

# DRONES IN THE FIGHT AGAINST TERRORISM--SHOULD THE GLOBAL COMMUNITY STRINGENTLY REGULATE THEIR USE?

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The significant problems we face cannot be solved at the same level of thinking we were at when we created them.<sup>1</sup>

## I. INTRODUCTION

On the one hand, “To say that we are living through a time of momentous change ... we could barely have imagined a quarter century ago”<sup>2</sup> is to state the obvious. But, on the other hand, to say that the U.S. and other nations would – in the 21<sup>st</sup> century – actively and aggressively use drones under the auspices of their nations’ security is far more than momentous. “Since 1999 remotely piloted aircraft have been used in a direct combat role for target acquisition, using laser markers to designate a target that is then attacked by precision-guided missiles discharged from conventional fixed-wing or rotary-blade aircraft.”<sup>3</sup> Currently, drones<sup>4</sup> are being used abroad in situations of military conflict or potential conflict or for other than normal peacetime purposes,<sup>5</sup> as an extension of governmental and military powers. In 2001, President George W. Bush declared the war on terrorism.<sup>6</sup> The war on terror has led the U.S. to engage in independent activities in their efforts to effectively address the war on terror. For almost two decades, “the dominant

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<sup>1</sup> Albert Einstein.

<sup>2</sup> Wilfred M. McClay, *The Tocquevillian Moment ... and Ours*, *Wilson Quarterly*, Summer 2012, at 48.

<sup>3</sup> Ben Emmerson, *Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN General Assembly, A/68/389, September 18, 2013, at 6 (Discussing the inquiry about drones in the counter-terrorism arena and the impact on civilian casualties.).

<sup>4</sup> Drones strikes in Pakistan rose steadily under President Barack Obama in 2009, to their peak of 122 in 2010. Starting in 2011, strikes in Pakistan began to decline, while they spiked in Yemen, particularly as the Obama administration used drones to support the Yemeni government’s battle against al-Qaeda-linked militants in 2012. New American Foundation, *The National Security Studies Program*, 11/24/13, at 1, [natsec.newamerica.net](http://natsec.newamerica.net)

<sup>5</sup> Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1798-2009*, Congressional Research Service, January 27, 2010.

<sup>6</sup> George W. Bush: Declaration of War on Terrorism, *The American Presidency-Encyclopedia Britannica’s Guide to American Presidents*, <http://www.britannica.com/presidents/articles-9398253>. President said, “Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network .... Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success.”

national security narrative for America stressed the dangers posed by weak or failing states,”<sup>7</sup> which from that perspective “breed terrorism”

The U.S.<sup>8</sup> and other nations<sup>9</sup> are also using and rapidly developing and improving their drone capabilities,<sup>10</sup> and they are indiscriminately using current technology to search out identified targets. “Eleven times in its history the U.S. has formally declared war against foreign nations.”<sup>11</sup> More specifically, “Extended ... engagement that might be considered undeclared wars [include] global actions against foreign terrorists after the September 11, 2001, attacks on the United States,”<sup>12</sup> this engagement continues today. President Obama “inherited this unprecedented and still-evolving capability. The tool—particularly the use of drones—<sup>13</sup> ... has been lethally effective against al Qaeda.”<sup>14</sup>

Because “identifying and neutralizing terrorists and insurgents has become one of the Pentagon’s most crucial tasks,”<sup>15</sup> drones have become a crucial component in the “find, fix, finish, exploit, analyze, and disseminate”<sup>16</sup> approach used by the U.S. military’s special operations; commitment to U.S. security. The U.S. uses unarmed and armed drones to collect intelligence and to make strikes of specified targets. This “direct approach,” and “indirect approach,”<sup>17</sup> that are increasingly being used are being criticized as a blatant violation of a country’s sovereignty.<sup>18</sup> “While Suspected U.S. drone strikes on Pakistani territory are effective, they are a violation of Pakistan’s sovereignty.”<sup>19</sup>

This essay addresses drone use by the U.S. government and other nations. “To say that we are ... stand[ing] on the threshold of a future”<sup>20</sup> that is inevitably linked by threats of violence against our nation and other citizens around the world would be an understatement. After the introduction, the next section reviews laws that authorize the use of drones. Next, a short overview of the criticism and opposition to drone use is explored. Part four outlines several recommendations, and part five concludes based the discussion in the previous sections that highlights that drones are here to stay, and recognizes the duty that the global community has attack the issue under a framework that encapsulates the best interest of its global citizenry as the driving force for creating strict regulations.

Drone “technology is so attractive to the U.S. and other governments that it’s going to proliferate very rapidly,”<sup>21</sup> and the law must be revamped to manage the proliferation.

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<sup>7</sup> Michael J. Mazarr, *The Rise and Fall of the Failed-State Paradigm*, 93.1 *For. Aff.*, Jan./Feb. 2014 at 113. (Discussing the requiem for a decade of distraction – the U.S. posture that failed states threatened national security.).

<sup>8</sup> US Announces Six Drone Test Sites, BBC News-US & Canada, <http://www.bbc.co.uk/news/world-us-canada-25552825>, 30 December 2013 (discussing the U.S. “program to develop safety and operational rules for drones by the end of 2015”; six U.S. locations were selected – Alaska, Nevada, New York, North Dakota, Texas, and Virginia).

<sup>9</sup> Pakistan Drone Strike Kills Seven in North Waziristan, BBC News World, 8 June 2013, <http://www.bbc.co.uk/news/world-22820208>.

<sup>10</sup> Iran unveils what it Says is Its Biggest Drone, KGW.com, November 18, 2013, <http://www.kgw.com/news/world/232303541.html> (discussing Iran’s assertion that its new drone is capable of flying for 30 non-stop hours, and its capable of carrying air-to-surface rockets, for combat readiness).

<sup>11</sup> *Id.*

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

<sup>13</sup> Mark Bowden, *The Finish*, (1<sup>st</sup> ed. – Atlantic Monthly Press 2012), at 69.

<sup>14</sup> *Id.* at 69.

<sup>15</sup> Linda Robinson, *The Future of Special Operations*, *For. Aff.*, November/December 2012, at 110.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 111.

<sup>18</sup> Linda Robinson, *The Future of Special Operations*, *For. Aff.*, November/December 2012, at 112;

<sup>19</sup> RFE/RL, Interview: UN Envoy Says Drone Strike Violate Pakistani Sovereignty, February 20, 2014, quoting Masood Khan, Pakistan’s permanent representative to the United Nations (Discussing U.S. – Pakistan relations as well as the use of drones to address the growing threat of terrorism.), at <http://www.rferl.org/content/drones-pakistan-un/250607.html>.

<sup>20</sup> Wilfred M. McClay, *The Tocquevillian Moment ... and Ours*, *Wilson Quart.*, at 48, 2012.

<sup>21</sup> Scott Shane, C.I.A. Is Disputed on Civilian Toll in Drone Strikes, *The New York Times*, August 11, 2011, quoting Sarah Holewinski, executive director, Campaign for Innocent Victims in Conflict.

## II. LAW AUTHORIZING DRONE USE

The U.S. and other states have used drones in various parts of the world, including Pakistan, Yemen, and Somalia.<sup>22</sup> The U.S. “opened or expanded drone bases in Saudi Arabia, Djibouti and Niger.”<sup>23</sup> Drones are forming “part of the arsenals of an increasing number of States that may be able to deploy [and are in fact deploying] such force across international borders in relatively non-intrusive and sometimes non-attributable ways, on the battlefield and to pursue targets far removed from what would traditionally be seen as zones of armed conflict.”<sup>24</sup>

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>25</sup>

The U.S. conducts drone attacks under the umbrella of “armed conflict.”<sup>26</sup> Therefore, no distinction is needed between U.S. authorized military, CIA, or other intelligence agencies’ involvement; they all are under the direction of the Commander-in-Chief.<sup>27</sup> As well, “the Constitution vests the President with the extraordinary and sole authority as Commander-in-Chief to lead our nation in times of war.”<sup>28</sup> According to International Human Rights Law, “civilians, including agents, are not prohibited from participating in hostilities.”<sup>29</sup> Like the U.S., Israel has also “invoked the existence of an armed conflict against alleged terrorist.”<sup>30</sup> It has also engaged in targeted killings by using drones against Fatah, Hamas, and the Islamic Jihad.<sup>31</sup> “The IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law.”<sup>32</sup> “Labeling a situation an armed conflict might also serve to

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<sup>22</sup> Michael Crowley, So, Who Can We Kill? *Time*, April 1, 2013, at 22. “Nowhere in this [U.S.] strategy to undermine global jihad more important than in Somalia, where some leaders of the insurgent group al-Shabab, where some leaders of the insurgent group al-Shabab, who are in contact with al-Qaida, are pressing to expand the group’s focus beyond the internal battle against the government and neighboring Ethiopian forces.” Suzanne E. Spaulding, *Turning Point*, ABA J., September 2011, at 50 (discussing U.S. strategies for subduing al-Qaida in Pakistan, Yemen, Somalia, and North Africa).

<sup>23</sup> Michael Crowley, So, Who Can We Kill? *Time*, April 1, 2013, at 22-23

<sup>24</sup> Christoph Heyns, *Extrajudicial, Summary or Arbitrary Executions*, A/68/382, 13 September 2013 at 4/24 (focusing on the use of lethal force through armed drones from the perspective of protection of the right to life).

<sup>25</sup> UN Charter, Art. 51 (1945)

<sup>26</sup> Philip Alston, Report of the Special Rapporteur on Extrajudicial, summary or Arbitrary Executions, UN General Assembly, A/HRC/14/24/Add. 6, 28 May 2010, at 21.

<sup>27</sup> U.S. Const. Art. 2, Sec. 2.

<sup>28</sup> Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary, December 6, 2001.

<sup>29</sup> *Id.* at 22 (Alston); *Int’l Humanitarian Law ...* see Meron, 94 *Am. J. Int’l Law* 239 (2009); Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S. T. 3516 (1949) (A duty exists to protect “persons taking no active part in the hostilities....”), Art. 3 (1).

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Id.* at 6. “One study by a human rights group found that between 2002 and May 2008 at least 387 Palestinians were killed as a result of targeted killing operations. Of these 234 were the targets, while the remainder were collateral casualties.” Philip Alston, Report of the Special Rapporteur on Extrajudicial, summary or Arbitrary Executions, UN General Assembly, A/HRC/14/24/Add. 6, 28 May 2010, at 6, citing B’Tselem, *Statistics related to Israel-Palestinian conflict post-2000*, available at:

<http://www.btselem.org/english/statistics/Casualties.asp>.

<sup>32</sup> *Id.*

expand executive power both as a matter of domestic law and in terms of public support.”<sup>33</sup>

In the U.S., the President as Commander-in-Chief<sup>34</sup> has the authority, in limited situations, to use military force when the Country is involved in hostilities.”<sup>35</sup> The President has the authority to “use the armed forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed threats ... take the necessary actions against international terrorist and terrorist organizations, including those nations organizations, or persons who planned, authorized, committed or aided in the terrorists attacks that occurred on September 11, 2001.”<sup>36</sup> Continuing former President Bush’s declaration, President Obama continues to “take defensive measures against terrorism to protect Americans<sup>37</sup> [as well as global citizens]. Perhaps by conscription, the current and past Presidents have used their authority to involve many Americans in this effort – “from the FBI agents to intelligence operatives to the reservists<sup>38</sup> who were called to duty to assist active duty military personnel – all groups report to the Commander-in-Chief.

“On September 11, 2001, we were shaken out of complacency. Thousands were taken from us.... This was a different kind of war. No armies came to our shores, and our military was not the principal target. Instead a group of terrorists came to kill as many civilians as they could.”<sup>39</sup> According to President Obama, the future of terrorism will be evinced by “threats to diplomatic facilities and business abroad”<sup>40</sup> as well as homegrown extremists.<sup>41</sup> Left unchecked, terrorist attacks like the Embassy in Beirut, the U.S. Marine barracks in Lebanon, Cruise ships and Pan Am Flight 103 can grow.<sup>42</sup> “But if dealt with smartly and proportionally, these threats need not rise to the level that we saw on the eve of 9/11.”<sup>43</sup> In other words, the President’s message is clear that the level of U.S. involvement will be dictated by the gravity of the threat.<sup>44</sup> These threats will be countered under the “protective principle”<sup>45</sup> of jurisdiction. “As state may exercise jurisdiction with respect to certain types of acts wherever, and by whomever, committed where the conduct substantially affects certain vital state interests....”<sup>46</sup>

If the U.S. government has the power, as it claims, “to designate any American citizen as a supporter of terrorism,”<sup>47</sup> the President as Commander-in-Chief also has the power to enlist volunteers to aid the U.S. in its efforts. The U.S. employs other states to assist in its efforts to fight terrorism, which includes approval to work within states’ territory.<sup>48</sup> Pakistan “has permitted the United States to launch drone strikes

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<sup>33</sup> Id.

<sup>34</sup> Constitution, Art. II, Sec. 2

<sup>35</sup> 50 U.S.C. § 1544 (Congressional Action); Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. § 401, 2004 (Providing mechanisms to address and prevent terrorism).

<sup>36</sup> Authorization For Use of Military Force Against Iraq Resolution of 2002, Sec. 3, 116 Stat. 1498, Public Law 107-243.

<sup>37</sup> George W. Bush: Declaration of War on Terrorism, The American Presidency-Encyclopaedia Britannica’s Guide to American Presidents, <http://www.britannica.com/presidents/articles-9398253>.

<sup>38</sup> Id.

<sup>39</sup> Obama’s Speech on Drone Policy, The New York Times, May 24, 2013.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> S. Houston Lay and Howard J. Taubenfeld, *The Law Relating to The Activities of Man in Space* (1970), at 55 (Discussing States’ traditional approach to asserting jurisdiction including the widespread acceptance that States can legitimately assert protective jurisdiction).

<sup>46</sup> Id.

<sup>47</sup> Anthony Lewis, *The Press and The “War on Terror”*: A Failure of Courage? Floersheimer Center for Constitutional Democracy, December 2004, at 2 (Discussing the government’s engagement in depriving individuals of their fundamental rights in its quest to fight terrorism).

<sup>48</sup> “In 2006 after coming under intense pressure from the Bush administration, Pakistan gave permission for U.S. drone strikes against the top 10 al Qaida leaders.” News, The Week, November 8, 2013; See Waris Husain, *The Obvious Illegality of Drones*, 22

from bases in Baluchistan.”<sup>49</sup> Additionally, “The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>50</sup>

The U.S. believes specific domestic authority<sup>51</sup> and international rules permit drone use and further believes, “this is not, however, just America’s fight. And what is at stake is not just America’s freedom. This is the world’s fight. This is civilization’s fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.”<sup>52</sup> President Obama has taken an approach that basically classifies terrorists as *hostes humani generis*,<sup>53</sup> enemies to all mankind. Saddam Hussein was basically classified as *hostes humani generis*<sup>54</sup> ... President Obama said, “We act against terrorist who pose a continuing and imminent threat to the American people [and global citizens], and when there are no other governments capable of effectively addressing the threat.”<sup>55</sup> According to the passive personality principle of jurisdiction, the U.S. has the authority to pursue terrorist as well.<sup>56</sup> Additionally, prescriptive jurisdiction permits “Congress or the President to make laws, regulations, or orders making conduct a crime.”<sup>57</sup> The UN has affirmed that terrorist “constitutes a threat to international peace and security,”<sup>58</sup> which also includes

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The Express Tribune with the Int’l New York Times, October 31, 2013 (Discussing Pakistan’s ongoing public denouncements denying agreements with the U.S. to allow drone strikes within its territory.).

<sup>49</sup> Stephen D. Krasner, Talking Tough to Pakistan, *For. Aff.*, January/February 2012, at 89 (Discussing Pakistan’s dismal record in its efforts to support the U.S. and how its “double game with the United States has been effective, too. After 9/11, Pakistan’s leaders could hardly resist pressure from Washington to cooperate. But they were also loath to lose influence with insurgents in Afghanistan, which they believed gave Pakistan strategic depth against India. So Islamabad decided to have things both ways: cooperating with Washington enough to make itself useful but obstructing the coalition’s plan enough to make it nearly impossible to end the Afghan insurgency.” Stephen D. Krasner, Talking Tough to Pakistan, *For. Aff.*, January/February 2012, at 89. Additionally, advocating that the U.S. should employ “Malign neglect” – “Malign neglect would mean ending all U.S. assistance, military and civilian; severing intelligence cooperation; continuing and possibly escalating U.S. drone strikes; initiating cross-border special operations raids; and strengthening U.S. ties with India. Active isolation would include, in addition, declaring Pakistan a state sponsor of terrorism, imposing sanctions, and pressuring China and Saudi Arabia to cut off their support, as well. Krasner, at 93.

<sup>50</sup> Authorization For Use of Military Force, Sec. 2, (a), September 18, 2001, P.L. 107-40, 1115 Stat. 224 (2001).

<sup>51</sup> Don Wallace, Jr., Extraterritorial Jurisdiction, 15 *Law & Pol’y in Int’l Bus.* 1983, at 1107 (Discussing the U.S. hierarchy of law – “statutes enacted by Congress, so long as they are constitutional, prevail over international law). See U.S. Patriot Act, PL 112-14 (2004).

<sup>52</sup> George W. Bush: Declaration of War on Terrorism, *The American Presidency-Exyclopedia Britannica’s Guide to American Presidents*, <http://www.britannica.com/presidents/articles-9398253>.

<sup>53</sup> *Blacks Law Dictionary* 755 (8<sup>th</sup> ed. 2004).

<sup>54</sup> Edith Y. Wu, Saddam Hussein as *Hostes Humanis Generis*? Should The U.S. Intervene? 26 *Syracuse J. of Int’l Law & Com.* 57, 58-65 (1998) (discussing jurisdictional principles, including universality, that may allow the U.S. to assert jurisdiction over certain types of actors, i.e., enemies to society – “enemies of civilization everywhere.”) quoting E. De Vattel, *The Law of Nations*, 232-233 (5<sup>th</sup> ed. 1849). The Universality principle provides the “a state may exercise jurisdiction with respect to certain specific universally condemned crimes, principally piracy [now terrorism] wherever and by whomever committed, without regard to the connection of the conduct with that state.” S. Houston Lay and Howard J. Taubenfeld, *The Law Relating to The Activities of Man in Space* (1970) (Discussing different forms of recognized jurisdiction: universality, protective, territoriality, etc.).

<sup>55</sup> Daphne Eviatar, Counterterrorism: Where are Obama’s Policy Changes? *Reuters*, October 21, 2013, [www.reuters.com/article/2013/10/21/us-opinion-eviatar-idUSBRE99K0EE20121021](http://www.reuters.com/article/2013/10/21/us-opinion-eviatar-idUSBRE99K0EE20121021), at 1 (discussing President Obama’s comments concerning the change in direction for U.S. strategy on counterterrorism). Some criticize the U.S. for complaining that “countries with hotbeds of terrorism are either unwilling or unable to prosecute suspects, which justifies the U.S. remotely killing the suspect with a trial.” Waris Husain, *The Obvious Illegality of Drones*, *The Express Tribune With the Int’l New York Times*, October 31, 2013, <http://tribune.com.pk/story/625220/the-obvious-illegality-of-drones/> (Discussing the deluge of criticism the U.S. is receiving as a result of its drone use).

<sup>56</sup> S. Houston Lay and Howard J. Taubenfeld, *The Law Relating to The Activities of Man in Space* (1970), at 55 (A state may exercise jurisdiction with respect to any act committed outside its territory by a foreigner, which substantially affects the person or property of a citizen.”).

<sup>57</sup> Don Wallace, Jr., Extraterritorial Jurisdiction, 15 *Law & Pol’y in Int’l Bus.* 1983, at 1101.

<sup>58</sup> U.N. Security Council Resolution 1373 (Concerning Terrorist Financing), S.C. Res. 1373 (Sept. 28, 2001) (

financing terrorists' acts. Thus, the UN also recognizes the U.S. right to individual self-defense<sup>59</sup> in appropriate circumstances.

U.S. drone use to pursue terrorists is not only allowed by general principles of domestic and international law but also because terrorists threaten the whole of society; thus, the U.S. has a right to pursue infringers, similar to the ban on slavery,"<sup>60</sup> which derives from *jus cogens*<sup>61</sup> and is based on a "violations of obligations owed to all"<sup>62</sup>; therefore, terrorism is "presumably *erga omnes*."<sup>63</sup> The United States defines "Terrorists as those who perpetrate premeditated, politically motivated violence against noncombatant targets."<sup>64</sup>

Drone use has been classified as "special warfare."<sup>65</sup> Drone use "offers lasting benefits with a [much] smaller footprint and lower cost than the hugely expensive wars of the last decade."<sup>66</sup> The challenge is to "more skillfully"<sup>67</sup> use drone attacks because they "hold[ ] great potential for advancing security objectives"<sup>68</sup> in the U.S. effort to win the war on terror. U.S. government lawyers have determined that domestic law and "international law permits the U.S. to target "associated forces" of al-Qaeda." Drone use is not prohibited under international law.

"A missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles."<sup>69</sup>

The most immediate protection for the right to life is provided by the international human rights law framework. This is the default legal regime from which deviations are permissible only when, and for as long as, those who justify the more permissive use of force under international humanitarian law can show that the requisite conditions have been fulfilled .... The protection of State sovereignty and of territorial integrity, which on occasion presents a barrier to the protection of human rights, here can constitute an important component of the protection of people against deadly force, especially with the advent of drones.<sup>70</sup>

Additionally, the "four pillars of international humanitarian law on weapons" state: "Nations have a right to choose the methods and means of war, but the right is limited."<sup>71</sup> They have to

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<sup>59</sup> Id.

<sup>60</sup> Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 Ala. C.R. & C.L.L. Rev. 121, 155 (2012); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law & Comp. Probs., 1996, at 63, 72.

<sup>61</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law & Comp. Probs., 1996, at 63, 72.

<sup>62</sup> *Ergo Omnes*, "The International Court of Justice notes that violations of these norms constitute *ergo omnes*—violations of obligations owed to all." Derrick Howard, *Twenty-First Century Slavery: Reconciling Diplomatic Immunity and the Rule of Law in the Obama Era*, 3 Ala. C.R. & C.L.L. Rev. 121, 155 (2012).

<sup>63</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law & Comp. Probs., 1996, at 63, 72. "This is the world's fight," George W. Bush: Declaration of War on Terrorism, *The American Presidency-Encyclopaedia Britannica's Guide to American Presidents*, <http://www.britannica.com/presidents/articles-9398253>.

<sup>64</sup> Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary, December 6, 2001.

<sup>65</sup> Linda Robinson, *The Future of Special Operations*, Foreign Aff., November/December 2012, at 112.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Philip Alston, Report of the Special Rapporteur on Extrajudicial, summary or Arbitrary Executions, UN General Assembly, A/HRC/14/24/Add. 6, 28 May 2010 (addressing the developments in "a few States adopt[ing] policies that permit the use of targeted killings, including in territories of other States. Such policies are often justified as a necessary and legitimate response to "terrorism" and "asymmetric warfare," but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal framework.").

<sup>70</sup> Christoph Heyns, *Extrajudicial, Summary or Arbitrary Executions*, A/68/382, 13 September 2013 at 6/24.

follow the rules. Second, weapons that cannot discriminate between civilian and military targets are prohibited. Third, weapons that cause unnecessary suffering are also prohibited. And fourth, any weapons that the international community decides are abhorrent for some other reason are prohibited.”<sup>72</sup> Nevertheless, the U.S. position is “that drones remain a vital counter-terrorism weapon,”<sup>73</sup> and they do not contravene any law, municipal, international humanitarian, or international otherwise. Nevertheless, drone use “should be of great benefit to America, especially against terrorists and insurgents in what ... [is] described as the current “Fourth World War.”<sup>74</sup> U.S. technology is “the thing that scares people.” Others believe the psychological impact helps the U.S. because “unmanned weapons tend to demoralize an enemy ... being killed by a remote-controlled machine is dispiriting.”<sup>75</sup>

Pakistan has experienced more than 330 drone strikes in certain parts of Pakistan since 2004.<sup>76</sup> According to the Pakistani government, more than 2,200 people have died as a result of drone strikes<sup>77</sup> ; additionally, more than 600 people suffered serious bodily injuries. Hundreds of civilian have been killed, and at least “200 individuals were regarded as probably non-combatants.”

“Although drones are not illegal weapons, they can make it easier for States to deploy deadly and targeted force on the territories of other State. As such, they risk undermining the protection of life in the immediate and longer terms.”<sup>78</sup> According to the United Nations, The U.S. and the United Kingdom have used and continue to use drones in Afghanistan, and a steady increase was noted during the 2009-2012 period.<sup>79</sup> As well, the United States and other nations are using drones in various nations around the globe, including but not limited to Yemen,<sup>80</sup> Libya,<sup>81</sup> Iraq,<sup>82</sup> Somalia,<sup>83</sup> and Gaza.<sup>84</sup>

Drones are not “inherently unlawful or unethical,”<sup>85</sup> but we must develop “legal and ethical norms to

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<sup>71</sup> P.W. Singer *Wired For War*, (The Penguin Press, 2009), at 384.

<sup>72</sup> *Id.* quoting Peter Herby of the ICRC (Singer); See Geneva Convention (No. IV) Relative to the Protection of Civilian Persons In Time of War, 6 U.S.T. 3516 (1949) (A duty exists to protect “persons taking no active part in the hostilities...”). See Geneva Convention (No. IV), Art. 3 (1).

<sup>73</sup> US Reduces Number of Drone Strikes, *Chicago Tribune*, November 16, 2013 (Discussing experts’ opinions on the drone strike that hit Hakimullah Mehsud, Pakistan’s Taliban who was responsible for assisting in organizing the killing of seven CIA officers and contractors, which was carried out by a suicide bomber in eastern Afghanistan).

<sup>74</sup> P.W. Singer *Wired For War*, (The Penguin Press, 2009), at 298, quoting Eliot Cohen.

<sup>75</sup> *Id.*, quoting the *Washington Post*.

<sup>76</sup> Ben Emmerson, Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN General Assembly, A/68/389, September 18, 2013, at 8.

<sup>77</sup> *Id.* at 8 (Discussing the Special Rapporteur’s visit to Pakistan to investigate civilian casualties that are resulting as a result of drone attacks).

<sup>78</sup> Christoph Heyns, *Extrajudicial, Summary or Arbitrary Executions*, A/68/382, 13 September 2013 at 4/24.

<sup>79</sup> Ben Emmerson, Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN General Assembly, A/68/389, September 18, 2013, at 7.

<sup>80</sup> “The first remotely piloted aircraft strike reported in Yemen occurred on 3 November 2002.” Ben Emmerson, Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN General Assembly, A/68/389, September 18, 2013, at 9.

<sup>81</sup> *Id.* at 9 “The 2011 operation by the North Atlantic Treaty Organization (NATO) in Libya was carried out almost exclusively through the deployment of air power.”

<sup>82</sup> *Id.* at 10 “The United States deployed a small number of unarmed Predators from the beginning of the conflict in Iraq. By 2004, it had an operational fleet of weaponized remotely piloted aircraft in use.” The United Kingdom also used its air force to make drone strikes. Ben Emmerson, Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN General Assembly, A/68/389, September 18, 2013, at 10.

<sup>83</sup> *Id.* at 10 “The United States has engaged in extensive cover counter-terrorism operations in Somalia.”

<sup>84</sup> Israel has used drones in Gaza on numerous occasions in its fight against terrorism. “Israel has acknowledged that its military operation resulted in “many civilian deaths and injuries, and significant damage to public and private property in Gaza.”” Ben Emmerson, Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN General Assembly, A/68/389, September 18, 2013, at 11, citing Israel Defense Forces, “The Operation in Gaza – Factual and legal aspects, July 2009,

[www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation\\_in\\_gaza-factual\\_and\\_legal\\_aspects.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx).

<sup>85</sup> Kenneth Anderson and Matthew Waxman, *Killer Robots and the Laws of War*, *WSJ.com*, November 3, 2013, at 2.

address”<sup>86</sup> their use. “Drones may be controversial, but the signs are that they are here to stay and many more countries may begin to use them,”<sup>87</sup> which is why the UN, the community of civilized nations must act to set real standards.

### III. CRITICISM AND OPPOSITION

“Clearly targeted societies cannot afford to wait passively for the inevitable demise of terrorist groups—the primary goal of the state must always be to hasten that demise.”<sup>88</sup> Nevertheless, criticism of drone use continues to escalate, and the use of drones is becoming more controversial domestically and globally. Worldwide use of drones to kill is highly controversial, especially U.S. Drone Use.<sup>89</sup> “For years, only a handful of critics questioned whether the drone campaign begun by George W. Bush ... and accelerated by Obama was operating out-side the law.”<sup>90</sup> A segment of Americans “feel that the country is over-reacting, and that the real danger is posed by our own responses to the threat.”<sup>91</sup> Each day, members of Congress as well as legal scholars and civilians are asking whether the Authorization for Use of Military Force,<sup>92</sup> which was passed quickly after the 9-11 attacks, is still makes sense.<sup>93</sup>

The significant developments in technologies related to “Unmanned and Autonomous systems” have been receiving the growing attention of the International community as seen in the almost daily coverage of news in the international media, as well as in materials produced by many research institutes, of issues pertaining to the uses of unmanned aerial vehicles in particular. .... Such technologies also potentially affect both international and domestic law, as well as international humanitarian law.<sup>94</sup>

Several nations debated the “rapidly expanding militarised use of remotely piloted aircraft and the fraught international legal issues that it raises.”<sup>95</sup> Growing concern mounts about strikes, especially where civilians were killed, that may contravene international law.<sup>96</sup> “Much of the criticism about drone strikes – both there at home and abroad – understandably centers on reports of civilian casualties.”<sup>97</sup> The U.S.

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<sup>86</sup> Id.

<sup>87</sup> UN Investigator Presses US to Publish Drone Attack Data, BBC News, October 18, 2013, <http://www.bbc.co.uk/news/world-US-Canada-24583909>.

<sup>88</sup> Christopher J. Fettweis, *Freedom Fighters and Zealots: Al Qaeda in Historical Perspectives*, Vol. 124.2, *Political Science Quarterly*, at 291 (Discussing the typologies of terrorism: nationalist and ideological groups and their similarities and differences in the reasons for their struggles to liberate either territorial, ideological, and in some instances global).

<sup>89</sup> UN Investigator Presses US to Publish Drone Attack Data, BBC News, October 18, 2013, <http://www.bbc.co.uk/news/world-US-Canada-24583909>.

<sup>90</sup> Michael Crowley, So, Who Can We Kill? *Time*, April 1, 2013, at 23 (discussing the U.S. rules regarding the permanent war as they relate to drones, GITMO, surveillance, and secrecy).

<sup>91</sup> Christopher J. Fettweis, *Freedom Fighters and Zealots: Al Qaeda in Historical Perspectives*, Vol. 124.2, *Political Science Quarterly*, at 296.

<sup>92</sup> Authorization For Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1498, Public Law 107-243, 2002; See Authorization For Use of Military Force in Response of the 9/11 Attacks, P.L. 107-40, Sept. 18, 2001 (“In response to the terrorist attacks against the United States on September 11, 2001, the Congress passed legislation, S.J.Res. 23, on September 14, 2001, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons e determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons...” 115 Stat. 224 (2001)

<sup>93</sup> Michael Crowley, So, Who Can We Kill? *Time*, April 1, 2013, at 23.

<sup>94</sup> Work of the Advisory Board on Disarmament Matters, Report of the Secretary General, A/68/206, at 7, 26 July 2013.

<sup>95</sup> Ed Pilkington and Ryan Devereaux, U.S. Defends Drone Strikes as ‘Necessary and Just’ in Face of UN Criticism, *The Guardian*, October 25, 2013 (discussing the slew of nations that sharply criticized the U.S. use of drone strikes at a meeting at the UN headquarters).

<sup>96</sup> Id, quoting Ben Emerson, special rapporteur on human rights and counter-terrorism.

<sup>97</sup> Daphne Eviatar, Counterterrorism: Where are Obama’s Policy Changes? *Reuters*, October 21, 2013, [www.reuters.com/article/2013/10/21/us-opinion-eviatar-idUSBRE99K0EE20121021](http://www.reuters.com/article/2013/10/21/us-opinion-eviatar-idUSBRE99K0EE20121021), at 3.

Senate Intelligence Committee recently voted “to require the administration to disclose how many civilians and militants were killed by drones each year. That tally has never been publicly available.”<sup>98</sup>

In 2011 the American Civil Liberties Union sought to review government documents that would reveal the use of unmanned drones to kill human targets.<sup>99</sup> The Court ultimately decided that the information was not obtainable “because the purpose of national security exemptions to the Freedom of Information Act (FOIA) is to protect intelligence sources before they are compromised and harmed, the Central Intelligence Agency (CIA) is entitled under the National Security Act (NSA) to protect all intelligence sources, regardless of their provenance.”<sup>100</sup> “Drone strikes are tactics that are rarely decisive and often incur significant political and diplomatic costs for the United States.”<sup>101</sup> A mistaken drone attack in Yemen that killed at least 14 people who were participating in a wedding convoy evinces the outrage and backlash experienced after such attacks. Local residents were extremely outraged “and called on the Yemeni government to put an end of drone strikes in their region.”<sup>102</sup> “The attack proved the need for tighter control and regulations as far as drones are concerned.”<sup>103</sup>

“With each new drone strike by the United States ... anger over the program mounts.”<sup>104</sup> Challenges are now coming from Amnesty International and Human Rights Watch. Unease continues to mount<sup>105</sup> ; “The protests, including “a coalition of nongovernmental organizations—the Campaign to Stop Killer Robots—is lobbying for an international treaty to ban the development and use of fully autonomous weapons.”<sup>106</sup>

After a U.S. strike in Pakistan on March 17, 2011, killed 50 civilians who were attending a Jirga that was presided over by Malik Daud Khan,<sup>107</sup> serious opposition to U.S. drone attacks ensued. Khan argued that the “Secretary of State must publish a policy identifying the circumstances in which intelligence may lawfully be passed on if it relates to the location of individuals who may be targeted in a drone strike.”<sup>108</sup> Additionally, Khan wanted a declaration defining what conduct contravened domestic criminal law.<sup>109</sup>

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<sup>98</sup> US Reduces Number of Drone Strikes, Chicago Tribune, November 16, 2016 (discussing President Obama’s changes in drone strikes, which has led to a sharp drop; nevertheless, “a blanket of secrecy thus far has remained firmly in place.”). “Sen. Dianne Feinstein, D-Calif., chairwoman of the Senate Intelligence Committee, said the number of noncombatant deaths was “significantly lower” than critics claimed. She said she had urged the White House to disclose the data so the American people know how careful these strikes have been.” “Experts say the Nov. 1 drone strike that killed Pakistani leader Hakimullah Mehsud, who helped organize the suicide bombing that killed seven CIA officers and contractors in December 2009 in eastern Afghanistan, proves that drones remain a vital **counter-terrorism** weapon.” US Reduces Number of Drone Strikes, Chicago Tribune, November 16, 2016

<sup>99</sup> American Civil Liberties, Union v. Department of Justice, 808 F.Supp.2d 280 (2011) (discussing whether the requested records fell within the discovery allowed under the freedom of information act and whether they should be kept secret).

<sup>100</sup> Id., citing National Security Act of 1947, § 102A, 50 U.S.C.A. § 403-1.

<sup>101</sup> Linda Robinson, The Future of Special Operations, Foreign Aff., November/December 2012, at 111 (Discussing U.S. use of special operations to address the terrorist problem by “adopting a new targeting system known as “find, fix, finish, exploit, analyze, and disseminate.”” Robinson, at 110.

<sup>102</sup> Hakim Alasmari, Yemen Says U.S. Drone Struck a Wedding Convoy, Killing 14, CNN.com, December 13, 2013, <http://www.kmov.com/news/world/Yemen-says-US-drone-struck-a-wedding-convoy-killi>.

<sup>103</sup> Id., quoting Abdul Salam Mohammed, President Sanaa-based Abaad Studies & Research Center. (CNN.com; In January 2013 “a drone launched Hellfire missile killed three suspected militants in Yemen. It was the third such strike in three days.” Michael Crowley, So, Who Can We Kill? Time, April 1, 2013, at 22.

<sup>104</sup> Kenneth Anderson and Matthew Waxman, Killer Robots and the Laws of War, WSJ.com, November 3, 2013 (discussing the drone strike on Hakimullah Mehsud, which occurred as “Pakistan is preparing for peace talks with the Taliban, the attack on this major terrorist stirred outrage in Pakistan and was denounced by the country’s interior minister, Chaudry Nisar Ali Khan, who said the U.S. had “murdered the hope and progress for peace in the region.”).

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> The Queen on The Application of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs, High Court of Justice, Queen’s Bench, EWHC 3728, 2002, at Para 7 (“The Claimant [ Khan’s son] seeks to impugn ... a decision to provide intelligence to the US authorities for use in drone strikes in Pakistan, amongst other place.”).

<sup>108</sup> Id. at Para 3.

<sup>109</sup> Id. at Para 4.

Khan claimed that employees of the UK's top-secret communications agency (GCHQ) intercepted telephone information and in turn provided it to the U.S. government.<sup>110</sup> The Court concluded that Mr. Khan was trying to persuade it to "stop further strikes by drones operated by the United States."<sup>111</sup> Mr. Khan's opposition is laudable, but the Court summarily said that Mr. Khan "cannot seek from this court a declaration that the United States' drone strikes are unlawful."<sup>112</sup>

Khan further asserted that it was indeed necessary to make the decision concerning the U.S. in order to secondarily determine if GCHQ employees were entitled to immunity as combatants, if they were later prosecuted under specific domestic crime statutes, and if not prosecutable under said statute then it was possible for them to fall within the jurisdiction of the International Criminal Court.<sup>113</sup> Additionally, determining how international law would classify U.S. actions was, therefore, crucial to an analysis of applicable domestic criminal law.<sup>114</sup> In spite of Mr. Khan's cogent arguments and attempts to bring the drone issue to the forefront of the global community, The Court said it saw "no point of any declaration which merely says that those who pass on intelligence may be at risk of breaking the law"<sup>115</sup> because "an abstract declaration would be far less effective than the oversight of the Parliamentary Committee charged with ensuring ... that legality does not give way to expediency."<sup>116</sup>

Opposition to drone use with continue in myriad ways. Mr. Khan desperately tried to persuade the Court "to make a public pronouncement designed to condemn the activities of the United States in North Waziristan, as a step in persuading them to halt such activity."<sup>117</sup> Khan continued his fight through an unsuccessful appeal process. He was supported by the Human Rights Charity, but unfortunately the Court a determination would amount to its" sitting in judgment on U.S.<sup>118</sup> One opponent to the use of drones and an avid support of Khan said, "It is shameful that the risk of embarrassing the US has trumped British justice in this case."<sup>119</sup>

The U.S. position, as articulated by President Obama's advisor, that the drone program near Pakistan and Afghanistan is legal, necessary, and wise under international law<sup>120</sup> was compared to "the doctrine of necessity adopted by Pakistan's Supreme Court justices in 1955, who claimed "that which is not legal, necessity can make legal." After many, many years jurists finally realized the doctrine's major fallacy. The arguments states, "it may take the United States just as long to realise the long-term negative implications of utilising the drone program as it currently stands." Nonetheless, Americans as well as global citizens continue to press nations that are using drones to become more transparent about the end results of drone strikes, i.e., deaths and destruction resulting from drone strikes.

The Democrat-led Senate Intelligence Committee voted on Nov. 5 to require the administration to

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<sup>110</sup> Id. at Para 9 (The Court said the activity "does not amount to a breach of the policy of 'no comment.'").

<sup>111</sup> Id. at Para 13.

<sup>112</sup> Id. at Para 13 (the Court recognized "that a domestic court would refuse to make such a declaration.), citing *Underhill v. Hernandez*, 168 US 25, 252, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *The Queen on The Application of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs*, High Court of Justice, Queen's Bench, EWHC 3728, 2002, at Para 14.

<sup>113</sup> Id. at Para 26.

<sup>114</sup> Id. at Para 27. (The Court said it would not give an advisory opinion as to whether such conduct was lawful, except when "it would serve a cogent public or private interest." *The Queen on The Application of Noor Khan*, at Para 29.

<sup>115</sup> Id. at Para 37.

<sup>116</sup> Id. at Para 50.

<sup>117</sup> Id. at Para 59.

<sup>118</sup> Owen Bowcott, *Pakistan Drone Strike Relative Loses GCHQ Court Case*, *Theguardian*, January 20, 2014 (Discussing the outrage after the Court's decision not to decide the issues involved in the drone attack that was led by the U.S.).

<sup>119</sup> Id.

<sup>120</sup> Waris Husain, *Drone Doctrine of Necessary*, *DAWN.Com*, 5/14/2012, <http://www.dawn.com/news/718316/drone-doctrine-of-necessity>.

disclose how many civilians and militants were killed by drones.<sup>121</sup> “That tally has never been publicly available.”<sup>122</sup> But, Sen. Dianne Feinstein, D-California “said the number of noncombatant deaths was “significantly lower” than critics claimed.”<sup>123</sup> Feinstein actually urged the White House to disclose the data “so the American people know how careful these strikes have been.”<sup>124</sup>

Americans believe,

The rules and regulations the U.S. government places on its use of drones as targeted killing machines will decide whether future U.S. leaders will be able to call on other countries to self-impose similar limitations. A failure to stand up a transparent, accountable structure within which drone targets are chosen, collateral damage decisions are made, and post-hoc evaluations are held could have important ramifications should countries like China and Russia cite U.S. precedent if using armed drones against individuals or groups they consider terrorists.<sup>125</sup>

Citizens have the view that U.S. rules concerning drone use as targeted killing machines will have a decisive impact “on other countries to self-impose similar limitations.”<sup>126</sup> The U.S. refusal to outline “a transparent, accountable structure within which drone targets are chosen, collateral damage decisions are made, and post-hoc evaluations are held could have important ramifications should countries like China and Russia cite U.S. precedents if using armed drones against individuals or groups they consider to be terrorist.”

As well, citizens are calling “for international treaties to limit the use of autonomous combat drones that are increasingly being developed by nations such as the US and Israel.”<sup>127</sup> These calls are often couched in the argument that people have a right to life, and should not be eliminated by drones. Nevertheless, currently:

“If a drone strike occurs in a situation where a non-international armed conflict exists, the protection afforded to the right to life is commonly interpreted in accordance with the rules of international humanitarian law. It is important to Emphasis, however, that not all applications of violence by States against non-State actors meet the threshold requirements to be regarded as an armed conflict. Accordingly, if there is not armed conflict, here can be no non-international armed conflict, and international humanitarian law does not apply to such use of force.”<sup>128</sup>

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<sup>121</sup> US Reduces Number of Drone Strikes, Chicago Tribune, November 16, 2013 (discussing the blanket of secrecy that continues to exist months after the President “vowed to change his administration’s approach to lethal drone missile strikes, the pace of aerial attacks has fallen sharply, thanks in part to stricter targeting criteria.).

<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> New American Foundation, The National Security Studies Program, 11/24/13, at 1, natsec.newamerica.net

<sup>126</sup> New America Foundation, The National Security Studies Program, November 24, 2013, natsec.newamerica.net, at 3

(Discussing the rise in drone strikes in Pakistan under President Obama’s leadership as well as a spike in strikes in Yemen, which support that government’s battle against militants).

<sup>127</sup> Jane Wakefield, TEDGlobal: Are Drones Tools of War or a Social Good? BBC News, 12 June 2013, <http://www.bbc.co.uk/news/technology-22863447>.

<sup>128</sup> Christof Heyns, UN General Assembly, Extrajudicial, Summary or Arbitrary Executions, 13 September 2013, A/68/382, at 11 (Secretary General reporting to the General Assembly the Special Rapporteur’s report discussing the constitutive regimes in international law and how they regulate drone use, “the use of legal force” from the protection of life approach.).

Findings show that “the most effective terrorists tend to be products of the middle class, often from nations such as Saudi Arabia, Germany, and the United Kingdom, not impoverished citizens of failed states.”<sup>129</sup> Like the failures of “trying to force change on recalcitrant governments and societies ... outside interventions [drone attacks may] undermine internal motives for reform by transferring responsibility for a better future from local leaders to external actors.”<sup>130</sup> Also, in failed states and other corners of the world, “what the West commonly refers to as terrorism is a tactic that whole segments of the world – those who feel oppressed, desperate or cheated and have no other practical way of fighting – see as legitimate.”<sup>131</sup> American officials are also skeptical about the long term impact that drone use is bringing about, and support ending<sup>132</sup> “unilateral American strikes in Pakistan, Yemen and Somalia.”

Nevertheless, America has basically the same goals as its great allies<sup>133</sup>: democracy, stability, and trade. The U.S. continues to spread itself to thin, especially with the war on terror, which is “irritating many states by its presence on, or near, their soil. Partnering with others is the only way to find a workable solution to the drone use issue.

#### IV. RECOMMENDATIONS

The Law of nations, established, recognized, and employed by “civilized societies” should and must regulate drone use. Direct or indirectly, the global community has the inherent right and duties to monitor and respond to abuses; thus, respect for “the rule of law” must be adhered to by all nations. “The U.S. role in counteracting the broader trends of systemic disintegration is therefore critical. The United States is the linchpin of a number of key alliances and networks; it provides the leadership and attractive force for many global diplomatic endeavors, and its dominant military [and drone] position helps rule out thoughts of aggression in many quarters”<sup>134</sup>; nevertheless, the UN must take the lead in harnessing States’ use of drones; it must assume its critical role and must contribute to the dialogue, which is sure to continue.

Fortunately, the global citizenry has refused to accept “that citizens might elect to withdraw from involvement in the larger public life, and regard themselves as autonomous and isolated actors, with no higher goal than the pursuit of their own material well-being.”<sup>135</sup> Most American felt deep sorrow and profound trauma after 9-11. As a result, they “felt it right to unite behind the President.”<sup>136</sup> During that period, any dissent was portrayed as unpatriotic.<sup>137</sup> Americans received an unequivocal message about it, “To those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists - for they erode our national unity and diminish our resolve. They give ammunition to Americas’ enemies, and pause to America’s friends.”<sup>138</sup> Americans and global citizens have heightened their interest about drone use. Similar to the doubts about weapons of mass destruction

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<sup>129</sup> Michael J. Mazarr, *The Rise and Fall of the Failed-State Paradigm*, 93.1 *For. Aff.*, Jan. /Feb. 2014 at 116.

<sup>130</sup> *Id.* at 117.

<sup>131</sup> Todd Richissin, “War on Terror” Difficult to Define, *The Seattle Times*, September 2, 2004, at 1, [http://seattletimes.com/html/nationworld2002023596\\_russanal02.html](http://seattletimes.com/html/nationworld2002023596_russanal02.html).

<sup>132</sup> Scott Shane, C.I.A. Is Disputed on Civilian Toll in Drone Strikes, *The New York Times*, August 11, 2011, quoting Dennis C. Blair, former U.S. Director of National Intelligence.

<sup>133</sup> Joseph M. Parent and Paul K. MacDonald, *For. Aff.* November/December 2011, at 41 (Discussing how the U.S. image and power are waning as a result of its foreign policy; therefore, “America must cut back to move forward.”)

<sup>134</sup> Michael J. Mazarr, *The Rise and Fall of the Failed-State Paradigm*, 93.1 *For. Aff.*, Jan./Feb. 2014 at 118.

<sup>135</sup> Wilfred M. McClay, *The Tocquevillean Moment ... and Ours*, *Wilson Quarterly*, Summer 2012, at 51.

<sup>136</sup> Anthony Lewis, *The Responsibilities of a Free Press*, *Nieman Reports*, March 2, 2004 (Speaking at the Cardozo School of Law Conference on “Weapons of Mass Destruction, National Security, and a Free Press.”)

<sup>137</sup> *Id.*

<sup>138</sup> Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary, December 6, 2001.

in Iraq,<sup>139</sup> drone casualties... the rationale for attacks and more transparency are being demanded.<sup>140</sup> The drone issue is unequivocally “the moment when an old order becomes conscious of the imperative need to give way to a new one—and becomes conscious, also, of the particular dilemma [drone use] that this change presents to thoughtful individuals<sup>141</sup> [and nations] that will

- The UN Security Council under the direction of the Secretary General should pass an immediate resolution specifically addressing drone use and set forth strict guidelines. At this point, “A lack of disclosure [and definitive mandates] gives States a virtual and impermissible right to kill.”<sup>142</sup> UN Resolutions should ensure transparency mandates and that all use terms “comply with States’ international obligations related to international human rights law, international humanitarian law and refugee law.”<sup>143</sup> “States should [prior to strikes] publicly identify the rules of international law [and domestic law] they consider to provide a basis for any targeted killings [drone attacks] they [plan to] to undertake. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killings to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a state commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.”<sup>144</sup>

Nonetheless, an out- out ban is not what is needed, but a clear framework must be developed and should include, at minimum that:

- The U.S., on the municipal level, revamp its Authorization for Use of Force law, which would “clarify, both legally and politically, whom we should be killing and why.”<sup>145</sup> Collaboration...UN,<sup>146</sup> and its appropriate agencies, i.e., the Security Council, and the UN Institute of Disarmament Research (UNIDIR) and other research and think tanks should be part of such an effort.”<sup>147</sup> The ICRC; the ICRC currently “has a strong position on weapons in general and how to ensure their legality,”<sup>148</sup> but needs to have at its disposal information on this new technology and work closely with the UN and the global community. “The proportionality of an attack must be assessed for each individual strike.”<sup>149</sup>

<sup>139</sup> Anthony Lewis, *The Responsibilities of a Free Press*, Nieman Reports, March 2, 2004 (Speaking at the Cardozo School of Law Conference on “Weapons of Mass Destruction, National Security, and a Free Press.”).

<sup>140</sup> Ben Emmerson, *Special Rapporteur Report – Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN General Assembly, A/68/389, September 18, 20013, at 11.

<sup>141</sup> Wilfred M. McClay, *The Tocquevillian Moment ... and Ours*, *Wilson Quarterly*, Summer 2012, at 51 (discussing Tocqueville’s admiration for America’s “practical-minded,” democracy... but also much to fear,” which is the situation with drones, their use, and the unpredictability of outcomes and where the future may lead).

<sup>142</sup> Philip Alston, *Report of the Special Rapporteur on Extrajudicial, summary or Arbitrary Executions*, UN General Assembly, A/HRC/14/24/Add. 6, 28 May 2010, at 26.

<sup>143</sup> *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, Report of the Secretary-General, A/68/298, 19 July 2013, at 8.

<sup>144</sup> *Id.* at 27.

<sup>145</sup> Michael Crowley, *So, Who Can We Kill? Time*, April 1, 2013, at 23 (which would “help reassure other nationals that the U.S. has some sense of limits.”) at 23

<sup>146</sup> *Each Drone Attack Must be Rigorously Assessed on The Merits of its Particular Facts*, *Weekly Sunday Times*, November 3, 2013 (“During his recent visit to Pakistan, United Nations Secretary-General Ban Ki-moon said US drones, “like any other weapon, should be subject to long-standing international law, including international humanitarian law.”)

<sup>147</sup> *Work of the Advisory Board on Disarmament Matters*, Report of the Secretary General, A/68/206, 26 July 2013 (The Advisory Board on Disarmament’s report as a result of its recent session where it addressed the “(a) relations between nuclear-weapons-free zones in advancing regional and global security; and (b) disarmament and security implications of emerging technologies.”).

<sup>148</sup> P.W. Singer *Wired For War*, (The Penguin Press, 2009), at385 (highlighting that “as important as the ICRC has been in shaping and guarding international law over the last century, it is not yet driving discussion on the most important weapons development in this century.”).

<sup>149</sup> Philip Alston, *Report of the Special Rapporteur on Extrajudicial, summary or Arbitrary Executions*, UN General Assembly, A/HRC/14/24/Add. 6, 28 May 2010, at 26, citing Sandoz, *AP Commentary*, AP 1, art. 57, section 2207

- A New-Drones War Technologies Commission should be set up to provide oversight for the above recommendation. If a State fails to comply, the Commission would, have the authority, through additional UN resolutions, to recommend proportional sanctions against the State, which would include the assessment of heavy fines. UN sponsored Moratorium would be issued against the State prohibiting it from future use of such technologies for periods ranging from 2-10 years, or longer if deemed necessary under the circumstances.
- A mandatory list of offenders would be published and disseminated to the public. Understanding that drones “warrant careful regulation” and must be “reviewed carefully to ensure that the weapon complies with the laws of war in its design and permissible uses. Drawing on long-standing international legal rules requiring that weapons be capable of being used in discriminating manner that limits collateral damages.”<sup>150</sup> “Standards should also be set for how these systems are to be used in what combat environment.”<sup>151</sup>

At this point, the U.S. seems to have the most aggressive pattern of drone use, but “No one [nation] gets to decide the law”<sup>152</sup> and procedural decisions for this changing and lethal technology. A checks and balance system must be implemented. The U.S. has a “commitment to the rule of law. The above recommendations, “will not work if the U.S. goes it alone. America [and the UN] should gather a coalition of like-minded partners to adapt existing international legal standards and develop best practices for applying them to autonomous weapons. The British government, for example, has declared its opposition to a treaty ban on autonomous weapons but is urging responsible states to develop common standards for the weapons’ use within the law of war.”<sup>153</sup>

“The power and appeal of our values [and commitment to the rule of law] enables the United States to build a broad coalition to act collectively against the common threat posed by terrorists, further delegitimizing, isolating and weakening our adversaries.”<sup>154</sup> These values and coalition building can only be respected and realized if the UN works in tandem to set clear guidelines for drone use. The recent U.S. spying scandal,<sup>155</sup> and “the Bush administration’s hyper-unilateralism and willful disregard for the views of longstanding allies [and other major nations] [has] caused deep resentment ...”<sup>156</sup> in the global community. Drone must be collectively monitored by the whole international community. The above recommendations would insist in developing a more comprehensive and collective position; the The European Parliaments resent resolution reflects the author’s sentiment of what can be accomplished if the global community’s efforts:

Drone strikes outside a declared war by a State on the territory of the Territory of another State without the consent of the latter or of the UN Security Council constitute a violation of international law and of the Territorial integrity and sovereignty of that country; expressed its grave concern over the use of armed drones outside the international legal framework; and urged the EU to develop and appropriate policy response at both European and global level which upholds human rights

<sup>150</sup> Kenneth Anderson and Matthew Waxman, Killer Robots and the Laws of War, WSJ.com, November 3, 2013, at 2.

<sup>151</sup> Id. at 2.

<sup>152</sup> Id. at 24, quoting Rand Paul.

<sup>153</sup> Id. at 2.

<sup>154</sup> Suzanne E. Spaulding, Turning Point, ABA J., September 2011, at 51, quoting President Obama.

<sup>155</sup> William M. Welch, Report: NSA Spying on Computers Around World, <http://www.king5.com/news/technology/Reports-NSA-spying-on-computer-around-world-...>, January 15, 2014 (discussing the NSA’s snooping on nearly 100,000 computers worldwide, which allows it to spy on machine).

<sup>156</sup> Nick Bryant, The Snowden Effect on US Diplomacy, BBC News, 24 October 2013 (Discussing the backlash after it was discovered that the U.S. had spied on private communications of world leaders, especially President Dilma Rousseff of Brazil; as a result, she cancelled her visit to the U.S. White House).

and international humanitarian law....<sup>157</sup>

## V. CONCLUSION

Governments are in a position that necessitates the use of technology. “The one country that can best lead the information revolution will be more powerful than any other.”<sup>158</sup> They understand “the ability to accept and capitalize on emerging technology will be a determinant of success in future armed conflict.”<sup>159</sup> The US government would never say that drone use should be unbridled and regulated, and it may also agree that there’s “something repulsive about killing by remote control.”<sup>160</sup> “But there’s a more practical way the program may backfire. America has no monopoly on drones.”<sup>161</sup> “By proclaiming the right to kill perceived enemies in sovereign states, the U.S. has paved the way for China, Russia, and other foreign government[s] to assassinate escaped dissidents and other enemies abroad.”<sup>162</sup>

Nevertheless, the U.S. government believes drone use is legal because “we are at war with al Qaeda, the Taliban, and their associated forces.” The war continues and so will drone use because it is “a war waged proportionally, in last resort, and in self-defense.”<sup>163</sup> Finally, the UN must develop a framework for drone use. The U.S. assertion of an allegedly legitimate claim of self-defense cannot end the discussion. According to President Obama, the government has worked to “establish a framework that governs our use of force against terrorists – insisting on clear guidelines, oversight and accountability that is now codified in the Presidential Policy Guidance that I signed yesterday.”<sup>164</sup> Terrorism, like drones, is an inevitable aspect of the 21<sup>st</sup> century. “As the threat continues to evolve, so must our [collective] strategy for dealing with it.”<sup>165</sup> Even though “new technologies ha[ve] often moved faster than the laws of war,”<sup>166</sup> drones, “because of their nonhumanity sums up their difference from all previous weapons. It is why their effect on war and politics is beginning to play out in such a new and revolutionary manner.”<sup>167</sup>

“The expansive use of drones by the first States to acquire them, if not challenged, [addressed by the UN and the international community, post haste] can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term.”<sup>168</sup> American’s reality and resolve was succinctly stated by one of our recent leaders,

<sup>157</sup> Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism – Human Rights Council, A/HRC/25/59, February 28, 2014, at 8 (Discussing the examination of drones in counter-terrorism and the disproportionate civilian casualties that have resulted.).

<sup>158</sup> P.W. Singer *Wired For War* (The Penguin Press, 2009), at 238 (discussing the impact that robots, and upgraded, - major shifts in technologies will have on the changing face of in this new era of warfare).

<sup>159</sup> *Id.*

<sup>160</sup> Drones: Has the U.S. Committed War Crimes? *The Week*, Nov 8, 2013, at 6 (discussing the psychological effects drone operators experience after working as drone operators), quoting Allan Massie in *The Scotsman* (UK).

<sup>161</sup> *Id.*

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

<sup>163</sup> Obama’s Speech on Drone Policy, *The New York Times*, May 24, 2013.

<sup>164</sup> Obama’s Speech on Drone Policy, *The New York Times*, May 24, 2013. Can the U.S. be left to its own devices to police itself? See Daphne Eviatar, Counterterrorism: Where Are Obama’s Policy Changes? *Reuters*, October 21, 2013 (Discussing the limited steps President Obama has taken to curtail the use of drones as well as suggesting what the President could do to address the issues: provide information on the drone technology and more transparency concerning the responsible use of drones).

<sup>165</sup> Suzanne E. Spaulding, *Turning Point*, ABA J., September 2011, at 51 (highlighting not only the success of drone use overseas, which has contributed to military advances in Afghanistan and along Pakistan’s border but also how their use angers locals and starts the legal debt at about “issues of sovereignty and the legitimacy of military action against non state entities”).

<sup>166</sup> P.W. Singer *Wired For War*, (The Penguin Press, 2009), at 387.

<sup>167</sup> P.W. Singer *Wired For War*, (The Penguin Press, 2009), at 431.

<sup>168</sup> Christoph Heyns, *Extrajudicial, Summary or Arbitrary Executions*, A/68/382, 13 September 2013 at 5; “In the context of drones, these requirements mean that international humanitarian law will not apply where the threshold levels of violence or organizations are not present, leaving international human rights law principles to govern the situations alone.” Christoph Heyns, *Extrajudicial, Summary or Arbitrary Executions*, A/68/382, 13 September 2013 at 12.

I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people. The course of conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them.<sup>169</sup>

As a result of the resolve that continues in the U.S. and perhaps in a few other countries. U.S. drone use and other adventures have directly undermined other important relationships or diplomatic initiatives, as when Washington faced the global political reaction to the Iraq war.”<sup>170</sup>

As weak states continue to generate specific threats [to the global community], such as terrorism, the United States [and the global community] has a range of more limited tools available to mitigate them. [They] can, for example, return terrorism to its proper place as a law enforcement task and continue to work closely with foreign law enforcement agencies. It [and other nations] can help train and develop such agencies, as well as local militaries, to lead in the fight. When necessary, [they] can employ targeted coercive instruments—classic intelligence work and clandestine operations, raids by special operations forces, and with far greater selectivity than today, remote strikes—to deal with particular threats, ideally in concert with the militaries of local allies.<sup>171</sup>

New capabilities as a result of advanced drone technology have “create[d] new pressure points for international law.”<sup>172</sup> Governments who have the new technology, governments who are developing the technology, and governments who do not possess the technology today are “trying to apply international law written for the Second World War”<sup>173</sup> to advanced high-tech “Star [Wars] technology”<sup>174</sup> is doubtlessly ineffective. The old approach to this serious global issues points to the reality that “New technology has often moved faster than the laws of war,”<sup>175</sup> but drone technology has changed the game in unimaginable ways. The global community must not only heed the recommendations and implement global regulations – with bite - to address the pressing drone issue to ensure that the “most notable decline in the frequency of wars over the last years”<sup>176</sup> continues but also fulfill its duty to protect global citizens and non-combatants from becoming unsuspected casualties of drone strikes.

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<sup>169</sup> George W. Bush: Declaration of War on Terrorism, The American Presidency-Encyclopedia Britannica’s Guide to American Presidents, <http://www.britannica.com/presidents/articles-9398253>.

<sup>170</sup> Michael J. Mazarr, The Rise and Fall of the Failed-State Paradigm, 93.1 For. Aff., Jan./Feb. 2014 at 119.

<sup>171</sup> Michael J. Mazarr, The Rise and Fall of the Failed-State Paradigm, 93.1 For. Aff., Jan./Feb. 2014 at 121.

<sup>172</sup> P.W. Singer, *Wired For War*, (the Penguin Press – 2009), at 387.

<sup>173</sup> Id.

<sup>174</sup> Id.

<sup>175</sup> Singer, at 387.

<sup>176</sup> John Mueller, War Has Almost Ceased to Exist: An Assessment, *Political Sci. Quar.* Vol. 124, No. 2, November 2, 2009, at 310 (Discussing the decrease in war and armed conflicts over the years: wars among developed countries, other international wars, colonial and imperial wars, and civil wars – concluding that a “rise of war aversion” exists.). Mueller, at 300.