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# Us Targeted Killing Post 9/11: Just and Effective Warfare

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## I. Introduction

On August 5<sup>th</sup>, 2009 a remotely controlled, unmanned plane, otherwise known as a Predator drone is able to capture images of the most wanted man in Pakistan; Baitullah Meshud.<sup>1</sup> With the capability of the Predator drone, the Central Intelligence Agency, located in Langley, Virginia watches live footage of Meshud relaxing and receiving medical treatment at his father in-laws house located in Pakistan.<sup>2</sup> Accompanying Meshud were family members, body guards and bystanders.<sup>3</sup> Pakistan Prime Interior Minister A. Rehman Malik explained that the images obtained by the CIA was a perfect picture of Meshud's entire body not just the top of his head.<sup>4</sup> The real time picture remained stable as the CIA remotely launched two Hellfire missiles from the Predator drone; after the dust had settled all that remained of the most wanted man in Pakistan was his detached torso.<sup>5</sup> Eleven others perished as well; including his wife, father-in-law, his mother-in-law, a lieutenant, and seven bodyguards.<sup>6</sup> To U.S. officials, the killing of Meshud was a crucial tactical victory in the fight against terrorist organizations such as the Taliban and al Qaeda.<sup>7</sup> Meshud was the number one most wanted man in Pakistan because he was suspected in the assassination of Pakistan's former Prime Minister, Benazir Bhutto, as well as the suicide truck bombing of the Marriot Hotel in Islamabad; resulting in 50 casualties.<sup>8</sup> Meshud was also involved in helping the Afghan confederates attack American coalition troops.<sup>9</sup> The successful airstrike in

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<sup>1</sup> Jane Mayer, *The Predator War*, *New Yorker* (Oct. 26, 2009), available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer) (last visited Mar. 10, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Stephen Dycus, Arthur L. Berney, William C. Banks, Peter Raven-Hansen & Stephen I. Vladeck, *National Security Law* 419 (6<sup>th</sup> ed. 2016).

<sup>4</sup> Mayer, *supra* note 2.

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

<sup>6</sup> *Id.*

<sup>7</sup> Dycus, *Supra.*

<sup>8</sup> Major John C. Harwood, *Knock, Knock; Who's There? Announcing targeted Killing Procedure and the Law of Armed Conflict*, 40 SYRACUSE J. INT'L. & COM. 1, 2-3 (2012).

<sup>9</sup> Mayer, *supra* note 2.

Pakistan is not a one-time event for the United States. It is an example of targeted killing—something that is necessary in the war on terrorism.

A week after the attacks on September 11, President George W. Bush authorized a secret order, which remains classified, that authorized the CIA to seek to kill or capture the leaders of al Qaeda and other allied terror organizations.<sup>10</sup> The executive order, authorized by Bush, was required by law to be in writing with copies sent to the House and Senate intelligence committees including a list of the leading al Qaeda figures to be targeted.<sup>11</sup> Since 2004 the United States has used drones to evaluate intelligence and vetted individuals for attack in the middle east.<sup>12</sup> According to data gathered by the Long War Journal, the number of drone-based strikes from 2004-2007 was in the single digits.<sup>13</sup> However, in years 2008-2010, those numbers soared to 35, 53, and 117 in those respective years.<sup>14</sup> Although that number has fallen to 64 strikes in 2011, following the killing of Osama bin Laden, these strikes are an integral part of the United States strategy in destroying terror organizations.<sup>15</sup> Since the implementation of Bush's secret executive order, targeted killing has become America's most effective tool in fighting terror organizations and according to CIA Director Leon Panetta the program was "the only game in town".<sup>16</sup>

While America has been successful in fighting terror groups using targeted killing, there have been opponents to the use of this strategy. Opponents of targeted killing protest that this practice may violate international human rights laws, laws of war, violates U.S. law banning assassinations, and even if these practices were legal it would be unwise because they risk

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<sup>10</sup> John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 59 (2011/2012).

<sup>11</sup> *Id.* at 59-60.

<sup>12</sup> Harwood, *Supra* at 4.

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

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

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

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

retaliations against Americans.<sup>17</sup> While these concerns are not completely meritless, we will discuss and analyze further in the paper why **targeted killing is a legal, just, and effective tool used by the United States because of the current landscape, necessity to keep US citizens safe, and up to date technology used during war.** Although targeted killing is a useful and reliable tactic that the US relies on; it needs to be used carefully and the law needs to be refined internationally.

First, this paper will discuss specific events where the United States used targeted killing post 9/11; the good and the bad. Then, we will discuss the policy and procedure used in determining whether to execute these targeted killings along with the benefits and the hazards of targeted killings. Next, we will discuss the war paradigm and the proper legal framework. During this section we will discuss the right to self-defense, different forms of self-defense and why targeted killing is not assassination.

## **II. Targeted Killing by the United States after 9/11**

In this section, we will primarily focus on specific accounts of targeted killing by the United States. The United States' targeted killing program has produced desired outcomes. However, there have been occasions where innocent lives have been lost while conducting this practice. This section will discuss different terror operatives and the circumstances surrounding their targeted killings. As noted the United States targeted killing program has been largely successful, however this section will further discuss instances where the United States' targeted killing program has had shortcomings.

### **a. Mullah Mohammed Omar**

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<sup>17</sup> Yoo, *Supra* at 60.

In October 2001, a 27-foot drone called the predator was deployed over southern Afghanistan and had appeared to spot Mullah Mohammed Omar (leader of the Taliban) in a convoy of cars fleeing Kabul.<sup>18</sup> Following protocol and agreement with the military commanders, the CIA sought approval from the United States Central Command to launch a hellfire missile at Omar, who at that time had already sought cover and was in a building with about 100 guards.<sup>19</sup> Apparently General Tommy Lee Franks declined approval because of advice from his military lawyer.<sup>20</sup> This because the building that was believed to contain Omar was believed to be a Mosque; which under the rules of engagement would make it a target to avoid.<sup>21</sup> However, other reports claim that he sought approval from the President, who personally approved the strike, but the delay allowed Omar to escape.<sup>22</sup> With a steadfast international law or protocol when conducting a drone strike, the United States would have been able to take out a high ranking Taliban official. Because of the confusion and delay, Omar was able to escape and continue to lead the Taliban, resulting in a failure for the United States.

**b. Qaed Salim Sinan al-Harethi**

On November 3, 2002, al-Harethi, al Qaeda's top operative in Yemen and a key planner in the 2000 bombing of the USS *Cole*, which killed 17 U.S. sailors, was spotted using a Predator drone in Marib Province, Yemen, with five other suspected al Qaeda members.<sup>23</sup> Controlling the drone from a remote area, a CIA pilot fired a Hellfire missile from the drone and directly connected with the target, killing all six members in the car.<sup>24</sup> DNA samples later confirmed the Predator

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<sup>18</sup> Dycus, *Supra* at 418.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Steve Coll, Looking for Mullah Omar, *New Yorker* (Jan. 23, 2012), available at <https://www.newyorker.com/magazine/2012/01/23/looking-for-mullah-omar> (last visited Apr. 25, 2018).

<sup>22</sup> Dycus, *Supra* at 418.

<sup>23</sup> Yoo, *Supra* at 60.

<sup>24</sup> *Id.*

missile attack had in fact taken out the al-Harethi, the intended target.<sup>25</sup> Also identified in wake of the hell fire missile attack was Kamal Derwish, a U.S. citizen who grew up near Buffalo and was reportedly the leader of an al Qaeda sleeper cell known as “Lackawanna 6” and helped recruit American Muslims for training in al Qaeda camps.<sup>26</sup> Other members of Derwish’s cell had been arrested in 2003 for providing material support to terrorists.<sup>27</sup> The members arrested plead guilty and are serving a sentence of seven to ten years in prison.<sup>28</sup> Derwish was not afforded the benefit of an arrest warrant, lawyers, and prosecution because he escaped the reach of the FBI and was found in reach of a CIA missile, resulting in a casualty during the pursuit of top al Qaeda operative.<sup>29</sup> During his presidency, President Obama stated that it would be unconstitutional for the government to target and kill any U.S. citizen without due process, however, when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens; his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd of people should be protected from a swat team.<sup>30</sup> Thus the killing of al-Harethi and Derwish should be considered successes because it prevented future terror plots.

### **c. Osama Bin Laden pursuit**

The United States used drones in the war with Iraq, but the pace and frequency at which the US used drones as well as the geographic expanse of their deployment widened after President Bush had received intelligence; revisions by President Obama in 2009 and 2010 authorized targeting Osama bin Laden as well as other top ranking terror operatives.<sup>31</sup> According to White

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<sup>25</sup> Dycus, *Supra* at 418.

<sup>26</sup> Yoo, *Supra* at 58.

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Dycus, *Supra* at 419.

<sup>31</sup> Dycus, *Supra* at 418.

House counterterrorism adviser John O. Brennan, rather than use “the hammer” the United States would use “the scalpel” to seek out terror targets.<sup>32</sup>

Although the United States has had many success stories involving drone strikes and targeted killings; there have been pitfalls. In February 2002, a United States Predator drone spotted a very tall man being greeted gushingly by villagers.<sup>33</sup> Because Osama bin Laden was said to be approximately six feet five inches tall, the order was quickly given to strike.<sup>34</sup> By the time the order was given the group had scattered, but the drone captured another image of a tall man and two others emerging from a wooded area.<sup>35</sup> The drone was quickly launched killing all three men who happened to be locals scavenging for wood instead of bin Laden; the intended target.<sup>36</sup>

After months of gathering intelligence regarding the whereabouts of Osama bin Laden, on May 1<sup>st</sup> 2011, American special force personnel in helicopters descended into a walled compound in Pakistan.<sup>37</sup> After nearly a forty-minute-long fire fight Osama bin Laden had been shot in the head and killed.<sup>38</sup> President Obama decided to use a commando raid as opposed to a drone strike to avoid collateral damage that would occur in a residential area and to also verify bin Laden’s identity once he was captured or killed.<sup>39</sup> Once bin Laden was located by Navy SEALs at the top floor of the compound, he was reported to have resisted arrest, which resulted in his fatality even though he was unarmed.<sup>40</sup> Several other people were also killed during the raid, but others

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

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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

<sup>37</sup> Dycus, *Supra* at 419.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

including one of bin Laden's wives, were uninjured during the ordeal.<sup>41</sup> Outside the compound was also unaffected.<sup>42</sup>

#### **d. Other Al Qaeda Operative Targets**

On May 25, 2010, the United States launched a drone strike into remote Marib Province in Yemen.<sup>43</sup> The strike was aimed to target a small group of al Qaeda operatives that had been meeting in the remote area.<sup>44</sup> The missile was successful in hitting the intended targets, however the drone strike had also killed the Deputy Governor of Marib Province, who unbeknownst to the United States, was meeting with al Qaeda to convince them to put down their arms (according to Yemen Government sources).<sup>45</sup>

As noted by the previous scenarios, the United States targeted killing program has largely been a success. However, it has its drawbacks in which the procedure should be refined to become more efficient. The refining of the United States policy will allow the U.S. to minimize failures in the future. Although this paper suggests the United States policy needs refining, this does not mean the targeted killing program, to date, is ineffective, unjust, or illegal. Simply, to become more effective, this tool needs to be revised. In the following section this paper will discuss and analyze United States policy on targeted killings.

### **III. Policy**

In response to the horrific events that took place on 9/11 congress passed the Authorization of Use Military Force (AUMF); authorizing the use of lethal force against al Qaeda.<sup>46</sup> The AUMF did not put a geographic or temporal limitation on the use of force; only stating that the president

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> Gen. John P. Abizaid & Rosa Brooks, *Recommendations and Report of the Task Force on US Drone Policy* 33 (Rachel Stohl, 2<sup>nd</sup> ed. 2015).

may 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 Sept. 11, 2001.”<sup>47</sup> Since being inaugurated, the Obama administration has used a broad interpretation of the AUMF; not only limiting the use of force to just al Qaeda and the Taliban but expanding to use of force against any organization or persons the administration views as “associate forces” of al Qaeda even if those groups or individuals had no hand in planning the 9/11 attacks.<sup>48</sup>

Since implementing and expanding the AUMF, Obama’s administration has faced questions of legality for continued use of drones that are targeted to kill terrorist.<sup>49</sup> In response, the State Department Legal Adviser, Harold Koh, addressed the American Society of International Law (ASIL).<sup>50</sup> During the address, Koh defended the United States targeted drone killings and stated, “It is the considered view of this Administration... that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war”.<sup>51</sup> Specifically Koh cites the United States compliance under domestic law, the AUMF, and international law as proof that the United States has engaged in armed conflict against al Qaeda, the Taliban, and “associate forces”.<sup>52</sup> When performed in accordance with the laws of war, targeted killings are not only a vital tool for the United States, but also a justified tool in fighting against terror organizations. In conducting targeted killings, the United States acts consistent with the principals of “distinction” and “proportionality” to warrant that the targeted are legitimate and minimize the collateral damage that may be a result.<sup>53</sup>

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

<sup>48</sup> *Id.*

<sup>49</sup> Michael W. Lewis and Vincent Vitkovsky, *The Use of Drones and Targeted Killing in Counterterrorism*, 12 ENGAGE: J FEDERALIST SOC’Y PRAC. GROUPS 73 (2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

In his Speech, Koh list four main reasons why targeted drone killings are legal. First, in response to suggestions that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war, Koh states, “individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law”.<sup>54</sup> Koh asserts, “targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects”.<sup>55</sup> Second, in response to challenges that the very use of advanced weapons, including drone strikes in lethal attacks is illegal, Koh states that as long as their use conforms to the laws of war that the use of drones is legal.<sup>56</sup> Essentially the rules governing targeting does not turn on the type of instrument used, and there is no prohibition under the laws of war to use technologically advanced weapons during armed conflict.<sup>57</sup> Third, there has been an ongoing argument that the use of lethal forces against specific individuals fails to provided adequate due process and is thus an unlawful extrajudicial killing.<sup>58</sup> Koh retorts that a state engaged in an armed conflict or in legitimate self-defense is not required to provide enemy combatants or targets with legal process before using lethal force.<sup>59</sup> Furthermore, the United States targets are selected through a “robust” procedure and advanced technologies have helped make strikes extremely precise.<sup>60</sup> Finally, Koh contends that using drones to target high level belligerent enemy combatants/leaders does not violate domestic law banning assassinations because during a time of armed conflict or acting in self-defense targeting these belligerent officials is not unlawful

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<sup>54</sup> Harold Koh, Legal Adviser, U.S. Dep’t of State. Address at the Annual meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

and thus does not constitute “assassination” as long as it is consistent with the applicable laws of war.<sup>61</sup>

In 2013, President Obama and senior members of the executive branch briefed to congress, written policy and procedures that formalize and strengthen the Administration’s rigorous process for reviewing and approving operations of capture or whether to use lethal force against terror operatives outside of the United States as well as outside of areas of active hostilities.<sup>62</sup> The written policy provided that United States Policy is not to use lethal force when feasible to capture the intended target.<sup>63</sup> If it is possible to capture the intended target it would provide the US with an opportunity to receive intelligence regarding terror activity and would provide the US with the ability to disrupt possible plots of terror. Capture operations are only conducted against suspects who may lawfully be captured and detained by the US and only when capture can be conducted in accordance with applicable law and obligations with other sovereign states.<sup>64</sup> It is the view of the Administration that lethal force is not to be used in lieu of prosecution of a terrorist.<sup>65</sup> Lethal force is a tool used to prevent or stop attacks against U.S. persons, and even then, lethal force will only be used when capture is not feasible and no other reasonable alternative exists to address the threat.<sup>66</sup>

The situations described by Koh take place while the United States is at war or during armed conflict. During peacetime conditions, the United States would not consider acting preemptively in an attempt to kill an individual before they had actually committed a crime. During Peacetime conditions protocol would be to act retrospectively; meaning a suspect must commit a

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<sup>61</sup> *Id.*

<sup>62</sup> Dycus, *Supra* at 425.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

crime which would then be followed by being arrested or detained by law enforcement; deadly force may only be used to save the lives of people at danger during the crime committed.<sup>67</sup>

However, in times of war the US must act prospectively. Because of the concern that war brings this is a necessity. When at war, a nation seeks to defeat its enemy to prevent future harms and attacks on its own citizens by opposing forces.<sup>68</sup> To prevent these potential harms and attacks the United States must rely less on exact information and more on probabilities and predictions.<sup>69</sup> Put more simply, the United States makes informed decisions on when to strike in times of war to keep society safe from future attack. During wartime, the military often attempts to destroy a building in which it believes, with high certainty, to contain enemy munitions or enemy soldiers.<sup>70</sup> It would be ill advised to wait until it has proof beyond a reasonable doubt, or even to a lesser standard, probable cause because that would risk allowing the enemy to escape or to live another day to attack and cause harm to American civilians.<sup>71</sup> In either event it gives the opposition an upper hand against the United States.

Let's take the Kamal Derwish situation into account for both peacetime conditions and during war time. What we know about Kamal Derwish is that he is a U.S. citizen who grew up near Buffalo and was reportedly the leader of an al Qaeda sleeper cell known as "Lackawanna 6" as well as helped recruit American Muslims for training in al Qaeda camps.<sup>72</sup> In 2002, Derwish was present, with other al Qaeda operatives whom all died when struck by a drone set off by the CIA director.<sup>73</sup> If during a time of peace, the United States had suspected Derwish of conspiring to commit terrorist acts, the United states would have to gather enough evidence to show probable

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<sup>67</sup> Yoo, *Supra* at 63.

<sup>68</sup> Yoo, *Supra* at 64.

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

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

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

<sup>72</sup> Yoo, *Supra* at 58.

<sup>73</sup> Yoo, *Supra* at 60.

cause to arrest him.<sup>74</sup> The American Justice system would require a trial and then only if the jury sentenced Derwish to death could he be executed.<sup>75</sup> However, because the United States was at war with Al Qaeda and “associated forces”, the AUMF governs and authorizes the lethal force against; making the death of Derwish not only just but legal as well.<sup>76</sup> According to John Yoo, because the United States is at war with al Qaeda, it is entitled to kill and eliminate opposing commanders.<sup>77</sup> This does not give the United States a license to kill anyone suspected of being a terror operative. There are limits to the use of targeted killing. In agreement with Yoo, under the rules of war, soldiers are limited and must obey the principles of necessity, discrimination, proportionality, and imminence.<sup>78</sup>

Beyond the aims of the US is the fact that the war on terror is a new kind of war. Historically the United States has been able to win using conventional warfare tactics. These tactics include invading the enemy location, destroying opposing forces on the battlefield, and capturing key cities geographically.<sup>79</sup> Because of the large population and mass production, resulting in a well-equipped and well-armed military, the US generally decimates and over-powers the opposing force resulting in being victorious. This type of warfare will not work with the war on terrorism. The United States can’t just out produce and out-man the opposing terror forces and expect to win. This is partially because the Taliban and Afghanistan insurgents take advantage of the porous border and difficult terrain.<sup>80</sup> Furthermore, because terrorist networks have no territory or uniformed armed forces to over-power, traditional warfare will remain largely ineffective.<sup>81</sup> The

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<sup>74</sup> Yoo, *Supra* at 64.

<sup>75</sup> *Id.*

<sup>76</sup> Abizaid, *Supra* note 46.

<sup>77</sup> Yoo, *Supra* at 64.

<sup>78</sup> Yoo, *Supra* at 77.

<sup>79</sup> *Id.*

<sup>80</sup> Dycus, *Supra* at 419.

<sup>81</sup> Yoo, *Supra* at 65.

problem does not lie within the amount of strength and power of the United States but mainly with where and whom to aim it at.<sup>82</sup> Terror organizations do not practice prototypical warfare and mass their operations on a battlefield. Instead they hide amongst the general population or in remote geographical locations; which are out of reach of the United States ground forces.<sup>83</sup>

To help overcome the obstacles in this new warfare the United States has implemented the use of drones to help fight the opponent. The use of this form of combat is a desirable and attractive one for military and counterterrorism operations for several reasons.<sup>84</sup> First is that drones have the ability to loiter over a specific area for extended periods of time; which allows them to collect and capture information and allow personnel to make decisions quickly based on the information.<sup>85</sup> Second, is that in military application the drones can provide precise information collection that facilitates accurate targeting as well as battlefield and non-battlefield surveillance.<sup>86</sup> Third, is that drones prove a wider range of operational reach; meaning that were manned operations cannot reach, drones are able to.<sup>87</sup> Fourth, is that drones allow military to have presence in areas that would otherwise be impossible politically, capacity/resource prohibitive, and too dangerous for manned operations.<sup>88</sup> Finally , the drone provides the military with the ability to act stealthy.<sup>89</sup> While the drone may be able to be detected by sophisticated air defense systems, most drones are relatively small, quiet, and capable of flying at high altitudes to avoid detection by opposing forces being targeted.<sup>90</sup>

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

<sup>83</sup> *Id.*

<sup>84</sup> Abizaid, *Supra* at 18.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

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

Often, opponents of targeted killings programs thrust the idea of national sovereignty and international laws into the forefront of the argument. The question presented is, “why can’t other nations take the necessary and appropriate action in order stop and detain terror operatives inside their own country”? Here the answer is quite simple; the country is either unwilling or unable to do so. A country that is unable might be where the sovereign state lacks functional control over those parts of its territory where military force is being used.<sup>91</sup> A country that is unwilling on the other hand might be opposed to the capture or detaining of an operative if said operative has helped the sovereign state in the past and has relations with state. For example, although Yemeni officials had apparently cooperated in the targeted killing of al-Harethi, they had previously failed in apprehending him and may have been reluctant to do so because of a perceived debt owed to bin Laden, who had assisted the Yemeni president in putting down a separatist movement in 1994.<sup>92</sup> U.S. policy and standards are emphatic that the United States respects national sovereignty and international law.<sup>93</sup> In 2012, then Attorney General Holder emphasized that “the use of force in a foreign territory would be consistent with these international law principles if conducted, for example,... after a determination that the nation is unwilling or unable to deal effectively with a threat to the United States”.<sup>94</sup>

Outside areas of hostilities, lethal force may only be used when a set of preconditions have been met.<sup>95</sup> The first criteria that must be met is there must be a legal basis for using lethal force, regardless if it is a senior operational leader of a terrorist organization or just the forces that organization is using.<sup>96</sup> Second, the US will only use lethal force against a target when the threat

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<sup>91</sup> Dycus, *Supra* at 427.

<sup>92</sup> Dycus, *Supra* at 424.

<sup>93</sup> Dycus, *Supra* at 427.

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

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

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

the target poses against a U.S. person is continuing and imminent.<sup>97</sup> If a terrorist does not pose such a threat the US will pursue a different avenue.<sup>98</sup> Third, the Administration listed criteria that must be met before lethal action may be taken: (1) near certainty that the terrorist target is present; (2) near certainty that non-combatants will not be injured or killed; (3) An assessment that capture is not feasible at the time of operation; (4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (5) an assessment that no other reasonable alternative exists to effectively address the threat to U.S. persons.<sup>99</sup> Lastly whenever the US uses lethal force in foreign territories, international legal principles, as well as that sovereign states laws, and the laws of armed conflict will apply.<sup>100</sup> The United States is unable to act unilaterally.<sup>101</sup>

The decision to use lethal force as opposed to capture is made at the most senior levels of the United States Government.<sup>102</sup> The senior officials receive information and intelligence from other departments and agencies with relevant expertise that allow them to make informed decisions.<sup>103</sup> These informed decisions will be informed by a broad analysis of an intended targets current and past role in plots that threaten U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation of ongoing terrorism plotting, capabilities of the terrorist organization, and on U.S. intelligence collection.<sup>104</sup> Not only does an analysis need to pass the policy standards; the analysis needs to pass legal analysis as well.

**a. Benefits and Hazards of Targeted Killings**

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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

### **i. Hazards of Targeted Killings**

Even if the United States is legally justified in using lethal force against enemy combatants it still has its strategic costs and hazards. While eliminating leaders of the enemy may sound like a great idea the downside is that it causes what is known as the hydra effect. The hydra effect is the rise of more and more resolute leaders to replace them.<sup>105</sup> Taking out the leader of the organization may also cause retaliation from the enemy forces.<sup>106</sup> If the terror group retaliates then the US will continue their path and use of targeted killing against the enemy, meaning that there will be no real end in sight and the behavior of both sides will continue. Furthermore the fallen leader may be viewed as a martyr for the cause.<sup>107</sup> For example, when Israel assassinated Abbas Mussawi, Hezbollah's leader in Lebanon, in 1992, the group retaliated with two strikes that blew up Israeli and Jewish targeted in Buenos Aires, in the name of their fallen leader.<sup>108</sup> This attack was led by new charismatic leader Hassan Nassrallah.<sup>109</sup> Targeted Killing may also interfere with the gathering of new information and critical intelligence because if they are unable to be captured and instead killed, the US loses out on a chance to interrogate the target.<sup>110</sup> Targets are also generally aware that they are targets which thrusts them into hiding, making it difficult for the US to track them.<sup>111</sup> Although, this can be spun into a positive because it may change the behavior of the terror group, which may impede the enemy group's ability to communicate, which results in confusion and the disarray of enemy forces.<sup>112</sup> Another negative to targeted killings is that it may strengthen the sense of legitimacy of the terrorist operation because it is viewed as the only possible

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<sup>105</sup> Gabriella Blum & Philip Heyman, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145,165 (2010).

<sup>106</sup> Dycus, *Supra* at 430.

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

<sup>108</sup> Blum & Heymann, *Supra* 165.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

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

<sup>112</sup> Dycus, *Supra* at 429.

option when up against an empire.<sup>113</sup> When the United States carries out a drone strike or any form of lethal killing that goes wrong, resulting in civilian casualties, it is possible that the United States has just helped in recruitment and further radicalization. In similar situations, targeted killings may cause a strain on diplomatic relations between the US and the sovereign state in which they are conducting the strike.<sup>114</sup> For example, when the US launched a drone strike into remote Marib Province in Yemen.<sup>115</sup> The strike was aimed to target a small group of al Qaeda operatives that had been meeting in the remote area.<sup>116</sup> The missile was successful in hitting the intended targets, however, the drone strike had also killed the Deputy Governor of Marib Province, who unbeknownst to the US, was meeting with al Qaeda to convince them to put down their arms (according to Yemen Government sources).<sup>117</sup> This scenario could foster and strain the US diplomatic relations with Yemen as well as other countries.

The United States needs to be cautious in the over use of targeted killing. The over use of targeted killing tactics may lead to desensitization of the matter, which in turn, could lead to the over stepping of legal boundaries set forth below. Although extraordinary interrogation tactics are per se illegal under IHL and targeted killing is not, a similarity can be drawn that the over use of targeting killing may lead to desensitization; resulting in the illegal use, the same way extraordinary interrogation tactics developed.<sup>118</sup> Technology has been advanced to the point that the US can kill from remote areas on the other side of the world. Philip Alston, the United Nations special rapporteur on extrajudicial, summary or arbitrary executions criticize what is coined as the

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<sup>113</sup> Blum & Heymann, *Supra* 165.

<sup>114</sup> Dycus, *Supra* at 430.

<sup>115</sup> Dycus, *Supra* at 419.

<sup>116</sup> *Id.*

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

<sup>118</sup> Blum & Heymann, *Supra* 166.

“PlayStation mentality” that technology has created.<sup>119</sup> Alston cautions that, “young military personnel raised on a healthy diet of video games now kill real people remotely using joysticks. Far removed from human consequences of their actions, how will this generation of fighters value the right to life?”<sup>120</sup> Further danger arises as the killing of a terrorist may be viewed as a simpler operation than lengthy legal battles over detention, trial, extradition, and release.<sup>121</sup>

Another concern and criticism of the targeted killing program is that the availability of lethal UAV technologies has tempted the United States to engage in a largely covert campaign, which has created a “secret war” governed by “secret law”.<sup>122</sup> This criticism centers around the use of lethal force against targets located outside of traditional battlefields.<sup>123</sup> Furthermore, the lack of transparency and accountability the US has when conducting targeted killing has been scrutinized because critics view potential implications for domestic and international rule of law; especially if other nations follow precedents set by the US.<sup>124</sup> The Stimson Report notes that states that may mimic US precedent may include many who are not known for their human rights record.<sup>125</sup>

## **ii. Benefits of Targeted Killing**

Although there are risks in conducting targeted killing, the benefits far outweigh the costs. At the most basic level, conducting targeted killing provides the US with less risk than if attempting to apprehend the target; and has proved to be effective.<sup>126</sup> The effectiveness has been

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<sup>119</sup> Abizaid, *Supra* at 20.

<sup>120</sup> *Id.*

<sup>121</sup> Blum & Heymann, *Supra* 166.

<sup>122</sup> Abizaid, *Supra* at 20.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Blum & Heymann, *Supra* 167.

asserted by President Obama after the United States had a successful strike against bin Laden.

Obama stated that:

the intelligence gathered at bin Laden's compound, we found what he wrote, "we could lose the reserves to the enemy's air strikes. We cannot fight airstrikes with explosives." Other communications from al Qaeda operatives confirm this as well. Dozens of highly skilled al Qaeda commanders, trainers, bomb makers, and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, U.S. transit systems, European cities and our troops in Afghanistan. Simply put, these strikes have saved lives.<sup>127</sup>

As stated above, the use of targeted killing of leaders of a terrorist group can change the groups organization behavior.<sup>128</sup> A change in group behavior caused by hiding out of fear of being targeted can cause organizational confusion and disarray.<sup>129</sup> The more time group leaders spend hiding, the less time they can spend developing terror plans against the US and the harder it becomes for them to relay these plans.<sup>130</sup> This may also cause paranoia amongst group members which interferes with communications.<sup>131</sup> Furthermore organizational leaders may spend more of their time protecting themselves instead of concocting terror plots.<sup>132</sup> According to reports, the killing of leaders of Palestinian armed groups weakened the will and ability of the group to execute suicide attacks against Israelis.<sup>133</sup> The Obama administration has used targeted killing not only because it has been effective, but because it has allowed them to reach areas and borders that would otherwise but unable to be reached in porous terrains by soldiers on foot.<sup>134</sup> It also adds a level of protection for the troops. Finally, targeted killing gives the public perception that the United States

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<sup>127</sup> Dycus, *Supra* at 429.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

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

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Blum & Heymann, *Supra* 167.

<sup>134</sup> Dycus, *Supra* at 419.

will not just stand by and allow terrorist to strike fear and cause harm to civilians. For the reasons stated, the benefits far outweigh the costs.

#### **IV. Legality of Targeted Killing**

The debate today is over whether the use of targeted killing is lawful and which law governs this action. Courts have generally remained silent on this subject; however, this has not stopped the US from implementing these tactics. In this section, we will apply several operations that the US has conducted and which legal paradigm it should be analyzed under. We will discuss the paradigm of international human rights law (IHR) as well as the paradigm of international humanitarian law (IHL). We will also discuss the executive ban on “assassination”.

Human Rights Law is international law that restricts governments in their treatment of civilians during peacetime conditions.<sup>135</sup> IHR requires some sort of judicial procedure and the right of due process before anyone is executed, thus avoiding the concern of extrajudicial killing.<sup>136</sup> The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides in Article 9 that, “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”.<sup>137</sup> Article 10 further provides that:

“Law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in circumstances of the incident.”<sup>138</sup>

Essentially the imminence of the threat provides the evidence to justify the use of lethal force, removing the need to prove intentions of the target.<sup>139</sup> IHR requires a strict threat of imminence

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<sup>135</sup> Dycus, *Supra* at 420.

<sup>136</sup> *Id.*

<sup>137</sup> Dycus, *Supra* at 421.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

and necessity through unavailability of other means.<sup>140</sup> As stated previously the predicate for extrajudicial killing of someone outside an area of armed conflict is that the killing would defend innocent person from unlawful violence and harm that is imminent.<sup>141</sup> The Human Rights Committee notes that before resorting to lethal force, that every measure to arrest a terror suspect must be exhausted.<sup>142</sup> The committee adds that an operation to use targeted killing must never be used as a form of retribution or revenge; the nation's operation will only be legitimate if its goal is preemption.<sup>143</sup>

Under IHR, proponents view the killing of al-Harethi and Derwish as a clear case of extrajudicial killing.<sup>144</sup> The Swedish foreign minister called the attacks, “a summary execution that violates human rights. Terrorist must be treated according to international law. Otherwise any country can start executing those whom they consider terrorist”.<sup>145</sup> The European view is that IHR always applies, even alongside IHL on the battle field.<sup>146</sup> The International Court of Justice (ICJ) and other International Courts have generally applied IHR during arm-conflict.<sup>147</sup> However, the United States position is that as a *lex specialis* IHL exclusively occupies the field of regulation during armed conflict.<sup>148</sup>

The US addressed the legal standard it believes to apply during armed conflict against al Qaeda in a letter to the Office of the High Commissioner for Human Rights.<sup>149</sup> In this letter the US stated that it is engaged in a continuing armed conflict with al Qaeda and that the law of war

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<sup>140</sup> *Id.*

<sup>141</sup> Dycus, *Supra* at 422.

<sup>142</sup> Blum & Heyman, *Supra* at 160.

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

<sup>144</sup> Dycus, *Supra* at 423.

<sup>145</sup> Dycus, *Supra* at 424.

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

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

<sup>148</sup> Harwood, *Supra* at 19.

<sup>149</sup> *Id.*

applies to the conduct of war.<sup>150</sup> IHR advocates believe that IHR principles should be applied to determine whether the targeted killing program constitutes an arbitrary deprivation of life.<sup>151</sup> In an advisory opinion on the legality of nuclear weapons, the ICJ held that during an armed conflict, the standard for judging whether an arbitrary deprivation of the right to life has occurred is rooted in IHL.<sup>152</sup> As noted in Major John C. Harwood's article, the rationale applied by the ICJ is applicable to a targeted killing program as it is to the use of nuclear weapons because when determining whether the use of a particular weapon system is lawful during armed conflict, IHL is the correct source of law in which to analyze.<sup>153</sup> IHL provides guidelines on the means and methods of warfare, the status and treatment of civilians, and the treatment of cultural property.<sup>154</sup> Thus, when there is a conflict that arises between IHR and IHL on the battlefield, IHL is a *lex specialis* of armed conflict and preempts IHR in the eyes of the United States.

IHL governs the use of force lethal force in armed conflicts.<sup>155</sup> Proponents of IHL claim that IHR is, and has traditionally been, understood as applying to State's actions within its own territory.<sup>156</sup> According to W. Jason Fisher, the US maintains that IHR is not operative because targeted killings take place outside state borders.<sup>157</sup> Advocates for IHL contend that the hostilities that are brought forth by terrorist and terror groups, such as al Qaeda, meet the definition of armed conflict. The US maintains that targeted killing should be evaluated in accordance with international armed conflict.<sup>158</sup> This even though hostilities between the US and terror groups are

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Harwood, *Supra* at 19.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Matthew Craig, *Targeted Killing, Procedure, and False Legitimation*, 35 CARDOZO L. REV. 2349, 2370 (2014).

<sup>156</sup> W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 719 (2007).

<sup>157</sup> *Id.*

<sup>158</sup> Fisher, *Supra* at 722.

between a state and a non-state actor. Proponents of applying the international armed conflict framework to targeted killing insist that humanitarian concerns and transnational nature of hostilities warrant application.<sup>159</sup> The core principle for international armed conflict centers around the distinction between “combatant” and “civilian”.<sup>160</sup> Combatants are subject to attacks and civilians are not. A combatant has certain criteria: (1) a member of the regular armed forces of a belligerent party; (2) a member of militia and volunteer corps fulfilling the following conditions: (a) to be commanded by a person responsible for his subordinates; (b) to have a fixed distinctive emblem recognizable at a distance; (c) to carry arms openly; (d) to conduct operations in accordance with laws and customs of war; and (e) to be linked to a party to the conflict; (3) an inhabitant of a non-occupied territory who, on approach of the enemy, spontaneously takes up arms to resist invading troops.<sup>161</sup> A majority of international scholars who evaluate targeted killing under the rules of international armed conflict agree that the terrorists the US seeks to eliminate do not qualify as combatants.<sup>162</sup> The legality of this principle instead rests on whether terrorist, as civilians, are taking part in active hostilities.<sup>163</sup> According to the Geneva Conventions Article 51(3) civilians shall enjoy protection unless they take part in hostilities.<sup>164</sup>

The principles behind non-international armed conflict more accurately describe the ongoing situation between the US and terror organizations. Like the use of the rules in international armed conflict; in non-international armed conflict to determine the legality of targeted killings a distinction between combatants and civilians must be made.<sup>165</sup> Non-international armed conflict is

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

<sup>160</sup> *Id.*

<sup>161</sup> Fisher, *Supra* at 723.

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

<sup>163</sup> *Id.*

<sup>164</sup> Fisher, *Supra* at 723.

<sup>165</sup> Fisher, *Supra* at 726.

a conflict between the armed forces of a state and “organized and armed groups.”<sup>166</sup> Proponents of this view maintain that terror organizations such as al Qaeda, Taliban, or any jihadist extremist group qualify as an organized and armed group and their members may be targeted with lethal force as combatants.<sup>167</sup> Individuals who do not take part in these armed groups referenced will be considered civilians and are not subject to targeted lethal force. It is the view of supporters of IHR and international armed conflict IHL that non-international armed conflict would give countries using it, such as the US, too much leeway in determining and targeting terror suspects.<sup>168</sup>

The legality of the rules of international armed conflict and legality of targeted killing turns on which interpretation, narrow or broad, to adopt. The narrow interpretation limits the US to only conducting targeted killings to civilians who are actively engaging in hostilities. This means a terrorist engaged in fighting, attempting to attack, or terrorist who are concealing weapons on their body are subject to targeted killing.<sup>169</sup> However, under this interpretation a terrorist may not be targeted in planning or preparation of an attack; in this case they are only subject to arrest and detainment.<sup>170</sup> Under the broad interpretation of the civilian targeting exception, hostilities between the US and terrorists are prolonged and terrorist tend to be repeat offenders.<sup>171</sup> If a civilian terrorist is allowed to alternate between protected and unprotected civilian status it would render right of self-defense of the US useless and would create a revolving door of terrorists alternating from active to inactive civilian terrorist.<sup>172</sup> A risk associated with the US application of IHL under non-international armed conflict is that it would erode the level of protection usually afforded to

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<sup>166</sup> Fisher, *Supra* at 727.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Fisher, *Supra* at 724.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

civilians and would grant the US to much leeway in determining terror suspects.<sup>173</sup> Although there are risks, the strongest argument for the US application of IHL in targeted killing would be according to the rules of non-international armed conflict.

Regardless if targeted killing is in accordance with international or non-international armed conflict it must also be in accordance with the proportionality standard to be deemed legal under the IHL analysis.<sup>174</sup> This rule is expressed in the Geneva Conventions Article 51(5)(b) of Additional Protocol, in which it states that an action is disproportionate if it may be expected to cause incidental loss of civilian life, injury to civilians, damage of civilian objects, or anything that would be considered excessive in relation to the concrete and direct military advantage anticipated.<sup>175</sup> Opponents of the IHL framework believe that targeted killing is presumptively disproportionate whenever it risks damage in any form to civilian.<sup>176</sup> Supporters believe that this is not the case and that under a fair interpretation and application of IHL principle of proportionality; incidental injuries to civilians caused during attack are legal so long as the attack is proportional to a military gain.<sup>177</sup>

A threshold question that appears when discussing the armed conflict paradigm and whether IHL governs is whether the location of the planned targeted killing falls within the geographic scope of the conflict.<sup>178</sup> In other words, is the potential targeted killing in the hotbed of the battlefield? The armed conflict with al Qaeda and its associated forces, can by definition, have no set geographical boundaries because al Qaeda is not territorially based due to how easily forces move across borders.<sup>179</sup> According to the Stimson report, the military and CIA generally

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<sup>173</sup> Fisher, *Supra* at 727.

<sup>174</sup> Fisher, *Supra* at 728.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Fisher, *Supra* at 729.

<sup>178</sup> Craig, *Supra* at 2370.

<sup>179</sup> Abizaid, *Supra* at 35.

work closely together when planning a targeted strike: few strikes are entirely military or entirely CIA.<sup>180</sup> Because of different reporting requirements between the CIA and military this could create a risk of executive branch “forum shopping,” tempting the executive branch to place a given targeted strike under the direction and control whichever entity is deemed to have the most accommodating committee members.<sup>181</sup> Some view that once conflict exists somewhere, IHL permits killing anywhere.<sup>182</sup> Some scholars believe if the word battlefield is narrowly construed and limited killings to that of the battlefield than it would create a safe haven for terrorist in areas removed from active hostilities.<sup>183</sup> Others believe that IHL restricts the use of force to areas of “substantial relationship” to the core conflict.<sup>184</sup> Opponents of this view worry that this will create a boundary-less battlefield for nations seeking to target and kill opposing forces. The US holds that lethal force may be used outside areas of active hostilities if there is a legal basis for using lethal force, target poses an imminent threat to U.S. persons, the proportionality standard is met, capture is not feasible, and the US will have respect for sovereignty and rules of armed conflict.<sup>185</sup>

Although the United States follows IHL rules when practicing targeting killings, some adversaries view the US targeted killing program as assassination. The practice of targeted killing by the US is not a recent development and has been a well-documented wartime strategy. In fact, evidence discovered by the U.S. Senate Select Committee chaired by Senator Frank Church reported in 1975 no less than eight plots involving CIA efforts to assassinate Cuban Dictator Fidel Castro.<sup>186</sup> Church also reported assassination plots against President Ngo Dinh Diem of South

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<sup>180</sup> Abizaid, *Supra* at 35.

<sup>181</sup> Abizaid, *Supra* at 39.

<sup>182</sup> *Id.*

<sup>183</sup> Craig, *Supra* at 2371.

<sup>184</sup> *Id.*

<sup>185</sup> Dycus, *Supra* at 425.

<sup>186</sup> Blum & Heymann, *Supra* 149.

Vietnam and General Rene Schneider of Chile.<sup>187</sup> During the Vietnam War, the Phoenix program was responsible for planning the assassinations of Viet Cong leaders and sympathizers.<sup>188</sup> In 1986, President Ronald Reagan ordered the Operation El Dorado Canyon, which ordered U.S. jets to bomb Libyan locations where Colonel Muammar Qadhafi believed to be domiciled.<sup>189</sup> According to Blum and Heymann, these assassination plots, “were taken to be an element of that part of foreign relations that always remains in the dark, outside official protocol or lawful interaction, unspoken of, but understood to be “part of the international game.””<sup>190</sup>

Because of these assassination attempts by the US, President Reagan issued Executive Order No. 12,333, which prohibits U.S. officials from engaging in assassination.<sup>191</sup> However, killing the enemy in wartime is legal. It is undisputed that assassination during peacetime conditions is illegal under international law; as any murder of a private individual and public figure for political purposes would be.<sup>192</sup> This is not a practice that the United States is engaged in. The United States conflict with al Qaeda and associated forces is a non-international armed conflict authorized by the 2001 AUMF; which authorizes the president to use appropriate and necessary force against senior operational leaders and associate forces of al Qaeda.<sup>193</sup> The US is not using targeted killings during times of peace but in times of war; which they are currently at with a non-state actor.

Throughout the Bush administration, they relied on a December 1989 Memorandum of Law, issued by the Special Assistant for Law of War Matters to The Judge Advocate General of

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Dycus, *Supra* at 430.

<sup>192</sup> Fisher, *Supra* at 729.

<sup>193</sup> Dycus, *Supra* at 430.

the army at the time, W. Hays Parks.<sup>194</sup> Parks asserted that the prohibition of assassinations did not preclude the use of targeted killing of enemy combatants in wartime or the killing in self-defense of specific individuals who pose an imminent and direct threat to U.S. citizens or national security during peacetime.<sup>195</sup> Parks stated that targeted killing was permissible under the inherent principal of self-defense to which every country is entitled to under Article 51 of the United Nations Charter and customary international law.<sup>196</sup> Article 51 allows countries to use force in self-defense after suffering armed attack such as the United States did after 9/11.<sup>197</sup> Former attorney general Reno warned President Clinton of the possible implications that might result if the assassination ban was relaxed on bin Laden; he warned of possible retaliation by the terror group.<sup>198</sup> Because of the potential for retaliation and need for self-defense, Administration lawyers concluded that the ban would not be broken.<sup>199</sup> Former Secretary of State Elihu Root affirmed that every state has the right to protect itself by preventing a conditions of affairs in which it will be too late to protect itself.<sup>200</sup> The United States does not need to wait until al-Qaeda attacks before it can preemptively launch a strike to take out a terrorist camp or its leaders. Furthermore, Executive Order No. 12,333, implemented during the Reagan error, does not apply to the conflict between the U.S. and its enemies because they were done under different rationales.

To sum up the legality portion, the US takes the position that during armed conflicts HRL gives way to IHL and its *jus in bello* principles. As long as the US follows the standards for the use of lethal force, provided there is a legal basis in IHL, the United States' conduct is legal and just. Because the United States is in a non-international armed conflict with al Qaeda and associate

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<sup>194</sup> Blum & Heymann, *Supra* 155.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Yoo, *Supra* at 71.

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

<sup>200</sup> Yoo, *Supra* at 72.

forces it is not considered assassination because the operatives are combatants and combatants are not precluded from being targeted and killed. Furthermore, combatants taking part in hostilities during armed conflict are subject to targeted killing because of the right of self-defense.

## **V. Conclusion**

The United States targeted killing program is a legal, just, and effective tool. Targeted killing has been effective because many al Qaeda operatives, commanders and associate forces have been removed from the battle field. These combatants are no longer able to reign terror by orchestrating plots to injure or kill the innocent. As Obama stated, “this is a just war—a war waged on proportionality, in the last resort, and in self-defense.”<sup>201</sup> The US is unable to win this war using traditional warfare like it has in the past. This is because of difficult terrain and because these terror groups aren’t geographically bound. To help overcome these obstacles the US has implemented the use of drones. The United States will not whimsically implement the use of drone strikes and will only use them when the preconditions of the law are met. As conveyed above the United States takes the view that IHL is the rule that governs during armed conflicts. As is the case in the non-international armed conflict the United States is currently engaged in with al Qaeda. During such armed conflict, lethal force may be used against combatants.

Although targeted killing is legal, useful, and a tactic that the US relies on; it needs to be used carefully and the law needs to be refined internationally because of the international uncertainty and disagreement about the authoritative rule of law. The uncertainty of which law to apply could lead to chaos among the international community. This chaos could expand if other nations acted in a similar manner to the United States in terms of the lack of transparency. Although the US needs to act in secrecy before the attack they should set new precedent in which they

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<sup>201</sup> Abizaid, *Supra* at 9.

acknowledge the attack afterwards; creating more transparency on the international level. Furthermore, the United States needs develop international norms for the use of lethal force outside the traditional battlefield. As stated previous the United States has set precedent before on where and when it may use lethal force. Unfortunately, this war on has no end in sight and with the expansion of technology may only grow so these issues and controversies will continue to exist. It is important for the United States to spearhead and take steps necessary in creating a transparent and clear rule of law when conducting targeted killing. The United States needs to do this so other nations don't undermined the rule of law in combatting enemies. Although the United States targeted killing program, that follows IHL, is a legal, just, and effective tool; it would best serve them and the international community to put forth a clearer and decided rule of law that is transparent. Although terror groups will not play by these rules it will allow the US and its allies to act in conformity and avoid unintended consequences.