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The Killing of Ayman al-Zawahiri: On Its Legality and Why the U.N. Should Clarify the "Unable or Unwilling" Doctrine

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THE KILLING OF AYMAN AL-ZAWAHIRI: ON ITS LEGALITY AND WHY THE U.N. SHOULD CLARIFY THE “UNABLE OR UNWILLING” DOCTRINE

Nicholas Abraksia †

ABSTRACT

On July 31, 2022, the Biden Administration successfully eliminated al-Qaeda leader Ayman al-Zawahiri in Kabul, Afghanistan via drone strike. This killing represented a continued implementation of U.S. policy forged after the September 11th attacks to eliminate al-Qaeda members wherever they seek shelter. Nevertheless, the United States has refrained from filing an Article 51 notification of self-defense to justify its use of force against Afghanistan. With the United States asserting that the Taliban was “unwilling or unable” to neutralize Zawahiri’s threat, existing international law fails to provide clear guidelines on addressing this determination. The following Note attempts to examine the legality of the strike through implementation of the Deeks Factors Test of “unable or unwilling.” Further, this Note advocates for a U.N. Resolution to establish a robust “unable or unwilling” framework, to provide states with a standard to consider when assessing the use of force against non-state actors.

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I. INTRODUCTION

On July 31, 2022, the United States affixed the sought-after red “deceased” label on the official FBI poster for the world’s number one terrorist.¹ For months, the United States had been closely monitoring al-Qaeda leader, Ayman al-Zawahiri, at his safehouse in Kabul, Afghanistan.² One of the “masterminds” of the *USS Cole* bombing, with a “key role” in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, and “deeply involved” in the September 11, 2001, attacks,³ Zawahiri was placed on the “most wanted terrorists” list by George W. Bush in 2001.⁴

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1. Most Wanted Terrorist Ayman Al-Zawahiri, *U.S. Dept. of Def.*, <https://www.defense.gov/MULTIMEDIA/PHOTOS/IGPHOTO/2003048422/> [https://perma.cc/8255-8srh].
 2. *Explained: How the US Planned and Executed the Killing of World No 1 Terrorist Ayman al-Zawahiri*, FIRSTPOST (Aug. 2, 2022), <https://firstpost.com/explainers/explained-plan-to-kill-al-qaeda-ayam-al-zawahiri-us-joe-biden-10997411.html> [https://perma.cc/96XL-XRBA].
 3. Joe Biden, 46th President of the U.S., Remarks by President Biden on a Successful Counterterrorism Operation in Afghanistan (Aug. 1, 2022).
 4. *Ayman-al-Zawahiri, From Eye Surgeon to Most Wanted Terrorist*, DEVDISCOURSE (Feb. 2, 2022, 7:46 IST), <https://www.devdiscourse.com/>

After infamous terrorist Osama Bin Laden was neutralized in 2011, al-Qaeda named Zawahiri its new Emir.⁵ Zawahiri had been on the move since the U.S.-led invasion of Afghanistan after the September 11th attacks.⁶ In early 2022, U.S. officials learned that members of his immediate family had relocated to a safe house in Kabul, Afghanistan.⁷ After months, intelligence officials were able to “build a pattern of life through multiple independent sources.”⁸ Found to frequent his balcony after morning prayer, Zawahiri would occasionally step outside to watch the sun rise over Kabul.⁹ On July 31, 2022, at 6:18 A.M., Zawahiri watched the final sunrise of his life.¹⁰ He was killed instantly when he was met with two R9X hellfire missiles fired from a U.S. MQ-9 reaper drone.¹¹

While touted as a political win, the United States has not provided an *official* legal basis for the drone strike.¹² So far, the United States

article/international/2130298-ayman-al-zawahiri-from-eye-surgeon-to-most-wanted-terrorist [https://perma.cc/8GFS-N5X8].

5. CNN Wire Staff, *Al-Zawahiri Appointed al-Qaeda’s New Leader, Jihadist Websites Say*, CNN (June 16, 2011, 5:37 PM), <http://www.cnn.com/2011/WORLD/meast/06/16/al.kaeda.new.leader/index.html> [https://perma.cc/4DLU-Y66H].
6. The U.S. government has been targeting Zawahiri since the U.S.-led invasion of Afghanistan following 9/11. In 2001, Zawahiri nearly escaped U.S. onslaught during the battle of Tora Bora region of Afghanistan where his wife and children were ultimately killed. See Kevin Liptak et al., *US Kills al-Qaeda Leader Ayman al-Zawahiri in Drone Strike in Afghanistan*, CNN (Aug. 2, 2022, 3:39 AM), <https://www.cnn.com/2022/08/01/politics/joe-biden-counter-terrorism> [https://perma.cc/US3L-QZEQ].
7. Matthew Lee et al., *CIA Drone Strike Kills al-Qaida Leader Ayman al-Zawahiri in Afghanistan*, PBS (Aug. 1, 2022, 8:49 PM), <https://www.pbs.org/newshour/politics/cia-drone-strike-kills-al-qaida-leader-ayman-al-zawahiri-in-afghanistan> [https://perma.cc/H9YB-XSSZ].
8. On July 1, 2022, President Biden received a comprehensive briefing in the Situation Room regarding a potential planned operation. This briefing included examining a model of the home Zawahiri was hiding in. *Id.*
9. Ed Pilkington, *How Ayman al-Zawahiri’s ‘Pattern of Life’ Allowed the US to Kill al-Qaida Leader*, THE GUARDIAN (Aug. 2, 2022, 11:01 AM), <https://www.theguardian.com/world/2022/aug/02/ayman-al-zawahiri-how-us-killed-al-qaida-leader> [https://perma.cc/C6MM-DABR].
10. Eleanor Watson, *Al Zawahiri Was on His Kabul Balcony. How Hellfire Missiles Took Him Out*, YAHOO NEWS (Aug. 2, 2022), <https://news.yahoo.com/al-zawahiri-kabul-balcony-hellfire-210820050.html> [https://perma.cc/NAW2-235A].
11. *Id.*
12. Craig Martin, *What Was the International Legal Basis for the Strike on al-Zawahiri*, JUST SECURITY (Aug. 9, 2022), <https://www.justsecurity.org/82605/what-was-the-international-legal-basis-for-the-strike-on-al-zawahiri/> [https://perma.cc/QR8U-JSKK].

has stated the Taliban government was “unable or unwilling” (“UOU”) to abide by their commitments of not harboring terrorists’ threats—continuing a long-standing U.S. policy.¹³ However, Zawahiri’s killing nearly twenty-one years after 9/11 begs the question: was the Taliban truly unable or unwilling to suppress Zawahiri, or was the United States tactfully continuing its policy of preventative self-defense?

This Note analyzes Zawahiri’s killing in three parts. Part II provides a historical context of the UOU test, detailing the doctrine’s evolution into a customary international law norm. Part III analyzes the legality of the strike through the UOU test by applying the Deeks Factors Test.¹⁴ Finally, Part IV explores possible additions to the Deeks factors and argues that in response to the ambiguity around the strike’s legality, the United Nations should adopt a resolution that clarifies the UOU standard.

While other scholars have written about the potential framework for the use of force against non-state actors (“NSAs”),¹⁵ this Note analyzes the legality of the Zawahiri strike through the Deeks factors of UOU. This Note also advocates for the Deeks Factors Test, with a few additions, to be included in a U.N. resolution so as to provide a crucial step in crystalizing UOU into customary international law.

II: HISTORY: THE “UNWILLING OR UNABLE” TEST UNDER CUSTOMARY INTERNATIONAL LAW

A. *The “Unable or Unwilling” Test and Its Limits*

Article 51 of the U.N. Charter allows a state the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁶ The

13. Anthony J. Blinken, 71st Sec’y of State, The Biden Administration, The Death of Ayman al-Zawahiri: Press Statement, (Aug. 1, 2022) (“In the face of the Taliban’s unwillingness or inability to abide by their commitments, we will continue to support the Afghan people with robust humanitarian assistance.”) [hereinafter Press Statement].

14. See Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012) (Ashley Deeks, who undertook an extensive study to establish a normative framework for the UOU doctrine, suggested guidelines for states that wish to apply the UOU test to determine whether they should resort to force in that area. Section III of this Note implements these factors and applies them to the Zawahiri strike).

15. See *id.*; see Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defense*, 55 INT’L & COMP. L.Q. 963 (2006); see Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 390 (2013).

16. U.N. Charter art. 51.

UOU doctrine derives its principles of self-defense from the *jus ad bellum* regime under Article 51 of the U.N. Charter.¹⁷ In the simplest form, the UOU doctrine would occur in the following situation: State A (“victim state”), is the victim of an armed attack conducted by Group X, a NSA. Group X operates from the territory of State B (“territorial state”). To use force within State B against Group X, State A would first have to prove that State B is UOU to suppress the threat of Group X.¹⁸

However, this test does not come without its limits. Once a state determines it may use force in self-defense in response to an armed attack, it must satisfy three elements to be legal under international law: necessity, proportionality, and immediacy.¹⁹ The International Criminal Justice Court has stated that the lawful exercise of self-defense is conditioned on the dual requirements of necessity and proportionality.²⁰ The *necessity* criteria stipulates that force may only be used when there are not other more peaceful means for redress²¹—the use of force in self-defense is a last resort.²² The *proportionality* element requires a state resorting to the use of force to prove that its force was proportionate to the military campaign’s objective.²³ Additionally, the response must be conducted *immediately* following the armed attack.²⁴ However, this prong should be interpreted with

17. The *jus ad bellum* regime details a state’s ability to breach the territorial sovereignty of another nation’s state and conduct targeted operation on their terrorists. See Craig Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, 52 VAND. J. TRANSNAT’L L. 387, 394 (2019).

18. If the territorial state is “willing or able” to suppress the threat, then a victim state is not allowed to resort to the use of force in their territorial state. However, if it’s determined the territorial state is “unable or unwilling” to suppress the threat of the NSA, then the victim state may resort to force to defend itself under Article 51 of the U.N. Charter. In the analysis of UOU for Zawahiri, the United States is the victim state due to the armed attack on 9/11, al-Qaeda is the NSA who conducted the attack, and the Taliban is the territorial state the attack was planned and conducted from. See Deeks, *supra* note 14, at 487.

19. *Id.* at 494.

20. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 194 (June 27) (“The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”).

21. Anders Henriksen, *Jus ad Bellum and American Targeted Use of Force to Fight Terrorism*, 19 J. CONFLICT & SEC. L. 211, 228 (2014).

22. *Id.* at 228.

23. *Id.* at 230.

24. Deeks, *supra* note 14, at 494.

some flexibility, as it could take a victim state some time to prepare and launch a response.²⁵

Two consequences flow from the necessity element in a NSA context.²⁶ First, a victim state must limit its use of force to the private actor responsible for the armed attack, and not make the agents of the host state the object of the attack.²⁷ Second, a victim state must also consider the conditions in the territorial state from which the NSA launched its attack.²⁸ This evaluation under necessity is where states currently employ the UOU test.²⁹

B. Origination and Implementation of “Unable or Unwilling” Pre-9/11

While the UOU doctrine has become far more popular and controversial following the 9/11 attacks, it has an older pedigree rooted in the law of neutrality.³⁰ Generally, the law of neutrality does not allow territorial states to harbor or operate NSAs within their territory.³¹ If a neutral state fails to prevent NSA operations within its territory, the law of neutrality permits the victim state to use force against the enemy NSA forces within the neutral state’s territory.³² One of the earliest adoptions of neutrality and UOU application comes from the *Caroline* incident of 1837.

In the *Caroline*³³ affair, Canadian militia, under the authority of Great Britain, faced an armed insurrection led by NSAs operating from

25. Henriksen, *supra* note 21, at 228.

26. *Id.*

27. If, however, the territorial state is implicated in the terrorist attack, then the victim state may have a right to self-defense against the territorial state and its agents. *Id.* at 230.

28. Deeks, *supra* note 14, at 495.

29. If the territorial state is neither willing nor able, the victim state may appropriately consider its own use of force in the territorial state to be necessary and, if the force is proportional and timely, lawful. If the territorial state is both willing and able, it will not be necessary for the victim state to use force, and the victim state’s force would be unlawful. *Id.*

30. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 402.

31. There is long precedent to the basic concept that states may act against other states when a territorial state is UOU to act against an NSA operating within its borders. See YORAM DINSTEN, WAR, AGGRESSION AND SELF-DEFENCE 169–83 (3d ed. 2001).

32. Deeks, *supra* note 14, at 499–500.

33. See Matthew Waxman, *The ‘Caroline’ Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018, 2:26 PM), <https://www.lawfareblog.com/caroline-affair> [https://perma.cc/P2SH-T4N6] (providing a description of the *Caroline* case).

the territory of the United States.³⁴ The United Kingdom responded to the insurrection by setting fire and destroying the insurgents’ ship, the *Caroline*, while it was on the U.S. side of the Niagara River.³⁵ This ultimately resulted in a series of diplomatic exchanges between the United States and the United Kingdom.³⁶ Through these exchanges, the United Kingdom asserted that their use of force against the *Caroline* was justified because the United States was UOU to prevent the rebels from conducting attacks against Canada.³⁷ The use of the UOU test against NSAs continuously reemerged internationally throughout the 20th century.³⁸

While the *Caroline* incident and subsequent cases demonstrate that the origins of the UOU doctrine as applied to NSAs predate 9/11, the doctrine became vastly more prominent in response to the 9/11 attacks.³⁹ Prior to 9/11, the level of concern about terrorists was linked to the financial support they received from their respective territorial states.⁴⁰ However, the emergence of al-Qaeda created a different kind of threat.⁴¹ Al-Qaeda demonstrated that a terrorist group, acting out of a failed state without direct governmental support, could “exploit relatively inexpensive and commercially available technology to conduct very destructive attacks over great distances.”⁴²

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34. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 403.
35. *Id.*
36. See Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214–20 (2003).
37. Extract from Note from Dan Webster (Apr. 24, 1941) (on file at Yale Law School Lillian Goldman Law Library) [<https://perma.cc/HXA3-7P9G>].
38. In 1979, President Carter invoked the UOU doctrine to justify the U.S. hostage rescue attempt in Tehran. In a 1985 address to the Security Council, then Israeli Ambassador to the United Nations Benjamin Netanyahu raised the UOU doctrine with their efforts to combat the Palestinian Liberation Organization (PLO) in Tunisia. Responding to the al-Qaeda’s bombings on the embassies in Nairobi and Dar Es Salaam, the United States’ Article 51 letter stated how the government of Sudan and Taliban regime were UOU to shut down Bin Laden’s organization. See Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test*, LAWFARE (OCT. 10, 2016, 1:55 PM), <https://www.lawfaremedia.org/article/which-states-support-unwilling-and-unable-test> [<https://perma.cc/b7fb-w2qp>].
39. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 404.
40. State Sponsors of Terrorism, U.S. DEPT. OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/Y4HZ597S>].
41. See Michael Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT’L LAW 1, 26 (2016).
42. *Id.* at 25; Olumide K. Obayemi, *Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the*

C. “Unable or Unwilling” Post 9/11

Following 9/11, the Bush Administration declared that the attacks were an act of war committed by terrorists, and thus, the United States was at war wherever any terrorist existed.⁴³ This policy, colloquially known as the “Bush Doctrine,” declared that states could not wait for a “smoking gun in the form of a mushroom cloud” before acting in self-defense against terrorist organizations.⁴⁴ To this end, the Bush Doctrine implemented the policy of targeting and killing key al-Qaeda figures in Afghanistan, Pakistan, Iraq, Yemen, Somalia, and elsewhere.⁴⁵ But, the concept of preventative self-defense remains widely rejected and deeply contested as a legal justification for the use of force.⁴⁶

Although preventative self-defense is widely condemned in legal and academic circles, the principle of imminence – the idea of preemptively neutralizing a terrorist before they can carry out an attack – has influenced the development of the UOU doctrine.⁴⁷ Conversely, the UOU doctrine has become the go to legal justification for use of force against NSAs.⁴⁸ When the Obama Administration came into office, it embraced and relied upon the Bush Doctrine to vastly expand the use of drone warfare.⁴⁹

U.N. Charter and General International Law, 12 ANN. SURV. INT’L & COMP. L. 19, 24 (2006).

43. George Bush, 43rd President of the U.S., Address to Joint Session of Congress and the American People (Sep. 20, 2001) (“Our war on terror begins with Al Qaeda but it doesn’t not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”).
44. *Bush: Don’t Wait for Mushroom Cloud*, CNN (Oct. 7, 2002), <http://edition.cnn.com/2002/ALLPOLITICS/10/07/bush.transcript/> [<https://perma.cc/XWD8-2BLJ>]; see Howard Witt, *U.S.: Killing of Al Qaeda Suspects was Lawful*, CHI. TRIB. (Nov. 24, 2002, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2002-11-24-0211240446-story.html> [<https://perma.cc/9V9V-8H8T>]; Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L LAW 349, 352 (2004).
45. MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 183 (2014).
46. The concept of preventative self-defense was widely rejected after the Iraq War of 2003. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 416; see also Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 39 (noting that preventative self-defense is “unnecessarily broad and lacking nuance.”).
47. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 416.
48. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 52.
49. *Id.* at 34; In March 2010 Harold Koh, then State Department Legal Advisor to the Obama Administration, gave a speech justifying the

Although momentum was growing towards crystalizing UOU as a matter of customary international law, the *Congo* case⁵⁰ thwarted this transition.⁵¹ In the *Congo* case, the International Court of Justice (ICJ) held that the inability or unwillingness of a state to deal with a terrorist threat did *not* justify use of force against the territorial state in self-defense.⁵² The Court reaffirmed the historical customary law standard of “effective control” for a victim state to use force against NSAs.⁵³ However, in a separate opinion, Judge Simma,⁵⁴ suggesting that the climate of international law was changing, indicated that the occurrence of an armed attack was sufficient to create a right of action in self-defense, regardless of whether the actions were attributable to the State.⁵⁵

legality of the drone program. In his speech, Koh argued that in addition to imminence and the sovereignty of the states involved, the “willingness and ability of the states to suppress the threat the target poses” would be the standard to justify a drone strike against a particular individual. Three years later, the United States cemented the UOU doctrine into its practicing policy by maintaining it would only take lethal action once it has assessed whether the relevant governmental authorities “cannot or will not effectively address the threat to U.S. persons.” Harold Kongiu Koh, Legal Advisor, U.S. Dep’t of State, The Obama Administration, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010); Press Release, The White House, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013).

50. *See generally* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).
51. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 40.
52. Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 147.
53. In conjunction with the *Congo* case, in the *Advisory Opinion on the Wall*, the ICJ rejected Israel’s claim of self-defense under Article 51 reasoning that a self-defense justification is not available against NSA operating on the territories under the control of Israel. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 39; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2005 I.C.J. 136, ¶ 139 (July 9).
54. Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, ¶ 12 (Dec. 19) (separate opinion by Simma, J.).
55. *Id.* ¶ 12 (“I fully agree with his conclusion that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it ‘would be reasonable to deny the attacked State the right of self-defense merely because there is no attack State and the Charter does not require.’”).

D. *UNSC Resolution 2249 and Current Climate of “Unable or Unwilling”*

In October of 2015, a Russian airliner crashed in Egypt and killed all 224 people on board.⁵⁶ Following the crash, a militant group affiliated with the Islamic State (IS) in Egypt claimed responsibility for bringing down the plane.⁵⁷ Nearly two weeks later, Islamic State of Iraq and the Levant (ISIS) attacks occurred on a Paris stadium and concert hall, where suicide bombers and gunmen killed 129 people.⁵⁸ These attacks were condemned internationally and fostered momentum for creating a global coalition to suppress the threat of ISIS.⁵⁹ In response to the devastating attacks, the U.N. Security Council adopted UNSC Resolution 2249, which permitted the use of force against ISIS in Syria, without invoking Chapter VII authorization.⁶⁰ While Resolution 2249 is ambiguous, many scholars have debated whether it crystalized the UOU doctrine into a customary international law norm.⁶¹ Following the Syrian crisis and UNSC Resolution 2249, a significant number of states articulated and clarified their views about the UOU test.⁶² Although a considerable number of states have lent support to the doctrine, there

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56. *Sinai Plane Crash: Russian Airliner ‘Broke up in Mid-Air’*, BBC (Nov. 1, 2015), <https://bbc.com/news/world-middle-east-34694057> [<https://perma.cc/5EBL-633H>].
57. *Russian Plane That Crashed in Egypt ‘Broke Up in Air’*, FRANCE 24 (Feb. 11, 2015, 2:51 AM), <https://www.france24.com/en/20151101-russian-plane-crash-sinai-egypt-broke-air-says-aviation-official> [<https://perma.cc/UBD8-B2BS>].
58. *Timeline of Paris Attacks According to Public Prosecutor*, REUTERS (Nov. 14, 2018, 2:08 PM), <https://www.reuters.com/article/us-france-shooting-timeline-idUSKCN0T31BS20151114> [<https://perma.cc/3P6D-Q8CS>].
59. S.C. Res. 2249, ¶ 1 (Nov. 20, 2015).
60. *Id.* ¶ 5 (“Calls upon member states that have the capacity to do so take all necessary measure . . . to prevent and suppress terrorist acts committed specifically by ISIL . . .”).
61. Those in support of the doctrine’s fruition believe the response of the international community citing the UOU doctrine as the ability to use force in Syria gives the final push to make the doctrine customary international law. See Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 51. However, those in opposition believe the resolution is nothing more than a restatement that member states may only use force against ISIS if, and only if, they are already permitted to do so legally. But see Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defense Against Designated Terrorist Groups*, EJIL:TALK! (Nov. 25, 2015), <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/> [<https://perma.cc/LZS2-JVEC>].
62. Chachko & Deeks, *supra* note 38.

is still ambivalence from prominent states, and there are others who outright object to the doctrine altogether.⁶³

III: ANALYSIS: THE “UNWILLING OR UNABLE” FACTORS APPLIED TO THE ZAWAHIRI STRIKE

A. *The Deeks Factors*

While the UOU test has evolved into a practicing standard among states, the test lacks guidance for those invoking it.⁶⁴ Ashley Deeks has suggested certain factors (the “Deeks factors”) for states wishing to apply the UOU⁶⁵ that should be applied by a victim state contemplating using extraterritorial force against NSAs.⁶⁶ Applying the Deeks factors may help demonstrate that the territorial state is UOU to suppress the threat.⁶⁷ The Deeks factors are briefly summarized below:

1. Prioritization of Consent or Cooperation from the Territorial State

Consent from the territorial country should be prioritized.⁶⁸ If the territorial country consents a UOU inquiry is unnecessary.⁶⁹ However, if a territorial state fails to consent, the failure may prove relevant in the UOU analysis.⁷⁰ Even if there is a denial of consent, the victim state should look to work jointly with the territorial state against the NSA.⁷¹

2. Nature of the Threat Posed by the NSA

Second, the victim state’s perception of the severity and nature of the threat posed by the NSA should influence its assessment of the territorial state’s capability and willingness to eliminate the threat.⁷² Some factors to consider are: the intensity of the NSA’s activities, the

63. *See id.* (listing those states that support, are uncertain of, or object to the UOU doctrine).

64. Deeks, *supra* note 14, at 483.

65. *Id.* at 519; Ashley Deeks, UNI. OF VA, <https://www.law.virginia.edu/faculty/profile/ad5jt/2378410> [<https://perma.cc/8JDE-9D8K>].

66. *Id.*

67. *Id.*

68. *Id.* at 519–20.

69. For example, the U.S. received consent from the Yemeni government when conducting a targeted killing on U.S. citizen Anwar Al Awlaki in 2011. *See* Shane Reeves & Jeremy Marsh, *Bin Laden and Awlaki: Lawful Targets*, HARV. INT’L REV (ONLINE PERSPS.) 2 (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297061 [<https://perma.cc/6PZP-KDNN>].

70. Deeks, *supra* note 14, at 519.

71. *Id.* at 520.

72. *Id.* at 520.

sophistication of the NSA’s past and future attacks, the actors in the area and their seniority, and the imminence of the threat.⁷³

3. Assessing the Willingness of the Territorial State

Third, assuming there was not consent or cooperation from the territorial state, the victim state can gauge the willingness of the territorial state by offering a timeframe for the state to subdue the threat from the NSA and then evaluate its response.⁷⁴ However, there may be certain circumstances where making a request would either be futile or cause harm to the victim state’s national security.⁷⁵ This would occur if the victim state has reason to believe the territorial state is colluding with the NSA.⁷⁶

4. Capability of the Territorial State

Fourth, it is important for the victim state to analyze the territorial state’s capability to suppress the threat of the NSA.⁷⁷ It may be the case that the territorial state is willing to counter the threat, but is simply unable to because of a lack of capacity in the region the NSA operates in.⁷⁸

5. Proposed Action

Fifth, if the territorial state has proposed taking action, it is imperative that the victim state assess the proposed action of the territorial state.⁷⁹ By having details of the proposed plan, the victim state can more reasonably assess whether the territorial state is willing and able to act.⁸⁰

73. *Id.*

74. *Id.*

75. *Id.* at 523.

76. *Id.* For example, the United States did not inform Pakistan of the operation to kill Osama Bin Laden because of fears they were harboring the leader and would warn him of the mission. See PTI, ‘*US Didn’t Inform Pakistan About Bin Laden Raid Due to Lack of Trust*’, THE WEEK (Oct. 2, 2020, 14:34), <https://www.theweek.in/news/world/2020/10/02/us-didnt-inform-pakistan-about-bin-laden-raid-due-to-lack-of-trust.html> [<https://perma.cc/A5RA-FKHZ>].

77. For example, Turkey justified its military operations against the PKK on Iraqi territory on the assertion that the areas from which the PKK was operating were not under the control of the Iraqi government, rendering Iraq unable to counter the threat posed by the PKK. Deeks, *supra* note 14, at 525–29.

78. *Id.* at 527–28.

79. *Id.* at 529.

80. *Id.* at 531.

6. Prior Interactions with the Territorial State

Lastly, a victim country should evaluate its prior interactions with the territorial state on issues related to the NSA attacks.⁸¹ If, in the past, the territorial state has helped the victim state, then it may be likely that it will again.⁸² Additionally, it is appropriate for a victim state to view prior attacks originating from the territorial state as a substantive indication of the territorial state’s unwillingness or inability to act.⁸³

B. Application to the Zawahiri Strike.

The Deeks factors collectively give the United States a framework through which it can acquire and assess the information it has about the territorial state, improve its decision processes, and defend its actions under clear standards.⁸⁴ As this is a highly fact-specific analysis, the United States must ultimately determine for itself which substantive factors should be afforded the most weight.⁸⁵ Part B concludes that, by completing this in-depth analysis before the Zawahiri Strike, the United States would have significantly improved its decision-making process and its position in the subsequent debate in the international community over the legality of the strike. The analysis follows below.

1. Prioritization of Consent or Cooperation with the Taliban

According to CNN, the United States did not alert the Taliban ahead of the strike, and within days following it, the Taliban condemned the U.S actions.⁸⁶ Since its insurgency in 2021, the Taliban has made it clear that it would not accept U.S. forces based in countries even near Afghanistan.⁸⁷ As for cooperation, the Taliban pledged to

81. Paulina Startski, *Right to Self-Defense, Attribution and the Non-State Actor—Birth of the “Unable or Unwilling” Standard?*, 75 HEIDELBERG J. INT’L L. 455, 459 (2015).

82. *Deeks*, supra note 14, at 531–32.

83. *Id.* at 532.

84. *Id.* at 519.

85. *Id.*

86. Taliban spokesman Zabiullah Majahid claimed that the Islamic Emirate of Afghanistan, “strongly condemns this attack on any pretext and calls it a clear violation of international principles and the Doha agreement.” Kevin Liptak et al., *US Kills al Qaeda Leader Ayman al-Zawahiri in Drone Strike in Afghanistan*, CNN (Aug. 2, 2022, 3:39 AM), <https://edition.cnn.com/2022/08/01/politics/joe-biden-counter-terrorism/index.html> [<https://perma.cc/AAX8-FUTP>].

87. Catherine Putz, *Taliban Tells Afghanistan’s Neighbors Not to Host US Forces*, THE DIPLOMAT (May 26, 2021), <https://thediplomat.com/2021/>

prevent al-Qaeda from operating in areas under Taliban control when it signed the Doha agreement.⁸⁸ However, despite this promise, the Taliban has kept a close relationship with al-Qaeda, permitting the militants to conduct training and deploy fighters in Afghanistan.⁸⁹ With this information, the United States claimed that Zawahiri’s presence in Kabul violated the Taliban’s core commitment not to harbor al-Qaeda members.⁹⁰ This factor indicates that even though the United States did not seek consent from the Taliban, they attempted to cooperate before the strike, through the Doha agreement.

2. Nature of the Threat Posed by Al-Qaeda and Zawahiri.

Al-Qaeda is an experienced, well-organized, well-funded, and well-armed terrorist organization.⁹¹ The U.S. intelligence community believes that as of early 2022 al-Qaeda was one of the groups that “probably pose the greatest threat to U.S. persons and interests abroad.”⁹² Although responsible for numerous terrorist attacks, sustained counterterrorism pressure has weakened the group since 9/11.⁹³ Financially, the group has consistent revenue streams generated from contributions and donations from its supporters.⁹⁴

05/taliban-tells-afghanistans-neighbors-not-to-host-us-forces/ [https://perma.cc/V5GZ-QGT8].

88. Agreement for Bringing Peace to Afghanistan, Ta-U.S., Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [hereinafter Doha Agreement].
89. Dan De Luce et al., *Taliban Keep Close Ties With Al Qaeda Despite Promise to U.S.*, NBC (Feb. 17, 2021, 7:11 AM), <https://www.nbcnews.com/politics/national-security/taliban-keep-close-ties-al-qaeda-despite-promise-u-s-n1258033> [https://perma.cc/DWF4-MFGN].
90. Senior Administration Official under the Biden administration stated on a teleconference days after the Zawahiri strike that it’s “very important point for us to make clear to the Taliban that we expect them to abide by the terms of the Doha Agreement. And the presence of Zawahiri in downtown Kabul was a clear violation of that.” Background Press Call by a Senior Administration Official on a U.S. Counterterrorism Operation (Aug. 1, 2022, 6:44 PM) (transcript available at <https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/01/background-press-call-by-a-senior-administration-official-on-a-u-s-counterterrorism-operation/> [https://perma.cc/Q2Z5-Q9AH]) [hereinafter Background Press Call].
91. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 25 (2022).
92. *Id.*
93. CONG. RSCH. SERV., IFII854, AL QAEDA: BACKGROUND, CURRENT STATUS, AND U.S. POLICY (2021).
94. Since 2020, al-Qaeda has increased its online propaganda, either to potentially launch attacks, or to raise funds. *FATF Public Statement on the Financing of ISIL, Al Qaeda and Affiliates*, FATF (Oct. 21, 2021),

But what threat does Zawahiri pose in Kabul with the resurgence of the Taliban? The return to power of the Taliban gave al-Qaeda a “significant boost,” as some of al-Qaeda’s closest sympathizers within the Taliban occupy senior positions in the new de facto Afghan Administration.⁹⁵ However, the United States stated that al-Qaeda “does not have a capability to launch attacks against the U.S. or its interest abroad from Afghanistan.”⁹⁶ Despite being experienced and well-funded, al-Qaeda poses only a minor threat in Afghanistan.

3. Assessing the Willingness of the Taliban

How has the Taliban addressed the threat of al-Qaeda at the request of the United States? The day following the Zawahiri strike, U.S. Secretary of State Anthony Blinken quoted the UOU doctrine when referencing the Taliban’s ability to honor the Doha Agreement.⁹⁷ The Zawahiri strike occurred nearly two and a half years after the Doha Agreement was signed.⁹⁸ Because reports indicated that Zawahiri moved to Kabul in early 2022, the United States asserts that the Taliban “grossly” breached the Doha Agreement by granting Zawahiri safe harbor in Afghanistan for nearly six months prior to the strike.⁹⁹ Assessing the willingness to act, the United States requested, in the form of an international agreement, the Taliban to address the threat.¹⁰⁰ However, according to the United States, the Taliban allowed safe

<https://www.fatf-gafi.org/en/publications/Fatfgeneral/Statement-isil-al-qaeda.html> [<https://perma.cc/W57V-JHNG>].

95. U.S. intelligence believes that as of 2022, al-Qaeda, “is constrained in its efforts to lead a unified global movement” but will try to “capitalized on permissive operating environments.” CONG. RSCH. SERV., *supra* note 93.
96. U.S. officials also believe that al-Qaeda has not reconstituted its presence in Afghanistan, and that fewer than a dozen al-Qaeda “core members” remain in Afghanistan. However, while the group lacks operational capability in Afghanistan, U.S. officials assess that al-Qaeda has the intention to reconstitute the ability to conduct external attacks and could do so in one to two years. *Id.*
97. *Blinken Says Taliban ‘Grossly’ Violated Doha Agreement by Sheltering al Qaeda’s Zawahiri*, REUTERS (Aug. 1, 2022, 10:17 PM), <https://www.reuters.com/world/asia-pacific/blinken-says-taliban-grossly-violated-doha-agreement-by-sheltering-al-qaedas-2022-08-02/> [<https://perma.cc/N7R2-X9SH>] (Blinken stated “in the face of the Taliban’s *unwillingness or inability* to abide by their commitments, we will continue to support the Afghan people with robust humanitarian assistance.”).
98. Yuliya Talmazan & Khalid Mowhid, *The U.S. Killed Al Qaeda Leader Ayman al-Zawahiri in Kabul. What Now for the Taliban?* NBC NEWS (Aug. 2, 2022, 4:27 PM), <https://www.nbcnews.com/news/world/us-killed-al-qaeda-leader-ayman-al-zawahri-kabul-taliban-war-on-terror-rca41120> [<https://perma.cc/6UQZ-NFXH>].
99. *Id.*
100. Doha Agreement, *supra* note 88, Part Two.

harbor to Zawahiri for nearly six months without taking any action, which could be analyzed as the Taliban’s unwillingness to suppress Zawahiri’s threat.

4. Capability of the Taliban

Assuming the Taliban was willing to follow the terms of the Doha Agreement, the United States still must assess if the Taliban was capable of abiding by its promises. After all, the United States had knowledge¹⁰¹ that Zawahiri was seeking refuge in a house maintained by a Taliban Minister, and it is questionable whether the Taliban knew the same.¹⁰² Indeed, nearly two years after the strike, the Taliban continues to persistently refute Zawahiri’s death, claiming it had no information about his killing, and even stating that there is no evidence to prove Zawahiri was killed in Kabul.¹⁰³

Since the Taliban takeover in 2021, terrorists across the Middle East have flocked to Afghanistan.¹⁰⁴ Experts claim that the Taliban

101. Background Press Call, *supra* note 90 (“Our ability to locate Zawahiri after years of hiding was the result of careful, patient, and persistent work by our counterterrorism professionals.”).

102. The major fact in dispute for this UOU analysis is whether the Taliban knew Zawahiri was in the safehouse in Kabul. Under the United States’ belief, the Taliban had knowledge of his residence and could have raided the safehouse and detained him. However, the Taliban denies having any knowledge of the arrival and residence of Zawahiri. While this fact might be disputed, neither side the Taliban takes is beneficial for its defense. If they were aware Zawahiri was residing in the safehouse, they would be deemed unwilling by the United States; however, if they were found to have no knowledge, the U.S. would deem the Taliban unable. *Id.*; *Taliban Claim They Were Unaware of al-Qaeda Leader in Afghanistan*, CTV NEWS (Aug. 4, 2022, 9:00 AM), <https://www.ctvnews.ca/world/taliban-claim-they-were-unaware-of-al-qaeda-leader-in-afghanistan-1.6013990> [<https://perma.cc/HGQ7-MP8W>]; *The U.S. and the Taliban After the Killing of al-Qaeda Leader Ayman al-Zawahiri*, INT’L CRISIS GRP. (Sep. 20, 2022), <https://www.crisisgroup.org/asia/south-asia/afghanistan-united-states/us-and-taliban-after-killing-al-qaeda-leader-ayman-al> [<https://perma.cc/XM9P-RR69>].

103. As discussed above, the appearance of Zawahiri in Kabul does not fare well for the Taliban in the UOU analysis. However, the emergence of claims by the Taliban indicate there is no evidence Zawahiri was killed in Afghanistan would hinder the U.S.’s argument of both unable or unwilling. With Biden claiming the United States had “clear and convincing evidence of his location,” and the Taliban claiming the contrary, this material fact is still up for consideration. Ayaz Gul, *Taliban Persistently Refute al-Zawahiri’ Death by U.S. Drone Strike, One Year on*, VOA (July 24, 2023, 7:56 AM), <https://www.voanews.com/a/7193513.html> [<https://perma.cc/J426-WCMU>].

104. Vanda Felbab-Brown, *Afghanistan in 2023: Taliban Internal Power Struggles and Militancy*, BROOKINGS (Feb. 3, 2013), <https://www.brookings.edu/articles/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/> [<https://perma.cc/3YH9-QTX7>].

government has limited capacity and that it is focused on figuring out how to govern the country.¹⁰⁵ Reports also emphasize that this governing does not necessarily mean the Taliban is becoming a state actor in charge of constraining terrorist activities.¹⁰⁶ With the Taliban’s focus shifted, several terrorist attacks have occurred in Kabul since the Taliban took power.¹⁰⁷ Although the Taliban has settled into Kabul and announced plans for a large security “apparatus,” this task may take years.¹⁰⁸ Based on what the United States knew at the time of the strike, it could have determined that the Taliban lacked capacity to find and detain Zawahiri.¹⁰⁹

5. Proposed Means to Address the Threat of al-Qaeda

The United States must have also reasonably assessed the actions that the Taliban proposed in the Doha Agreement. From an outsider’s perspective, signing an international agreement may show the international community that the Taliban is serious about tackling the threat of al-Qaeda. The Agreement laid out specific steps the Taliban would take to assure the United States that the threat was under control:¹¹⁰

- 1) Not allowing al-Qaeda to use the soil of Afghanistan to threaten the security of the United States;

105. Priyanka Boghani, *The Threat of Al Qaeda and ISIS-K in Taliban-Controlled Afghanistan*, FRONTLINE (Nov. 4, 2021), <https://www.pbs.org/wgbh/frontline/article/al-qaeda-isis-k-threat-taliban-afghanistan/> [https://perma.cc/3MMU-ZZU4].

106. The Taliban is also busy fighting two insurgencies—one led by the National Resistance Front (NRF) and other groups aligned with the former Afghani government and the second comprising of the Islamic State affiliate in Afghanistan (ISKP, also known as ISIS-K). While ISIS-K was “nearly eradicated” in late 2019 by the United States and the Taliban, their operation capabilities remain strong as they continue to conduct terrorist attacks within Kabul. CLAYTON THOMAS, CONG. RSCH. SERV., R46955, TALIBAN GOVERNMENT IN AFGHANISTAN: BACKGROUND AND ISSUES FOR CONGRESS 15–16 (2021) <https://crsreports.congress.gov/product/pdf/R/R46955>.

107. *See id.* at 12, 15.

108. *Afghanistan’s Security Challenges Under the Taliban*, INT’L CRISIS GRP. (Aug. 12, 2022), <https://crisisgroup.org/asia/south-asia/afghanistan/afghanistans-security-challenges-under-taliban> [https://perma.cc/2BEA-RKFB].

109. This may be conditioned on whether the Taliban knew Zawahiri was residing at the safehouse. If they knew, it would not take much control over the territory to eradicate him. If they did not know, then they would not have enough information to eradicate him. *See supra* Sections III(a)(3-4).

110. Doha Agreement, *supra* note 88, Part One.

- 2) Sending a clear message to those posing a threat to the United States that they have no place in Afghanistan, and not cooperating with those who pose a threat;
- 3) Preventing any group from recruiting, training, and fundraising in Afghanistan;
- 4) Committing to deal with individuals or groups seeking asylum in accordance with international migration law, so that such persons or groups do not pose a threat to U.S. security; and
- 5) Not providing visas, passports, travel permits, or other legal documentation to those who pose a threat to the United States.

These proposed means *could* demonstrate that the Taliban was willing and able to address Zawahiri’s presence in the country. But a closer reading shows that the Taliban never pledged to break ties with al-Qaeda or expel terrorists.¹¹¹ Scholars believe that the best the United States could muster in the Agreement was a flimsy pledge to “not allow” al-Qaeda to use Afghan soil to threaten U.S. security.¹¹² To this end, without specific verification and enforcement mechanisms, the Taliban’s “commitments” would be difficult to address.¹¹³ Afghan expert Lisa Curtis claimed that “[t]he Doha agreement was a very weak agreement, and the United States should have gained more concessions from the Taliban.”¹¹⁴ In fact, shortly before the deal was signed, the Taliban promised al-Qaeda that the two groups would “remain friends.”¹¹⁵ This has led some to believe that the Taliban was engaging as a “false negotiator”¹¹⁶ and it was “wishful thinking” by the United States to believe the Taliban would be interested in cutting ties with al-Qaeda.¹¹⁷ The proposed means to address al-Qaeda in Afghanistan

111. Lisa Curtis, *How the Doha Agreement Guaranteed US Failure in Afghanistan*, HOOVER INST: THE CARAVAN NOTEBOOK (Oct 29, 2021), <https://scribd.com/document/535940581/How-the-Doha-Agreement-Guaranteed-US-Failure-in-Afghanistan> [<https://perma.cc/JY4R-4RVH>].

112. *Id.* at 4.

113. John R. Allen, *The US-Taliban Peace Deal: A Road to Nowhere*, BROOKINGS (Mar. 5, 2020), <https://www.brookings.edu/articles/the-us-taliban-peace-deal-a-road-to-nowhere/> [<https://perma.cc/XCW2-QJGZ>].

114. Matthew Lee & Eric Tucker, *Was Biden Handcuffed by Trump’s Taliban Deal in Doha?*, ASSOCIATED PRESS (Aug. 19, 2021), <https://apnews.com/article/joe-biden-middle-east-taliban-doha-e6f48507848aef2ee849154604aa11be> [<https://perma.cc/PBR3-EFU6>].

115. Curtis, *supra* note 111, at 4.

116. Yaqub Ibrahim, *False Negotiations and the Fall of Afghanistan to the Taliban*, 77(2) INT’L J. 168, 173 (2022).

117. Lee & Tucker, *supra* note 114.

by the Taliban were empty promises, and it was not surprising that Zawahiri was able to take refuge in Kabul.

6. Assessing Prior Interactions with the Taliban

The United States should also assess its prior interactions with the Taliban on related issues to attacking al-Qaeda. By several accounts, the United States has taken repeated steps to address al-Qaeda’s presence in Afghanistan while under the control of the Taliban.

Prior to 9/11, the U.N. Security Council, with sponsorship from the United States, demanded that the Taliban turn over Osama Bin Laden in UNSC Resolution 1267.¹¹⁸ The Taliban ignored UNSCR 1267, and according to the United States “provided no indication that they intend to comply with the resolution’s obligations to stop supporting international terrorism.”¹¹⁹ Ten days after 9/11, President Bush demanded that the Taliban turn over the al-Qaeda leaders harbored in Afghanistan.¹²⁰ However, the Taliban stated it would not do so without an immediate cessation of the bombing campaign over Afghanistan and evidence that Bin Laden was behind the attacks.¹²¹ After numerous failed negotiations, the United States chose to continue its bombing expedition.¹²² The existence and failures of these requests support the U.S. theory that the Taliban was UOU to eradicate the threat of al-Qaeda from its territory.

C. Legality of Strike and Questions Raised

The U.S. explanation for the force used against Zawahiri did not exhibit the analysis discussed in Section III(B).¹²³ This ambiguity has caused experts to question the legality of the strike.¹²⁴ Scholars point to

118. S.C. Res. 1267, ¶ 2 (Oct. 15, 1999).

119. *Taliban Fact Sheet*, U.S. DEP’T OF STATE, https://1997-2001.state.gov/regions/sa/fact_sheet_taliban.html [<https://perma.cc/928T-WWX2>].

120. George W. Bush, 43rd President of the U.S., Address to Joint Session of Congress (Sept. 21, 2001) (“[T]onight, the United States of America makes the following demands on the Taliban: Deliver to the United States authorities all the leaders of al Qaeda who hide in your land.”).

121. *Bush Rejects Taliban Offer to Hand Bin Laden Over*, THE GUARDIAN (Oct. 14, 2001, 9:30 PM), <https://www.theguardian.com/world/2001/oct/14/afghanistan.terrorism5> [<https://perma.cc/N32D-4RFB>].

122. Bryce Greene, *NPR Distorts History of US Invasion of Afghanistan*, FAIR (Aug. 2, 2022), <https://fair.org/home/npr-distorts-history-of-us-invasion-of-afghanistan/> [<https://perma.cc/9BWM-CL38>].

123. The only information released was a U.S. Secretary of State press statement claiming the Taliban’s “unwillingness and inability” to abide by the Doha agreement. *See* Press Statement, *supra* note 13.

124. *Top Experts Raise Questions Regarding Legal Basis of Zawahiri Strike*, JUST SEC. (Aug. 4, 2022), <https://www.justsecurity.org/82584/top->

the level of support the doctrine has internationally, whether Zawahiri’s threat to the United States was imminent, and the level of consent the Taliban gave to conduct the strike.¹²⁵ From the analysis detailed in Section III(B), the United States’ likely best arguments for finding UOU are the following: i) the Taliban breached the Doha Agreement not to harbor al-Qaeda members on Afghani soil ii) the Taliban has had a cooperative relationship with al-Qaeda in the past, present, and apparent future; and iii) this relationship was an important aspect in carrying out deadly terrorist attacks.¹²⁶ However, this argument has two weaknesses: i) without more information, the United States cannot be certain that the Taliban knew Zawahiri was in Kabul; and ii) Zawahiri may not constitute an imminent threat with al-Qaeda still regrouping at the time.

While there is no official decision on the strike’s legality, it is likely that the United Nations would find it illegal, as the United States claimed UOU without clarifying why or how it reached that decision.¹²⁷ Analyzing the Zawahiri strike with the Deeks factors shows the importance of states providing analysis and facts to defend their decision-making. Without an appropriate framework, any country looking to attack NSAs walks the line between appropriate invocation of self-defense and reprisal each time it strikes. With the UOU doctrine crystalizing into customary international law,¹²⁸ the United Nations should use the Zawahiri strike’s ambiguity as an opportunity to formulate a resolution that finalizes the standard for UOU.

IV: MOVING FORWARD: ADDING CLARITY TO “UNABLE OR UNWILLING” IN CUSTOMARY INTERNATIONAL LAW

A. *Framework of the “Unable or Unwilling” Resolution*

This recommended U.N. resolution should set up a normative framework based upon the Deeks factors for states to follow when contemplating use of force against NSAs. While the current version of the Deeks factors can provide value, it lacks requirements and

experts-raise-questions-regarding-legal-basis-of-zawahiri-strike/ [https://perma.cc/J362-FTQF].

125. *Id.*

126. *See supra* Section III(B).

127. In this strike, the United States claimed UOU without backing its strike with evidence or submitting an Article 51 notification to the Security Council detailing its thought process. The United States has not shown Zawahiri was planning an imminent attack or that he was taking refuge with the knowledge of the Taliban, two important factors in the UOU Deeks factors test. *See supra* Sections III(a), IV(a)(2).

128. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 41, at 40.

procedures to inspire fair dealings. This Note offers a few suggestions to solidify the framework’s intentions and requirements.

1. Good-Faith Standard

The resolution should subject all determinations by states to a robust and well-developed good-faith requirement.¹²⁹ Craig Martin has suggested that good faith should apply to both the initial determination that self-judgement is appropriate to use force, as well as the exercise of judgment.¹³⁰ The standard should compel all states to conduct the generally accepted good-faith test that requires that i) the state engage in honest and fair dealing in the exercise of self-judgement; and (ii) the state has a rational basis for the judgement made.¹³¹ This addition would hold states accountable and force them to defend the basis of their strikes through objective evidence and rationales.

2. Article 51 Notification Explanation Requirement

Article 51 of the U.N. Charter requires states to promptly notify the Security Council of its actions taken in self-defense.¹³² Nonetheless, Article 51 does not impose any requirement on what needs to be included other than the measures taken in response to self-defense. With no requirement to provide evidence, “Art. 51 becomes a convenient excuse for any use of force at the whims of a State against another state.”¹³³ The proposed U.N. resolution should implement the special rapporteur’s recommendation of providing a thorough justification, including evidence of an ongoing attack and proportionality, when contemplating using force.¹³⁴ By adding an explanation requirement, states would have to complete a thorough analysis with the Deeks factors prior to conducting a strike, which would be used as evidence in their Article 51 notification. This explanation would then go to the Security Council for public

129. Martin, *Challenges and Refining the Unwilling or Unable Doctrine*, *supra* note 17, at 452.

130. *Id.*

131. *Id.* at 453.

132. Durward Johnson, *The UN Soleimani Report and the U.S. Article 51 Notification*, LIEBER INST. (Sep. 24, 2020), <https://lieber.westpoint.edu/un-soleimani-report-u-s-article-51-notification> [<https://perma.cc/4C6D-R4AL>].

133. Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Extrajudicial, Summary on Arbitrary Executions*, ¶ 64, U.N. Doc. A/HRC/44/38 (June 29, 2020).

134. *Id.* ¶ 92.

examination.¹³⁵ This public examination cannot occur when states provide slim evidence for targeted killings.¹³⁶

V: CONCLUSION

With the United States likely to invoke the UOU doctrine if prompted internationally, an analysis with the Deeks factors shows that the factors do not weigh heavily in its favor. While the Taliban and al-Qaeda relationship still exists and the Taliban lacks complete control over Kabul, it is uncertain whether the Taliban knew Zawahiri was living in Afghanistan or whether he produced any threat to U.S. security.¹³⁷ Aside from the disputed fact that the Taliban harbored Zawahiri, the United States provided little evidence that the Taliban was UOU. This lack of evidence has caused scholars to question the legitimacy of a test that supposedly has no limits. Ultimately, the international community may perceive the Zawahiri strike as another instance of the United States conducting preventative self-defense.

As states continue to invoke the UOU doctrine to justify targeted killings, they lack guidance as to the correct way to implement it. In the strike of Zawahiri, the United States would have benefitted from conducting the analysis in Section III(B)¹³⁸ and submitting it to the United Nations for consideration. While it may have been in the best interest of the United States to eliminate Zawahiri for his involvement in al-Qaeda’s terrorist attacks, the legal judgment should not be biased by hindsight.¹³⁹ A resolution mandating countries intending to invoke the UOU doctrine to undergo the Deeks Factors Test would have necessitated the United States to gather and evaluate information on the Taliban, enhance its decision-making procedures, and justify its

135. *Id.* ¶ 64.

136. States are providing little evidence for the imminence of the threats against which they are invoking claims of preemptive self-defense and targeted killings. It is theorized that this poor quality of Article 51 notifications is due to Member States not being informed of their submission as a matter of routine. *Id.* ¶ 68.

137. While it’s ultimately up to the victim state to weigh each substantive factor accordingly, even the most favorable analysis would show the United States most likely intended to kill Zawahiri without regard to state sovereignty, continuing its policy of preventative self-defense. Deeks, *supra* note 14, at 519.

138. It’s important to note that all the information received for this analysis was public information. The United States may have certain confidential information it does not want to disclose that it could have considered when conducting the killing. Regardless, the strike produces a continuance of ambiguity inherent in the current U.S. counterterrorism program. *See Top Experts Raise Questions Regarding Legal Basis of Zawahiri Strike*, *supra* note 124.

139. *Id.*

actions based on explicit standards. Additionally, this resolution would have shielded the United States from criticism and accusations of engaging in unlawful preventative self-defense.

