

The Evolution of Law and Policy for CIA Targeted Killing

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INTRODUCTION

Just suppose. The Attorney General, lanky as the President, walks into the Oval Office to join a meeting. The top law enforcement officer is slumped down with apparent bad news. He avoids eye contact with the Commander-in-Chief. “Mr. President,” he says looking down at the coffee table, “the ACLU believes our drone program is illegal.” Silence. (The President and the Attorney General both, of course, maintain links to the human rights community, an important part of their political base.) The President’s other advisers fidget and twitch. The Vice President adjusts the coaster under his drink. Beads of perspiration form on some faces. The Secretary of State and the Secretary of Defense look for the exit; the law is not their thing.

The President is cool. “Could you be more specific,” he says, tapping his finger on a black briefing book.

The Attorney General looks up from the table. “The drone strikes in Pakistan. Remember, the program Leon was not supposed to talk about with the media.”¹

The President smiles. “Yes, I know that. But which laws are they talking about?”

After an awkward pause, the President, himself a highly sophisticated lawyer, suggests, “Let’s talk this through some more.” The Attorney General agrees. After the lawyer-to-lawyer exchange, the other advisers relax. Maybe the CIA drone strikes are not illegal after all. Or maybe the apparent illegality does not matter that much. The Vice President takes a sip of his drink. And the President asks for tea and coffee to be served. No

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1. *U.S. Airstrikes in Pakistan Called “Very Effective,”* CNN (May 10, 2009), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> (quoting Leon Panetta as saying the Predator is “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership”).

one wants to leave the room after all. They open their briefing books instead.

This scenario emphasizes a simple point: President Obama, a Harvard Law School graduate, a former teacher of constitutional law at the University of Chicago and a Nobel Peace Laureate, must believe that he has the authority to order the CIA to fire missiles from drones to kill suspected terrorists. Not everyone agrees with him, though.

For almost a decade now, the United States has been firing missiles from unmanned drones to kill people identified as leaders of al Qaeda and the Taliban. This “targeted killing” has engendered controversy in policymaking and legal circles, spilling into law review articles, op-ed pieces, congressional hearings, and television programs.² On one level, this

2. For a significant judicial assessment of the legality of targeted killing, see Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02, (Dec. 11, 2005), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter PC ATI] (Israeli High Court decision subjecting targeted killing in armed conflict to various procedural and substantive controls suggested by human rights law). For a congressional hearing focusing on the use of drones for targeted killing, see *The Rise of the Drones II – Examining the Legality of Unmanned Targeting, Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 2d Sess. (2010) (including testimony from Professors Mary Ellen O'Connell, William C. Banks, David Glazier, and Kenneth Anderson). For other commentary, see NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 442-444 (2008) (providing a detailed survey and assessment of targeted killing under international humanitarian law, international human rights law, and the law governing interstate use of force); Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings*, U.N. DOC. A/HRC/14/24/Add.6 (May 28, 2010) (assessing the legality of targeted killing generally, criticizing, in particular, elements of the United States' CIA drone campaign against al Qaeda and the Taliban); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Benjamin Wittes ed., 2009) (focusing on self-defense as a rationale for targeted killing of terrorists); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003) (concluding that U.S. law treats targeted killing as a “as a permissible but tightly managed and fully accountable weapon of national self-defense”); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT. SEC. J. 145 (2010) (discussing difficulties of pigeonholing targeted killing of terrorists into the traditional models of armed conflict or law enforcement and suggesting limits on targeted killing should ultimately be “respectful of the values and considerations espoused” by both models); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUM. L. (2010) (assessing the legality of the United States targeting Anwar al-Awlaki, a dual Yemeni-American citizen, under the U.N. Charter, IHL, and IHRL regimes); W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 724 (2007) (predicting evolution of a legal norm permitting targeted killing in some circumstances); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004) (concluding “targeted killing is a legitimate and effective form of active self-defense”); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005) (contending that IHL should borrow elements of IHRL to provide greater protection against improper targeting of suspected terrorists); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405

controversy is curious. A state has considerable authority in war to kill enemy combatants – whether by gun, bomb, or cruise missile – so long as those attacks obey basic, often vague, rules (e.g., avoidance of “disproportionate” collateral damage). So what is so different about targeted killing by drone?

Some of the concerns about a CIA drone campaign relate to the personalized nature of targeted killing. All attacks in an armed conflict must, as a matter of basic law and common sense, be targeted. To attack something, whether by shooting a gun at a person or dropping a bomb on a building, is to target it. “Targeted killing,” however, refers to a premeditated attack on a specific person. President Franklin D. Roosevelt, for instance, ordered Admiral Yamamoto killed not because he was *any* Japanese sailor, but because he was the author of “toro, toro, toro” on Pearl Harbor. President Obama, more recently, ordered Osama bin Laden killed not because the Saudi was *any* member of al Qaeda, but because he was the author of 9/11 who continued to command the terrorist organization. Targeted killing is psychologically disturbing because it is individualized. It is easier for a U.S. operator to kill a faceless soldier in a uniform than someone whom the operator has been tracking with photographs, videos, voice samples, and biographical information in an intelligence file.

There is also concern that drones will attack improperly identified targets or cause excessive collateral damage. Targets who hide among peaceful civilians heighten these dangers. Of course, drone strikes should be far more precise than bombs dropped from a piloted aircraft. The lower

(2009) (contending that CIA drone strikes against non-citizens located outside the United States implicate due process under the U.S. Constitution) [hereinafter *Due Process and Targeted Killing*]; Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 NAV. WAR COLL. INT’L L. STUDIES 109 (2009) (assessing the legality of U.S. incursions into Pakistan to attack al Qaeda and the Taliban); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237 (2010) (concluding that a state may, as a matter of self-defense, legally target non-state actors directly involved in armed attacks); Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. & POL’Y 343 (2010) (concluding that the United States is not in an armed conflict with al Qaeda and that “[p]eacetime criminal law, not the law of armed conflict is the right choice against sporadic acts of terrorist violence”); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming) (concluding that CIA drone attacks in Pakistan are illegal) [hereinafter *Case Study*]; Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011 UNIV. ILL. L. REV. 101 (2011) (proposing that IHL principles require the CIA to be certain of its targets beyond reasonable doubt and that CIA drone strikes should receive independent review) [hereinafter *Measure Twice*]; Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR COLL. REV. 127, 134-136 (2007) (concluding that targeted strikes against civilians are legal only if: (a) the civilian is directly participating in hostilities, and (b) the attack was authorized by a senior military commander).

“costs” of drone strikes, however, encourage governments to resort to deadly force more quickly – a trend that may accelerate as drone technology rapidly improves and perhaps becomes fully automated through advances in artificial intelligence. Paradoxically, improved precision could lead to an increase in deadly mistakes.

Another concern relates to granting an intelligence agency trigger authority. Entrusting drones to the CIA, an intelligence agency with a checkered history as to the use of force whose activities are largely conducted in secret, heightens concerns in some quarters that strikes may sometimes kill the wrong people for the wrong reasons. If applied sloppily or maliciously, targeted killing by drones could amount to nothing more than advanced death squads.

For these and related reasons, the use of killer drones merits serious thought and criticism. Along these lines, many opponents of the reported CIA program have decried it as illegal. Without questioning their sincerity, one can acknowledge the soundness of their tactics. “Law talk” offers them a strong weapon. How could anyone, without shame or worse, support an illegal killing campaign? Illegality is for gangsters, drug dealers, and other outlaws – not the Oval Office.

A thorough review of the arguments against the CIA drone campaign, however, shows that most critics invoke laws that do not bind American officials or laws that are vague. In a zone of ambiguity, one expects those responsible for protecting the United States to interpret their authority broadly. The President and his advisers – notably Harold Koh, the Dean of Yale Law School, currently the State Department Legal Adviser and a human rights specialist of the first order – have argued and concluded that CIA drone strikes are legal.³ The rules of armed conflict and the laws of interstate force permit the United States reasonably to assert the right to use the CIA to fire missiles from unmanned drones to kill “fighting” members of al Qaeda and the Taliban located in countries that are unable (or perhaps unwilling) to control the threat these armed groups pose.

Although critics of the CIA drone program do not demonstrate that its strikes are clearly illegal, some raise important points on how the law, drifting into policy, *should* constrain drone strikes. As noted, the CIA drone campaign and any similar campaigns pose acute dangers of mistakes and abuses. The law, in response to this type of problem, seeks to ensure accuracy, fairness, and accountability by insisting on regular, responsible procedures. Yet the laws of war, generally speaking, merely require reasonable precautions before striking.⁴ A simple rule-of-reason seems

3. See Harold Hongju Koh, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of Internat'l Law (Mar. 25, 2010), available at <http://www.state.gov/s/1/releases/remarks/139119.htm>.

4. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 57,

inadequate for targeted killing that, by its terms, demands “intelligence-driven use of force.”⁵

To facilitate the evolution of a “due process” of targeted killing, in two earlier pieces, we have attempted to tease controls from the U.S. Constitution and from international humanitarian law’s insistence on reasonable precautions.⁶ Whether for us or for other commentators, creating fine-grained constraints will not be straightforward. If the constraints are to evolve at all, they are likely to come from a long dialogue among many interested parties. The United States could add to this conversation by publicly adopting standards for its use of drones that ensure accuracy and accountability. The CIA, accordingly, could acknowledge a general role in the drone program without mentioning the names of any participating countries. By giving up a thin veil of secrecy, the CIA would benefit from more informed public scrutiny and might receive more support from some American citizens and allies. But that increased transparency could carry costs, including offending those concerned about the level of collateral damage. Residents of foreign countries closest to the locations of CIA strikes are likely to be the most sensitive. Take Pakistan as one possible example.

We do not expect opponents of CIA drones to give up their rhetorical weapon claiming illegality. Their rhetoric, however, tends to obscure how the law should *evolve* to result in good policy. The relevant substantive law governing resort to deadly force by states is and necessarily will remain vague. In contrast, the specific procedures for CIA targeted killing cry out for scrutiny and improvement. At the level of specificity that matters to actual drone operators, good law blurs into good policy. At this level, all of the President’s national security team, lawyers and non-lawyers alike, are welcome to advise him on drones.

To help further this conversation, this essay explores legal concerns raised by targeted killing in the context of the CIA drone campaign. Part I briefly assesses the significance of domestic law regimes. In short, U.S. law plainly authorizes some sort of drone campaign; the domestic laws of other countries do not bind American officials or alter their legal duties. Analysis must therefore focus on the drone campaign’s compliance with international law. Part II concludes that the drone campaign appears to

Dec. 7, 1978, 1125 U.N.T.S. 3; *see also* MELZER, *supra* note 2, at 364 (observing that the requirement of feasible precaution has attained customary status in both international and non-international armed conflicts).

5. Kenneth Anderson, “Efficiency” *Jus in Bello* and “Efficiency” *Jus Ad Bellum* in the Practice of Targeted Killing Through Drone Warfare?, PENN CONF. ON TARGETED KILLING, WORKING PAPER SSRN SERIES 2 (Apr. 18, 2011 Draft), available at <http://www.ssrn-id1812124.pdf>.

6. *See generally*, Murphy & Radsan, *Due Process and Targeted Killing*, *supra* note 2; Radsan & Murphy, *Measure Twice*, *supra* note 2.

comply with applicable substantive norms of international law. Part III addresses the adequacy of procedural limits on CIA drone strikes and offers tentative recommendations for improvement.

I. CIA DRONE STRIKES AND DOMESTIC LAW

A. *The President at Maximum Authority Under U.S. Domestic Law*

In assessing the legality of CIA drone strikes, one should remember that the President is acting with maximum constitutional authority when engaged in armed conflict against those responsible for the 9/11 attacks. Within a week of 9/11, Congress passed the Authorization for Use of Military Force (AUMF).⁷ This congressional boost authorizes the President to “use all necessary and appropriate force” against those who “planned, authorized, committed, or aided” the 9/11 attacks or “harbored” the attackers.⁸ In terms of Justice Robert H. Jackson’s famous framework from the *Steel Seizure Case*, the AUMF put the President in his most constitutionally powerful position for prosecuting a war against al Qaeda and the Taliban. In that position, the President “personif[ies] the federal sovereignty.”⁹

The President’s authority to use force is not limited to the terms of the AUMF. Article II of the U.S. Constitution arguably grants him, as Commander-in-Chief, as representative of the United States in foreign policy, and through a separate vesting of executive power, independent levers for the use of force. Witness the use of American force in Libya to protect rebels from being attacked by their own government. President Obama justified this Libyan action by a combination of his executive powers plus an applicable U.N. Security Council Resolution.¹⁰ The President has the power (and the duty) to repel attacks on the nation.¹¹

Still, the AUMF is not a blank check for unlimited war-making. It authorizes force only against persons and entities bearing responsibility for the 9/11 attacks. Because al Qaeda, the Taliban, and associated groups are amorphous in themselves and in their interrelationships, it may take

7. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. §1541 (2006)).

8. *Id.*

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

10. President Barack Obama, Remarks by the President on the Situation in Libya (Mar. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya>; see also S.C. Res. 1973, ¶4, U.N. Doc S/RES/1973 (Mar. 17, 2011), available at <http://daccess-ods.un.org/TMP/8119533.html> (authorizing Member States “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack” in Libya).

11. *The Prize Cases*, 67 U.S. 635, 647, 659–660 (1863).

contestable judgments based on classified information to resolve whether a particular entity (e.g., al Qaeda in the Arabian Peninsula) is part of al Qaeda, a close ally, or a loose affiliate. For this reason, Jack Goldsmith and others have suggested that the AUMF be updated to include international terrorist groups that threaten American security but are distinct from al Qaeda.¹² This problem of characterization, however, cannot preclude the legality of the CIA drone campaign per se since core members of al Qaeda and the Taliban – many of whom reside in Pakistan – plainly fall within the AUMF’s ambit.

Determining targeting authority under the AUMF, in sum, requires an assessment of whether a person is a member of an entity that “planned, authorized, committed, or aided” the 9/11 attacks or “harbored” them. Applying this broad language involves an exercise in discretion. We expect that the President, in conducting this exercise, will weigh national security more highly than the ACLU does. The President takes into account his special responsibilities under the Constitution.

B. The Legal Irrelevance of Other Nations’ Domestic Law

Critics of the CIA’s targeted killing program contend that drone strikes might constitute crimes in the countries in which they occur.¹³ Violations of a foreign nation’s laws can indeed create difficulties for American officials. Italian authorities, for instance, have issued arrest warrants against CIA officials in connection with an extraordinary rendition from that country.¹⁴ So those American officials must now be careful where they travel. But as long as the President and his agents do not fall into the jurisdictional grasp of a nation in which drone strikes occur, that nation’s laws lack force for U.S. operators. Those domestic laws cannot trump U.S. law, which charges the President with protecting the United States. Where the President’s constitutional obligation to protect the United States so requires, the President must violate another nation’s law. The President and his advisers should consider, of course, the policy implications of domestic violations in other countries – and the charge of murder is, needless to say, especially sensitive. Assessing such considerations, the President is making a policy judgment, not a legal judgment, about the force of another country’s laws.

12. Jack Goldsmith, *More on the Growing Problem of Extra-AUMF Threats*, LAWFARE (Dec. 1, 2010), <http://www.lawfareblog.com/2010/12/more-on-the-growing-problem-of-extra-aumf-threats>.

13. See, e.g., O’Connell, *Case Study*, *supra* note 2, at 22 (noting that CIA officers are not lawful combatants and could be charged with crimes under Pakistani law).

14. Stephen Grey & Don Van Natta, Jr., *13 with the C.I.A. Sought by Italy in a Kidnapping*, N.Y. TIMES, June 24, 2005, at A1.

The most obvious example of how these concerns should play out is the killing of Osama bin Laden in May 2011. The United States, after careful surveillance and planning, organized a helicopter attack on bin Laden's compound in an area under civilian Pakistani control. According to public accounts, the United States did not notify Pakistan of the raid in advance. For the sake of argument, stipulate that killing bin Laden was murder under Pakistani law. Nonetheless, given an adequate assurance of success and limited collateral damage, any American President would have ordered the bin Laden attack, and any account of the President's obligations that says otherwise should be discounted as unrealistic.

Independent of the bin Laden example, the CIA has a long reach around the world. Like its sister agencies in the intelligence community, the CIA habitually violates the laws of other countries – and arguably international law as well – as it conducts espionage around the world.¹⁵ Every year since the CIA's founding in 1947, Congress has appropriated money for the Agency to conduct espionage and other secret activities.¹⁶ To steal secrets from other countries, the CIA is expected – by Congress and by anyone else who thinks for more than a moment – to violate other nations' laws. After all, it does not require a clandestine agency to collect the open-source information available in newspapers, magazines, radio broadcasts, and television shows. The State Department could handle those matters on its own.

II. CIA DRONE STRIKES AND INTERNATIONAL LAW

Most of the charges leveled against the CIA drone campaign turn on the interpretation and application of international law in the form of either treaties or custom. One should recall that international law binds American officials *only* if it is also U.S. law. This fact leads to the problem of determining just which international laws convert into U.S. law. Some cases are easy: A treaty approved by the Senate constitutes a type of U.S. law, although making it domestically enforceable may require additional legislation.¹⁷ Some cases are hard: determining the binding force of customary international law, for example.¹⁸ Moreover, even if some piece

15. A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 596 (2007).

16. National Security Act of 1947, Pub. L. No. 80-253, §102(d)(5), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. §403-3(d)(5) (2006)) (“[I]t shall be the duty of the Agency . . . to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”).

17. *Medillin v. Texas*, 552 U.S. 491, 504-505 (2008).

18. For a nuanced discussion of the debate over the domestic force of customary international law, see generally Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L LAW 365 (2002). For a forceful argument that customary international law is not binding on the United States as a matter of constitutional law, see

of international law has become U.S. law, there is always the possibility that the United States, as a sovereign power, might change it – e.g., by withdrawing from the treaty. Coupling this point with an aggressive understanding of the President’s foreign affairs and commander-in-chief powers, Michael Paulsen says that the President may freely abandon or suspend the United States’ international law obligations, even many enshrined in domestic law.¹⁹ Professor Paulsen offers an admonition that the force of law on a sovereign is on some level always up to the sovereign and is fraught with policy considerations. The Obama administration, however, is not bogged down in academic debates; the Administration states that the United States should (and indeed does) follow all relevant international law.²⁰ Both proponents and opponents of the CIA drone campaign thus largely agree on the framework of the discussion.

Part of the reason they can agree is that many norms of international law are vague and even border on the vacuous. International humanitarian law (IHL), for instance, forbids attacks that cause “disproportionate” or “excessive” collateral damage to peaceful civilian interests. No responsible party is likely to defend its attacks by claiming a right to cause “excessive” collateral damage. No, that party will contend that its attacks honor proportionality – though critics will claim the contrary. The norms of international law, no doubt, leave room for major disagreements about interpretation and application. This wiggle room helps ensure international law’s existence by reducing incentives for nations to withdraw from a regime they might otherwise regard as too restrictive. But it also limits the power of international law to compel agreement from all interested parties on whether an attack was legal, particularly in light of uncertain facts and a lack of neutral observers. Unanimity over the legality of the CIA drone campaign is thus highly unlikely. This said, as detailed below, international law leaves ample room for the Obama administration to defend the campaign’s legality.

A. It Is Reasonable To Conclude that IHL’s Paradigm for Killing Governs Some Set of CIA Drone Strikes

Much of the debate about armed drones has revolved around whether it is legal for a state to use extra-judicial means to kill a person who is not, at

Michael Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L. J. 1762, 1800-1804 (2009).

19. Paulsen, *supra* note 18, at 1842 (“The force of international law, as a body of law, upon the United States is thus largely an illusion.”).

20. See Koh, *supra* note 3 (“[I]t is the considered view of this administration . . . that targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles (UAVs), comply with all applicable law, including the laws of war.”).

that moment, an imminent threat. Again, though he was killed by a bullet instead of a missile, bin Laden comes to mind: Did the United States have an obligation to capture him alive in his compound if it could have done so with minimal risk?

Whether deadly attacks are legal depends in large part on which paradigm applies: international human rights law (IHRL), IHL, self-defense, or some emergent hybrid. Rivers of ink have flowed on this subject, but the bottom line is that IHL gives the United States authority to use deadly force against some members of al Qaeda and the Taliban in some places. The outer limits of this authority are – as one might expect – hazy.

IHRL, which controls law enforcement, protects the right to life by limiting state authority to kill by extrajudicial means to circumstances where the target poses an immediate risk of death or serious injury to others.²¹ Drone strikes, however, attempt to kill people regardless of whether they pose an immediate threat. Critics have therefore stressed that these strikes contradict a fundamental tenet of IHRL. Philip Alston submits that “[a]s a practical matter, there are very few situations outside the context of active hostilities” that would satisfy IHRL’s requirement of imminent threat.²² Promiscuous use of rhetorical devices such as the “ticking-time bomb” to justify targeted killing “threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life.”²³ In short, “[i]f one contests the view that an armed conflict is ongoing, the lawfulness of any targeted killing is necessarily contested as well.”²⁴

IHLR does (and should) impose strict requirements on the use of deadly force. There is a clear preference for capture and arrest. But, like all of the law’s abstractions, IHRL is influenced by context. Thus Mary Ellen O’Connell, a critic of the CIA drone campaign, seems to suggest that arrest may not be necessary in areas so remote, violent, and lawless that an

21. See, e.g., MELZER, *supra* note 2, at 59 (“It is generally found that, under human rights law, targeted killings are permitted only in the most extreme circumstances, such as to prevent a concrete and immediate danger of death or serious physical injury. . .”). The right to life (protected by limits on state authority to kill) is enshrined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “[n]o one shall be arbitrarily deprived of his life.” The United States does not accept that the ICCPR applies to actions it takes outside its borders. No administration would lay claim, however, to a right to arbitrarily deprive others of life – wherever they may be. We will therefore assume that IHRL’s basic protections of the right to life are binding, customary law. Cf. Chesney, *supra* note 2, at 50 (making this same assumption).

22. Alston, *supra* note 2, ¶86.

23. *Id.*

24. Solis, *supra* note 2, at 135; see also Chris Downes, ‘Targeted Killings’ in an Age of Terror: The Legality of the Yemen Strike, 9 J. CONFLICT & SECURITY L. 277, 294 (2004) (contending that targeted killing “is irreconcilable with consistent support for many fundamental human rights norms”).

attempt would be futile.²⁵ As a practical result, IHLR and IHL may come to overlap more substantially – at least in "weak countries with poor human rights records."²⁶ O'Connell's concession suggests that it is possible for the human-rights and armed-conflict models to converge on the use of force when dealing with the unique threat of international terrorism.²⁷

In comparison with IHRL, IHL allows states greater leeway to kill. Proponents of the CIA's drone campaign are therefore eager to characterize the campaign as subject to IHL. IHL authorizes a state to target and kill enemy combatants – provided they are not *hors de combat* by, for instance, clearly surrendering. A soldier need not wait for an enemy combatant to pull out a gun before shooting him; a pilot may drop bombs on opposition forces asleep in their barracks; and, the President may order bin Laden killed by a Navy SEAL team absent clear surrender.

For IHL to apply, an "armed conflict" must exist. Armed conflicts are defined as international or non-international. As the American conflict with the Taliban and al Qaeda is not among states, it is a non-international armed conflict (NIAC). The law governing NIACs was originally developed to control conflicts between states and internal dissident forces.²⁸ Because states have little interest in limiting their powers to deal with dissidents, it is not surprising that the definition of NIAC is vague. Consider the following definition, proposed by the International Committee of the Red Cross (ICRC), which, it claims, reflects prevailing legal opinion:

Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups The armed confrontation must reach a minimum level

25. Mary Ellen O'Connell, *Re-Leashing the Dogs of War*, 97 AMER. J. INT'L L. 446, 455 (2003) (condemning 2002 Predator strike in Yemen due to failure to demand surrender but adding that a consensus might well develop that an unsuccessful Yemeni attack on al Qaeda in the same area had demonstrated that "attempting to arrest anyone in the area would be futile").

26. *See id.* (contending that, although the United States claimed the power to kill terrorists anywhere without warning, it would be "highly unlikely" to wield this power anywhere but in "weak countries with poor human rights records").

27. *See also* Chesney, *supra* note 2, at 56 (concluding that the United States, consistent with IHRL, can kill al-Awlaki "so long as the U.S. government does indeed have substantial reason to believe that he will continue to play an operational leadership role in planned attacks against the United States and that he cannot plausibly be incapacitated with sub-lethal means."); Blum & Heymann, *supra* note 2, at 160-164 (suggesting that targeted killing of active participants in a terrorist scheme may be justified under a law-enforcement regime even absent an immediate threat).

28. *See* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need To Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 308 (2007) (tracing the view that the category of non-international armed conflict was limited to intra-state civil wars).

of intensity and the parties involved in the conflict must show a minimum of organization.²⁹

Accordingly, drawing the line between riots and sporadic violence on the one hand and a true NIAC on the other hand requires judgments subject to reasonable disagreements.³⁰

Suppose, following bin Laden's death, that the American conflict with al Qaeda becomes sporadic and is no longer plausibly characterized as an armed conflict. To address threats in the absence of armed conflict, Kenneth Anderson contends that the United States may strike terrorists based on a "self-defense" paradigm. In apparent opposition, Article 2(4) of the U.N. Charter declares that Member States must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." This language seems to bar the use of force in self-defense. To avoid this absurdity, Article 51 adds that nothing in the Charter shall "impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations." As Anderson is quick to note, "self-defense is one of the most contested issues in public international law."³¹ Still, he observes that the United States has long taken the view that it may resort to interstate force to respond to a hostile act, to preempt imminent use of force, or to respond to a continuing threat.³² Self-defense is not, of course, a license to unlimited violence; it could not justify dropping a nuclear bomb on bin Laden's compound. Rather, customary law insists on "necessity and proportionality," and, in applying these standards, decisionmakers should regard IHL's parallel standards as "highly persuasive."³³

As Anderson surely expected, his argument for self-defense outside armed conflict has elicited strong criticism. Critics have called his self-defense justification, at least in its more aggressive form, "convoluted and hard to sustain."³⁴ These critics emphasize the requirement of an imminent threat. Alston, for example, describes the claim that states may strike preemptively to block uncertain, non-imminent attacks as "deeply contested and lack[ing] any basis in international law."³⁵ Alston further contends that

29. International Committee of the Red Cross (ICRC), *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* 5 (2008), available at <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

30. For an argument that the conflict with al Qaeda does not amount to a "worldwide-armed conflict," see O'Connell, *The Choice of Law*, *supra* note 2, at 15.

31. Anderson, *supra* note 2, at 18.

32. *Id.* at 18-19.

33. *Id.* at 28.

34. Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 115 (2010).

35. Alston, *supra* note 2, ¶45; see also Hina Shamsi, *Statement: The Rise of the*

Anderson's views "reflect an unlawful and disturbing tendency" to permit violations of international law and "impermissibly conflate jus ad bellum and jus ad bello."³⁶ Alston opposes anything that tends toward illegal reprisals.

Over time, these debates about self-defense may play a role in defining the abstract limits of state authority to engage in targeted killing. Applied to CIA drone strikes, however, they currently border on the academic. Under circumstances that include 9/11, American officials have reasonably concluded that the American conflict with the Taliban and al Qaeda is not among states; it is a non-international armed conflict. This conclusion allows the United States to target and kill some members of these armed groups in some places under IHL's relatively relaxed rules on killing.

B. The Law Does Not Limit CIA Strikes by Geographic "War Zones"

The existence of an armed conflict between the United States and al Qaeda and the Taliban does not carry with it a license to kill enemy combatants wherever they may be. There must be *some* limit on where the CIA may strike; it would be beyond bizarre to argue, for example, that the CIA could legally fire a missile at an al Qaeda operative in Toronto.

Two geographic limits have been suggested for drone strikes. The first is premised on the idea that IHL, as a body of law to protect civilians, limits the scope of armed conflicts. In a public letter to President Obama, the ACLU argued that the AUMF implicitly limits his warmaking to "war zone[s]" and "battlefields."³⁷ The ACLU states that "[t]he entire world is not a war zone" and hints that even the border regions of Pakistan may not qualify.³⁸ Starting more directly from IHL's law of NIAC, Alston contends that it is difficult "for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against 'al Qaeda, the Taliban, and other associated forces.'"³⁹ These critics obviously reject the notion – integral to

Drones II – Examining the Legality of Unmanned Targeting, Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform, 111th Cong. (2010), at 7, available at http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=4903&Itemid=55.

36. Alston, *supra* note 2, ¶42.

37. Letter from Anthony D. Romero, Executive Director, American Civil Liberties Union, to Barack Obama, President of the United States (Apr. 28, 2010), *available at* <http://www.aclu.org/human-rights-national-security/letter-president-obama-regarding-targeted-killings>. *See also* Shamsi, *supra* note 35, at 4 (contending that the AUMF "does not contain broad authorization for the use of lethal force anywhere in the world, in conflicts unrelated to the 9/11 attacks, or where there is no conflict at all.").

38. *Id.*

39. Alston, *supra* note 2, ¶53.

the Obama administration's public justification for the drone program – that the conflict with al Qaeda is global.⁴⁰

The ACLU's insistence on an implicit restriction in the AUMF is misplaced. If it were true that the conflict with al Qaeda is so easily cabined, then it would seem to follow that the strike on bin Laden seventy miles from Islamabad exceeded President Obama's authority under the AUMF. This conclusion amounts to a *reductio ad absurdum*. The AUMF does not explicitly state any geographic limitation.⁴¹

Alston's argument is the more important as it purports to rest on basic IHL principles instead of the AUMF. On closer inspection, however, his argument is not really about *geography*. Instead, it is based on the premise that persons or groups in countries allied with al Qaeda are unlikely to qualify as organized armed groups that can be proper parties to NIAC.⁴² Granted, figuring out which groups and people are integrated into al Qaeda (and which are not) is a problem. That said, it is difficult to see why a person outside of the "war zone" of Afghanistan could not be an al Qaeda commander. Indeed, immediately after bin Laden's death, there was public speculation that Anwar al-Awlaki, born in New Mexico but residing in Yemen, might become al Qaeda's next leader.⁴³

The example of al-Awlaki, a dual American-Yemeni citizen, is especially apt since the ACLU sued the Obama administration to remove him from an official "hit list" of targets.⁴⁴ Almost by way of a response to

40. See O'Connell, *The Choice of Law*, *supra* note 2, at 14 ("The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.").

41. AUMF, *supra* note 10.

42. At ¶55 of his report, Special Rapporteur Alston observes:

With respect to the existence of a non-state group as a "party," al Qaeda and other alleged "associated" groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take "inspiration" from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such "associates" cannot constitute a "party" as required by IHL – although they can be criminals, if their conduct violates U.S. law or the law of the country in which they are located.

Alston, *supra* note 2, ¶55.

43. See, e.g., *Chilling Al-Qaeda Email Sent to Undercover Reporter*, MAIL ONLINE, May 5, 2011, available at <http://www.dailymail.co.uk/news/article-1383804/Osama-Bin-Laden-dead-Al-Qaeda-email-details-plan-Mumbai-style-terror-attack-UK.html> (describing threats of retaliation by al-Awlaki, "widely tipped to succeed Osama bin Laden," after death of bin Laden).

44. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (using standing and political question doctrines to dismiss suit brought by al-Awlaki's father and the ACLU). Events have mooted the issue of removing al-Awlaki from any "hit" list. In late September 2011, the U.S. killed al-Awlaki with a drone strike in Yemen. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

the ACLU, Robert Chesney, in a recent article, assesses the legality of killing al-Awlaki under international law.⁴⁵ Examining IHL's effect on the conflict with al Qaeda, Chesney makes several points. First, treaty language does not clearly impose geographic restrictions. Second, there are "endless examples of a party to an existing armed conflict using force in the territory of another state which until then was not experiencing hostilities within its own borders." Third, indeterminate case law suggests that geography should not be decisive. And, finally, a strict, formalistic approach to IHL's geographical scope would encourage parties to spread their forces outside the zone of armed conflict, thus destabilizing previously peaceful states.⁴⁶

Chesney's reasoning is compelling, since another area of law *does* limit where the United States can strike. Consistent with Article 51 of the U.N. Charter, a state may resort under limited circumstances to interstate force in self-defense against a non-state actor (such as a terrorist organization) in a "host" state. As noted, the level of threat that triggers the right of self-defense is contested.⁴⁷ Self-defense also raises issues concerning consent of the host state. Some commentators insist that this consent must be express and public – no winks and nods allowed.⁴⁸ Others see no consent requirement at all.⁴⁹ Independent of the consent issue, some take the relatively narrow view that a violent incursion into a host state is permissible only if the host cannot control the non-state actor or is somehow responsible for the latter's actions. Others take the broader view that incursions in self-defense are permissible so long as the host is either unable or unwilling to control the non-state actor.⁵⁰ In practice, these competing abstractions blur into each other, as a state that is unwilling to control the violent actions of an armed group on its territory might be fairly said to be responsible for those actions.⁵¹

As long as there are states, the intense conversation about self-defense is not likely to end. Even so, the law of interstate force, such as it is, makes common sense. The United States may not carry out drone strikes in, to

45. See generally Chesney, *supra* note 2.

46. *Id.* at 33-38.

47. See *supra* text accompanying notes 32-35.

48. See, e.g., O'Connell, *Case Study*, *supra* note 2, at 24 ("Without express, public consent of the kind the U.S. received from Afghanistan and Iraq, Pakistan is in a position to claim the U.S. is acting unlawfully. . .").

49. See, e.g., Paust, *supra* note 2, at 249 ("Nothing in the language of Article 51 of the U.N. Charter or in customary international law reflected therein or in pre-Charter practice . . . requires consent of the state from which a non-state actor armed attack is emanating and on whose territory a self-defense action takes place. . .").

50. See Chesney, *supra* note 2, at 21-24 (summarizing these stricter and broader views on the right to resort to interstate force).

51. *Id.* at 24.

give a few examples, the United Kingdom, France, and Canada. These countries exercise thorough control over their territories and are unequivocally opposed to al Qaeda. Nations other than Afghanistan where drone strikes have occurred, such as Pakistan and Yemen, fall into a gray zone where consent and the government's willingness or ability to control armed groups is debatable. In this gray zone, one should expect the Obama administration to apply an expansive construction of its authority to kill especially dangerous members of al Qaeda. The executive pushes, and other parts of our constitutional system exist to push back.

C. IHL's Principle of Distinction Permits Strikes Directed at Members of al Qaeda and the Taliban Who Function as Combatants

In both international and non-international armed conflicts, attackers must honor the IHL principle of distinction, which forbids attacks on, among others, peaceful civilians.⁵² In an international armed conflict (IAC), a party may attack enemy combatants who are not *hors de combat*.⁵³ Thus, an attacker may bomb opposing forces in their barracks due to their *status* as enemy combatants. Civilians, however, may only be directly attacked if their *conduct* amounts to direct participation in hostilities.

The IAC approach to distinction does not translate neatly to the NIAC context in part because “[c]urrent conventional IHL governing non-international armed conflict does not use the notion of ‘combatant.’”⁵⁴ As a result, some authorities contend that all non-state actors in a NIAC must be regarded as “civilians,” subject to attack only while directly participating in hostilities (DPH).⁵⁵ A basic problem with this DPH approach is that it creates a revolving door that allows a fighter by night to be immune from attack while a baker by day.⁵⁶ In response to this problem, states may tend

52. MELZER, *supra* note 2, at 311-312.

53. *Cf.* Alston, *supra* note 2, at ¶58 (“In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).”).

54. MELZER, *supra* note 2, at 323; *see also* Alston, *supra* note 2, at ¶58 (“Under the IHL applicable to non-international armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a ‘combatant.’”).

55. *See, e.g.,* Alston, *supra* note 2, at ¶¶58, 65 (stating that civilians directly participating in hostilities in a NIAC are subject to direct attack; questioning the correctness of recent ICRC guidance that allows targeting of persons who are not directly participating in hostilities so long as they have adopted a “continuous combat function” in an armed group); *cf.* Shamsi, *supra* note 35, at 7 (referring to “civilian” as a “term of art that applies to alleged terrorists engaging in an armed conflict”).

56. Kretzmer, *supra* note 2, at 193 (observing that strict construction of “direct participation” in hostilities would allow terrorists to “enjoy the best of both worlds – they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out a terrorist act”).

toward a broad construction of “direct participation,” with the unfortunate effect of diluting civilian protections.⁵⁷

The ICRC has proposed an alternative means to address this problem. It recently issued an Interpretive Guidance that persons who assume a “continuous combat function” (CCF) in an organized armed group are not civilians and may be targeted even while not directly participating in hostilities.⁵⁸ Although the ICRC’s approach may ease pressure to adopt an overly expansive definition of direct participation, it raises interpretive questions. For instance, at what point does an activity become intense or frequent enough to be “continuous”?

The ICRC’s Interpretive Guidance lacks broad support.⁵⁹ Alston, a vocal critic, argues that the “the creation of the CCF category . . . is questionable given specific treaty language” and that the ICRC approach increases the risk of mistaken targeting.⁶⁰

Both the DPH and CCF approaches require application of abstractions to facts – where both the abstractions and the facts may be contestable and uncertain. Hina Shamsi, Director of the National Security Project of the ACLU, observes that “whatever definition [of DPH] the United States is using . . . is more expansive than that of the ICRC.”⁶¹ Inevitably, there will be gray zones in which security forces will justify attacks and human rights organizations will question them.⁶² They have different perspectives on the same situation. Even so, under either a DPH or a CCF approach, the Obama administration has reasonable grounds for targeting members of al Qaeda and the Taliban who are regularly involved with planning, commanding, or executing hostilities. That much from the law seems clear.

D. The CIA Strikes Have Not Clearly Violated Proportionality

IHL forbids attacks reasonably expected to cause disproportionate “collateral damage” to civilians and their property. This proportionality

57. See, e.g., *PCATI*, *supra* note 2, at ¶¶33, 37, 39 (concluding that civilians lose their immunity from direct attack by directly participating in hostilities while “preparing” for hostilities, “planning” hostilities, or participating in a “chain of hostilities”).

58. NILS MELZER, INT’L COMM. RED CROSS INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 27 (2009), available at <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

59. See, e.g., Alston, *supra* note 2, at ¶¶65–67, (“[T]he [ICRC’s] creation of [a] CCF category. . . is questionable given the specific treaty language that limits direct participation “for such time” as opposed to “all the time.”).

60. Alston, *supra* note 2, at ¶¶65–66.

61. Shamsi, *supra* note 35, at 8.

62. See, e.g., Alston, *supra* note 2, at ¶68 (criticizing the United States for an unstated but overly broad approach to DPH under which “drug traffickers on the ‘battlefield’ who have links to the insurgency may be targeted and killed”).

requirement is vital to IHL's protections of civilians, but it is also notoriously and necessarily vague. It precludes attacks that should outrage the conscience of sane people. Again, the United States could not, consistent with proportionality, have dropped a nuclear bomb to kill bin Laden in his Pakistani compound. But what about a raid with cruise missiles? On close cases, one cannot expect different decisionmakers to apply the vague standard of proportionality in identical ways. There is room for reasonable differences of opinion.

Some critics claim that the CIA drone strikes have caused civilian casualties at rates of 20:1 to 50:1 to even higher.⁶³ Notwithstanding the vagueness of "proportionality," these ratios on the face of the matter suggest war crimes. Suggesting a different verdict, the New America Foundation maintains a comprehensive website that updates available information on drone strikes in Pakistan. It maintains "that the true non-militant fatality rate since 2004 [has been] approximately 20 percent. In 2010, it was more like five percent."⁶⁴ This figure accords with off-the-record comments from a government official.⁶⁵ Thus the killer drone, in an ironic turn of circumstances, might be a very civilian-friendly weapons platform.

Determining the "true" collateral damage from drone strikes is difficult due to the remote locations of many strikes, the strong interests of many observers to distort facts, the veil of governmental secrecy over the program, and the difficulty of categorizing persons within irregular forces. The most careful analysis appears to demonstrate drone strikes are remarkably precise and are becoming more so with time. Low figures on civilian casualties accord with both the drone's immense capabilities as well as the United States' political, legal, and moral interests.

63. Shah, *supra* note 34, at 126 ("[T]he intensity and frequency with which these drone attacks have been carried out . . . have resulted in the unnecessary killing of hundreds of civilians and needless destruction of infrastructure."). According to Shah, "the success percentage of the U.S. Predator strikes thus comes to not more than six per cent." *Id.* See also O'Connell, *Case Study, supra* note 2 (manuscript at 24) ("Most serious of all, perhaps, is the disproportionate impact of drone attacks. Fifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle."). Others report the ratio of civilians killed for every terrorist as much higher than this. Steve Breyman & Aneel Salman, *Reaping the Whirlwind: Pakistani Counterinsurgency Campaigns, 2004-2010*, 34 FLETCHER F. WORLD AFF. 65, 78 (2010) (claiming that Pakistan has reported that 140 civilians are killed for every terrorist killed by drone strikes).

64. *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011*, NEWAMERICA.NET, <http://counterterrorism.newamerica.net/drones#2011chart>. These figures draw "only on accounts from reliable media organizations with deep reporting capabilities in Pakistan," which include, *inter alia*, *The New York Times*, Reuters, the BBC, leading Pakistani English-language newspapers, and Geo TV, the largest independent Pakistani television network. *Id.*

65. Scott Shane, *C.I.A. To Expand Use of Drones in Pakistan*, N.Y. TIMES, Dec. 4, 2009, at A1.

E. IHL Does Not Block the CIA (as Opposed to the Military) from Conducting Strikes

The CIA has been involved in lethal programs before the reported drone campaign in Pakistan. It tried to remove Castro through the Bay of Pigs invasion. When the Bay of Pigs turned to disaster, the CIA plotted to kill Castro, even reaching out to the Mafia for help. During the Vietnam War, the CIA was behind Operation Phoenix, a project that captured and executed thousands of suspected communists. In yet another covert action, the CIA provided arms and other assistance – mainly through Pakistan as an intermediary – to the Mujahideen in Afghanistan. There, the purpose was for Afghan insurgents to kill Soviet soldiers. Unlike the prior covert actions in Cuba and Vietnam, the Afghan project was considered a clear success when the Soviets withdrew from Afghanistan and the Soviet Union later disintegrated. The eventual rise of bin Laden and al Qaeda based in Afghanistan, however, caused a reassessment of that success.

Some critics believe that the CIA's measures to comply with IHL are inadequate. While American military training manuals discuss principles of humanitarian law at length, the nature of CIA training is not known.⁶⁶ For this reason, Shamsi finds it unsettling that “the laws of war are not part of the ‘DNA’ of the CIA.”⁶⁷ Her concerns about the CIA's willingness or ability to follow IHL seem misplaced. In counterterrorism, the lines between military and intelligence functions are blurring. And CIA officials have learned lessons from the backlash about controversial aspects of the Bush administration's “war on terror.” These lessons build on the findings of the Select Committee To Study Governmental Operations with Respect to Intelligence Activities about abuses in covert actions. The Church Committee, as that Senate committee came to be known, asserted a political and legal need for: presidential orders in writing, briefing programs to the oversight committees in Congress, and opinions from in-house lawyers and from the Office of Legal Counsel at the Justice Department. The CIA, like any bureaucracy, is adept at protecting itself. As a result, despite uncertainty about the CIA's exact IHL training, it is probable that cautious

66. TARGETING OPERATIONS WITH DRONE TECHNOLOGY: HUMANITARIAN LAW IMPLICATIONS 31 (Human Rights Institute, Columbia Law School), *available at* http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf. Cf. O'Connell, *Case Study, supra* note 2, at 26 (“CIA operatives are not trained in the IHL rules governing the use of force . . .”).

67. Shamsi, *supra* note 35, at 10; *see also* Alston, *supra* note 2, at ¶73 (observing that “unlike a State's armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs”).

CIA officials are trying their best to follow the law, such as it may be, in all lethal operations.

Nevertheless, some critics insist that the CIA cannot carry out drone strikes consistent with IHL because the CIA is not a part of the “regular U.S. armed forces.”⁶⁸ For these critics, the only way CIA drone operators “might still qualify as lawful combatants” under the Geneva Conventions is if they “have a commander, wear insignia, [and] carry their weapons openly and conduct operations in accordance with the laws and customs of war.”⁶⁹ Yet, O’Connell goes on to say, “operating a drone remotely hardly constitutes carrying weapons openly.”⁷⁰

The charge that the CIA drone program violates the Geneva Conventions is unpersuasive. Under domestic law, CIA officers are not members of the U.S. armed forces, but under IHL, intelligence officers may be regarded as such.⁷¹ CIA drone operators do have a commander (President Obama) and, if they wished, could wear insignia (perhaps red-white-and-blue berets) while operating the drones. An official refusal to confirm or deny the CIA program might suggest that drone operators do not “carry” their drones openly, but almost everyone concludes that when a missile strikes someone in Pakistan, the CIA did it.

Assuming CIA officials are civilians, the laws of war do not forbid them from participating in hostilities.⁷² Their conduct does, however, carry consequences under IHL. For one, as civilians directly participating in hostilities, CIA officials could be subject to direct attack from the enemy.⁷³ Further, as civilians, they lack “combatant immunity,” which would protect them from prosecution under domestic laws for killing and destroying in foreign countries.⁷⁴ Thus, in theory, a CIA official who authorizes or conducts a targeted killing in Pakistan could be vulnerable to murder charges under domestic Pakistani law. In sum, while IHL does not bar CIA drone strikes just because the CIA is a civilian agency, it does leave CIA officials vulnerable to the criminal laws of places where strikes occur. Non-U.S. domestic law, however, does not *bind* U.S. officials as they seek to discharge their obligations under U.S. law.

68. Mary Ellen O’Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT’L L. 325, 327 (2003) [hereinafter *To Kill or Capture*]; see O’Connell, *Case Study*, *supra* note 2, at 22.

69. O’Connell, *To Kill or Capture*, *supra* note 68, at 327.

70. *Id.*

71. See MELZER, *supra* note 2, at 317 (2008) (observing that the “notion of ‘armed forces’” as used in the Additional Protocols “remains functionally wide enough to include police forces, intelligence agents, and border guards assuming combat function for the States, without formally qualifying as members of its armed forces under domestic law”).

72. Shamsi, *supra* note 35, at 9 (observing that “most experts agree that the laws of war do not prohibit civilians, such as CIA personnel, from participating in hostilities”).

73. See, e.g., Alston, *supra* note 2, at ¶71.

74. *Id.*

III. IMPROVING PROCEDURES THAT LIMIT CIA DRONE STRIKES

Targeted killing by drones or other means necessarily involves an “intelligence-driven use of force,” a practice that requires identification and justification of targets based on assessments of their functions.⁷⁵ Mistaken identifications must be avoided, and malicious abuses stopped and punished. These truisms suggest, in turn, that the government should subject all targeted killings to a thoughtful, detailed process to ensure that only legal targets are identified and struck.⁷⁶

Even assuming IHL or some closely related doctrine of self-defense applies, existing law offers little concrete guidance for targeted killing by drone. Special Rapporteur Alston’s strained effort to spell out a process helps prove our point. In a recent report, he asserts that “[t]he refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.”⁷⁷ In support of this proposition, Alston cites various texts and cases based on human rights law.⁷⁸ In the next paragraph, Alston switches paradigms and specifically asserts that “[t]ransparency is required by . . . IHL”⁷⁹ In support of this proposition Alston cites various provisions of the Geneva Conventions and Additional Protocol I.⁸⁰ These provisions are only loosely and indirectly connected to the principle of transparency.⁸¹ Further, Alston lists procedural requirements for targeted killing by drone. These requirements, as good policy, include ensuring access to reliable information, requiring “an appropriate command and control structure,” protecting against “faulty or unverifiable evidence,” ensuring adequate intelligence on the effects on civilians of an attack, and assessing the proportionality of each attack.⁸²

75. Anderson, “Efficiency,” *supra* note 2.

76. *Cf.* Alston, *supra* note 2, at ¶83 (“States must . . . ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.”).

77. Alston, *supra* note 2, at ¶87.

78. *Id.* at ¶87, n. 149.

79. *Id.* at ¶88.

80. *Id.* at ¶88, n. 150 (citing “Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50/51/130/147”).

81. Marching through the cited provisions: GC I-IV, art. 1 provides, “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” GC I-IV, art. 50/51/130/147 identify grave breaches in substantive terms. Of the three cited provisions of Additional Protocol I, art. 11 bars various practices for the protection of persons; art. 85 identifies grave breaches; and art. 87(3) identifies the duty of commanders to “initiate disciplinary or penal action against” subordinates who breach the Conventions or Protocol. Of these provisions, Article 87(3) of AP I has the closest connection to transparency.

82. Alston, *supra* note 2, at ¶89.

Here Alston cites the HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare.⁸³ He seems to agree with its admonition that those who conduct air or missile attacks should “do [] everything feasible” to verify the lawfulness of targets, to minimize collateral damage, and to ensure proportionality.⁸⁴ The HPCR Manual does not venture beyond Article 57(2)(a) of Additional Protocol I, which imposes the same “feasibility” requirement,⁸⁵ or the U.S. Army’s Field Manual, which demands that “all reasonable steps” be taken to ensure the lawfulness of targets and the proportionality of attacks.⁸⁶ The law still needs to be more specific for drone operators.

We sympathize with Alston’s effort to develop reasonable procedures from scant sources. In two earlier articles, we attempted something similar.⁸⁷ We may cite different authorities from Alston, but we share his goal in calling for more process and accountability. In one article, we said that IHL’s demand for precaution “requires the CIA, in general, to adopt procedures reasonably expected to improve accuracy and to curb abuse without excessive military or humanitarian costs.”⁸⁸ While recognizing that decisionmakers may differ in their application of a “rule of reason,” we suggested that precaution demands as much independent, public, *ex post* review of CIA drone strikes as national security reasonably permits.⁸⁹ In an earlier piece, we proposed an aggressive reading of the majority opinion in *Boumediene v. Bush*,⁹⁰ suggesting that the constitutional requirement of due process even restricts U.S. actions against non-citizens located outside the United States.⁹¹ The government must take reasonable steps based on individualized facts to ensure accuracy before depriving any person of life, liberty, or property. What is required varies with circumstances. Full-blown

83. See *id.* at ¶89, n. 152-155 (citing the *HPCR Manual on International Law Applicable to Air and Missile Warfare* and its *Commentary*, produced by Harvard University’s Program on Humanitarian Policy and Conflict Research (HPCR)).

84. See HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, §G.32(a)-(c), Program on Humanitarian Policy and Conflict Research, Harvard University (2009), available at <http://www.ihlresearch.org/amw/manual/section-g-precautions-in-attacks/g-a-general-rules/rule-32>.

85. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3, art. 57(2)(a).

86. U.S. DEP’T OF ARMY, FIELD MANUAL NO. 27-10 – THE LAW OF LAND WARFARE, para. 41 (1956).

87. Murphy & Radsan, *Due Process and Targeted Killing*, *supra* note 2 (drawing on due-process protections of the United States Constitution); Radsan & Murphy, *Measure Twice*, *supra* note 2 (drawing on IHL’s principle of “precaution”).

88. Radsan & Murphy, *Measure Twice*, *supra* note 2, at 131.

89. *Id.*

90. *Boumediene v. Bush*, 553 U.S. 723 (2008).

91. Murphy & Radsan, *Due Process and Targeted Killing*, *supra* note 2, at 411.

judicial process is not always necessary. As to CIA drone strikes, due process might be satisfied by independent, intra-executive review.⁹²

What is needed is a new, specific understanding of what “due process” or “precaution” or “reason” – the label does not much matter – demands for drone strikes. The goal of this new due process should be to balance national security against the risk of killing persons who are not lawful targets in an armed conflict or under lawful self-defense. The precise contours of this new balance have not yet come into focus. Still, since targeted killing should involve only a few, high-level targets, significant resources should be available for assessing any given attack. Also, Alston is correct that the new balance will need to enhance transparency and accountability. At the same time, this new balance will need to protect legitimate secret sources and methods.

No one person or group can speak alone to create a new, specific framework for the CIA’s targeted killing by drone. This framework, if it emerges at all, will depend on a conversation that includes all reasonable voices from the human rights, international law, and national security communities. In particular, the U.S. government, including policymakers and lawyers, should be a powerful voice in this conversation. The U.S. government can and should take a leading role in developing and publicizing standards that maximize accuracy and transparency, consistent with concerns about national security. The government has already taken a few steps down this road. Although the CIA will neither confirm nor deny a drone program, some information has leaked out concerning its procedures. Agency lawyers prepare detailed cables to justify particular targets.⁹³ The Agency’s General Counsel signs off on these cables.⁹⁴ (Former Acting General Counsel John Rizzo stated that during his tenure the Agency generally had about thirty targets on the list.)⁹⁵ And each strike requires the Director’s approval.⁹⁶ Since military and intelligence functions have become increasingly intertwined, the CIA should learn from the military’s extensive experience, both practical and legal, in targeting.

If one always expects a judicial trial in, or before, making important decisions, the procedures we sketch will seem too thin. But depending on how they are applied, in the context of an armed conflict or in self-defense, they may be remarkably robust. Whether any given set of procedures

92. *Id.*

93. See Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK (Feb. 13, 2011) (interviewing former Acting General Counsel of the CIA John Rizzo), available at <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html>.

94. *Id.*

95. *Id.*

96. Peter Finn & Joby Warrick, *Under Panetta, a More Aggressive CIA*, WASH. POST, Mar. 21, 2010, at A1.

strikes the best balance cannot be determined with mathematical certainty – in part because such judgments implicate contestable facts and competing values. It seems obvious, however, that a better balance can emerge only through a more open conversation than the U.S. government has so far been willing to indulge.

CONCLUSION

Indulge another scenario, farther from the Oval Office than the scenario with which this essay began. A group of conspirators has demonstrated its commitment and ability to kill thousands of peaceful civilians. This group, though weakened by American counterattacks, remains ideologically and operationally committed to further attacks. A leader of this group involved in the planning, command, or execution of terrorist attacks has been identified in a “host” country, but neither the host nor the United States can, as a practical matter, arrest him. Should the United States kill this person with a drone-fired missile? Call the target al-Awlaki or al-Zawahiri.⁹⁷

Various critics suggest that the answer is “no.” Some depend on law that does not effectively bind the United States. A violation of Yemeni law, for example, presents more of a policy concern than a legal concern, so long as the alleged American violator remains outside Yemeni reach. On this score, it is instructive that both the Bush and Obama administrations have refused to deliver CIA officials to Italian authorities for an alleged kidnapping of an Egyptian cleric in Milan. Some American intelligence activities just require a level of illegality.

Other critics depend on contestable applications of uncertain facts to vague law: the claim that the United States is not in an armed conflict with al Qaeda, that consent to an incursion must be express, that armed conflicts are limited to war zones, and so on. This article clears the legal thicket to show that President Obama and his advisers can adequately address these critics. Presumably, they have already done so in a classified setting.

The right answer to the question we posed about targeted killing is yes – subject to qualifications. Under appropriate circumstances, the United States has legal authority to engage in targeted killing of al Qaeda and Taliban operatives. (Actually, it has an obligation to do so to protect its citizens and other potential victims.) This answer is based on a reasonable application of the substantive law of armed conflict and self-defense and is consistent with public remarks from the Obama administration. Because terrorism poses a far greater danger than organized crime or narcotics trafficking, we must go beyond the law enforcement model for justice.

97. After this essay was submitted for publication, the United States killed al-Awlaki in Yemen by a CIA drone strike. See Mazzetti, Schmitt & Worth, *C.I.A. Strike Kills U.S.-Born Militant*, *supra* note 44.

In the real world, intelligence is sometimes faulty. Mistakes occur, and peaceful civilians are at risk. The law's method for preventing the government from harming people based on mistaken facts is to insist on reasonable or "due" process. IHL, as an example of one body of law, demands very little in the way of process beyond the admonition to take feasible precautions. IHL, after all, must control an infinite number of variations in combat. Even so, the intelligence-driven nature of targeted killing, and the accompanying real concerns over mistakes and abuse, prompt the law – whether couched as IHL or something else – to develop specifics for the CIA's drone program. To assist this development, the United States should publicize and defend its standards for the CIA. If any of these standards turn out to be indefensible, the United States should abandon them and develop better rules for its shadow war. Just as the United States should play a more constructive role in this conversation, so should some of its critics. Some, it seems, are most interested in using "lawfare" to block the use of U.S. force around the world. We do not agree with them. A world in which the United States could not, after taking due precautions, use deadly force against bin Laden, or al-Awlaki, or al-Zawahiri would be less secure and less just.