93 (Feb. 3); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 4) ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.") Contemporary laws of state responsibility govern a state's purposeful absence of the rule of law, but this article addresses how to respond when territorial state cannot enforce the rule of law.

[129] *See* United States v. Yousef, 327 F.3d 56, 105 (6th Cir. 2003) (observing that war crimes became universally enforceable like piracy because "[i]n both situations there is…a lack of any adequate judicial system operating on the spot where the crime takes place" and holding that universal jurisdiction extends only where the crime occurs outside of a state or in an area where no state is capable of punishing the crime). "More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or

situation the interest is the same, preventing the creation of a criminal haven. Thus, the conduct occurring within ungoverned areas calls for special consideration.[130]

C. At War against the World

Because "[t]errorists and pirates are defined as *hostis humani generis* under the law of nations,"[131] the states operating against them enjoy an expanded authority to use force. While universal jurisdiction is an important aspect of *hostis humani generis*, the author finds that it is not synonymous. The designation includes a second notion of an enemy at war with the world. This could denote the universal reprehensibility of the conduct, as described above, but it also embodies a more sinister notion, the "condition of war against everyone."[132] This notion has been given literal effect; *hostis humani generis* were found to have declared war against all the world, and were subjected to forceful intervention.[133] Admittedly, this view would be a departure from current views on international law's restrictions on the use of force,[134] but it is not one without precedent.[135]

"In effect, the categorization of pirates as *hostis humani generi* created a third legal category in international law halfway between states and individuals; pirates were deemed at 'war' with civilization itself, and thus granted neither the protections of citizenship nor the sovereignty of states."[136] By applying this designation to terrorist, they too fall into this unique legal category which hold them to be "not only criminals, but enemies of humanity" permitting action beyond legal prosecution.[137] This unique legal category is warranted

terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat." Deeks, *infra* note 182, at 486

[130] "Piracy no doubt can take place independently of the sea, under the conditions at least of modern civilization; but the pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.... [P]iracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society." Burgess, *supra* note 58, at 322 (citing William Edward Hall, A Treatise on International Law 313-314 (8' ed. 2001) (1924)).

[131] D.R. BURGESS, THE WORLD FOR RANSOM: PIRACY IS TERRORISM, TERRORISM IS PIRACY 244 (Prometheus Books 2010).

[132] GLEN NEWEY, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO HOBBES AND LEVIATHAN 86 (London: Routledge, 2008).

[133] *See infra* notes 139–42 and accompanying text.

[134] Franklin Berman, *The UN Charter and the Use of Force*, 10 SINGAPORE YEAR BOOK OF INT'L L. AND CONTRIBUTORS 9, 10 (2006) (observing the prominent view is "that the essence of international law is to prevent force being used at all costs").

[135] *See infra* notes 140–41 and accompanying text.

[136] Burgess, *supra* note 58, at 299.

[137] Burgess, *supra* note 58, at 313; *See also* BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980).

because *hostis humani generis* are "men who band[] together in extraterritorial conclaves, remov[ing] themselves from the protection and jurisdiction of the nation-state, and declar[ing] a personal war against civilization itself."[138] Alberico Gentile's *De Jure Belli Libri Tres* observed that such men:

> "[A]re common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they find no protection in that law. They ought to be crushed by us... and by all men. This is a warfare shared by all nations."[139]

This distinct "third legal category" permits states to engage *hostis humani generis* through both legal and military channels.[140] As something more than individuals, but something less than states, *hostis humani generis* cannot be addressed neatly within the traditional state-to-state framework of international law.

As a result, military force was used against pirates. Certain naval vessels were specifically commissioned to hunt pirates. "[N]ations organize[d] and dispatch[ed] antipirate naval forces….Powerful naval squadrons [sought] out and destroy[ed] pirate forces at sea."[141] Of equal importance was the practice of assaulting pirate strongholds ashore.[142] This practice encompassed the notion of descent from the sea as well. It does not connote the idea of a "land pirate" whose conduct is punishable under other criminal provisions of the territorial state, but seeks to include acts of piracy beyond sea based actions, as when pirates went ashore to do piratical acts upon coastal localities.

The practice of using force against pirates ashore has endured. The U.N. Security Council resolution passed in 2008 extended authorization for nations to conduct military operations on land and by air against pirates plaguing the waters near the coast of Somalia.[143] The fact that states can reach into the sovereign areas of another state to fully combat piracy is not without parallel in combating terrorism. As Dr. Burgess observed:

> By equating terrorists with pirates, the problem of capture in a recalcitrant or openly hostile state is neatly avoided. A pirate may be captured wherever he is found…. If the same rule were

[138] Marcus Rediker, *The Seaman as Pirate - Plunder and Social Banditry at Sea, in* BANDITS AT SEA 139 (C.R. Pennell ed. 2001); *see id*. at 139–40, 146, 154.

[139] ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 423 (trans. John C. Rolfe, 1995).

[140] *See* Burgess, *supra* note 58, at 300.

[141] A. James Wombwell, *The Long War Against Piracy: Historical Trends*, COMBAT STUD. INST. 3 (2010). While these operations were often unilaterally performed by the major naval power in the region, cooperative efforts are also used to hunt pirates. One historic example was a multination effort consisting of British, American, Chinese, and Portuguese naval forces during the 1850's in the South China Sea. *Id.* at 112.

[142] *Id.* at 3.

[143] S.C. Res. 1851 (Dec. 16, 2008), U.N. Doc S/RES/1851 (2008).

> extended to terrorists, states might enter and retrieve them within the borders of other states without risking impingement on that state's sovereignty. By the same logic, states would have no legal standing to offer protection to terrorists within their borders.[144]

Terrorists, too, are at war with the world. This does not mean that all counterterrorism efforts must entail a full-scale war. Rather, it means that terrorists and states consider themselves in open conflict, wherein one will prevail and the other will fail. Many nations have participated in the "global war on terror," a phrase universal in scope.[145] This concept is also embodied in Security Council resolutions asserting a determination "to enhanc[e] the effectiveness of the overall effort to fight this scourge [of terrorism] on a global level."[146] For fear that the language be viewed as a mere means of political and legal prosecution, the council has "[reaffirmed] the need to *combat by all means*, …threats to international peace and security caused by terrorist acts…."[147]

More importantly, terrorists have declared war against the world, both literally and conceptually.[148] The Islamic State has literally declared war on the United States,[149] the United Kingdom,[150] France,[151] and Germany. [152] Lest this be construed as a war against the West, they have also declared war on

[144] Burgess, *supra* note 58, at 300.

[145] *See* Tams, *supra* note 13, at 374 ("An increasing number of states considers terrorist activities to be a threat which has to be addressed through multilateral or unilateral action, including by forcible means….").

[146] S.C.Res. 2370 (Aug. 2, 2017), U.N. Doc S/RES/2370 (2017).

[147] S.C.Res. 2199 (Feb. 12, 2015) (emphasis added), U.N. Doc S/RES/2199 (2015).

[148] *See* Will Mccants, *How the Islamic State Declared War on the World*, FOREIGN POL'Y (Nov. 16, 2015), http://foreignpolicy.com/2015/11/16/how-the-islamic-state-declared-war-on-the-world-actual-state/; Lizzie Dearden, *ISIS Calls on Supporters To Wage 'All-Out War' on West During Ramadan with New Terror Attacks*, INDEPENDENT (May 26, 2017), http://www.independent.co.uk/news/world/middle-east/isis-ramadan-2017-all-out-war-west-new-terror-attacks-manchester-suicide-bombing-islamic-state-a7758121.html.

[149] Siobhan Mcfadyen, *ISIS Declares Trump Inauguration Day 'Bloody Friday'*, EXPRESS (Dec. 05, 2016), http://www.express.co.uk/news/world/739508/ISIS-declare-Bloody-Friday-war-on-Trump-inauguration-day.

[150] *See* Peter B. Zwack (B.G Ret.), *With Paris, ISIS Has Declared War on Us. Here's How We Should Respond*, HUFFINGTON POST (visited Oct. 27, 2017), https://www.huffingtonpost.com/peter-b-zwack/paris-isis-war-respond_b_8604500.html.

[151] Jethro Mullen and Margot Haddad, *'France is at War,' President Francois Hollande Says After ISIS Attack*, CNN (Nov. 16, 2015), http://www.cnn.com/2015/11/16/world/paris-attacks/index.html.

[152] Tom Batchelor, *Now Germany Declares War on ISIS and Sends Tornado Jets, Naval Frigate & 1,200 Troops*, EXPRESS NEWS (Dec. 01, 2015), http://www.express.co.uk/news/world/623293/Islamic-State-Germany-Tornado-jets-naval-frigate-troops-ISIS.

Indonesia, Malaysia,[153] Spain,[154] Russia,[155] China,[156] and even the Taliban.[157] The Islamic State is an easy example, but it is not the only terrorist organization at war with the world.[158] Similarly, states have reciprocated and declared war on terrorists.[159] Conceptually, the existence of a state of war[160] is evident in a study observing that terrorist attacks were conducted in 92 countries in 2015, with more than 55% of the attacks occurring in: Iraq, Afghanistan, Pakistan, India, and Nigeria.[161] Ideologically and through force, terrorism ravages a large portion of the states across the globe. A move to classify terrorists as enemies rather than just criminals is not a denial of due process, but a war function since the body of terrorists are enemies of the world.

This article suggests that the necessity requirement of a self-defense justification for the use of force is satisfied by the aggregation of several

[153] Petaling Jaya, *ISIS videos declare war on Malaysia and Indonesia*, STRAITS TIMES (Jul. 5, 2016), http://www.straitstimes.com/asia/se-asia/isis-videos-declare-war-on-malaysia-and-indonesia.

[154] *ISIS Warns of More Spain Attacks in New Spanish-Language Video*, FOX NEWS (Aug. 24, 2017), http://www.foxnews.com/world/2017/08/24/isis-warns-more-spain-attacks-in-new-spanish-language-video.html.

[155] Saagar Enjeti, *ISIS Declares War on Russia*, DAILY CALLER (Aug. 01, 2016), http://dailycaller.com/2016/08/01/isis-declares-war-on-russia/.

[156] Robbie Gramer, *The Islamic State Pledged to Attack China Next. Here's Why*, FOREIGN POL'Y (Mar. 01, 2017), http://foreignpolicy.com/2017/03/01/the-islamic-state-pledged-to-attack-china-next-heres-why/.

[157] David Rivers, *ISIS declares WAR on Taliban for 'betraying Islam'*, DAILY STAR (June 26, 2017), https://www.dailystar.co.uk/news/world-news/625227/ISIS-war-Taliban-Afghanistan-Islam-London-Bridge-Manchester-Westminster.

[158] *See* Jon Lee Anderson, *The Most Failed State: Is Somalia's New President a Viable Ally?*, NEW YORKER (Dec. 14, 2009), https://www.newyorker.com/magazine/2009/12/14/the-most-failed-state (Al Shabaab declared war on the U.N.); Brendan O'Leary, *IRA: Irish Republican Army*, *in* TERROR, INSURGENCY, AND THE STATE: ENDING PROTRACTED CONFLICTS 226 (Marianne Heiberg ed., 2007) (Irish Republican Army declared War on Great Britain); *Basque raid 'declaration of war'*, BBC (Oct. 06, 2007), http://news.bbc.co.uk/2/hi/europe/7031815.stm (Basque separatists considered at war with the Spanish government); Arthur Brice, *Shining Path rebels stage comeback in Peru*, CNN (Apr. 21, 2009), http://edition.cnn.com/2009/WORLD/americas/04/21/peru.shining.path/ (Shining declared war on Peruvian government); *Boko Haram Declares War*, AFRICA CONFIDENTIAL (June 24, 2011), https://www.africa-confidential.com/article-preview/id/4039/Boko_Haram_declares_war (declaring war on Nigeria).

[159] *See, e.g., Saudi-led 'Arab NATO' declares total war on terrorism; Iran, Iraq & Syria not invited*, RT NEWS (Nov. 27, 2017), https://www.rt.com/news/411030-saudi-islamic-military-alliance-terrorism/.

[160] A state of war or an undeclared war is a military conflict between nations without the issuance of a formal declaration of war by either side. *See* James M. Crain, *War Exclusion Clauses and Undeclared Wars*, 39 TENN. L. REV. 328, 329 (1972).

[161] *Annex of Statistical Information: Country Reports on Terrorism 2015*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM 3 (June 2016).

existing principles.[162] While this practice is not novel,[163] it is novel to suggest that terrorists are subject to military action[164] by virtue of their classification as *hostis humani generis* and at the expense of another state's sovereignty.[165] *Part III* explores limitations on the use of force against transnational terrorists.

III. Respecting Sovereignty and Preventing Abuse

There are significant risks which inhere in granting a victim state[166] the power to use force in a territorial state.[167] These risks are enhanced by the fear that the international community has liberally accepted claims of self-defense which do not necessarily serve a defensive purpose.[168] Conversely, it is necessary to recognize the security interests of states exercising the "inherent right" to defend against attacks in order to prevent harms to the victim state and its citizenry. Recognition of this right is especially important given that Security Council action has not always been timely.[169]

---

[162] The ICJ rejected Uganda's claim of self-defense in response to attacks by rebels from within the Democratic Republic of the Congo, because the attacks were not attributable to the DRC. But, the court notably left open the question as to "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces." Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda), 2005 I.C.J. Rep. 201, at ¶147 (Dec. 19). Of interest are opinions of Judges Buergenthal, Kooijmans, and Simma who all seemed to accept the self-defense claim against armed attacks even if they are not directly attributable to the territorial State. *Id.* at ¶12 (separate opinion of Simma, J.); *id.* at ¶30 (separate opinion of Kooijmans, J.); see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, 2004 I.C.J. Rep. 131, at ¶6 (July 9) (separate opinion of J. Buergenthal).

[163] Examples may include: the Ethiopian invasion in Somalia, Israel's bombing of Palestine in 2003, or their invasion of Lebanon in 2006 — which although controversial for the disproportionate use of force, was accepted by a number of states as a legitimate act of self-defense — and Turkey's repeated incursions into northern Iraq to combat the PKK. Tams asserts that "[w]hen looking at uses of force below the threshold of invasions proper, the number of instances in which states have used force against terrorist attacks increases considerably." Tams, *supra* note 13, at 379.

[164] *See* Tams, *supra* note 13, at 374 ("the fight against terrorism is increasingly regarded as a legitimate cause which might warrant a 'military approach' and allow readjustments to the *jus ad bellum*…").

[165] "Attempts to place war within a legal framework date back to the earliest articulation of the theory of 'just war', by virtue of which war was considered a 'just' response to illegal aggression. Ultimately, it was a means to restore the rights offended by the aggressor as well as a means of punishment. By relying on the validity of the cause for war, this doctrine brought into place a legal regime that reflected the belligerents right to resort to force." Jasmine Moussa, *Can* Jus Ad Bellum *Override* Jus en Bello*? Reaffirming the Separation of the Two Bodies of Law*, 872 INT'L REV. RED CROSS 963, 966 (Dec. 2008).

[166] *Supra* note 8.

[167] *Supra* note 10.

[168] Tams, *supra* note 13, at 391.

[169] *See generally* Deeks, *infra* note 182, at 508.

While sovereignty is important, international law "is supposed to protect human rights, not just sovereignty."[170] A state's duty to protect its citizens' lives is paramount[171] and can't be subverted in order to preserve sovereign integrity, especially where that integrity is already compromised.[172] To prevent abuses of the right to self-defense, and to prevent unwarranted subversion of the right to sovereignty, a balanced standard for the use of force is necessary.[173] To achieve this balance, the question must turn on "not whether self-defense is permissible against non-state actors; rather, the questions are when, how, and where a state may take action."[174]

Although the idea of encroaching on a state's sovereignty, the "hallmark of statehood" and "the basis of the international system" is often repugnant, it is at times necessary.[175] In the context of this article, the conflict between self-defense and sovereignty concerns a state's internal sovereignty and the principle of non-intervention.[176] "International internal sovereignty refers to the international rights and duties of a State that pertain to its ultimate authority and competence over all people and all things within its territory."[177] If an ungoverned zone exists within a state, its sovereignty is already degraded as it is not acting as the ultimate authority within the area.[178]

---

[170] Ryan Lizza, *Was Trump's Strike on Syria Legal?*, NEW YORKER (April 7, 2017) https://www.newyorker.com/news/ryan-lizza/was-trumps-strike-on-syria-legal (*quoting* Harold Koh, former legal adviser of the U.S. Department of State, Sterling Professor of International Law at Yale Law School).

[171] "The oldest and simplest justification for government is as protector: protecting citizens from violence. Thomas Hobbes' Leviathan describes a world of unrelenting insecurity without a government to provide the safety of law and order, protecting citizens from each other and from foreign foes." Anne-Marie Slaughter, *3 Responsibilities Every Government has Towards Its Citizens*, WORLD ECON. FORUM (Feb. 13, 2017), https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/.

[172] *See infra* note 178 and accompanying text.

[173] *See* Deeks, *infra* note 182, at 511 ("When a rule is not clear, actions taken pursuant to the rule are of questionable legitimacy.").

[174] Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77, 85 (2013).

[175] THOMAS G. WEISS, HUMANITARIAN INTERVENTION: WAR AND CONFLICT IN THE MODERN WORLD, 223 (Third ed., 2016).

[176] Samantha Besson, *Sovereignty*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶70, online edition (2011), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?rskey=01IRon&result=1&prd=EPIL (last visited Dec. 5, 2017).

[177] *Id.*

[178] The existence of an ungoverned zone within a state indicates the state is incapable of enforcing the rule of law. The inability to enforce its laws and exercise authority over the area denotes that the state is not the ultimate authority there. Therefore, it cannot be said that the state exercises sovereignty in the ungoverned zone. Accordingly, its integrity as a sovereign is not as threatened by the incursion of another state seeking to cure a threat created within the ungoverned area.

So, incursions there do not implicate a state's sovereignty to the fullest degree. Rather, what is left is the state's sovereign right to exclude others from exercising authority there. This right is enshrined by the principle of non-intervention.

However, intervention is only prohibited if it is "bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[179] The principle of sovereignty does not permit a state to allow terrorist forces to threaten or use force against another state.[180] Therefore, intervention against such threats is not prohibited by the principle of non-intervention and does not violate the principle of sovereignty. Furthermore, action against terrorists within an ungoverned area does not "deprive[] peoples … of [their] right to self-determination and freedom and independence."[181] It enhances these rights by removing terrorists which threaten the independence of the state from which they operate. The mere presence of terrorists undermines the authority and legitimacy of the state.

However, to ensure the use of force by a victim state against a terrorist threat within another state does not violate that territorial state's sovereignty and interfere with its independence, it is necessary to impose restraints. The comments below briefly address the restraints of the unwilling or unable test and the conceptualization of the zone of combat.

A. The Unwilling or Unable Test

The unwilling or unable test was articulated by Professor Ashely Deeks as a previously unrecognized normative standard.[182] The test restricts a victim state's ability to use force to instances of absolute necessity. The test is much more than a one-step determination by the victim state concerning the capacity of the territorial state, it is an involved process which whittles down the need to intervene in the territory of another state. Simply stated, the test permits a victim state to take action against a non-state actor within a territorial state when the territorial state is either unwilling or unable to adequately address the threat posed to the victim state.

However, determining whether a territorial state is unwilling or unable to act involves a number of steps. Among these are the "requirement that a victim state undertake certain inquiries and engage in certain exchanges with the territorial state" to gauge their willingness and capacity.[183] This may be a

[179] *Paramilitary Activities*, *supra* note 35, at ¶205.

[180] *Id.* at para 192.

[181] *Id.* at ¶191.

[182] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, (2011-2012). Though the test is debated, the author of this article accepts that it has been formidably presented and stands as a reasonable representation of current practice.

[183] *See* Deeks, *supra* note 182, at 490.

relatively brief inquiry or a lengthy one, depending on the urgency with which the victim state needs to act.[184] The depth of the inquiry can vary based on the established history of the territorial state.[185] A long history of incapacity as a failed state may permit a brief and cursory inquiry with the territories government before taking action.

Additionally, this test only operates in the limited time frame permitted under Article 51 of the United Nation's Charter.[186] That period is restricted to the time in between the need arising and the time when the Security Council has acted. Meaning, the test "assumes that the victim state urgently needs to respond to an armed attack in the period before the Security Council has had time to address the situation."[187] This necessarily makes the victim state the judge in at least the preliminary determination of whether the territorial state is unwilling or unable to act. But, the Security Council will ultimately assume responsibility for making that assessment, discouraging abuse of the justification by a victim state.

The test also places premier importance on the notion that while the law of self-defense itself imposes no locational limits of the defensive action, the victim state must take into account the territorial state's sovereignty.[188] But, when making a determination of whether or not to use force, the author sides with the position that force may be used where a territorial state fails to remedy a threat because it is unable by either of two measures: an outright lack of the military capability, or a lack of progress in addressing the threat of concern to the victim state.[189] Meaning that although a territorial state is engaged in the conflict seeking to prevent harm to the victim state, if the territorial state fails to prevent or eliminate the threat, the victim state may take action to prevent the harm.[190]

---

[184] *Id.* at 495.

[185] *Id.* at 521–25.

[186] *Id.* at 495.

[187] *Id.*

[188] *Id.* at 509, 520.

[189] *See supra* note 129 and accompanying text.

[190] The goal of eliminating or neutralizing terrorists is best realized under the principle of economy of force. This term is used both in its traditional sense of "discriminat[e] employment and distribution of forces" as well as in a broader sense that it is more economical for one state to engage in a conflict than for another. U.S. ARMY OPERATIONS, FIELD MANUEL 3–0 (2008). If the economy of force is reduced, the conflict may be protracted, and a greater loss of life may ensue. Operating under the premise of sovereign equality, one must expect that the lives of each state's citizens are to be valued equally as well. Given this, the secondary meaning of the term is meant to indicate that it is more economical for one state to employ force than it is for another measured by the expected cost of life. A determination of which state could more economically employ force is dependent upon factors such as technological advancement, access to targets, national interest and commitment, manpower, funding, and the costs of inaction. Each hinderance by the international community to the use of force by a victim state decreases the economy of force and necessarily increases the body

B. Locational Restraints

The unwilling or unable test limits the interpretation of necessity as to when a state may take action. But, it does not address many other limitations that may be appropriate to narrow the justification provided by the *hostis humani generis* designation. Because this article proposes using force within the territory of another state, it seem appropriate to impose locational limits on where within the territorial state force may be used.

Since any action in another state's territory infringes its sovereignty, a use of force must be as limited as possible within the territorial state to minimize the contravention. The conceptualization of a zone of combat[191] is meant to restrict a victim state's operations to the terrorist havens within the territorial state. In theory, the territorial state maintains the capacity to conduct effective operations elsewhere within its own borders and the use of force by the victim state is not necessary outside of the ungoverned area. The Law of Armed Conflict provide a framework for when a zone of combat exists and where it exists.[192] Essentially, the zone of combat blends concepts of armed conflict and counterterrorism and can be "characterized as broadly as anywhere terrorist attacks are taking place, or perhaps even being planned and financed."[193]

Specific geographic limits are often difficult to determine in asymmetric conflicts.[194] By their very nature, geographic limits are self-defeating because any terrorist learning of them will expeditiously slip in and out of the zone of combat to avoid being targeted. Thus, the zone of combat must be a flexible construct.[195] As difficult as this may prove, establishing this restraint is necessary to prevent a victim state's use of force throughout the entirety of a

count of the conflict. This is generally true for both combatants and non-combatants, since civilians have been estimated to account for up to ninety percent of wartime causalities. *See* Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115, 115 (2010); *Patterns in Conflict: Civilians are Now the Target*, U,N. CHILDREN'S FUND, https://www.unicef.org/graca/patterns.htm (last visited Oct. 11, 2017). The principle of economy of force means states "employ all combat power available in the most effective way possible; allocate minimum essential combat power to secondary effects." Robert R. Leonhard, *Economy of Force*, *in* THE ARMCHAIR GENERAL (2013), available at http://www.jhuapl.edu/ourwork/nsa/papers/economyofforce.pdf (last visited Oct. 11, 2017).

[191] Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 4 (2010).

[192] *Id.* at 1–2.

[193] *Id.* at 4.

[194] *Id.* at 22.

[195] "For non-international armed conflicts, Common Article 3 refers to conflict 'occurring in the territory of one of the High Contracting Parties' suggesting that, at a minimum, the territory of the state in which the conflict is taking place forms part of the geographic area of conflict." *Id.* at 11.

territorial state, which becomes an usurpation of the territorial state's sovereignty.

These restraints are but two of many which could be imposed in order to prevent abuses by the victim state. Some restraint is an absolute necessity, given the disproportionate military capacities and political designs of the various states. But, it would be self-defeating to impose too many or too stringent restraints which undermine the use of force in self-defense against terrorist threats.

Conclusion

As a final assertion for the need to apply the existing legal standards in the ways described above, stands the importance of economy of force. The principle of economy of force suggests that states "employ all combat power available in the most effective way possible."[196] The phrase can be conveyed in both in its traditional sense of "discriminat[e] employment and distribution of forces" as well as in a broader sense that it is more economical for one state to engage in a conflict than for another.[197] Operating under the premise of sovereign equality, one must expect that the lives and resources of each state's citizens are to be valued equally. Given this presumption, the second meaning indicates that it is more economical for one state to employ force than it is for another, measured by the expected cost of life to the warfighters of each state. A prediction of which state could more economically employ force is dependent upon factors such as technological advancement, access to targets, national interest and commitment, manpower, funding, and the costs of inaction, among others.

Acting under the principles advocated by this article enhances the economy of force of a state because it eliminates impediments to the use force. By justifying limited use of force while threats are still nascent, a state may decrease the expected causality count of the conflict, because the number of causalities must necessarily increase with the duration of the conflict. This is generally true for both combatants and non-combatants, since civilians have been estimated to account for up to ninety percent of wartime causalities.[198] So, allowing the state with the greatest economy of force to eliminate a terrorist threat brings the most expeditious end to the human rights abuses perpetrated by the terrorists.

Given the risks that terrorism presents to a state's security and stability, special measures are needed to effectively combat it. The international

[196] Robert R. Leonhard, *Economy of Force*, ARMCHAIR GENERAL (2013), http://www.jhuapl.edu/ourwork/nsa/papers/economyofforce.pdf.

[197] U.S. ARMY OPERATIONS, FIELD MANUEL 3-0 (2008).

[198] *See* Adam Roberts, Lives and Statistics: Are 90% of War Victims Civilians?, 52 SURVIVAL 115, 115 (2010); *Patterns in Conflict: Civilians are Now the Target*, U.N. CHILDREN'S FUND, available at https://www.unicef.org/graca/patterns.htm (last visited Oct. 11, 2017).

community's aversion to the use of force has prioritized inaction over intervention and allows circumstances conducive to conflict to fester. Applying the existing legal framework of self-defense and *hostis humani generis* to terrorists provides the limited but necessary justifications for the action needed to effectively combat terrorism. Just as prescribed burns are needed to eliminate fuel loads and prevent uncontrollable fires, the use of force is sometimes needed to eliminate threats before they fuel larger conflicts. This carries a risk of sparking an event, but properly employed it can be a successful preventative measure.

This article demonstrated how a state can adapt existing international laws to justify the use of force against an international terrorist threat in its nascent stage, precluding the exacerbation of a full-scale conflict. Specifically, this article showed that a victim state can use force in self-defense against a terrorist organization, operating from a separate territorial state which is unwilling or unable to address the threat to the victim state.

In order to move this application of international law forward, states must first embrace the designation of *hostis humani generis* for terrorists. Domestic legislation to this end is not the only way whereby this step is accomplished. A normative analysis may be sufficient to establish this practice. Secondly, states must cooperate in reaching a consensus as to which organizations are properly classified as terrorists. While reaching a consensus on the definition of terrorism would be ideal, this step can also be accomplished as effectively on a group-by-group basis through the designation of an organization as terrorists by the international community. Third, states must work in harmony to apply in earnest the principles restraining the use of force to prevent abuses.

This is perhaps the most pivotal step for ensuring the longevity of the approach advocated in this article. Further discussion is warranted concerning the systems and practices for determining a zone of combat and designating a state as unwilling or unable to intervene. If these discussions are carried to a meaningful conclusion, future operations against terrorists as *hostis humani generis* will become a powerful tool in eliminating threats while preserving international peace. States will be justified in eliminating terrorist threats before a full-scale conflict becomes necessary and lives will ultimately be saved.