

RPAS AND NON-INTERNATIONAL CONFLICT – A STRATEGIC/LEGAL ASSESSMENT

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Remotely Piloted Aircraft (RPAs) have, in recent years, been among the most controversial weapons systems in the U.S. war on terrorism. Debate rages over their overall effectiveness, their legality outside of recognized war zones, such as Afghanistan, and the precedent U.S. RPAs might set for other state and non-state actors in the future. Rather than focusing on the technology of the RPA platform itself, this Article argues that the RPA enables a type of war against individuals that exposes a significant hole in both international law and conventional understanding of the boundaries of warfare. Rather than focusing on treaties to limit the use of RPAs, the first focus should be in addressing what constitutes war with non-state actors, what its boundaries are, and how such wars begin and end. Defining the parameters for a “just war” against a non-state actor will serve to clarify many of the legal debates surrounding discrimination and proportionality in strikes. Additionally, it will likely increase the effectiveness of the strikes themselves by allowing greater transparency of operations which will enable those employing the RPAs to better exploit the potential strategic effects of the operation.

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INTRODUCTION

In early 2008, the U.S. War on Terrorism entered a new phase, visibly extending the reach of conflict to states beyond Iraq and Afghanistan through the use of air power and special operations forces. Among these forces, the most prominently discussed and debated symbol of this new type of counterterrorism campaign has been the Remotely Piloted Aircraft (RPA), or the “drone.”¹ Over the past seven years, there has been no shortage of scholarly articles and public discussion of the legal implications for RPAs, the hazards of their employment in military campaigns, or the prospects for the diffusion of RPA technology. Missing from the conversation, however, has been a discussion of the true strategic utility of RPAs, which can frame the debate over the legal implications for their use.

This Article examines the military utility of RPAs, with the goal of increasing awareness about both of the strengths and limits of their operational use, and thus reframing the legal debate surrounding RPA operations. Rather than being a radical new technology—which due to its lack of an on-board pilot makes it a game-changer in terms of law with respect to risk—I argue that the RPA has made legal scholars uncomfortable because it enables a particular form of warfare which, to date, is largely a black hole in international law. Owing to its characteristics of persistent coverage at low speeds over long periods of time, the RPA’s chief virtue is that it enables airpower to directly intervene in Non-International Conflicts with aerial bombing, something that was largely impossible prior to the development of the RPA. A focus on limiting the RPA’s involvement is misguided, as other tools remain available for such interventions. Rather, the international law community must focus on defining the process of declaring and ending non-international conflicts as well as defining the territorial reach and actors in such conflicts. This represents a *Jus ad Bellum* approach, rather than a *Jus in Bello* or a *Jus Post Bellum* approach, to the problem of human targeting.

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¹ Michael J. Boyle, *The Costs and Consequences of Drone Warfare*, 89 INT’L AFFS. 1 (2013).

Establishing a strong legal framework for the bounds of Non-International Conflict would serve both to ease the legal debate over the relevant definitions of proportionality and discrimination by firmly establishing which body of international law covered different types of strikes (International Humanitarian Law or International Human Rights Law), and clearly delineating combatant and military leadership status. This would be beneficial to combatants operating RPAs as well, as a strong framework specifying the legality of strikes under certain parameters would enable greater transparency of strikes. This would allow policymakers and the public alike to better analyze the effectiveness of strikes and would allow the military to make greater strategic gains from strikes by both limiting the potential for “blowback” and by deterring future operations by increasing the disruptive effects on adversary networks.

I. THE RPA, ITS UTILITY, AND ITS EFFECTIVENESS

At the dawn of the aviation era, at about the same time when airpower theorists such as Giulio Douhet and Billy Mitchell were developing theories for strategic bombing that would come to dominate air targeting for much of the next century,² the United Kingdom was experimenting with air support in military operations in places familiar today. Airborne units patrolled territories in the periphery of India (now Pakistan’s Federally Administered Tribal Areas or FATA), from Baghdad and Haifa in the British Mandates, and along the Horn of Africa. Despite initial success against formations of resistance, the British fairly quickly turned against the practice. A 1923 article in the *British Naval Review* first articulated what would become a truism of airpower in small wars for much of the next century:

In all these small war operations, the limitations which to us appear to be the most permanent are: the transitory influence of aircraft attack, due mainly to the shortness of time the aeroplane can remain in the air; its lack of power to occupy a disturbed district; the difficulty of providing it with landing grounds and the danger of indiscriminate slaughter of friend and foe, of women and children as well as armed men. Such slaughter is an action which does not harmonise with British traditions, and which ethically has again and again been proved to be unsound.³

The United Kingdom was the lone country to rely significantly on air forces for waging counterinsurgency/guerilla campaigns in the early

² THE SCH. OF ADVANCED AIRPOWER STUDIES, *THE PATHS OF HEAVEN: THE EVOLUTION OF AIRPOWER THEORY* 79–114 (Col Philip S. Meilinger ed., 1997).

³ *The Fiends of the Air*, 11 NAVAL REV. 81, 90 (1923).

twentieth century. The United States, like many other states, entrusted such missions primarily to smaller forces with organic air assets for close air support. This was the pattern employed by the Marines in Nicaragua and elsewhere in Central America. As Martin Van Creveld noted, in this capacity air power was effective in thwarting what later Maoist Insurgent Doctrine would characterize as a transition from phase one to phase two of insurgency, the building of safe havens from which to operate and build towards the third phase of open warfare.⁴ The U.S. use of bombers in counterinsurgency within South Vietnam further demonstrated the challenges of relying on airpower in a coercive role to attain productive results. Kocher, Pepinsky, and Kalyvas⁵ found strong empirical evidence of the counterproductivity of aerial bombardment in South Vietnam, where “[h]igher frequencies of bombing correspond unambiguously to higher levels of downstream control by the Viet Cong.”⁶ As with prior campaigns, air power in Vietnam during the 1960s was best served in intelligence, supply, and close air support roles to prevent the insurgency from moving from Phase 1 to Phase 2.

Air manuals and experiences for the remainder of the twentieth century followed these lessons and limited both the use and development of air power theory as it related to small wars. Field Manual 100-20/Air Force Publication 3-20 devotes only a few sentences to the use of airpower in counterinsurgency missions in its appendix on counterinsurgency operations, emphasizing close air support and lines of communication:

The task force makes maximum effective use of air power by assigning Air Force liaison parties to the lowest organizational level possible and making maximum use of forward air controllers. . . . Air power can assist by supporting the establishment of efficient communications means with other government controlled sectors. These provide for the movement of goods and services to bolster institutional and infrastructure development. . . . Aerial resupply and close air support reaction forces must help sustain remote area operations.⁷

The U.S. campaign against Osama bin Laden in the 1990s and the advent of new technologies such as cruise missiles began a gradual shift away from this philosophy. Following attacks on the U.S. Embassies in

⁴ MARTIN VAN CREVELD, *THE AGE OF AIRPOWER* 349 (2011).

⁵ Matthew Adam Kocher, Thomas B. Pepinsky & Stathis N. Kalyvas, *Aerial Bombing and Counterinsurgency in the Vietnam War*, AM. J. POL. SCI. 1, 1–18 (2011).

⁶ *Id.* at 2.

⁷ HEADQUARTERS DEP'TS OF THE ARMY & THE AIR FORCE, FM 100-20 / AFP 3-20, *MILITARY OPERATIONS IN LOW INTENSITY CONFLICT*, app. E (1990), available at <http://www.globalsecurity.org/military/library/policy/army/fm/100-20/index.html>.

Nairobi, Kenya, and Dar es Salaam, Tanzania, the U.S. government reacted with a series of missile strikes against targets in Afghanistan believed to be associated with al-Qaeda and in hopes of decapitating al-Qaeda leadership, as well as a chemical plant believed to be associated with a nascent al-Qaeda chemical weapons program, code named Operation Infinite Reach.⁸ The failure of cruise missiles to hit bin Laden and questions over the accuracy of intelligence on targets in Afghanistan and Sudan undercut the credibility of airstrikes against non-state actors. In the short term, these strikes combined with the failures of similar cruise missile operations against Iraq in retaliation for violations of the No-fly Zones and other U.N. obligations, led some critics to derisively accuse the United States of engaging in “Cruise Missile Diplomacy.”⁹ In the aftermath of the September 11th attacks, President George W. Bush summarized a wider accepted philosophy on the matter by stating “When I take action, . . . I’m not going to fire a \$2 million missile at a \$10 empty tent and hit a camel in the butt.”¹⁰

The cruise missile proved to be a sub-optimal tool for human targeting because of the time lag between the release of the munition and the time on target. Targeting accuracy can be affected by four general factors: the circular error probable of the munition,¹¹ the probability of mechanical failure of the munition, the accuracy of the underlying intelligence, and the timeliness of the intelligence.¹² Given

⁸ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE MILITARY: STAFF STATEMENT NO. 6, at 4, 12 (2004) [hereinafter THE MILITARY: STAFF STATEMENT NO. 6], available at http://www.9-11commission.gov/staff_statements/staff_statement_6.pdf.

⁹ Michael Rip and James Hasik devote a full section of their book on the precision revolution to the topic, with longtime adversary Moammar Qaddafi stating in 2000 that “America relies on cruise missiles for conducting its relations with the rest of the world. . . . These are outdated methods and bankrupt programs that have no future.” Tom Hundley, *U.S. Accused of Cruise Missile Diplomacy*, CHI. TRIB., May 28, 2000, at 17 (internal quotation marks omitted).

¹⁰ Howard Fineman, *A President Finds His True Voice*, NEWSWEEK (Sept. 23, 2001, 8:00 PM), <http://www.newsweek.com/president-finds-his-true-voice-152099> (internal quotation marks omitted). Despite this rhetoric and although cruise missiles played a lower visibility role in the war during the Bush years, cruise missiles were still extensively used by the Administration in the early years of the war on terror, particularly in Somalia. Daniel Klaideman observed:

Tomahawk cruise missiles could be fired from a warship off the Somali coast, the least dangerous option in terms of US casualties. Such missile strikes had been a hallmark of the Bush administration. For all of its “dead or alive” rhetoric, the Bush White House was surprisingly risk-averse when it came to antiterrorist operations in lawless areas like Somalia. But the missile strikes were not always effective. Sometimes the missiles went astray, killing civilians, and even when they hit their targets they didn’t always take them out.

DANIEL KLAIDMAN, *KILL OR CAPTURE* 123–24 (2012).

¹¹ Circular Error Probable, or CEP, is defined as the radius within which a munition can be expected to land fifty percent of the time.

¹² Michael P. Kreuzer, *Remotely Piloted Aircraft: Evolution, Diffusion, and the Future of Air Warfare* (Ph.D. dissertation, Princeton University 2014), available at

the programming requirements of missiles at the time, this led to a six-hour gap between the time the target coordinates were programmed and its on-station time, requiring in essence unreasonable expectations of intelligence to target an individual.¹³ The process, however, inspired significant changes in the Predator program.

On April 2 1999, then-Air Force Chief of Staff Michael Ryan contacted Colonel James Clark—who in 1996 served as lead evaluator of Predator’s effectiveness in Bosnia—to task Clark with “an urgent requirement for the Predator to provide precise geographic locations of the subjects it was observing, so they could be targeted.”¹⁴ Lieutenant General Michael Short, the Combined Forces Air Component Commander for Operation Allied Force, generated this requirement based on conversations with his son on the difficulty he experienced being cued to targets based on descriptions from RPA operators.¹⁵ Within thirty-eight days, Predator’s sensor camera was replaced with a separate sensor consisting of both a camera and a laser designator, facilitating the relay of targeting information directly to F-16 and A-10 platforms.¹⁶ Sensing that making the sensor platform the shooter as well would dramatically reduce the “kill chain” and increase the effectiveness of strike operations, General Jumper advocated for the arming of Predator shortly after his arrival as Commander of Air Combat Command in February 2000.¹⁷ Under Clark and working with Big Safari,¹⁸ the Air Force initiated a program to arm Predator in mid-2000, with the first successful operational test of a Hellfire launched from a Predator on February 16, 2001.¹⁹

The pieces were now in place for the United States to have a weapons system capable of overcoming many of the traditional obstacles to airpower in small wars. Predator boasted an on-station time

http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01n296x136t/1/Kreuzer_princeton_0181D_11118.pdf

¹³ This is largely confirmed in the after action report on Operation Infinite Reach:

National Security Adviser Berger and others told us that more strikes, if they failed to kill Bin Ladin, could actually be counterproductive—increasing Bin Ladin’s stature. . . . There were no occasions after July 1999 when cruise missiles were actively readied for a possible strike against Bin Ladin. The challenge of providing actionable intelligence could not be overcome before 9/11.

THE MILITARY: STAFF STATEMENT NO. 6, *supra* note 8, at 2–9.

¹⁴ Walter J. Boyne, *How the Predator Grew Teeth*, AIR FORCE MAG., July 2009, <http://www.airforcemag.com/MagazineArchive/Pages/2009/July%202009/0709predator.aspx> (Big Safari is an office at Wright-Patterson Air Force Base, Ohio, famous for its scientific analysis of weapons systems integrated with acquisition and logistics).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

in excess of twenty-four hours, had onboard a sophisticated array of intelligence collection assets, and was networked via satellite data-link to human intelligence, signals intelligence, and intelligence fusion analysts who were positioned to support targeting operations in real time. In effect, although Predator would not be on the ground, it could theoretically hold territory as a near permanent fortress in the sky.

However, this was not without obstacles. The attacks of September 11, 2001 occurred before Predator was ready for operations, with Predator making its debut in Afghanistan in November 2001 in a strike against Muhammad Atef.²⁰ As the problem set moved from a terrorist organization with the likely limited aims of striking at key leaders, the RPA's mission was built and tested largely in real-world operations by multiple agencies with varying buy ins to the program. Although the Air Force played a key role in weaponizing the Predator, it was not until 2007 that the Air Force dramatically expanded its own program sufficiently in order to conduct wider operations.

A. *A Model for Effective Employment of Airpower*

Given the history of U.S. air operations and the lessons learned in World War II, the Cold War, Vietnam, the Balkans, and multiple Middle East-Central Asian conflicts, my research has led to the model, depicted in Table 1, of the modern air warfare system. This system is based on the elements of national power derived from Clausewitz's "remarkable trinity," summarized as the military, the government, and the population aligned with a warring faction. The Nuclear Revolution operates at the highest levels of conflict, in essence making direct warfare between major powers nearly obsolete as a tool of war. In all levels of conflict below this, the innovations of the Airpower Revolution enable precision targeting against military, infrastructure, and leadership targets in order to reshape the calculus for war and the capabilities of fielded forces from the operational level down. This represents the new system for air warfare.

Despite the issues with measuring the effectiveness of airpower quantitatively based on both the limited historic examples and the internal debates over what constituted a proper test of the effectiveness of air power, basic lessons can be derived qualitatively from analysis of the cases at hand. Airpower has historically been unable to effectively target non-fixed targets (generally human targeting) outside of a close-air-support role due to the transient nature of aircraft and the complex problem of actionable intelligence. This has made leadership targeting

²⁰ Jihan Anwar, Op-Ed., *Yemen: 'Open Skies' For Drone Strikes*, NAT'L YEMEN (Dec. 22, 2012), <http://nationalyemen.com/2012/12/22/yemenopen-skies-for-drone-strikes>.

ineffective in previous conflicts, but there are strong indications that successful “decapitation strikes” even in previous conflicts could be ineffective depending on how closely the personality of the leader was tied to the conflict.

Table 1: Model for Air Campaign Planning Across Spectrum of Conflict

| | Range of Target Sets | | |
|--------------|----------------------|--|-------------------------|
| | Population | Military | Leadership |
| Total Wars | Nuclear Deterrence | | |
| Limited Wars | | “Denial”: Cruise missiles, stealth, PGMs | Decapitation strategies |
| Small Wars | | “Signature Strikes” | “Personality Strikes” |

Robert Pape’s work on conventional bombing, while it predates many of the technological advances of the Airpower Revolution and by focusing on force employment vice deterrence, makes a compelling case for the use of coercive bombing against military forces in conventional limited wars.²¹ This strategy, which he terms *Denial*, focuses on attacking an enemy’s military strategy, rather than its civilian population.²² This makes intuitive sense almost by definition, as in general limited war is “limited” by the desire to constrain military action to achieve an objective without expanding the war above the nuclear threshold. Attacking or threatening to attack civilians or national leadership to coerce an adversary in such a conflict would greatly risk expanding the conflict and be politically unacceptable in any case where the level of military power applied is to be effective. Short of civilian vulnerability being perceived as very high, such a strategy is doomed to fail.

For small wars such as counterinsurgency, Pape’s conclusions about the weaknesses of leadership targeting for the purpose of a “decapitation strike” are less applicable as his model assumes the strategy of a nation-state, which he sees as resilient and broader-based than just the leadership.²³ Applying the lessons of such a model to a

²¹ See ROBERT A. PAPE, *BOMBING TO WIN: AIR POWER AND COERCION IN WAR* (1996).

²² *Id.* at 10.

²³ Pape’s model looks primarily at international conflict likely because of the wide consensus to that time that airpower’s kinetic role in small wars was limited. See Mark Clodfelter, *Forty-Five*

non-state actor is challenging as the essence of a counterinsurgency campaign is competition for leadership between rival factions—one or more insurgent groups, and a government with weakened legitimacy. Destruction of the leadership element vying to claim control of a state or territory from the established government is the ultimate objective of a counterinsurgency. At the same time, attacking civilian targets will be unlikely to achieve objectives in this form of fighting as well, as they would be perceived as too vulnerable lacking a military defense and may in cases be likely to sympathize with the over-matched campaign.

Academic scholars and airpower theorists alike remain divided over the true implications of such strikes as previously noted. I posit an expanded role for airpower in small wars when intelligence and technology is able to sufficiently separate insurgents, and in particular the key leaders of insurgency, from the population in which they “swim.” Mark Clodfelter is more skeptical, noting:

Against such a savvy opponent, those instances of isolation will be rarities. . . . American air commanders today cannot be expected to forgo the bombing option when insurgents attack US troops or when intelligence pinpoints “high-value” targets. Yet, those commanders—and their political leaders—must have a complete appreciation for the potential costs of such bombing and for whether the potential long-term price is worth the desired short-term gain. In certain cases, the costs may appear justified. For most, though, restraint is probably the prudent course of action.²⁴

Certainly valid advice and a reminder that airpower is unlikely to win a protracted campaign alone.²⁵ However, I believe it is rooted in the fundamental assumption that counterinsurgency is only won by eliminating the causes of insurgency rather than eliminating the insurgent force. Ultimately, I argue the latter must be a means to the former, and carefully executed, properly justified strikes to degrade the organizational capacity are vital to destroying its fighting effectiveness, which is necessary to restoring/building the legitimacy of the counterinsurgent.

The “causes” of insurgency will be almost universally present; the key issue is a collective action problem in mobilizing people to act against a perceived grievance. An active insurgency can and will readily move between causes—economic disparity, religious ideology, physical threat to civilians, etc., all in the name of the true underlying cause, the power struggle between the insurgent organization and the government. Removal of the organizational hierarchy threatening government

Years of Frustration: America's Enduring Dilemma of Fighting Insurgents with Airpower, 25 AIR & SPACE POWER J. 78, 85 (2011).

²⁴ *Id.* at 86.

²⁵ *Id.*

legitimacy in the near term is the highest priority, while alleviating causes of future insurgencies long-term must be addressed as well. David Kilcullen has likened an insurgency to a virus, with the key to defeating it being to treat and immunize the population to prevent its spread.²⁶ I, in contrast, liken it to a wildfire. It must be isolated and destroyed, with efforts to “clear brush” to remove fuel for future fires being a secondary, but long-term vital consideration. Trying to end a wildfire by removing the fuel for fire alone will be theoretically possible, but more likely a drawn-out, resource-intensive, and ultimately futile effort, much as many of our historic classic counterinsurgency cases have proved to be.

A key challenge for the RPA is the potential effectiveness of “personality strikes,” or strikes against a specific individual, where analysts identify the signatures of insurgent activity for the purpose of striking. Traditional models against state actors such as Pape would lead to the conclusion that signature strikes would be preferable to personality strikes as they more closely resemble a denial strategy. However, in the case of insurgency this logic is reversed: the leadership is more central to the movement in many cases than the organization as a transcendent and unifying force, and the difficulty in distinguishing between combatants and noncombatants renders such strikes harmful as they have the appearance of coercive bombing against civilians without significant justification which might compromise sourcing. This suggests an emphasis on personality strikes against non-state actors, and the curtailing of signature strikes, is necessary for effective RPA operations.

II. EVALUATING THE RPA

From 2004 through 2010, open source reporting indicates a steady increase in the use of Predator and other attack RPAs in U.S. air operations.²⁷ Of those operations, reports of U.S. RPA operations in Pakistan garnered the most media attention. Initially targeting key al-Qaeda leaders, reporting indicates a shift to lower-level figures and an increase in “signature strikes,” with some citations reporting as few as two percent of attacks focusing on high-value targets (HVTs).²⁸ As

²⁶ DAVID KILCULLEN, UNITED STATES COUNTERINSURGENCY: AN AUSTRALIAN VIEW, available at <http://www.smallwarsjournal.com/documents/australianview.pdf>.

²⁷ New Am. Found., *Drone Wars Pakistan: Analysis*, INT’L SECURITY, <http://natsec.newamerica.net/drones/pakistan/analysis> (last visited Oct. 25, 2014) [hereinafter *Drone Wars Pakistan*].

²⁸ STANFORD INT’L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC & GLOBAL JUSTICE CLINIC AT NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO

attacks declined in Pakistan since 2010, reported airstrikes increased in Yemen. Though the number of strikes is declining, the RPA appear to remain the weapon of choice in the U.S. global campaign outside of theaters where a significant ground presence exists.

While RPA activity in Pakistan and Yemen receive the bulk of media attention due to the controversies over military strikes in these states, they are in fact a small percentage of the overall employment of RPA strikes. The overwhelming majority have occurred inside Afghanistan, likely receiving less attention in the United States because their use is in a universally recognized war zone where the United States has the clear legal authority to operate. Similarly, RPAs were extensively used during the first phase of the air campaign involving the United States, which led to the overthrow of the Qaddafi regime.²⁹ Even though RPA strikes in Afghanistan receive less attention in the United States than similar strikes in Yemen and Pakistan, they still receive criticism from the international community as well as from factions within Afghanistan. The International Security Assistance Force in Afghanistan's (ISAF) airstrikes are responsible for an estimated thirty-five percent of civilian casualties from pro-Afghan Government forces,³⁰ and a series of incidents have led to the suspension of coalition air strikes in Afghanistan. UNAMA's annual report showed a dramatic increase in U.S. RPA activity in 2012 over previous years, combined with a total decline in the number of civilian casualties associated with airstrikes overall.³¹ Figure 1 depicts RPA operations from 2009 through 2012 for Afghanistan, Pakistan, Libya, and Yemen.

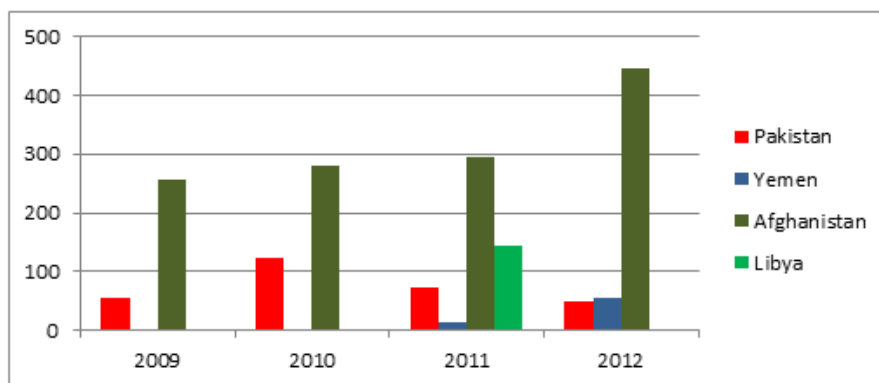
CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN vii, 12 & n.51 (2012) [hereinafter LIVING UNDER DRONES], available at <http://livingunderdrones.org/report>.

²⁹ Spencer Ackerman, *Libya: The Real U.S. Drone War*, WIRED (Oct. 20, 2001, 12:11 PM), <http://www.wired.com/dangerroom/2011/10/predator-libya>.

³⁰ UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN & UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, AFGHANISTAN ANNUAL REPORT 2012: PROTECTION OF CIVILIANS IN ARMED CONFLICT 35 (2013), available at <http://unama.unmissions.org/LinkClick.aspx?fileticket=K0B5RL2XYcU%3D>.

³¹ *Id.* at 32, 34.

Figure 1: Number of RPA Strikes by Year/Country³²



A. Disruption of Organizations

In terms of effectiveness, some literature is divided though a general consensus appears to exist some tactical-level success at a minimum. Looking at operations in Pakistan, Patrick B. Johnston and Anoop Sarbahi released a paper in February 2012 based on an analysis of open-source reporting from 2004 through 2010.³³ Their research identifies a negative correlation between violence and the frequency of RPA attacks during the period, suggesting that although violence remains elevated, targeted strikes may be contributing to the reduction of violence in the area.³⁴ Using a simple correlation between incidents of drone strikes followed by a panel data analysis with fixed effects and first differenced regression for administrative regions within the FATA, Johnston and Sarbahi demonstrate that, when controlling for local

³² *Id.* at 27; see New Am. Found., *Drone Wars Yemen: Analysis*, INT'L SECURITY, <http://natsec.newamerica.net/drones/yemen/analysis> (last visited Oct. 25, 2014) [hereinafter *Drone Wars Yemen*]; see also COMBINED AIR & SPACE OPERATIONS CTR., U.S. AIR FORCES CENT. COMMAND, COMBINED FORCES AIR COMPONENT COMMANDER: 2007–2012 AIRPOWER STATISTICS, available at <http://www.thebureauinvestigates.com/wp-content/uploads/2012/11/Combined-Forces-Airpower-Statistics.pdf> [hereinafter *Airpower Statistics*]. Data on Pakistan and Yemen was derived from New America Foundation and includes through the end of 2012. See *Drone Wars Pakistan*, *supra* note 27; *Drone Wars Yemen*, *supra*. Data on Afghanistan was taken from a U.S. document obtained from the Bureau of Investigative Journalism. See *Airpower Statistics*, *supra*.

³³ Patrick B. Johnston & Anoop K. Sarbahi, *The Impact of U.S. Drone Strikes on Terrorism in Pakistan and Afghanistan* (Feb. 11, 2014) (unpublished manuscript), available at <http://patrickjohnston.info/materials/drones.pdf>.

³⁴ *Id.* at 19, 20.

effects, RPA strikes are associated with declines in militant attacks, fatalities inflicted in militant attacks, improvised explosive device attacks, and suicide attacks.³⁵ Although the effects they find are real and significant, Johnston and Sarbahi note that their method of analysis looks solely at tactical, rather than strategic, impacts and that the effects observed were modest in scope.³⁶ Klaidman largely agreed, noting:

There was little doubt that the program was effective as a tactic; drone strikes routinely killed high-value targets on the CIA's hit parade. . . . [T]he scores of lower- and midlevel militants that were being eliminated devastated al-Qaeda's morale and seriously diminished its ability to train terrorists and plan operations. . . . [L]ess clear was the strategic value of the program.³⁷

This finding was reinforced anecdotally by Pir Zubair Shah, who observed that despite the conflicted views toward strikes in Pakistan (both within the government and in the population of the FATA), his interviews with Taliban and other insurgent operatives show the net effect on the organizations. RPAs can be heard from the ground (they are called *bbungana*, or “the one that produces a bee-like sound”), and their flights push Taliban commanders off the grid, as use of electronics or being seen outdoors might make them targets, which has led one commander to nap during odd hours, and fighters to not even sit together to speak in some cases.³⁸ As the prospect of RPA strikes has become accepted as part of the war by insurgents, the mere threat of force undercuts organization and communication, potentially yielding strategic battlespace impacts.³⁹

³⁵ *Id.* at 3, 14–16. Note that this study only examined the first week following strikes and did not look at long-term patterns to reach this conclusion.

³⁶ *See id.* A 2011 report by David A. Jaeger and Zahra Siddique was one of the earliest to examine the results of the RPA campaign based on data from the early years of the campaign in Pakistan. *See* DAVID A. JAEGER & ZAHRA SIDDIQUE, ARE DRONE STRIKES EFFECTIVE IN AFGHANISTAN AND PAKISTAN? ON THE DYNAMICS OF VIOLENCE BETWEEN THE UNITED STATES AND THE TALIBAN 2 (Inst. for the Study of Labor 2011). While their results found little to no tactical impact of the strikes (unlike later surveys by Johnston and Sarbahi which may show improvement in targeting over time), they did find a significant negative correlation in attacks more than a week after the strike, indicating a deterrent effect to future activities resulting from the presence of RPAs. From an effect-based standpoint, and along the lines of my earlier critiques of analysis of the effectiveness of bombing campaigns in general, the deterrent effect achieves the strategic aims of the program as much as the potential for decapitation.

³⁷ KLAIDMAN, *supra* note 10, at 118.

³⁸ Pir Zubair Shah, *The Drone War: View from the Ground*, in TALIBANISTAN 237–47 (Peter Bergen & Katherine Tiedemann eds., 2012).

³⁹ *See also* JACOB N. SHAPIRO, THE TERRORIST'S DILEMMA (2013) (providing an account of the balance of hierarchy and security in terrorist organizations). Disruption of hierarchy in secret organizations can significantly diminish strategic reach through lack of clarity among members of the chain of command and divisions between would-be successors, and can have a chilling effect on advancement.

Documents recovered from the bin Laden raid in 2012 further suggest that this strategy was effective in disrupting al-Qaeda in Waziristan, as Osama bin Laden himself cited the threat to al-Qaeda leadership as cause for them either to maintain a low profile to evade detection, or to leave the area altogether, and to never meet in visible locations. Bin Laden voiced such concerns in a letter dated October 21, 2010:

Regarding the brothers in Wasiristan in general, whoever can keep a low profile and take the necessary precautions, should stay in the area and those who cannot do so, their first option is to go to Nuristan in Kunar, Gazni or Zabil. I am leaning toward getting most of the brothers out of the area. We could leave the cars because they are targeting cars now, but if we leave them, they will start focusing on houses and that would increase casualties among women and children. It is possible that they have photographed targeted homes. The brothers who can keep a low profile and take the necessary precautions should stay, but move to new houses on a cloudy day. A warning to the brothers: they should not meet on the road and move in their cars because many of them got targeted while they were meeting on the road. They also should not enter the market in their cars. . . . Note: tell the brothers that the ban is not only to those who come by car. The amir should not meet anyone except the two carriers. The Americans have great accumulative experience in photography of the area due to the fact that they have been doing it in the area for so many years. They can distinguish between houses frequented by men at a higher rate than usual. Also, the visiting person might be tracked without him knowing. This applies to locals too.⁴⁰

Yemen may prove a weak precedent due to its own internal weaknesses and overreach which Osama bin Laden himself foresaw. Writing in May 2010, bin Laden expressed reservations about al-Qaeda operatives holding territory in Yemen, believing that they lacked the administrative and financial resources to control territory.⁴¹ Attempts to exercise control without providing for basic services would discredit the organization and draw increased opposition from both the Yemeni government and the United States, which in turn would bring about its downfall.⁴²

That said, the RPA could magnify the challenges for al-Qaeda's organization by placing local leadership under increased pressure to act against the direction of the al-Qaeda leadership in Pakistan, and by

⁴⁰ Letter from Osama bin Laden, al-Qaeda Founder, to Atiyya (Oct. 21, 2010), *available at* <http://www.jihadica.com/wp-content/uploads/2012/05/SOCOM-2012-0000015-Trans.pdf>.

⁴¹ Letter from Osama bin Laden, al-Qaeda Founder, to Atiyya (May 2010), *available at* <http://www.jihadica.com/wp-content/uploads/2012/05/SOCOM-2012-0000019-Trans.pdf>.

⁴² *Id.*

forcing the replacement of leaders closely tied to the broader al-Qaeda network with other, more tactically skilled leaders. This observation relates directly to the issue of leadership replacement, noted by Cronin. The common argument⁴³ is that target killing is short term, as leaders are replaceable and generally are replaced. This claim is, in a sense true, as another person is generally available to fill the leadership role. However, it is problematic due to issues over their effectiveness in managing an organization, as well as their tactical skills versus their value as strategists. This combines with the “scatter effect,” to lead a terrorist or insurgent organization from a robust hierarchy with strategic react to a diffused network. These effects combine in many cases to reduce their ability to carry out operations that meet the strategic objectives of the organization at large; the outcome airpower advocates of strategic bombing from Mitchell to Warden to Deptula have long been cited as the theory behind leadership and infrastructure strikes.⁴⁴

Early warnings of wide proliferation of RPAs similar to Predator also appear to be weak, which is unsurprising given the requirements of the weapons system beyond simply the unmanned aircraft. RPAs require airspace control to operate freely, which necessitates their use either internally against a domestic enemy or in cooperation with an advanced air force capable of gaining and maintaining air superiority sufficient to allow for RPA operations. Even with that condition met, the aircraft by itself does not have the capability to match Predator or Reaper. Recalling the four limitations on precision targeting (mechanical, intelligence, timeliness, and employment lag time) mentioned earlier, the argument in favor of the attack RPA is that it enables dynamic targeting by extending the strike window for operations to near infinity and reduces the time to strike enabling real-time operations. The platform in isolation does not have significant bearing on the reliability of the weapon employed or the reliability of intelligence, which require infrastructure and investment above and beyond the RPA platform. That is a key limitation for diffusion, but even advanced states that have the capabilities to address all four issues, the issues are reduced or eliminated. Mechanical failure, intelligence failure, obstacles to persistence through basing and flight restriction, and delays of even seconds both in release of weapons and in reaction time of operators to sensors (compounded by data link delays) all can

⁴³ See, e.g., Michael J. Boyle, *supra* note 1; Audrey Kurth Cronin, *Why Drones Fail*, FOREIGN AFF., July–Aug. 2013, available at <http://www.foreignaffairs.com/articles/139454/audrey-kurth-cronin/why-drones-fail>.

⁴⁴ See DAVID A. DEPTULA, AEROSPACE EDUC. FOUND., EFFECTS-BASED OPERATIONS: CHANGE IN THE NATURE OF WARFARE (2001), available at <http://www.ausairpower.net/PDF-A/AEF-AFA-Effect-Based-Operations-D.A.Deptula-2001.pdf>.

mean the difference between a successful strike and failure with negative strategic implications. For this reason, many analysts who were once fearful of rapid RPA proliferation now see some examples, such as Hamas' use of RPAs against Israel, as neither surprising nor worrying.⁴⁵

B. *Civilian Casualties*

One of the most significant and controversial points of discussion of RPAs is the number of civilian casualties that RPAs produce, which in turn influences the incidence of "blowback." Advocates of RPAs, and the RMA more generally, often regard the reduced levels of civilian casualties from precision weapons of war as a benefit. In early 2012, then-Counterterrorism advisor, and now CIA Director, John Brennan said of RPAs, "[i]t's this surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaeda terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential."⁴⁶ Limiting civilian casualties in a combat zone is vital, both for legal purposes within the laws of war and Just War criteria, as well as limiting the potential for blowback by the local population against military activities.

Aerial bombardment has, from its inception, been a controversial military tactic decried as immoral and thus, vulnerable to blowback, regardless of a manned platform or an RPA. The Hague Convention of 1907 sought to significantly curtail the use of coercive bombing by prohibiting the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended."⁴⁷ Germany, in its declaration of war on France in 1914, justified the action in part by falsely claiming that France had bombed Nuremberg.⁴⁸ In purely technical terms, the collateral damage caused by RPAs should be lower than that caused by piloted aircrafts, as the level of oversight due to reachback, the increased time on station, and the high-resolution imagery and advanced sensors for ground targeting that they possess enable RPAs to monitor a potential target area with greater situational awareness than a manned platform that has limited station time and

⁴⁵ See Alexander Smith, *Hamas' Drone Program Will Not Worry Israel, Experts Say*, NBC NEWS (July 15, 2014, 5:05 AM), <http://www.nbcnews.com/storyline/middle-east-unrest/hamas-drone-program-will-not-worry-israel-experts-say-n155341>.

⁴⁶ Adam Serwer, *What Obama's Counterterrorism Chief Won't Say About Drone Strikes*, MOTHER JONES (May 1, 2012, 1:25 PM), <http://www.motherjones.com/mojo/2012/04/john-brennan-drones-signature-strikes>.

⁴⁷ *Hague Convention on the Laws and Customs of War on Land* § II, ch. 1, art. 25, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

⁴⁸ See WALTER J. BOYNE, *THE INFLUENCE OF AIR POWER UPON HISTORY* 90 (2003).

fewer ground sensors.⁴⁹ Returning to the earlier mentioned four factors that impact the accuracy of strikes, RPAs lower the time between decision and strike to nearly zero, and smaller warheads limit the blast radius of the munition to focus the strike on the intended target. This significantly reduces two of the causes of error to nearly zero, leaving mechanical error and intelligence analysis as the two remaining factors that would lead to civilian casualties, which would be a common source of potential error with all other platforms.

In practice, other issues complicate the situation. The timing of the increase in RPA and air operations generally in 2010, coinciding with a rapidly expanding RPA fleet and demands to support an increase of ground force operations, may have led to a temporary spike in RPA collateral damage. Larry Lewis, a research scientist at the Center for Naval Analysis, and co-author Sarah Holewinski, conducted a classified study of the issue and determined that RPAs were significantly more likely to result in civilian casualties than a manned aircraft.⁵⁰ In an interview with *The Guardian*, Holewinski stated that they attributed this higher casualty rate to lower training for RPA pilots in avoiding civilian casualties:

These findings show us that it's not about the technology, it's about how the technology is used . . . Drones aren't magically better at avoiding civilians than fighter jets. When pilots flying jets were given clear directives and training on civilian protection, they were able to lower civilian casualty rates.⁵¹

Without access to the underlying data for the study, it is difficult to accurately evaluate the claims of the causal mechanism for the results. But, given the oversight of RPA operations from interviews I have conducted, to include the participation of legal advisers in a reachback capacity, the conclusion that RPAs are more likely to result in higher civilian casualties due to training standards appears flawed. There is no indication that RPA pilots receive less training on avoiding civilian casualties than their counterparts, and there is additional oversight to RPA missions in the feedback loop. This discrepancy could, however, reflect changes in RPA oversight since the period studied, which was limited to peak operations from mid-2010 to mid-2011. More likely, pressure to expand the number of operations to a greater reliance on

⁴⁹ See Larry Lewis & Sarah Holewinski, *Changing of the Guard: Civilian Protection for an Evolving Military*, 4 PRISM 57, 60 (2013), available at <http://www.ndu.edu/DigitalPubs/PRISM%204.2%20Final%20for%20Web.pdf>.

⁵⁰ *Id.*

⁵¹ Spencer Ackerman, *US Drone Strikes More Deadly to Afghan Civilians Than Manned Aircraft – Adviser*, THE GUARDIAN (July 2, 2013, 8:00 AM), <http://www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians>; see also Lewis & Holewinski, *supra* note 49 (summarizing their classified report).

“signature strikes” as opposed to “personality strikes” led to an increase in the error rate as the demand for RPA missions rose.

The timeframe was also a period in which there were a total of under 300 civilian casualties for all aircraft types and in which RPAs accounted for approximately 5% of the air campaign.⁵² Thus, for their publicly released assessment to be correct, RPAs would have been responsible for approximately 100 civilian casualties (a 30% rate) and manned aircrafts would have been responsible for 200 civilian casualties (a 3.9% casualty rate).⁵³ These small numbers, given the timeframe, further lead to issues of significance, given that a single airstrike, in Nangahar province in August of 2010 was responsible for as many as thirty civilian casualties.⁵⁴ Were an RPA responsible for this strike (unclassified data does not allow for a judgment), that strike alone would radically alter the overall numbers. These questions aside, the underlying survey demonstrates that both manned and remotely piloted aircrafts incur a risk of civilian casualties, and for one reason or another there was a higher casualty rate for RPAs, though the degree may not be as significant given the numbers. Denial of the program prevents those using RPAs from exploiting the gains of a strike, and yields the information battlespace to the adversaries to spin the information to their benefit with little to no response from the coalition. Thus, a tactical success can be turned into strategic defeat simply by failing to answer criticism.

Even against that backdrop, the claims of widespread “blowback” to U.S. operations also appear weak. Traditional counterinsurgency models see the risk of blowback as the major danger of an enemy-centric campaign, and Kilcullen noted that counterinsurgents who adopt an enemy-centric approach “risk chasing their tails and so exhausting themselves, while doing enormous damage to the noncombat civilian population, alienating the people and thus further strengthening their support for insurgency.”⁵⁵ This concern drove the United States toward population-centric counterinsurgency in Iraq in 2007, and later in Afghanistan. Reaching a definitive answer on the implications of blowback from the RPA campaign is difficult, given the covert nature of the campaigns. The New America Foundation and a joint effort by the Stanford and New York University (NYU) law schools

⁵² See Spencer Ackerman, *2012 Was the Year of the Drone in Afghanistan*, WIRED (Dec. 6, 2012, 12:24 PM), <http://www.wired.com/2012/12/2012-drones-afghanistan> (reporting on slides released by ISAF covering the air war in Afghanistan) for greater discussion. See also Kreuzer, *supra* note 12, at 248.

⁵³ Kreuzer, *supra* note 12.

⁵⁴ See NATO Expresses Regrets over Afghan Civilian Deaths in Military Operation, RTT NEWS (Aug. 5, 2010, 2:59 PM), <http://www.rttnews.com/1384558/nato-expresses-regrets-over-afghan-civilian-deaths-in-military-operation.aspx>.

⁵⁵ DAVID KILCULLEN, COUNTERINSURGENCY 9 (2010).

have examined the issue extensively and reached opposing conclusions with regard to Pakistan,⁵⁶ while Gregory Johnson and Christopher Swift represent the leading voices on opposing sides of the debate in Yemen, based largely on their experiences in the country and reviewing the anecdotes of others.⁵⁷

Empirically, Hudson, Owens, and Flannes base their critique of RPA effectiveness on recruitment and resentment.⁵⁸

Between 2004 and 2009, our research and databases compiled by others document a dramatic spike in deaths by suicide bombings in Afghanistan and Pakistan. While it is impossible to prove direct causality from data analysis alone, it is probable that drone strikes provide motivation for retaliation, and that there is a substantive relationship between the increasing number of drone strikes and the increasing number of retaliation attacks.⁵⁹

This correlation is based on databases compiled by RAND and by the University of Chicago's Project on Security and Terrorism. As presented, it sounds plausible that a correlation may exist that could be a basis to support this thesis, but in examining the data underlying the claim, the data appears to support the opposite conclusion as there is a negative correlation between RPA strikes and suicide attacks in Afghanistan. Figure 2 compares the Global Terrorism Database's results for suicide bombings in both Afghanistan and Pakistan and to New America Foundation's database on RPA strikes in Pakistan.⁶⁰ Suicide attacks in Afghanistan peaked in 2007 before beginning to decline, which coincides with the rise in RPA strikes in Pakistan that peaked in 2010. As RPA strikes declined in 2011, suicide attacks began to rise again. This correlation does not show a causal link between RPAs and the reduction in suicide attacks, and indeed, the rise in 2011, may be at least in part, a reaction to the RPA strikes which peaked the year prior. However, for RPA strikes to have caused the increase in suicide bombings prior to 2010, as stated by the source article, a positive correlation at minimum should have been observed. Meanwhile, the level of attacks has not skyrocketed, but merely returned to approximately their 2007 pre-RPA campaign levels.

⁵⁶ See LIVING UNDER DRONES, *supra* note 28.

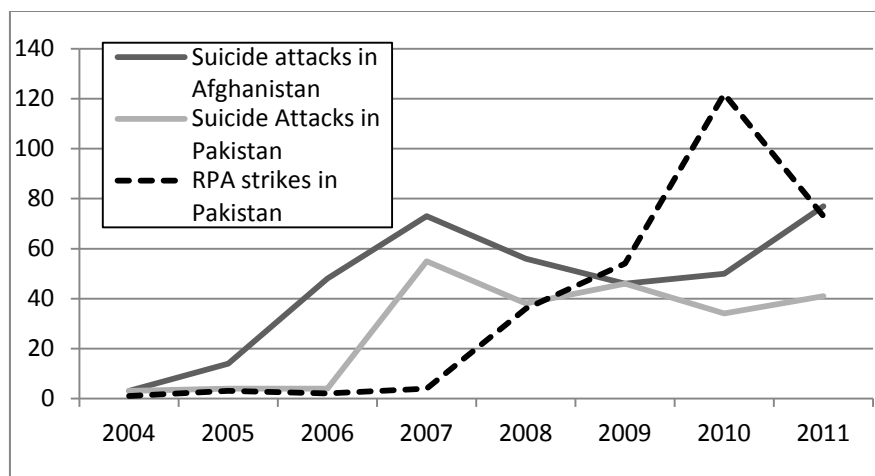
⁵⁷ See Christopher Swift, *The Drone Blowback Fallacy*, CHRISTOPHER SWIFT (July 1, 2012), <http://christopher-swift.com/publications/the-drone-blowback-fallacy>.

⁵⁸ See Leila Hudson et al., *Drone Warfare: Blowback for the New American Way of War*, 18 MIDDLE E. POL'Y COUNCIL (2011), available at <http://www.mepc.org/journal/middle-east-policy-archives/drone-warfare-blowback-new-american-way-war>.

⁵⁹ *Id.* (footnote omitted).

⁶⁰ The Project on Security and Terrorism only includes one month's data for 2011, so 2011 is excluded. The comparison to the other database is shown to note similar trends even where absolute numbers differ.

Figure 2: Suicide Attacks in Afghanistan & Pakistan vs. RPA Strikes in Pakistan⁶¹



The incidents of suicide attacks, if directly related to RPAs, may be due to an immediate “vengeance” response rather than blowback, which is a different phenomenon with different implications. A closer examination of the Pakistan strikes and their targets points to a problem in the anti-RPA argument regarding the creation of new enemies as a result of RPA strikes. Michael Boyle, a former adviser to President Obama and critic of the RPA program, noted that:

[f]ar from concentrating exclusively on Al-Qaeda, the US has begun to use drone strikes against Pakistan’s enemies, including the TTP, the Mullah Nazir group, the Haqqani network and other smaller Islamist groups. The result is that the US has weakened its principal enemy, Al-Qaeda, but only at the cost of earning a new set of enemies, some of whom may find a way to strike back.⁶²

Listed conspicuously among those groups is the Haqqani Network, an organization that has long been seen as the leading organization responsible for suicide bombings in Afghanistan.⁶³ The Project on

⁶¹ See *Drone Wars Pakistan*, *supra* note 27 (the New America Foundation database for RPA strike data). For suicide attack data, see *Chicago Project on Security and Terrorism Database*, CHI. PROJECT ON SECURITY & TERRORISM, http://cpostdata.uchicago.edu/search_new.php (last visited Oct. 25, 2014).

⁶² Boyle, *supra* note 1, at 12 (footnotes omitted).

⁶³ Siraj Haqqani imported the tactic in the 2003–2004 timeframe after observing its success in Iraq. The Haqqani network is more likely to work with factions outside of Afghanistan and is more likely to recruit foreign fighters to engage in attacks. See JEFFREY A. DRESSLER, INST. FOR

Security and Terrorism does not differentiate the Haqqani Network from the Taliban at large (which comprises the overwhelming majority at 350 total suicide attacks over the listed timeframe), and given the Haqqani Network's history and the number of specific incidents tied to the Haqqani Network it is clear for most observers that the network was a key enemy within Afghanistan well before the RPA strikes. Indeed, Jalaludin Haqqani has been a member of the Taliban Quetta Shura since 2003, and his influence has been critical to Taliban control of the pivotal Paktia region of Afghanistan.⁶⁴ The listing of the Mullah Nazir Group as an enemy distinct from al-Qaeda is also odd, as Mullah Nazir was a long-time Taliban leader who proclaimed himself to be a member of al-Qaeda and stated that the Taliban and al-Qaeda are one and the same.⁶⁵

The Pakistani case of “blowback” is further complicated by the multiple levels of violence occurring within Pakistan and division over blame of responsibility. In addition to the RPA campaign, Pakistan's Federally Administered Tribal Areas (FATA)⁶⁶ has long been an area where some of Pakistan's most hardened militants have found sanctuary.⁶⁷ In connection with campaigns in Afghanistan and elsewhere, the area is home to active fighting with both Afghan and Pakistani Taliban and the government of Pakistan, as well as numerous longstanding tribal disputes. In *Understanding FATA*, opposition to U.S. military operations in the FATA was measured at 85.3% of the population strongly opposed to a U.S. presence, but this compared to 79.5% opposing Arab and al-Qaeda fighters, 74% opposing Afghan Taliban fighters, and 72% strongly opposing Pakistani Taliban fighters.⁶⁸ When asked if RPA strikes were justified, strong majorities in both 2010 and 2011 of residents in the FATA said they were never justified (58.8% in 2010 and 62% in 2011), but 72% also believed foreign fighters/jihadis should be asked to leave when discovered.⁶⁹ RPAs are certainly hated by the local population who want them to stop, but the question of whether they are causing “blowback” in the traditional sense—driving the population toward the Taliban—is far more complicated.

THE STUDY OF WAR, AFGHANISTAN REPORT 6: THE HAQQANI NETWORK 14 (2010), available at http://www.understandingwar.org/sites/default/files/Haqqani_Network_0.pdf.

⁶⁴ *Id.* at 9–10.

⁶⁵ Bill Riggio, ‘Good’ Pakistani Taliban Leader Nazir Affirms Membership in al Qaeda, LONG WAR J. (May 4, 2011), http://www.longwarjournal.org/archives/2011/05/good_pakistani_taliban_leader_nazir_admits_membership_in_al_qaeda.php.

⁶⁶ See C. Christine Fair, *Drones, Spies, Terrorists, and Second-Class Citizenship in Pakistan*, 25 SMALL WARS & INSURGENCIES 205, 206 (2014), available at http://www.tandfonline.com/doi/abs/10.1080/09592318.2014.894061#.U_OQTPIdVEE.

⁶⁷ *Id.* at 224.

⁶⁸ NAVEED AHMAD SHINWARI, UNDERSTANDING FATA: 2011, at 87 (2012), available at <http://www.understandingfata.org/en/?p=4>.

⁶⁹ *Id.* at 100.

Figure 3: FATA - RPA Strikes vs. Blame for Suicide Bombings in Pakistan

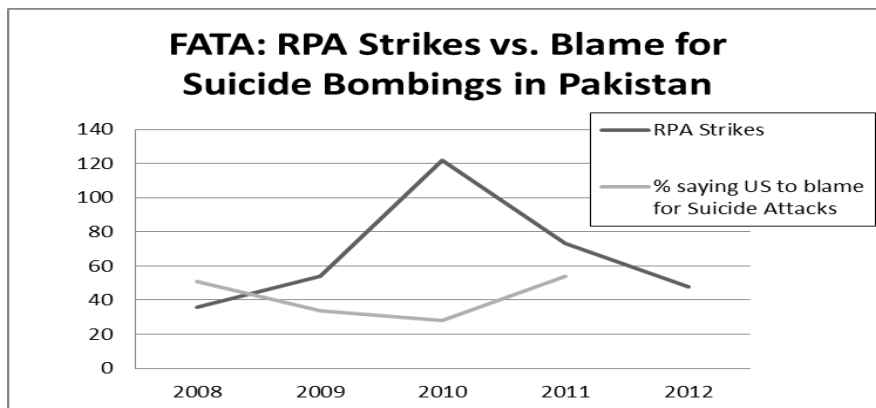
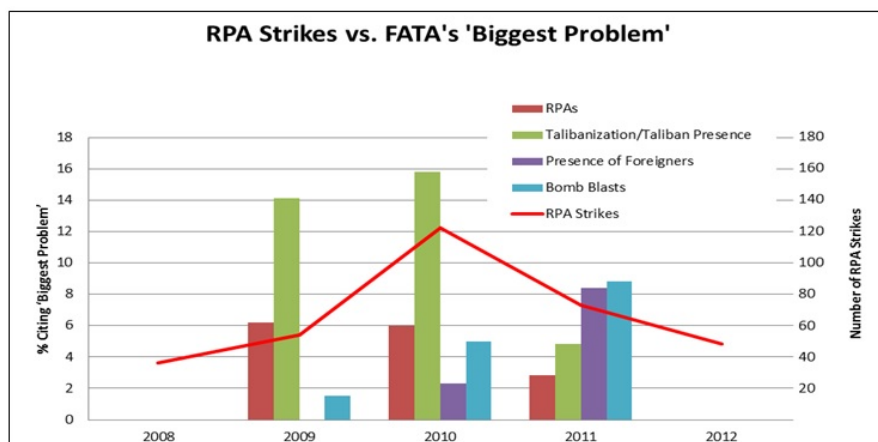


Figure 3 shows a correlation between the rise in RPA strikes in 2010 followed by an increase of people in the FATA that blame the U.S./Western influence for suicide bombings in Pakistan, but as with the actual number of suicide attacks in Afghanistan and Pakistan in Figure 2, this correlation is complicated by the fact that the numbers have largely returned to their pre-RPA campaign levels, rather than a significant spike. In reading through the remainder of the document for qualitative evidence, I compared the number of RPA strikes with a year-by-year comparison of the results of *Understanding FATA's* survey on what people within the FATA saw as the biggest problem, as Figure 4 does.⁷⁰ While most individuals saw issues like crime and unemployment as the most important, Figure 4 shows that people were generally more likely to list either the Taliban or some variation on “foreign fighters” or “bomb explosions” as the biggest problem in the FATA.

⁷⁰ *Id.* at 59.

Figure 4: RPA Strikes vs. “FATA’s Biggest Problem”



The two charts to an extent appear contradictory, and point to the more nuanced problem that exists within small wars. Multiple parties are involved, parties received differing share of blame for conduct that has negative impacts on the population such as collateral damage, but the overall impact is not necessarily a zero-sum game. Luke Condra and Jacob Shapiro looked at the issue of blame for such incidents in Iraq from 2004–2007, and found the Coalition was more likely to be punished by the population than insurgents were for indiscriminate violence.⁷¹ Applying that logic to RPA campaigns, it is logical that the populations would disproportionately blame the United States for the conduct of strikes and the resulting collateral damage, though this does not necessarily imply that they would take up arms to fight alongside the Taliban.

In Yemen, attribution of blowback to RPAs is complicated by alternative explanations for the growth of al-Qaeda in the Arabian Peninsula during the 2007–2011 timeframe. Accounts of the size and strength of AQAP vary, but generally place the strength of the group as rising from around 300 in early 2009 to 700 in mid-2012, or as high as 1000, per Gregory Johnsen’s account.⁷² RPA critics point to a correlation in these rising numbers with the increase in RPA strikes. In this case, unlike the aforementioned suicide bombing case, the positive correlation is present. This simple correlation, however, omits a number

⁷¹ Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Impact of Collateral Damage*, 56 AM. J. POL. SCI. 167, 168 (2012).

⁷² Michael B. Kelley, *Obama’s Drone War in Yemen May Be Al Qaeda’s Best Recruitment Tool Ever*, BUS. INSIDER (May 30, 2012, 1:42 PM), <http://www.businessinsider.com/obamas-covert-drone-war-in-yemen-prompting-more-terror-2012-5>.

of alternative explanations for the rise in AQAP's membership over the same timeframe, and provides little supportive data—beyond anecdotes—to demonstrate that the increase in RPA strikes drove the increase in AQAP membership. The drawdown of U.S. military operations in Iraq, al-Qaeda's strategic planning, the global financial crisis, the Arab Spring, and the resulting change in the Yemeni government all coincided with rising al-Qaeda recruitment numbers, which actually appear to have preceded the U.S. RPA campaign. The U.S. RPA campaign hit its peak in Yemen in 2012 with forty-six RPA strikes and nine additional air strikes per New America Foundation's database,⁷³ yet the statistic that AQAP's strength has risen from about 300 to nearly 1000 has been readily repeated by critics of U.S. intervention since 2010 with little evidence to show a dramatic rise in AQAP's strength in that time period.⁷⁴

Islamist militancy in Yemen long predates the formation of al-Qaeda in the Arabian Peninsula in 2009, notably the 2000 attack on the USS Cole. During the Iraq war, Yemenis constituted a major share of foreign fighters in the conflict, with combined numbers from Iraq and Afghanistan showing that Yemen produced the third highest number of foreign fighters per capita, behind only Libya and Saudi Arabia.⁷⁵ As the United States drew down forces in Iraq during the 2008–2009 timeframe, violence began to increase in Yemen as fighters from Iraq returned home.⁷⁶ At the same time, Saudi Arabia was executing a significant crackdown on al-Qaeda within their territory, virtually eliminating the terrorist threat within its boundaries during that same timeframe.⁷⁷ “The quieter it is in Iraq, the more inflamed it is here,” as

⁷³ *Drone Wars Yemen*, *supra* note 32.

⁷⁴ In one interview in August of 2013, Gregory Johnsen cited a State Department report, stating “[a]nd yet what we have seen over the past three-and-a-half years is that AQAP has gone from a group of about 200 to 300 people on Christmas Day 2009 to, according to the U.S. State Department, more than a few thousand fighters today.” *Yemen Scholar Says U.S. Drone Strikes May Have Driven al-Qaida Membership*, PBS NEWSHOUR (Aug. 6, 2013), http://www.pbs.org/newshour/bb/terrorism-july-dec13-yemen2_08-06. However, State Department reports from that time still listed as the most current as of this date states “[a]lthough it is difficult to assess the number of AQAP's members, the group is estimated to have close to one thousand members.” OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2012: CHAPTER 6. FOREIGN TERRORIST ORGANIZATIONS (2013), *available at* <http://www.state.gov/j/ct/rls/crt/2012/209989.htm>.

⁷⁵ Clinton Watts, *Beyond Iraq and Afghanistan: What Foreign Fighter Data Reveals About the Future of Terrorism*, SMALL WARS J. (Apr. 17, 2008, 4:27 AM), <http://smallwarsjournal.com/jrn/art/beyond-iraq-and-afghanistan>.

⁷⁶ See the Council on Foreign Relations' backgrounder on terrorism in Yemen for more information. Jonathan Masters & Zachary Laub, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369> (last updated Aug. 22, 2013).

⁷⁷ Saudi Arabia's crackdown has been criticized for extending well beyond al-Qaeda to all political dissent within the Kingdom, David Mizner, *The Saudi Monarchy's Harsh Crackdown on Dissent*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/msnbc/the-saudi-monarchys->

Yemeni fighters travel back and forth, said Nabil al-Sofee, a former spokesman for a Yemeni Islamist political party” in 2008.⁷⁸

The return of fighters to Yemen as well as additional al-Qaeda operatives pushed out of Saudi Arabia coincided with an increase in political instability in Yemen, which peaked in February 2012 with the removal of President Ali Abdullah Saleh. This political crisis cannot be separated from a simultaneous economic crisis, wherein many Yemenis faced water, electric, and food shortages over much of the period. Inflation rose by conservative estimates of between 20% and 30%, GDP contracted by 7.8% in 2011 as oil output declined to 180,000 barrels/day, versus 250,000 before the crisis.⁷⁹ All of these factors combined to form a perfect storm of grievances that al-Qaeda in the Arabian Peninsula was positioned to exploit, with RPA strikes emerging late in al-Qaeda’s growth as a factor that might affect recruiting.

Overall, the RPA program appears to be yielding tactical successes with unclear strategic impacts. Civilian casualties are a reality and will be an inevitable part of any bombing campaign, with the likelihood of employment strategies rather than the RPA itself being responsible for an increase in civilian casualties in the 2010 timeframe. The RPA is likely being used as a tool in recruiting, but the evidence to suggest widespread blowback in response to U.S. RPA operations is as ambiguous at this time as is the evidence of positive strategic impacts from the program. More so than a technical challenge, the main obstacles to successful operations are the secrecy surrounding the program, which inhibits command-and-control, oversight, and the ability to exploit tactical gains of strikes. This secrecy, I argue in the next section, results from the gap in international law that would clarify the legality and restrictions on such strikes in addition to the argument for expediency.

III. NON-INTERNATIONAL CONFLICT AND TARGETED KILLING

In examining the RPA from a practitioner’s standpoint, I observed what appeared to me to be a paradox in criticism in the employment of RPAs in comparison with chemical weapons, which were also being

harsh-crackdown, but those efforts have largely seen the elimination of al-Qaeda threats from domestic sources, with Yemen being the primary base for attacks against Saudi Arabia. Gerald Butt, *Saudi Arabia’s al-Qaeda Challenge*, BBC NEWS (Sept. 8, 2012, 7:34 PM), <http://www.bbc.com/news/world-middle-east-19517476>.

⁷⁸ Ellen Knickmeyer, *Attack Against U.S. Embassy in Yemen Blamed on Al-Qaeda*, WASH. POST, Sept. 18, 2008, at A1.

⁷⁹ TOBIAS THIEL, LONDON SCH. ECON. IDEAS, YEMEN’S ARAB SPRING: FROM YOUTH REVOLUTION TO FRAGILE POLITICAL TRANSITION 43, 45 (2012), available at http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR011/FINAL_LSE_IDEAS_YemensArabSpring_Thiel.pdf.

debated at the time in the context of Syria. At a time that the Assad regime in Syria was being criticized for using chemical weapons⁸⁰—which, like many weapons, are considered a violation of the laws of war because they terrorize civilian populations by being both disproportional and indiscriminate—the RPA seemed to be criticized for terrorizing the population through “assassination,” by being too discriminate. As I read the arguments in greater detail, it became clear that the real dilemma was not the application of the wartime standards of proportionality, but the fact that the RPA was being judged by two different sets of criteria based not on how the observers viewed the RPA, but how they viewed the conflict itself. If it is in a war, discrimination is good and the data evaluated earlier shows that the RPA is at least on par with, and under certain conditions better than, manned bombers. If it is not in a war, however, then bombing is not sufficiently discriminate and lacks the process of law that should be exhausted before use of lethal force. The effect of the Airpower Revolution is to return some types of warfare to a highly-specialized endeavor with the goal of capturing or killing key individuals, much as it was before the Infantry Revolution. This is nearly impossible to justify within a system of international law devised for nation states within the framework of war post-Infantry Revolution. Rethinking the law, rather than the tools, is essential.

Much of the RPA debate focuses on the underlying argument of whether RPA strikes constitute a legitimate act of war or whether they constitute state-sanctioned murder. Medea Benjamin,⁸¹ Nick Turse, and Tom Englehardt⁸² fall into the latter category, with near constant references in their works to strikes as “assassinations” and “murder by remote control.” Kenneth Anderson, in contrast, takes the former position readily defining strikes in the context of a U.S. war, while arguing that their capabilities make them both ethical and effective.⁸³ This fundamental divide is mirrored internationally, with officials in the United States maintaining that this is a war, while allies abroad characterize anti-terrorism as largely a law enforcement issue.⁸⁴

⁸⁰ See Joby Warrick, *More Than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, WASH. POST (Aug. 30, 2013), http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html.

⁸¹ See MEDEA BENJAMIN, *DRONE WARFARE: KILLING BY REMOTE CONTROL* (2012).

⁸² See NICK TURSE & TOM ENGELHARDT, *TERMINATOR PLANET: THE FIRST HISTORY OF DRONE WARFARE 2001–2050* (2012).

⁸³ Kenneth Anderson, *The Case for Drones*, COMMENTARY (June 1, 2013, 12:00 AM), <http://www.commentarymagazine.com/article/the-case-for-drones>.

⁸⁴ President Bush first used the phrase “War on Terrorism” in unscripted remarks on September 16, 2001 and more prominently on September 20, 2001, declaring “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” George W. Bush, President of the U.S., Address to Congress Following 9/11 (Sept. 20, 2001), available at <http://edition.cnn.com/2001/US/09/20/gen>.

Defining whether these strikes are acts of war is central to the debate, and must be examined first to develop a legal framework for the employment of RPAs.

The *Jus ad Bellum* criteria have been refined over the years through both philosophy and codification in international law, today being described generally as: “having just cause, being a last resort, being declared by a proper authority, possessing right intention, having a reasonable chance of success, and the end being proportional to the means used.”⁸⁵ Historically, in wars between states, a “declaration of war” satisfied the requirements of *Jus ad Bellum* tradition by stating the causes of war, declared by proper authority within the state as defined by domestic law.⁸⁶ The Hague Convention of 1907 formalized the requirement of issuing a “declaration of war” prior to initiating hostilities between states and notifying neutral states of the existence of a state of war.⁸⁷ However, the ratification of the U.N. Charter and the decline in interstate conflicts post-World War II have led a number of analysts to conclude, given the common understanding of declarations of war as a matter of inter-state conflicts, that declarations of war as commonly understood may be obsolete.⁸⁸

bush.transcript. This was the rationale maintained throughout the Bush presidency, reinforced by the 9/11 Commission Report, which stated “[c]alling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably Afghanistan. The language of war also evokes the mobilization for a national effort.” NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363 (2004), available at <http://govinfo.library.unt.edu/911/report/index.htm>. President Obama offered similar justification in calling to define and scope the character of the war at his speech to the National Defense University. Barack H. Obama, President of the U.S., Remarks by the President at the National Defense University (May 23, 2013) [hereinafter Remarks by the President], available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. In contrast, the Christian Science Monitor noted in 2004 that Europeans “continue to believe that the best counterterrorism work is done through police intelligence and cooperation. And they believe that characterizing the fight as a ‘war’ only antagonizes the populations that have produced terrorist groups and makes it harder to address the root causes of terrorism.” Howard LaFranchi, *US vs. Europe: Two Views of Terror*, CHRISTIAN SCI. MONITOR, Mar. 18, 2004, at 1.

⁸⁵ Alexander Moseley, *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/justwar> (last visited Oct. 25, 2014).

⁸⁶ Often the monarch historically, but often today residing with the parliament or legislature in democratic states. Article 1 of the U.S. Constitution places this power solely in the hands of Congress. U.S. CONST. art. I, § 8, cl. 11.

⁸⁷ *Hague Convention III Relative to the Opening of Hostilities* art. 1, Oct. 18, 1907, 26 Stat. 2259, 205 Consol. T.S. 263, available at http://avalon.law.yale.edu/20th_century/hague03.asp.

⁸⁸ A report prepared for the Parliament of the United Kingdom stated:

The United Kingdom has made no declaration of war since that against Siam (modern Thailand) in 1942, and it is unlikely that there will ever be another. Developments in international law since 1945, notably the United Nations (UN) Charter, including its prohibition on the threat or use of force in international relations, may well have made the declaration of war redundant as a formal international legal instrument (unlawful recourse to force does not sit happily with an idea of legal equality). The courts have recently decided that, as a matter of our constitutional law, the United Kingdom is not

Prior to their codification in the 1900s, the *Jus ad Bellum* criteria were observed under common international law as a means for reinforcing the status quo of the state actor being the sole authority for waging war as the principle actor in the international community; war “was an attribute of sovereignty and was lawful when waged on the orders of the ruler, who was the sole judge of the reasons which prompted him to take up arms.”⁸⁹ Absent sovereignty, there is no authority to wage war and thus the actions of belligerents would ultimately be the responsibility of the sovereign from which the hostilities originated. This model of state responsibility has in part framed the war on terrorism, particularly President Bush’s statement of 20 September 2001.

We will starve terrorists of funding, turn them one against another, drive them from place to place until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists.⁹⁰

The challenge has come with states that are either ambiguous in their positions, unwilling to publicly support the tools of counterterrorism used by the United States, or fearful of a domestic backlash for choosing sides in which the United States sees a need to intervene.⁹¹

The *Jus ad Bellum* criteria have been codified in many ways into international law to define and limit wars between nation-states, but applying this state-based derivation of “Just War” criteria to non-state conflicts serves to confuse, rather than clarify, the issues that the law seeks to address. International norms, and eventually international law, must be shaped to address the realities of international non-state conflict. François Bugnion, writing in the *Yearbook of International Humanitarian Law*, noted that the framework for international law has incorporated *Jus in Bello* criteria for the conduct of war within non-state conflicts through both treaties and customary international law, while there is room to doubt similar accommodations have been made for *Jus*

at war with Iraq because there has not been a declaration of war. In this report, when we use the word “war,” we use it in the popular sense, conscious of its limitations as a definition suitable to our purposes in the modern world.

SELECT COMMITTEE ON THE CONSTITUTION, WAGING WAR: PARLIAMENT’S ROLE AND RESPONSIBILITY, 2005-6, H.L. 236-I, ¶ 10 (U.K), available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf>.

⁸⁹ François Bugnion, *Jus ad Bellum, Jus in Bello, and Non-International Armed Conflicts*, 6 Y.B. INT’L HUMANITARIAN L. 167, 172 (2003).

⁹⁰ Bush, *supra* note 84.

⁹¹ Pakistan is the most cited example of this dilemma, and Yemen is to a lesser extent as the Presidents of Yemen have supported U.S. operations openly while they have been strongly rebuked both by Parliament and by cabinet ministers. Kreuzer, *supra* note 12.

ad Bellum criteria.⁹² The U.N. Charter is ambiguous with respect to the issue of Civil War, recognizing both the rights of peoples for self-determination as well as the rights of states to suppress internal rebellion to include resorting to the use of armed force: “There is therefore a set of norms regulating the recourse to armed force in non-international armed conflicts, although those rules are still rudimentary and state practice is not always consistent.”⁹³ This lack of consistency in applying the rules of *Jus ad Bellum* leads to the differing opinions of RPA observers as to whether their use constitutes acts of war. Often for purposes of expediency, state actors have used this gap in norms to take the advantage of using wartime powers against opponents while denying their opponents the benefits of combatant status under the law. Defining when a Non-International Conflict begins is vital to closing this gap in the law, not just as it applies to RPAs, but to numerous other related issues as well.

A. U.S. War Powers and Proper Authority

As noted by the authors of the National War Powers Commission, the war powers of the United States have suffered from two centuries of confusion,⁹⁴ owing to the division of powers between Congress and the President. Congress is empowered “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”⁹⁵ in addition to its other Article I powers to raise an army and maintain a navy. Meanwhile, the President is designated “Commander in Chief” of the armed forces when in federal service and has implied executive powers of national defense.⁹⁶ Unlike other significant constitutional questions, the Judiciary has largely deferred the debate to the political realm, leaving ambiguity over the status of

⁹² Bugnion, *supra* note 89, at 167. Bugnion notes that the incorporation of *Jus in Bello* to non-state conflicts to include civil wars and rebellions is itself a relatively recent phenomenon with states historically rigorously adhering to Just War traditions in international conflicts while ignoring them in domestic conflicts. The law for much of the past few centuries, was a contractual agreement between parties—states—and not applicable to non-contracting parties. The norm of recognizing rebellion as belligerency subject to *Jus in Bello* is first seen in the American Revolution, and again in 1847 during the Swiss Civil Conflict and in the 1860s with the U.S. Civil War, but fell into disuse in the early 20th Century with the Spanish and Russian conflicts. It was not until the adoption of Article III of the Geneva Conventions of 1949 that *Jus in Bello* was formally established as applying in civil conflict. *Id.*

⁹³ *Id.* at 168–70 (footnote omitted).

⁹⁴ MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT 12 (2008) [hereinafter NATIONAL WAR POWERS COMMISSION REPORT], available at <http://web1.millercenter.org/reports/warpowers/report.pdf>.

⁹⁵ U.S. CONST. art. I, § 8, cl. 11.

⁹⁶ See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 94, at 13.

war powers. Congress has only declared war in five conflicts,⁹⁷ relying on other means to authorize and fund armed conflicts outside an Article I declaration of war. As previously noted, most of the debate surrounding war powers surrounds this argument over who has the power to declare and to wage war, rather than the underlying purpose of a declaration of war beyond as an authorization of force.

The challenge for the United States in establishing norms for the use of force against non-state actors within such states, compliant with traditional understanding of *Jus ad Bellum* is twofold: establishing a clear framework in domestic law/constitutional structure for identifying a proper authority for declaring a state of conflict, and identifying a means of using such a declaration to scope the conflict in order to comply with the principles of having a reasonable chance of success, and the end being proportional to the means used. To date, the authority has largely been extra-constitutional, with Congress authorizing the President to use force against the organizations that attacked the United States on September 11th, 2001, and their allies, but deferring on specifically defining who those organizations are and defining any geographic boundaries for the conflict. This creates a situation where domestic law in the United States regards the President's use of force as lawful, but fails to satisfy international criteria for armed conflict across state borders.

The use of an Authorization for Use of Military Force (AUMF) is not new, and has been used by the U.S. government to engage in combat actions more often than formal Declarations of War. The first combat actions involving U.S. forces—the Quasi-War with France from 1798–1800, and the First Barbary War of 1802—were fought under authorization from Congress for the President to use the U.S. Navy in a

⁹⁷ The War of 1812, The Mexican War (1846), the Spanish-American War (1898), World War I (two declarations, one with Germany and one with Austria-Hungary), and World War II (six declarations in 1941 and 1942, with Japan, Germany, Italy, Bulgaria, Hungary, and Romania). *Official Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Oct. 25, 2014).

defensive role against aggressive states.⁹⁸ The U.S. Congress has issued similar authorizations in the Second Barbary War,⁹⁹ Vietnam,¹⁰⁰ and the Gulf War of 1991, among others.¹⁰¹ Congress has further funded actions, but not explicitly authorized the use of force, in the Korea War, the Bosnia War, and the Libyan intervention Operation Odyssey Dawn.¹⁰² Unlike these cases, however, the U.S. involvement in the war on terror has not always involved U.S. forces intervening in what is commonly recognized as an active war zone, nor has it confined within a single sovereign entity—as has been the case with previous authorizations.¹⁰³ In the case of Korea and elsewhere, an international

⁹⁸ For further information on the 1798–1800 Congressional actions, see J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465 (2005). In the case of the First Barbary War, President Jefferson was empowered by Congress to establish defenses but stated in his first annual address that:

[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel [the schooner *Enterprise*], being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries.

Thomas Jefferson: First Annual Message December 8, 1801, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29443> (last visited Oct. 25, 2014). This led to a congressional authorization, but not a formal declaration of war, to commence offensive actions against Tripoli.

⁹⁹ See *American President: A Reference Resource*, MILLER CENTER OF PUB. AFF., <http://millercenter.org/academic/americanpresident/keyevents/madison> (last visited Oct. 25, 2014).

¹⁰⁰ H.R.J. Res. 1145, 88th Cong. (1964).

¹⁰¹ H.R.J. Res. 77, 102d Cong. (1991).

¹⁰² See Louis Fisher, Ryan C. Hendrickson, and Stephen R. Weissman’s letter to Foreign Affairs providing additional insights into this Executive/Legislative balance with respect to undeclared wars. Louis Fisher, Ryan C. Hendrickson & Stephen R. Weissman, Letter to the Editor, *Congress at War*, FOREIGN AFF., May–June 2008, available at <http://www.foreignaffairs.com/articles/64297/louis-fisher-ryan-hendrickson-and-stephen-r-weissman/congress-at-war>.

¹⁰³ The examples listed in this section largely represent cases of what Professor Saikrishna Prakash categorizes under the pragmatic theory of war: the declaration of war by another state alleviates the need of the second state to declare war in response as a state of war already exists. Prakash himself disagrees with this view arguing that a “categorical theory” of war is what the Constitution intended, expanding a declaration of war to also include Congress’s ability to authorize a war after another state has declared war on the United States. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45 (2007). This perspective can be critiqued by the notes from the Constitutional Convention cited by William Van Alstyne, where the original text granting Congress the power to “wage war” was struck in favor of “declare war,” “leaving to the Executive the power to repel sudden attacks.” This, combined with the history of congressional authorizations for force, reinforces a normative compromise position. William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972). Prakash sees the history of response declarations of war (as was the case in World War II) as evidence that the pragmatic theory is flawed, but more likely is a recognition that the legal status is ambiguous and so in a number of cases the response declarations of war served to remove any debate between the legal schools of thought and to reinforce national unity, rather than to satisfy an actual legal requirement.

entity recognized a conflict zone and recognized a need for forces to re-establish peace under existing treaties. In the more complicated cases of Vietnam, Bosnia, and Libya, the actions were clearly tied to interventions in recognized sub-national conflicts, with specific legislation authorizing intervention, and with international pressure to confine the conflict within specific states. International norms provided a means of generally recognizing civil war based on the levels of violence, and thus, these uses of force represented intervention in active wars under a pragmatic theory of war.

Rather than a single conflict based on one legal theory, the war on terror has been justified based on a hodgepodge of justifications, with each bent to the unique circumstances of the specific campaign. It has been primarily justified domestically by a single authorization as a war without boundaries against a transnational entity, but has been often rationalized as a series of interventions within specific nation states. President Bush's previously mentioned state sovereignty and responsibility argument represents one example of this approach. The latter justification has the strongest legal tradition, but generally it is sanctioned either through a request for forces by the state, or when the intervention is explicitly emphasized by the entity with the war-declaring powers. The former represents a new idea for fighting transnational wars, with no concrete precedent in international norms or domestic law. The war on terrorism is often talked about as an international non-state conflict rhetorically, but is for legal purposes a series of non-international armed conflicts.¹⁰⁴ Absent open permission for intervention in a civil war/rebellion, intervention within a sovereign state without formal notification and justification thus appears to violate the *Jus ad Bellum* criteria.

This challenge is evident with the justifications for war provided by both Presidents Bush and Obama. "Just Cause" has been defined by last resort, self-defense, and proportionality. President Obama, in his often cited speech at the National Defense University, made this explicit: "So this is a just war—a war waged proportionally, in last resort, and in self-defense."¹⁰⁵ Absent from these statements is the legitimate authority to declare war internationally, as well as statements on the probability of success based on a broader framework to describe the scope of the conflict. From a pragmatic theory of war perspective, the president

Prakash, *supra*. I would argue instead that Congress's war powers require its consent to continue to make war after a reasonable period to legislate such action, and to declare war absent an existing state of war.

¹⁰⁴ This is the view adopted by the U.S. Supreme Court in *Hamdan v. Rumsfeld* 548 U.S. 557, 628–32 (2006), and my review of the literature of the laws of war since that time referring to the laws governing the war on terror shows this as the primary legal model.

¹⁰⁵ Remarks by the President, *supra* note 84.

could rely on Article II authority to wage a war which had already been declared, but this too is problematic as neither bin Laden's fatwas declaring wars against the United States nor the attacks of September 11, 2001 could be declared acts of war as bin Laden, a non-state actor, cannot declare war because he is not a recognized sovereign authority. In this sense, al-Qaeda is unlawfully waging war, which can justify various defensive measures and strikes against specific imminent threats, but a "state of war" would not exist because no authority has declared it and no recognized international norm encompasses such a conflict.

The AUMF authorizes the President to use military "force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹⁰⁶ Through the lens of *Jus ad Bellum*, it fails by not identifying the nations, organizations, or persons, nor does it require that the president publicly identify those entities or the justification for tying them to the attack. Implicitly, it is sufficient for the war in Afghanistan and against both the main al-Qaeda organization and the Taliban as they were widely recognized as being responsible for the attack, but beyond that the ambiguity leads to its insufficiency. For Congress to provide a list through legislative means would be complicated as—with the main enemies being organizations and networks—those organizations could reorganize and rename themselves to avoid the legal restrictions of such legislation—a factor that would not be present with a state actor and the continuity of sovereignty. Congress would also lack the timely intelligence to make such decisions.

Violating *Jus ad Bellum* criteria in such a manner is problematic because the purpose of the criteria is to limit the scope of conflict in order to increase the likelihood that it results in a lasting peace. War conducted when proper authority is in question, and without formal notification, presents challenges to ensuring proportionality of response and to having a reasonable chance of success. This is not just a complicating factor from an academic perspective, but it makes it difficult for parties to the conflict to understand the reasons for intervention, to justify that the military tools being used are proportional to the threat, and to develop a path to a peaceful post-war settlement. If the goal is annihilation of the opposing force, identifying what constitutes the opposing force is a necessary precondition. If the

¹⁰⁶ Pub. L. No. 107-40, 115 Stat. 224 (2001).

goal is a negotiated settlement, a starting position for negotiations in the form of a specific grievance is similarly required.¹⁰⁷

B. *Declarations of War, Disclosure, and the RPA Debate*

The lack of a declaration of war has led to a number of problems in assessing the RPA campaign, notably a failure to appreciate the purpose and scope of a declaration of war and how it differs from an authority to wage war. Michael Boyle argued that because a state of war does not exist between the United States and states such as Pakistan or Yemen, conducting operations in those territories cannot be considered legitimate wartime operations.¹⁰⁸ This is problematic as the U.S. grievance is not with those states, but with non-state entities operating within their territories. A traditional declaration of war is therefore not applicable, but alternative standards for conducting military operations in the territory of another country such as Foreign Internal Defense also do not necessarily apply, especially without disclosure or open discussion of the operations.

In the case of Pakistan and Yemen, currently available reporting suggests varying levels of cooperation between those governments and the U.S. government in fighting what amounts to a domestic insurgency. The first RPA strike in Pakistan, which took place in June 2004, killed Nek Muhammad—a tribal leader and fierce opponent of the Mubarak regime who Pakistan had unsuccessfully sought to kill on earlier missions.¹⁰⁹ Per reporting by the New York Times' Mark Mazzetti, the United States was granted authorization to conduct missions over Pakistan in exchange for the removal of Nek Muhammad, so long as the United States never publicly claimed credit for the mission.¹¹⁰ This account provided details to an earlier article by the Washington Post's David Ignatius, who also alleged a secret agreement for RPA strikes.¹¹¹ The International Crisis Group largely concurred, stating "Ample evidence exists of tacit Pakistani consent and active cooperation with the drone program, contradicting the official posture that it violates the country's sovereignty. This includes

¹⁰⁷ In the case of AQAP, would renouncing the fatwa against the United States and renouncing loyalty to the al-Qaeda organization be sufficient? Is the United States merely supporting the Yemeni government in its suppression of an internal rebellion and thus do their criteria drive U.S. policy?

¹⁰⁸ Boyle, *supra* note 1.

¹⁰⁹ Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. TIMES, Apr. 7, 2013, at A1.

¹¹⁰ *Id.*

¹¹¹ David Ignatius, Op-Ed., *A Quiet Deal with Pakistan*, WASH. POST, Nov. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110302638.html>.

acknowledgements by former President Pervez Musharraf in April 2013 and by then-Prime Minister Yousuf Raza Gilani in 2008 and 2010.”¹¹²

If we are to assume that Ignatius and Mazzetti’s accounts and the assessment of the International Crisis Group are correct, it might be challenging to square a Foreign Internal Defense mission with operations that have occurred in recent years. Since 2010, an increasing number of Pakistani officials have spoken out against RPA strikes, most notably with newly-elected Prime Minister Nawaz Sharif calling for an end to the strikes.¹¹³ Beyond these calls, however, the reaction of the Pakistani government has been characterized as “border[ing] on the schizophrenic” by the International Crisis Group.¹¹⁴ However, even if Pakistan had fully rescinded authorization to allow for these strikes, there would remain serious questions about the argument that the United States was not authorized to conduct such strikes.

While Boyle and other critics cite this as an absolute from a perspective of sovereignty, this is in fact a highly ambiguous area of international law. United Nations Security Council Resolution 1373 places an affirmative requirement on states to “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts.”¹¹⁵ Further, Lionel Beehner noted in the *Yale Journal of International Relations*, “[s]overeignty, after all, confers rights as well as responsibilities.”¹¹⁶ Beehner further notes that strikes in the FATA directly related to groups fighting an active war in Afghanistan can be justified as an act of pursuit.¹¹⁷ Under this theory of sovereignty, actions aimed at terrorists operating in the FATA would be legal and justified under international law, however, they would be problematic due to lack of acceptance of responsibility for the strike invoking justification.

Philip Alston, writing in the *Harvard National Security Journal*, concurs noting that:

A targeted killing conducted by one state in the territory of a second does not violate the latter’s sovereignty if either (a) the second state consents, or (b) the first, targeting, state has a right under international law to use force in self-defense under Article 51 of the UN Charter, because (i) the second state is responsible for an armed attack against the first state, or (ii) the second state is unwilling or

¹¹² INT’L CRISIS GRP., DRONES: MYTHS AND REALITY IN PAKISTAN (2013), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/247-drones-myths-and-reality-in-pakistan.pdf>.

¹¹³ Declan Walsh & Salman Masood, *Pakistan’s New Premier Calls for Drone Strike Halt*, N.Y. TIMES, June 5, 2013, at A6.

¹¹⁴ INT’L CRISIS GRP., *supra* note 112.

¹¹⁵ S.C. Res. 1373, ¶ 2(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹¹⁶ Lionel Beehner, *Can Nations “Pursue” Non-State Actors Across Borders?*, 6 YALE J. INT’L AFF. 110, 112 (2011).

¹¹⁷ *Id.*

unable to stop armed attacks against the first state launched from its territory.¹¹⁸

The true problem for U.S. policy is not the lack of a declaration of war against the states in which the United States is conducting operations, but the lack of formally justifying the strikes and providing notice that this represents an ongoing campaign justified under Just War criteria. We do not know openly if there is consent for operations, nor do we know under which justification the United States is launching specific strikes.

The lack of formal justification has the potential to set a bad precedent for international norms moving forward if the United States does not move swiftly to rectify the ambiguity of the legal status of international non-state wars. Continuing on the current path threatens to undermine the traditions of Just War as it applies to non-state conflicts, expand covert operations by other powers to potentially destabilize regimes, and undercut the post-World War II norms on conflict and self-determination. Using Just War criteria, rather than manipulating existing international law derived from Just War criteria, the United States can begin the process of establishing new norms for behavior for international non-state conflict.

C. *Establishing a Just War Begins with Domestic Law*

To this point, much of the internal debate in the United States on war powers have focused on the longstanding debate over the powers of the President versus the powers of Congress—which are usually rooted in fears of the concentration of power and the need for checks and balances on important issues, especially the power to wage war. In January 2014, Senators John McCain and Tim Kaine introduced a bill to replace the War Powers Resolution of 1973 based on this reasoning.¹¹⁹ In Senator Kaine's words, "Forty years of a failed war powers resolution in today's dangerous world suggests that it's time now to get back in and to do some careful deliberation, to update and normalize the appropriate level of consultation between a president and the legislature"¹²⁰ Their bill came in large measure from a report from the National War Powers Commission, who themselves recognized

¹¹⁸ Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SECURITY J. 283, 306 (2011) (footnote omitted).

¹¹⁹ Press Release, Senator Tim Kaine, Kaine Announces Joint Effort with McCain to Reform War Powers Resolution (July 18, 2013), available at <http://www.kaine.senate.gov/press-releases/kaine-announces-joint-effort-with-mccain-to-reform-war-powers-resolution>.

¹²⁰ Donna Cassata, *McCain, Kaine Unveil Measure To Change War Powers*, ASSOCIATED PRESS, Jan. 16, 2014, available at <http://bigstory.ap.org/article/mccain-kaine-unveil-measure-change-war-powers>.

their guiding principles as “the rule of law, bipartisanship, and an equal respect for the three branches of government.”¹²¹ This, as with many reports and debates on the subject, focuses on the question of *who* has the proper authority to authorize forces to wage war, versus what is the more important question—what is required to legitimize a *war* both domestically and internationally.

Parsing the constitutional war powers to establish a domestic legal justification for employing force in many ways undercuts the latter in the name of satisfying the former. The declaration of war, for traditional interstate conflicts, was a means to satisfying the ends of *Jus ad Bellum*. The practice of issuing AUMFs merely satisfies the question of the President’s ability to make war, rather than defining the causes, scope, and implicitly means of achieving a peaceful conclusion.

To reconcile the problems posed by the AUMF and the need to satisfy *Jus ad Bellum* criteria, Congress could modify the AUMF to specifically empower the President to, in effect, declare war against non-state actors (interpreting the Article I powers to pertain to inter-state conflicts). In doing so, Congress could explicitly require formal declarations and notification of organizations which the president finds to meet the criteria as authorized in the AUMF, areas the United States assesses as operating areas for that organization for the purposes of the AUMF, as well as to justify the cause for that organization’s inclusion. This would allow for a scenario where, politically, the war could be described in terms of a single conflict against a global entity and planned by U.S. forces in such a manner, but for the purposes of law could be evaluated legally as a series of campaigns each confined to a specific geographic area within an existing state. As previously noted, this is in many ways *de facto* how the war is legally justified today, but this would do so in a transparent manner fully supported by domestic law as a legitimate authority to declare a war and which is subject to scrutiny by opponents of the designation. This would represent a significant shift in war powers for non-international conflicts to the presidency only when specifically designated as Congress’s agent by statute. In doing so Congress could conceivably maintain several checks on the President’s authority within the legislation itself. One mechanism could be a variation on a legislative veto.

Legislative vetoes have been enacted as part of various statutes over the years, from the single House legislative veto over immigrant deportations to overturning federal regulations through a joint resolution. The single House veto was declared unconstitutional in 1983 because neither house of Congress could “act alone and outside of its prescribed bicameral legislative role” outside of purposes explicitly

¹²¹ NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 94, at 3.

mentioned in the Constitution.¹²² The power to overturn regulations through joint resolutions remains, but is of debatable utility as a joint resolution requires the signature of the President or sufficient votes in both Houses to override a veto. At the same time, a Congressional Research Service report noted “some maintain that a number of major rules have been affected by the Agency recognition of the existence of the review mechanism, and argue that the review scheme has had a significant influence,” though the report ultimately concludes the limited use over time has likely diminished this potential impact.¹²³

Structuring the AUMF to contain a provision for a legislative veto over either organizations or areas of operations would likely withstand most scrutiny if the joint resolution model were followed, but the low likelihood that a President would concur or that a two-thirds majority would exist to overturn the President’s veto would likely reduce the credibility of such an initiative. Another option, which would strengthen Congress’ hand, would be to empower Congress to veto under a concurrent resolution, which would require a majority of both Houses and not require the President’s signature. The concurrent resolution process is seldom used for legally binding measures, and generally for administrative measures within Congress and for budget measures.¹²⁴ Such a move would open the process to legal scrutiny which the President might consider unconstitutional, and thus is not a perfect solution either. However, either the joint or concurrent resolution process to register a veto over a specific action would provide Congress the opportunity to explicitly reject aspects of a non-state war. This in itself may limit the President’s declaration for fear of lack of unity behind the decision and choosing to rely on non-war powers to pursue adversaries in those cases.

Were Congress to enact such a system via a new AUMF and/or War Powers Act, the United States could begin working towards establishing new international norms for the conduct of international non-state conflicts by empowering a legitimate authority to declare war against a non-state entity in a manner that both justifies the operation as a war under traditional *Jus ad Bellum* criteria. This would allow for open debate in the international community for building a legal framework for prosecuting such conflicts to include ensuring mechanisms for invoking state sovereignty, ensuring the level of harm or threat should be proportionately met with war-measures or other means, and clarifying status of regions as war zones or not. This in turn would

¹²² *INS v. Chadha*, 462 U.S. 919, 955 (1983).

¹²³ MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE, at Summary, 44 (2008), available at research.policyarchive.org/18670.pdf.

¹²⁴ See S. Con. Res. 8, 113th Cong. § 1(a) (2014) (the 2014 budget resolution).

provide a framework for separating the arguments of RPA defenders and detractors, and evaluating the legality of RPA strikes under two clearly delineated circumstances. In areas the President formally declares to be active theaters in the U.S. war on terror, wartime targeting standards and military control over operations would apply. Outside of those areas, new processes would need to be developed to enable the RPA to act as a support element of a judicial process for counterterrorism, maintaining a far more limited strike capability when necessary based on a higher standard of imminent threat and last resort.

D. *Legal Clarification Eases Disclosure Debate*

One area where outside parties tend to agree, regardless of their evaluation of the effectiveness of RPA strikes, is that the lack of disclosure of U.S. targeting strategies is probably the most problematic part of the program. For supporters, lack of disclosure prevents the United States from exploiting strike operations through information campaigns, aid for victims of collateral damage, and countering the narrative of RPAs put forward by their detractors. However, Joshua Foust concurs with the NYU/Stanford study *Living Under Drones* on this point in his critique, stating, “[o]n that last point, the authors are absolutely right—more transparency about targeting and effects would help everyone understand the consequences of drone strikes in Pakistan.”¹²⁵ The Obama Administration itself seems to agree in principle that there is a need for greater transparency, increasingly speaking about legal justification and the possible deliberate leaking of discussion over development of a “Drone Rulebook.” The main problem appears to be both internal debate over the exact framework for the rulebook itself, and the degree of transparency.

The Obama Administration, like the Bush Administration before it, remains reluctant to publicly discuss RPA usage outside of Afghanistan. In 2008, then candidate Obama accused the Bush Administration of failing to act aggressively enough in pursuing terrorists,¹²⁶ and stated in a debate that, were he to have actionable intelligence on bin Laden in Pakistan, he would act by going in and killing him without the consent of Pakistan’s government if necessary. The stated positions of then candidate Obama regarding aggressively

¹²⁵ Joshua Foust, *Targeted Killing, Pro and Con: What to Make of U.S. Drone Strikes in Pakistan*, THE ATLANTIC (Sept. 26, 2012, 10:55 AM), <http://www.theatlantic.com/international/archive/2012/09/targeted-killing-pro-and-con-what-to-make-of-us-drone-strikes-in-pakistan/262862>.

¹²⁶ Hillel Ofek, *The Tortured Logic of Obama’s Drone War*, NEW ATLANTIS, Spring 2010, at 35, available at <http://www.thenewatlantis.com/publications/the-tortured-logic-of-obamas-drone-war>.

pursuing al-Qaeda leadership outside of Afghanistan indicated a willingness to use lethal force beyond Afghanistan to prosecute the campaign against al-Qaeda,¹²⁷ but did not speak to the scope and lengths to which the administration would go. Obama adviser John O. Brennan laid out the legal and ethical rationale for strikes in an April 2012 discussion at the Woodrow Wilson Center,¹²⁸ but beyond that little official acknowledgment of the program or official policy exists.

A legal construct to clarify which theaters constitute war zones governed primarily by international humanitarian law and non-warzones covered by international human rights law would be a necessary first step in easing the debate over disclosure by setting clear guidance on a legal framework for the conduct and process for conducting RPA strike missions, which in turn would dictate the degree of transparency required and the mechanisms for oversight. Such clarification would make a transition of most RPA programs from various government entities to the Defense Department easier, further aiding international legitimacy of operations under military control. Limited disclosure of overall rationale (legally and strategically), combined with an independent review authority capable of auditing activities post-strike, and an effective oversight process from Congress based on the findings of the review authority conducted in both classified and unclassified settings would increase confidence at home and abroad in the utility of the campaign, draw insights into its strengths and limitations, and highlight the scope of campaigns beyond simply RPAs flown at a distance to include presence on the ground and manned airborne and strike assets.

CONCLUSION

The RPA combined with fused intelligence and precision weapons provides states with the ability to use airpower effectively in small wars for the first time in history, but that effectiveness is limited by how operations are conducted and the secrecy surrounding them. To an

¹²⁷ Candidate Obama stated:

And if we have Osama bin Laden in our sights and the Pakistani government is unable or unwilling to take them out, then I think that we have to act and we will take them out. We will kill bin Laden; we will crush Al Qaida. That has to be our biggest national security priority.

Barack H. Obama, Senator, The Second McCain-Obama Presidential Debate (Oct. 7, 2008), available at <http://www.debates.org/index.php?page=october-7-2008-debate-transcrip>.

¹²⁸ John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Address at the Wilson Center: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

extent, this can be blamed on path dependence, bureaucratic inertia, and expediency. Equally important, however, is the gray area of international law and norms surrounding what constitutes a non-international conflict, when it begins and ends, and who combatants in such conflicts are.

This gap extends well beyond the RPA to the conduct of states in the early phases of civil wars and the employment of alternatives to RPAs such as special forces, missiles, and other weapons, which are regularly used along with RPAs in non-international conflicts. Failure to resolve this issue is at the center of the RPA debate and must be resolved both to reduce the negative effects of RPA campaigns, to limit the potential for their abuse by other states in the future, and to set the stage for effective campaigns that are positioned to exploit the tactical gains being made by RPAs today.