

A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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## AMERICA'S DRONE WARS

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The U.S. practice of targeted killing by remotely-piloted unmanned vehicles<sup>1</sup> in Afghanistan, Pakistan, Yemen, Libya, Iraq and Somalia—popularly referred to as “America’s drone wars”<sup>2</sup>—raises the question of the application of humanitarian law principles to the conduct of America’s longest-running war. Yet, it not only presents complex issues of international law but difficult moral and ethical questions. Administration officials and some academics and commentators have praised targeted killing as effective and lawful. Others have criticized it as immoral, illegal, and unproductive. This article concludes that conducting targeted killing operations outside areas of active hostilities violates international law. In addition, even in areas in which targeted killings may be lawful, particular uses of drones may violate international humanitarian law if insufficient attention is paid to principles of proportionality and distinction in

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1. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>.

2. David Rhode, *The Drone War*, REUTERS, Jan. 26, 2012, <http://www.reuters.com/article/2012/01/26/us-davos-reutersmagazine-dronewar-idUSTRE80P19R20120126>.

their use, particularly as regards decisions of whom, how, and when to target an individual for death. Moreover, to the extent that drones become a means to terrorize a civilian population, their use may be prohibited by international humanitarian law. Finally, decision-makers in the United States must engage not only with the question whether their use of targeted killing is legal, but is a policy that resonates with America's deepest values and promotes U.S. long term interests, including its interest in international peace and justice.<sup>3</sup>

## I. INTRODUCTION

In November 2008, the Taliban captured *New York Times* journalist David Rhode, along with two Afghan colleagues, and held them for seven months in North and South Waziristan, the focus of the American drone campaign at the time. Rhode was lucky enough to escape from his captors and penned a series of gripping articles about his captivity that appeared on the front pages of the *New York Times* in 2009.<sup>4</sup> His articles recount an astonishing tale of his capture, the death threats he endured, and the hardships he faced; but what is perhaps even more extraordinary are his insights into the minds of his Taliban captors. In particular, because he was being held in an area being patrolled by drones and in which drone strikes were taking place with regularity, he wrote about the experience of being on the ground while U.S. drones circled overhead. He recently summarized this experience in *Reuters*, observing:

Throughout our captivity, American drones were a frequent presence in the skies above North and South Waziristan.

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3. A full treatment of this question is beyond the scope of this short essay, which admittedly raises more questions than answers. For other writings see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L L. 171 (2005); Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQ. L. 111 (2004); Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J.L. INFO. & SCI., Aug. 2011, at 116; Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT'L L.J. 595 (2012); Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012).
  4. David Rhode, *A Rope and a Prayer*, N.Y. TIMES, Oct. 22, 2009, at A1; David Rhode, *A Drone Strike and Dwindling Hope*, N.Y. TIMES, Oct. 21, 2009, at A1; David Rhode, *'You Have Atomic Bombs, but We Have Suicide Bombers'*, N.Y. TIMES, Oct. 20, 2009, at A1; David Rhode, *Inside the Islamic Emirate*, N.Y. TIMES, Oct. 19, 2009, at A1; David Rhode, *7 Months, 10 Days in Captivity*, N.Y. TIMES, Oct. 18, 2009, at A1.

Unmanned, propeller driven aircraft, they sounded like a small plane—a Piper Cub or Cessna—circling overhead. Dark specks in a blue sky, they could be spotted and tracked with the naked eye. Our guards studied their flight patterns for indications of when they might strike. . . .

The drones were terrifying. From the ground, it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of imminent death. Drones fire missiles that travel faster than the speed of sound. A drone's victim never hears the missile that kills him.<sup>5</sup>

Rhode was almost beheaded by his captors after a drone strike took place near his prison, inflaming his captors.<sup>6</sup> In his writings, he admits that the drone strikes clearly disrupted Taliban operations and seemed to be tactically effective. At the same time, he observes, as have others, that the strategic value of U.S. drone strikes may be problematic, as they have also resulted in tremendous hatred of and anger with the United States and increased support for the militants.

Though only recently acknowledged by U.S. government officials, attacks by unmanned aerial vehicles (commonly called “drones”) have become a major part of U.S. military strategy and counterterrorism operations. The drones include the MQ-1 Predator and the MQ-9 Reaper.<sup>7</sup> The Predator is more commonly used and is an “armed, multi-mission, medium-altitude, long endurance remotely piloted aircraft,” with a “unique capability to autonomously execute the kill chain (find, fix, track, target, engage, and assess) against high value, fleeting, and time sensitive targets,” according to U.S. Air Force reports.<sup>8</sup> Predator drones are fitted with two video cameras, an infrared sensor, a laser system, and two laser-guided Hellfire missiles, which the Air Force describes as having “highly accurate, low collateral damage, and anti-armor and anti-personnel engagement capability.”<sup>9</sup> Besides a small on-site crew that handles the Predator's takeoff and landing, the Predator is controlled remotely by a crew based in the United States.<sup>10</sup>

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5. Rhode, *supra* note 2.

6. *Id.*

7. *MQ-1B Predator*, U.S. AIR FORCE (Jan. 5, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>; *MQ-9 Reaper*, U.S. AIR FORCE (Jan. 5, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

8. *MQ-1B Predator*, *supra* note 7.

9. *Id.*

10. *Id.* The Reaper is also an “armed, multi-mission, medium-altitude, long endurance remotely piloted aircraft,” but is primarily a “hunter/killer”

## II. THE OBAMA ADMINISTRATION “LAWYERS UP”

In 2009, Jane Mayer reported in *The New Yorker* on a drone strike that had taken place in Pakistan and discussed both the CIA's highly classified program of drone strikes in Pakistan and other countries around the world, as well as the open use of drones by U.S. military forces operating in theatres of war in Afghanistan and Iraq.<sup>11</sup> The story generated a great deal of criticism of U.S. policy and, just as lawyers were asked to justify Bush Administration Policies on detention after the 9/11 attacks, Obama Administration lawyers were asked to do the same for the drone program.

In March of 2010, the Legal Advisor to the U.S. Department of State, Harold Hongju Koh, gave a much-anticipated speech at the Annual Meeting of the American Society of International Law in which he defended the Obama Administration's increasing use of drones against individuals alleged to be members of al Qaeda, the Taliban, or “associated forces.”<sup>12</sup> The speech emphasized the desire of the United States to comply with international humanitarian law, and specifically, the principles of distinction and proportionality. Koh argued that, as a matter of law, the right of the United States to kill suspected terrorists and militants was predicated upon the existence of an armed conflict between it and various individuals and organizations that allowed the United States to use “self-defense” against these individuals and organizations.<sup>13</sup> The speech was controversial. Although Obama had promised to pursue terrorists and “finish” the war in Afghanistan during the presidential campaign, many human rights activists did not expect his administration to cleave to the same legal arguments about the “war on terror” that his predecessor had, and were surprised that he had done so. Dean Koh's speech responded to very few of the difficult legal and moral questions raised by targeted killing, and although he never used the Bush Administration term of “unlawful enemy combatant” to describe those targeted, the speech seemed more in line with past administration policies than a departure from them.

Subsequently, the drone campaign intensified, and additional strikes took place in more countries and, occasionally, against not only foreigners but United States citizens. Because the program has

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and only collects intelligence secondarily. As such, it is both larger and carries more power than the Predator, and can use additional weapons and carry up to four Hellfire missiles. *MQ-9 Reaper*, *supra* note 7.

11. Jane Mayer, *The Predators of War*, THE NEW YORKER, Oct. 26, 2009, [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

12. Koh, *supra* note 1.

13. *Id.*

largely been operated by the CIA and classified as secret, accurate quantitative assessments of the number of strikes, the locations of the strikes, the number of persons killed, and the identities of those killed or injured is very difficult to come by. Nonetheless, based upon information available in the public domain, it has been estimated that during his eight years in office, President George W. Bush authorized forty-four strikes in Pakistan.<sup>14</sup> Conversely, in less than four years, it has been reported that President Obama authorized 294 strikes in Pakistan, Yemen, and Somalia as of May 28, 2012, in addition to strikes in Afghanistan, Libya and Iraq.<sup>15</sup> In Pakistan alone, it has been reported that these strikes resulted in between 2,524–3,247 casualties, including 482–852 civilians, and an additional 1,204–1,330 injured.<sup>16</sup> Other sources suggest that the number of civilian casualties may be considerably lower,<sup>17</sup> and the Pakistani government suggests that the civilian casualties have been much higher.<sup>18</sup> Regardless of the precise number of casualties, there seems little doubt that thousands of human beings have been killed by drone strikes, and thousands more injured, most outside the theatre of active hostilities.

In 2011, a fifty-page memorandum drafted by David Barron and Martin Lederman, attorneys in the Department of Justice's Office of Legal Counsel, and signed by Barron authorized the targeting killing of U.S. citizen Anwar al-Awlaki in Yemen. This memo has not been made public; however, its contents were described by anonymous

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14. Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFF., July–Aug. 2011, at 12, 12.
  15. *Striking Al Qaeda*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/interactive/2012/05/29/world/middleeast/striking-al-qaeda.html>.
  16. *Obama 2012 Pakistan Strikes*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes> (last updated Dec. 28, 2012). *The Bureau of Investigative Journalism* is a London-based nonprofit journalism organization that collaborates with media outlets such as the *BBC*, *Financial Times*, *Daily Telegraph*, and *Le Monde*. *About the Bureau*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/who> (last visited Feb. 11, 2013). *See also* STANFORD INT'L HUM. RTS. & CONFLICT RES. CLINIC & NYU GLOBAL JUSTICE CLINIC, *LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012) [hereinafter *LIVING UNDER DRONES*] (concluding that there is significant evidence that U.S. drone strikes have injured and killed civilians).
  17. *The Long War Journal*, a U.S.-based nonprofit media organization has reported 2,354 militant casualties and 138 civilian deaths in Pakistan since 2006. *About the Long War Journal*, THE LONG WAR JOURNAL, <http://www.longwarjournal.org/about.php> (last visited Feb. 11, 2013).
  18. Bergen & Tiedemann, *supra* note 14, at 13 (according to Pakistani government officials, 700 civilians were killed in 2009 alone).

sources to journalist Charlie Savage and published in the *New York Times*.<sup>19</sup>

According to Savage's sources, the memo authorized the killing of al-Awlaki only if it was not feasible to capture him.<sup>20</sup> Such a killing was justified because al-Awlaki "was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans."<sup>21</sup> The memorandum argued that killing al-Awlaki was not an assassination, as he was a lawful target in an armed conflict, and wasn't murder since he was a lawful target in an armed conflict. Further, it concluded that the drone's pilot, as a CIA official, would not be committing a war crime even though he or she was not a uniformed soldier.<sup>22</sup> Finally, relying on precedent allowing American citizens to be prosecuted in a military court if they had joined an enemy's military, the memorandum apparently states that the process due to al-Awlaki was "due process in war,"<sup>23</sup> not the protections of the U.S. Constitution. Accordingly, if killing or capturing al-Awlaki was justifiable to avoid imminent attack, then his targeted killing abroad was legal.<sup>24</sup>

On March 5, 2012, another prominent government lawyer, Attorney General Eric Holder, also went public to justify the targeted killing of foreigners and U.S. citizens by the government.<sup>25</sup> Holder's speech laid out the procedures used by the president in determining

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19. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1. According to the article, the Obama Administration refused to acknowledge its role in the strike, and the memorandum, which was written more than a year before Mr. Awlaki was killed, did not independently analyze the quality of the evidence against him. The *Washington Post* reported on the story several days earlier. See Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9.
  20. Savage, *supra* note 19. See Jordan J. Paust, *Propriety of Self-Defense Targetings of Members of al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L. & COMP. L. 565, 574–76 (2012) (arguing that the killing of al-Awlaki was legal); *but see* Mary Ellen O'Connell, *The Right to Life in War and Peace: A Legal and Moral Critique of Targeted Killing*, Remarks for the Institute of Theology and Peace (Hamburg) (Aug. 15, 2012), *available at* <http://chicagotonight.wttw.com/sites/default/files/The%20Right%20to%20Life%20in%20War%20and%20Peace.txt>.
  21. Savage, *supra* note 19.
  22. *Id.* (although apparently this official could be prosecuted in Yemen for murder, according to the memo).
  23. Finn, *supra* note 19.
  24. Savage, *supra* note 19.
  25. Eric Holder, Att'y Gen., U.S. Dep't of Just., *Speech at Northwestern University School of Law* (Mar. 5, 2010), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

who to target for capture, who to target with lethal force, and who to try before military commissions as opposed to civilian courts.<sup>26</sup> Reading the speech, it is clear—if it hadn't been before—that the precedents set and the tactics employed during the Bush Administration were *not* rejected by the Obama Administration, but in fact, have become part and parcel of U.S. policy. In fact, the fundamental conceptual error of the Bush Administration's legal regime—that the targets of the U.S. "war on terror" are entitled to *neither* the protections of the criminal law (or human rights law), *nor* the protections of international humanitarian law, but exist instead in a legal "black hole" subject to the whim or the grace of the executive branch—remains virtually unchanged.<sup>27</sup> Although generally avoiding the term "unlawful enemy combatant," the Obama Administration appears in fact to be using the identical legal analysis as its predecessor.

Finally, on April 30, 2012, the day after a particularly controversial drone strike in Pakistan, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, gave a spirited defense of Obama's targeted killing policy at the Woodrow Wilson Center at Princeton University. Brennan is not a lawyer, but asserted that "the United States Government conducts targeted strikes against specific al-Qaida terrorists" in order to "prevent terrorist attacks on the United States" and to "save American lives."<sup>28</sup> He also argued that the strikes were lawful "beyond hot battlefields like Afghanistan" and argued that they were legal, ethical and effective. Finally, he concluded that "we" (meaning the administration) employ standards and processes designed to ensure that targeting is legal and effective.

Brennan's speech, however, did not quell the international criticism of the U.S. drone program, however, nor satisfy Pakistani objections to its conduct. This is unsurprising, for other than Israel, the United States is the only country in the world to aggressively use targeted killing as part of its counterterrorism strategy.<sup>29</sup> Two United

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26. *Id.*

27. While other legal issues in the conduct of the drone wars are debatable, I have argued in earlier writings that this is not. *See, e.g.,* Leila Nadya Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT'L L. & POL. 539 (2009).

28. John O. Brennan, White House Counter Terrorism Adviser, Speech on U.S. Drone Strikes Targeted at al-Qaida at the Woodrow Wilson Center (Apr. 30, 2012), available at <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>.

29. Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24/Add.6, ¶¶ 13–26 (May 28, 2010). Russia has also reportedly used targeted killings



Nations Special Rapporteurs on Extra-judicial Executions, Philip Alston and Christophe Heyns, have criticized the drone program,<sup>30</sup> and ICRC President, Jacob Kellenberger, has worried aloud that it is undermining fundamental principles of international humanitarian law.<sup>31</sup> More recently, on October 25, 2012, the United Nations announced the opening of an investigation into the “extrajudicial killings of suspected insurgents and the innocent civilians all too often executed in the process.”<sup>32</sup>

### III. SOME PRELIMINARY LEGAL QUESTIONS RAISED BY THE USE OF DRONES BY THE UNITED STATES

In spite of the fact that many top U.S. lawyers have justified the use of targeted killing by the United States, they have not answered all the questions surrounding the use of this controversial new weapon of war. Perhaps in response to the fury generated by the Bush Administration's torture memos, which were either released or leaked to the press and then subjected to intense analysis and debate by other lawyers, the “lawyering up” of targeted killing by the Obama Administration has largely remained vague, policy-oriented, and secret. The speeches of both Koh and Holder are imprecise as to which targets are permissible, where attacks may take place and under what conditions, whether or not specific congressional authorization exists or is needed for the attacks, who is entitled to carry out the operations, the military or the CIA, and the expected purpose of the killings. They rest upon assumptions about the law of war that have been challenged by many scholars and UN bodies, including the assumption that the United States is entitled to attack non-state actors under Article 51 of the UN Charter as a response to terrorist activity,<sup>33</sup> that the ensuing “war” follows the alleged

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in Chechnya, which its military refers to as a counter-terrorism operation. *Id.* ¶ 23.

30. *Id.* ¶ 10; Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, THE GUARDIAN (UK), June 21, 2012, <http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un>.
31. Jakob Kellenberger, IHL and New Weapon Technologies, 34th Round Table on Current Issues of International Law (Sep. 9, 2011), *available at* <http://intercrossblog.icrc.org/blog/ihl-and-new-weapon-technologies>.
32. *See, e.g., United Nations to Begin Investigating US Drone Strike Targeted Kills*, RT.COM (Oct. 26, 2012, 2:14 PM), <http://rt.com/usa/news/us-drone-emmerston-un-256/>.
33. *See, e.g.,* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOB. STUD. L. REV. 135, 143–144 (2004) (and authorities cited). *See also* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 996 (2011); Luigi Condorelli, *Les attentats du 11 septembre et leurs suite: ou va le*

terrorists wherever they may be found,<sup>34</sup> and that the war has no temporal limitations.<sup>35</sup> Some have suggested that the Obama Administration has resorted to killing terror suspects to avoid legal problems surrounding their indefinite detention and trial.<sup>36</sup> I do not know if this is true. Yet, the picture emerging suggests that the Obama Administration, like the Bush Administration before it, has implicitly reversed the normal rules and burdens of proof that accompany the use of lethal force by state, obliging those targeted to prove their innocence or status as civilians, and adopted a “presumption of guilt” rather than innocence for terror suspects. As Claire Finkelstein has observed:

Our current approach to targeted killing is betwixt and between. We treat targeted individuals as belligerents insofar as we regard them as legitimate targets by virtue of status, rather than action. But we treat them as subjects of law enforcement in that we resist according them the privileges that go along with the status of combatants, such as affording them the rights of P.O.W.s and recognize their equal right to kill in combat.<sup>37</sup>

This raises at least five sets of legal questions regarding U.S. targeted killing operations:

- a) Questions as to the legal regime justifying the government’s use of lethal force;
- b) Questions as to the permissible targets;
- c) Questions regarding the processes used to create the “kill list,” as it is called;
- d) Questions as to whether drone strikes are lawful methods of warfare; and
- e) Questions regarding the intended purposes of the strikes.

Finally, given that some uses of drones are clearly lawful, this essay will briefly explore the questions surrounding even lawful uses of these very controversial new weapons.

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*droit international?*, 105 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 829 (2001).

34. Sadat, *supra* note 33, at 142.

35. *Id.* at 143–44. See also Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010).

36. Claire Finkelstein, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 161 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) [hereinafter TARGETED KILLINGS].

37. *Id.*

A. *What Legal Regime Justifies the Use of Lethal Force Against Terrorists or Taliban Armed Forces*

The Authorization for the Use of Military Force Resolution (AUMF) adopted by Congress in 2001 states that the president is authorized to use “all necessary and appropriate force” against:

[T]hose nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>38</sup>

This Resolution seems to limit the targets of America's war on terror to those having a nexus to the September 11th attacks. But it would not, on its face, suggest that individuals having nothing to do with those attacks could still fall within the armed conflict authorized by Congress in 2001. Indeed, recently, even conservative commentators and Republican presidential candidate Mitt Romney has suggested that the drone program may need to be reauthorized specifically by Congress under the Constitution and the War Powers Resolution.<sup>39</sup>

The government's current position, as stated by Koh, is that the United States is engaged in an armed conflict between itself and various individuals and organizations that gave a right to the United States to use “self-defense” against these individuals and organizations.<sup>40</sup> Under this view, this right of “self-defense” allows the government to kill individuals alleged to be enemies of the United States even if those individuals are found in the territories of states with which the United States clearly is not at war. Even assuming that the individuals in question were combatants that can be targeted in war, an assumption that in many cases is highly questionable as some of the individuals targeted appear clearly to be civilians, the fact that most drone strikes are taking place in states “at peace” with the United States, suggests not only that the use of military force against individuals in those states may be ill-advised, but that they may be unlawful.<sup>41</sup> Although the United States continues to maintain that

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38. Authorization for the Use of Military Force, S.J. Res. 23, 170th Cong. § 2 (2001) (enacted).

39. Romney for President, *An American Century: A Strategy to Secure America's Enduring Interests and Ideals* 40 (A Romney for President White Paper, Oct. 7, 2011).

40. Koh, *supra* note 1.

41. Mary Ellen O'Connell makes this point, noting that without a state of armed conflict, even killing with permission of the government, does not make the operation lawful. O'Connell, *supra* note 35, at 16 (noting that

there are no geographical constraints to the “war on terror,” which follows suspected terrorists wherever they may be, that position has not generally been accepted by most authorities, at least not as a rule of international law.<sup>42</sup> To the extent that military weapons are targeting individuals in areas outside a theatre of war, their use amounts to a violation of international human rights law, not a proper application of international humanitarian law. Philip Alston has made this point several times<sup>43</sup> as has Professor Mary Ellen O’Connell.<sup>44</sup> Moreover, it may be observed that if taken without the consent of the territorial state against whom they are launched, U.S. drone strikes may amount to acts of aggression as well.

It is possible to argue, as the United States does,<sup>45</sup> that international human rights law is inapplicable to its extraterritorial activity, meaning that apparently no international norms specifically protect the right to life of individuals residing outside the United States in countries with which the United States is at peace, other than the domestic law of the countries in which the individuals are targeted. International human rights bodies and international courts and tribunals have, for the most part, rejected this assertion.<sup>46</sup> Yet the strikes may violate the international human rights obligations of those governments permitting (or acquiescing to) U.S. targeted killing activities on their territories.

Moreover, the U.S. position also suggests that there are no temporal constraints on self-defense, which may continue ad infinitum after a terror attack—or at least one on the scale of the September 11th attacks—and continues to refer to Resolution 1373 as authorizing drone strikes taking place eleven years later. Professor

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even “express consent” from Pakistan would not justify the use of drones by the United States on Pakistani territory given the absence of an armed conflict for most of the period that the United States has been using drones there).

42. *Id.* at 23–24; but see Paust, *supra* note 20, at 573 (arguing that although the United States cannot be “at war” with al-Qaeda, it can use military force in self-defense against al-Qaeda members anywhere in the world).
43. See, e.g., Alston, *supra* note 29, ¶ 22.
44. See, e.g., Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y J. 343, 355 (2010).
45. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 2003: United States of America*, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).
46. See, e.g., *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ¶ 25, 1996 I.C.J. 226 (the protection of the ICCPR does not cease in times of war, and in principle the right not arbitrarily to be deprived of one’s life applies also in hostilities, but is evaluated under international humanitarian law).

Monica Hakimi has recently suggested that the legal problems caused by U.S. targeted-killing policies stem from the effort to place them in either the “domain” of international human rights law or international humanitarian law, and proposes a balancing test that would be used in all cases.<sup>47</sup> Yet her work, like the administration’s approach, takes as its starting point the necessity and appropriateness of targeted killing of individuals living outside the United States as a remedy to U.S. insecurity about future terrorist attacks. This is a “war” paradigm, which takes killing as a given, not a “peace” paradigm, which takes the protection of life as the most fundamental duty of the state. International law has traditionally taken a bright line rather than a balancing approach to certain *jus cogens* norms such as the prohibition of torture, and the protection of life, both of which are non-derogable norms under the International Covenant on Civil and Political Rights.<sup>48</sup>

*B. Questions as to the Permissible Targets*

The rhetoric used to describe the individuals placed on the CIA’s “kill list” is imprecise. The individuals in question are alternatively described as “terrorists,”<sup>49</sup> “suspected terrorists,” “Islamic radicals,” “insurgents,” “members of al-Qaeda and its associates,” “Taliban,” “jihadists,” “[M]uslim extremists,” and “unlawful combatants” depending upon the source consulted. None of these, with the possible exception of “members of al-Qaeda and its associates” have much legal consonance, nor are they particularly well-defined categories of individuals. Is a “suspected terrorist” a proper target? Is he or she a civilian? A combatant? What constitutes direct participation in hostilities? Who decides? The ICRC has issued guidelines that the UN Report on Extrajudicial Killings has criticized because it includes individuals who may be included because of their status, and not just their conduct.<sup>50</sup> But it is not clear that the United States respects even the ICRC guidelines, as, for example, the United States appears to permit the targeted killing of drug traffickers whereas the ICRC guidelines do not.<sup>51</sup> How sure must the CIA be of his or her membership in and active participation in al-Qaeda before he or she can be placed on the CIA’s kill list? How is it that the U.S.

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47. See Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

48. International Covenant on Civil and Political Rights, arts. 6–7, G.A. Res. 2200(XXI)A, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200(XXI)A, (Dec. 16, 1966).

49. Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

50. Alston, *supra* note 29, ¶ 65.

51. *Id.* ¶ 68.

government can now use lethal military force to kill a U.S. citizen with no judicial process in a foreign country far from any active theatre of war?

In 2002, an American of Yemeni background, Kamal Derwish, was killed by a missile from a Predator Drone. Derwish was not the target of the attack, according to media reports, but the U.S. position was that “as an enemy combatant. . . . [he] had no constitutional rights.”<sup>52</sup> Nonetheless, it shocked many and the killing was widely reported and denounced in the US media. Fewer than ten years later, government policy has been transformed from accidentally killing U.S. citizens to targeting them, with very little public explanation or justification. The kill lists target specific individuals, not just soldiers on a battlefield, and of course, no surrender is possible once a targeting decision has been taken.

*C. Questions Regarding the Processes Used to Create the “Kill List”*

It has been reported that President Obama himself oversees decisions to place terrorists on a “kill list,” looking at pictures and intelligence briefings and considering discussions with his advisors.<sup>53</sup> According to the published information available, each week the President and his advisors gather by teleconference to decide which individuals should be targeted and killed. President Obama himself reportedly must approve every name, signing off on every strike in Yemen, Somalia and Pakistan—including al-Awlaki—about one third of the total.<sup>54</sup> Yet in Pakistan, the President had approved not only “personality” strikes, aimed at named individuals, but “signature” strikes that target alleged training camps and suspicious compounds in areas allegedly controlled by militants and individuals whose identities are unknown. Because signature strikes became so controversial, they were stopped in Pakistan, but the CIA had, according to the media, sought authority to carry them out in Yemen.<sup>55</sup>

The process used by the executive branch to determine who and when to target human beings for death can be summarized in two words: “trust us.” They would undoubtedly add, “we are very careful.” I believe that a sincere effort to be careful has been undertaken by U.S. government officials, including the President himself; this is clear from both Holder’s and Brennan’s remarks, as

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52. John J. Lumpkin, *Administration Says That Bush Has, in Effect: A License to Kill*, ST. LOUIS POST-DISPATCH, Dec. 4, 2002, at A12.

53. Becker & Shane, *supra* note 49.

54. *Id.*

55. Robert Naiman, *Could We Stop ‘Signature’ Drone Strikes in Yemen and Pakistan?*, HUFFINGTON POST WORLD (Apr. 27, 2012), [www.huffingtonpost.com/robert-naiman/drones-yemen\\_b\\_1458668.html](http://www.huffingtonpost.com/robert-naiman/drones-yemen_b_1458668.html).

well as media accounts of President Obama's personal engagement with targeting terrorists. Yet it is simply not consistent with the rule of law to make the lives of thousands of individuals depend solely on executive grace, or the wisdom and integrity of the person inhabiting the Oval Office in a particular year. Unsurprisingly, there have been mistakes reported, errors that resulted in families including women and children being killed by drone strikes. Some of these "mistakes" end up as YouTube videos of "children's bodies and American missile parts,"<sup>56</sup> which serve as recruitment devices for al-Qaeda and its associates, and fuel anti-American sentiment in areas where drones are operating.

*D. Questions as to Whether Drone Strikes Are Lawful Methods of Warfare*

States generally assume that unless a particular weapon is prohibited by treaty or a particular method of warfare has not been outlawed by treaty, it is lawful. Indeed, there is perhaps no area of international law more deeply dependent upon the application of the *Lotus* principle—which provides that restrictions on the sovereignty of states are not to be presumed<sup>57</sup>—than questions involving the use of weaponry by a state. Although states may concede the application of the principles of distinction and proportionality, as Koh has done with respect to drone attacks, they typically do not concede any limitations upon their choice of weaponry or means of warfare.

Human rights groups, on the other hand, have often challenged particular weapons as violating the principles of distinction per se, or have challenged particular means of warfare as violating international law. During the NATO bombing campaign in the former Yugoslavia, for example, human rights organizations and the government of the Federal Republic of Yugoslavia ("FRY," the target of the campaign) argued that the NATO decision to wage a "zero-casualty war" caused NATO pilots to fly at "heights which enabled them to avoid attack by Yugoslav defenses and, consequently, made it impossible for them to properly distinguish between military or civilian objects on the ground."<sup>58</sup> When the ICTY Prosecutor rejected this assertion, a committee asked for an examination of the legality of NATO's actions, stating:

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56. *Predator Drones and Unmanned Aerial Vehicles (UAVs)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned\\_aerial\\_vehicles/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html) (last visited Feb. 11, 2013)
57. *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).
58. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 2 (1999) [hereinafter Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign].

The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.<sup>59</sup>

Today's drone pilots, who are even further removed from their targets than NATO air commanders during the 1990s, may have even greater obligations under the laws of war to ensure that they are able to distinguish, with a degree of certainty, military from non-military targets. It is not clear, given the high levels of civilian casualties resulting from the drone strikes, that they are doing so. By way of comparison, the committee on the NATO bombing reported that the FRY (the targeted state) reported 495 civilians killed and 820 civilians wounded<sup>60</sup> in a bombing campaign that lasted for several months, and involved more than 38,000 sorties, 10,000 strike sorties, and the release of more than 23,000 air munitions.<sup>61</sup> Yet, as noted earlier, America's drone strikes in Pakistan alone from 2004 until 2012 are estimated to have resulted in between 2,524–3,247 casualties, including 482–852 civilians, and an additional 1,204–1,330 injured,<sup>62</sup> from an estimated 350 strikes. While these figures are not uncontroverted, it would appear, if they are correct, that the ratio of civilians killed to air strikes undertaken is dramatically higher, by many orders of magnitude, in the case of the drone wars than the NATO intervention in 1999. While numbers alone do not tell the story, this seems much closer to the kind of reckless intent suggesting the offense of unlawful attack upon civilians that was alleged to have been violated by NATO in 1999.<sup>63</sup>

*E. Questions Regarding the Intended Purposes of the Strikes*

The purpose of the drone strikes depends upon the nature of the target and the areas being targeted. In Pakistan, for example, in 2009 it was reported that only six of the forty-one CIA drone strikes

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59. *Id.* ¶ 55.

60. *Id.* ¶ 90.

61. *Id.* ¶ 54.

62. *Obama 2012 Pakistan Strikes*, *supra* note 16; LIVING UNDER DRONES, *supra* note 16, at vi (reporting similar statistics).

63. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign, *supra* note 58, ¶¶ 28–29.



conducted by the Obama Administration targeted members of al-Qaeda. To obtain the cooperation of Pakistan for the drone program, Pakistani officials were permitted to nominate targets then “taken out” by U.S. drone strikes, and eighteen strikes were therefore directed at Taliban targets, fifteen of which were aimed at Baitullah Mehsud, the leader of the Taliban in Pakistan.<sup>64</sup> Some strikes seem to target al-Qaeda leaders; others appear generally directed at the Taliban or other “suspected militants.” Some strikes are taking place during active military conflict in war zones, such as the U.S. drones flown in Libya in 2011, whereas others on the territories of states such as Yemen, with which the United States is not at war. In terms of the counter-terrorism use of drones, which are clearly the most controversial, there are several possible purposes for the strikes:

–*Specific deterrence* (killing “terrorists” to punish them and so they cannot engage in future operations against the United States or its allies);

–*General deterrence* (demonstrating U.S. ability to kill at great distances and thereby deterring other would-be “terrorists”);

–*Retribution* (punishing those who are deemed morally blameworthy because they have “hurt” the United States or attacked U.S. interests, allies, or persons, or have allegedly allied themselves with persons who have done so);

–*Preventive or pre-emptive strikes* to eliminate potential threats against the United States, U.S. interests, allies, or persons (combining specific and general deterrence).

In this brief discussion, it is impossible to fully elaborate upon each of these categories but it is worth noting that several either violate principles of international humanitarian law (such as killing for retribution and preventive strikes) and others may do so as well. Given that experts have suggested that the number of high-value targets killed in Pakistan is as low as one in seven persons killed, one wonders whether the purpose is general deterrence or frightening the civilian population in areas of alleged terrorist activity to prevent civilians from possibly assisting alleged terrorists and disrupting their operations. Yet terrorizing a civilian population may be a war crime, as the ICTY found in the *Galic* case<sup>65</sup> and the Special Court for Sierra Leone has held as well.<sup>66</sup> To the extent that the United States is

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64. Mayer, *supra* note 11.

65. See Prosecutor v. Galic, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003).

66. See, e.g., Prosecutor v. Fofana and Kondewa, SCSL-04-14-T, Judgment, ¶ 115 (Aug. 2, 2007) [hereinafter CDF Case].

perceived as carrying out reprisals for the 9/11 attacks against Pakistanis who may not have had anything to do with them,<sup>67</sup> the drone campaign is more suggestive of collective punishment than the surgically precise targeting of particularly dangerous individuals, which is how the U.S. government justifies it. Indeed, a recent study carried out by clinics at New York University and Stanford University law schools suggests that the presence of the drones “terrorizes men, women, and children, giving rise to anxiety and psychological trauma among civilian communities.”<sup>68</sup> Finally, a Pakistani professor at Lahore University has made the additional point that while it may be admitted that al-Qaeda has as its mission the carrying out of jihad against U.S. forces and persons wherever possible, the Taliban has as its goal to regain power in Afghanistan and re-institute its vision of a purist state.<sup>69</sup> If this is correct, the drone campaign at best appears over inclusive, targeting the Taliban which is not fighting a global war against the United States but a local war for control of its territory, as well as targeting many low-level terrorism suspects and civilians.

#### IV. ETHICAL AND MORAL QUESTIONS RAISED BY U.S. TARGETED KILLING OPERATIONS

This essay has argued that the legal framework within which U.S. drone strikes are carried out as part of the “war on terror” is shaky, especially outside of active war zones. Indeed, it rests upon assumptions about international humanitarian law that are highly contested. At the same time, it is certainly correct that some drone strikes are legal under more traditional notions of international humanitarian law than those the U.S. government currently seems to employ. Yet, as this essay has already noted, international humanitarian law rules do not address the question whether the use of drones by the United States is effective, nor whether it is morally justified or represents U.S. values.

As Whitney R. Harris wrote, some years before his death,

[T]he rule of law of Nuremberg, and of modern Rome [meaning the Rome Statute of the International Criminal Court] is universal, binding large states and small, victor and vanquished in any future war. The principle was most forcefully expressed by Mr. Justice Jackson when he declared that international law

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67. 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, 87 (2010).

68. LIVING UNDER DRONES, *supra* note 16, at vii.

69. *Id.* at 17–18.

condemned aggression by every nation, “including those which sit here now in judgment.”<sup>70</sup>

This idea has been captured by Jeremy Waldron’s work requiring legal norms to be neutral in their application and has particular salience for the use of drones and targeted killing as tactics of war. The United States now conducts its targeted killing campaign as if only states with “good” purposes (like us) will have access to or deploy these weapons. Waldron notes that if we defend as legal (and appropriate) a norm (N1) such as, “named civilians may be targeted with deadly force if they are presently involved in planning terrorist atrocities or are likely to be involved in carrying them out in the future,”<sup>71</sup> because international humanitarian law applies to all states alike, we must expect N1 to be used by other states, including enemies of the United States. Moreover, given American disinclination to permit international, or even domestic scrutiny, of its targeted killing operations, the United States cannot expect other countries to do much better, especially countries we might expect to use targeted killing, and drones if they had them, unscrupulously. The notion that the “good guys” get to use different rules than the “bad guys” has periodically surfaced in both moral analysis<sup>72</sup> and at the international criminal tribunals. Recall the arguments made and initially accepted in the Civil Defence Forces (CDF) case at the Special Court for Sierra Leone that, as the opponents of the Revolutionary United Front, the CDF were operating under different principles.<sup>73</sup> Yet those arguments have been overwhelmingly rejected by the nations of the world in the Statute of the International Criminal Court. By its terms, Rome Law applies to all nations, small or large, rich or poor;<sup>74</sup> with, unfortunately a possible escape hatch for the Permanent Members of the Security Council and countries under their protection. It is estimated that over seventy other countries, including China, Russia, Pakistan, and Iran, now possess drone technology.<sup>75</sup> Current U.S. policy on drones appears to be providing other countries with unintended incentives to both develop and use these weapons.

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70. WHITNEY R. HARRIS, *TYRANNY ON TRIAL* 560 (1995).

71. Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle*, in *TARGETED KILLINGS*, *supra* note 3636, at 112.

72. Particularly in the work of philosophy professor Jeff McMahan.

73. *See* CDF Case, *supra* note 66.

74. Rome Statue of the International Criminal Court, art. 27, July 17, 1998, 2187 U.N.T.S. 90.

75. *Mapping Drone Proliferation: UAVs in 76 Countries*, GLOBAL RES. (Sep. 18, 2012), <http://www.globalresearch.ca/mapping-drone-proliferation-uavs-in-76-countries/5305191>.

Finally, as Peter Singer recently noted, specific uses of drones in war may not only violate international humanitarian law, but they represent a technology that appears to remove the last political barrier to war. The drone campaign involves hundreds of strikes and thousands of deaths, and yet it has never been seriously debated or authorized by Congress. Moreover, it has spread to additional countries and campaigns: nearly 150 American unmanned systems were deployed over Libya, without approval by Congress.<sup>76</sup> When asked why there was no need to comply with the War Powers Resolution to obtain additional authorization for the use of force, the White House argued that the operations did not “involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof.”<sup>77</sup> As Singer notes, however, “they did involve something we used to think of as war: blowing up stuff, lots of it.”<sup>78</sup>

Drones are fired from thousands of miles away, using technology that resembles a video game. After the killing is over, the drone operator returns home to a “normal” life—perhaps grabbing a bite to eat, hugging his kids, or enjoying time with friends. Some uses of drones may be clearly legal under the principles of the laws of war; but their misuse and overuse as counterterrorism tools raise real legal and moral problems. While the occasional or exceptional use of drone strikes to target very dangerous individuals that cannot be captured might be tolerable, the widespread use of these controversial weapons by the United States is deeply problematic. As we saw with the practice of torture by the United States following the 9/11 attacks, the exception easily becomes the rule, and those opposing the use of targeted killing find themselves trying to justify why a particular individual should not be killed, rather than the government being required to show not only why it is legal for the killing to take place, but that capture is impossible.<sup>79</sup>

For several months I have had a newspaper clipping on the corner of my desk about the death of a young man named Tariq Aziz who was killed in Pakistan by a Hellfire missile strike launched by the United States. Tariq’s story emerged from the shadows of the CIA’s

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76. Peter Singer, *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5.

77. *Id.*

78. *Id.*

79. In this essay, I do not focus on the requirement that a government must claim that capture is not feasible. Indeed, under the laws of war, individuals who surrender must be captured rather than killed. Because it is impossible to surrender to a drone, that rule is, by definition, difficult to apply in the context of targeted killing with aerial unmanned vehicles. See, e.g., Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. (forthcoming 2013).

drone war only because he had encountered a lawyer, Clive Smith, at a meeting organized to discuss the drone strikes held between Westerners and Pashtun tribal leaders a few days before his death. Tariq was brought to the meeting to experience the interaction with Americans, and, according to Smith, was friendly, open, and warm—"too young for much facial hair; too young to have learned to hate."<sup>80</sup> For some reason, he was targeted for death, and killed by a Hellfire missile fired from a Predator while driving a car with his twelve-year old cousin—who was also killed—on the way to pick up his aunt and bring her home to his village.<sup>81</sup> As Smith wrote in *The New York Times*:

My mistake had been to see the drone war in Waziristan in terms of abstract legal theory—as a blatantly illegal invasion of Pakistan's sovereignty, akin to President Richard M. Nixon's bombing of Cambodia in 1970.

But now the issue has suddenly become very real and personal. Tariq was a good kid, and courageous. My warm hand recently touched his in friendship; yet, within three days, his would be cold in death, the rigor mortis inflicted by my government.

And Tariq's extended family, so recently hoping to be our allies for peace, has now been ripped apart by an American missile—most likely making any effort we make at reconciliation futile.<sup>82</sup>

Tariq's story reminds us that war and international humanitarian law are not just abstract legal and political concepts, but deeply personal realities for the human beings caught in their throes. His story could have been our story, had we been unlucky enough to live in a different time or place. In assessing the legality, morality, and policy considerations surrounding America's targeting killing policy, that is a sobering thought indeed.

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80. Clive Stafford Smith, *For Our Allies, Death from Above*, N.Y. TIMES, Nov. 4, 2011, at A31.

81. *Id.*

82. *Id.*