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The U.S. Employment of Unmanned Aerial Vehicles (UAVs): An Abandonment of Applicable International Norms

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I. INTRODUCTION

The subject of the *Texas A&M Law Review* Symposium serving as the genesis for this edition of the Law Review was that of "New Technology and Old Law-Rethinking National Security." While identifying a clearly topical and timely issue, this Symposium title also appeared to reflect an inherent doubt regarding the ability of the existing, i.e., the *old law*, to effectively regulate the employment of certain elements of 21st century technology for national security purposes. Indeed, the use of *old* to describe the current legal regime relevant to such technology was, in and of itself, somewhat pejorative in nature. The obvious implication to be drawn, then: It was the goal of the Law Review to foster a critical examination of whether existing international legal norms remained relevant to controlling the national security use of certain technological advances. And, as reflected by the Symposium agenda, the specific technology to be assessed was that of cyber—and its national security component—cyber warfare, as well as unmanned aerial vehicles (UAVs), also referred to as drones, or, as designated by the U.S. Air Force, remotely piloted aircraft. This latter form of technology is the subject of this article.

Much has been written over the past several years regarding the increased U.S. employment of UAVs as a weapon system against both combatants on a battlefield and terrorists far removed from an active zone of military operations. As an element of this dialogue, there has occurred a growing discussion as to whether, given what some view as the appearance of *new* threats to national security—existing in the form of al-Qaeda and similar terrorist organizations—there is now a need for enhanced clarity and transparency concerning the legal principles applicable to when, where, and how such systems might be used.[1] The purpose of this article is to demonstrate that, if, in fact, *uncertainty* exists as to the legal norms to be applied in the employment of UAVs against those who threaten U.S. security interests—it is an uncertainty of a U.S. self-inflicted nature. In truth, the *old* law, i.e., currently existing codified and customary international legal principles, can quite sufficiently regulate the lawful use of these systems. Any confusion surrounding this subject is, in reality, due to the consistently self-serving and highly questionable manner in which the U.S. government has both interpreted and applied these norms. Before turning to a discussion of the relevant legal issues, however, it

1. BLUEPRINT FOR THE NEXT ADMINISTRATION: HOW TO ENSURE THAT THE U.S. DRONE PROGRAM DOES NOT UNDERMINE HUMAN RIGHTS, HUMAN RIGHTS FIRST 2 (2013), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Targeted_Killing_blueprint.pdf; David Ignatius, *Dazzling New Weapons Require New Rules for War*, WASH. POST, Nov. 11, 2010, at A5, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/10/AR2010111005500.html.

would be helpful to briefly examine the basic nomenclature of commonly U.S.-deployed UAVs.

II. UAV Capabilities

The U.S. Department of Defense has over 10,000 UAVs in its inventory, with the vast majority of these being used for surveillance and intelligence gathering, rather than for targeting purposes. They range in size from the one-pound Wasp to the fifteen-ton Global Hawk. Thousands were used in the Afghanistan-Pakistan theater of operations, and included those so small that they could be carried by Army and Marine Corps personnel and tossed like footballs in order to peer beyond the horizon. Spy drones—micro UAVs the size of pizza platters capable of monitoring potential targets at a very close range for days at a time—were frequently used. At night, these systems are almost impossible to detect.[2]

The UAVs that constantly have been in the news, however, are the Predator and its larger cousin, the Reaper. For, while also used for surveillance purposes, these are the systems that have been used as the primary weapon platforms for strike missions. The Predator is twenty-seven feet long, powered, essentially, by a high-performance snowmobile engine, produced at a cost of approximately $4.5 million. Given the fact that a modern fighter aircraft carries a price tag of over $140 million, the Predator is a very economical product. The newest version of the Reaper is both larger and faster than the Predator, traveling up to 250 miles per hour, and capable of beaming back up to 65 video images to its operator. Indeed, troops on the ground are able to see what the Reaper sees—in real time—and can actually query the Reaper in operational situations. These systems can effectively linger over and surveil an area for more than twenty hours at a time. As a result, in Afghanistan, they were able to provide continuous protection—and an exceptionally broad view of their surroundings—to both Army and Marine personnel, again—in real-time. They also identified Taliban fighters, monitored their weapon storehouses, their routes into and out of an area, and mapped their roadside bombs. U.S. Special Forces elements used these UAVs to attack the Taliban leadership and their bomb-making networks—often by stacking two to three of these systems over a single compound and monitoring, on a 24-7 basis, all who entered and departed the area.[3]

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2. Lynn E. Davis et al., Armed and Dangerous?: UAVs and U.S. Security 7 (2014).

3. Joby Warrick & Peter Finn, *In Pakistan, CIA Refines Methods to Reduce Civilian Deaths*, Wash. Post, Apr. 26, 2010, at A8; Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. Times, Mar. 16, 2009, at A4, *available at* http://www.nytimes.com/2009/03/17/business/17uav.html?pagewanted=all&_r=0; Walter Pincus, *Air Force Training More Pilots for Drones Than for Manned Planes*, Wash. Post, Aug. 11, 2009, at A18; Christopher Drew, *Drones Are Playing a Growing Role*

When the Predator and Reaper are used for strike missions, they are generally fitted with two types of missiles. The Hellfire II weighs over 100 pounds, is 64 inches in length, has a range of five miles, and can be fitted with a variety of warheads. The Scorpion, in contrast, weighs less than 35 pounds, is 21 inches in length (about the size of a violin case), has a diameter approximately the size of a coffee cup, and is capable of striking objectives at up to 10 miles. It also can be fitted with four different guidance systems, a feature that ensures exceptionally accurate targeting. It can, in fact, strike a single individual—in darkness.[4]

An extensive amount of information regarding the various types of UAVs and their consistently upgraded operational capabilities is available in the public domain.[5] Suffice it to say that these systems have become increasingly sophisticated on an ongoing basis, proving to be ideally suited for waging counter-insurgency and, more recently, counter-terrorism campaigns. A note of caution is required, however. These platforms are, indeed, extraordinarily effective when operating in air space over which the U.S. maintains complete air superiority. If forced to perform in operational situations where this is not the case, UAVs are particularly vulnerable. Moreover, since 2001, more than 400 of these systems have crashed in major accidents around the world, due to mechanical breakdowns, human error, bad weather, and for other unexplained reasons.[6] Given these factors, the operational effectiveness of UAVs as weapon platforms in a conventional conflict would be substantially limited.

III. International Norms Applicable to the Employment of UAVs

A. *The UAV as a Weapon Platform*

There exists no uncertainty surrounding the legality of the UAV as a weapon system. It is simply one of any number of weapon platforms, such as the F-16 and Tomahawk Missile, available for use by the U.S. when a decision is made to engage in a kinetic strike against a target. Indeed, as later discussion will detail, from both a legal and operational perspective, the use of this particular platform will most probably ensure enhanced target certainty, greater accuracy, and very importantly, reduced collateral damage—an always sought after result.

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in Afghanistan, N.Y. Times, Feb. 20, 2010, at A4, *available at* http://www.nytimes.com/2010/02/20/world/asia/20drones.html.

4. Warrick & Finn, *supra* note 3, at A8.

5. Davis et al., *supra* note 2, at 1–15. As noted, these UAV systems continue to become increasingly sophisticated. Their current capabilities are classified in nature.

6. *See id.* at 13.

B. *Assessing the Legal Bases for the Use of Force Employment of UAVs*

If, in fact, the UAV is an undeniably lawful weapon system, why all of the controversy surrounding its use, as well as the numerous calls for clarification of the *confusion* regarding the current legal norms as to when, where, and how it might be employed? The answer to this question lies in the fact that the real issue at play here has never been the legitimacy of the UAV. The criticism associated with its use has actually been driven by a perception of the faulty nature of the legal bases provided by the U.S. government for its engagement in certain use of force actions utilizing a UAV as the weapon platform of choice. This perception is grounded in the belief, which I share, that when the U.S. government—and, particularly a certain element of the government, i.e., the CIA—launches UAV strikes against singular targets—specifically individuals, or small groups of individuals (the latter of whom may or may not have been positively identified)—in locations distant from an active theater of military operations, it is often acting in violation of the universally recognized codified and customary norms of Jus ad Bellum—those conflict management principles that dictate when and where a State might resort to the use of force beyond its territorial boundaries.[7] It is these use of force concerns, rather than an actual belief in the illegitimacy of the UAV as a weapon system, that has fueled the criticism of its use. Simply put, due to the fact that the UAV has been seen as a much more cost-effective, risk-averse, and, thus, very attractive first option for engaging in the types of use of force operations in issue, it has become, in essence, the poster child for those who would challenge the legitimacy of such actions. Accordingly, it is in this context that I turn to a discussion of my previously stated contention that the *old* law, i.e., the currently existing international legal norms—if not ignored, misinterpreted, or misapplied—are quite up to the task of effectively regulating when, where, and how a UAV might be employed.

1. UAV Employment in an Ongoing Armed Conflict

No controversy is associated with the *when* and *where* aspects of the employment of UAVs when these systems are deployed, by military personnel, in the midst of an active combat zone. For example, in Afghanistan, UAVs were operated by members of the U.S. armed forces in, indisputably, the context of an ongoing armed conflict.[8] In

7. For a well-considered discussion of these principles and their application to the U.S. use of UAVs, see Rosa Brooks, *Drones and the International Rule of Law*, 28 ETHICS & INT'L AFF. 83 (2014).

8. There existed a universal consensus that, when initiated, the armed conflict in Afghanistan was international in nature. When a new Afghan government was installed, U.S. coalition partners came to view the continuing hostilities in Afghanistan as a non-international armed conflict. The U.S., however, continued to characterize

that case, the *when* and *where* Jus ad Bellum principles associated with the legitimacy of the U.S. use of force were considered and acted upon appropriately. The UN Security Council had specifically recognized that terrorist attacks could trigger a right to use force in self-defense and, at least implicitly, had approved the U.S. operation in Afghanistan. In passing Security Council Resolution 1368, just a day after the 9/11 terrorist attacks, the Council noted that "such acts, like any act of international terrorism [constitute] . . . a threat to international peace and security."[9] In doing so, it also reaffirmed "the inherent right of individual or collective self-defence in accordance with the Charter."[10] This, and several subsequent Resolutions,[11] were seen by the U.S. and the great majority of the international community as sanctioning the lawful use of force by the U.S. and NATO in Afghanistan. Additionally, there was a consensus among commentators that this U.S./NATO campaign represented a valid instance of individual and collective self-defense.[12] And, very importantly, on December 30, 2001, the Security Council authorized the creation of the International Security Assistance Force ("ISAF"), an act that served to place the war in Afghanistan under the formal umbrella of a Security Council-authorized use of force.[13] In the context of this sanctioned use of force, the UAV was thus viewed as but one of a number of legitimate weapon platforms being used by the U.S. and its coalition partners.

Left to be considered in this armed conflict scenario, however, is the matter of whether the *old*, the existing law, effectively addresses *how* the UAV might be employed in such an environment. In making this assessment, we need only to turn to the customary Law of Armed Conflict ("LOAC") principles applicable to any targeting decision: those of military necessity, distinction/discrimination, proportionality, and unnecessary suffering.[14] In brief, these norms dictate that, when

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these ongoing hostilities with the Taliban and elements of al-Qaeda as an international-armed conflict.

9. S.C. Res. 1368, ¶ 4, U.N. SCOR, 4370th Meeting, U.N. Document S/RES/1368 (Sept. 12, 2001).

10. *Id.* at ¶ 3.

11. *See* S.C. Res. 1373, U.N. SCOR, 4385th Meeting, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res.1377, U.N. SCOR, 4413th Meeting, U.N. Doc. S/RES/1377 (Nov. 12, 2001); S.C. Res. 1378, U.N. SCOR, 4413th Meeting, 4413th Meeting, U.N. Doc.S/RES/1378 (Nov. 12, 2001); S.C. Res. 1383, U.N. SCOR, 4434th Meeting, U.N. Doc.S/RES/1383 (Dec. 6, 2001); and S.C. Res. 1386, U.N. SCOR, 4443rd Meeting, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

12. See Thomas M. Franck, Editorial Comments, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839–43 (2001).

13. S.C. Res. 1386, *supra* note 11, at ¶ 4.

14. These principles are defined as follows: (1) *Military necessity* "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." OPERATIONAL LAW HANDBOOK, INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY 11 (2014). This principle must be applied in conjunction with other LOAC principles, as well as other, more specific, legal constraints set forth

selecting UAV targets, civilians must be distinguished from combatants, military objectives must be distinguished from protected places and property, and that collateral damage incurred, if any, must not be disproportionate to the military advantage reasonably expected to be gained.

In sum, with respect to the use of UAVs in an ongoing-armed-conflict scenario, it is clear that the currently existing international norms are fully capable of effectively regulating when, where, and how these systems might be utilized.

2. UAV Employment in Non-Armed Conflict Scenarios

It is the U.S. government's recent use of UAVs in what would appear to be non-armed conflict scenarios that has given rise to numerous questions concerning the validity of such actions when measured against the widely acknowledged international law regulating when and where a State might engage in the use of force. Indeed, it is this disconnect between U.S. UAV employment and the existing law applicable to such that has led some to challenge the continued utility of this *old* law—and to call for a *clarification* of the *confusion* generated by an attempt to assess the lawfulness of U.S. actions in the context of current international principles. In order to more readily understand this increasingly evident gap between U.S. actions and the relevant legal principles at play, it is essential to engage in a brief review of the recognized Jus ad Bellum norms that dictate when and where a State might resort to the use of force abroad.

IV. Legal Bases for the Use of Force

A. *The United Nations Charter*

Article 2, paragraph 4 of the United Nations Charter is universally viewed as a prohibition on the use of force by a State within the territorial boundaries of another State.[15] Only two exceptions to this pro-

in LOAC international agreements to which the U.S. is a party. (2) *Distinction*, "sometimes referred to as the principle of *discrimination* . . . requires that belligerents distinguish combatants from civilians and military objectives from civilian objects (i.e., protected property or places)." *Id.* at 12. (3) *Proportionality* "requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained." *Id.* at 13. This principle is not a separate legal standard as such, but provides a method by which a balance can be struck between military necessity and civilian loss or damage when an attack might cause incidental damage to civilian personnel or property. (4) *Unnecessary suffering*, "sometimes referred to as the principle of 'superfluous injury' or 'humanity,' requires that military forces avoid inflicting gratuitous violence on the enemy." *Id.* at 14.

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

hibition are set forth in Chapter VII of the Charter. The first of these occurs when the Security Council identifies "any threat to the peace, breach of the peace, or act of aggression."[16] If such a determination is made, the Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[17] The second exception occurs in the form of a State's right to use force for self-defense purposes. Article 51 of the Charter states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." As previously discussed, it was this Council-sanctioned right of self-defense that served as the legal basis for the initiation of the U.S./NATO armed conflict waged in Afghanistan.

B. *The Customary Right of Anticipatory Self-Defense*

There exists substantial agreement among States and international lawyers/scholars that an inherent, customary right of self-defense has transcended that of the relatively restrictive codified Article 51 right of a State to use force to defend itself against an *armed attack*.[18] Indeed, a consensus has increasingly coalesced around the existence of such a right, given the ongoing difficulty in defining what does, and does not, constitute an *armed attack* in the 21st century. This customary right of *anticipatory self-defense* is said to exist when the threat posed, and thus the necessity of self-defense, is "instantaneous, overwhelming, leaving no choice of means, and no moment of deliberation."[19]

V. U.S. UAV USE OUTSIDE OF AFGHANISTAN

As noted, most, if not all, of the criticism leveled against the recent U.S. employment of UAVs has centered on the legal arguments mounted by the U.S. for its use of these weapon platforms outside the active combat zone of Afghanistan. These legal justifications have consisted of both a U.S. creation of a completely new form of armed conflict, giving rise to what it considers an ongoing, continuous right

16. U.N. Charter art. 39.
17. U.N. Charter art. 42.
18. U.N. Charter art. 51.
19. The most widely accepted standard for determining when a threat is *imminent*, thus justifying the use of force, is the *Caroline doctrine*, arising from an incident in 1842, when British soldiers crossed into the U.S. in order to destroy a U.S ship carrying arms to insurgents in Canada. British and American officials, at the time, agreed in an exchange of Diplomatic Notes, that the use of defensive force is permitted when "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *See* 2 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 409, 412 (1906); *see also* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150–52 (2d ed. 1991).

to resort to the use of force on a global scale, and a *re-interpretation* of an existing international norm regulating when and where a State might use force in self-defense.

A. *U.S. Congressional Authorization for the Use of Military Force (AUMF)–2001*

Before moving to a discussion of the U.S.-proffered legal theories justifying its expanded use of UAVs, it is necessary to briefly assess the impact on this discussion of the often cited, and currently debated, 2001 U.S. congressional joint resolution authorizing then President Bush to use all necessary and appropriate force against those nations, organizations, or persons that he determined planned, authorized, committed, or aided the terrorist attacks of 9/11-or that harbored such organizations or persons.[20] Such an analysis can be accomplished in short order when, in doing so, it is recognized that the AUMF is a purely U.S. legislative instrument—serving exclusively as a domestic law authorization for a U.S. president to commit U.S. armed forces to the projection of force abroad. It affords absolutely no legal basis, from an international law perspective, for any U.S. use of force action undertaken in another State, to include a use of force involving the deployment of a UAV.

B. *U.S. Legal Bases for the Use of UAVs Outside Afghanistan*

1. U.S. Engagement in a "Global Armed Conflict" With al-Qaeda and Associated Forces

The U.S. legal justification for its use of force outside of Afghanistan; that is, its deployment of UAVs as weapon systems in non-armed conflict scenarios, hinges substantially on its contention that, since 9/11, it has, in fact, been continuously engaged in a *global armed conflict* with al-Qaeda and its *associated forces*.[21] Accordingly, in the view of

20. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

21. President Barack Obama, Address at the National Defense University on drone and counterterrorism policy, *Obama's Speech on Drone Policy* (May 23, 2013), http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html). In this speech, the President asserted that: "Under domestic law, and international law, the United States is at war with al-Qaeida, the Taliban, and their associated forces." *Id.; see also* Eric Holder, U.S. Attorney Gen., Address at the Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law ("Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. . . . None of this is changed by the fact that we are not in a conventional war."); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws, Remarks at Harvard Law School Program on Law and Security (Sept. 16, 2011), https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an. A speech in which Mr. Brennan stated, "We are at war with al Qa'ida. In an indisputable act of

the U.S., its use of UAVs has not occurred in non-conflict environments, but, instead, in the context of this ongoing armed conflict. Moreover, the U.S. has further asserted that, given this reality, as enemy *combatants*, albeit *unlawful* enemy combatants, members of al-Qaeda and its associated forces are subject to being targeted by U.S. UAVs, wherever and whenever they might be found.[22]

An assessment of the validity of this U.S. *global armed conflict* claim reveals that, post-9/11, an almost universal consensus existed that though launched by a non-State entity, the 9/11 al-Qaeda strikes constituted an *armed attack* against the U.S. It was reasoned that these acts represented but the latest al-Qaeda activities that, when collectively considered, amounted to an *ongoing armed attack* against U.S. interests—one dating back to the initial bombing of the New York World Trade Center in 1993, and including the 1998 bombing of the U.S. Embassies in Kenya and Tanzania, and the 2000 attack on the USS Cole in Yemen.

Importantly, however, despite the Bush Administration's subsequent unilateral declaration of its *Global War on Terrorism*[23]—to include, of course, al-Qaeda and its associated forces—the UN demonstrated no support for the proposition that, even given the scope and destructiveness of the 9/11 al-Qaeda strikes, these actions triggered the initiation of an *armed conflict* between the U.S. and a

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aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people." *Id.* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), www.state.gov/s/l/releases/remarks/139119.htm (submitting that "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks").

22. Significant debate has centered around the manner in which the U.S. government defines "associated force," given that it has asserted that it is engaged in an armed conflict with, and has the right to target, both members of al-Qaeda and its "associated forces." The most straightforward explanation of the government's interpretation of this term was offered, in 2012, by then Department of Defense General Counsel, Jeh Johnson:

> An "associated force," as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al-Qaeda, and (2) is a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al-Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an "associated force" is not any terrorist group in the world that merely embraces the al-Qaeda ideology. More is required before we draw the legal conclusion that the group fits the statutory authorization for the use of military force passed by the Congress in 2001.

Jeh Johnson, General Counsel, Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Speech at Yale Law School (Oct. 17, 2012), http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/.

23. *See generally* Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (military order of Nov. 13, 2001).

transnational terrorist organization. The UN Security Council, on September 12, 2001, unanimously adopted a resolution condemning "the . . . terrorist attacks" of 9/11, which the Council regarded, "like any act of international terrorism, as a threat to international peace and security. . . ."[24] On September 28, the Council also unanimously adopted, under Chapter VII of the UN Charter, a U.S.-sponsored resolution obligating all member states to deny financing, support, and safe haven to terrorists.[25] Additionally, each of these resolutions affirmed, in the context of the events of 9/11, the inherent right of both individual and collective self-defense, as well as the need "to combat by all means" the "threats to international peace and security caused by terrorist acts."[26] Significantly, however, while these resolutions made repeated references to *terrorist attacks* and *international terrorism*, conspicuously absent was any UN reference to—or recognition of—the existence of an *armed conflict* between al-Qaeda and the U.S. triggered by the events of 9/11.

Despite this UN lack of recognition of the existence of an ongoing *global armed conflict* between the U.S. and al-Qaeda and its associated forces, the U.S. has doggedly and consistently clung to the contention that, indeed, it has been waging an *armed conflict* with, among others, militants in Pakistan, suspected al-Qaeda associates in Yemen, members of the al-Shabaab Organization in Somalia, as well as other groups and individuals. In doing so, the U.S. has continued to maintain the position that it is possible for an armed conflict to exist between a State and one, or even more, non-State entities—even if these entities are not publicly identified, their membership criteria not clearly defined, they lack a clear structural organization, and their activities are widely dispersed, geographically. Accordingly, it has argued, members of these entities, as unlawful enemy combatants engaged in an armed conflict with the U.S., may, as a result of their status alone, be targeted by U.S. UAVs when and wherever they might be discovered—State sovereignty notwithstanding.[27]

Not surprisingly, the existence of this unilaterally conceived form of armed conflict has found minimal support within the international community. Disagreement with the U.S. position on this matter is captured in a recently published European Council on Foreign Relations Report, which noted that most legal scholars and courts "[reject] the notion of a de-territorialised global armed conflict between the U.S. and al Qaeda."[28] This position was said to be based on the belief

24. S.C. Res. 1368, *supra* note 9.

25. S.C. Res. 1373, *supra* note 11.

26. S.C. Res. 1368 *supra* note 9; S.C. Res. 1373, *supra* note 11.

27. *See* Obama, *supra* note 21; Holder, *supra* note 21; Brennan, *supra* note 21; Koh, *supra* note 21.

28. Anthony Dworkin, European Council on Foreign Relations, Drones and Targeted Killing: Defining a European Position, at 7 (July 2013), *available at* www.ecfr.eu/page/-ECFR84_DRONES_BRIEF.pdf.

that a "confrontation between a State and a non-State group only rises to the level of an armed conflict if the non-State group meets a threshold for organization . . . there are intense hostilities between the two parties . . . . [and] fighting [is] concentrated within a specific zone (or zones) of hostilities."[29]

A rejoinder often heard, within the U.S., to this essentially universal rejection of the U.S. contention that it is free to make UAV targeting decisions based on the existence of its ongoing armed conflict with al-Qaeda, is this: "But, the U.S. Supreme Court opined, in its 2006 Hamdan v. Rumsfeld decision, that Common Article 3 of the 1949 Geneva Conventions did, in fact, apply to the 'relevant conflict' between the U.S. and al-Qaeda—an obviously definitive confirmation of the existence of such an armed conflict."[30] This contention fails for two distinct reasons. First, the Hamdan decision reflects both a misinterpretation and misapplication of Common Article 3 by the Court, in that the Court's reasoning ignored, collectively, the plain language of Article 3, the official Geneva Convention commentary dealing with the meaning of this article, and the long and well-practiced manner in which this article has been interpreted and applied, since its inception, by the international community—to include the U.S.[31] Taken to its illogical conclusion, the Court's interpretation of Article 3 would have the U.S. engaged in an ongoing global, non-international armed conflict, against a transnational terrorist organization. Secondly, and even more importantly, as in the case of the U.S. Congress, the U.S. Supreme Court cannot, unilaterally, create or obviate customary international norms or render an interpretation of a multilateral international agreement binding upon other parties.

While it is clear that the U.S. contention that it can select UAV targets based on its involvement in a continuing global armed conflict with al-Qaeda finds no support in international law, significantly, the U.S., has, in this context, consistently stated that, when it does engage a target, it complies with the currently existing—and previously discussed—LOAC principles applicable to any targeting decision.[32] Thus, while certain Jus ad Bellum norms relevant to "when" and "where" a State might use force have largely been misapplied—or ignored—by the U.S. in asserting its right to strike al-Qaeda and other "associated" targets, worldwide, it purports to have abided by the existing Jus in Bello norms regulating the "how" aspects of target engagement.

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29. *Id.*

30. Hamdan v. Rumsfeld, 548 U.S. 557, 718–19 (2006).

31. JEAN DE PRUEX ET AL., GENEVA: INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36–37 (Pictet, Jean S., ed., 1960).

32. *See supra* note 14 (discussing these principles).

This U.S. submission that it adheres to the currently existing LOAC principles relevant to targeting considerations in waging what it submits to be a "global armed conflict" does not mean, of course, that it has correctly applied these norms in all cases of target prosecution—a matter that will later be discussed. Moreover, though not directly germane to the thesis of this article, by insisting that its UAV strikes are undertaken, outside of Afghanistan, in the context of an ongoing *armed conflict*, the U.S. use of non-military (CIA) personnel to conduct many of these strikes raises the issue, among others, as to whether such personnel are, in fact, functioning as *unlawful combatants*.[33]

2. If Not an Armed Conflict-How About the Right of Self-Defense?

The alternative legal basis consistently put forward by the U.S. for its right to engage in UAV strikes in locations apart from an active-armed-conflict zone has been one of self-defense. Prior to assessing the elements of this argument, however, it is important to note that this use of dual legal justifications for the U.S. right to employ force, in the form of UAV strikes, has carried with it significant ramifications. Removed from an *armed conflict* context, members of al-Qaeda and its associated forces can no longer be targeted on the basis of their status alone, i.e., as *unlawful enemy combatants*. These individuals now become *terrorists*. Accordingly, U.S. UAV strikes against such personnel now occur as an integral element of an ongoing U.S. *counterterrorism campaign*. Other substantive considerations come into play, as well. Do LOAC targeting principles remain applicable to UAV strikes conducted in a self-defense, vice armed conflict, mode? Do third States now have to provide their specific consent to U.S. UAV strikes conducted against *terrorists* operating within their territory? Can the stigma of *unlawful combatant* now be removed from CIA personnel who participate in self-defense, UAV strikes? Little wonder that these competing legal theories have generated confusion concerning the applicability of existing international norms to the current U.S. use of UAVs.

The self-defense theory posed—and implemented by—the U.S. represents a unique interpretation of a well-established Jus ad Bellum principle, as it has appeared in a substantially altered form of the customary right of anticipatory self-defense. Recall that this anticipatory

33. "*Unprivileged enemy belligerents*, also referred to as *unlawful combatants*, may include spies, saboteurs, or civilians who directly participate in hostilities or who otherwise engage in combatant acts. These individuals do not qualify for [Prisoner of War] status and may be prosecuted for their unlawful acts." *See* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 17 (emphasis added). CIA personnel, if directly participating in hostilities (an armed conflict) as civilians, are subject to being categorized as unlawful combatants.

right is premised on a State's perception of a necessity to respond to a threat that is "instantaneous, overwhelming, leaving no choice of means or moment of deliberation."[34] That is, a State possesses an inherent right to use force to counter what it deems to be an *imminent* threat to its security interests. There has long existed a consensus among States and international lawyers that an *imminent* threat is one that constitutes a concrete and immediate danger—readily evidenced by the relevant actions engaged in by a State or individuals posing such a threat.[35] However, as in the case of its construction of a new form of *armed conflict*, the U.S. has developed a substantially different determinative process to be used in making a decision regarding the existence of an *imminent* threat.

A leaked 2011 U.S. Justice Department White Paper offers the most detailed legal analysis—publicly available—of the U.S. interpretation and implementation of anticipatory self-defense. While dealing specifically with the legal basis for a U.S. use of force against a U.S. citizen, outside the country, it is logical to assume that relevant aspects of this analysis would apply to the targeting of non-U.S. citizens, as well. The "White Paper[36] sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country, outside an area of active hostilities, against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force, that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans."[37] It then goes on to state that such a use of force would be lawful only when three conditions are met: "(1) an informed, high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation . . . [is] conducted in a manner consistent with applicable . . . [LOAC] principles."[38]

An assessment of these conditions established for the exercise of this U.S. view of anticipatory self-defense must begin with this observation. Target selection conducted under this self-defense theory is, at least theoretically, not *status*-driven. That is, individuals marked for targeting have not been deemed "*unlawful enemy combatant* participants in a global armed conflict with the U.S., a status that would, as noted previously, purportedly subject such personnel to attack when

34. *See* MOORE, *supra* note 19.

35. *See supra* note 19 (discussing imminent as defined by the "Caroline Doctrine").

36. *See* U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

37. *Id.* at 1.

38. *Id.*

and wherever they might be discovered. Instead, as indicated, individuals targeted in the U.S. exercise of this particular self-defense right must be determined, by a "high-level U.S. government official," to pose an "imminent threat of violent attack against the U.S."[39] This requirement, in turn, immediately raises the issue as to whether the U.S. interpretation of *imminent*—in invoking the right to engage in anticipatory self-defense—parallels that reflected in currently existing customary international law. In brief, it does not.

The Justice Department White Paper states that the requirement that force only be used to counter an *imminent* threat "does not require the U.S. to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[40] Why? Because such a restrictive definition of *imminence* "would require the United States to refrain from action until preparations for an attack are concluded, [which] would not allow the United States sufficient time to defend itself."[41] This reasoning is said to be based on the fact that "certain members of al-Qa'ida . . . are continually plotting attacks, . . . would engage in such attacks regularly [if they] were able to do so, that the U.S. government may not be aware of all al-Qa'ida plots as they are developing, and thus cannot be confident that none is about to occur . . . ."[42] Drawing upon this analysis, the White Paper concludes that any person deemed an operational leader of al-Qa'ida or its *associated forces* represents, per se, an *imminent* threat, with the result that the U.S. might target such persons at all times, regardless of whether it possesses specific knowledge concerning planned future attacks.[43]

This novel U.S. re-interpretation of the customary right of anticipatory self-defense is a distinct departure from the currently existing international norm. While one might certainly argue that, in this age of transnational terrorism, a broader concept of *imminence* is required, this U.S.-established basis for adjudging the existence of an *imminent* threat takes subjective- and self-serving- threat analysis to an extreme. In brief, a certain individual may be targeted by the U.S. simply because—given who he is—he may be deemed to pose a consistent, ongoing, and, thus, "imminent" threat to the U.S. This wholesale modification of the anticipatory self-defense principle obviously gives rise to any number of questions. Is not targeting individuals, based on this analysis, just another form of *status-based* targeting, rather than targeting centered on any well-practiced self-defense principle? Who is the *informed, high-level U.S. government official* making these threat/targeting determinations? What criteria are used in making a

39. *Id.*
40. *Id.* at 7.
41. *Id.*
42. *Id.* at 8.
43. *Id.* at 8–9.

decision to target a specific individual or individuals? And, what are the procedural requirements for making such a determination? The U.S. response: That is all classified information. We are confident, however, that UAV strikes conducted against these individuals constitute legitimate acts of self-defense. Again, little wonder that such reasoning has generated both confusion and criticism regarding U.S. compliance with current international norms in its employment of UAVs.

VI. LOAC: The "How" Component of Applicable Use of Force Principles

In setting forth both its *ongoing armed conflict* and *anticipatory self-defense* legal justifications for its use of UAVs in targeting members of al-Qaeda and its associated forces, the U.S. government has consistently insisted that such strikes are conducted in compliance with the four fundamental LOAC principles relevant to targeting decisions.[44] And, presumably, this claim relates to strikes carried out by both the U.S. armed forces and the CIA, even though the latter, acting under Title 50 of the U.S. Code, conducts such strikes as covert activities. Accordingly, these CIA actions lack transparency—making it difficult to determine whether the Agency does, in fact, adhere to the same LOAC targeting principles and process followed by U.S. military personnel.

The U.S. contention that all of its UAV strikes comply with applicable LOAC targeting principles merits closer examination. Much of the criticism leveled at the U.S. employment of UAVs has been centered on the assertion that they have been used to engage in *targeted* strikes, such strikes being viewed by some as the equivalent of assassination or extra-judicial killings. This criticism rings false. Indeed, there would be much more of a basis for concern, from a LOAC perspective, if UAV strikes were not *targeted*. This is precisely what the LOAC principle of *distinction*, prohibiting indiscriminate targeting, requires. The real issue, once again, is whether, in the case of many of the UAV strikes, the individual or individuals struck, constitute legitimate targets. And, this, of course, returns the overall legal analysis to the already visited consideration of whether these individuals can, under currently existing international norms, be viewed as *combatant* participants in a *global armed conflict* with the U.S.—or, alternatively, as *terrorists* posing an *imminent* threat to engage in an attack against the United States.

The more troubling LOAC matter related to the U.S. employment of UAVs is that associated with so-called *signature strikes*, wherein the U.S. does not target specific individuals, but, instead, groups of individuals, not positively identified, said to be engaged in *suspicious*, *mil-*

44. U.S. Dep't of Justice, *supra* note 36, at 7; *see also* Koh, *supra* note 21.

itant-like activity in areas generally under al-Qaeda, Taliban, or even Yemini insurgent control.[45] These types of strikes almost inevitably run afoul of the basic LOAC targeting principles. Is the targeting of these unidentified individuals *indispensable* to the accomplishment of a lawful mission? Is such a strike *proportionate* in nature? That is, given the military advantage expected to be gained, will such an attack result in an unacceptable level of collateral damage or deaths? None of these questions can be answered definitively, given the failure, in engaging in such attacks, to adhere to that most basic of LOAC targeting norms, that of *distinction*—the requirement to distinguish between combatants and non-combatants. As a result, contrary to the contention consistently made by the U.S., these types of strikes cannot, per se, comply with the basic LOAC principles applicable to the "how" aspects of UAV employment.

VII. Sovereignty: A Casualty of U.S. Legal Justifications for UAV Employment

The concept of sovereignty—the essential foundation upon which the Westphalian notion of international legal order has been built—is captured in Article 2, paragraphs 1 and 4 of the U.N. Charter:

> The Organization is based on the principle of the sovereign equality of all its members.[46]
>
> All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[47]

As has been discussed, the currently existing international legal norms dictating when, where, and how a State might resort to the use of force—and thus employ UAVs in projecting such force—are based on these codified UN principles and other, limited, customary usages widely accepted by the international community. In ignoring these *old law* principles in formulating its legal justifications for its UAV strikes against members of al-Qaeda and its associated forces, the U.S. has, to a great extent, substantially weakened the stabilizing influence of the universal belief in the sovereignty of every State—the most fundamental of international legal practices. The result of these U.S. actions has been well captured in a recent Stimson Task Force Report on U.S. Drone Policy:

> From the perspective of many around the world, the United States currently appears to claim, in effect, the legal right to kill any person it determines is a member of al-Qaida or its associated forces, in

45. Daniel Bynam, *Why Drones Work: The Case for Washington's Weapon of Choice*, 92 Foreign Aff., No. 4, at 32, 36 (2013).

46. U.N. Charter art. 2 para. 1.

47. *Id.* at art. 2 para. 4.

> any state on Earth, at any time, based on secret criteria and secret evidence, evaluated in a secret process by unknown and largely anonymous individuals—with no public disclosure of which organizations are considered 'associated forces' (or how combatant status is determined . . .), no means for anyone outside that secret process to raise questions about the criteria or validity of the evidence, and no means for anyone outside that process to identify or remedy mistakes or abuses.[48]

Or—as succinctly stated by a commentator on the subject of U.S. drone use:

> At the moment, the United States itself—as the globe's only military superpower—is the sole arbiter of its own actions: with zero transparency, it determines which laws apply, and it comes up with its own interpretation of core concepts. Or, to put it in more familiar terms, the United States is judge, jury, and executioner, all rolled into one. It decides how to interpret the law to which it is subject; it decides what can be counted as evidence and how to evaluate that evidence; and, ultimately, it kills.[49]

The accuracy of these synopses of the minimal concern displayed by the U.S. for the role of sovereignty in its UAV targeting process is evidenced in the form of yet another of its decision-making mechanisms. U.S. officials have repeatedly indicated that the United States will use force in the territory of another State only if that State is *unable or unwilling* to effectively deal with what the U.S. has adjudged to be a threat posed by a certain individual or individuals, located in that State. Yet, in the final analysis, it will be the U.S. that engages in a unilateral determination as to whether a third State has, in fact, proven to be *unable or unwilling* to suppress the threat in issue—a decision that may, or may not, be substantially supported by demonstrable evidence. Thus, if the U.S. makes a determination that an individual present in State X poses an *imminent* threat to U.S. security interests; makes a request that State X deal with this threat; State X makes an independent assessment that the individual in issue poses no such threat, and, therefore, refuses to consent to the U.S. targeting of this individual; the U.S. may then simply declare that State X has proven to be, ipso facto, *unwilling or unable* to meet its international obligations. Consequently, UAV strikes follow.

The U.S. may deem this disregard for the concept of sovereignty essential, currently, in order to thwart terrorist threats to U.S. security. The UAV targeting of individuals in third States, absent the consent, and against the will of, these States, however, is certain to establish a use of force precedent that can only serve to significantly eviscerate a principle of international law that has served as the

48. STIMSON CENTER, RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON U.S. DRONE POLICY 37 (June 2014).

49. Brooks, *supra* note 7, at 96–97.

lynchpin for stability within the global community. In doing so, the U.S. may well be sacrificing the possibility of achieving future strategic goals for the ability to strike contemporary tactical objectives.

VIII. Conclusion

The purpose of this article has been twofold: (1) to demonstrate that the currently existing international norms regulating a State's use of force—if not ignored, misinterpreted, or misapplied—are fully capable of dictating when, where, and how the U.S. might employ UAVs in pursuing its national security interests and (2) to shift the criticism surrounding the UAV from the weapon platform, itself, to those who have formulated highly questionable legal justifications for its employment.

As has been shown, it is not that existing use of force principles do not, and cannot, apply to the U.S. use of UAVs; it is that the U.S. has intentionally chosen not to apply these long practiced norms to its employment of these weapon systems. Instead, it has formulated *novel*, dual, legal justifications for their use—legal theories grounded on, first, the creation of a completely new form of armed conflict, and, secondly, a dubious re-interpretation of an existing customary self-defense norm. It is these alternatively issued legal justifications, resulting in the application of different legal regimes, with divergent legal considerations, that have generated the *confusion* surrounding the law applicable to U.S. UAV use, as well as the doubt concerning the continued viability of attempting to apply currently existing use of force principles to this *21st century* technology. And, it is these newly minted legal justifications, rather than the UAV, per se, that have largely given rise to the intense criticism of the latter's use.

For U.S. policy makers, when considering a UAV strike, the question posed has thus become: Which of my two legal justifications available to me best supports U.S. security interests in this particular situation—at this specific point in time? That is, is it best, in this case, to categorize my intended target(s) as *unlawful combatants* or *terrorists*? Again, little wonder that uncertainty surrounding the credibility of the existing use of force norms and criticism of the U.S. use of UAVs exist. Well established international principles have generally been subjected to a consistent U.S. shell game of legal theories—applied exclusively on the basis of opportunistic interests and policy considerations, rather than as a matter of law.

Why has the U.S. government resorted to the formulation of legal justifications for its employment of UAVs that are so transparently questionable in nature? In a final analysis of this matter, the answer is relatively evident. The characteristics of this weapon platform simply make it too easy, too attractive for the U.S. to engage in the use of force in situations where it would not have done so in the past. There exists no risk to personnel or to a piloted aircraft; the targeting is both

more deliberate and accurate, with the resulting benefit that any collateral damage and casualties can be minimized. The danger that resides in the allure of engaging in such thinking, of course, is that it is just this *ease*, this obvious attractiveness of UAV employment, that has fostered the necessity for the U.S. government to abandon the existing international norms applicable to the use of UAVs and to create strained, self-serving, and, potentially, precedent-setting legal justifications for the very use of force itself.