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## DISCUSSION PAPER ON THE LEGALITY OF DRONE STRIKES UNDER INTERNATIONAL LAW

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Since at least 2002, the United States has engaged in the targeted killing of suspected terrorists associated with al Qaeda or affiliates outside Afghanistan, including through the use of unmanned aerial vehicles, or drones. The United States has publicly confirmed direct attacks in Yemen and Somalia<sup>1</sup> and there are reliable reports of a continuing drone campaign in Pakistan. As the number of drone attacks has increased, there has been mounting concern about the legality of such lethal operations under international law.

This discussion paper was prepared on behalf of the American Bar Association Center for Human Rights.<sup>2</sup> The Center was established to develop educational programs in the field of human rights; promote a greater understanding of and belief in the importance of human rights; collaborate with other ABA entities in the development and encouragement of human rights efforts, activities and programs; and assist in the development of appropriate ABA policies on human rights issues.

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<sup>1</sup> Letter from Barack Obama, President of the U.S., to the U.S. Congress, 2012 War Powers Resolution 6-month Report, (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

<sup>2</sup> The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. The Center thanks Kate Martin, Director of the Center for National Security Studies, and Joseph Onek, former Deputy Counsel to President Carter and Senior Counsel to Speaker Pelosi, for drafting the Discussion Paper. Professor Michael Newton and Professor David Akerson generously commented on the draft. The authors gratefully acknowledge the many thoughtful and detailed papers by scholars and practitioners, too numerous to list, that have informed and guided their analysis of the complex issues addressed herein.

The U.S. government has acknowledged concerns about its use of lethal drone strikes and asserts that it strictly adheres to the law when using such lethal force.<sup>3</sup> But the U.S. has not articulated clearly the limiting principles applicable to a government's use of lethal force against suspected terrorists outside a traditionally recognizable war zone.<sup>4</sup> President Obama on May 23, 2013, gave a seminal speech promising to end the war against al Qaeda and "discipline" the use of drones.<sup>5</sup> He issued a presidential directive that set forth restrictions on the use of drones by the U.S. outside "areas of active hostilities." While the President's policy decision, when fully

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<sup>3</sup> John O. Brennan, Asst. to the President for Homeland Security and Counterterrorism, Remarks to Harvard Law School Program on Law and Security: Strengthening our Security by Adhering to our Values and Laws, (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

<sup>4</sup> Former Legal Adviser Harold Koh has spoken about the need to "discipline" drone strikes with international standards, although his speech does not detail the standards. See Harold Koh, Former Legal Adviser, U.S. Dep't of State, Remarks to Oxford Union: How to End the Forever War? (May 17, 2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>.

The U.S. government has outlined its legal rationale for drone strikes in testimony and several speeches. See *Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force: Hearing Before Sen. Comm. on Armed Services*, 113th Cong. (2013) (joint statement for the record of Dep't of Defense), available at [http://www.armed-services.senate.gov/imo/media/doc/Taylor-Sheehan-Nagata-Gross\\_05-16-133.pdf](http://www.armed-services.senate.gov/imo/media/doc/Taylor-Sheehan-Nagata-Gross_05-16-133.pdf) [hereinafter *Dep't of Defense Testimony, Law of Armed Conflict Hearing*].

Official speeches include:

John O. Brennan, Ass't to the President for Homeland Security and Counterterrorism, Remarks to Council on Foreign Relations: U.S. Policy Toward Yemen (Aug. 8, 2012), available at <http://www.cfr.org/united-states/us-policy-toward-yemen/p28794>; Jeh Johnson, General Counsel, U.S. Dept. of Defense, Remarks to Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>; Eric Holder, Attorney General of the U.S., Speech to Northwestern University School of Law, (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Stephen W. Preston, General Counsel, Cent. Intelligence Agency, Remarks to Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), available at <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912>; John O. Brennan, Ass't to the President for Homeland Security and Counterterrorism, Remarks to Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.lawfareblog.com/2012/04/brennanspeech/>; Jeh Johnson, General Counsel, U.S. Dep't of Defense, Remarks to Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>; Brennan, *supra* note 3; Harold Koh, Legal Adviser, U.S. Dep't of State, *The Lawfulness of the U.S. Operation Against Osama bin Laden* OPINIO JURIS (May 19, 2011, 6:00 AM), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>; John O. Brennan, Asst. to the President for Homeland Security and Counterterrorism, Remarks at the Brennan Center Symposium (Mar. 18, 2011), available at <http://www.brennancenter.org/analysis/remarks-john-brennan-brennan-center-symposium>; and Harold Koh, Legal Adviser, U.S. Dep't of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

In February of 2013, the Justice Department formally released a white paper that articulated some limits on when the United States can use military force against U.S. citizens who are affiliated with al Qaeda. U.S. Dep't of Justice, White Paper: Lawfulness of a Lethal Operation Directed against a U.S. Citizen who is a Senior Operational Leader of Al-Qa'ida or an Associated Force (Nov. 8, 2011) [hereinafter *Dep't of Justice White Paper*], available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>.

<sup>5</sup> Barack Obama, President of the U.S., Remarks at the National Defense University, (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

implemented, should result in fewer drone strikes, neither his speech nor the directive outlined limits that the *law* imposes on the use of military force, including targeted strikes outside “areas of active hostilities.”<sup>6</sup>

### Background

Since September 2001, the U.S. has been engaged in combat operations in Afghanistan with al Qaeda and the Taliban. As of this writing, fighting continues in Afghanistan; U.S., North Atlantic Treaty Organization (NATO) and Afghan security forces continue to be engaged in active hostilities there and suffer almost daily casualties. In the past decade, the U.S. has expanded its use of military force to places outside Afghanistan, claiming that its armed conflict with al Qaeda is not geographically limited to Afghanistan.<sup>7</sup> It has also expanded its lethal operations to target “associated forces” of al Qaeda, located outside of Afghanistan, claiming that such groups are part of the armed conflict with al Qaeda. It defines such associated forces as organized armed groups that have entered the fight with al Qaeda against the U.S. or its coalition partners.<sup>8</sup> During the Bush administration, the U.S. also seized individuals located in various countries around the world and held them in military detention without trial, claiming the right to do so as part of the war against al Qaeda and the Taliban. During the Obama administration, the military seized one individual in a place where the U.S. is not using military force (Libya), initially detained him as an “unprivileged belligerent” and then transferred him for civilian trial in the U.S.<sup>9</sup> In addition, the Obama administration has continued to claim that individuals seized in places like Bosnia by the previous administration, who are now held in Guantanamo, are legally detained pursuant to the laws of war. This position has contributed to the confusion and

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<sup>6</sup> While the text of the policy directive itself is classified, the government released a summary sufficient to discern the new policies that will be applied to the use of drone strikes outside of “areas of active hostilities.” Although the U.S. government has not specifically identified which areas are considered outside the zone of active hostilities, it seems clear that at least for the moment, they do not include Afghanistan and the border regions of Pakistan where U.S. and NATO troops continue to be engaged in hostilities. The White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

<sup>7</sup> Johnson, Feb. 2012, *supra* note 4.

<sup>8</sup> Johnson, Feb. 2012, *supra* note 4. The U.S. claims that its use of force against such groups is consistent with rules concerning “co-belligerents” in traditional armed conflicts. It defines “associated forces” as a group which is “(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group ... must have also entered the fight against the United States or its coalition partners. Thus, an ‘associated force’ is not any terrorist group in the world that merely embraces the al Qaeda ideology.”

<sup>9</sup> In addition to the seizure of Nazih Abdul-Hamed al-Ruqai, also known as Anas al Liby, in Libya, during the Obama administration Ahmad Warsame was seized on the high seas between Yemen and Somalia and held temporarily on a U.S. naval vessel as an “unprivileged belligerent” before being transferred to the United States for civilian trial.

lack of coherence in the U.S. government's articulation of the geographic scope of the armed conflict with al Qaeda beyond Afghanistan.

The U.S. government has stated that international humanitarian law (IHL) covers U.S. military operations against al Qaeda, the Taliban, or associated forces.<sup>10</sup> The Obama administration asserts that the U.S. complies with IHL, in all of its operations against these groups, including those conducted by the Central Intelligence Agency (CIA).<sup>11</sup>

However, the application of IHL to a conflict between a State and non-state actors occurring on the territory of multiple third-party States that are not *themselves* at war with the State has generated significant controversy in the international community. The United States' articulation of how IHL applies in this context is disputed as a legal matter. From a policy standpoint, there is concern that the U.S. drone killings in particular may create precedents for arbitrary killings by other governments.<sup>12</sup> There is also evidence that concerns about the legality of such operations threaten to interfere with the United States' ability to garner support from countries whose cooperation is essential to effective counterterrorism operations.<sup>13</sup>

#### Summary recommendation

As noted above, the U.S. acknowledges that targeted lethal operations must comply with international law, including international humanitarian law, wherever they take place.<sup>14</sup> But it has not articulated the concrete and specific limits on when and where such operations may take place *outside the recognizable war zone of Afghanistan*. To prevent erosion of important limits on the permissible use of force, *the U.S. should clearly state that it will only use lethal force against al Qaeda or organized armed groups associated with al Qaeda in countries where al*

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<sup>10</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (military commission lacked power to prosecute Hamdan because its structure and procedures violated the Geneva Conventions); and Johnson, Nov. 2012, *supra* note 4 (“...In this *unconventional* conflict, therefore, we apply *conventional* legal principles – conventional legal principles found in treaties and customary international law”).

<sup>11</sup> See Koh, The Obama Administration and International Law, *supra* note 4 (while the U.S. government has not officially acknowledged that some lethal operations are carried out by the CIA, Koh, the Legal Adviser of the State Department, stated that all operations by the U.S. government comply with international humanitarian law).

<sup>12</sup> See Kurt Volker, *What The U.S. Risks by Relying on Drones*, WASHINGTON POST (Oct. 28, 2012), [http://articles.washingtonpost.com/2012-10-26/opinions/35500650\\_1\\_drone-strikes-drone-attacks-guantanamo-bay](http://articles.washingtonpost.com/2012-10-26/opinions/35500650_1_drone-strikes-drone-attacks-guantanamo-bay) (“[O]ur monopoly on drone warfare will not last. Others, from European allies to Russia, China and Iran, are acquiring and beginning to use drones for surveillance – eventually, they will use them for killing as well. What would we say if others used drones to take out their opponents – whether within their own territory or internationally? Imagine China killing Tibetan separatists that it deemed terrorists or Russia launching drone strikes on Chechens. What would we say? What rules would we urge them to abide by?”).

<sup>13</sup> Brennan, *supra* note 3 (“[t]he convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies – who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law.”).

<sup>14</sup> In addition to adhering to international law principles, these operations must also comply with U.S. domestic law. Such considerations are outside the scope of this paper, although we note that U.S. domestic law, both constitutional and statutory, incorporates international humanitarian law requirements.

*Qaeda or such groups are involved in hostilities targeting the United States and where there is an ongoing armed conflict in which al Qaeda or such groups are participating. Outside such existing areas of armed conflict, the United States may only resort to the use of force against al Qaeda or associated organized armed groups in self-defense against an armed attack on the U.S., when lethal force is being used only as a last resort and the force used is proportional to the threat posed by the target. The U.S. should also state clearly that it will use lethal force in self-defense to prevent an armed attack only when such attack is imminent. As the U.S. has acknowledged, the use of force must also comply with the further requirements of international humanitarian law, including those that prohibit the targeted killing of civilians who are not directly participating in hostilities. Any supporters or members of al Qaeda or associated forces who are not engaged in a “continuous combat function” must be accorded the protections afforded civilians, unless and for such time as they directly participate in hostilities.*

### Legal analysis

The current controversies concerning targeted killing operations by the U.S. arise in applying the traditional concepts of “armed conflict” and a State’s right to self-defense against attacks by a non-state terrorist organization, and in distinguishing civilians from combatants in these situations.

Extrajudicial killing constitutes murder under international law,<sup>15</sup> with two exceptions: first, during wartime, or when a State acts in self-defense against an armed attack;<sup>16</sup> and, second, when a law enforcement officer or individual acts in self-defense. The second circumstance – when, for example, a police officer kills someone in the course of making an arrest to prevent that person from injuring the officer or a third person – is not relevant here. The U.S. use of drones or other forms of targeted killing against suspected al Qaeda or associates is not such a use of law enforcement. Rather, the drone attacks are deliberate and premeditated uses of

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<sup>15</sup> International Covenant on Civil and Political Rights (ICCPR), art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 (“[n]o one shall be arbitrarily deprived of his life.”). (While not the subject of this memorandum, the United States Constitution likewise prohibits the arbitrary deprivation of life.) See also U.N. General Assembly, *Interim Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, at ¶ 36, U.N. Doc. A/61/311 (September 5, 2006) (“A judicial procedure, respectful of due process and arriving at a final judgment, is generally the sine qua non without which a decision by the States and its agents to kill someone will constitute an ‘arbitrary deprivation of life’ and, thus, violate the right to life.”) Although the United States has long taken the position that the ICCPR does not apply to U.S. government actions directed at non-citizens overseas, this prohibition on extrajudicial killing is generally considered a part of customary international law. See U.N. Human Rights Comm., General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (March 29, 2004); David Kretzmer, *Targeted Killing of Suspected Terrorists*, 16 Eur. J. Int’l. 184, 184-185 (2005); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *The International Bill of Rights – The Covenant on Civil and Political Rights*, 114-115 (Louis Henkin ed., 1981). The United States has never claimed a right to kill foreigners overseas, except when such killings are permitted under international law.

<sup>16</sup> U.N. Charter, art. 51. In some circumstances, it may also be permissible to use military force to rescue a country’s nationals or in a case of humanitarian intervention, but those are not applicable to this discussion. James E. Baker, *In the Common Defense, National Security Law for Perilous Times* 207-210 (2007).

military force intended to kill individuals. As such, they must be consistent with international law restrictions on resort to the use of force (*jus ad bellum*) and conducted in accordance with international humanitarian law requirements (IHL) (*jus in bello*).

Specifically, these requirements of IHL include:

“(1) *military necessity*, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not forbidden by the law of war) be directed at accomplishing a valid military purpose; (2) *humanity*, which forbids the unnecessary infliction of suffering, injury, or destruction; (3) *distinction*, which requires that only lawful targets—such as combatants and other military objectives— be intentionally targeted; and (4) *proportionality*, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.”<sup>17</sup>

The U.S. acknowledges the IHL requirements in its commitment to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations”.<sup>18</sup> Accordingly, the U.S. recognizes correctly that IHL restrictions apply to its use of force in the war against al Qaeda in Afghanistan. The U.S. also asserts that the armed conflict with al Qaeda extends beyond Afghanistan (and Pakistan) and that the U.S. is entitled to use lethal force in this conflict, consistent with IHL principles. Some other governments apparently argue that the U.S. is entitled to use lethal force against al Qaeda beyond Afghanistan as part of its right of self-defense under Article 51 of the U.N. Charter. Both of these claims are discussed below.

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<sup>17</sup> Dep’t of Defense Testimony, Law of Armed Conflict Hearing, *supra* note 4. U.S. military lawyers summarize these principles as: 1. Fight only combatants; 2. Attack only military targets; 3. Spare Civilian persons and objects; 4. Restrict destruction to what your mission requires. *See* U.S. Army Center for Law and Military Operations, Rules of Engagement (ROE) Handbook for Judge Advocates, App. C-17 (2000). These principles apply to the use of force by anyone, whether a member of a military, paramilitary, security or intelligence force. This paper takes no position on the serious questions raised about the legality of civilian intelligence agents who are outside the military chain of command participating in lethal operations.

<sup>18</sup> U.S. Department of Defense Directive 2311.01E, Law of War Program, § 4.1 (May 9, 2006), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>. Note that this commitment is set forth in a document binding on the armed services; on its face it does not apply to the CIA when conducting operations on its own.



*Use of Force in an Armed Conflict: what constitutes an armed conflict justifying the application of IHL rules allowing targeted killing?*

An armed conflict exists when there is a resort to armed force between States.<sup>19</sup> International law also recognizes that armed conflict may exist in situations where only one party to the conflict is a State and the other party is one or more organized armed groups, called a “non-international armed conflict.” The States in which the organized armed groups operate may or may not be parties to the armed conflict.

The determination whether there is an armed conflict depends upon the facts on the ground.<sup>20</sup> Outside the traditional situation of a war between two or more nations, an armed conflict exists only when the necessary factual threshold has been met. It is generally accepted that an armed conflict exists under international law when there is *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*.<sup>21</sup> Mere “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature” do not meet the criteria for an armed conflict.<sup>22</sup>

*The scope of the existing armed conflict in which the United States is engaged.*

There seems little doubt that war continues in Afghanistan as of this writing and it is generally agreed that the U.S. and others are currently engaged in an armed conflict there. The U.S. apparently views that armed conflict as spilling over into at least some border areas of Pakistan. The U.S. has also defended expanding its theatre of military operations beyond Afghanistan by pointing to the fact that al Qaeda and its allies, especially al Qaeda in the Arabian Peninsula, have moved their terrorist operations to other countries, in particular Yemen, and have launched attacks against the U.S. from those places. It characterizes such groups as “associated

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<sup>19</sup> Common Article 2 of the 1949 Geneva Conventions, Aug. 12, 1949, 75 U.N.T.S.

<sup>20</sup> International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 8 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

<sup>21</sup> See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

<sup>22</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. See also *Prosecutor v. Limaj & Others*, Case No. IT-03-66-T, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), available at <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> (stating that these criteria are “solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”); and International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 3 (2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

forces” and invokes the doctrine of co-belligerency against them.<sup>23</sup> However, the geographical borders and scope of the existing armed conflict (which continues to claim the lives of both combatants and civilians on an almost daily basis) are disputed.

In particular, the U.S. claims that the armed conflict extends beyond “areas of active hostilities.” As a senior U.S. official explained:

The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

*That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a State’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.*<sup>24</sup>

Yet, while acknowledging the existence of “constraints” on its use of military force against al Qaeda and associated forces, the U.S. government has not articulated what those constraints are. A leaked Justice Department white paper acknowledged that “the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case.”<sup>25</sup> The white paper claimed that a lethal operation occurring in a location where al Qaeda has a significant and organized presence, including senior operational leaders, and from which al Qaeda plans attacks against U.S. persons or interests, would be part of the armed conflict between the U.S. and al Qaeda.<sup>26</sup> It remains unclear, however, whether the Justice Department would apply this standard to every location in the world, as the white paper was written to justify the use of lethal force in Yemen, where additional factors support such use. Otherwise, as discussed below, the standard as articulated in that white paper would be too broad because it does not require that al Qaeda be involved in ongoing hostilities in a place in order to find that the armed conflict with al Qaeda extends to that place.

*International law does not permit the U.S., as part of the war against al Qaeda, to carry out lethal operations against members of al Qaeda or an associated armed group under the*

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<sup>23</sup> See Johnson, Feb. 2012, *supra* note 4. Without accepting or rejecting this assertion, as a matter of common sense, the presence of organized armed groups which join in fighting against a State party is clearly relevant, even if not sufficient to determine the existence of an armed conflict.

<sup>24</sup> Brennan, *supra* note 3 (emphasis added).

<sup>25</sup> Department of Justice White Paper, *supra* note 4, at 4.

<sup>26</sup> Department of Justice White Paper, *supra* note 4, at 5.



*more permissive rules of international humanitarian law except in States where there is an ongoing armed conflict and al Qaeda or an associated armed group is a party to that conflict.* This limitation on the geographic scope of the war against al Qaeda serves two significant purposes: It protects against incursions on State sovereignty<sup>27</sup> and against the expansion of armed conflict (thereby protecting human rights and humanitarian values).

The U.S. argues that the existence of an armed conflict anywhere justifies the use of targeted lethal force against members of al Qaeda or affiliates wherever they are a significant and organized presence and are plotting attacks. But it provides no positive authority for that position; it only cites an absence of contrary judicial or other authority.<sup>28</sup> Its position, however, is inconsistent with the fundamental purpose of international treaties, including the U.N. Charter, that limit the use of force and the situations where the more permissive wartime rules for the use of force under international humanitarian law apply. These treaties permit the use of wartime rules in a particular country only when there is an armed conflict in that country warranting such use of force.<sup>29</sup> Any broader rule would be inconsistent with the object and purpose of the international agreements intended to limit the situations in which it is legal for a State to use military force.<sup>30</sup> *The mere presence of members of al Qaeda in a country, even members planning attacks, is not by itself sufficient to meet the threshold requirement of the existence of an armed conflict in that country.* The existence of an armed conflict in another country (such as Afghanistan) cannot justify the use of wartime force in a country where there is no armed conflict.<sup>31</sup>

At the other end of the spectrum, IHL criteria for the existence of an armed conflict could be met in places where organized and armed al Qaeda groups are engaged in protracted and intense violence. Whether the circumstances in Pakistan, Yemen or Somalia satisfy this threshold requirement is a factual question on which this paper states no opinion. In those countries where there is no armed conflict involving al Qaeda, a threat from al Qaeda would have to be met with law enforcement or intelligence-gathering capabilities unless, as discussed below, the threat were of such a magnitude as to threaten an “armed attack” against the U.S. giving rise to a right to use lethal force in self-defense in a particular country independent of any existing right to use force in self-defense against al Qaeda in Afghanistan. There are myriad

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<sup>27</sup> While the consent of a State to the use of force may resolve sovereignty issues, it does not resolve the question of whether IHL applies.

<sup>28</sup> Dep’t of Justice White Paper, *supra* note 4.

<sup>29</sup> See Additional Protocol II, *supra* note 22; and Rome Statute of the International Criminal Court art. 8(2)(d), Jul. 17, 1998, 2187 U.N.T.S. 90.

<sup>30</sup> See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). The U.S. has not ratified the Vienna Convention but considers many of its provisions to constitute customary international law on the law of treaties; see <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

<sup>31</sup> International law does recognize that violence can spill over borders into contiguous territory, such that a neighboring country or part thereof may become part of the armed conflict.

examples of multi-lateral intelligence and law enforcement cooperation leading to prevention of al Qaeda attacks through arrest of al Qaeda suspects.

### *Use of Lethal Force in Self-Defense*

As outlined above, international law requires that resort to force be justified under *jus ad bellum* principles and be consistent with the U.N. Charter, which permits the use of force in limited circumstances, including in self-defense against an “armed attack.”<sup>32</sup> An “armed attack” will not include every act of terrorist violence. States have asserted the right to respond in self-defense to terrorist acts depending on the scope and magnitude of the acts.<sup>33</sup> In addition, resort to force must be necessary: peaceful mechanisms of resolution must be exhausted; lethal force is legal only as the last resort to stop an imminent threat. Moreover, the kind and amount of force used must be proportional to the attack; “the means, duration, and intensity of the force used cannot exceed that which is reasonably necessary to address the precipitating wrong.”<sup>34</sup> These requirements of necessity and proportionality in relation to the threat mean that a State may not resort to force in response to an armed attack or to prevent an imminent attack until other remedies have been reasonably exhausted and there is no reasonable possibility of peaceful means of resolution.

Whether the right to self-defense would justify the use of lethal force by the U.S. outside Afghanistan is both a legal and factual question, and a matter of dispute. The U.S. has offered no detailed analysis of the issue because it relies instead on its assertion that the armed conflict with al Qaeda extends beyond Afghanistan. It appears, however, that some U.S. allies who disagree with the U.S. that the current armed conflict extends beyond Afghanistan or Afghanistan and Pakistan, take the position that outside those areas the use of military force in self-defense in response to an imminent threat of an armed attack by non-state actors may be permissible under international law.<sup>35</sup>

### *Imminence*

IHL *jus in bello* rules governing the use of force in armed conflict allow the use of force without any determination that an attack by the other party is imminent. In contrast, *jus ad bellum* rules governing the resort to force based on self-defense limit the use of force to situations where force is necessary to prevent an imminent attack by the other party. The U.S.

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<sup>32</sup> U.N. Charter, art. 51.

<sup>33</sup> It is unlikely that an individual operating alone in any given country would present a threat justifying the immediate resort to force.

<sup>34</sup> Baker, *supra* note 16, at 194 [citing Restatement of Foreign Relations Law 3<sup>rd</sup> (1987)]; *see also* Parl. Deb., H.L. 370-71 (Apr. 21, 2004) (statement of Lord Goldsmith), *quoted in* Daniel Bethlehem, *Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770 (2012), <http://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

<sup>35</sup> Brennan, *supra* note 3 (describes the view of key allies of the U.S. that use of force outside of the “hot battlefield” is permitted as a matter of self-defense in response to an imminent threat).

contends that all of its uses of force are part of an armed conflict and that therefore it does not need to conduct a “separate self-defense” analysis each time it uses force against al-Qaeda.<sup>36</sup> Nonetheless, the leaked Justice Department white paper concerning targeting a U.S. citizen deemed a “senior operational leader” of al Qaeda contains a detailed discussion of “imminence,” without explaining why that concept is relevant to the legality of targeting the U.S. citizen. The leaked white paper argues that the determination of imminence must take into account the special problems posed by the terrorist activities of senior operational leaders of al Qaeda and associated forces.<sup>37</sup> It contends that these leaders are continually plotting attacks against the U.S.; that the U.S. cannot always know when these attacks are going to take place; and that the U.S. “may have a limited opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.” The white paper therefore calls for a “broader concept of imminence” in determining when the use of force is appropriate against such leaders who are U.S. citizens.<sup>38</sup>

The U.S. should clarify whether, in its view: i) the U.S. Constitution requires consideration of imminence in an armed conflict when the target is a U.S. citizen; ii) the U.S. is engaged in an armed conflict and is applying the concept of imminence as a matter of policy; or iii) the white paper’s broader concept satisfies the general requirement of imminence needed to justify the use of force in self-defense to prevent an armed attack. The last position is not supportable. In the context of self-defense, the broader understanding of imminence outlined by the white paper does not sufficiently account for the possibility of preventing armed attacks through other means or establish the requisite likelihood that the threatened attacks will ever occur. Therefore, it does not meet the requirement of international law for initiating the use of force in self-defense against an armed attack.

#### *Individuals Who May be Targeted Legally.*

Once it has been determined that the use of military force, including drone strikes, is permissible under international law in a particular location, there remains the question of who can be subjected to such military force. All targeting decisions must comply with – at a minimum – the IHL *jus in bello* requirements outlined above. A core requirement is “distinction,” the requirement that “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>39</sup> However, if civilians

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

<sup>37</sup> Dep’t of Justice White Paper, *supra* note 4, at 7. It is unclear whether the discussion of “imminence” in the Justice Department White Paper relates to the legality of the resort to force or is imposed as a policy constraint in cases concerning American citizens.

<sup>38</sup> Dep’t of Justice White Paper, *supra* note 4, at 7-8.

<sup>39</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 48 Jun. 8, 1977, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

directly participate in hostilities, they lose protection against military attack for the duration of such participation. The International Committee of the Red Cross has issued Interpretive Guidance concluding that direct participation includes any preparations and geographical deployments or withdrawals constituting an integral part of a specific hostile act.<sup>40</sup>

The U.S. asserts that its use of drone strikes complies with this principle of distinction and that it does not target civilians. Nonetheless, questions have been raised about the ways in which those targeting decisions are made or carried out, including whether the U.S. is taking adequate care to avoid killing civilians, as required by the principle of proportionality.<sup>41</sup>

In addition, there is controversy about who may be targeted on the basis of their status as a member of an organized armed group where one party is not a State with regular armed forces. The ICRC Interpretive Guidance also addresses this issue: whether members of armed terrorist groups may, like enemy soldiers, lawfully be targeted based on their status as members. The Guidance does not agree with some commentators that such individuals are civilians who may be targeted only if they are directly participating in such hostilities and only for such time as they are participating in hostilities. Rather, the Guidance asserts that “members of organized armed groups belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function).”<sup>42</sup> The Guidance lends support to the U.S. position that members of al Qaeda and associated forces generally engaged in hostilities against the U.S. are not civilians. The U.S. claims they are “unprivileged belligerents” who accordingly can be targeted without regard to whether they are directly participating in hostilities at the time they are targeted. (The U.S. and the ICRC agree that such fighters are not “combatants” who enjoy the privilege of immunity for killing enemy soldiers as they do not comply with the requirements of the Geneva Conventions that they take specific steps to openly distinguish themselves from civilians.)<sup>43</sup>

International law has long recognized that individuals who are not members of the armed forces and who support hostilities only indirectly may not be targeted; otherwise the vast majority of the civilian population potentially could be targetable.<sup>44</sup> Following this principle, the ICRC Interpretive Guidance states that “financiers” and “propagandists” should not be

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<sup>40</sup> International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct participation in Hostilities under International Humanitarian Law 43-45 (Nils Melzer ed., 2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC Interpretive Guidance].

<sup>41</sup> See Columbia Law School Center for Civilians in Conflict and Human Rights Clinic, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (2012).

<sup>42</sup> ICRC Interpretive Guidance, *supra* note 40, at 77.

<sup>43</sup> There is some confusion over terminology and its legal effect. The Interpretive Guidance does not use the term “combatant” to describe these “members of organized armed groups,” apparently to avoid any contention that they are entitled to the privileges accorded regular combatants by the Geneva Conventions. The Bush administration used the term “enemy combatant” and the current U.S. administration designates members of al Qaeda and associated forces as “unprivileged belligerents.”

<sup>44</sup> ICRC Interpretive Guidance, *supra* note 40, at 15.

considered to be members of organized armed groups.<sup>45</sup> The U.S. therefore should make clear that it will not use lethal force against financiers or propagandists and others who do not directly engage in hostilities (unless they are also members of the organized armed group engaging in a continuous combat function).

### Conclusion

International law has long recognized that the use of lethal force is an extreme measure that should be utilized only when the facts on the ground warrant its use, namely where there is an armed conflict or where it is necessary to prevent an armed attack. To ensure it complies with international law, the U.S. should acknowledge these limits on the use of targeted lethal force and conform its operations to them. Any congressional authorization of military force, including drone strikes, must comply with these U.S. treaty obligations.

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<sup>45</sup> *Id.* at 38.