

THE UNITED STATES, PAKISTAN, THE LAW OF WAR AND THE LEGALITY OF THE DRONE ATTACKS

Kurt Larson and Zachary Malamud***

INTRODUCTION

Throughout the course of human history, war has been a part of the human condition. Every successive generation from ancient Mesopotamia to the present has been involved in conflict. As warfare has evolved, so have its means and methods.

On September 11, 2001 (hereinafter 9/11), another generation heard the call to arms as a result of the terrorist attacks upon the World Trade Center and the Pentagon. Soon after the 9/11 attacks, the United States entered into a conflict with al-Qaeda and the Taliban in Afghanistan. Three years into the conflict in Afghanistan, the United States decided to adjust the strategy. The “new” strategy was actually first used in 2002, when a drone flew into Yemen to eliminate a local al-Qaeda leader.¹ From 2004 on, the United States has used drones to selectively target and eliminate suspected al-Qaeda and Taliban strongholds primarily in the north-west mountainous border region between Afghanistan and Pakistan known as Waziristan.² Waziristan is in the territorial domain of Pakistan and is part of an area called the Federally Administered Tribal Areas (FATA).³

The arrival of the new strategy of selected targeting of enemy strongholds in the FATA region raises many legal issues. These legal issues range from domestic law in the United States, to international law and specifically the Law of War. The discussion presented in this study focuses on the analysis of the United States’ ability to use drones to pursue a strategy of cross-border incursions into Pakistan to pursue the “War on Terror.”⁴

The positions and opinions stated in this article are those of the authors and do not represent the views of the US Department of Justice, the US Department of Defense, the US government, or any of its entities or any other nongovernmental entity. All information obtained for this article was gathered through open sources or unclassified interviews and briefings.

* Kurt Larson (B.A. Indiana State University 1985, J.D. Valparaiso University School of Law 1990) is a Senior Litigation Counsel with the U.S. Department of Justice and a Lieutenant Colonel and Judge Advocate in the U.S. Marine Corps Reserves.

** Zachary Malamud (B.A. State University of New York at Albany 2007, J.D. Hofstra University School of Law 2010) is a First Lieutenant and Student Judge Advocate with the U.S. Marine Corps.

The authors would like to express their gratitude and appreciation for editing, research, and assistance to: JOURNAL OF INTERNATIONAL BUSINESS & LAW, Professor Julian Ku, Dr. Gregory P. Noone and Dr. Diana C. Noone.

¹ Bobby Ghosh & Mark Thompson, *The CIA’s Silent War in Pakistan*, TIME, Jun. 1, 2009, <http://www.time.com/time/printout/0,8816,1900248,00.html>.

² Alex Rodriguez & David Zucchini, *U.S. Airstrikes in Pakistan Draw Critics, Defenders*, ORLANDO SENTINEL, May 3, 2010, at A4.

³ See generally *Welcome to FATA*, FEDERALLY ADMINISTERED TRIBAL AREAS, <http://www.fata.gov.pk/> (last updated July 16, 2010).

⁴ See Scott Wilson & Al Kamen, *‘Global War on Terror’ is Given New Name; Bush’s Phrase Out, Pentagon Says*, WASH. POST, Mar. 25, 2009, at A4. The term of art, “War on Terror” is no longer the favored term by the Obama administration. The current term is “Overseas Contingency Operations.”

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

The use of drones in Pakistan has been widely criticized; however, their efficiency and effectiveness is undeniable.⁵ Much of the criticism that is generated by the international community is based on the involvement of the Central Intelligence Agency and their lack of transparency.⁶ Even though the use of force may be covert, this does not mean that it is illegal. However, the effectiveness of drones cannot produce an “ends justifies the means” argument and a reverse engineering legal justification. Generally speaking, the use of force during armed conflict must comply with the Law of War. The United States has officially stated that it is complying with the Law of War with regard to the employment of drones.⁷ This paper will focus specifically on the legal justification for cross-border incursions into Pakistan.

This paper begins with an overview of the current sources for the Law of War. An analysis of the history of the Law of War is essential to providing an understanding of the emergence of the current state of the Law of War in the international arena regarding the extraterritorial use of drones. Next, an overview of the relevant laws, treaties, and conventions which pertain to the use of force is examined. This lays out the framework that gives the United States the authority to generally employ military force and focuses on the international and domestic authority for the use of military force. Next, the use of drones in Pakistan is reviewed, along with the main discussion which analyzes different arguments concerning whether the United States may conduct cross-border incursions and use force according to the relevant legal authority.

SOURCES OF THE LAW OF WAR

The Law of War, Past and Present

The history of the Law of War is as old as war itself.⁸ The Law of War lays out principles that give States a legal basis to justify the use of force and the employment of force.⁹ The Law of War is separated into two different categories: *Jus ad Bellum* and *Jus in Bello*.¹⁰ *Jus ad Bellum*, Latin for “right to wage war,” is the concept that provides justifica-

⁵ Michael Evans, *Death from above: how Predator is taking its toll on al-Qaeda*, London Times, Jan. 3, 2009, http://www.timesonline.co.uk/tol/news/world/middle_east/article5435471.ece (Drone strikes in Pakistan have had a “huge impact on the structure, organisation and effectiveness of al-Qaeda. . .”); see also PETER BERGEN AND KATHERINE TIEDEMANN, NEW AMERICA FOUNDATION, THE YEAR OF THE DRONE – AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN 2004-2010 (2010) (Although the use of drones has resulted in the elimination of numerous high level terrorists, this study estimates that 32 percent of those killed by drones in Pakistan were civilians.).

⁶ U.N. Human Rights Council, 14th Session Agenda, Item 3, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/Agenda5_1.pdf; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, U.N. G.A. Human Rights Council, 14th Sess., U.N. Doc A/HRC/14/24/Add.6 (May 28, 2010) (By Philip Aston) (hereinafter U.N. Report).

⁷ Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and the International Law (Mar. 25, 2010).

⁸ Alexander Moseley, *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/justwar/> (last updated Feb. 10, 2009); See also, Gregory P. Noone, *The History and Evolution of the Law of Armed Conflict Prior to World War II*, 47 NAVAL LAW REVIEW 1 (2000).

⁹ INT’L & OPERATIONAL L. DEP’T, OPERATIONAL LAW HANDBOOK 1, (Brian Bill et al. eds., 2009), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2009.pdf.

¹⁰ Robert Kolb, *Origin of the Twin Terms Jus as Bellum/Jus in Bello*, 37 INT’L REV. OF THE RED CROSS (1961-1997) 553, 558 (1997).

PREDATOR DRONE

tion for a State to engage in warfare.¹¹ *Jus ad Bellum* developed what is known today by political philosophers as the “Just War Theory.”¹² The Just War Theory espouses principles on what justifies a State to use force against another State.¹³ Traditional principles of this theory are that war can only be waged if there is a just cause, there is a right intention, the State has proper authority, war is waged only as a last resort, there is a probability of success, and there is proportionality.¹⁴ Additionally, the Just War Theory requires that all of these principles must be satisfied in order for a State to engage in war.¹⁵

Jus in Bello, Latin for “justice in war,” is a second body of laws that covers the conduct of warfare.¹⁶ It was developed after *Jus ad Bellum* and the purpose of *Jus in Bello* was not to govern the ways in which a State can enter into a state of warfare, but rather to govern warfare itself.¹⁷ Both *Jus ad Bellum* and *Jus in Bello* have long histories and have developed jurisprudence regarding their respective bodies of laws.¹⁸ Aspects of both bodies of laws can be found in the writings of numerous ancient philosophers, as well as in religious texts, such as the Old Testament.¹⁹

The culmination of these two aspects of the Law of War came to a forefront in the 17th and 18th centuries.²⁰ During this time period warfare became a *de facto* situation.²¹ The general thought process was that States “had discretionary powers to wage war and that those powers could be used as a means of pursuing national policy.”²² This mindset caused the deterioration of *Jus ad Bellum* and gave rise to *Jus in Bello*.²³ “Now that the field of vision had been restricted, greater attention could be paid to the conduct of hostilities: for owing to this indifference [to the cause of war], armed violence came to be seen first and foremost as a process to be regulated in itself, regardless of its causes, motives and ends.”²⁴

Eventually, after the First World War and the introduction of the League of Nations, the two bodies of law began to be “considered on equal footing and found their place in positive law.”²⁵ Furthermore, while these concepts had been Customary International Law in one respect or another throughout most of history, the Hague Peace Conferences of 1899 and 1907 and the Geneva Conventions of 1949 were some of the first contemporary attempts to

¹¹ *Id.* at 1.

¹² Moseley, *supra* note 8.

¹³ *Id.*

¹⁴ Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Just Post Bellum*, 186 MIL. L. REV. 116, 128 (2005) (briefly discusses the tenants of Jus ad Bellum and examining the core principles involved)

¹⁵ *Id.*

¹⁶ Moseley, *supra* note 8.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Kolb, *supra* note 10, at 556.

²¹ *Id.*; see also generally François Bugnion, *Jus ad Bellum, Jus in Bello, and Non-International Armed Conflicts* 6 (Oct. 28, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/html/francois-bugnion-article-150306> (“War was an attribute of sovereignty and was lawful when waged on the orders of the ruler, who was the sole judge of the reasons which prompted him to take up arms. In these circumstances, the application of the laws and customs of war could not be contingent on the reasons for resorting to armed force, and the question of the possible subordination of jus in bello to jus ad bellum did not arise.”).

²² Kolb, *supra* note 10, at 556.

²³ *Id.*

²⁴ Peter Haggenmacher, *Grotius et la Doctrine de la Guerre Juste* 599 (1983).

²⁵ Kolb, *supra* note 10, at 558.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

codify the Law of War and put in the form of treaties.²⁶ Numerous treaties have been created and ratified concerning the Law of War incorporating both *Jus ad Bellum* and *Jus in Bello*.²⁷ Since the Hague Conferences, there have been almost 30 treaties that have been codified governing the Law of War, and most of them have been ratified by the United States.²⁸ While one body of law was thought to be superior to the other at different points in history, modern Law of War has realized the importance of what both bodies of law bring to the forefront. The atrocities and suffering of warfare created a need to stop arbitrary warfare, as well as a need to limit the suffering that resulted from the means and methods of warfare. As a result, contemporary Law of War embodies both sources of law, holding them to equal footing, requiring nations engaging in armed conflict to satisfy both to be in accordance with international law.²⁹

Today, the United Nations Charter is one of the modern codifications of the principles of *Jus ad Bellum*.³⁰ The UN Charter's main purpose is to maintain international peace and security and develop friendly relations among nations.³¹ Article 2(4) set forth the Charter's guiding principle on the prohibition of the use of force.³² Article 2(4) states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."³³ Although Article 2(4) is the general rule, the Charter recognized limited instances in which the use of force would be necessary.³⁴ Specifically, the "UN Charter provides for self-defense pursuant to Article 51 which governs acts of both individual and collective self-defense."³⁵ Article 51 embodies the notion of a States inherent right to self-defense.³⁶ Under the black letter law of Article 51, a State may only defend itself "if an armed attack occurs."³⁷ Much controversy has existed in recent years on the scope of Article 51 and self-defense; "[s]ome States, including the United States, argue that an expansive interpretation of the UN Charter is more appropriate, contending that the Customary International Law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not 'negotiated' away under the Charter."³⁸

The Law of War is not a single treaty, but rather a compendium of agreements and understandings. In addition to the UN Charter, the other relevant sources of the Law of War alluded to earlier are codified in the Hague Laws of 1907, the Geneva Conventions of 1949 as

²⁶ *Id.*

²⁷ INT'L & OPERATIONAL L. DEP'T, LAW OF WAR DOCUMENTARY SUPPLEMENT XX, (Brian J. Bill & J. Porter Harlows eds.), available at http://www.loc.gov/tr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2009.pdf.

²⁸ *Id.*

²⁹ Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 69 (2009) ("[T]oday, in contrast to the prewar era, both the jus ad bellum and the jus in bello apply concurrently throughout an armed conflict. . .").

³⁰ INT'L & OPERATIONAL L. DEP'T, *supra* note 9, at 1.

³¹ JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 142 (2004); see also U.N. Charter art. 1, para. 2.

³² ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE 30 (1993).

³³ U.N. Charter art. 2, para. 4.

³⁴ See U.N. Charter, *supra* note 32, art. 42; U.N. Charter, *supra* note 32, art. 51.

³⁵ U.N. Charter, *supra* note 32, art. 51.

³⁶ INT'L & OPERATIONAL L. DEP'T, *supra* note 9, at 4.

³⁷ U.N. Charter, *supra* note 32, art. 51.

³⁸ INT'L & OPERATIONAL L. DEP'T, *supra* note 9, at 4-5.

PREDATOR DRONE

well a subsequent treaties such as Additional Protocol I and II³⁹ It is important to understand the general construct of the Law of War, as well as when it applies and how it applies. International Humanitarian Law⁴⁰ is only activated during armed conflict.⁴¹ In essence, the Geneva Conventions are the modern codification of *Jus in Bello*.⁴² However, International Humanitarian Law has separated armed conflict into two categories: international armed conflict and armed conflict not of an international character.⁴³

International armed conflicts are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I.

Non-international armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II.⁴⁴

When the armed conflict occurs, “[t]he full complement of protections provided by [International Humanitarian Law] applies in cases of international armed conflict.”⁴⁵ However, a more limited range of rules apply to armed conflict not of an international character which “bind all parties to the conflict, including non-State actors.”⁴⁶

Conventional thought is that *Jus ad Bellum* and *Jus in Bello* are two separate bodies of law that cover distinct issues related to war. The legality regarding the use of drones in Pakistan appears by some to be a hybrid of *Jus ad Bellum* and *Jus in Bello*.⁴⁷ The United States is finding legal justification for the employment of drones in Pakistan, using self-de-

³⁹ INT’L COMM. OF THE RED CROSS, *What is International Humanitarian Law?* (July 2004), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). Note that the United States has not ratified the additional protocols.

⁴⁰ Human Rights Education Associates, *International Humanitarian Law*, http://www.hrea.org/index.php?doc_id=415 (last visited Oct. 4, 2010) (International Humanitarian Law is commonly referred to as the Law of War or Law of Armed Conflict. However, “Humanitarian law is the branch of public international law that comprises the rules, which, in times of armed conflict, seek to (i) protect persons who are not or are no longer taking part in the hostilities, (ii) restrict the methods and means of warfare employed, and (iii) resolve matters of humanitarian concern resulting from war.”); *What is the Difference Between Humanitarian Law and Human Rights Law?*, INT’L COMM. OF THE RED CROSS (Jan. 1, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZMUY>.

⁴¹ INT’L COMM. OF THE RED CROSS, *supra* note 39.

⁴² Walter Gary Sharp, Sr., *Revoking An Aggressor’s License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT’L L. & TRADE 1, 12 (1998) (“[T]he practice of codifying the *Jus in Bello* in binding international agreements began in the nineteenth century with the 1856 Paris Declaration on Maritime War. Following the Paris Declaration, codification accelerated at the turn of the twentieth century. Since that time, the *Jus in Bello* has generally developed in two regimes: the Hague regulations that govern the means and methods of warfare, and the Geneva conventions that govern the protection of victims of war.”).

⁴³ INT’L COMM. OF THE RED CROSS, *supra* note 39.

⁴⁴ *Id.* Note that the United States has not ratified the additional protocols.

⁴⁵ Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2469 (2008).

⁴⁶ *Id.* at 2470.

⁴⁷ See generally Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 YALE J. INT’L L. 541 (2009).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

fense as its basis – the *Jus ad Bellum* concept. However, continued and sustained use of drones in Pakistan is a concept covered by *Jus in Bello*. Moreover, the justification for the use of drones in Pakistan becomes even murkier when one considers the *Jus in Bello* body of law that applies. Due to the fact that al-Qaeda and the Taliban⁴⁸ are now considered non-state actors and the conflict is considered an armed conflict not of an international character, the only law that covers the employment of the drones is Common Article 3 and possibly Additional Protocol II.⁴⁹ While the discussion and jurisprudence is expansive with regard to international armed conflict, codified jurisprudence regarding conflicts not of an international character is limited. Regardless of how it is characterized, a Department of Defense Directive specifically states that service members will comply with the Law of War during all armed conflicts and in all other military operations.⁵⁰

LEGAL AUTHORITY FOR THE UNITED STATES TO ACT IN SELF-DEFENSE

“On September 11, 2001, terrorists hijacked four planes, flew two of them into the twin towers of the World Trade Center, and one of them into the Pentagon, and crashed the fourth in a Pennsylvania field. More than 3,000 civilians from over eighty different nations died in the attack.”⁵¹ Following these attacks the United States government and the international community quickly worked to set up the proper authority for the United States to legally take action against the Taliban and al-Qaeda.⁵² In order for the use of force to be legal within the framework of the United States Constitution, there had to be both domestic and international legal support for the use of force.⁵³ Furthermore, the domestic authority had to also comply with the War Powers Resolution.⁵⁴

The US Constitution explicitly gives Congress the power to declare war.⁵⁵ Although Congress has only declared war five times, “that power comprehends not only the enactment of formal declarations of war, but also the authorization of uses of military force

⁴⁸ Félix Kutzsch, *Afghanistan's Rocky Road to Modernity: Non-State Actors and Scio-Political Entities in the Process of State and Nation Building*, PAIX ET SÉCURITÉ INTERNATIONALES, 27 (Can.) (July 2008), http://www.psi.ulaval.ca/fileadmin/psi/documents/Documents/Travaux_et_recherches/Afghanistan_s_Rocky_Road_to_Modernity.pdf (“The Taliban movement and, albeit to a lesser extent, Afghanistan’s so-called warlords can thus be understood as non-state actors.”)

⁴⁹ Note that the United States has not ratified Additional Protocol II and therefore could make the argument that only Common Article 3 applies; see also Lieutenant Colonel Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, June 2010 ARMY LAW. 9, 15 n.47 (In this footnote the author discusses the timeline of the Afghanistan conflict from its beginning status as an international armed conflict, to its current status as an armed conflict not of an international character. “[F]ew dispute that after Karzai was appointed by the Loya Jirga in June 2002, the armed conflict clearly became an internal armed conflict.”).

⁵⁰ DoD Law of War Program, DEP’T OF DEFENSE, DIRECTIVE 2311.01E (May 9, 2006) (Note however, that much of the controversy surrounding the employment of drones is based on the Central Intelligence Agency and this Directive only covers DoD personnel.).

⁵¹ CTR. FOR LAW AND MILITARY OPERATIONS, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008*, 117 (Sept. 1, 2008), http://www.loc.gov/tr/frd/Military_Law/CLAMO.html.

⁵² *Id.*

⁵³ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 1.

⁵⁴ *Id.* at 1; See also 50 U.S.C. §§ 1541-1548 (2006).

⁵⁵ U.S. CONST. art. I § 8.

PREDATOR DRONE

which are not intended to rise to the level of a war.”⁵⁶ Furthermore, “as a State in the international community of States, the United States is subject to international law, the law that governs relations between the States.”⁵⁷ In combination, these two requirements ensure that authorization of the use of force must be authorized not only domestically, but under international authority as well.⁵⁸

The International Community’s Response

The day after the horrific attacks on the Twin Towers and the Pentagon, the international community rallied to support the United States.⁵⁹ On September 12, 2001, the UN Security Council passed United Nations Security Council Resolution (“UNSCR”) 1368.⁶⁰ UNSCR 1368 reaffirmed the principle of self-defense by “[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter.”⁶¹ UNSCR 1368 also allowed the United States, individually or collectively, “to combat by all means, threats to international peace and security caused by terrorist acts.”⁶² The reference to individual and collective self-defense acknowledges the implementation of Article 51, giving a legal basis to use force in the international arena.⁶³ It should also be noted that, implementing collective self-defense allowed the United States to invoke parts of the North Atlantic Treaty Organization (“NATO”) as well.⁶⁴ The same day that the UN passed UNSCR 1368, NATO invoked Article V⁶⁵ of the NATO Treaty. “NATO recognized the individual and collective right of self defense, as described in Article 51 of the UN Charter, allowing its members to come to the aid of the United States through armed force, if necessary, to restore and maintain the security of the North Atlantic area.”⁶⁶

On September 28, 2001, the UN Security Council further reaffirmed in UNSCR 1373 the “need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”⁶⁷ UNSCR 1373 not only echoed UNSCR 1368 in the requirement to combat terrorism, but specifically reaffirmed the inherent right of self-defense as “recognized by the Charter of the United Nations as reiterated

⁵⁶ David M. Ackerman, *Response to Terrorism: Legal Aspects of the Use of Military Force*, CONG. RESEARCH SERV. – LIBRARY OF CONGRESS (Sept. 13, 2001), <http://www.au.af.mil/au/awc/awcgate/crs/rs21009.pdf>.

⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. a (1987).

⁵⁸ As will be discussed later, the international authorization may come from the UN as well as through Customary International Law.

⁵⁹ CTR. FOR LAW AND MILITARY OPERATIONS, *supra* note 51 at 117.

⁶⁰ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), (hereinafter “UNSCR 1368”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ North Atlantic Treaty art. 5, Apr. 4, 1969, 63 Stat.2241, 34 U.N.T.S. 243 (“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”)

⁶⁶ CTR. FOR LAW AND MILITARY OPERATIONS, *supra* note 51 at 117.

⁶⁷ S.C. Res. 1373, U.N. Doc. S.RES/1373 (Sept. 28, 2001) (hereinafter “UNSCR 1373”).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

in resolution 1368.”⁶⁸ It should also be noted that UNSCR 1373 established a committee of the Security Council⁶⁹ in order to “suppress terrorist financing, share intelligence on terrorism, monitor borders, and ‘implement. . .the relevant international conventions and protocols to combat terrorism.’”⁷⁰ In a general sense, the international community recognized the inherit right of self-defense in both UNSCR 1368 and 1373 for the use of force in Afghanistan for those responsible for 9/11.⁷¹

Domestic Authority

The domestic authority for the United States to engage in armed conflict in Afghanistan originated from the Joint Resolution of Congress Authorizing the Use of Military Force (“AUMF”).⁷² The passage of this resolution came one week after the events that transpired on 9/11.⁷³ In the resolution section of the AUMF, Congress reiterated provisions found in the UNSCR 1368.⁷⁴ Important provisions of the AUMF cite to the United States’ inherit right to self-defense.⁷⁵ The AUMF also spoke about the United States’ national security and foreign policy, echoing the UNSCR language of “international peace and security.”⁷⁶

In Section 2 of the AUMF, specific provisions detail the scope of Congress’s intent pertaining to the authority given to the President.⁷⁷ The AUMF grants the President broad powers to go after and pursue the terrorist organizations responsible for the 9/11 attacks in order to prevent future acts of terrorism against the United States.⁷⁸ Furthermore, Section 2(b) of the AUMF acts as the trigger required to satisfy Congressional authorization in accordance with the War Powers Resolution.⁷⁹

⁶⁸ *Id.*

⁶⁹ *Id.* at para. 6.

⁷⁰ *Id.*

⁷¹ Patrick E. Tyler, *Bush Warns ‘Taliban Will Pay a Price’*, N.Y. TIMES, Oct. 8, 2001, available at <http://www.nytimes.com/2001/10/08/international/08ATTA.html?scp=4&sq=october%208,%202001&st=cse>.

⁷² Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (hereinafter “AUMF”).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (“Whereas, such acts render it both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad. . .”).

⁷⁶ *Id.* (“Whereas, such acts continue to pose an unusual and extraordinary threat to national security and foreign policy of the United States. . .”).

⁷⁷ *Id.* § 2.

⁷⁸ *Id.* § 2(a) (“That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”).

⁷⁹ Section 2(b) of the AUMF states:

(b) War Powers Resolution Requirements-

(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2(b) (2001) (enacted); *see also* Richard F. Grimmet, *RL32267 – The War Powers Resolution: After Thirty Years*, CRS REPORT FOR CONGRESS (Mar. 11, 2004), <http://www.fas.org/man/crs/RL32267.html> (“The main purpose of the Resolution was to establish procedures for both branches to share in decisions that might get the United States involved in war. The drafters

PREDATOR DRONE

DISCUSSION

Background on Policy of Drone Attacks

Based upon the resolutions of both the United Nations Security Council and Congress, the United States took action and employed the doctrine of self-defense to use force against the terrorists responsible for 9/11. On September 20, 2001, President George Bush called on the Taliban to close terrorist training camps and turn over Osama bin Laden and his cohorts.⁸⁰ The United States government and military then started to devise plans to “capture Osama bin Laden, destroy al-Qaeda in Afghanistan, and remove the Taliban regime.”⁸¹ On October 7, 2001, United States’ forces entered into Afghanistan and Operation Enduring Freedom started.⁸²

Early in the war effort, the Bush administration used drones and initiated cross-border incursions into Pakistan.⁸³ From its inception, the employment of drones has grown exponentially.⁸⁴ The pace of these attacks dramatically increased in 2006 after it had “become clear that the terror group was reconstituting itself in Pakistan’s tribal regions.”⁸⁵ “In July 2007, the 16 agencies that make up the U.S. intelligence community released a National Intelligence Estimate assessing that al-Qaeda was resurging and warning that it ‘has protected or regenerated key elements of its Homeland attack capability, including a safe haven in Pakistan’s Federally Administered Tribal Areas.’”⁸⁶ This safe haven was particularly disturbing to officials in the Bush administration because evidence showed that al-Qaeda and its affiliates were using the FATA region in Pakistan to train Westerners for attacks on American and European targets.⁸⁷

The planning and training for numerous terrorist attacks originated in the FATA region including: the July 7, 2005 attacks in London;⁸⁸ the plot to use liquid explosives to

sought to circumscribe the President’s authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization, yet provide enough flexibility to permit him to respond to attack or other emergencies.”).

⁸⁰ CTR. FOR LAW AND MILITARY OPERATIONS, *supra* note 51 at 118.

⁸¹ *Id.*

⁸² *Id.* at 119.

⁸³ See, e.g., *Al-Qaeda number three ‘killed by CIA spy plane’ in Pakistan*, TELEGRAPH (Dec 4, 2005, 12:01 AM GMT), <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/1504718/Al-Qaeda-number-three-killed-by-CIA-spy-plane-in-Pakistan.html>.

⁸⁴ See Peter Bergen & Katherine Tiedemann, *The Drone Wars*, NEW AMERICA FOUNDATION (June 3, 2009), http://www.newamerica.net/publications/articles/2009/drone_war_13672; Christopher Drew, *Drones are Weapons of Choice in Fighting Qaeda*, NY TIMES (Mar. 16, 2009), http://www.nytimes.com/2009/03/17/business/17uav.html?ref=unmanned_aerial_vehicles (noting the exponential appropriation of drones from a mere 167 drones in 2001 to more than 5500 in 2009); Scott Shane, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, NY TIMES (Jan. 22, 2010), http://www.nytimes.com/2010/01/23/world/asia/23drone.html?ref=unmanned_aerial_vehicles (“The strikes, carried out from a secret base in Pakistan and controlled by satellite link from C.I.A. headquarters in Virginia, have been expanded by President Obama and praised by both parties in Congress as a potent weapon against terrorism that puts no American lives at risk.”).

⁸⁵ Bergen & Tiedemann, *supra* note 84.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Paul Reynolds, *Bomber Video ‘Points to Al-Qaeda’*, BBC NEWS (Sept. 2, 2005, 11:37 GMT), http://news.bbc.co.uk/2/hi/uk_news/4208250.stm (illustrating that although the suicide bombers were homegrown, they travelled to Pakistan where they linked up with al-Qaeda).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

bring down passenger jets leaving Heathrow in 2006;⁸⁹ and the plotters who planned on bombing the Ramstein U.S. Air Force Base in Germany.⁹⁰ In fact, the UK has alleged that Pakistan is linked to 75% of the terror plots in the UK.⁹¹ Furthermore, numerous top U.S. officials believe that Osama bin Laden and other top al-Qaeda officials are living in the region and that the tribal belt on Pakistan's western border has become the "global headquarters" for al-Qaeda.⁹²

Reports indicated that the Pakistan government had made peace agreements with the Taliban in the FATA region in 2005 and 2006.⁹³ This allowed militants to stage attacks from Pakistan and the attacks were increasing at a dramatic rate.⁹⁴ After waiting for the Pakistani government to respond to the incursions into Afghanistan, President Bush finally sent in a Special Operations team on the ground to capture high value al-Qaeda targets.⁹⁵ The Pakistani government vehemently protested the presence of American troops on the ground and argued that it violated their sovereignty.⁹⁶ "In the face of the intense opposition to American boots on the ground, the Bush administration chose to rely on drones to target suspected militants."⁹⁷

⁸⁹ *Heathrow: Spotlight on Pak 'terror factory'*, THE TIMES OF INDIA (Aug. 11, 2006, 12:41 Am IST), <http://timesofindia.indiatimes.com/articleshow/1882645.cms> ("Today's Islamist terrorist may not live in Pakistan — they can be trained in Pakistan, financed by Pakistani groups, or inspired by the lives and works of global terrorist leaders in Pakistan.").

⁹⁰ *German Islamists convicted over bomb plot*, BBC NEWS (last updated Mar. 4, 2010, 11:55 GMT), <http://news.bbc.co.uk/2/hi/8549044.stm> ("[T]he men had trained at camps in Pakistan and procured some 700kg (1,500lbs) of chemicals to produce 410kg (900lbs) of explosives, prosecutors said.").

⁹¹ Sam Coates and Jeremy Page, *Pakistan 'Linked to 75% of All UK Terror Plots,' Warns Gordon Brown*, TIMES ONLINE (Dec. 15, 2008), <http://www.timesonline.co.uk/tol/news/uk/article5339975.ece>.

⁹² Asian News International, *Osama Bin Laden 'Hiding in Pakistan': Admiral Mullen*, SIFY NEWS (July 25, 2010), <http://sify.com/news/osama-bin-laden-hiding-in-pakistan-admiral-mullen-news-international-khznuibadhh.html> ("US Joint Chiefs of Staff Chairman Admiral Mike Mullen has supported US Secretary of State Hillary Clinton's statement about the presence of Osama Bin Laden and other top Al-Qaida leadership in Pakistan.").

⁹³ Carlotta Gall & Ismail Khan, *Taliban and Allies Tighten Grip in Northern Pakistan*, NY TIMES (Dec. 11, 2006), http://query.nytimes.com/gst/fullpage.html?res=9503E1D91431F932A25751C1A9609C8B63&page_wanted=all ("After failing to gain control of the areas in military campaigns, the government cut peace deals in South Waziristan in 2004 and 2005."); *Pakistan 'Taleban' in Peace Deal*, BBC NEWS (last updated Sept. 5, 2006, 15:58 GMT), <http://news.bbc.co.uk/2/hi/5315564.stm> (reporting that in 2006 Pakistan entered into accords with pro-Taliban militants to end cross border excursions and expel foreign militants for reduced presence of Pakistani Federal Troops in North Waziristan.).

⁹⁴ Gall & Khan, *supra* note 93 (reporting that the accords between the Taliban in Pakistan and the Pakistan government allowed the militants to gain a stronghold in the FATA region. Through this stronghold, and the lack of a Pakistani military presence in the region, the Taliban has "expand[ed] their training of suicide bombers and other recruits and fortif[ied] alliances with Al Qaeda and foreign fighters." Furthermore, "[s]ince the September accord, NATO officials say cross-border attacks by Pakistani and Afghan Taliban and their foreign allies have increased.").

⁹⁵ See Declan Walsh, *US Forces Mounted Secret Pakistan Raids in Hunt for Al-Qaida*, <http://www.guardian.co.uk/world/2009/dec/21/us-forces-secret-pakistan-raids> (reporting that although one raid was made public, a former NATO officer alleges that multiple cross border incursions occurred before and since then.).

⁹⁶ See *Pakistan Fury Over 'US Assault'*, BBC NEWS (last updated Sept. 4, 2008, 17:57 GMT), <http://news.bbc.co.uk/2/hi/7597529.stm> ("Pakistan has condemned an alleged raid by foreign troops based in Afghanistan which officials say killed at least 15 villagers in a north-west tribal area.").

⁹⁷ Bergen & Tiedemann, *supra* note 84.

PREDATOR DRONE

After President Bush left office, President Obama has continued, and even expanded on the drone program and cross-border incursions into Pakistan.⁹⁸ Even prior to assuming office, then candidate Obama criticized the Bush administration for not “acting aggressively enough to go after all al-Qaeda’s leadership.”⁹⁹ He went on further to say, “I would be clear that if Pakistan cannot or will not take out al-Qaeda leadership when we have actionable intelligence about their whereabouts, we will act to protect the American people. There can be no safe haven for al-Qaeda terrorists who killed thousands of Americans and threaten our homeland today.”¹⁰⁰ Three days into President Obama’s term, drones struck the FATA area destroying two compounds, killing numerous people, and possibly killing a high value target.¹⁰¹

Arguments Related to the Use of Force in Pakistan

A review of possible legal justifications arguing why the United States is able to use drones to carry out cross-border incursions into Pakistan underscores the complexity of the issue. Though there are a plethora of possible justifications, each carries its own caveat. The first, and primary justification, is that Pakistan has either authorized, or has acquiesced to the incursions. The proposition that a State may consent to the use of force on its sovereign territory by another State is not legally controversial.¹⁰² Even if Pakistan has not authorized such incursions, the United States could argue the inherent right to self-defense, both as commonly defined by the international community and possibly by using anticipatory self-defense. Moreover, on a strict case-by-case review that is closely associated with self-defense, one could use the theory of Hot Pursuit to justify the incursions. Regardless of the basic legal foundation for the incursions into sovereign territory of another country, the final argument for the incursions into the FATA region of Pakistan is that the area is “ungoverned territory”, which would result in an argument that no legal justification has to be made as there is no sovereign State involved and therefore no “incursion.”

Pakistan’s Consent, or Acquiescence

Today, the United States reportedly operates at least two separate drone programs in Pakistan; one is run by the U.S. military, the other by the Central Intelligence Agency (CIA).¹⁰³ Drones have struck targets inside Pakistan at least 141 times since 2004.¹⁰⁴ While the United States is the only country known to have the ability to employ drones in the region,

⁹⁸ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, SERIES ON COUNTERTERRORISM AND AMERICAN STATUTORY LAW 2 (May 11, 2009), available at <http://ssrn.com/abstract=1415070>.

⁹⁹ Hillel Ofek, *The Tortured Logic of Obama’s Drone War*, THE NEW ATLANTIS, Spring 2010, at 35.

¹⁰⁰ Anderson, *supra* note 98.

¹⁰¹ See *Deadly Missiles Strike Pakistan*, BBC NEWS (last updated Jan. 23, 2009, 20:04 GMT), <http://news.bbc.co.uk/2/hi/7847423.stm>.

¹⁰² U.N. Report, *supra* note 6, at ¶ 37.

¹⁰³ Greg Bruno, *U.S. Drone Activities in Pakistan*, COUNCIL ON FOREIGN RELATIONS (July 19, 2010), http://www.cfr.org/publication/22659/us_drone_activities_in_pakistan.html.

¹⁰⁴ Imtiaz Gul, *Foreign Policy: Pakistan’s Dueling Drones Debate*, NPR (July 6, 2010), <http://www.npr.org/templates/story/story.php?storyId=128332426>.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

U.S. officials normally do not comment on suspected drone strikes.¹⁰⁵ The Obama administration considers the issue classified and does not acknowledge covert targeting of militants, however CIA chief Leon Panetta stated that the unmanned airstrikes in Pakistan have been “very effective” and considers them “the only game in town” in targeting al-Qaeda leadership in the tribal areas.¹⁰⁶ Senator Dianne Feinstein (D. - CA) who chairs the Senate Intelligence Committee has publically acknowledged U.S.-Pakistani drone cooperation.¹⁰⁷ In fact, officials have gone so far as to say that drones are “their most effective weapon against al-Qaeda.”¹⁰⁸ Based upon the numerous statements from U.S. government officials, the classified CIA program to kill militants in tribal regions of Pakistan using drones is considered by some to be the “world’s worst kept secret.”¹⁰⁹

In response to the drone attacks, the Pakistani government has gone on record as steadfastly opposed the cross-border incursion of drones into its sovereign territory.¹¹⁰ Officially, publically and consistently, Pakistan has stated that the United States drone attacks in Pakistan are illegal.¹¹¹ Pakistan’s Ministry of Foreign Affairs has stated that they are in regular contact with the United States and have conveyed serious concerns regarding the use of drones in Pakistan.¹¹² Pakistan has called the drone attacks “a violation of our sovereignty and they are also unhelpful in the context of winning hearts and minds . . .”¹¹³ On June 30, 2010, a regional Pakistani court in Lahore ruled against drone strikes and called on the government to take appropriate measures to stop drone attacks in Pakistan.¹¹⁴ Imran Khan, a Pakistani politician, has spoken out contending that drone strikes inside the territorial border of Pakistan are illegal, unwarranted and unconstitutional.¹¹⁵ Mr. Kahn recently filed a law suit in Pakistan’s Supreme Court asking the Court to declare drone attacks as attacks on sovereignty and a war crime.¹¹⁶

¹⁰⁵ Nasir Dawar, *Suspected U.S. drones kill 13 in Pakistan*, CNN (Sept. 14, 2010, 12:01 PM EDT), <http://www.cnn.com/2010/WORLD/asiapcf/09/14/pakistan.drone.attack/index.html?htp+T2>.

¹⁰⁶ *U.S. airstrikes in Pakistan called ‘very effective’*, CNN (May 18, 2009), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes>; see also Gul, *supra* note 104.

¹⁰⁷ Greg Miller, *Feinstein Comment on U.S. Drones Likely to Embarrass Pakistan*, L.A. TIMES (Feb. 13, 2009), <http://articles.latimes.com/2009/feb/13/world/fg-uspakistan13>; see also Gul, *supra* note 104.

¹⁰⁸ Catherine Philip, *Drone Strikes the Most Effective Weapon Against Al-Qaeda – but at What Cost?*, TIMES ONLINE (June 2, 2010), <http://www.timesonline.co.uk/tol/news/world/asia/article7142182.ece>.

¹⁰⁹ Peter Bergen & Katherine Tiedemann, Op-Ed., *No Secrets in the Sky*, NY TIMES (Apr. 26, 2010), <http://www.nytimes.com/2010/04/26/opinion/26bergen.html>.

¹¹⁰ *Pakistan Fury Over ‘US Assault’*, *supra* note 96.

¹¹¹ Press Release, Ministry of Foreign Affairs Pakistan, *Drone Attacks Are a Violation of Pakistan’s Sovereignty*, PR No. 128/2009 (Mar. 27, 2009) available at http://www.mofa.gov.pk/press_releases/2009/March/PR_128_09.htm.

¹¹² Press Release, Ministry of Foreign Affairs Pakistan, *Pakistan Conveys Across its Concerns on Drone Attacks*, PR No. 247/2009 (June 24, 2009) available at http://www.mofa.gov.pk/press_releases/2009/June/PR_247_09.htm

¹¹³ Record of the Press Briefing, Ministry of Foreign Affairs Pakistan, (July 9, 2009) available at http://www.mofa.gov.pk/Spokesperson/2009/July/Spokes_09_07_09.htm.

¹¹⁴ *Lahore Court Rules Against Drone Strikes*, UPI.COM (June 30, 2010), http://www.upi.com/Top_News/Special/2010/06/30/Lahore-court-rules-against-drone-strikes/UPI-47681277923443/ (“Federal authorities should take measures to stop drone attacks in Pakistan if they are carried out without formal approval, a Lahore court said Wednesday.”)

¹¹⁵ Nasir Iqbal, *Imram Moves SC Against Drone Attacks*, DAWN.COM (July 1, 2010, 03:18 AM PST), <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/21-imran-moves-sc-against-drone-attacks-170-sk-03>.

¹¹⁶ *Id.*

PREDATOR DRONE

Although Pakistan officially denounces the attacks and the U.S. considers the issues classified, both sides quietly recognize the benefits of co-operating regarding drone strikes.¹¹⁷ Reportedly the covert drone program was used sporadically under the Bush administration, but has been greatly expanded by the Obama administration and is now considered the “centerpiece” of the administration’s counterterrorism policy.¹¹⁸ So close are the ties between the States, the U.S. and Pakistan have established “fusion centers” in Pakistan to aid in sharing information regarding the drone strikes.¹¹⁹ The United States and Pakistan continue to foster this “partnership,” in terms of aid as well as strategy against common enemies.¹²⁰ Today, open source documents refer to the arrangement as Pakistan “tacitly” approving the use of drones within its sovereign territory.¹²¹

Assuming that Pakistan has authorized the U.S. to use drones in order to carry out cross-border incursions into its sovereign territory, then we need to discuss the nuance of the agreement and point out the fact that even unequivocal consent is not a panacea regarding the legal issues involved with drone strikes. If Pakistan has consented to the drone strikes, then the United States and Pakistan must still ensure the legality of the strike.¹²² A finding that the cross-border incursion is “legal” does not relieve States from their obligations to follow the Law of War. States must still review, among other things, issues related to proportionality, distinction, and the avoidance of unnecessary suffering.¹²³

If Pakistan has only tacitly approved, one could make the argument that Pakistan’s duty to ensure the legality of the use of force is somewhat attenuated. Going one step further, if there is only tacit approval and the area is considered “ungoverned”, then the duty of the Pakistan could be even more attenuated. Regardless of the degree of consent for the cross-border incursion, the legality of the actual use of force must be reviewed.

The Inherent Right of Self-Defense

If the United States does not have the consent of the Pakistani Government to use drones in order to conduct cross-border incursions, then the legality should be based on the inherent right of self-defense. Some legal scholars have argued that the applicable law in “special, sometimes covert, operations outside of traditional zones of armed conflict” is controlled by the customary international law of self-defense, rather than the narrow Law of Armed conflict.¹²⁴ This cannot and should not be the U.S. position. Mr. Harold Koh, the United States legal advisor to the Department of State, has publically stated that the legal

¹¹⁷ Amanda Hodge, *Pakistan Allowing CIA to Use Airbase for Drone Strikes*, THE AUSTRALIAN (Feb. 19, 2009), <http://www.theaustralian.com.au/news/pakistan-permits-cia-base-for-strikes/story-e6frg6t6-1111118893683>.

¹¹⁸ Ofek, *supra* note 99 at 36 (stating that fifty-three drone attacks were reported in 2009 alone – more than during the entire Bush presidency); *see also* Gul, *supra* note 104 (noting that as of July 6, 2010, forty-five attacks have already occurred in 2010).

¹¹⁹ Greg Miller, *Options Studied for a Possible Pakistan Strike*, WASH. POST, May 29, 2010, at A1, A12.

¹²⁰ Elise Labott, *Analysis: U.S.-Pakistan Relationship Like Uneasy Marriage*, <http://www.cnn.com/2009/POLITICS/10/09/labott.pakistan.analysis/index.html> (last visited Oct. 6, 2010).

¹²¹ Haji Mujtaba & Zeeshan Haider, *U.S. Missile Strike kills 12 Militants in Pakistan*, REUTERS (Aug. 14, 2010), <http://www.reuters.com/article/idUSTRE67D13L20100814>.

¹²² U.N. Report, *supra* note 6; Tyler, *supra* note 71.

¹²³ U.N. Report, *supra* note 6, at 10; Ackerman, *supra* note 56.

¹²⁴ U.S. House of Representatives, Subcomm. on Nat’l Sec. & Foreign Affairs, *Rise of Drones: Unmanned Systems and the Future of War*, 2, Mar. 23, 2010 (Written Testimony Submitted by Kenneth Anderson).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

justification for the use of drones is based on the asserted right of self-defense.¹²⁵ Mr. Koh has however gone one step further and also stated that the use of drones complies with the Law of War.¹²⁶ Basing the legality of the cross-border incursions on the concept of self-defense is specifically backed by the United Nations in UNSCR 1368 and the Joint Resolution of Congress.¹²⁷ Requiring the United States to follow the Law of War is a fundamental duty.¹²⁸

The language of UNSCR 1368 appears to give the United States broad authority to defend itself. The UNSCR states in its “Determined” clause that the United Nations, and by implication the United States, must “combat by all means threats to international peace and security caused by terrorist acts.”¹²⁹ The UNSCR then goes on to recognize the inherent right of self-defense of the United States.¹³⁰ The UNSCR also reaffirms the principles and purpose of the UN Charter and “expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001.”¹³¹ The plain reading of the Resolution gives the United States and other member states the authority to pursue those responsible for 9/11 in accordance with the UN Charter. Absent any further resolution from the UN Security Council, when applying international law, it would appear as though the United States is within its authority to use the drones to attack al-Qaeda inside Pakistan, since they are the ones responsible for international terrorism and 9/11 and the inherent right to self-defense still applies. The President is also within his authority to seek out the Taliban in Pakistan under the UNSCR since the Taliban had originally harbored al-Qaeda.¹³² Furthermore, the United States may interpret the third clause of the UNSCR to authorize attacking al-Qaeda with drones due to what it sees as an inability of the Pakistanis to bring the terrorists in their borders to justice, and in a sense harboring the terrorists by omission.¹³³

On the domestic angle of the President’s power to use drones to attack the Taliban and al-Qaeda, the answer seems to be clearer. As with the UNSCR, the AUMF invokes the right of self-defense.¹³⁴ Furthermore, in the “Whereas” section of the resolution, one clause states that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”¹³⁵ This statement, in conjunction with the self-defense statement, infers that the AUMF may not even be necessary,

¹²⁵ See U.N. Report, *supra* note 6, at 8; Koh, *supra* note 7, at 8.

¹²⁶ Koh, *supra* note 7, at 8.

¹²⁷ See AUMF, *supra* note 72; UNSCR 1368, *supra* note 60.

¹²⁸ At a minimum Common Article 3 should apply; *see also generally* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795-96 (2006).

¹²⁹ UNSCR 1368, *supra* note 60.

¹³⁰ *Id.* (“Recognizing the inherent right of individual or collective self-defence in accordance with the Charter.”).

¹³¹ *Id.*

¹³² U.S. President Bush’s Speech to United Nations (Nov. 10, 2001), <http://archives.cnn.com/2001/US/11/10/ret.bush.un.transcript/index.html>. (“The Taliban’s days of harboring terrorists and dealing in heroin and brutalizing women are drawing to a close.” Referring to the Taliban harboring al-Qaeda.)

¹³³ UNSCR 1368, *supra* note 60 (“Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;”) (emphasis in original).

¹³⁴ AUMF, *supra* note 72 (“Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad;”).

¹³⁵ *Id.*

PREDATOR DRONE

and that the Constitution by itself authorizes the President to go after international terrorism under the right of self-defense. Regardless, Congress still issued the AUMF, and it clearly states that the President may use “necessary and appropriate force” (i.e. the use of drones), and does not appear to place territorial limitations on his ability to use force, whether it be Afghanistan, Pakistan, or some other country.¹³⁶

There is also another important aspect of the domestic legality of the President’s actions. In this situation, if the AUMF does not have territorial limitations, the President would wield the greatest authority under the holding set forth in *Youngstown Sheet & Tube Co. v. Sawyer*.¹³⁷ *Youngstown* was a case dealing with the President’s executive power to seize private property during the Korean War.¹³⁸ In an attempt to stop a steel strike, President Truman used an Executive Order to seize steel mills.¹³⁹ President Truman cited Article II executive power as authority to do this,¹⁴⁰ even though Congress had passed the Taft-Hartley Act which laid out what the President may do in such circumstances.¹⁴¹ This clash led to the concurrence of Justice Jackson, which has held great weight in determining the extent of the President’s power in relation to the laws duly enacted by Congress.¹⁴² With Congress addressing the problem of terrorism in the wake of the 9/11 attacks with the AUMF, and the President following the AUMF, a *Youngstown* analysis would allow the President’s authority to be “at its maximum.”¹⁴³ Without a territorial limitation set forth in the AUMF, the President is not required to limit himself to any geographical jurisdiction. Had Congress been more precise in geographical jurisdiction, the President would have been bound by those limitations.¹⁴⁴

¹³⁶ See generally Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

¹³⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹³⁸ *Id.* at 582.

¹³⁹ *Id.* at 589-92.

¹⁴⁰ *Id.* at 587.

¹⁴¹ *Id.* at 657. (“For the purposes of this case the most significant feature of that Act is its omission of authority to seize an affected industry. The debate preceding its passage demonstrated the significance of that omission. Collective bargaining, rather than governmental seizure, was to be relied upon. Seizure was not to be resorted to without specific congressional authority. Congress reserved to itself the opportunity to authorize seizure to meet particular emergencies.”)

¹⁴² CURTIS BRADLEY & JACK GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 178 (Aspen Publishers 2009).

¹⁴³ Justice Jackson’s concurrence established a framework to determine the scope of Presidential power. It is a three tiered analysis:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . .

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . .

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Youngstown, 343 U.S. 579 at 635-638.

¹⁴⁴ *Id.* at 637-638. (The President would have fallen into the third category of Justice Jackson’s rubric in that the President would be considered to have gone against the implied or express will of Congress, and would have to justify his actions using his own constitutional powers, minus any constitutional powers of Congress on the matter.)

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

Although there is justification to propose that self-defense does not have territorial limitations, there is a counter argument. The Constitution provides that treaties are to be considered the supreme law of the land.¹⁴⁵ The U.S. Constitution also provides that the President “shall take Care that the Laws be faithfully executed.”¹⁴⁶ Due to this limitation, the President is bound by Article 2 of the UN Charter which requires member states uphold certain purposes and principles, including 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 Purposes of the United Nations.”¹⁴⁷

Although the United Nations passed UNSCR 1368 calling the member States to bring the terrorists responsible for the 9/11 attacks to justice, it may be considered a leap of logic to apply this UNSCR, with regard to the use of force, within the sovereign territory of Pakistan.¹⁴⁸ The language in the UNSCR is broad but was “widely viewed as confirming the right to use force in self-defense against al-Qaeda in Afghanistan.”¹⁴⁹ If this is so, this would negate the expansive interpretation of the UNSCR self-defense justification which gives the United States legal authority to use the drones as an extension of the warfighting effort and violate the territorial integrity of Pakistan. However, the UNSCR specifically stressed that it would go after “those responsible for aiding, supporting or harbouring the perpetrators. . .”¹⁵⁰ While this clause seems to imply that a State must knowingly aid, support or harbor the terrorists in order for another State to use force against them under the guise of self-defense, some believe “it is a ‘fair inference’ today that self-defense may be invoked against non-state actors.”¹⁵¹

Anticipatory Self-Defense

If Article 51 self-defense cannot be used to justify cross-border incursions, the analysis must then include an extension to the inherent right of self-defense known as anticipatory self-defense.¹⁵² “Some States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, under the principle of ‘anticipatory self-defense.’”¹⁵³ Unlike Article 51, which triggers individual or collective self-defense based upon the prerequisite that one must first be attacked, the Customary International Law approach of

¹⁴⁵ U.S. Const. art. VI, § 2.

¹⁴⁶ U.S. Const. art. II, § 3.

¹⁴⁷ U.N. Charter art 2., para. 4.

¹⁴⁸ UNSCR 1368, *supra* note 60 at ¶ 3.

¹⁴⁹ Michael P. Scharf, *Seizing The “Grotian Moment”: Accelerated Formation Of Customary International Law In Times Of Fundamental Change*, 43 Cornell Int’l L.J. 439, 451.

¹⁵⁰ UNSCR 1368, *supra* note 60 at ¶ 3.

¹⁵¹ Scharf, *supra* note 149, at 452 (quoting Professor Ian Johnstone, The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism, 43 COLUM. J. TRANSNAT’L L. 337, 370 (2005).); *see also* Scharf, *supra* note 149, 452 n.73, (concluding that “Security Council Resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51” (quoting *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 45 I.L.M. 271, 370 separate opinion of Judge Simma at ¶ 11 (Dec. 19, 2005))).

¹⁵² Ron Synovitz, *Legality Of ‘Hot Pursuit’ Into Pakistan Debated*, RADIO FREE EUROPE/ RADIO LIBERTY (Jun. 22, 2008), <http://www.rferl.org/content/article/1144663.html>.

¹⁵³ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 6.

PREDATOR DRONE

anticipatory self-defense “justifies using force in anticipation of an ‘imminent’ armed attack.”¹⁵⁴

The standard for what is an imminent armed attack dates back to the 1837 Caroline case.¹⁵⁵ In correspondence between then Secretary of State Daniel Webster and Lord Ashburn, the idea that a State does not actually need to be attacked in order to defend itself was discussed. The correspondence details the preconditions for using armed response which would result in anticipatory self-defense and has become the standard in Customary International Law.¹⁵⁶ Specifically, States “may engage in anticipatory self-defense if the circumstances leading to the use of force are ‘instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.’”¹⁵⁷ What this means is that a State has to show “necessity.”¹⁵⁸ In addition to showing necessity, a State also has to show proportionality in that the actions are not “unreasonable or excessive.”¹⁵⁹

Since the Caroline case, and after 9/11, the Bush administration attempted to expand the meaning of imminent use of force in relation to anticipatory self-defense.¹⁶⁰ In The National Security Strategy of the United States of America of 2002¹⁶¹ and 2006 (“NSS”)¹⁶², President Bush put forth what is known as the “Bush Doctrine.” In discussing the need to address an expanded version of the imminent use of force, the NSS concluded that “[t]he greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁶³ In order to quantify a standard for this new version of imminent use of force, some have suggested that a State may use force when evidence shows that an aggressor has committed itself to an armed attack and delaying a response would hinder the defender’s ability to mount a meaningful defense.¹⁶⁴

Anticipatory self-defense, whether the traditional version or the expanded version, can be used to justify the legality for cross-border incursions into Pakistan. It should be noted that there is significant controversy regarding even the employment of the traditional doctrine of anticipatory self-defense.¹⁶⁵ Moreover, while there may be occasions where the United States may be justified using anticipatory self-defense for the employment of drones, it is hard to imagine that the continued use of drone attacks fall within this category. In order for the

¹⁵⁴ *Id.*

¹⁵⁵ See generally Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L. J. 325 § 2 at 328-30 (1999) (detailing the events of the Caroline Case that lead to the correspondence).

¹⁵⁶ “[T]he general rule stating the conditions under which force legitimately can be used in self-defense under customary international law was set out in a letter written in 1841 by United States Secretary of State Daniel Webster to Henry Fox, the British minister in Washington.” *Id.* at 325.

¹⁵⁷ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 6.

¹⁵⁸ ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 18 (Routledge 1993).

¹⁵⁹ *Id.*

¹⁶⁰ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 7.

¹⁶¹ The White House, *The National Security Strategy of the United States of America* (Sept. 2002) available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.

¹⁶² The White House, *The National Security Strategy of the United States of America* (Mar. 2006) available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>.

¹⁶³ *Id.* at 18.

¹⁶⁴ Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 534 (2003).

¹⁶⁵ See Valerie Epps, *Rejecting the Supposed Right of Anticipatory Self Defense* (Oct. 20, 2008), <http://ssrn.com/abstract=1292446>.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

United States to satisfy the standard for traditional anticipatory self-defense, it would need show that the circumstances leading to the use of force are “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.”¹⁶⁶ To justify force under this rather limited standard is fact specific, and for the United States’ to attempt to justify every attack with the imminent use of force test is highly unlikely.¹⁶⁷ Furthermore, if the employment of the traditional use of anticipatory self-defense is viewed as controversial, the expanded notion under the Bush Doctrine is generally seen as too expansive.¹⁶⁸ Obviously, under the Bush Doctrine, with the looser definition of imminent use of force, it would be easier to justify the legality of cross-border incursions. However, this looser definition does not enable a “dead-lever” approach that swallows all circumstances.¹⁶⁹

Hot Pursuit

A narrow legal justification for the cross-border incursion of drones that is closely related to the macro theory of self-defense is “Hot Pursuit.” Hot Pursuit is Customary International Law that has been enshrined in the United Nations Convention on the Law of the Sea.¹⁷⁰ Article 111 of the UN Convention on the Law of the Sea sets out the rules regarding Hot Pursuit on the high seas.¹⁷¹ “The doctrine generally pertains to the law of the seas and the ability of one State’s navy to pursue a foreign ship that has violated laws and regulations in its territorial waters, even if the ship flees to the high seas.”¹⁷² The doctrine has been expanded and adapted to pertain to sovereign land as well as territorial waters.¹⁷³

With the doctrine of Hot Pursuit, the United States could justify cross-border incursions to pursue terrorists. Since this doctrine is recognized under Customary International Law, the U.S. could use the doctrine to validate cross-border incursions.¹⁷⁴ However, there may be limitations on when and how the United States may use this as authority to go after al-Qaeda and the Taliban in Pakistan. “On land. . . the right to ‘hot pursuit’ has evolved and been recognized under international law as the chasing of armed aggressors across international borders.”¹⁷⁵ Furthermore, the force must “literally and temporally [be] in pursuit and

¹⁶⁶ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 6.

¹⁶⁷ “Indeed, on its face, it appears to impose a fairly restrictive test in which the defensive force can only be used just as the attack is about to be launched.” Schmitt, *supra* note 170, at 533.

¹⁶⁸ “*Bush Doctrine*’ has critics, other nations worried, Lexington Herald-Leader (KY), 2002 WLNR 2083590, 9/9/02 LEXINGTONHLD A1.; see also Bradley Aron Cooper, *Defending Liberty and Defeating Tyrants: The Reemergence of Federal Theology in the Rhetoric of the Bush Doctrine*, 85 U. Det. Mercy L. Rev. 521, 551.

¹⁶⁹ Schmitt, *supra* note 164, at 535 (“[I]t is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks - an expectation that is much more than merely speculative.”).

¹⁷⁰ United Nations Conventions on the Law of the Sea, The United Nations, Art. 111: Right of Hot Pursuit, http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁷¹ *Id.*

¹⁷² Lionel Beehner, *Can States Invoke ‘Hot Pursuit’ to Hunt Rebels?*, COUNCIL ON FOREIGN RELATIONS (Jun. 2007), <http://www.cfr.org/publication/13440/>.

¹⁷³ *Id.*

¹⁷⁴ Synovitz, *supra* note 152.

¹⁷⁵ *Id.*

PREDATOR DRONE

following the tail of a fugitive.”¹⁷⁶ So, in order for this doctrine to justify the use of drones in Pakistan, as with chasing fleeing ships, militants must have been physically present in Afghanistan, committed an act which violated the laws/regulations of Afghanistan’s territory, and the United States or Coalition forces have chased them into Pakistan. This doctrine may work especially noting that, under domestic law in the United States, the President does not have jurisdictional limitations when pursuing al-Qaeda or the Taliban.¹⁷⁷

The United States can also use Hot Pursuit and validate cross-border incursion by interpreting United Nations Security Council Resolution 1373.¹⁷⁸ Under this resolution, the Security Council reiterates the ability of self-defense.¹⁷⁹ The rest of the UNSCR calls for States to “complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.”¹⁸⁰ The UNSCR reaffirms “that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.”¹⁸¹ Therefore, the UNSCR can be used to validate Hot Pursuit because of Pakistan’s failure to prohibit al-Qaeda and the Taliban from developing strongholds in the FATA region and allowing these actors to cross the border and stage attacks in Afghanistan.¹⁸²

Although Hot Pursuit seems to be a viable justification for cross-border incursions, there are some constraints on the use of Hot Pursuit. First, there are “real world” limitations to Hot Pursuit. Specifically, there are a number of static targets that would not be justified under the Hot Pursuit doctrine. Some targets such as training camps, operation centers and alike simply would not fall under the Hot Pursuit doctrine. This real world limitation may make the doctrine of Hot Pursuit untenable.

Another constraint regarding the use of Hot Pursuit to justify cross-border incursion is the fact that Hot Pursuit has been primarily applicable to the Law of the Sea.¹⁸³ More telling is that it was codified in a specific UN Convention for the Law of the Sea.”¹⁸⁴ To use a doctrine specifically relegated to actions viewed as a Law of the Sea paradigm and apply it outside of that realm appears counterintuitive when other conventions and treaties could have addressed it. Furthermore, in relation to Article 2(4) of the UN Charter, Hot Pursuit would violate the territorial integrity of Pakistan.¹⁸⁵ The cross-border chase of militants would violate the duty imposed by Article 2(4) if it is deemed inconsistent with the purposes of the UN Charter.

¹⁷⁶ Beehner, *supra* note 172.

¹⁷⁷ AUMF, *supra* note 72.

¹⁷⁸ UNSCR 1373, *supra* note 67.

¹⁷⁹ *Id.* (“Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001).”).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Beehner, *supra* note 172 (This is an analogy to the argument made by the author that “a government has an obligation not to allow its territory to be used by non-state actors—or terrorist organizations—to carry out armed attacks against its neighbors. In this case, the U.S. government must prove the Syrian government has failed to prevent these foreign actors from crossing into Iraq and carrying out attacks against U.S. troops. In response, U.S. Special Forces could then “pursue” these foreign jihadists, even if they flee back into Syrian territory.”).

¹⁸³ United Nations Conventions on the Law of the Sea, *supra* note 170.

¹⁸⁴ *Id.*

¹⁸⁵ *See* U.N. Charter, art. 2, para. 4.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

Ungoverned Territory

Finally, a possible legal justification for cross-border incursions might be derived from the notion that using drones in the FATA region is not technically crossing the border because the FATA region is not a sovereign territory. If the FATA region were truly ungoverned territory, the United States would basically be allowed unfettered access to use force.

The term ‘ungoverned territories’ does not imply the complete absence of power structures in the territories in question.”¹⁸⁶ One definition of ungoverned territory concludes that ungoverned territory exists where “the State is absent, unable, or unwilling to perform its functions.”¹⁸⁷ Trying to define the term some scholars look to whether the “‘host’ State is unwilling or unable to deal with the non-state actors who are launching armed attacks from within its territory.”¹⁸⁸

To determine if this region is an ungoverned region, the RAND Corporation has devised a four factor test.¹⁸⁹ The first factor is the level of State penetration into a society.¹⁹⁰ The second is the extent to which the State has a monopoly on the use of force.¹⁹¹ The third factor is the extent to which the State controls its borders.¹⁹² The last factor is whether the State is subject to external intervention by other States or outside forces.¹⁹³ Logically speaking, the first and third factors lean in favor of determining that the FATA region is an ungoverned territory. If FATA is in fact ungoverned, there is an argument to be made that this would allow the United States to launch attacks into this region without the consent of the Pakistani Government.¹⁹⁴ If there is no State, then sovereignty would not be compromised.

Justifying the use of drone attacks by determining that the region is ungoverned territory has complications. The first question is to determine if in fact the FATA region is an “ungoverned territory.” Thomas Johnson, a professor at the Naval Postgraduate School, believes that the FATA region is not an ungoverned territory.¹⁹⁵ He points out that “for 200 years, the region has had very strong governance – based on tribal traditions and tribal mores.”¹⁹⁶ The salient point he makes is that this style of governance and sovereignty in the FATA region is very different from any Western notion of sovereignty.¹⁹⁷

When reviewing the possibility of basing the legality of cross-border incursion on an ungoverned territory theory, the U.S. must be mindful of the repercussions of the international community. Although some have found that determining an area to be “ungoverned territory”

¹⁸⁶ Angel Rabasa, *Ungoverned Territories*, RAND CORPORATION (Feb 14, 2008), http://www.rand.org/pubs/testimonies/2008/RAND_CT299.pdf.

¹⁸⁷ *Id.*

¹⁸⁸ INT’L & OPERATIONAL L. DEP’T, *supra* note 9, at 7.

¹⁸⁹ *Ungoverned Territories: A Unique Front in the War on Terrorism*, RAND Project Air Force Research Brief (2007), http://www.rand.org/pubs/research_briefs/2007/RAND_RB233.pdf.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Jackie Northam, *Airstrikes in Pakistan’s Tribal Areas Legally Murky*, NPR (Mar. 17, 2009), <http://www.npr.org/templates/story/story.php?storyId=101953944>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

PREDATOR DRONE

as a justification for cross-border attacks against non-state actors, others attribute this view to “western arrogance.”¹⁹⁸ Moreover, although some might argue that the Pakistani Federal government is not in control of the FATA region, other entities fill the void left by the Federal government, such as warlords, mullahs, or tribal leaders.¹⁹⁹ However, in some parts of FATA, “the Pashtun tribes have a long history of resistance to outside authority and a distinct legal and administrative system dating back to colonial times.”²⁰⁰

CONCLUSION

The use of drones in combat is evolutionary, not revolutionary. The employment of unmanned vehicles on the battlefield is not so different from the use of manned vehicles as to cause a disconnect between the use of drones and their legality. Drones must be used in accordance with national and international law, to specifically include the Law of War. Once it is determined there is a legal justification for an attack, the conduct of the attack must comply with the Law of War. Some critics may argue that there is a lack of transparency concerning the United States, the War on Terror, and the use of drones to respond to an asymmetrical battlefield, however, lack of transparency does not equate to lack of legality. With that said, the lack of transparency does give critics of the United States the leeway to engage in circumspection.

The United States can employ drones and conduct cross-border incursions if the incursions are legal. There are several legal justifications for cross-border incursions. Clearly, the least controversial would be founded on the consent of the sovereign. The reality however is that Pakistan will probably never publically announce that they have consented to the incursions.

Relying on self-defense, both traditional and anticipatory, is factually driven and may not provide continued support simply based upon the events of 9/11. Hot Pursuit is another avenue that can be used to justify the incursions, but it is only a derivative of self-defense and, as such, is factually driven. Finally, categorizing the FATA region as “un-governed territory” would not require legal justification because there would be no real border and thus no incursion. However, the realities and politics prohibit the use of this avenue of approach.

The legality of cross-border incursions should not be viewed as a static response. Working with our partners to respond to the War on Terror requires a dynamic thought process. The use of force must be decisive, but it also must be legal. The United States is not conducting operations in a vacuum, and actions taken by the United States have repercussions. Obtaining consent from the country where force is to be used should be the goal because consent allows for a synergy of effort and focus on a common enemy. The lack of consent amplifies the impact of all issues, from geo-political aspects, to the negative aspects of collateral damage. As a cautionary note, although the use of force should lack trepidation, the United States could win the battle and lose the war if consent is not obtained.

If consent is not forthcoming, a fallback position must be in place so that the action is seamless and the mission is accomplished. The United States can make cross-border incur-

¹⁹⁸ *Id.*

¹⁹⁹ Rabasa, *supra* note 146.

²⁰⁰ *Id.*

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

sions into Pakistan on the basis of self-defense in response to fighting the War on Terror. Making cross-border incursions based on self-defense does not have geographical borders, but it should not be seen as a pocket response. Self-defense requires justification, and regardless of the basis of self-defense, whether it be Article 51, anticipatory self-defense, or the Bush Doctrine, each basis contemplates thresholds. Moreover, the further we are away from the events of 9/11, the more attenuated the basis for self-defense may become.

Using Hot Pursuit to justify cross border incursions has real world considerations that make it untenable as a baseline to justify cross-border incursions. Hot Pursuit is a reactive approach to the use of force and, as such, cannot be relied upon for a systemic strategy regarding the War on Terror. It can be used in exigent circumstances, but those circumstances are limited, factually driven, and must be strictly controlled by senior level decision makers so as not to cause an international incident.

Finally, considering FATA to be an ungoverned territory which would not infringe on the sovereignty of Pakistan is, as a practical matter, not available as a basis for cross-border incursions. Although there are some indicia that FATA is ungoverned, its current condition does not equate to a finding that it is "ungoverned". Moreover, concluding that the area is ungoverned should be used as a last resort as it will be perceived as imperialistic and an avoidance of the rule of law.