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# UNMANNED AERIAL VEHICLES: LEGITIMATE WEAPON SYSTEMS OR UNLAWFUL ANGELS OF DEATH?

**Michael J. Deegan\***

## ABSTRACT

SINCE THE INVASION OF AFGHANISTAN, the United States has utilized Unmanned Aerial Vehicles (UAVs) to locate, surveil and kill members of the Taliban, Al-Qaeda and its associated forces. Such killings have decimated the leadership of these groups and disrupted their operations. However, there are collateral effects from UAV killings including civilian deaths. These deaths increase resentment and hatred toward the US, which is channeled by terrorist groups to recruit new members and for local support. Moreover, targeted killings outside a combat zone have political and diplomatic consequences. This paper argues that the current uses of UAV are legal under international and domestic law. However, it proposes amended targeting criteria, greater transparency and increased checks on the executive branch for future use of UAVs.

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\* Colonel, U.S. Army Reserve, with duty at the International & Operational Law Division, Office of The Judge Advocate General; M.A., U.S. Army War College 2013; J.D., Hofstra University School of Law 1992; B.A., University of Delaware 1989. I extend my deepest thanks to Colonel Brett Weigle for his support and advice with writing this article, and to the editors and staff of the Pace International Law Review for their hard work preparing the article for publication. The views expressed in this article do not necessarily reflect the views of the United States Army, the United States Army Reserve, or the United States Government.

## UNMANNED AERIAL VEHICLES: LEGITIMATE WEAPON SYSTEMS OR UNLAWFUL ANGELS OF DEATH?

Michael J. Deegan\*

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. Even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war.

--President Barack Obama<sup>1</sup>

Since the attacks on September 11, 2001, the Central Intelligence Agency (CIA) and the Department of Defense (DoD) have targeted numerous leaders of al-Qaida (AQ) and the Taliban via unmanned aerial vehicles (UAVs), commonly referred to as “drones.”<sup>2</sup> These deaths have caused confusion in the ranks of AQ and the Taliban, and disruptions to their operations. Generally speaking, the targeted strikes have assisted the United States and its allies in combating terrorist groups

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<sup>1</sup> President Barrack H. Obama, Nobel Peace Prize Acceptance Speech (December 10, 2009) (transcript available at [http://www.csmonitor.com/World/Global-News/2009/1210/text-of-barack-obamas-nobel-peace-prize-acceptance-speech/\(page\)/4](http://www.csmonitor.com/World/Global-News/2009/1210/text-of-barack-obamas-nobel-peace-prize-acceptance-speech/(page)/4)).

<sup>2</sup> Unmanned aircraft systems (UAS) refer to aircraft that fly without onboard pilots along with ground control stations, networks and personnel needed to operate these aircraft. Unmanned aerial vehicles (UAVs) refer to the unmanned aircraft in these systems, which are often referred to as drones in the media. BART ELIAS CONG. RESEARCH SERV., R 42718 *PILOTLESS DRONES: BACKGROUND AND CONSIDERATIONS FOR CONGRESS REGARDING UNMANNED AIRCRAFT OPERATIONS IN THE NATIONAL AIRSPACE SYSTEM* 1 n.1 (2012) (2012).

overseas.<sup>3</sup> UAVs are unique weapon systems. They can fly virtually undetectable by the human eye, thousands of feet in the air, the ground below for more than a day, and once finding its target, bring a laser guided missile onto its mark, all without exposing the pilot to harm.<sup>4</sup>

However, the UAV program is not without criticism from both inside and outside the United States (US). Collateral effects include civilian deaths from the strikes on the intended targets.<sup>5</sup> In addition, there are political effects that appear to counter security gains from targeted UAV strikes. The leaders of many partner-nations face criticism from their citizenry for allowing the strikes to occur on their territory. Foreign diplomats and international scholars complain that the strikes violate the sovereignty of countries that are outside a combat zone when the strikes are conducted without the affected country's consent. Even with these criticisms, this application of national power by the United States government is consonant with both domestic and international law.

This paper will argue that Congressional authorizations, the U.S. Constitution, international law, and the Law of Armed Conflict (LOAC) provide the legal justification for this method of employing lethal force in the manner it is currently conducted. It will recommend amended targeting criteria, and suggest US judicial review prior to the conduct of future drone strikes against suspected terrorists who are US citizens, and other reporting requirements to address some of the negative effects.

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<sup>3</sup> In 2009, the Obama Administration requested DoD not use the term "Global War on Terror" as termed by the preceding administration, and requested instead the term, "Overseas Contingency Operation" (OCO). Scott Wilson and Al Kamen, "Global War on Terror is Given New Name," WASHINGTON POST, March 25, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/03/24/AR2009032402818.html>.

<sup>4</sup> *Predator RQ-1 / MQ-1 / MQ-9 Reaper UAV, United States of America*, AIRFORCE-TECHNOLOGY.COM, <http://www.airforce-technology.com/projects/predator-uav/> (last visited December 8, 2013). See also JEREMIAH GERTLER, CONG. RESEARCH SERV., R42136 U.S. UNMANNED AERIAL SYSTEMS 1, 33 (2012).

<sup>5</sup> Michael J. Boyle, *The Cost and Consequences of Drone Warfare*, 89 INT'L AFFAIRS 1, 5 (2013) (noting that all government data on death counts are classified).

## I. HISTORICAL BACKGROUND, CAPABILITIES AND CRITICISMS

A. *The Unmanned Aerial Vehicle*

The use of unmanned aircraft is not a new concept for the US military. Almost from the beginning of flight, the military has tried to use unmanned aircraft as a weapons system. During World War I, the Navy attempted to develop a flying bomb.<sup>6</sup> The Navy endeavored again during World War II by loading a B-24 Liberator with bombs for pilotless flight.<sup>7</sup> In the 1950s, the military used unmanned aircraft as targets for new pilots and as decoys in combat.<sup>8</sup> During Vietnam and in the Balkans, the US employed unmanned aircraft for intelligence gathering.<sup>9</sup> Following the attacks on September 11, 2001 (9-11), the American military used UAVs in Afghanistan and Iraq for reconnaissance, surveillance, and later, combat strikes.<sup>10</sup>

Today's UAVs range in size from those the size of a typical remote controlled hobby airplane of less than ten pounds, to the size and weight of a large business jet.<sup>11</sup> The smaller models are employed by troops in theater. For instance, the RQ-14 Dragon Eye is a small UAV that is carried in a backpack. Once deployed, the Dragon Eye can travel as far as 2.5 nautical miles from its operator.<sup>12</sup> The larger models, such as the MQ-9 Reaper, have satellite communications that provide for beyond line-of-sight operations.<sup>13</sup> Thus, the "pilots" of the larger UAV

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<sup>6</sup> ELIAS, *supra* note 2, at 1.

<sup>7</sup> *Id.*; Lev Grossman, *Drone Home*, TIME MAGAZINE, Feb. 2013, at 2, available at <http://www.time.com/time/magazine/article/0,9171,2135132-2,00.html> ("The program was an utter failure, and it claimed the life of Joseph Kennedy, older brother of the future President, when his B-24 blew up prematurely.").

<sup>8</sup> ELIAS, *supra* note 2, at 1.

<sup>9</sup> *Id.*; see also Lev Grossman, *Drone Home*, Time Magazine, Feb. 11, 2013, <http://www.time.com/time/magazine/article/0,9171,2135132-2,00.html>; JEREMIAH GERTLER, CONG. RESEARCH SERV., R42136 *US UNMANNED AERIAL SYSTEMS* 4.

<sup>10</sup> ELIAS, *supra* note 2, at 1.

<sup>11</sup> Jeremiah Gertler, Cong. Research Serv., R42136 *US Unmanned Aerial Systems* 36; see also *UAS: Dragon*, Aerovironment Inc., [http://www.avinc.com/uas/small\\_uas/dragon\\_eye/](http://www.avinc.com/uas/small_uas/dragon_eye/).

<sup>12</sup> Jeremiah Gertler, Cong. Research Serv., R42136 *US Unmanned Aerial Systems*, 44.

<sup>13</sup> *MQ-9 Reaper Predator B Unmanned Aircraft System UAS Drone*,

can operate and fly the aircraft thousands of miles from the actual location of the UAV.<sup>14</sup>

American journalist Lev Grossman describes UAV as “omniscient surveillance, surgical precision, zero risk.”<sup>15</sup> UAVs also contain multiple systems. One system provides instantaneous up-to-date intelligence, surveillance and reconnaissance.<sup>16</sup> Another system allows for a weapon system that is a relatively inexpensive strike option.<sup>17</sup> The use of UAV enhances the *United States National Strategy for Counterterrorism*: to bring targeted force on Al-Qaeda (AQ) to disrupt, dismantle and eventually defeat AQ, and its affiliates and adherents, in order to ensure the security of US citizens and interests.<sup>18</sup> The UAV is similar in nature to a precision guided munition or “smart bomb” fired from a manned fighter jet. However, the UAV operator has the ability to identify a target and surveil the individual virtually undetected, with little to no risk to its operator, and with the added benefit of keeping troops out of harm’s way.<sup>19</sup>

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ARMY RECOGNITION [http://www.armyrecognition.com/united\\_states\\_military\\_equipment\\_uk/mq9\\_reaper\\_predator\\_b\\_unmanned\\_aircraft\\_system\\_uas\\_data\\_sheet\\_specifications\\_information\\_pictures\\_u.html](http://www.armyrecognition.com/united_states_military_equipment_uk/mq9_reaper_predator_b_unmanned_aircraft_system_uas_data_sheet_specifications_information_pictures_u.html) (last visited Feb 12, 2014).

<sup>14</sup> Denise Chow, *Drone Wars: Pilots Reveal Debilitating Stress Beyond Virtual Battlefield*, LIVE SCIENCE (Nov. 5, 2013), <http://www.livescience.com/40959-military-drone-war-psychology.html> (last visited Dec. 22, 2013). However, a pilot at the airfield controls take-off and landing of large UAV using a joystick.

<sup>15</sup> GERTLER, *supra* note 9, at 2.

<sup>16</sup> GERTLER, *supra* note 12, at 1, 9.

<sup>17</sup> Ashley Boyle, *The US and its UAVs: A Cost-Benefit Analysis*, AMERICAN SECURITY PROJECT (July 24, 2012), <http://americansecurityproject.org/blog/2012/the-us-and-its-uavs-a-cost-benefit-analysis/> (last visited Dec. 27, 2012); *but see* GERTLER, *supra* note 12, at 10, who reports some UAVs, such as the Global Hawk, cost more than similar manned aircraft.

<sup>18</sup> THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 2 (2011), [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf).

<sup>19</sup> Grossman, *supra* note 15, at 2.

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*B. Effects of UAV Strikes*

## 1. Killing AQ and Taliban leadership

The employment of UAV is an effective tool in countering violent extremism. UAV targeting has disrupted AQ and its affiliates, resulting in the deaths of 50 high-ranking AQ and Taliban leaders.<sup>20</sup> President Obama has hailed his administration's success in depleting the ranks of senior AQ leaders and making the U.S. safer.<sup>21</sup> This "thinning" of AQ leadership is due in large part to the use of UAVs.<sup>22</sup> Surveillance and intelligence from UAVs were used for the successful 2011 raid by Navy SEALs on Osama bin Laden's compound in Pakistan that led to his death.<sup>23</sup> In fact, bin Laden papers found in his compound revealed that bin Laden languished the impact of UAV strikes and advised AQ leaders flee parts of Pakistan for safer areas.<sup>24</sup>

High value targets that were killed via UAVs include Abdel Rehman al-Hussainan, the reported second in command of AQ who was killed in December 2012 in Pakistan.<sup>25</sup> He allegedly had replaced Abu Yahya al-Libi, who was killed by a UAV attack in the same area of Pakistan in June 2012.<sup>26</sup> A top AQ operative and US citizen was killed in September 2011 in Yem-

<sup>20</sup> Grossman, *supra* note 9, at 2.

<sup>21</sup> Michael D. Shear & Scott Shane, *Congress to See Memo Backing Drone Attacks on Americans*, N.Y. TIMES, Feb. 6, 2013, [http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?\\_r=0](http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?_r=0).

<sup>22</sup> Bob Orr, *Drone Strike in Pakistan Targets al Qaeda Leader*, CBS NEWS, June 5, 2012, <http://www.cbsnews.com/news/drone-strike-in-pakistan-targets-al-qaeda-leader/>.

<sup>23</sup> Greg Miller, *CIA Flew Stealth Drones into Pakistan to Monitor Bin Laden House*, WASH. POST, May 17, 2011, [http://www.washingtonpost.com/world/national-security/cia-flew-stealth-drones-into-pakistan-to-monitor-bin-laden-house/2011/05/13/AF5dW55G\\_story.html](http://www.washingtonpost.com/world/national-security/cia-flew-stealth-drones-into-pakistan-to-monitor-bin-laden-house/2011/05/13/AF5dW55G_story.html).

<sup>24</sup> Peter Bergen, *Bin Laden's Final Days – Big Plans, Deep Fears*, CNN, March 19, 2012, <http://www.cnn.com/2012/03/16/opinion/bergen-bin-laden-final-writings/> (last visited May 6, 2014).

<sup>25</sup> Ismail Khan, *U.S. Drone Strike Kills a Commander for Al Qaeda in Pakistan*, N.Y. TIMES, Dec. 9, 2012, <http://www.nytimes.com/2012/12/10/world/asia/us-drone-strike-kills-a-senior-al-qaeda-commander.html>. Hussainan was also known as Abu Zaid al-Kuwaiti.

<sup>26</sup> *Id.* See also Mary Ellen O'Connell, *The Questions Brennan Can't Dodge*, N.Y. TIMES, Feb. 6, 2013.

en when a UAV targeted Anwar al-Awlaki.<sup>27</sup> Further, AQ's chief scientist and master bomb-maker, Abu Khabab al-Masri, was a casualty of a UAV sortie in Pakistan in 2008.<sup>28</sup>

## 2. Civilian Deaths

The UAV strike that killed Hussainan also wounded Hussainan's daughter and wife (who later died from her wounds).<sup>29</sup> This is but one example of the collateral damage from UAV targeting. Former CIA Director and Defense Secretary Leon Panetta has argued that UAVs are "remarkably precise and limited in terms of collateral damage".<sup>30</sup> However, other sources indicate a much larger footprint. The Bureau of Investigative Journalism, a nonprofit news organization in Great Britain, "estimates the number of persons killed in drone attacks at 3,000 to 4,500 including well over 200 children."<sup>31</sup> They estimate that civilian deaths as a percentage of total casualties from UAV attacks range between 18 to 26 percent in Pakistan, 16 percent in Yemen and between 7 to 33.5 percent in Somalia.<sup>32</sup>

Another group cites lower, but still significant civilian casualties. The New America Foundation reports that from June 2004 to October 2012 there were 334 UAV strikes in Pakistan.<sup>33</sup> These attacks were responsible for between 1,886 and 3,191 deaths with an average of 7.4 to 9.6 persons killed per

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<sup>27</sup> Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. Times, Sep. 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all> (Awlaki was termed "the leader of external operations for Al Qaeda in the Arabian Peninsula." The strike also killed Samir Khan, a U.S. citizen of Pakistani descent who was an editor of an AQ English online magazine. One of the published articles was "Make a Bomb in the Kitchen of Your Mom").

<sup>28</sup> Brian Michael Jenkins, *Al Qaeda in Its Third Decade, Irreversible Decline or Imminent Victory?*, RAND CORP. (2012) available at [http://www.rand.org/pubs/occasional\\_papers/OP362.html](http://www.rand.org/pubs/occasional_papers/OP362.html).

<sup>29</sup> Khan, *supra* note 25.

<sup>30</sup> Boyle, *supra* note 5, at 3.

<sup>31</sup> Mary Ellen O'Connell, *The Questions Brennan Can't Dodge*, N.Y. TIMES (Feb. 6, 2013), [http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html?\\_r=0](http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html?_r=0).

<sup>32</sup> Boyle, *supra* note 5, at 6.

<sup>33</sup> *Id.* at 5.



strike.<sup>34</sup> The group labels 85 percent of those killed as “militants” from the period of 2004 to 2012.<sup>35</sup> This is a dramatic decrease in civilian casualties as compared to previous years.. Based on the group’s figures, from 2004 to 2007, noncombatant deaths in Pakistan comprised more than 50 percent of the UAV strikes.<sup>36</sup> By 2011, civilian fatalities had dropped to 1 percent of all UAV assaults in Pakistan.<sup>37</sup> The low percentages continued into 2012.<sup>38</sup> The lower rate of civilian casualties are believed to be the result of greater scrutiny by the Obama Administration prior to approval of a strike involving the potential for civilian casualties. Smaller munitions used for a smaller blast radius prolonged the dwell-time over the objective; and resulted in less strikes.<sup>39</sup>

For numerous reasons the data on civilian deaths are mere estimates. First, the attacks usually occur in remote and sometimes uncontrolled territories where a formal constabulary is not established.<sup>40</sup> Second, relatives of the casualties remove the bodies from the area and quickly bury them in accordance with Muslim law preventing identification and the number of individuals killed.<sup>41</sup> Third, AQ and the Taliban exaggerate the number of civilians killed for propaganda and recruitment purposes.<sup>42</sup> Lastly, the US classifies details of UAV strikes thereby precluding dissemination of this information.<sup>43</sup>

Due to the number of civilians killed and the public outcry of alleged indiscriminate killings by UAVs, a United Nations panel convened in 2013 to investigate whether unlawful killings had occurred. The investigation is centered on 25 recent UAV strikes in Afghanistan, Pakistan, Yemen, Somalia

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Peter Bergen, *Civilian Casualties Plummet in Drone Strikes*, CNN (July 14, 2012), <http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties>.

<sup>39</sup> *Id.*

<sup>40</sup> Boyle, *supra* note 5, at 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Boyle also indicates that United States officials underestimate the number of civilian casualties from UAV strikes.

<sup>43</sup> *Id.*

and the Palestinian territories.<sup>44</sup> The panel is also investigating the alleged “double-tap” UAV attacks, which killed individuals who were attending funerals of those who died in an earlier strike, and spectators visiting the bomb scene.<sup>45</sup> An interim report was issued in September 2013.<sup>46</sup> The Special Rapporteur found 33 UAV strikes that caused civilian casualties, but did not render an opinion as to whether any deaths violated international law.<sup>47</sup> The September report calls for greater transparency by States who utilize UAVs that involve lethal targeting.<sup>48</sup> A subsequent report was issued in March 2014. Key findings disclosed a reduction in UAV strikes in 2013 in Pakistan, but increased strikes in Afghanistan and Yemen.<sup>49</sup> Per the report, civilian casualties had increased three-fold in 2013 in Afghanistan compared to 2012, accounting for 45 deaths and 14 non-fatal injuries.<sup>50</sup> The Special Rapporteur reiterated a previous conclusion that States have an obligation following a UAV strike that results in civilian casualties to “conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results.”<sup>51</sup>

### 3. Deaths Used for Recruitment and anti-American Sentiment

In addition to the number of civilians killed, each death “represents an alienated family, a new desire for revenge, and more recruits for [whatever] militant movement” can tap into that hatred.<sup>52</sup> Visceral feelings are not limited to the affected

<sup>44</sup> John F. Burns, *U.N. Panel to Investigate Rise in Drone Strikes*, N.Y. TIMES (Jan. 24, 2013), [http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html?\\_r=0](http://www.nytimes.com/2013/01/25/world/europe/un-panel-to-investigate-rise-in-drone-strikes.html?_r=0).

<sup>45</sup> *Id.*

<sup>46</sup> G.A. Res. 66/171, U.N. Doc. A/RES/68/389 (Sept. 18, 2013).

<sup>47</sup> G.A. Res. 66/171, *supra* note 46, ¶ 21.

<sup>48</sup> G.A. Res. 66/171, *supra* note 46, ¶ 45.

<sup>49</sup> United Nations, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, UN Doc. A/HRC/25/59, March 11, 2014, ¶¶ 25-26, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/119/49/PDF/G1411949.pdf?OpenElement>.

<sup>50</sup> *Id.* at 6, para. 25.

<sup>51</sup> *Id.* at 8-9, para. 32.

<sup>52</sup> David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/>

area, but extend to the greater population in the targeted region. As the local population sees it, when their government cannot protect them from UAV strikes by the US, they become antagonistic toward their government, resulting in a weakened State.<sup>53</sup> This environment is perfect for terrorist safe havens: the local populace feels disenfranchised from the government thereby decreasing the stability of the affected State.<sup>54</sup> Moreover, the hatred is easy to channel by terrorists despite the fact that the terrorists and the angry population may hold different political or religious philosophies.<sup>55</sup> Farea al-Muslimi, a Yemeni appearing before the Senate Judiciary Committee in April 2013, testified that UAV strikes are now “the face of America.”<sup>56</sup> He emphasized his point by stating, “What violent militants had previously failed to achieve, one drone strike achieved in an instant.”<sup>57</sup>

#### 4. Potential for Decreased Support from Allies

One UAV attack in Pakistan in 2011, which allegedly killed 40 civilians when the US confused a tribal meeting for an assemblage of terrorists, has prompted a lawsuit by the survivors’ families against the British government.<sup>58</sup> The plaintiffs in that suit allege that British officials are liable for the deaths that occurred because they gave intelligence to Americans who used the information for subsequent UAV strikes, including the one that killed the plaintiffs’ family members.<sup>59</sup> Judges have yet to decide whether to hear the case, but it may create a chilling effect on US allies who pass intelligence to the US.

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2009/05/17/opinion/17exum.html?pagewanted=all.

<sup>53</sup> See Boyle, *supra* note 5, at 3.

<sup>54</sup> See *id.* at 18. See also Kilcullen & Exum, *supra* note 49.

<sup>55</sup> See *Thousands rally in Pakistan against US drone attacks*, HURRIYET DAILY NEWS (Dec. 1, 2013), <http://www.hurriyetdailynews.com/thousands-rally-in-pakistan-against-us-drone-attacks.aspx?PageID=238&NID=58810&NewsCatID=356>.

<sup>56</sup> Charlie Savage, *Drone Strikes Turn Allies into Enemies Yemeni Says*, N.Y. TIMES (Apr. 23, 2012), available at <http://www.nytimes.com/2013/04/24/world/middleeast/judiciary-panel-hears-testimony-on-use-of-drones.html>

<sup>57</sup> *Id.*

<sup>58</sup> Ravi Somaiya, *Drone Strike Prompts Suit, Raising Fears for U.S. Allies*, N.Y. TIMES, (Jan. 30, 2013), available at <http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit-raises-concerns-on-intelligence-sharing.html>.

<sup>59</sup> *Id.*

The British are the United States' greatest allies in countering violent extremism.<sup>60</sup> Other nations, such as Germany and the Netherlands, also supply intelligence to the US, and may cut intelligence sharing for fear of similar lawsuits.<sup>61</sup> Any decrease in the flow of intelligence will curtail America's goal to disrupt, dismantle and defeat AQ and its affiliates.<sup>62</sup>

Criticism also concerns UAV strikes that occur in Pakistan, Yemen and Somalia, nations outside the borders of Afghanistan. Critics argue that attacks in countries outside a war zone and without the consent of the affected government violate the country's sovereignty and are possibly acts of war.<sup>63</sup> The Obama Administration dismisses these arguments since AQ and its affiliates are "transnational, non-State actors where the principal theater of operations is not in a country in conflict with America."<sup>64</sup> Thus, boundaries are irrelevant, similar to the global war zone of World War II. While most Americans support UAV strikes overseas to target terrorists,<sup>65</sup> many, however, would not support UAV assaults within the US.<sup>66</sup>

### C. UAV Operations over American Territory

The U.S. Attorney General has stated that UAV targeting

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Louis Charbonneau, *U.S. drone Strikes Violate Pakistan's Sovereignty: U.N.*, REUTERS, (Mar. 15, 2013), <http://www.reuters.com/article/2013/03/15/us-un-drones-idUSBRE92E0Y320130315>.

<sup>64</sup> O'Connell, *supra* note 26.

<sup>65</sup> John Sides, *Most Americans Approve of Foreign Drone Strikes*, WASHINGTON POST, (Mar. 10, 2013), *available at* <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/10/most-americans-approve-of-foreign-drone-strikes/>. This article cites a Pew Center poll, which conducted a random survey of Americans. They were asked whether they supported "the United States conducting missile strikes from pilotless aircraft called drones to target extremists in countries such as Pakistan, Yemen and Somalia?" The results were that 56 percent approved of the strikes, 26 percent disapproved and 18 percent were undecided. *See also* Megan Thee-Brenan, *Poll Shows Isolationist Streak in Americans*, N.Y. TIMES (May 1, 2013), *available at* <http://www.nytimes.com/2013/05/01/world/american-public-opposes-action-in-syria-and-north-korea.html> (also citing a New York Times/CBS News poll demonstrating that 70 percent of those polled favor the use of UAV to carry out attacks against terrorists overseas).

<sup>66</sup> *See* Thee-Brenan, *supra* note 62.

in the U.S. is a possibility in an “extraordinary circumstance” to prevent an attack similar to Pearl Harbor or 9-11.<sup>67</sup> This is not as remote of a possibility as one would think. The Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 “requires the FAA to begin integrating unmanned aircraft into the national airspace system by the end of fiscal year 2015.”<sup>68</sup> The FAA currently consents to the use of unmanned aircraft by public entities such as law enforcement on an individual basis. However, requests for such use have increased dramatically in recent years.<sup>69</sup> Few Americans support UAV targeting in the U.S. against a suspected terrorist, regardless of whether the suspected terrorist is a U.S. citizen or not.<sup>70</sup> Only 25 percent support UAV airstrikes in the US against suspected foreign terrorist living in the U.S., and the support is even less for UAV targeting of US citizens living in the U.S. who are suspected terrorists (13%).<sup>71</sup>

One rationale for the low support is that most Americans perceive UAVs as an instrument of the military or CIA, not of law enforcement. Americans have long-standing suspicions against using the military in a law enforcement capacity (e.g., the Posse Comitatus Act).<sup>72</sup> However, the weapon system on a UAV is just like any other lethal weapon used by the police. In that light, the inquiry should revolve around the imminence of the danger, and the lack of a less violent alternative. Current law dictates that lethal force against a criminal suspect is permissible when the police officer has probable cause to fear for

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<sup>67</sup> Terry Frieden, *Holder Does Not Rule Out Drone Strike Scenario in U.S.*, CNN (Mar. 6, 2013), <http://www.cnn.com/2013/03/05/politics/obama-drones-cia>.

<sup>68</sup> Elias, *supra* note 2, at Summary.

<sup>69</sup> *Id.* at 5.

<sup>70</sup> Alyssa Brown and Frank Newport, *In U.S., 65% Support Drone Attacks on Terrorists Abroad*, GALLUP POLITICS, (Mar. 25, 2013), <http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx>.

<sup>71</sup> *Id.*

<sup>72</sup> 18 U.S.C. § 1385. The Posse Comitatus Act was a compromise to end Reconstruction and was due to southerners' abhorrence of federal troops serving in law enforcement capacities after the Civil War. The Act prevents using federal troops to enforce laws generally carried out by police. See Sydney J. Freedberg, Jr., *Posse Comitatus: Tiny Law, Big Impact*, NAT'L J. Nov.12, 2005, at 3557.

his or her life, or the lives of others.<sup>73</sup> Therefore, the question should center on whether there is probable cause or an imminent threat that precludes apprehension.

Another possible concern regarding the use of UAV within the U.S. is the belief in the right to privacy, and the fear that America will become akin to George Orwell's novel *Nineteen Eighty-four* in which the government is engaged in omnipresent surveillance.<sup>74</sup> Because of these apprehensions, legislators in Florida, Virginia and Idaho passed laws that prevent UAV observation by law enforcement at public gatherings.<sup>75</sup> There are likewise more than 30 proposed laws under consideration across the US that are similar to the laws already in effect.<sup>76</sup> The current laws do not preclude the police from using UAVs to locate a fleeing suspect or in an emergency.<sup>77</sup>

These concerns raise the issue of a foreign nation conducting strikes against its own list of alleged terrorists on American soil. Has the U.S. set a precedent for strikes within the borders of a foreign nation, without the consent of that nation, based on a declared war on a group or groups within that nation's populace? The only known States that have armed UAV capabilities are Israel, Great Britain and possibly Italy.<sup>78</sup> Several other nations are known to be seeking them: France, Germany, Turkey, India, Russia, Taiwan, China, Iran, South Korea, Pakistan, Turkey, Saudi Arabia and the United Arab Emirates.<sup>79</sup> Hezbollah has launched a crude, Iranian-made UAV, that carries an eighty-eight pound armament, which is activated when the UAV slams into its mark (Israel has intercepted several of these sorties).<sup>80</sup> Based on current data, it is unlikely that most States or non-State actors will have a long-range, armed UAV within ten years to threaten the U.S. security interests or those

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<sup>73</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>74</sup> See generally George Orwell, *Nineteen Eighty-Four* (1949).

<sup>75</sup> Maggie Clark, *After Boston, Police Use of Drones Debated*, POLITICO, May 6, 2013.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Micah Zenko, *Reforming U.S. Drone Strike Policies*, COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORT NO. 65 (2013).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 21.

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on U.S. soil.<sup>81</sup> Lack of capability, however, does not equate to lack of weighing an option. Nevertheless, this paper will show that the US has set the precedent for other States to lawfully conduct UAV strikes within the US.

The rules for targeting remain classified by both the US DoD and the CIA.<sup>82</sup> There is no congressional or judicial oversight - the Justice Department asserts dominion remains solely in the executive branch of government.<sup>83</sup> Thus, any legal analyses that justify the killings are not released to the public or any other government agency outside the executive branch. The lack of disclosure invites the criticism that UAV killings are indiscriminate and not in conformity with US or international law.<sup>84</sup>

Sections II, III and IV of this paper will use three concepts to affirm a legal basis for the use of UAV strikes outside a war zone.

## II. TARGETING UNDER *JUS AD BELLUM*

### *A. Customary International Law, the United Nations Charter and Self-Defense*

When one State can use force against another is guided by the principles of *jus ad bellum* or the “right to wage war.”<sup>85</sup> This concept requires a State to only resort to force in limited circumstances, which are codified in the United Nations Char-

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<sup>81</sup> *Id.* at 20-21.

<sup>82</sup> Mary Ellen O’Connell, Op-Ed., *The Questions Brennan Can’t Dodge*, N.Y. TIMES, Feb. 6, 2013, <http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html>. Critics have accused President Obama of hypocrisy for keeping the legal opinions that justify UAV targeting secret, noting that shortly after his inauguration he ordered the public release of classified memos governing CIA interrogations under President George W. Bush. See also Michael Shear & Scott Shane, *Congress to See Memo*, N.Y. Times Feb. 6, 2013.

<sup>83</sup> O’Connell, *supra* note 79.

<sup>84</sup> Lev Grossman, *Drone Home*, TIME MAGAZINE, Feb. 11, 2013. Critics also charge the US has engaged in “signature strikes” aimed at anyone “whose behavior conforms to suspicious patterns,” not just high-level AQ members.

<sup>85</sup> Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, J. INT’L BUS. & L. 1, 2 (2011).

ter and customary international law (CIL).<sup>86</sup> Those limited circumstances include self-defense, or when a state has authorization from the United Nations Security Council.<sup>87</sup>

The United Nations (UN) Charter attempts to restrict States from using force against another State or “against the territorial integrity or political independence of any State”.<sup>88</sup> Article 2(4) of the UN Charter states that “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...”<sup>89</sup> These restrictions are in accordance with the central theme of the UN Charter: States should respect each other’s internal affairs and national sovereignty.<sup>90</sup>

As mentioned above, there are instances where a State may justifiably use force against another State or within a State’s borders. The first is where a State can claim their actions were in self-defense, and the second is when the force is authorized by the UN Security Council under Chapter VII of the UN Charter.<sup>91</sup> The use of force in self-defense is based on CIL, which was codified in Article 51 of the UN Charter:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security....”<sup>92</sup>

There are two types of self-defense: individual and collective.<sup>93</sup> Individual self-defense is generally thought to include a State’s right to protect its territorial integrity, its political independence and the protection of its citizens and their property abroad.<sup>94</sup> Collective self-defense is the right of a State to re-

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<sup>86</sup> *Id.* at, 4.

<sup>87</sup> U.N. Charter art. 51,

<sup>88</sup> U.N. Charter art. 2(4).

<sup>89</sup> *Id.*

<sup>90</sup> U.N. Charter art. 2.

<sup>91</sup> *Id.*; see also U.N. Charter, art. 39. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>92</sup> U.N. Charter art. 51.

<sup>93</sup> *Id.*

<sup>94</sup> Richard DiMeglio, et al., *Law of Armed Conflict Deskbook* 35 ( The



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ceive support from or join with another State to react to an attack or fend off an attack.<sup>95</sup> Prior to a Security Council authorization, the Council will examine the act of aggression and make a determination concerning how the international peace and security can be restored.<sup>96</sup>

B. Authorizations under United Nations Security Council Resolutions and Operation *Enduring Freedom*

The UN Security Council implicitly recognized the right of a State to take action in self-defense following a terrorist attack in Security Council Resolution 1368 (SCR 1368).<sup>97</sup> This occurred following AQ's attack on the US on 9-11.<sup>98</sup> The resolution "unequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 ... and regard[ed] such acts, like any act of international terrorism, as a threat to international peace and security ..."<sup>99</sup> The Security Council reiterated its position in SCR 1373 less than three weeks after 9-11, affirming "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts ..."<sup>100</sup> The resolution also recognized a duty of each State to not ignore terrorist activities within its borders stating, "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts ..."<sup>101</sup> In line with the sentiments of SCRs 1368 and 1373, the U.S. invaded Afghanistan and attacked both AQ and the then-government of Afghanistan, the Taliban, on October 7, 2001. The operation was termed *Enduring Freedom* (OEF).

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Judge Advocate General's Legal Center and School, U.S. Army 2012), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/LOAC-Deskbook-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf).

<sup>95</sup> *Id.* at 36.

<sup>96</sup> U.N. Charter art. 42.

<sup>97</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), available at <http://www.refworld.org/docid/3c4e94557.html>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), available at <http://www.state.gov/j/ct/rls/other/un/6135.htm>

<sup>101</sup> *Id.*

The US and its allied forces involved in OEF used the basis of self-defense as the justification for the use of force to invade Afghanistan. The US Ambassador to the United Nations at the time, John Negroponte, notified the Security Council of the invasion and cited self-defense as its justification:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, 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 on 11 September 2001...<sup>102</sup>

The international community recognized the right of the US to use force against AQ and the Taliban, even though responding to terrorist attacks was historically a matter for law enforcement. International entities such as the North Atlantic Treaty Organization, the European Union and the Organization of American States joined in condemning the attacks and recognized the right of the US to defend itself.<sup>103</sup> Even unlikely advocates, such as China and Russia, endorsed OEF.<sup>104</sup> Thus, UAV strikes remain necessary to decimate AQ leadership and keep their training and subversive efforts thwarted. No other known means are as effective as UAV strikes for these purposes.<sup>105</sup>

### 1. Proportionality

The other test under *jus ad bellum* is proportionality, which limits the force to what is necessary to circumvent the threat.<sup>106</sup> However, proportionality does not require an eye for

<sup>102</sup> Letter of John Negroponte to the President of the Security Council, AVALON.LAW.YALE.EDU, [http://avalon.law.yale.edu/sept11/un\\_006.asp](http://avalon.law.yale.edu/sept11/un_006.asp) (last visited Apr. 4, 2013).

<sup>103</sup> Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 9-10 (2008).

<sup>104</sup> *Id.*

<sup>105</sup> Daniel L. Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, THE BROOKINGS INSTITUTION, July/August 2013, available at <http://www.brookings.edu/research/articles/2013/06/17-drones-obama-weapon-choice-us-counterterrorism-byman#>.

<sup>106</sup> Schmitt, *Responding to Transnational Terrorism*, at 16.

an eye or parity between the terrorist attack and the State's response.<sup>107</sup> Critics argue that UAV strikes are no longer proportional to the attacks on 9-11 given the architects of 9-11 were killed or captured. This is likewise a narrow, "tit for tat" analysis. AQ still seeks weapons of mass destruction (WMD) to inflict on the West's nuclear capabilities are not the only WMD that AQ seeks. Toxins such as ricin, anthrax and botulinum toxin "appear in several AQ post-September 11 terrorist plots."<sup>108</sup> The employment of UAVs have curtailed these pursuits. Al Qaeda's WMD program was impeded in 2008 when AQ's "chief scientist and master bomb-maker," Abu Khabab al-Masri was killed by a UAV operation in Pakistan.<sup>109</sup> Thus, in this instance the proportionality test was met because the killing by UAV greatly outweighed the mass destruction that could have occurred if al-Masri and AQ continued in their pursuit of WMDs.

#### *D. Anticipatory Self-Defense*

Another criticism of the UAV program is the force used by the US is no longer grounded in self-defense. The U.S. subscribes to the theory of anticipatory self-defense.<sup>110</sup> Under this concept, the U.S. is not required to wait for an attack before it can defend itself. Instead, it may repel an imminent attack before it occurs.<sup>111</sup> This analysis is logical. As stated by Professor Yoram Dinstein of Tel Aviv University, "[i]t [is] absurd to require that the defending State should sustain and absorb a

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<sup>107</sup> *Id.*

<sup>108</sup> Jenkins, *Al Qaeda in Its Third Decade*, at 3.

<sup>109</sup> *Id.*

<sup>110</sup> The concept is not new. In 1914, former Senator and Secretary of State, Elihu Root, stated "Every sovereign state [has the right] to protect itself by preventing a condition of affairs in which it will be too late to protect itself." Michael Gerson, "Obama's Drone Policy, Rooted in Self-Defense," WASH. POST, Feb. 7, 2013.

<sup>111</sup> Some in the international community advocate the very narrow view that a State may only use force following an armed attack and then only after the Security Council takes effective action per United Nations Charter, Article 51. U.N. Charter art. 51. In their view, the Charter eliminated the concept of anticipatory self-defense, and the right of a State to act independently of the Security Council. The United States takes the opposite opinion, contending that the inherent right of self-defense was not expunged by the UN Charter.

devastating (perhaps a fatal) blow, only to prove the immaculate conception of self-defence.”<sup>112</sup> Anticipatory self-defense makes sense, especially in response to terrorism. Since terrorist groups do not have the resources to match arms with the target State, they must rely on surprise to exert the greatest effects. Thus, catching a State unaware is the objective. As articulated by President George W. Bush in his 2002 National Security Strategy (NSS):

[Terrorists] rely on acts of terror and, potentially, the use of weapons of mass destruction - weapons that can be easily concealed, delivered covertly, and used without warning ... To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>113</sup>

This position was reinforced four years later in President Bush's 2006 NSS:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries ... The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.<sup>114</sup>

The Obama Administration has likewise taken the position that UAV strikes are justified under an anticipatory self-defense basis.<sup>115</sup> The key to anticipatory self-defense is that the

<sup>112</sup> Yoram Dinstein, *War, Aggression, and Self-Defence*, 191 (Cambridge, 4<sup>th</sup> ed., 2005). cited by Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework*, NAVAL L. REV. 23, 64 (2008).

<sup>113</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, September 2002), 15.

<sup>114</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, March 2006), 18.

<sup>115</sup> Eric Holder, Attorney General of the United States, Speech to Northwestern University School of Law, (March 5, 2012) available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (“Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans

action is made to forego an imminent armed attack.

Critics of the America's interpretation of anticipatory self-defense assail it as preventative, and thus illegal under international law.<sup>116</sup> They argue that the window of opportunity to prevent a terrorist attack is generally so small and obscure to render anticipatory self-defense unavailing.<sup>117</sup> Professor Michael Schmitt of the US Naval War College advocates a two-pronged test before anticipatory self-defense is employed against non-State terrorists.<sup>118</sup> First, the State must identify a group with intent to execute an attack against the State. Second, the group must make significant advancement toward obtaining the manner to execute an attack. Therefore, the test involves intent to attack by a group and an overt act towards carrying out the attack. This test is reasonable and should assure the international community that States are not acting indiscriminately when targeting non-State actors.

#### *E. State Sovereignty*

However, even if Professor Schmitt's test is satisfied, does that allow one State to violate the sovereignty of a second State in order to launch an attack against a non-State actor operating within the borders of that second State? Sovereignty is the right of a State to be free from outside meddling and incursion. As mentioned earlier, it is a fundamental right in CIL and articulated in the UN Charter.<sup>119</sup> Critics of the UAV program contend that the US does not have the right to violate another State's sovereignty, outside of a combat zone, even if there is a legitimate target and other jus ad bellum criteria are met (E.g.,

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would be killed.”).

<sup>116</sup> Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law*, ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW, Vol. 17: Iss. 1, Article 8 available at <http://digitalcommons.law.ggu.edu/annlsurvey/vol17/iss1/8>.

<sup>117</sup> Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 Vill. L. Rev. 699 (2005).

<sup>118</sup> Schmitt, *supra* note 112, at 65.

<sup>119</sup> “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.

necessity and proportionality).<sup>120</sup>

Nevertheless, sovereignty should not take precedence over self-defense. Outside the recent combat zones of Iraq and Afghanistan, the US has engaged in UAV strikes primarily in Pakistan, but also in Yemen and Somalia.<sup>121</sup> Some of these strikes were undertaken with the consent of the “host” nation, while others were not.<sup>122</sup> It is lawful for another State to conduct counter-terrorist operations with the consent of the host State.<sup>123</sup> For example, in cooperation with Yemeni officials, the US administered a UAV strike in 2012 on a group intending to attack Yemeni troops.<sup>124</sup> Nine people were killed including Nader al-Shaddadi, a leader of the local branch of AQ.<sup>125</sup> The issue is less clear, however, when no explicit consent is given by the host State.

Many times, the US does not obtain the express consent of the host State prior to UAV strikes, only tacit consent. Political reasons or internal instability may prevent a host State from giving express consent. For instance, Pakistan’s refusal to give express consent after notification from the U.S. of its intent to conduct UAV strikes could serve the competing designs of maintaining good relations with the U.S., while dissociating Pakistan from UAV operations, which are abhorred by its citizens.<sup>126</sup> In an April 2012 speech, White House counterterrorism advisor (now CIA Director), John Brennan, said the Obama Administration concluded there is no law barring the U.S. from

<sup>120</sup> O’Connell, *Unlawful Killing with Combat Drones*, at 19.

<sup>121</sup> O’Connell, *The Questions Brennan Can’t Dodge*.

<sup>122</sup> Adam Entous, Siobhan Gorman, & Evan Perez, *U.S. Unease Over Drone Strikes*, WALL ST. J., September 26, 2012.

<sup>123</sup> Schmitt, *supra* note 112, at 67; but see, O’Connell, *Unlawful Killing with Combat Drones*, at 16. Professor O’Connell asserts that it is unlawful to use drone outside of a combat zone even if the State consents to the strike within the State’s borders.

<sup>124</sup> Nasser Arrabyee, *Qaeda Leader Reported Dead in Yemen Attack*, N.Y. TIMES (Oct. 18, 2012), <http://www.nytimes.com/2012/10/19/world/middleeast/yemen-drone-strike-al-qaeda.html>.

<sup>125</sup> *Id.*

<sup>126</sup> Entous, et al., *supra* note 129 (“Approximately once a month, the CIA sends a fax to Pakistani intelligence outlining broad areas where the US intends to conduct UAV strikes. The Pakistanis do not respond.” Although the Pakistanis do not formally reply, they clear airspace for the UAV and do not interfere with the aircraft in any way. The US takes these actions and omissions as tacit consent.)

using lethal force outside of a combat zone, “provided the country involved consents or is unable or unwilling to take action against the threat.”<sup>127</sup> One month before, Attorney General Eric Holder articulated this same doctrine known as “unwilling or unable.”<sup>128</sup>

#### *F. The “Unwilling or Unable” Doctrine*

The unwilling or unable doctrine is grounded in the philosophy that a State “cannot be deprived of its right to defend itself, but at the same time must allow the host State a reasonable opportunity to remedy the matters before suffering a non-consensual violation of its territory.”<sup>129</sup> Aside from responding to requests from another State to infringe on a host State’s territory, all States are responsible to maintain order in their domain, making certain their territory is not utilized to the impairment of another State’s security.<sup>130</sup> The Taliban did not do this, instead allowing AQ to establish training camps and plot terrorist activities including those involving 9-11 within its borders.<sup>131</sup> The U.S. gave warning to the Taliban prior to launching OEF, demanding that they turn over bin Laden and those who planned the terrorist attack.<sup>132</sup> The Taliban refused,<sup>133</sup> and their regime was toppled shortly thereafter.<sup>134</sup>

<sup>127</sup> *Id.* This doctrine is also articulated by Professor Dinstein cited by Schmitt, *Responding to Transnational Terrorism*, at 21-22.

<sup>128</sup> Attorney Gen., Eric Holder, Speech to Northwestern University Sch. of Law (Mar. 5, 2012).

<sup>129</sup> Schmitt, *supra* note 112, at 70.

<sup>130</sup> *Id.* 23-24 (Citing the International Court of Justice (ICJ) case of *Corfu Channel* in which it held that every State had an obligation to not knowingly allow its territory be used for acts contrary to the rights of others). *But see* the ICJ cases of *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005, I.C.J. 25 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10521.pdf>, <http://www.icj-cij.org/docket/?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>; U.N. Secretary-General, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, U.N. Doc. A/ES-10/L.16 (Dec. 3, 2003), available at <http://www.icj-cij.org/docket/files/131/1497.pdf>.

<sup>131</sup> Schmitt, *supra* note 136, at 22.

<sup>132</sup> John F. Burns WITH Christopher S. Wren, *Without Evidence, the Taliban Refuses to Turn Over bin Laden*, N.Y. TIMES (Sept. 21, 2001), <http://www.nytimes.com/2001/09/21/international/21CND-PAK.html>.

<sup>133</sup> *Id.*

<sup>134</sup> Jayshree Bajoria AND Zachary Laub, *The Taliban in Afghanistan*,

Security Council Resolution 1373 also recognizes the duty of a State to refrain from instigating, assisting or acquiescing in organized terrorist activities within its borders: “[E]very State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts...”<sup>135</sup> Thus, there are actions which could make the host State complicit in the activities of a terrorist organization acting within its borders, allowing the offended State to act in self-defense against the host State (e.g., the Taliban in Afghanistan).

It is possible that the host State is unaware of the actions within its borders, or which actions the victim State wishes to take or have taken within the host State. Thus, the victim State must make a demand on the host State to fix the complained wrong, and give the host State a reasonable time to comply.<sup>136</sup> The failure of the government of the host State to do so because it is unwilling or unable provides the victim State the right to intervene within the host State’s borders. The intervention must be restricted to addressing the hazard within the host State as expeditiously and precisely as possible.<sup>137</sup>

#### *G. Summary Analysis under Jus ad Bellum*

The United States use of UAVs is compliant with the principles of Jus ad Bellum. Under this concept, a State is justified in using force in self-defense. The UN Security Council recognized such a right following the terrorist attack of 9-11 in various resolutions in 2001. America asserted the right of self-defense to invade Afghanistan, and allies and UN Member States endorsed the actions of the U.S. Although more than a decade has passed since the invasion of Afghanistan, the threat of violent extremism from AQ and its associated forces still ex-

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<http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> (last visited Feb 12, 2014).

<sup>135</sup> S.C. Res. 1373, U.N. Security Council, Resolution 1373, S/RES/1377, September 28, 2001, <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (accessed 4/2/13). The resolution goes into much detail on the acts or omissions that are considered unlawful actions by States in relation to the prevention of terrorist activities.

<sup>136</sup> Schmitt, *supra* note 136, at 27.

<sup>137</sup> Schmitt, *supra* note 136.



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ists today. Given such, America's invocation of anticipatory self-defense is necessary to forego a future attack. Outside of a combat zone, UAV strikes are lawful when the U.S. obtains the consent of the State where the attack will occur, or when the State is unwilling or unable to confront the threat.

### III. TARGETING UNDER *JUS IN BELLO*

#### A. *Introduction to Jus in Bello*

The previous analysis under *jus ad bellum* took into account *when* force is permissible. Similarly, the rules on the *type* or *means* of military force are guided by the principles of *jus in bello* (law of war).<sup>138</sup> *Jus in bello* is primarily codified in the Hague Conventions, the Geneva Conventions and CIL, and is guided by the principles of military necessity, distinction, proportionality and humanity.<sup>139</sup> These principles explicitly define what and who may be targeted and how such targeting may occur.

#### B. *Military Necessity*

Military necessity is the means necessary to obtain military objectives. Military objectives are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization ... offers a definite military advantage."<sup>140</sup> Only military targets are lawful objects for direct

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<sup>138</sup> It is DoD policy to ensure compliance with the law of war regardless of level of armed conflict or how the conflict is characterized. U.S. Department of Defense, *Department of Defense Law of War Program*, Department of Defense Directive 2311.01E (Washington, DC: U.S. Department of Defense, May 9, 2006), paragraph 4.1. However, some scholars argue that the LOAC does not apply to AQ or its associated forces since they do not meet the legal standards, such as wearing uniforms or following the customs of warfare. See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009), <http://insct.syr.edu/wp-content/uploads/2013/03/Sitaraman-Ganesh.CT-GWOT-and-the-LOAC.2009.2.pdf>.

<sup>139</sup> This analysis is separate and distinct from the *jus ad bellum* analysis of necessity and proportionality described above in Section II.C.

<sup>140</sup> U.S. Joint Chiefs of Staff, *Joint Targeting*, Joint Publication 3-60 (Washington, DC: U.S. Joint Chiefs of Staff, January 31, 2013) E-2.

attack.<sup>141</sup> CIL makes a distinction between combatants and noncombatants (usually – but not always – civilians). Combatants, and those participating in hostilities that have demonstrated a hostile intent or performed a hostile act, may be targeted.<sup>142</sup> Civilians cannot be targeted nor can other people who are *hors de combat* or “outside the fight.”<sup>143</sup> Persons that fit this definition include prisoners of war, medical personnel engaged in medical duties, and combatants who are wounded and who cease to fight.<sup>144</sup>

Civilian status is presumed until there is evidence to the contrary.<sup>145</sup> Given that AQ members do not wear distinctive insignia or uniforms that separate them from civilians, a State is required to conduct an analysis prior to a UAV strike to ensure the person is a proper military target. This author proposes the following test prior to UAV targeting: (1) that the potential target is a member of AQ or its affiliate organizations; (2) that the target has taken or is currently engaged in actions against the US that have caused or could cause death or physical injury to US citizens or significant destruction of US property; (3) the target continues to participate in the activities of AQ or its affiliate organizations; and (4) the target has not re-

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<sup>141</sup> Trevor A. Keck, *Not all Civilians are Created Equal: The Principles of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115 (2012).

<sup>142</sup> *Id.*

<sup>143</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 50, 51, June 8, 1977, 1125 U.N.T.S. 609, [hereinafter Protocol Additional to the Geneva Convention]. However, civilians can lose their protection “for such time as they take a direct part in hostilities.” See, Protocol Additional to the Geneva Convention, *Id.* at article 51(3).

<sup>144</sup> Geneva Convention Relative to the Treatment of Prisoners of War and Medical Personnel art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 24, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC II].

<sup>145</sup> AP I, article 50(1). Some have referred to terrorists as “unlawful combatants”, “irregular forces” or “unprivileged enemy belligerents” since they do not fall into the definition of “combatants” as conceived in the Geneva Conventions. Other scholars argue that AQ are enemy combatants that Congress has authorized the use of force against. See Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (This essay concludes that AQ and its associated forces are enemy combatants in which LOAC applies).

nounced his membership and prior actions.<sup>146</sup>

Using the example of an improvised explosive device (IED), there are numerous people involved in the execution of said device. There is the logistics person who obtains the “ingredients”: for instance, a cell phone, gunpowder, wiring, fuses, projectiles and a container. He or she may deliver these components to the maker or assembler of the IED. A cell leader may select a location for emplacement of the IED. One or more persons may place the IED in the ground, a car or other undetectable place. There may be spotters who signal a triggerman to detonate the IED to ensure maximum casualties in the target area. Thus, one IED attack may involve as many as six or more persons who have taken a direct part in the terrorist act. Each of them could be targeted by a UAV. While there may be policy and/or strategic reasons to the contrary, each of these participants is a proper military target under *jus in bello*.<sup>147</sup>

### C. Distinction

In addition to military necessity, distinction is the principle of *jus in bello* that ensures that only proper parties are targeted. For example, it is unlawful to target civilians or medical personnel engaged in medical duties.<sup>148</sup> Critics of UAV strikes have alleged that vast numbers of civilians are killed along

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<sup>146</sup> This proposed test is similar to the loss of protections for citizens found in AP I, article 51(3). However, it does not contain the limitation of targeting only for the limited time that the civilian is engaged in direct part of hostilities. The test is similarly distinguishable from the “continuous combat function” articulated in the INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER THE INTERNATIONAL HUMANITARIAN LAW 996 (2009) [hereinafter ICRC DPH Guidance].

<sup>147</sup> Some scholars argue that the only legitimate targets are those who directly participate in terrorist activities. They further assert that the direct participants can only be targeted when they are engaged as a combatant. Thus, under this thinking the farmer by day and fighter by night can only be targeted at night. See Philip Alston, Report of the Special Rapporteur on *Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 19, Addendum (May 28, 2010). See also ICRC DPH Guidance, 66-68. (This author does not subscribe to this opinion as it would unjustly favor the terrorist over the State, with potential cataclysmic ramifications to the State).

<sup>148</sup> See *supra* note 150, at articles 50, 51; see also GC I, article 24.

with targeted terrorists.<sup>149</sup> Civilian deaths are always a tragedy but sometimes unavoidable when a terrorist is targeted. AQ leaders are known to use protected persons (e.g., civilians) and places (e.g., religious, charitable or cultural property) as cover to avoid attacks.<sup>150</sup>

A UAV can potentially discriminate more precisely between legitimate and protected targets than traditional manned aircraft or other weapon systems. For instance, the UAV MQ-9 Reaper can soar at 50,000 feet for 32 hours to survey an area two-and-a-half miles wide from 12 simultaneous angles; this persistence ensures that an AQ member is targeted to minimize the killing of civilians and the destruction of civilian property.<sup>151</sup> An imaging system called ARGUS included in some UAVs can detect an item as small as six inches from an altitude of 20,000 feet to ensure that an AQ member is properly identified.<sup>152</sup>

Fatigue is less a concern with UAV than manned aircraft given UAV operators can take shifts while the UAV remains airborne. The operator of a UAV does not have to fear being shot down while waiting for the opportune time to strike. Thus, the UAV controller can focus on ensuring a precise, laser-guided strike on a target. Finally, a strike from a UAV can be pinpoint and produce less collateral damage than an assault by a Special Forces team into a hostile area.

#### *D. Proportionality*

The next consideration in the *jus in bello* analysis is proportionality, which ensures that the benefits from targeting outweigh the damages or collateral effects from the targeting.<sup>153</sup> There is a balancing test between the military advantage and the civilian damage/loss of life.<sup>154</sup> Thus, it may be

<sup>149</sup> Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan*, 21 (2012).

<sup>150</sup> Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 118 (2011).

<sup>151</sup> JEREMIAH GERTLER, U.S. UNMANNED AERIAL SYSTEMS, R42136, 35 (2012); *see also* Grossman, "Drone Home," *supra* note 15.

<sup>152</sup> *See supra* note 15.

<sup>153</sup> Vogel, *supra* note 150, at 124.

<sup>154</sup> Protocol Additional to the Geneva Convention, *supra* note 143, at art. 51(5)(b); *see also* U.S. DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE,

unlawful to strike a bazaar where an AQ leader is shopping if numerous civilians may be killed or wounded in the process. The question hinges upon a judgment that the civilian deaths or property damage is, or is not, excessive in relation to the military advantage that would be achieved by the strike. Suppose the target is an elusive terrorist who rarely presents himself in public and has directed numerous terrorist attacks in the past. Therefore, proportionality may not restrict the attack given the military advantage to be gained by this target's death. In the final analysis, leaders must take all precautions necessary to minimize the loss of life and property damage if available.

### *E. Humanity*

The last component of the *jus in bello* analysis is humanity. This principle attempts to minimize suffering.<sup>155</sup> For instance, it is unlawful to place broken glass in a mortar or grenade which will make it difficult to treat an injured combatant since the glass is not detectable by x-ray.<sup>156</sup> A commander must evaluate if there is a more prudent way to target a person.<sup>157</sup> In the context of UAV, there is no need to capture a terrorist if it would expose friendly forces to unnecessary risk or suffering, or threaten security arrangements between nations by putting American forces on the ground in another State.<sup>158</sup> Moreover, there may be policy reasons that constrain the sending of US forces into a country, with or without the host State's consent. From a strategic standpoint, one could argue that the assault in Abbottabad, Pakistan by Navy SEALs to kill Bin Laden caused greater condemnation from the Pakistani government than many UAV strikes in that country.<sup>159</sup> This is probably the sentiment that "boots on the ground" is a greater infringement on a State's sovereignty than a UAV that flies

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FIELD MANUAL 27-10 5 (1956).

<sup>155</sup> Hague Convention IV Respecting the Laws and Customs of War on Land art. 23(e), (Oct. 18, 1907) 36 Stat. 2277, 205 Consol. T.S. 277.

<sup>156</sup> U.S. Army Field Manual 27-10, *supra* note 161, at § 34.b.

<sup>157</sup> Vogel, *supra* note 150, at 127-128.

<sup>158</sup> Michael J. Boyle, *The Cost and Consequences of Drone Warfare*, 89 INT'L AFFAIRS 12 (2013).

<sup>159</sup> Jane Perlez and David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES, May 3, 2011.

thousands of feet above the ground and launches an attack silently from the sky.

The armaments found on UAV are lawful weapons. However, any lawful weapon has the potential for improper use. Combatants who fire mortars without regard for where the projectiles will land have used a lawful weapon in an unlawful manner. This is not to say that every strike by UAV is lawful. There is not a mandate for a State to anticipate all potential wrongful applications of a lawful weapon system since all weapons are capable of use in an unlawful manner.<sup>160</sup> UAV can employ the same missiles as those carried by manned aircraft. The UAV MQ-1 Predator is armed with two AGM-114 Hellfire missiles, while the MQ-9 Reaper carries up to sixteen Hellfire missiles.<sup>161</sup> The Army's Apache helicopter carries the same number of Hellfire missiles as the Reaper, but nobody has suggested that the Apache is an unlawful weapon system.<sup>162</sup> What makes the UAV unique is its operation by personnel, who are at times thousands of miles from the scene of the strike. Regardless of its mysterious nature, the UAV is still a lawful weapons system.

#### *F. Summary Analysis under Jus in Bello*

America's uses of UAVs pass the necessary criteria of *jus in bello* when the target is evaluated for military necessity, distinction, proportionality and humanity. Under military necessity, only military objectives can be targeted. Terrorists are lawful objects to attack. Identifying these targets is challenging given AQ members do not wear distinctive insignia or uniforms. Given the ability of UAVs to hover over an area for hours at a time and sophisticated imaging systems, they have the ability to discriminate between legitimate and protected targets. Like other weapons systems, commanders must perform a proportionality analysis that weighs the collateral effects from targeting terrorists. The weapons on UAVs are lawful weapon system, and are the same as used on piloted

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<sup>160</sup> Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 22 U. PA. J. INT'L L. 687 (2012).

<sup>161</sup> Gertler, *supra* note 156, at 35.

<sup>162</sup> *Id.*

aircraft. In the final analysis, a UAV is a lawful weapon system, as long as UAVs are utilized with a focus on minimizing human suffering.

#### IV. TARGETING UNDER DOMESTIC LAW

##### A. *The Department of Justice White Paper*

Any decision to employ force must rest upon the existence of a legal basis in international law from the dual perspectives of *jus ad bellum* and *jus in bello*.<sup>163</sup> Another prerequisite is the domestic law of a State.<sup>164</sup> The Obama Administration justified the targeting of American citizens via UAV in a 2012 memorandum published by the Department of Justice titled “Lawfulness of a Lethal Operation Directed against a U.S. Citizen who is a Senior Operational Leader of Al-Qa’ida or an Associate Force.”<sup>165</sup> This unclassified, undated White Paper (with no listed author) was obtained by the press during the Senate confirmation hearings for John Brennan to be Director of the CIA. Much of the analysis in the White Paper is applicable to targeted persons irrespective of US citizenship.

The sixteen-page memo details the elements that the Obama Administration deems necessary prior to the targeting of a U.S. citizen.<sup>166</sup> First, the targeted individual must present an imminent threat of violent attack against the U.S.<sup>167</sup> Second, the U.S. citizen must have joined AQ or its associated forces and is a senior operational leader.<sup>168</sup> Third, capture must be infeasible.<sup>169</sup> Lastly, the operation, must be conducted in accordance with the previously discussed LOAC (and its

<sup>163</sup> Richard DiMeglio, *supra* note 94, at 8.

<sup>164</sup> Larson, *supra* note 82, at 2.

<sup>165</sup> “Lawfulness of a Lethal Operation Directed against a U.S. Citizen who is a Senior Operational Leader of Al-Qa’ida or an Associate Force,” [hereinafter White Paper]. [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (accessed 4/10/13). There appears to be a classified version of the White Paper that was not publicly released but was shown to members of two Congressional Committees; see O’Connell, *supra* note 26.

<sup>166</sup> *Id.*

<sup>167</sup> White Paper, at 1.

<sup>168</sup> *Id.* at 2.

<sup>169</sup> *Id.* at 6.

components of necessity, distinction, proportionality and humanity).<sup>170</sup> The legal determinations are not new; they closely reflect those given by Attorney General Eric H. Holder, Jr. in a speech he gave at Northwestern University School of Law on March 5, 2012.<sup>171</sup> Let us examine five assertions within the White Paper: 1) Authorization for Use of Military Force; 2) Associated Forces as Targets; 3) Imminence of the Threat; 4) Capture of Suspect Infeasible; and 5) No Mandatory Judicial Review.<sup>172</sup>

### *B. Authorization for the Use of Military Force*

The White Paper's primary argument for justification of targeting a U.S. citizen, who has joined AQ or its associated forces, is the President's alleged constitutional responsibility to protect the U.S. and its citizens.<sup>173</sup> The document also bases the right to target U.S. citizens who are senior leaders of AQ under the self-defense justification in both CIL and Article 51 of the U.N. Charter. The White Paper further cites Public Law 107-40, Authorization For Use of Military Force in Response to the 9/11 Attacks, (AUMF).<sup>174</sup> This legislation authorizes the President to use military force against only those international terrorists and other parties directly involved in aiding or materially supporting the 9-11 attacks.<sup>175</sup> The relevant portion of

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<sup>170</sup> *Id.* at 1.

<sup>171</sup> Eric Holder, Attorney General of the United States, Speech to Northwestern University School of Law, (March 5, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>172</sup> White Paper.

<sup>173</sup> Although no specific responsibility is prescribed in the Constitution, it is believed the author meant that this "responsibility" is derived by analogy from the President being the commander in chief of the Army and Navy and his responsibility to "preserve, protect and defend the Constitution of the US." *See generally* U.S. CONST. art. 2, § 1-2; President Obama also references this responsibility in the *National Strategy for Counterterrorism*: "The most solemn responsibility of the President and the United States Government is to protect the American people, both at home and abroad..." Barak Obama, President of the U.S., *National Strategy for Counterterrorism* 1, 8 (June 28, 2011).

<sup>174</sup> AUTHORIZATION FOR USE OF MILITARY FORCE, PL 107-40, September 18, 2001, 115 Stat 224. [hereinafter AUMF].

<sup>175</sup> The AUMF satisfied the authorization required under the War Powers Act. *See* AUMF at §2(b)(1).



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the law reads:

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL. — That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>176</sup>

*C. Associated Forces*

Note that the AUMF only gives the President authorization to take military action against those nations, organizations or persons he has determined to have planned, authorized, committed or aided the 9-11 terrorist attacks. Congress did not give the President a blanket authorization to use force against all terrorist organizations.<sup>177</sup> It is clear that AQ and the Taliban fall under the authorized entities encompassed by the AUMF based on AQ's planning and execution of the 9-11 attacks and the Taliban's harboring of AQ. This Congressional authorization is far-reaching as applied to AQ and the Taliban. It not only authorizes targeting members of AQ and the Taliban who had a part in the 9-11 attacks, but members who played no part in the attacks, and also converts who became a part of AQ or the Taliban after 9-11.<sup>178</sup> The White Paper also asserts the ability to target both AQ and *its associated forces*.<sup>179</sup>

These associated forces can be targeted under the authority of the AUMF if they have a direct connection to AQ.<sup>180</sup> The associated forces with connections to AQ may be dwindling after twelve years of war. AQ was a vertical organization with

<sup>176</sup> AUMF, *supra* note 174.

<sup>177</sup> Richard F. Grimmett, Cong. Research Serv., RL22357, Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History 3 (2007).

<sup>178</sup> Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005)

<sup>179</sup> White Paper, at 1.

<sup>180</sup> Richard DiMeglio, *supra* note 177, at 3.

a central command structure at the time of 9-11.<sup>181</sup> Since then, AQ has been described by John Rollins, specialist in Terrorism and National Security for the Congressional Research Service, as:

... composed mostly of a core cadre of veterans of the Afghan insurgency against the Soviet Union, with a centralized leadership structure made up mostly of Egyptians. Most of the organization's plots either emanated from the top or were approved by the leadership. Some analysts describe pre-9/11 Al Qaeda as akin to a corporation, with Osama Bin Laden acting as an agile Chief Executive Officer issuing orders and soliciting ideas from subordinates. Some would argue that the Al Qaeda of that period no longer exists. Out of necessity, due to pressures from the security community, in the ensuing years it has transformed into a diffuse global network and philosophical movement composed of dispersed nodes with varying degrees of independence.<sup>182</sup>

Thus, AQ is more fractured and decentralized today than at any time since the 9-11 attacks. This puts a greater burden on the present Administration to ensure the targeted person is a member of an organization actually connected to AQ. Another noteworthy point in the AUMF is that there is no expiration date for the authorization for the use of force. However, Congress could pass a law that revokes this authority at any time. Finally, there is no restriction as to the geographic confines of the authorization: the strike does not necessarily need to occur in a declared combat zone.

#### *D. Imminence of the Threat*

The White Paper sets as a condition that the targeted individual must constitute an imminent threat of a violent attack against the U.S.<sup>183</sup> The paper promulgates a unique definition of "imminent" that "does not require clear evidence of a specific attack on US persons and interests in the immediate future."<sup>184</sup>

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<sup>181</sup> John Rollins, Cong. Research Serv., RS41070, Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy (Jan. 25, 2011).

<sup>182</sup> *Id.*

<sup>183</sup> White Paper, at 1.

<sup>184</sup> *Id.* at 7.

Thus, imminence is inferred as long as the targeted U.S. citizen has recently been involved in activities posing a threat of violent attack, and there is no evidence suggesting that the person has renounced or abandoned such activities. From the author of the White Paper's perspective, senior leaders of AQ are continually planning attacks and prior activity implies intent for future attacks.<sup>185</sup> Thus, imminence is always present or continuous as long as there is no renunciation from the targeted person.

Critics argue that the memo "redefines the word imminence in a way that deprives the word of its ordinary meaning."<sup>186</sup> It is unclear why the administration put this stipulation into the White Paper, since there is no requirement under *jus in bello* that a lawful target be an imminent threat. It is possible that it was included to reinforce the grounds for the strike in the first place: self-defense generally and anticipatory self-defense more specifically. Recall that anticipatory self-defense justifies using force in anticipation of an "imminent" armed attack.<sup>187</sup>

#### *E. Capture of the Terrorist Infeasible*

The White Paper determines that capture is infeasible when the attempt would pose an undue risk to U.S. personnel involved in an operation or if the host State did not consent to the capture within their borders.<sup>188</sup> If capture is not feasible, then the U.S. citizen could be targeted by UAV. There may be policy or strategic considerations to capture a member of AQ or its associated forces instead of targeting them; however, under CIL there is no requirement to capture the target if it would threaten the lives of friendly forces.<sup>189</sup> The only requirement under the humanity analysis of *jus in bello* is to reduce the de-

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<sup>185</sup> *Id.* at 8.

<sup>186</sup> Jameel Jaffer, "The Justice Department's White Paper on Targeted Killing," *ACLU Blog of Rights*, February 4, 2013, <http://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing> (last visited Feb. 12, 2014).

<sup>187</sup> Murphy, *supra* note 117, at 3.

<sup>188</sup> White Paper, at 8.

<sup>189</sup> Keck, *supra* note 141, at 171-172.

gree of suffering caused by a particular weapon system.<sup>190</sup>

#### *F. Judicial Review Not Required*

The White Paper argues that judicial oversight is not required and is in fact inappropriate regarding the targeting of a U.S. citizen.<sup>191</sup> The administration argues that it is well established that matters relating to foreign policy or national security are not the province of the courts, since they involve matters of discretion assigned by the Constitution to the executive branch.<sup>192</sup> This may be technically accurate; however, the absence of a legal requirement in our current system does not make such targeting a correct policy decision.

Congress could create an appropriate judicial forum to review the justification for targeting a U.S. citizen and rule on this action. While perhaps not legally required, it is logical under basic due process for certain checks on executive branch power to be in place prior to the taking of a U.S. citizen's life. The American legal system gives more rights to a U.S. citizen prior to police searching his or her home than when they are marked for a drone strike; the former action requires a court-issued search warrant.<sup>193</sup>

The present Administration should introduce legislation to Congress that would create a special court to review the analysis and evidence from the executive branch that indicates a U.S. citizen meets all criteria under domestic and international law prior to targeting.<sup>194</sup> This special court would be empowered to authorize or decline the government's request for that U.S. citizen to be added to the targeted list. If time would not permit bringing the evidence before the court, the legislation must include other safeguards such as post-targeting reporting to the court and/or select committees or subcommittees of Congress. A similar reporting system to Congress should be in

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<sup>190</sup> See *supra* note 143. Protocol Additional to the Geneva Convention at article 51(5)(b).

<sup>191</sup> White Paper at 10.

<sup>192</sup> *Id.*

<sup>193</sup> See U.S. CONST. amend. IV.

<sup>194</sup> Editorial Comment, *A Court for Targeted Killings*, N.Y. Times (Feb. 13, 2013), <http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html>.

place for targeted AQ members who are not U.S. citizens. Without such legal protections, the United States government will continue to be accused of violating LOAC and infringing on the sovereignty of other States.

*G. Summary Analysis of Targeting under Domestic Law*

In sum, the AUMF empowers the executive branch to take military action against AQ and the Taliban. The White Paper cites the authority from the AUMF, amongst other claimed authorities. In addition, the White Paper claims authority to not only target AQ and Taliban senior leaders, but also members of its “associated forces.” As a condition for targeting, the White Paper notes the target must constitute an imminent threat of a violent attack against the US. The author of the White Paper takes a broad definition of “imminence” in regards to the threat to the U.S., indicating that imminence is inferred as long as the targeted person has recently been involved in activities posing a threat of violent attack, without any evidence of renunciation. The White Paper also determines that capture is infeasible if the attempt would pose an undue risk to U.S. troops involved in an operation or if the host State did not consent to the capture within its borders. Finally, the White Paper argues that judicial oversight of UAV targeting is not required since it is a matter of foreign policy or national security, which is reserved to the executive branch.

V. CONCLUSION

Administrations since 9-11 have wielded power in the form of unmanned aircraft flying thousands of feet above their targets. The concept of lethality without exposing a pilot to harm was attempted virtually from the advent of flight. During OEF, those capabilities were realized and honed to find and target Taliban, AQ and associated fighters in Somalia, Yemen, Pakistan, Iraq and Afghanistan. This paper has argued that, within certain parameters, the U.S. can legitimately target terrorists under the AUMF outside a combat zone as long as the government conducts proper analysis prior to such targeting. This use of force is permitted in self-defense under both customary international law and the United Nations Charter.

The UAV targeting has reduced the ranks of leadership and the decentralization of AQ and its affiliates. "Eliminating AQ's leadership is an effective way of disrupting its command and control and reducing its operational capabilities, but these killings will not end AQ's terrorist crusade" unless they are properly integrated into the *U.S. National Counterterrorism Strategy*.<sup>195</sup> In fact, secondary effects from targeting (civilian deaths) increase the size of the recruiting pool for AQ. These consequences can perpetuate the very conflict the UAV program seeks to eliminate.

This is not to say that the UAV program does not have its place as a permissible weapon system in the commander's arsenal. There is a time and place for UAV targeting, especially in the "shadowy and secretive world of transnational terrorism."<sup>196</sup> The judicious use of this weapon alongside other elements of national power will comprehensively combat AQ and its ruthless ideology.

When President Obama was elected in 2008, he wanted to restore the United States' reputation in the international community as a good neighbor following the failure of American forces to find weapons of mass destruction in Iraq and the controversial interrogation practices that followed the invasions of Iraq and Afghanistan.<sup>197</sup> His administration's current practice of targeted killings using UAVs potentially damages that restoration campaign. A clearly articulated process with appropriate checks and balances is essential for domestic support at home and tolerated acceptance abroad of the UAV program. An appropriate judicial forum to review and approve targeted killings of U.S. citizens abroad will assist in adding transparency and legitimacy to a criticized secret program. Additionally, disclosures to Congress concerning non-citizens will ensure

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<sup>195</sup> Jenkins, *supra* note 28, at 15.

<sup>196</sup> Per Professor Schmitt, "In the shadowy and secretive world of transnational terrorism, that window can close long before a terrorist strike takes place. Stated bluntly, when the opportunity presents itself, it may be necessary, and lawful, to kill a terrorist that you cannot capture, even though you do not know precisely when and where he or she will strike." Schmitt, *supra* note 112, at 66.

<sup>197</sup> Barack H. Obama, *Democratic National Convention Acceptance Speech*, Aug. 28, 2008, available at <http://www.nytimes.com/2008/08/28/us/politics/28text-obama.html?pagewanted=all&r=0>.

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that the administration is conducting the proper legal analysis before targeting a suspected terrorist.