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## COUNTERTERRORISM USES OF FORCE: THE LAWS OF WAR AND JUS AD VIM

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COUNTERTERRORISM USES OF FORCE:  
THE LAWS OF WAR AND JUS AD VIM

Paolo Salomon

ABSTRACT

*Al Qaeda's terror attacks against the United States on September 11, 2001, introduced heretofore unseen issues under International Humanitarian Law. After Al-Qaeda's attacks, the Bush administration began its Global War on Terror by invading Afghanistan in order to find those responsible for the attacks on September 11, 2001. This invasion caused Al-Qaeda to flee into Pakistan's Tribal Areas in order to evade American forces. The Bush administration began employing drone strikes in Pakistan's Tribal Areas to degrade Al-Qaeda's ability to conduct operations against the United States. The Obama administration continued and expanded the use of drone strikes. Amid the use of these strikes was the growing international backlash against excessive civilian casualties. In response, the Obama administration argued that these strikes were justified because of the Unwilling or Unable Doctrine. In this article, the first section provides a background on the Laws of War, the development of drones and drone strikes, a discussion of the Unwilling or Unable Doctrine and the jus ad vim approach to the use of force under international law. The next section compares the Unwilling or Unable Doctrine to the jus ad vim approach. The article concludes with the proposition that the jus ad vim framework is not an adequate body of law to tackle the complexity of issues embedded in the use of drone strikes.*

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## INTRODUCTION

The terrorist attacks on September 11, 2001, ushered in a period of significant development in international humanitarian law. Those developments mainly concerned *jus ad bellum* issues and its requirements for the use of force in self-defense. In response to those attacks, the Bush administration began a so-called “War on Terror” that targeted Al-Qaeda militants and associated forces around the world. The Bush administration invaded Afghanistan in the search for Al-Qaeda’s leader, Osama Bin Laden, and later toppled the Taliban government. The Obama administration continued this War on Terror beyond Afghanistan and Iraq and increased the use of drone strikes on terrorist targets located in the territories of other countries such as Somalia and Yemen. Finally, President Biden adopted substantially the same stance as the Obama administration regarding U.S. objectives and parameters in the War on Terror.

This paper will first discuss the issues that have been raised because of the United States’ use of drone strikes and commando raids in the Global War on Terror. To provide context on the U.S. use of force through drone strikes, a brief history of that subject will be given. Uses of force through drone strikes offer decision-makers strategic and operational advantages that are not present in other forms of direct action, such as commando raids. After, the law governing armed conflict, which consists of *jus ad bellum* and *jus in bello*, will be discussed. *Jus ad bellum* governs when a state may legally use force against another, and *jus in bello* governs the parties’ conduct in an armed conflict. In discussing the law of armed conflict (“LOAC”), the primary issue that arises from the U.S. uses of force pursuant to counterterrorism objectives will be identified. Because the U.S. drone strikes are often used to target terrorists in the territory of other sovereign nations without their consent, a violation of the laws of *jus ad bellum* is implicated. The “unwilling or unable” doctrine has emerged as a possible solution to that aforementioned violation. After the “unwilling or unable doctrine” has been described, it will be applied to recent U.S. uses of force.

Second, the paper will discuss the *jus ad vim* theory of armed conflict advanced by Brunstetter, et al. After the basic principles of *jus ad vim* have been described, they will be applied to recent U.S. actions involving drone strikes or commando raids. Some examples of this include the drone strike on Iranian General Qassem Soleimani, the raid on the Bin Laden compound in Pakistan in 2011, and the use of drone strikes against Al-Qaeda militants in Pakistan's tribal areas. Additionally, the paper will compare the *jus ad vim* framework to the existing laws of war (*jus ad bellum* and *jus in bello*). Specifically, the paper will compare the "unwilling or unable" doctrine to the *jus ad vim* framework for the use of force. Finally, the paper will conclude that even if *jus ad vim* is not adopted, continued U.S. actions in the area of counterterrorism might well lead to greater acceptance of the unwilling or unable doctrine with respect to the international law of the use of force in self-defense.

## I. HISTORICAL AND LEGAL OVERVIEW OF THE PROBLEM

On September 11, 2001, members of Al-Qaeda hijacked airplanes and crashed them into the World Trade Center in New York and the Pentagon in Washington, D.C.<sup>1</sup> Ten days later, in a speech addressed to a joint session of Congress on September 20, 2001, President George Bush declared that "[o]ur war on terror begins with Al-Qaeda, but does not end there [and] [i]t will not end until every terrorist group of global reach has been found, stopped, and defeated."<sup>2</sup> In response to those attacks, the Bush Administration invaded Afghanistan and toppled the Taliban government in its search for Osama Bin Laden.<sup>3</sup> This marked the beginning of the "Global War on Terror," which sought to seek out and stop terrorists around the

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<sup>1</sup> *The U.S. Marks the 21st anniversary of the 9/11 terror attacks*, ASSOCIATED PRESS (Sep. 11, 2022), available at:

<https://www.npr.org/2022/09/11/1122247528/us-marks-21st-anniversary-of-9-11-terror-attacks>.

<sup>2</sup> *Transcript of President Bush's address*, CNN (Sep. 21, 2001), available at:

<http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>.

<sup>3</sup> See *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELATIONS,

<https://www.cfr.org/timeline/us-war-afghanistan> (last accessed Dec. 20, 2022). See also Pub. L. No. 107-40 (Resolution of Congress that authorized the President to use force against Al-Qaeda).

world.<sup>4</sup> In addition to Afghanistan, the Bush administration also invaded Iraq in March of 2003 to force Saddam Hussein to break ties with terrorists and to destroy its weapons of mass destruction.<sup>5</sup>

*A. Historical Background and Technological Development of Drones*

As a preliminary matter, the usage of the term drones must be clarified because numerous terms have been used to describe the aircraft that the U.S. uses for counterterrorism purposes. The plain meaning of the word “drone” is an aircraft that does not have a pilot but is controlled by someone on the ground, used primarily for dropping bombs or for surveillance.<sup>6</sup> Other common terms used for drones are unmanned aerial systems (“UAS”), remotely piloted aircraft (“RPA”), and unmanned aerial vehicles (“UAV”). To describe the history and development of the use of drone strikes and its resulting legal issues, the terms drone, UAS, RPA, and UAV all mean the same thing: any aircraft controlled or operated by the U.S. that has been used to either conduct surveillance or lethal strikes against terrorists around the world.

In waging the War On Terror, the U.S. has turned to the extensive use of drone strikes to target suspected terrorist militants around the world.<sup>7</sup> In areas ranging from the tribal areas of Pakistan bordering Afghanistan to Afghanistan itself, the use of drones has emerged as a

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<sup>4</sup> *Global War on Terror*, GEORGE W. BUSH PRESIDENTIAL LIBRARY AND MUSEUM, available at: <https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror> (last accessed Dec. 20, 2022).

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

<sup>6</sup> *Drone*, CAMBRIDGE DICTIONARY, available at: <https://dictionary.cambridge.org/us/dictionary/english/drone> (last accessed Dec. 22, 2022).

<sup>7</sup> Daniel L. Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, BROOKINGS (June 17, 2013), available at: <https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice>.

potent tool in the U.S. counterterrorist arsenal.<sup>8</sup> The U.S. use of drone strikes has decimated terrorist groups through the killing of its leaders and the deprivation of terrorist sanctuaries.<sup>9</sup> Moreover, it has done so at little financial cost, avoided U.S. casualties, and, importantly, avoided excessive civilian deaths.<sup>10</sup> To provide context, a brief historical overview of the development of drones will be given. This historical overview begins with the initial military development of drones, beginning in WWI and continuing to the present day. After the historical development has been described, its operational and strategic advantages will be described. The most prominent of these advantages is that drones shield their operators from direct harm and are cheaper than other forms of counterterrorist action.

Drones were first developed in Britain and the U.S. during World War I (“WWI”).<sup>11</sup> Although prototypes developed by Britain and the U.S. showed promise in test flights, they were not used for actual operations in the war.<sup>12</sup> After WWI, drone development continued through the testing of radio-controlled aircraft to be used as targets for training purposes.<sup>13</sup> Then in the Vietnam War, reconnaissance UAVs were deployed on a large scale.<sup>14</sup> After the Vietnam War, the development of drone capabilities rapidly increased, as they featured improved endurance and the ability to maintain greater height.<sup>15</sup>

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<sup>8</sup> *The Drone War in Pakistan*, NEW AMERICA, available at: <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-drone-war-in-pakistan/> (last accessed Dec. 20, 2022). (The tribal regions of Pakistan refer to the Federally Administered Tribal Areas). See also Matt Murphy & Robert Plummer, *Ayman al-Zawahiri: Al-Qaeda leader killed in US drone strike*, BBC (Aug. 2, 2022), available at: <https://www.bbc.com/news/world-asia-62387167>; United States Africa Command, *U.S. forces conduct strike in Somalia targeting al-Shabaab*, DEP’T OF DEFENSE (Oct. 3, 2022), available at: <https://www.africom.mil/pressrelease/34758/us-forces-conduct-strike-in-somalia-targeting-al-shabaab-leader>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *A Brief History of Drones*, IMPERIAL WAR MUSEUM, available at: <https://www.iwm.org.uk/history/a-brief-history-of-drones> (last accessed Dec. 20, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (Unmanned aerial vehicles or UAVs are aircraft with no on-board crew or passengers. They can be automated drones or remotely piloted vehicles.)

<sup>15</sup> *Id.*

Aircraft such as the General Atomics MQ-1 Predator was developed to have a flight range of 454 miles and the ability to fly in an area for 14 hours.<sup>16</sup> At first, the MQ-1 was fielded primarily as an aerial surveillance and reconnaissance platform.<sup>17</sup> In 2001, the Predator was modified to allow the employment of a Hellfire missile against a target.<sup>18</sup> Another aircraft, the General Atomics MQ-9 Reaper, improved upon the Predator's capabilities through the ability to carry an increased payload and to fly for upwards of 40 hours.<sup>19</sup> In the context of the Laws of War, drone use has generated controversy because the U.S. military has used drone strikes to target suspected terrorist militants.<sup>20</sup>

In 2002, the Central Intelligence Agency ("CIA") first used a drone to destroy a car carrying suspected members of Al Qaeda in Yemen.<sup>21</sup> In that strike, a Predator drone launched two Hellfire missiles at a car, which resulted in the complete destruction of the vehicle.<sup>22</sup> By the end of the Bush administration, the government had acquired many more armed drones,

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<sup>16</sup> *MQ-1 Predator*, MAG AEROSPACE, available at: <https://www.magaero.com/mq-1-predator> (last accessed Dec. 20, 2022).

<sup>17</sup> *Predator RQ-1 / MQ-1 / MQ-9 Reaper UAV*, AIRFORCE TECHNOLOGY, available at: <https://www.airforce-technology.com/projects/predator-uav/> (last accessed Dec. 20, 2022). Also see *General Atomics Aeronautical Systems RQ-1 Predator*, NATIONAL MUSEUM OF THE UNITED STATES AIR FORCE, available at: <https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/196333/general-atomics-aeronautical-systems-rq-1-predator/> (last accessed Dec. 20, 2022).

<sup>18</sup> *The Q-1 Predator Became A History-Changing Deadly Missile Slinger 15 Years Ago Today*, JALOPNIK (Feb. 21, 2016), available at:

<https://jalopnik.com/the-q-1-predator-became-a-history-changing-deadly-missi-1760408544>

<sup>19</sup> Tyler Rogoway, *USAF Officially Retires MQ-1 Predator While MQ-9 Reaper Set To Gain Air-To-Air Missiles*, THE DRIVE (Mar. 10, 2019), available at:

<https://www.thedrive.com/the-war-zone/19122/usaf-officially-retires-mq-1-predator-while-mq-9-reaper-set-to-gain-air-to-air-missiles>.

<sup>20</sup> *A Brief History of Drones*, *supra* note 11. The basic definition of a drone strike is the launching of a missile or other projectile from a UAV against a specific target. See *Drone Strike*, CAMBRIDGE DICTIONARY, available at: <https://dictionary.cambridge.org/us/dictionary/english/drone-strike> (last accessed Dec. 20, 2022).

<sup>21</sup> Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, NEW YORK TIMES (Oct. 7, 2022), available at:

<https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html>.

<sup>22</sup> *U.S. Predator Kills 6 Al Qaeda Suspects*, ABC NEWS (Nov. 5, 2002), available at: <https://abcnews.go.com/WNT/story?id=130027>.



and airstrikes in the tribal regions<sup>23</sup> of Pakistan were soaring.<sup>24</sup> In 2008, the Bush administration conducted 36 drone strikes, in contrast to the mere four strikes conducted in the previous year.<sup>25</sup> This increasing trend continued through the Obama administration.<sup>26</sup> In 2009, the Obama administration conducted 52 drone strikes, with that number increasing to 122 in the next year.<sup>27</sup> The use of drone strikes in the tribal regions of Pakistan peaked in 2010 and then began a slow decline until 2016 when the Obama administration only conducted three known strikes in Pakistan.<sup>28</sup>

However, there were negative effects that came with the use of drone strikes. For instance, the increasing amount of airstrikes came with the rising cost of unintended civilian deaths.<sup>29</sup> During the Obama administration, as many as 162 civilians were killed in the tribal regions.<sup>30</sup> These deaths caused an international backlash, mainly in Pakistan. Rioters in Pakistan believed the U.S. drone strikes violated Pakistan's sovereignty and caused excess civilian deaths.<sup>31</sup> In response to the rising deaths, President Obama issued limits on the use of drone strikes outside war zones in 2013.<sup>32</sup>

In 2013, the Obama administration limited the instances when unmanned aircraft can be used to attack in places that are not overt war zones, such as Pakistan, Yemen, and Somalia.<sup>33</sup> In areas considered

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<sup>23</sup> *Federally Administered Tribal Areas*, BRITANNICA, AVAILABLE AT: <https://www.britannica.com/topic/Federally-Administered-Tribal-Areas> (last accessed Mar. 23, 2024).

<sup>24</sup> Savage, *supra* note 21.

<sup>25</sup> *The Drone War in Pakistan*, *supra* note 8.

<sup>26</sup> Savage, *supra* note 21.

<sup>27</sup> *The Drone War in Pakistan*, *supra* note 8.

<sup>28</sup> *The Drone War in Pakistan*, *supra* note 8.

<sup>29</sup> Savage, *supra* note 21.

<sup>30</sup> *The Drone War in Pakistan*, *supra* note 8.

<sup>31</sup> Eyder Peralta, *In Pakistan, Thousands Protest Against U.S. Drone Strikes*, NPR (Nov. 23, 2013), available at:

<https://www.npr.org/sections/thetwo-way/2013/11/23/246887028/in-pakistan-thousands-protest-against-u-s-drone-strikes>.

<sup>32</sup> Savage, *supra* note 21.

<sup>33</sup> Peter Baker & Charlie Savage, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N. Y. TIMES (May 22, 2013), available at: <https://www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html>.

conventional war zones, such as Iraq and Syria, Obama's restrictions on drone strikes did not apply.<sup>34</sup> When President Trump assumed office in 2017, those limits were relaxed and decentralized.<sup>35</sup> Drone operators in the field were permitted to decide whether to target suspects based on their status as members of a terrorist group, so long as general operating principles were satisfied.<sup>36</sup> In addition, during the Trump administration, commanders in the field were given broad latitude in conducting strikes as long as they fit within broad sets of "operating principles."<sup>37</sup> Next, President Biden set aside the Trump administration's drone policy when he first took office in January 2021.<sup>38</sup> The most visible change that the Biden administration instituted was that field commanders required White House approval to attack militants in areas such as Somalia and Yemen.<sup>39</sup>

Finally, in October 2022, the Biden administration changed the rules governing drone strikes, which represented a tightening of the rules used during the Trump administration.<sup>40</sup> In effect, the changes instituted in October 2022 codified the limits the Biden administration had issued the previous year. The changes consisted of two parts. First, the Biden administration removed field commanders' discretion in deciding targets for a drone strike or commando raid.<sup>41</sup> As set forth previously, under the Trump administration, those field commanders were given greater latitude in determining appropriate targets, given specific area requirements were met.<sup>42</sup> Second, the Biden administration required an operator of a drone to ensure with "near certainty" that no civilians would be harmed because of

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<sup>34</sup> Luke Hartig, *Trump's New Drone Strike Policy: What's Any Different? Why It Matters*, JUST SECURITY (Sep. 22, 2017), available at:

<https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/>.

<sup>35</sup> Charlie Savage, *Trump's Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, NEW YORK TIMES (May 1, 2021), available at:

<https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html>.

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

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

<sup>38</sup> Savage, *supra* note 21.

<sup>39</sup> Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away From War Zones*, New York Times (Mar. 3, 2021), available at:

<https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html>.

<sup>40</sup> Savage, *supra* note 21.

<sup>41</sup> Savage, *supra* note 21.

<sup>42</sup> Savage, *supra* note 21.

a strike, regardless of whether they are a woman, child, or man.<sup>43</sup> Given the U.S. actions in constraining the use of drone strikes, possible *jus ad bellum* and *jus in bello* issues are raised, which will be discussed further below.

The military and political appeal of the use of drones for counterterrorist purposes is clear because drones offer multiple advantages over other forms of force employed by the U.S. The capacity of drones to conduct highly precise lethal attacks with minimal risk to friendly forces has incentivized their use, notwithstanding their legality.<sup>44</sup> Drones are one of the many tools available for strategic and operational leaders to wield to achieve a desired effect against an enemy.<sup>45</sup> For the military, drone use offers several advantages. Using drones for lethal action or intelligence, surveillance, and reconnaissance (ISR) purposes is relatively inexpensive. According to a June 2021 report by the Congressional Budget Office, an RQ-4 drone had 38% less recurring costs per flying hour when compared to the P-8 (a manned aircraft).<sup>46</sup>

Furthermore, even if a more favorable metric to manned aircraft systems is used, such as life-cycle costs per flying hour, the metric still favors the RQ-4 drone because it had 17% fewer life-cycle costs per flying hour than the P-8.<sup>47</sup> Using two platforms that perform similar roles, such as close-air-support (“CAS”), the flying cost of an MQ-9 is a sixth of the cost required by an F-16.<sup>48</sup> Using another aircraft that could be used to strike terrorists, the F-22 has a cost per flying hour of \$70,000, in contrast to the \$3,649 required by an MQ-9.<sup>49</sup> Drones are also much more inexpensive to procure. For example, four MQ-9s cost \$56.5 million, in comparison to the

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<sup>43</sup> Savage, *supra* note 21.

<sup>44</sup> Geoffrey Corn, *Drone warfare and the erosion of traditional limits on war powers* 246, in RESEARCH HANDBOOK ON REMOTE WARFARE (David J. Ohlin ed., Edward Elgar Publ'g 2017).

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

<sup>46</sup> CONGRESSIONAL BUDGET OFFICE, USAGE PATTERNS AND COSTS OF UNMANNED AERIAL SYSTEMS 8 (Jun. 2021) [hereinafter COSTS OF UAS].

<sup>47</sup> *Id.* at 8.

<sup>48</sup> Nigel Mease, *Too Little for Too Much? Or A Lot for A Little? The Air Force OA-X Light-Attack Program*, 17 NEW PERSPECTIVES IN FOREIGN POL'Y 38 (2019). [hereinafter *Too Little for Too Much?*].

<sup>49</sup> *Id.*

\$159 million required for an F-35.<sup>50</sup> Even using an older airframe with a similar role to the F-35, such as the F-16, a set of four MQ-9s is still cheaper.<sup>51</sup> In 2022 dollars, the F-16 (C Model) costs \$34 million, in contrast to the \$56.5 million required for a set of four MQ-9s.<sup>52</sup> As such, the low operating and procurement costs of using drones as compared to traditional manned aircraft are one of the reasons they are viewed favorably by political and military leaders.

It is true that cost is only one consideration when choosing a drone over a manned aircraft such as the F-16 or P-8.<sup>53</sup> Nonetheless, unmanned aerial systems (“UAS”) may be preferable over traditional airframes because they offer operational advantages such as the ability to undertake long-duration ISR missions.<sup>54</sup> On the other hand, some situations may require an aircraft such as the F-16 because of specific mission requirements.<sup>55</sup> For example, a manned aircraft can be used in contested environments where command and control are limited, autonomy is required, or policy restrictions exist.<sup>56</sup> Moreover, using manned aircraft may be beneficial in situations requiring greater ISR output because manned aircraft fly higher and faster.<sup>57</sup> Depending on the area, although a

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<sup>50</sup> Alan W. Dowd, *Drone Wars: Risks and Warnings*, 43 U.S. ARMY WAR COLLEGE QUARTERLY: PARAMETERS 9 (2013). See also *MQ-9 Reaper*, UNITED STATES AIR FORCE, available at: <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/> (last accessed Dec. 27, 2022).

<sup>51</sup> *F-16 Fighting Falcon*, UNITED STATES AIR FORCE, available at: <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104505/f-16-fighting-falcon/> (last accessed Dec. 27, 2022).

<sup>52</sup> *Id.* See also *Inflation Calculator*, U.S. INFLATION CALCULATOR, available at: <https://www.usinflationcalculator.com/> (last accessed Dec. 27, 2022).

<sup>53</sup> Costs of UAS, *supra* note 46. (Cited material is located on the page with the header “At a Glance”).

<sup>54</sup> Costs of UAS, *supra* note 46.

<sup>55</sup> Costs of UAS, *supra* note 46.

<sup>56</sup> Anil Chopra, *Manned vs. Unmanned*, SP’S AVIATION (Aug. 2013), available at: <https://www.sps-aviation.com/story/?id=1278>

<sup>57</sup> Brendan A. Barrett, *When To Use Drones vs. Manned Aircraft*, LINKEDIN (Apr. 8, 2021), available at: <https://www.linkedin.com/pulse/when-use-drones-vs-manned-aircraft-surveying-brendan-alan-barrett>. (While many UAS programs are limited to mapping just a few dozen acres a day using a single aircraft, others can map up to 500 acres using a single multi-rotor aircraft and more than 2,000 acres a day using a fixed wing aircraft.) See also Gostar de Daas, *Lockheed A-12 / SR-71*, AVIAMAGAZINE (Jan. 2016), available at: <https://www.aviamagazine.com/factsheets/aircraft/sr71/index.aspx>; *RQ-4 Global Hawk*, UNITED

UAS may look like the optimal choice because of its lower cost, the situation in the field may nonetheless require a commander to use a traditional manned aircraft. Therefore, the mere availability of drones gives commanders the flexibility to address a broad range of situations with differing operational requirements.

There are other operational benefits to using drones. They shield the operator from direct harm, and its time in the air is not limited by human physiology.<sup>58</sup> Because its time in the air is not limited by human physiology, it can linger over an area or specific target for an extended period of time.<sup>59</sup> Other tools in a military's arsenal offer similar capabilities to those of drones.<sup>60</sup> Aircraft such as the F-35, F-22, and F-16,<sup>61</sup> in addition to cruise missiles and platforms even as basic as a sniper, offer precision engagement through the employment of smart munitions.<sup>62</sup> Only the sniper can rival the real-time surveillance capability offered by drones.<sup>63</sup> But even if a sniper is used, a drone can still linger for an extended period of time over a target without risk to human lives.<sup>64</sup> Finally, even if an enemy deploys countermeasures against a drone, the worst case scenario is that the drone is lost—the drone's operator remains safe from danger.<sup>65</sup> Therefore, drones are operationally advantageous because they do not expose human lives to danger.

As discussed previously, drones such as the MQ-1 Predator and MQ-9 Reaper can sustain greater flying times than manned aircraft used in a similar role.<sup>66</sup> Because of this, terrorist operational capabilities are

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STATES AIR FORCE, available at:

<https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104516/rq-4-global-hawk/> (last accessed Dec. 22, 2022). (The SR-71 has a much higher operating ceiling and maximum speed compared to the RQ-4).

<sup>58</sup> Dowd, *supra* note 50 at 7.

<sup>59</sup> See Rogoway, *supra* note 19.

<sup>60</sup> Corn, *supra* note 44 at 248.

<sup>61</sup> See notes 46-49.

<sup>62</sup> Corn, *supra* note 44 at 248.

<sup>63</sup> Corn, *supra* note 44 at 248.

<sup>64</sup> Corn, *supra* note 44 at 248.

<sup>65</sup> Corn, *supra* note 44 at 248.

<sup>66</sup> Rogoway, *supra* note 19. See also Aaron Mehta, *Ready for Retirement, Can Predator Find New Home?*, DEFENSENEWS (May 13, 2014), available at: <https://archive.vn/20140517154223/http://www.defensenews.com/article/20140513/DEFREG/305>

seriously hindered.<sup>67</sup> The operational benefits of using drones that accrue to the U.S. also extend to hampering the capabilities of suspected terrorists.<sup>68</sup> This is because terrorists themselves also recognize the effectiveness of drones.<sup>69</sup> In letters seized during the 2011 raid on Osama bin Laden's ("OBL") compound in Abbottabad, Pakistan, OBL instructed his subordinates to stay indoors except on a "cloudy overcast day" to avoid being spotted.<sup>70</sup> Additionally, another senior al-Qaeda leader lamented that the group's leadership had been suffering from the spy planes [and war] problem in the tribal areas of Pakistan.<sup>71</sup> Moreover, the use of drones deprives the enemy of human targets. By using unmanned aerial systems such as drones, U.S. military members are taken out of harm's way because there is no physical person for a terrorist to target. This deprivation of targets for the enemy also extends more broadly because fewer military members have to physically deploy to countries where terrorists are present.<sup>72</sup>

Using drones also gives strategic advantages to its users. As a weapon system, drones have offered military and national leaders the capability to identify and engage a target with a high degree of precision, all while posing little to no risk to friendly forces.<sup>73</sup> First, and most importantly, the use of drones is harmonious with the U.S. public's growing distaste for human casualties.<sup>74</sup> For example, the American people had a higher threshold for unacceptable casualties during World War II and much of the Vietnam War.<sup>75</sup> But this changed after the Vietnam War, with public

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120020/Ready-for-Retirement-Can-Predator-Find-New-Home. (MQ-1 Reaper can sustain a flying time of 30 hours).

<sup>67</sup> Netivist, *Drone strikes pros and cons: do you agree with the use of military drones*, NETIVIST, available at: <https://netivist.org/debate/drone-strikes-pros-and-cons> (last accessed Dec. 27, 2022)[Hereinafter *Drone strikes pros and cons*].

<sup>68</sup> *Id.*

<sup>69</sup> "Targeted Killing" and the Rule of Law: The Legal and Human Costs of 20 Years of US Drone Strikes at 1, *Hearing Before the Senate Comm. on the Judiciary*, Feb. 9, 2022 (statement of Nathan A. Sales) [Hereinafter Sales Testimony].

<sup>70</sup> *Id.*

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

<sup>72</sup> *Drone strikes pros and cons*, *supra* note 67.

<sup>73</sup> *Drone strikes pros and cons*, *supra* note 67.

<sup>74</sup> Dowd, *supra* note 50, at 7-8.

<sup>75</sup> Dowd, *supra* note 50, at 8.

support for excessive casualties decreasing after that War.<sup>76</sup> After the Vietnam War, American leaders have continually waged wars and conflicts that have incurred fewer and fewer deaths than the preceding conflict.<sup>77</sup> Obviously, after 9/11, this distaste toward casualties reversed course. In a CNN poll conducted after the 9/11 attack, 76% of the respondents said they would support military action even if it means 5,000 American troops would be killed.<sup>78</sup>

Nonetheless, this pro-military action attitude shifted back again towards ambivalence to military action as the wars in Afghanistan and Iraq wore on.<sup>79</sup> This is because of the 4,431 American troops killed in Iraq and the 2,462 killed in Afghanistan.<sup>80</sup> Indeed, in addition to the change in attitudes toward military casualties, broader public support for the War in Afghanistan was high at the beginning but decreased as the war wore on. In a poll conducted by Gallup, 93% of Americans in 2002 were willing to say that getting militarily involved in Afghanistan was not a mistake.<sup>81</sup> In contrast, in 2021, only 46% said that getting militarily involved in Afghanistan was not a mistake.<sup>82</sup> Because drones do not place American troops at risk for harm and have emerged as a potent counterterrorism tool, the use of drones is consonant with the American public's desire to minimize loss of life.

An additional strategic benefit to the use of drone strikes is that they have a minimal footprint. After the September 11 attacks, the U.S. adopted the position that it was in an armed conflict with Al-Qaeda and associated groups.<sup>83</sup> This meant that the U.S. had the authority to strike Al-Qaeda when its members presented themselves. U.S. operations involving drone

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<sup>76</sup> Dowd, *supra* note 50, at 8.

<sup>77</sup> Dowd, *supra* note 50, at 8.

<sup>78</sup> Dowd, *supra* note 50, at 8.

<sup>79</sup> Dowd, *supra* note 50, at 8.

<sup>80</sup> *Casualty Status*, DEP'T OF DEFENSE (Dec. 19, 2022), available at: <https://www.defense.gov/casualty.pdf>. (The Afghanistan number was calculated by adding the total worldwide deaths in the Operation Enduring Freedom table of 2,353 to the total deaths in the Operation Freedom's Sentinel table of 109.)

<sup>81</sup> Megan Brenan, *Americans Split on Whether Afghanistan War Was a Mistake*, GALLUP (Jul. 26, 2021), available at: <https://archive.vn/i8Zyd> (last accessed Dec. 27, 2022).

<sup>82</sup> *Id.*

<sup>83</sup> Corn, *supra* note 44 at 249.

strikes conducted against members of Al-Qaeda often occurred in the territory of another state without their permission.<sup>84</sup> The U.S. invoked the “unwilling or unable” doctrine to justify the projection of U.S. military power into the territory of another without their consent.<sup>85</sup> Because drones provide the capability to conduct attacks in such areas with minimal physical intrusion into the sovereign state with virtually no risk of mission compromise to the U.S., they fit ideally within the “unwilling or unable” test.<sup>86</sup> Finally, the infrastructure required by drone operations is much smaller than that required for conventional military forces.<sup>87</sup> An example is the Ramstein Air Base. The Air Base is valued at \$12.6 billion, while a small drone base in Niger only cost \$100 million.<sup>88</sup> In addition to the cost impact of drone operations, the number of people drones require is much less than the amount required for conventional forces.<sup>89</sup> In effect, the smaller cost and personnel impact demonstrate the smaller logistical footprint that drones require. Therefore, for the above reasons, drones have a smaller operational and logistical footprint than other tools for the use of force.

### *B. Issues Raised By U.S. Counter Terrorist Use of Force*

Despite the advantages gained by using drones against terrorists, its use by the U.S. has raised numerous issues. The ability of drones to accurately strike a target while also avoiding civilian casualties and high risk to friendly forces is its most prominent characteristic for the reasons discussed above. This characteristic has proven valuable in the Global War

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<sup>84</sup> See *The Drone War in Pakistan*, *supra* note 8.

<sup>85</sup> Corn, *supra* note 44 at 249.

<sup>86</sup> Corn, *supra* note 44 at 249. (The “unwilling or unable” test is also known as the “unwilling or unable” Doctrine in other sources. It will be explained further in Section III.)

<sup>87</sup> Michael A. Allen et al., *After Afghanistan, US military presence abroad faces domestic and foreign opposition in 2022*, THE CONVERSATION (Jan. 5, 2022), available at: <https://theconversation.com/after-afghanistan-us-military-presence-abroad-faces-domestic-and-foreign-opposition-in-2022-172360>.

<sup>88</sup> *Id.* See also Carla Babb, *US-Constructed Air Base in Niger Begins Operations*, VOICE OF AMERICA NEWS (Nov. 1, 2019), [https://www.voanews.com/a/africa\\_us-constructed-air-base-niger-begins-operations/6178666.html](https://www.voanews.com/a/africa_us-constructed-air-base-niger-begins-operations/6178666.html).

<sup>89</sup> Babb, *supra* note 88. (Hundreds of U.S. Airmen are present in the Air Base in Niger, in contrast to the thousands found at Ramstein Air Base).



on Terror due to the nature of the non-state enemies the U.S. has faced abroad.<sup>90</sup> Drones are also relatively inexpensive to procure and maintain, which offers another reason decision makers turn to their use as a tool for national security objectives.<sup>91</sup> Drone strikes are not inherently sinister—they merely represent the latest in a long line of technological developments designed to enable the delivery of force from a distance.<sup>92</sup>

However, the U.S. use of drone strikes has raised problems domestically and internationally. Domestically, the U.S.'s use of drone strikes is shrouded in secrecy.<sup>93</sup> The U.S. government, for the most part, does not comment on or acknowledge reported drone strikes that take place outside “hot” battlefields and does not release lists of those targeted or killed. During the Obama administration, statements by senior administration officials and the President himself did little to shed light on internal U.S. practices or procedures with the use of drone strikes.<sup>94</sup> Because of this shroud of secrecy over the U.S. program of drone strikes, oversight and accountability for government actions are hindered.<sup>95</sup>

Additionally, objective assessments of the use of force outside conventional war zones cannot be completed because of the lack of publicly available strike information.<sup>96</sup> Internationally, the legality of the U.S. drone program is unclear because of differing justifications for the use of force through drone strikes.<sup>97</sup> On the one hand, U.S. officials have suggested that the self-defense framework for the use of force under international law supplements the armed conflict framework.<sup>98</sup> On the other hand, it has been suggested that the U.S. has shifted entirely from an

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<sup>90</sup> Corn, *supra* note 44 at 248.

<sup>91</sup> See *supra* notes 45-51.

<sup>92</sup> Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFF. 83, 88 (2014) (In their time, the crossbow and the cannon were also condemned as devilish and dishonorable inventions).

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

<sup>94</sup> *Id.*

<sup>95</sup> SHANNON DICK & RACHEL STOHL, A NEW AGENDA FOR US DRONE POLICY AND THE USE OF LETHAL FORCE 23 (Stimson Center, 2021).

<sup>96</sup> *Id.*

<sup>97</sup> Rosa Brooks, *Drones and the International Rule of Law*, 28 J. Ethics & Int'l Aff. 83, 90 (2014).

<sup>98</sup> Brooks, *supra* note 97, at 90.

armed conflict framework to a self-defense framework.<sup>99</sup> Regardless of what framework is used in analyzing U.S. uses of force through drone strikes, there are still uncertainties with respect to compliance with international law.

With *jus ad bellum* rules, the legality of U.S. drone strikes is called into question because the U.S. does not believe that the use of force in self-defense requires “. . . clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”<sup>100</sup> Additionally, international law requires that the use of force in self-defense be consistent with the principles of necessity and proportionality.<sup>101</sup> The issue of necessity is raised because nonlethal means other than drones may be available to prevent future attacks.<sup>102</sup> Furthermore, proportionality may be implicated; the use of drone strikes may inspire more future terrorists than they kill.<sup>103</sup> The lack of transparency around U.S. drone strikes means that it is impossible to determine whether drone strikes satisfy international legal principles.<sup>104</sup> As for *jus in bello* issues, determining the existence of an armed conflict is critical.<sup>105</sup> If the U.S. is in an armed conflict with a group such as Al-Qaeda, rules relating to the use of force change, allowing for a state to target enemy combatants simply based on their status as enemy soldiers.<sup>106</sup> However, if there is no armed conflict, the use of force through drone strikes must satisfy *jus ad bellum* principles.<sup>107</sup> Thus, the issues above regarding *jus ad bellum* surface once again. Finally, as for issues of sovereignty, U.S. officials have asserted that drone strikes are only conducted inside the borders of another state when that state is

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<sup>99</sup> Brooks, *supra* note 97, at 90.

<sup>100</sup> Brooks, *supra* note 97, at 93-94.

<sup>101</sup> Brooks, *supra* note 97, at 94.

<sup>102</sup> Brooks, *supra* note 97, at 94.

<sup>103</sup> Brooks, *supra* note 97, at 95 (2014). See also Aqil Shah, *Do U.S. Drone Strikes Cause Blowback? Evidence from Pakistan and Beyond*, CARNEGIE ENDOWMENT (May 4, 2018), available at:

<https://carnegieendowment.org/2018/05/04/do-u.s.-drone-strikes-cause-blowback-evidence-from-pakistan-and-beyond-pub-76271>

<sup>104</sup> *Id.* at 94.

<sup>105</sup> *Id.* at 95.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 91.

“unwilling or unable” to deal with a threat themselves.<sup>108</sup> There are uncertainties with the use of drone strikes because it is unknown what criteria the U.S. uses to determine whether a state is “unwilling or unable” to take appropriate action.<sup>109</sup>

## II. THE STATUS OF UNITED STATES DRONE STRIKES UNDER ARTICLE 2(4) AND ARTICLE 51 OF THE UNITED NATIONS CHARTER

### A. *Jus Ad Bellum and Jus In Bello*

The use of drone strikes implicates two sets of international rules: *jus ad bellum* and *jus in bello*.<sup>110</sup> *Jus ad bellum* governs when a state may employ force against another.<sup>111</sup> *Jus in bello* regulates the conduct of states after the fighting has begun.<sup>112</sup> In *jus ad bellum*, Article 2(4) of the United Nations Charter (“U.N. Charter”) provides a blanket prohibition against the use of force by one state inside the borders of another state.<sup>113</sup> Two exceptions to this prohibition are if a state consents to the force at issue or the use of force is in self-defense.<sup>114</sup> Once a state has begun fighting, *jus in bello* says that only enemy combatants and other military objectives may be made the object of attack.<sup>115</sup>

Thus, given the law regarding *jus ad bellum* and *jus in bello*, the issue with U.S. counterterrorist uses of force is its legality under the Laws of War. If the U.S. is in armed conflict with a terrorist group, U.S. drone strikes and commando raids comply with *jus in bello*.<sup>116</sup> On the other hand,

<sup>108</sup> *Id.* at 90.

<sup>109</sup> Brooks, *supra* note 97, at 90.

<sup>110</sup> Brooks, *supra* note 97, at 91.

<sup>111</sup> Brooks, *supra* note 97, at 91.

<sup>112</sup> Sean D. Murphy, PRINCIPLES OF INT’L LAW 602 (3rd ed. 2018).

<sup>113</sup> *Id.* at 573.

<sup>114</sup> *Id.* at 580-582. The use of force in self-defense included the ability of a state to defend itself against not only actual attacks, but also an imminent attack. See Article 51 of the U.N. Charter.

<sup>115</sup> U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL 207 (Dec. 2016).

<sup>116</sup> See Pub. L. No. 107-40 (Resolution of Congress that authorized the President to use force against Al-Qaeda); also see Rebecca Ingber, *Legally Sliding Into War*, JUST SECURITY (Mar. 15, 2021), available at: <https://www.justsecurity.org/75306/legally-sliding-into-war/> (Public Law No. 107-40 has been interpreted to extend to Al-Qaeda and associated forces).

if the U.S. is not in armed conflict with a terrorist group, the U.S. use of force for counterterrorist purposes is more problematic. This is because drone strikes are taken against targets the U.S. is not at war with and are also located within the territory of other states. In arguing the legality of these strikes, the U.S. might rely on the “unwilling or unable” doctrine as a functional extension of the self-defense justification found in Article 51 of the U.N. Charter.

The law of *jus ad bellum* refers to the conditions under which states may resort to war or to the use of armed force in general.<sup>117</sup> Underlying the framework of *jus ad bellum* is Article 2(4) of the U.N. Charter. That section says that “[a]ll 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 [p]urposes of the United Nations.”<sup>118</sup> Essentially, *jus ad bellum*, deals with the “why” of the international armed conflict (the legitimacy or otherwise of going to war).<sup>119</sup> Critically, a state cannot commit “. . . threat or use of force” against a state that consents to the conduct at issue.<sup>120</sup> For example, if Germany consents to the presence of U.S. military forces at bases in Germany, the presence of those forces in German territory cannot violate Article 2(4).<sup>121</sup> However, once the consent is withdrawn, if the forces are not removed, then Article 2(4) is violated.<sup>122</sup> By its terms, Article 2(4) also prohibits the threats of the use of force.<sup>123</sup> In 2007, an arbitral panel found that a Surinamese patrol boat’s actions in threatening the operators of a Guyanese oil rig constituted a violation of Article 2(4).<sup>124</sup> The actions taken

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<sup>117</sup> *What are jus ad bellum and jus in bello?*, INT’L COMMITTEE OF THE RED CROSS (Jan. 22, 2015), available at: <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>

<sup>118</sup> U.N. Charter art. 2(4).

<sup>119</sup> Rob McLaughlin, *Keeping The Ukraine-Russia Jus Ad Bellum and Jus In Bello Issues Separate*, LIEBER INSTITUTE (Mar. 7, 2022), available at:

<https://lieber.westpoint.edu/keeping-ukraine-russia-jus-ad-bellum-jus-in-bello-issues-separate/>.

<sup>120</sup> Murphy, *supra* note 112 at 54.

<sup>121</sup> Murphy, *supra* note 112 at 54.

<sup>122</sup> Murphy, *supra* note 112 at 54.

<sup>123</sup> Murphy, *supra* note 112 at 54.

<sup>124</sup> Murphy, *supra* note 112 at 54.

by the Surinamese patrol boat were not merely law enforcement activity, but an unlawful threat of the use of force.<sup>125</sup>

Another component in the *jus ad bellum* framework is the inherent right to self-defense. Article 51 of the U.N. Charter does not grant a right of self-defense but rather preserves a right under customary international law that predates the U.N. Charter.<sup>126</sup> It states that “[n]othing 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 . . . .”<sup>127</sup> Thus, for a state to legally use force against another state, an armed attack must occur.<sup>128</sup> While there is common agreement that a state may respond in self-defense if an actual armed attack occurs (i.e., an actual invasion of a state’s territory), it remains a matter of debate where the force is of a lesser magnitude.<sup>129</sup> For example, the International Court of Justice held that Nicaragua’s conduct in sending armed bands, groups, weapons, and logistical support to rebels in Nicaragua did not rise to the level of armed conduct required for the lawful use of self-defense by the United States.<sup>130</sup>

The temporal limits in which the force can be carried out are related to the use of force in self-defense in response to an armed attack. The views of states are split as to whether a state can 1) only respond to an armed attack that has already occurred; 2) respond to an imminent attack that has not occurred (imminent self-defense) or; 3) respond to an armed attack that is not imminent but may occur at some point in the future if action is not taken (preemptive self-defense).<sup>131</sup> The first view is known as the “strict constructionist” school; adherents say that lawful self-defense can only occur if an actual armed attack has occurred and that anticipatory and preemptive self-defense cannot be lawful under international law.<sup>132</sup>

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<sup>125</sup> Murphy, *supra* note 112 at 54.

<sup>126</sup> Sean D. Murphy, *PRINCIPLES OF INTERNATIONAL LAW* 580 (3rd ed. 2018).

<sup>127</sup> U.N. Charter art. 51.

<sup>128</sup> Murphy, *supra* note 112, at 580.

<sup>129</sup> Murphy, *supra* note 112, at 580.

<sup>130</sup> *Id.* See also *Nicar. v. U.S.*, Judgment, 1986 I.C.J. 14 (June 27).

<sup>131</sup> Murphy, *supra* note 112, at 580.

<sup>132</sup> Murphy, *supra* note 112, at 580.

The second view, also known as the imminent threat school, accepts that the language in Article 51 of the U.N. Charter speaks of self-defense in response to an armed attack, yet notes that the language in Article 51 references a right under customary international law that predated the Charter.<sup>133</sup> Finally, the most permissive school with respect to the use of force in self-defense is known as the qualitative threat school.<sup>134</sup> Adherents to this school say that a state need not await an actual attack, but say that the requirement of an imminent threat is misplaced.<sup>135</sup> They argue that the world has changed significantly since 1945 because of the advent of weapons of mass destruction and the rise of global terrorism.<sup>136</sup> The rationale for this theory of self-defense under international law is that states should not be subject to paralysis in attempting to deal with a potential threat simply because a temporal element has not been met.<sup>137</sup> Rather than analyzing the temporal potential of an attack, more factors, such as the probability that the attack will occur in the future, the magnitude of the harm that would occur, and the availability of non-forcible means, must be evaluated.<sup>138</sup> More recently, the Obama administration adopted positions that align with the qualitative threat school because “. . . the traditional conception of what constitutes an “armed attack” under international law must be understood by modern-day capabilities, techniques, and technological innovations of terrorist organizations.”<sup>139</sup>

The framework of *jus ad bellum* for the use of force in self-defense is relevant in today’s geopolitical climate because U.S. drone strikes are often used to strike targets located in the territory of other sovereign

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<sup>133</sup> Murphy, *supra* note 112, at 580, 582. See also Megan C. Malone & Christopher E. Seibert, *Anticipatory Self-Defense*, UNITED STATES AIR FORCE (Dec. 13, 2018), available at: <https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2549128/anticipatory-self-defense/>

<sup>134</sup> SEAN D. MURPHY, *PRINCIPLES OF INT’L L.* 582 (3rd ed. 2018) [Hereinafter “Murphy 582”].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 582. See also MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 217 (1961).

<sup>137</sup> Murphy 582, *supra* note 134, at 582.

<sup>138</sup> Murphy 582, *supra* note 583.

<sup>139</sup> WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* 9 (Dec. 2016).

nations.<sup>140</sup> Because of the War On Terror, the U.S. has leveraged the precision strike capabilities and increased operational endurance of drones to target members of Al-Qaeda, especially in the tribal areas of Pakistan.<sup>141</sup> If members of a terrorist group were located within the territory of another state and also presented an imminent threat to the U.S., Article 51 of the U.N. Charter provides a self-defense justification for the use of force against that terrorist group. The use of force in self-defense against a terrorist group would be a foregone conclusion if the U.S. were at war with the country that contains that terrorist group. However, if the U.S. is not at war with a state that is harboring terrorists, the use of drone strikes pursuant to a *jus ad bellum* initiation of the use of force raises more issues. The U.S. would need consent from the harboring state to lawfully use those drone strikes. Thus, Article 2(4) of the U.N. Charter has been violated because the U.S. has used force against the territorial integrity of another state it is not at war with and with which it has not obtained consent. Therefore, with the assumptions above, the U.S. would violate international law if a drone strike targets militants located in another country.

### *B. The Unwilling or Unable Doctrine*

This section will apply the Unwilling or Unable Doctrine to the U.S. drone strikes in Pakistan's Tribal Areas. To emphasize and re-iterate the scope of the problem, if the U.S. employs a drone strike against a terrorist group located in the territory of another state that the U.S. is not at war with and has not given consent to the U.S. to conduct that drone strike, international law has been violated. The Doctrine's applicability to drone strikes can first be traced to then-presidential candidate Obama's assertion that the U.S. would take action against leaders of al-Qaeda in Pakistan if its

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<sup>140</sup> See Steve Coll, *The Unblinking Stare*, THE NEW YORKER (Nov. 17, 2014), available at: <https://www.newyorker.com/magazine/2014/11/24/unblinking-stare> (Drone strikes were used to strike Al-Qaeda militants in the Tribal Areas of Pakistan). See also Mark Memmott, *Bin Laden's End: The Story So Far*, NPR (May 2, 2011), available at: <https://www.npr.org/sections/thetwo-way/2011/05/02/135932758/bin-ladens-end-the-story-so-far> (U.S forces conducted a raid on Osama Bin Laden's compound in Abbottabad, Pakistan).

<sup>141</sup> Coll, *supra* note 140.

president was unwilling or unable to strike against them.<sup>142</sup> On May 2, 2011, the U.S. entered Pakistan and killed Osama bin Laden without Pakistan's consent.<sup>143</sup> In response to Pakistan's objections that the U.S. took unilateral unauthorized action, the U.S. declined to provide Pakistan with advance knowledge of the raid because it was concerned the mission might be compromised.<sup>144</sup> There are other instances where this Doctrine might have been invoked. For example, it could have been relevant when Russia used force in Georgia in 2002 against Chechen rebels who attacked Russia, purportedly based on Georgia's unwillingness and inability to suppress the rebels' attacks.<sup>145</sup> Alternatively, it might have been relevant when Israel used force in Lebanon against Hezbollah and the Palestine Liberation Organization.<sup>146</sup>

Thus, the Doctrine applies when a victim state concludes that it must use force in self-defense to respond to an attack from a non-state group operating outside the victim state's territory.<sup>147</sup> The issue in these instances is whether the territorial state will agree to suppress the non-state group on the victim state's behalf.<sup>148</sup> The Doctrine requires a victim state to determine “. . . whether the territorial state is willing and able to address the threat posed by the non-state group before using force in the territorial state's territory without consent.”<sup>149</sup> “If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the non-state group.”<sup>150</sup> On the other hand, if the territorial state is unwilling or unable to take those steps, it is lawful for the victim state to use necessary and proportional force to suppress the threat that a non-state group poses.<sup>151</sup>

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<sup>142</sup> Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483, 485 (2012).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Deeks, *supra* note 142, at 487.

<sup>149</sup> Deeks, *supra* note 142, at 487.

<sup>150</sup> Deeks, *supra* note 142, at 487.

<sup>151</sup> Deeks, *supra* note 142, at 487-488.



Moreover, the Doctrine does not require members to wait for Security Council intervention before engaging in lawful self-defense.<sup>152</sup> This means that the Charter allows for some time after the occurrence of an armed attack in which a state may act in self-defense without Council approval.<sup>153</sup> In applying the Doctrine, some assumptions must be made. First, it is assumed that the victim state needs to respond to an armed attack before the Security Council has made a decision as to whether to authorize a member of the United Nations to use force.<sup>154</sup> With this assumption, the victim state is the finder of fact with respect to a territorial state's extent of unwillingness or inability to respond to a threat within its territory.<sup>155</sup> In other cases, however, the victim state may determine that the use of force in self-defense is warranted but does not believe that it needs to respond to an armed threat immediately.<sup>156</sup> For example, when Kuwait was invaded by Iraq in the early 1990s, the U.N. Security Council swiftly adopted a resolution condemning Iraq's illegal invasion of Kuwaiti territory.<sup>157</sup> However, not all power to decide the applicability of the Doctrine is confined to the victim state. As will be set forth below, the territorial state has the ability to suppress the threat itself or provide information to the victim state to allay the victim state's concerns.<sup>158</sup> Therefore, in most cases, the victim state is the arbiter of the "unwilling or unable" inquiry, but the Security Council may need to make that assessment itself.<sup>159</sup>

General principles in describing the Doctrine are insufficient in regard to the Laws of War. The Doctrine offers a useful way to manage the competing interests of affected states. However, if no guidance is offered on what the test actually means, the Doctrine is ineffective in adequately accommodating all affected states.<sup>160</sup> Therefore, articulating more specific

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<sup>152</sup> Deeks, *supra* note 142, at 495. See also U.N. Charter art. 51.

<sup>153</sup> Deeks, *supra* note 142, at 495. See also U.N. Charter art. 51.

<sup>154</sup> Deeks, *supra* note 142, at 495.

<sup>155</sup> Deeks, *supra* note 142, at 495.

<sup>156</sup> Deeks, *supra* note 142, at 495-496.

<sup>157</sup> Deeks, *supra* note 142, at 496. See also S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

<sup>158</sup> Deeks, *supra* note 142, at 496. See also S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

<sup>159</sup> Deeks, *supra* note 142, at 496. See also S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

<sup>160</sup> Deeks, *supra* note 142, at 506.

parameters on the applicability of the Doctrine would 1) serve as a substantive constraint on action by the victim; 2) provide a basis on which the victim state can justify its actions; and 3) as a procedural matter, structure decision making by the victim and territorial states and international bodies to improve the quality of decisions.<sup>161</sup> Therefore, these specific parameters shift the Doctrine from how it currently operates similarly as a “legal standard” to a more detailed “rule”-like test.<sup>162</sup> This shift seeks to advance the three goals mentioned above.<sup>163</sup>

In addition to managing the interests of affected states, the Doctrine more broadly affects foreign policy decisions because it functions as a constraint on action, as a basis of justification for action, and as a way to provide organizational structure, procedures, and forms.<sup>164</sup> Concerning the three goals set forth in the previous paragraph, the Doctrine functions as a substantive constraint on states because the Doctrine gives a territorial state an incentive to address the threat itself; because of unclear international rules, territorial states are less likely to be on sufficient notice of the steps required to avoid having other states use force on their territory.<sup>165</sup> Because of this lack of notice, there is an increase in the likelihood that a territorial state is unwilling or unable to suppress the threat.<sup>166</sup> Another way that the Doctrine might serve as a constraint on victim states is to improve the quality of the information that the victim state uses to make its decision and reduce factual uncertainties when a victim state uses force.<sup>167</sup> As for the Doctrine’s advantages providing an avenue for states to legitimize or justify their actions, there are two aspects on this point. First, a clearer, more detailed Doctrine would allow victim states to effectively gauge the reaction of other states and therefore provide a more measured decision-making process and may result in fewer decisions to use force.<sup>168</sup> Second, if the Doctrine were better elucidated,

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<sup>161</sup> Deeks, *supra* note 142, at 506.

<sup>162</sup> Deeks, *supra* note 142, at 506.

<sup>163</sup> Deeks, *supra* note 142, at 506.

<sup>164</sup> Deeks, *supra* note 142, at 507.

<sup>165</sup> Deeks, *supra* note 142, at 509.

<sup>166</sup> Deeks, *supra* note 142, at 509.

<sup>167</sup> Deeks, *supra* note 142, at 510.

<sup>168</sup> Deeks, *supra* note 142, at 512.

practically speaking, determinacy is increased; this increase in determinacy bolsters the legitimacy of an international norm.<sup>169</sup> Finally, a better articulation of the Doctrine offers better procedural guidelines.

There are six relevant factors in fleshing out the Doctrine, which would effectively constrain the power of victim states in situations where the use of force would not benefit international peace and security.<sup>170</sup> These factors include the requirements that the victim state: 1) prioritize acquiring consent or cooperating with the territorial state; 2) assess the nature of the threat posed by the non-state actor; 3) request the territorial state to take action and evaluate its response; 4) reasonably assess the territorial state's control and capacity over the area in which a nonstate group operates; 5) assess the territorial state's proposed means to suppress the threat; and finally 6) evaluate its prior (positive and negative) interactions with the territorial state on related issues.

The first factor requires the victim state to prioritize acquiring consent or cooperating with the territorial state. This is the first factor because if a victim state obtains consent from the territorial state, a further inquiry using the other five factors is unnecessary.<sup>171</sup> Moreover, this factor is important because it may illustrate how common counterterrorism cooperation occurs between states.<sup>172</sup> Although a victim state should prioritize obtaining consent from the territorial state prior to using force, the fact that consent is not given does not completely foreclose the ability of the victim state to take action. If the territorial state denies the victim state's request for consent, the denial may prove relevant under the remaining factors in the subsequent "unwilling or unable" analysis.<sup>173</sup> Prioritizing consent is thus preferred because cooperation preserves the integrity of the territorial state's sovereignty, and "states acting collectively

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<sup>169</sup> Deeks, *supra* note 142, at 512.

<sup>170</sup> Deeks, *supra* note 142, at 509.

<sup>171</sup> Deeks, *supra* note 142, at 519.

<sup>172</sup> See *US Somali air strikes 'kill many'*, BBC News (Jan. 9, 2007), <http://news.bbc.co.uk/2/hi/africa/6243459.stm> (last accessed Jan. 29, 2023). For example, it appears that the U.S. has obtained consent from Somalia prior to using force in Somalia's territory. See also Amos S. Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 558, 560 (1919) (In 1877, the U.S. Secretary of War instructed General William Sherman to suppress Mexican and Indian raids with the cooperation of the Mexican authorities.)

<sup>173</sup> Deeks, *supra* note 142, at 519.

are likely to have better information about the target than would either state acting alone.”<sup>174</sup>

The second factor requires an assessment of the nature of the threat posed by the non-state actor.<sup>175</sup> A victim state’s understanding of the nature and seriousness posed by the non-state actor that attacked it will inform its future decision-making with respect to the territorial state’s willingness and ability to suppress the threat.<sup>176</sup> “Relevant factors that the victim state should consider are the geographic scope and intensity of the non-state actor’s activities, the sophistication of the attacks the non-state actors have undertaken and are expected to undertake in the future, the number of actors in a particular area, the seniority (or juniority) of those actors within the organization, and the imminence of the threat of further armed attacks.”<sup>177</sup>

The third factor requires the victim state to request the territorial state to take action and evaluate its response; this should be done because, assuming that the territorial state has not consented to the victim state’s use of force in its territory, it is obvious that asking a state whether they can address a threat will accomplish that end.<sup>178</sup> This procedural requirement ensures that the territorial state is aware of the threat of the non-state actor/group and reduces the chance that the territorial state’s inaction is not due to its ignorance of the situation.<sup>179</sup> However, this procedural requirement is not absolute; if situations arise in which the victim state finds that asking a territorial state to take action would be futile or damaging to its own security, the victim state need not request the territorial state to take action.<sup>180</sup>

The fourth factor requires a reasonable assessment of territorial state control and capacity.<sup>181</sup> This factor addresses situations where a territorial state says that it is willing to take steps against the non-state

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<sup>174</sup> Deeks, *supra* note 142, at 520.

<sup>175</sup> Deeks, *supra* note 142, at 521.

<sup>176</sup> Deeks, *supra* note 142, at 521.

<sup>177</sup> Deeks, *supra* note 142, at 521.

<sup>178</sup> Deeks, *supra* note 142, at 521.

<sup>179</sup> Deeks, *supra* note 142, at 522.

<sup>180</sup> Deeks, *supra* note 142, at 522-525.

<sup>181</sup> Deeks, *supra* note 142, at 525.

actor, but the victim state has doubts about the territorial state's level of control over the area in which the non-state actor operates.<sup>182</sup> Therefore, an assessment of a territorial state's level of control over an area is critical in determining the territorial state's "ability" to suppress a threat.<sup>183</sup> Some guiding considerations in evaluating a state's level of control over an area include using public information regarding ungoverned spaces<sup>184</sup> or the capacity of a nation's military or law enforcement personnel.<sup>185</sup> The military and law-enforcement capabilities are more relevant to the issue of a state's ability to tackle a threat than its willingness.<sup>186</sup> However, there may be cases where military and law enforcement personnel can clearly address a threat, but since they are sympathetic to the non-state group, are ultimately unwilling to address it as a threat.<sup>187</sup>

The fifth factor requires the victim state to assess the territorial state's proposed means to suppress the threat.<sup>188</sup> This factor has procedural and substantive elements and purposes.<sup>189</sup> Substantively, this factor would advance the victim state's efforts to determine the territorial state's ability and willingness to address the threat by specifically analyzing how the territorial state would apply its capabilities to the non-state group.<sup>190</sup> Procedurally, this factor allows a victim state to determine what actual steps are required to suppress the threat.<sup>191</sup> Therefore, the issue is whether the territorial state is actually able to bear the burden of using force effectively in a lower cost way than the victim state, or is the victim state persuaded that it must employ force itself within the territorial state's borders?<sup>192</sup>

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<sup>182</sup> Deeks, *supra* note 142, at 525.

<sup>183</sup> Deeks, *supra* note 142, at 525.

<sup>184</sup> See, e.g., *Failed State Index 2011*, FUND FOR PEACE (Jun. 20, 2011), available at: <https://www.fundforpeace.org>; Angelea Rabasa et al., *Ungoverned Territories: Understanding and Reducing Terrorism Risks*, RAND CORPORATION (2007), available at: <https://www.rand.org/pubs/monographs/MG561.html>.

<sup>185</sup> Deeks, *supra* note 186, at 525.

<sup>186</sup> Deeks, *supra* note 142, at 527.

<sup>187</sup> Deeks, *supra* note 142, at 527-528.

<sup>188</sup> Deeks, *supra* note 142, at 529.

<sup>189</sup> Deeks, *supra* note 142, at 529.

<sup>190</sup> Deeks, *supra* note 142, at 529.

<sup>191</sup> Deeks, *supra* note 142, at 529.

<sup>192</sup> Deeks, *supra* note 142, at 531.

Finally, the sixth factor requires the victim state to evaluate its prior interactions with the territorial state on issues relevant to the non-state group.<sup>193</sup> Generally, a victim state may draw inferences on a territorial state's future actions based on past actions in similar circumstances, especially where the action relates to the same non-state actor.<sup>194</sup> On the other hand, evaluating a territorial state's past actions with respect to a non-state actor may not be appropriate when the territorial state's circumstances have changed significantly since the time of the prior request.<sup>195</sup> Additionally, the victim state may view prior attacks executed by non-state actors within a territorial state as indications that the territorial state is unable or unwilling to act.<sup>196</sup>

### C. *Jus Ad Vim*

This section will describe *jus ad vim*, or the just use of force. This doctrine is an alternative to applying the Unable or Unwilling Doctrine because the U.S. has used measures short of war (such as air strikes, CIA operations, and drone strikes) in carrying out its counter terrorist goals.<sup>197</sup> Although these actions are nominally acts of war under international law, Walzer states that it makes common sense to consider those actions very different from war.<sup>198</sup> Compared to acts of war, *jus ad vim* actions present a reduced risk to one's own troops, curtail the risk of civilian casualties, and incur lower economic and military burdens.<sup>199</sup> Because of these factors, *jus ad vim* actions are nominally easier for statesmen to justify than conventional warfare.<sup>200</sup> Moreover, because many acts of force short of war increasingly characterize global conflict and are evaluated under the limitations associated with *jus ad bellum*, *jus ad vim* may offer a

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<sup>193</sup> Deeks, *supra* note 142, at 531.

<sup>194</sup> Deeks, *supra* note 142, at 531.

<sup>195</sup> Deeks, *supra* note 142, at 531.

<sup>196</sup> Deeks, *supra* note 142, at 532.

<sup>197</sup> MEGAN BRAUN & DANIEL BRUNSTETTER, *FROM JUS AD BELLUM TO JUS AD VIM: RECALIBRATING OUR UNDERSTANDING OF THE MORAL USE OF FORCE* 87 (Cambridge Univ. Press 2013).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

framework to analyze these actions that fall short of war.<sup>201</sup> Thus, *jus ad vim* functions as a framework that counters the weaknesses of the *jus ad bellum* framework in armed conflict.<sup>202</sup>

Broadly speaking, the theory of *jus ad vim* should be “more permissive” than *jus ad bellum*, but not “overly tolerant or permissive.”<sup>203</sup> This means that there are more cases in which incurred harm justifies some use of force, but not necessarily war.<sup>204</sup> Events such as terrorist bombings, attacks on embassies or military bases, and the kidnapping of citizens are acts of aggression that justify the right to a forceful response.<sup>205</sup> Moreover, *jus ad vim* should not be conceived of as part of the actions leading up to war but rather serve as an alternative set of options to war.<sup>206</sup>

Brunstetter seems to identify the first factor of *jus ad vim* as the “last resort” requirement.<sup>207</sup> Some attempts at nonviolent diplomatic measures must be tried before resorting to force; for example, nonlethal policing actions such as expanding intelligence gathering activities, freezing terrorists’ assets, and creating strategic partnerships with other governments may be needed to satisfy the “last resort” requirement of *jus ad vim*.<sup>208</sup> The next requirement that Brunstetter identifies in the *jus ad vim* framework is the requirement of proportionality.<sup>209</sup> Proportionality means the maximally just level of force that can be applied to a specific situation, not what level to begin with.<sup>210</sup> Critical in aiding this proportionality analysis is defining what constitutes a successful outcome and determining which actions will enable this outcome.<sup>211</sup>

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<sup>201</sup> *Id.* at 87-88.

<sup>202</sup> *Id.* at 88.

<sup>203</sup> Braun, *supra* note 197, at 95-96.

<sup>204</sup> Braun, *supra* note 197, at 96.

<sup>205</sup> Braun, *supra* note 197, at 96.

<sup>206</sup> Braun, *supra* note 197, at 97.

<sup>207</sup> Braun, *supra* note 197, at 97.

<sup>208</sup> Braun, *supra* note 197, at 97.

<sup>209</sup> Braun, *supra* note 197, at 98.

<sup>210</sup> Braun, *supra* note 197, at 98.

<sup>211</sup> Braun, *supra* note 197, at 98.

Another requirement to consider in the *jus ad vim* analysis is the probability of escalation.<sup>212</sup> Because the success of *jus ad vim* actions such as drone strikes hinges on avoiding escalation to a full-blown war, the probability of escalation factor is an essential element of any actions taken pursuant to *jus ad vim*.<sup>213</sup> Brunstetter defines escalation as the elevation of hostilities to war, which increases the costs of resolving a specific crisis and introduces the totalizing and unpredictable consequences of widespread conflict.<sup>214</sup> If engaging in *jus ad vim* actions has a high probability of war, then one could argue that those actions are not justifiable.<sup>215</sup> Finally, this factor must be continuously evaluated because of changing circumstances.<sup>216</sup>

Another requirement that circumscribes the use of *jus ad vim* actions is the “right intention” prong.<sup>217</sup> Right intention for *jus ad vim* means quelling a specific threat while causing the least amount of damage by protecting civilians.<sup>218</sup> Brunstetter states that there is a strict relationship between *jus ad vim* and *jus in bello* between the principles of proportionality and discrimination.<sup>219</sup> Thus, Brunstetter states that a state undertaking *jus ad vim* actions cannot forgo the rights of the “Other” for the sake of its own security.<sup>220</sup>

The final consideration that Brunstetter identifies is the need for a state to possess legitimate authority.<sup>221</sup> Brunstetter seems to categorize a legitimate authority acting in accord with the *jus ad vim* framework in three ways.<sup>222</sup> One way Brunstetter categorizes this legitimate authority is when a state takes matters of limited self-defense into its own hands (known as a unilateral action).<sup>223</sup> These types of actions “exemplify the

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<sup>212</sup> Braun, *supra* note 197, at 98.

<sup>213</sup> Braun, *supra* note 197, at 98.

<sup>214</sup> Braun, *supra* note 197, at 99.

<sup>215</sup> Braun, *supra* note 197, at 99.

<sup>216</sup> Braun, *supra* note 197, at 99.

<sup>217</sup> Braun, *supra* note 197, at 100.

<sup>218</sup> Braun, *supra* note 197, at 100.

<sup>219</sup> Braun, *supra* note 197, at 101.

<sup>220</sup> Braun, *supra* note 197, at 101.

<sup>221</sup> Braun, *supra* note 197, at 102.

<sup>222</sup> Braun, *supra* note 197, at 102.

<sup>223</sup> Braun, *supra* note 197, at 102.



‘right to remedy,’ which is based on international law and just war principles.” This means “an injury involving the use of force must confer a right to use force in response,” but only if such a response is proportional to the injury received and is “calculated to induce the state to cease its injury.”<sup>224</sup>

Brunstetter also identifies acting as part of a collective international exercise as another way to think about legitimate authority for *jus ad vim*.<sup>225</sup>

Using this approach, the existence of a large number of states willing to support and commit to lower levels of force in a specific scenario could be seen as a sign that the scale of force being applied is the maximal level that ensures the rights of the Other and satisfies the probability of escalation principle, while a lack of support would suggest that recourse to *jus ad vim* acts is unjustified.<sup>226</sup>

Finally, Brunstetter identifies acting in accordance with U.N. Security Council authorization as the third way for a state to legitimize all *jus ad vim* acts.<sup>227</sup> This thinking would reduce the risk that *jus ad vim* actions being used too permissively, although the drawback is that the veto system may paralyze their just use.<sup>228</sup> Brunstetter therefore views Security Council resolutions as a base criterion of legitimacy for most *jus ad vim* cases, but allows states to argue for exceptions in hard cases or where the collective decision-making process is flawed.<sup>229</sup>

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<sup>224</sup> Braun, *supra* note 197, at 102.

<sup>225</sup> Braun, *supra* note 197, at 102.

<sup>226</sup> Braun, *supra* note 197, at 102.

<sup>227</sup> Braun, *supra* note 197, at 103.

<sup>228</sup> Braun, *supra* note 197, at 103.

<sup>229</sup> Braun, *supra* note 197, at 103. (This section is a direct quotation from the article).

### III. THE UNWILLING OR UNABLE DOCTRINE IS PREFERABLE OVER THE *JUS AD VIM* FRAMEWORK

#### A. *Unwilling or Unable Doctrine and Jus Ad Vim Framework Compared*

This section compares the Unwilling or Unable Doctrine with the *jus ad vim* framework for the use of force as advanced by Braun and Brunstetter. This section will conclude that although the *jus ad vim* framework is a commendable attempt at reconciling the traditional laws of war with modern uses of force, it does not have enough specificity as to the factors to be used in evaluating the actions short of war that are commonplace in today's geopolitical climate. Moreover, the factors in *jus ad vim* seem largely duplicative of the existing requirements under *jus ad bellum*.

The Doctrine, as set forth by Deeks, contains more factors to determine the legality of a state's use of force in self-defense, especially with respect to drone strikes. On the other hand, though, *jus ad vim*, as advanced by Brunstetter, seems to offer an entirely new avenue of using force in the context of self-defense, as opposed to the more specific application of the Doctrine. Therefore, the issue in comparing these two theories of self-defense is whether, given the current geopolitical climate in which many actions short of war are taken, a more specific approach is preferable (Unwilling or Unable Doctrine) or a more radical approach is preferable. This Section (IV-A) will conclude that because of the prevalence of counterterrorist uses of force, a more measured, specific doctrine is required to reduce the uncertainty present in international law while also providing a means for a state to justify its actions in targeting terrorists with drone strikes.

Broadly speaking, the Doctrine is more specific and thus better tailored to the U.S. use of drone strikes because of its six factors that a state may consider before using force against a non-state group located in a territorial state. These six factors are 1) prioritizing the obtaining of consent from the territorial state; 2) assessing the nature of the threat;

requesting the territorial state to take action and evaluating its response; 4) reasonably assessing the territorial state's control and capacity over the area in which a non-state group operates; 5) assessing the territorial state's proposed means to suppress the threat; and 6) evaluating its prior interactions with the territorial state on related issues.<sup>230</sup> Here, it appears that these six factors relate only to a specific situation: when a state suffers an armed attack from a non-state group operating outside its territory and concludes that it is necessary to use force in self-defense.<sup>231</sup> In contrast, *jus ad vim* is espoused as an entirely new set of options as an alternative to the uses of force associated with war.<sup>232</sup> Indeed, Brunstetter & Braun reinforce this point by saying that *jus ad vim* should serve as an alternative to *jus ad bellum* actions, not as part of a continuum of actions leading to war because *jus ad vim* has an advantage in avoiding the unpredictable and widespread destructive consequences of war.<sup>233</sup>

The problem with this view is two-fold. First, *jus ad vim* cannot be considered binding customary international law. Thus, an assertion that *jus ad vim* should function as an alternative to the traditional laws of war lacks merit. Brunstetter's statement that *jus ad vim* should function as an alternative to *jus ad bellum*, at this point in time, is premature. Brunstetter does not offer any evidence on this point. Second, the factors that Brunstetter identifies as crucial in using force pursuant to *jus ad vim* are largely duplicative of the existing analysis under *jus ad bellum*. *Jus ad vim* cannot be considered binding customary international law because it does not meet the dual requirements of *opinio juris* and sufficient state practice.<sup>234</sup> Brunstetter does not identify the extent to which *jus ad vim* would need to be practiced for it to become a sufficiently widespread custom among the international community. Because of this, this requirement for customary international law fails. Brunstetter also does

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<sup>230</sup> Deeks, *supra* note 142 nn. 178-201.

<sup>231</sup> Deeks, *supra* note 142 at 485.

<sup>232</sup> Braun, *supra* note 197, at 97.

<sup>233</sup> Braun, *supra* note 197, at 97.

<sup>234</sup> Ronald Alcalá, *Opinio Juris And The Essential Role of States*, Lieber Institute (Feb. 11, 2021), available at: <https://lieber.westpoint.edu/opinio-juris-essential-role-states/>.

not identify to what extent *jus ad vim* is practiced as a matter of *opinio juris*, the concept of a state following a practice in the belief that it must be followed because of a legal obligation rather than mere custom.

Even if it is argued that the Doctrine is **not** binding customary international law, there is more evidence to suggest that it is closer to becoming customary.<sup>235</sup> The fact that it is closer to becoming customary international law means that the Doctrine is preferable to *jus ad vim*. Second, the factors that Brunstetter proposes as factors for *jus ad vim* analysis appear largely duplicative of the method of analysis taken for *jus ad bellum* uses of force. In fact, Brunstetter himself acknowledges this: “[o]ne could imagine *jus ad vim* actions as being contained within [last resort], as options to be tried before resorting to war.”<sup>236</sup> In that sentence, Brunstetter appears to argue that the principle of last resort is in *jus ad bellum* **and** *jus ad vim*. Another principle that is duplicated in Brunstetter’s *jus ad vim* analysis is the principle of proportionality. Brunstetter argues that proportionality under *jus ad vim* means the maximal use of force that can be applied to a specific situation.<sup>237</sup> But this definition is functionally the same as the definition of proportionality found in *jus ad bellum*: there must be an assessment of the result sought for eliminating a threat, and against that assessment, the means being used to achieve that result must be weighed.<sup>238</sup> Brunstetter states that proportionality in *jus ad vim* is the level of force that achieves a successful outcome and determines which actions will enable this outcome.<sup>239</sup> Parsing this language and comparing it to the rule for *jus ad bellum*, it appears that both point to the same thing: using the minimum force necessary to achieve a desired result.

In addition to the proportionality requirement in *jus ad vim* being duplicative of the proportionality requirement found in the traditional *jus*

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<sup>235</sup> See Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test?*, LAWFARE (Oct. 10, 2016), available at:

<https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>.

<sup>236</sup> Braun, *supra* note 197, at 96.

<sup>237</sup> Braun, *supra* note 197, at 98.

<sup>238</sup> MURPHY *supra* note 112, at 584.

<sup>239</sup> Braun, *supra* note 197, at 98.

*ad bellum* analysis, the “right intention” is also duplicative.<sup>240</sup> Right intention under *jus ad vim* means quelling a specific threat while causing the least amount of damage possible by protecting civilians.<sup>241</sup> This seems functionally equivalent to the principle of distinction, as found in the traditional Law of Armed Conflict.<sup>242</sup> Distinction obliges parties to a conflict to distinguish between the armed forces and the civilian population and between unprotected and protected objects.<sup>243</sup> In both principles, the protection of civilians is emphasized through the use of force that seeks to attack only military forces to the extent necessary. Hence, for the above reasons, there are multiple principles that are duplicative in *jus ad vim*.

### *B. The Unwilling or Unable Doctrine and United States Drone Strikes in Pakistan*

This section will apply the Unwilling or Unable Doctrine to the U.S. use of drone strikes in Pakistan in the late 2000s and early 2010s. Because the Doctrine is better suited to today’s geopolitical landscape, for the reasons previously mentioned, application of the Doctrine to a state’s extraterritorial uses of force in self-defense is preferable over applying the *jus ad vim* framework. In this hypothetical application of the Doctrine, it must be assumed that the Unwilling or Unable Doctrine actually existed when U.S. drone strikes were first carried out in Pakistan. Further, it will also be assumed in this hypothetical that the Doctrine has met the two requirements of common state practice and *opinio juris* to be considered binding customary international law. Finally, it is assumed factors three and five will not be analyzed due to the scarcity of information relevant to a determination of those factors.

The first factor under the Doctrine requires the victim state (in this case, this would be the United States, due to suffering a terrorist attack at

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<sup>240</sup> Braun, *supra* note 197, at 100.

<sup>241</sup> Braun, *supra* note 197, at 100.

<sup>242</sup> *Principle of Distinction*, International Committee of the Red Cross, available at: <https://casebook.icrc.org/law/principle-distinction> (last accessed Mar. 18, 2024).

<sup>243</sup> U.S. DEP’T OF DEF., *supra* note 115, at 207.

the hands of Al Qaeda)<sup>244</sup> to prioritize obtaining consent from the territorial state (in this case, this would be Pakistan).<sup>245</sup> Here, the U.S. did not obtain consent from Pakistan to conduct the drone strikes in the Tribal Areas. The strongest piece of evidence on this point is that in December 2013, the National Assembly of Pakistan unanimously approved a resolution against U.S. drone strikes in Pakistan.<sup>246</sup> Reinforcing this lack of consent is the fact that the U.S. did not inform the Pakistani government of the mission to raid Osama Bin Laden's compound in Abbottabad.<sup>247</sup> Though the incident concerned an area outside the Tribal Areas, the U.S.' failure to inform the Pakistani government of this mission shows the U.S. did not prioritize obtaining consent in accordance with factor one of the Doctrine. Given the evidence above, this factor weighs against the U.S. legal use of force in self-defense because consent was not prioritized.

The second factor of the Doctrine requires the victim state to assess the nature of the threat posed by the non-state actor.<sup>248</sup> A victim state's future decision-making will be informed by its understanding of the nature and seriousness posed by the attacking non-state actor with respect to the territorial state's willingness and ability to suppress the threat.<sup>249</sup> Here, the U.S. understanding of the nature of the threat is greatly influenced by the Al-Qaeda attacks on the World Trade Center on September 11, 2001.<sup>250</sup> President Bush's first statement of ". . . our citizens, our way of life, our very freedom came under attack . . ." <sup>251</sup> is certainly indicative that the U.S. perceived this Al-Qaeda attack as a grave threat. Additional factors, such as the geographic spread of Al-Qaeda's activities and the sophistication of its

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<sup>244</sup> See ASSOCIATED PRESS, *supra* note 1.

<sup>245</sup> Deeks, *supra* note 142, at 519.

<sup>246</sup> NA unanimously passes resolution against US drone strikes, DAWN (Dec. 10, 2013), available at: <https://www.dawn.com/news/1061704>.

<sup>247</sup> David Taintor, *Panetta explains why US didn't alert Pakistan of bin Laden raid*, MSNBC (Oct. 7, 2014), available at:

<https://www.msnbc.com/msnbc/panetta-explains-why-us-didnt-alert-pakistan-bin-laden-raid-msna430086>.

<sup>248</sup> Deeks, *supra* note 142, at 520.

<sup>249</sup> Deeks, *supra* note 142, at 520.

<sup>250</sup> Associated Press, *supra* note 1. See also *Statement by the President in His Address to the Nation*, THE WHITE HOUSE, PRESIDENT GEORGE BUSH (Sep. 11, 2001), available at:

<https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>.

<sup>251</sup> *Id.*

attacks, led to the U.S. perceiving Al-Qaeda's threat as sufficiently grave for the purposes of factor two of the Doctrine.<sup>252</sup> Al-Qaeda's attacks in Yemen and Kenya in the late 1990s are also instructive on this point.<sup>253</sup>

Additionally, a victim state should consider the number of actors in a particular area and the imminence of the threat of further armed attacks. An assessment of what the U.S. actually knew at the time of the drone strikes' commencement, with respect to the number of Al-Qaeda operatives in the Tribal Areas of Pakistan, cannot be made, given the secretive nature surrounding the U.S. intelligence community. For similar reasons, a definitive assessment of the U.S. view of the imminence of Al-Qaeda attacks directed against the U.S. cannot be made. The subjective belief that Al-Qaeda posed a grave threat to the U.S. is a fact that weighs in favor of the U.S. Despite the inability to make an assessment of the imminence of Al-Qaeda attacks and the number of Al-Qaeda operatives in the Tribal Areas of Pakistan, on balance, factor two points in favor of the victim state, the U.S.

The fourth factor of the Doctrine requires a reasonable assessment of territorial state control and capacity. An assessment of a territorial state's level of control over an area is critical to determining the territorial state's "ability" to suppress a threat.<sup>254</sup> Some guiding considerations in evaluating a state's level of control over an area include using public information regarding ungoverned spaces or the capacity of a nation's military or law-enforcement personnel.<sup>255</sup> On this point, the facts surrounding the Tribal Areas of Pakistan weigh in favor of the U.S. using drones against Al-Qaeda in Pakistan. This is because of the widespread insurgency present in the Tribal Areas as a result of the Pakistani Army

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<sup>252</sup> See *USS Cole Bombing*, FEDERAL BUREAU OF INVESTIGATION, available at: <https://www.fbi.gov/history/famous-cases/uss-cole-bombing> (last accessed Feb. 3, 2023); *East African Embassy Bombings*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/east-african-embassy-bombings> (last accessed Feb. 3, 2023). In both cases, Al-Qaeda was linked to these attacks.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 525.

<sup>255</sup> *Id.*

searching for Al-Qaeda.<sup>256</sup> This factor also weighs in favor of the U.S. because Pakistan is ranked 89 (out of 120) on the Fragile States Index.<sup>257</sup> This index assesses states' vulnerability to conflict or collapse.<sup>258</sup> This shows that Pakistan has a low level of control not just generally in its country but because of the aforementioned conflicts in the Tribal Areas. Thus, for the above reasons, this factor weighs in favor of the U.S. use of drone strikes legal under the Doctrine.

Finally, the sixth factor requires the victim state to evaluate its prior interactions with the territorial state on issues relevant to the non-state group. Given Pakistan's cooperation with the U.S. in its War on Terror, this factor weighs slightly in favor of finding the U.S. use of drone strikes illegal because if cooperation is present, Pakistan is probably unwilling nor unable to tackle the threat of Al-Qaeda. After September 2001, Pakistani President Musharraf ended his government's ties with the Taliban regime of Afghanistan and has since cooperated with and contributed to U.S. efforts to track and capture remnants of Al Qaeda and Taliban forces that have sought refuge inside Pakistan's territory.<sup>259</sup> Thus, Pakistan's cooperation has been called "crucial" to past and ongoing U.S. successes in the region.<sup>260</sup> Moreover, in 2002, the U.S. took an increasingly direct role in both law enforcement and military operations in Pakistani territory that have led to favorable results in tracking and apprehending Islamic militants.<sup>261</sup> As such, because of the Pakistani cooperation with the U.S. in military operations, this factor weighs slightly in favor of finding that the U.S. drone strikes are illegal under international law.

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<sup>256</sup> *Hits on Qaeda Compounds Continue*, CBS NEWS (Mar. 20, 2004), <https://www.cbsnews.com/news/hits-on-qaeda-compounds-continue/>; Also see *Top Al Qaeda leader hurt, hiding in WANA: ISPR*, DAWN (Mar. 28, 2004), available at: <https://archive.ph/20130702065613/http://archives.dawn.com/2004/03/28/top3.htm>.

<sup>257</sup> *What Does State Fragility Mean?*, FRAGILE STATES INDEX, available at: <https://fragilestatesindex.org/frequently-asked-questions/what-does-state-fragility-mean/> (last accessed Feb. 3, 2023).

<sup>258</sup> *Country Dashboard*, FRAGILE STATES INDEX, available at: <https://fragilestatesindex.org/country-data/> (last accessed Feb. 3, 2023) (in the drop-down menu, select Pakistan).

<sup>259</sup> K. ALAN KRONSTADT, CONG. RSCH. SERV., RL31624, PAKISTAN-U.S. ANTI-TERRORISM COOPERATION (2003) (relevant portion is located in the summary portion).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*



Based on the foregoing analysis, factors two and four weigh in favor of finding the U.S. use of drone strikes in the Tribal Areas permissible under the Doctrine. Notwithstanding the lack of obtaining consent pursuant to factor one and the preexisting cooperative relationship between the U.S. and Pakistan, factors two and four heavily weigh in favor of the legality of U.S. strikes because Pakistan is a state that is unable to exercise effective control within its borders, especially within the Tribal Areas, and the nature of the terrorist group al-Qaeda was such that U.S. drone strikes are necessary for protection.

### C. *Jus Ad Vim and United States Drone Strikes in Pakistan*

Next, this section will apply the doctrine of *jus ad vim* to the use of U.S. drone strikes in Pakistan. Application of the doctrine to scenarios in which a state is weighing a use of force that falls short of war would likely paralyze decision makers in weighing those uses of force because the factors in *jus ad vim* are functionally equivalent to the factors used in the Unwilling or Unable doctrine. However, given the factual background in Pakistan's Tribal Areas, *jus ad vim* (assuming that *jus ad vim* is customary international law) would likely yield the conclusion that the use of force is justified under international law. As stated above, the theory of *jus ad vim* should be "more permissive" than *jus ad bellum*, but not "overly tolerant or permissive."<sup>262</sup> In *jus ad vim*, there are more cases in which incurred harm justifies some use of force, but not necessarily war.<sup>263</sup> Events such as terrorist bombings, attacks on embassies or military bases, and the kidnapping of citizens are acts of aggression that justify the right to a forceful response.<sup>264</sup> Finally, *jus ad vim* should not be conceived of as part of the actions leading up to war but rather serve as an alternative set of options to war.<sup>265</sup>

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<sup>262</sup> Braun, *supra* note 197, at 95-96.

<sup>263</sup> Braun, *supra* note 197, at 95-96.

<sup>264</sup> Braun, *supra* note 197, at 95-96.

<sup>265</sup> Braun, *supra* note 197, at 95-96..

The first factor of *jus ad vim* is the “last resort” requirement, which says that nonviolent diplomatic measures should first be employed before using lethal force.<sup>266</sup> Diplomatic measures such as allying with friendly governments, freezing the financial assets of suspected terrorists, and conducting intelligence operations are ways to satisfy the “last resort” requirement of *jus ad vim*.<sup>267</sup> Based on the factual background surrounding the U.S. use of drone strikes in Pakistan, the first factor of *jus ad vim* weighs in favor of the legality of those drone strikes because the U.S. allied with a friendly government (Pakistan) and conducted intelligence operations inside Pakistan’s Tribal Areas.

The United States and Pakistan’s diplomatic relationship dates back to 1947 and has been marked by cooperation in areas such as energy, trade, and, most importantly, counterterrorism.<sup>268</sup> Following the 9/11 attacks, Pakistan assisted in U.S. counterterrorist matters by granting logistics facilities, sharing intelligence, and capturing and handing over suspected members of al-Qaeda.<sup>269</sup> Because of this long-standing relationship and the recent cooperation given the events of 9/11, the first factor of *jus ad vim* is satisfied in favor of the legality of the use of drone strikes.

The second factor, proportionality, requires a state to use the maximum level of force that can be applied to a specific situation.<sup>270</sup> In determining proportionality, it is critical to define what constitutes a successful outcome and determine which actions will enable this outcome.<sup>271</sup> With the U.S. drone strikes, proportionality is tougher to satisfy because of the extensive amount of civilian deaths that led to riots in Pakistani cities.<sup>272</sup> Although the U.S. tailored its strikes against suspected al-Qaeda militants, there were nonetheless unintended casualties. According to Daniel Byman, for every militant killed, there were

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<sup>266</sup> Braun, *supra* note 197, at 95-96.

<sup>267</sup> Braun, *supra* note 197, at 95-96.

<sup>268</sup> *U.S. Relations With Pakistan*, Dep’t of State (Aug. 15, 2022), available at: <https://www.state.gov/u-s-relations-with-pakistan>.

<sup>269</sup> Touqir Hussain, *U.S.-Pakistan Engagement: The War On Terrorism and Beyond 5*, United States Institute For Peace (Aug. 2005), available at: <https://www.usip.org/sites/default/files/sr145.pdf>.

<sup>270</sup> Braun, *supra* note 197, at 98.

<sup>271</sup> Braun, *supra* note 197, at 98.

<sup>272</sup> *See* Peralta, *supra* note 31.

approximately ten civilians killed.<sup>273</sup> Based on this ratio, and in addition to the riots that ensued in Pakistan, the proportionality factor in *jus ad vim* is likely not satisfied.

The third factor is the probability of escalation. The probability of escalation factor is an essential element of any actions taken pursuant to *jus ad vim* because the success of *jus ad vim* actions such as drone strikes hinges on avoiding escalation to full-blown war.<sup>274</sup> Escalation is defined as the elevation of hostilities to war and raises the possibility of an unpredictable, widespread conflict.<sup>275</sup> This factor must be continuously evaluated because of changing circumstances.<sup>276</sup> The third factor weighs in favor of legality because the drone strikes targeted suspected militants in Pakistan's Tribal Areas, which are loosely controlled by the Pakistani government. Because the Tribal Areas are loosely controlled by the Pakistani government, there are fewer opportunities in which an errant drone strike may strike an unintended target, such as a member of the Pakistani military. Similarly, the geographical location in which the drone strikes are employed shows that there is a low probability of an escalation of force. This is because U.S. drone strikes were not employed over an expansive geographical area that spanned multiple countries. Rather, these strikes were specifically targeted against suspected terrorist combatants. Therefore, for the above reasons, the third factor weighs in favor of the legality of drone strikes.

The fourth factor, "right intention," means that the user of force must quell a specific threat and cause the least amount of damage by protecting civilians.<sup>277</sup> Essentially, a state undertaking *jus ad vim* actions cannot ignore the rights of potential collateral targets.<sup>278</sup> Based on the statements made by President Barack Obama to the National Defense University in 2013 ("we act against terrorists who pose a continuing and

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<sup>273</sup> Daniel Byman, *Do Targeted Killings Work?*, Brookings INSTITUTION (Jul. 14, 2009), available at: <https://www.brookings.edu/articles/do-targeted-killings-work-2/>.

<sup>274</sup> *Id.* at 99.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 100.

<sup>278</sup> Braun, *supra* note 197, at 100.

imminent threat to the American people . . .”), there is a “right intention” present, though it appears that the use of drone strikes are used based on the U.S.’s subjective belief of a continuing and imminent threat.<sup>279</sup> No other country endorsed the U.S. position that the drone strikes are necessary to address a continuing and imminent threat and for that reason the U.S. intention in undertaking the strikes can only be analyzed from a subjective point of view, rather than with an objective analysis. This is because an objective analysis, similar to the first prong of whether customary international law exists, asks whether states at large follow a general practice accepted as law. But since the *jus ad vim* theory of the use of force under international law is not binding or even adequately developed, the lack of an objective component to the “right intention” analysis does not mean that the “right intention” factor is conclusively unsatisfied. Given the totality of the circumstances, the “right intention” factor for the purposes of analyzing U.S. drone strikes in Pakistan is likely not satisfied because America did not adequately consider the rights of collateral targets in Pakistan’s Tribal Areas.

The final consideration that Brunstetter identifies is the need for the state to possess legitimate authority.<sup>280</sup> There are three ways that a state can possess legitimate authority. The first way is through unilateral action, where a state takes matters of limited self-defense into its own hands.<sup>281</sup> The second way is through acting as a part of a collective international exercise, where the existence of a large number of states willing to support lower levels of force shows that the use of force is proportionally applied.<sup>282</sup> This is because a large group of states acting in consensus would adequately tame any impulse to use more force than necessary. Conversely, a lack of support in accordance with a collective international exercise would mean that actions taken pursuant to *jus ad vim* are unjustified.<sup>283</sup> The

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<sup>279</sup> *Remarks by the President at the National Defense University*, The White House (May 23, 2013), available at: <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>280</sup> Braun, *supra* note 197, at 102.

<sup>281</sup> Braun, *supra* note 197, at 102.

<sup>282</sup> Braun, *supra* note 197, at 102.

<sup>283</sup> Braun, *supra* note 197, at 102.

third way a state can possess legitimate authority is by acting in accordance with U.N. Security Council resolutions.

Here, given the American use of drone strikes in Pakistan, there is no legitimate authority based on acting as part of a collective international exercise, nor is there legitimate authority gained from acting in accordance with a U.N. Security Council resolution. To date, there is no evidence to suggest that the U.S. ever formed a multinational coalition designed to identify combatants and noncombatants, plan operations, and carry out missions to eliminate terrorist threats. Moreover, there has been no U.N. Security Council Resolution that authorizes the U.S. to perform drone strikes in Pakistan's Tribal Areas. On the contrary, American use of drone strikes raises international law issues with respect to the final *jus ad vim* factor because a special rapporteur was appointed in 2013 to investigate the use of drones in Pakistan's Tribal Areas.<sup>284</sup> Even with the problematic analysis detailed above, one may argue that the U.S. possessed legitimate authority because it took unilateral action to address the terrorist threat emanating from the Tribal Areas. Unilateral action, as defined by Brunstetter, requires that a state take matters of limited self-defense into its own hands.<sup>285</sup> The U.S. took unilateral action because, as detailed above, acted without authorization from the U.N. Security Council. However, even with the lack of authorization, the actions it took likely qualify as "limited self-defense" because the strikes were confined to the Tribal Areas of Pakistan and did not unduly escalate the conflict in that region. As such, notwithstanding the lack of U.N. Security Council authorization for the U.S. drone strikes, the final factor of legitimate authority for *jus ad vim* is likely satisfied because the U.S. took unilateral action in matters of limited self-defense.

Given the foregoing, factors one, three, four, and five are weighted in favor of finding that the U.S. use of drone strikes is legal. The U.S. use of

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<sup>284</sup> See *U.N. Special Rapporteur Initiates Investigation Into Drone Strikes and Other Targeted Killings*, International Justice Resource Center (Feb. 4, 2013), available at: <https://ijrcenter.org/2013/02/04/un-special-rapporteur-initiates-investigation-into-drone-strikes-and-other-targeted-killings/>.

<sup>285</sup> Braun, *supra* note 197, at 102.

drone strikes was a last resort, avoided the probability of escalation, had the right intention, and was undertaken with legitimate authority.

#### CONCLUSION

The U.S. use of drone strikes first occurred in the later years of the Bush Administration and accelerated through the Obama Administration. Drones have been around since World War II as an observation tool to gather information and perform surveillance. As the decades wore on past that conflict, however, technological advancements in the area of aviation design and electronics have brought the use of drones into the spotlight. Modern drones such as the MQ-1 Predator and MQ-9 Reaper have allowed governments, especially the U.S., to perform strikes against targets that do not harm friendly forces and also reduce the chance of excessive civilian deaths. However, the use of these drones has not gone without criticism because they implicate the *jus ad bellum* law regarding the use of force in self-defense. Moreover, the way the U.S. uses drones as an instrument of its foreign policy and counterterrorist objectives implicates the laws of war because drone strikes often take place in the territory of another state without its permission. This would function as a violation of international law, but an application of the Unwilling or Unable Doctrine may show that there is no international law violation. At the same time, U.S. drone strikes have led scholars such as Daniel Brunstetter and Megan Braun to postulate an alternative way of evaluating uses of force through drone strikes. Brunstetter and Braun argue that a *jus ad vim*, or a just use of force framework, is needed in today's geopolitical climate where many actions short of war are taken (such as commando raids, drone strikes, no-fly zones, etc.).

Although a *jus ad vim* framework may solve the law of war issues associated with drone strikes, it has concepts that are largely duplicative of existing concepts in the traditional laws of war and are clearly not binding customary international law. The Unwilling or Unable Doctrine is a more suitable choice, given the prevalence of counterterrorist actions taken by the U.S. and others, because it offers more discrete factors to apply and is

not a drastic leap in the formulation of international law. Finally, applying the Unwilling or Unable Doctrine to the U.S. use of drone strikes in Pakistan in the late 2000s shows that, although factors three and five are not analyzed, the remaining factors weigh strongly in favor of finding that the U.S. strikes in the Tribal Areas of Pakistan are legal under international law. In the future, factual scenarios that arise that are similar to the U.S. uses of forces in Pakistan may yield the same result because of the application of the Unwilling or Unable Doctrine.