

DRONE WARS: THE LEGAL FRAMEWORK FOR REMOTE WARFARE

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DISCLAIMER

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ABSTRACT

On 2 October 2011, Anwar Al-Awlaki, the leader of al-Qaeda in the Arabian Peninsula, and several associates rode in a pickup truck toward a meeting in Northern Yemen. In a violent explosion of twisted steel and burning gasses, the vehicle and its occupants perished in a flash. Al-Awlaki and his acquaintances were the target of a U.S. drone strike - one of nearly 300 strikes to occur in hostile regions throughout the globe over the last three years. The drone, which can be flown remotely from thousands of miles away, is silent, precise and lethal. As such, the drone has fast become the weapon of choice for the United States in a war against violent extremism. Available to all, the drone will most certainly be on the battlefield of the Next War.

The conditions under which drone use is acceptable as a tool to target and destroy those who haunt the globe under the shadow of terror, is hotly debated among academics, government lawyers and practitioners. Who can operate drones, what constitutes a lawful target, and even what law should be applied are a few of the complex issues that are still largely unresolved. Drone use must be examined in light of International Humanitarian Law, the Law of Self Defense, Criminal Law and the secretive Law of Covert and Intelligence Operations. This broad application of battlefield law will shape the risk-based decisions of policy makers, as it will inform target selection, location of drone activity and which government or private organizations may lawfully operate drones.

Ultimately, this paper will conclude that kinetic drone strikes are a lawful instrument of war, supported by domestic and international law. However, each drone strike must be considered in light of its own circumstances with the understanding the precedent set by U.S. drone use today will establish the legal principles that will govern drone activities of our allies and our enemies tomorrow.

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On 2 October 2011, Anwar Al-Awlaki, the leader of al-Qaeda in the Arabian Peninsula, was one of five men in a white Toyota pickup on the way to a meeting. As they navigated the sandy and desolate terrain of an isolated corner of the Northern Province of Yemen they were watched from above. An unmanned drone flown by a pilot half a world away spotted al-Awlaki and his associates. The drone fired two Hellfire missiles. In a brilliant flash of fire and steel, the truck exploded. All five men were killed instantly.

INTRODUCTION

Al-Awlaki became the latest casualty in global robotic warfare. Silent and nearly invisible, the killer drone was confined to science fiction thrillers and spy movies only a decade ago. Today it is the weapon of choice in a counterterrorism effort that spans the earth collecting surveillance, gathering intelligence and performing kinetic strike operations, or targeted killings. It is the physical embodiment of the President's strategy for Global Leadership, which calls for innovative, low-cost, and small-footprint approaches to achieve our security objectives.¹

Drone strikes began in earnest during the last two years of the Bush administration, but they have become the tour de force of the Obama administration's counterterrorism efforts. According to the New America Foundation's drone database, President Bush conducted 42 kinetic strikes in Pakistan from 2004 to 2008, with 33 of those in his last year in office.² Those strikes are credited with the deaths in the range of 215 to 268 militants and approximately 148 to 211 others.³ President Obama has dramatically increased drone use with 241 strikes in his first three years. Those strikes are credited with 1209 to 1941 militant deaths and approximately 145 to 313 others.⁴ There is some variance with the numbers due to the un-reliability of press reports inside Pakistan, but it is clear that the drone program is gaining momentum. Former CIA director Leon Panetta, now Secretary of Defense, stated that drones are the only game in town in terms of disrupting al-Qaeda's leadership.⁵

Drones operated by the United States have reportedly taken flight in Somalia, Iran, Yemen, Iraq, Libya, Afghanistan and Pakistan.⁶ Peter Singer of the Brookings Institute reports that the United States has approximately 7,000 unmanned drones, and that 44 countries have begun work on some form of robotic systems.⁷ As reports of successful drone strikes have become a near daily occurrence it is not surprising that they have become a fast growing instrument of U.S. policy and that many other nations are seeking to enter the robotic arena. Drones are relatively inexpensive compared to manned aircraft. They can be launched from nearly anywhere. They are light, fast and flexible and crews can be swapped out in flight, since the pilot of a drone in Yemen could be sitting in a building in Nevada or suburban Virginia.⁸ Most enticing from a policy perspective is that no matter what happens to the drone shoot down, crash, mechanical failure, etc. there is no pilot to rescue, and no family to notify. The drone could malfunction and crash in Iran, and the pilot will be home in Northern Virginia by dinner. This is an evolutionary leap in risk management, especially in comparison to other standoff weapons like an artillery barrage or air and sea launched cruise missiles. Despite their relative distance from the enemy, ships, planes and guns must be in the theatre, susceptible to counterattack, early discovery, crew endurance, morale, and risk of loss due to mechanical failure. In drone warfare, at least from a force protection standpoint, total mission failure results in no more than the loss of a drone.

The ease with which drones can be deployed and the relatively low cost of failure has garnered tremendous interest across a full spectrum of mission sets. The military, intelligence community, and law enforcement organizations are developing and implementing drone programs. With innovation comes controversy. Academics, government lawyers, and practitioners are locked in a sometimes-heated debate about the legality of drone use, from surveillance to kinetic strike operations. Who can operate them, what constitutes a lawful target, and even what law should be applied are a few of the

complex issues that are still largely unresolved. This paper will examine the existing law as it applies to kinetic drone operations and conclude that remote weapon systems are legal instruments of war under international and domestic law. However, the legal and policy risk will vary depending upon the status of the individual being targeted, the location of drone activity, and the agency or organization operating the drone. Part I of this paper will discuss the current state of international and domestic law as it applies broadly to drone operations. Part II will examine the status of an individual target under the law, the legal and policy implications of location as it pertains to remote drone missions.

I. OVERVIEW OF OPERATIONAL LAW

The principal issue faced by U.S. policy makers and legal experts regarding the use of drones is that the physical drone itself is the only common thread in the operation. Since drones are used for a multitude of purposes, against an array of targets, in a variety of places, and operated by different agencies, a complex web of international and domestic law governs their activities.

Most commentators agree that at least four sets of laws govern drone usage: (1) the law of armed conflict (also known as International Humanitarian Law), (2) criminal law, (3) intelligence law, and (4) the inherent right of self-defense as codified in the United Nations Charter.⁹ Importantly, the extent to which each set of laws applies to a given situation is a factual determination based on many of the factors listed above. The first portion of this paper will examine the legal framework as it applies to drone pilots conducting kinetic strike operations.

International Humanitarian Law, The law of Armed Conflict

International Humanitarian Law (hereinafter IHL) governs armed conflict. IHL is that part of international law that regulates the conduct of armed hostilities.¹⁰ It is a well-established set of treaties, conventions, and customary law dating back centuries. IHL accepts that war, including the deliberate killing of the enemy, is a political instrument, a continuation of political intercourse, carried on by other means.¹¹ Under IHL, a drone strike is somewhat analogous with an artillery barrage, a hand grenade, or a sniper's rifle. The drone is a lawful weapon of war specifically intended to destroy the enemy and degrade his ability to fight. IHL does not, however, apply to all drone strikes.

A basic argument for IHL, as laid out in the Geneva Convention, is that its rights and protections are limited to lawful combatants.¹² Lawful combatants may not be held criminally responsible for killing or injuring enemy personnel, or damaging or destroying enemy equipment, so long as their actions are in compliance with the law of war.¹³

Combatants include uniformed regular armed forces of a state, militia groups, volunteer corps, and organized resistance movements belonging to a State Party to the conflict.¹⁴ These criteria are important because they provide specific rights and privileges to combatants. They specifically exclude unprivileged belligerents, spies, saboteurs, and civilians participating in hostilities.¹⁵ In drone warfare, IHL only applies to operations conducted by military pilots as part of armed conflict. Strikes conducted by non-military personnel, e.g., members of the Central Intelligence Agency or government contractors, are not illegal, *per se*, but those individuals do not have the same legal privileges and responsibilities as lawful combatants under the rules of war. CIA and contractor strikes are legal under U.S. law, but they are problematic under the Geneva Convention—a treaty to which the U.S. is a signatory. Under the Geneva Convention, a civilian is vulnerable to prosecution in a foreign court or before the International Criminal Court, if the ICC or a foreign target state were to gain custody of a civilian U.S. drone pilot. Technically, a civilian pilot could even be tried by a U.S. court, although that is obviously unlikely.

Drone strikes, or targeted killings, performed by military personnel must meet four criteria in order to comply with IHL principles. The strike must comply with the principles of military necessity, discrimination (or distinction), proportionality and humanity (or avoidance of unnecessary suffering).¹⁶ The principle of necessity, as described by the U.S. Army Field Manual, authorizes that force which is necessary to accomplish the mission.¹⁷ Targeting must be limited to those areas, people, or things that advance a military objective. The law does not provide a description of acceptable or illegal targets, but a drone strike against a fortification, a military runway or a leadership target, like a command and control center, would generally meet the principle of necessity. A single individual leader, like Anwar al-Alwaki, can be targeted if he meets the criteria as a military objective. The person directing the drone strike must be able to articulate the military value of the target and advantage gained relative to the harm caused. In the unlikely event that the military targeted a civilian food distribution location or a daycare center it would most certainly not pass muster. Necessity must be viewed in light of the other three principles in order to evaluate the overall legality of a strike.

Second, an attack must also satisfy the requirement of discrimination or distinction. The general rule is that the strike must distinguish combatants from non-combatants. In practice it means that the operation must be directed at a legitimate military target, not fired indiscriminately. Iraq's indiscriminate SCUD missile strikes against Israeli cities during the first Gulf War were illegal, insofar as they were not aimed at a specific military target.¹⁸ The issue is that the SCUD was an unguided weapon launched in a highly populated area where non-combatants clearly outnumbered any troops or lawful military objectives. SCUD attacks were essentially random. An unguided weapon, however, may be lawful if it is used in a discriminate manner. To wit: a military aircraft could lawfully drop an unguided bomb on a bridge used to transport ammunition, or on military barracks, if collateral damage was considered and mitigated. Weapon selection, expected accuracy, delivery method, and fuse setting are among the choices a pilot has to account for and mitigate unintended damage.¹⁹

The principles of discrimination and distinction does not suggest that there can never be collateral damage or loss of life to civilians in the area unfortunately that is the ugly, but legally accepted, cost of war. Ultimately, to meet the criteria of distinction, combatants, not civilians, must be the object of the attack.²⁰ The amount of incidental death or damage that is legally permissible is measured by proportionality.

The principle of proportionality requires a military commander to consider the balance between damage inflicted and military gain. The overall damage to all military and civilian targets, with particular emphasis on collateral damage, must not be excessive in relation to concrete and direct military advantage expected in the final outcome.²¹ In other words, a direct attack against a military target that results in incidental death to civilian lives and property is legally permissible, but a reckless attack that causes loss of civilian life and property would violate the principle of proportionality.²² There is no mathematical formula to determine proportionality it is a largely subjective test that must be performed before the attack.²³ The test requires one to measure expected loss against anticipated military advantage.²⁴ Thus, it is not a war crime to inflict unintended civilian death, as long as civilians were not the intended targets of the attack.

The Al Firdus Bunker attack²⁵ in the 1991 Gulf War illustrates this point. The bunker was deemed a lawful target by United States forces during the early phase of the air attack, based upon available intelligence and satellite estimates. It was hardened and hidden in a manner that depicted a military target. It was destroyed. Battle damage reports later showed a high loss of civilian life as the bunker was actually being utilized as civilian sleeping quarters. This act was not deemed a war crime by the U.S. panel that investigated the incident, because the expected loss of civilian life based on all available information was very low, even though that assessment later turned out to be untrue.²⁶

Proportionality, and distinction, are points of substantial disagreement among lawyers studying drone strikes.²⁷ Some argue that the lack of a human pilot, the greater ability of the drone to loiter silently, and the precision strike capability raises the bar against which the drone should be measured.²⁸ For instance, an unmanned drone flying at 15,000 feet unrestrained by human crew endurance or limitation, bolstered by space age sensor technology can identify, track, photograph and monitor a target for a significant period of time, before its operator has to make a use of force determination. Additionally, a drone operator can stream data to multiple sources, allowing the pilot to gain legal review, and receive higher echelon clearance in real time. This provides the drone with a clear advantage over manned aircraft. Manned fighters and bombers, like drones, have the shared benefit of distance and speed, but manned aircraft are greatly limited by crew endurance, surface to air threats, and are easily seen and heard from the ground. An F-16 pilot in a single seat aircraft must identify and track a target while also flying a sophisticated jet. He or she must avoid surface to air missile threats, track fuel and ammunition, handle communications and stay on top of dozens of systems to protect the jet, and most importantly, the pilot. The fighter pilot's decisions, including weapons release, are often split-second. His or her life is on the line. Conversely, the drone pilot is in an office building or a trailer. The screen seen by the pilot can be analyzed by as many people as will fit in the room, or even by remote video feed. The only risk is to a machine thousands of miles away. There is time to get the decision right.

At the center of the proportionality debate are the numbers of civilians or others reportedly killed in drone strikes targeting members of the Taliban and al-Qaeda in Pakistan and elsewhere. As the fatality numbers at the outset of this paper demonstrate, both the Bush and Obama administrations have directed strikes that have resulted in incidental loss of civilian life. One well-publicized strike in Pakistan mistook a family gathering for a militant group and killed a wheelchair bound grandfather, two other family members, and severely injured a six-year-old girl.²⁹ Some commentators argue that the entire program should be scrapped due to what they believe is a disproportional loss of civilian life,³⁰ while others, including current administration officials,³¹ disagree.

Interestingly, the Army Field Manual for Counterinsurgency offers a nuanced definition of proportionality for use in COIN operations, noting that in COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.³² As one commentator has noted, the Field Manual is not a restatement of the law of war requirements, but rather it is an interpretation of the law of war as influenced by U.S. COIN policy.³³ This would suggest that a senior insurgent capable of causing great harm might justify a greater incidental cost than a lesser target. Ryan Vogel, Foreign Affairs Specialist in Office of the Secretary of Defense, noted that targeting the most senior leaders might lead to a quicker cessation of hostilities and fewer military and non-military deaths.³⁴

Therefore, in the larger context of overall deaths, especially if considered over a period of time, one might suggest that the Army's COIN definition has merit for drone strikes. The question policy makers must determine is how much incidental damage is acceptable in a strike to kill a very valuable target, if his death will cause a draw down in hostilities? This question must be counterbalanced by those who will point out that particularly deadly drone strikes, where civilians are killed, can also backfire and potentially fuel the very insurgency being targeted.³⁵

The final qualifier under IHL is the principle of humanity or unnecessary suffering. This principle applies to the weapons and ammunition used in war. As stated in the Hague Convention, it is especially forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering.³⁶ There is no definitive agreement as to what constitutes unnecessary suffering, but the types of arms that are specifically banned include: weapons

made of glass, lances with barbed heads, and hollow point ammunition.³⁷ The Hellfire missile is the publicly acknowledged standard weapon system aboard most of the drones used for kinetic strike operations. The same missile is carried aboard a number of attack helicopters and some fixed wing assets, and has been in use for two decades. Therefore, in terms of the principle of humanity and unnecessary suffering, there is no particular issue with the weapon itself, or the damage it causes, in relation to other similar systems.

Drone strikes, however, have been criticized by a number of commentators for their somewhat limited set of options.³⁸ To be blunt, they can take a hi-resolution photo or blow the target (or person) to pieces, but they can't accomplish much else. The criticism is that they can't capture, detain or accept the surrender of the target they are tracking.

In terms of accepting surrender, the drone is similarly situated to other manned aircraft and projectiles. Fighters, bombers, cruise missiles, even a hand grenade, once it is thrown, are not capable of accepting surrender. There is simply a point in combat where the surrender option is moot. The ability to surrender ends once the bombs are released.³⁹ However, IHL does require that one accept surrender if it is otherwise possible. This could pose a dilemma for a drone operator, if a target should discover the drone and make it obvious to the drone's sensors (and thus to the operator) that he or she wishes to surrender. For instance, if a target stops their vehicle, climbs out and raises their hands or literally waves the white flag, the drone would legally be precluded from firing. Yet, it also has no capacity to detain the target as a prisoner. Even if there were an infinite number of drones available, at some point, ground forces would be needed to affect the detention. If ground forces aren't available, then the operator and target are left in a very peculiar standoff. The target can't flee without regaining target status, and the drone can't fire until while the target is actively trying to surrender.

The larger issue of detention versus destruction is an even harder issue, but one properly left to the policy maker. Detention can have obvious benefits in terms of intelligence collection and perhaps public opinion, and as detained persons are not killed, detention might seem like the more humane thing to do. On the downside, detention requires a detention facility, which as two consecutive administrations have learned is hotly political, and an extremely difficult thing to undo.

The Coast Guard deals with detention issues on a daily basis with illegal migrant interdiction, and even in those cases, where the overwhelming majority of migrants are not accused of a crime (other than attempted illegal entry), the migrants can be on the deck of a Coast Guard Cutter for days. The U.S. Navy faces a similar problem with pirates. There are no easy answers once a foreign, or stateless, national is detained extra-territorially, and by far the most difficult detainees in terms of process and politics are suspected terrorists and insurgents. To wit: the U.S. has had detainees at Guantanamo Bay for over a decade. Also, as mentioned above, a person cannot surrender or be detained by a drone. Detaining members of Al Qaeda, the Taliban and other terrorists requires boots on the ground, and the countries where they have chosen to hide are not always amenable to United States ground forces. Permission and sovereignty issues are substantial, and there is extreme risk to U.S. Military and law enforcement forces operating in areas of large areas of Sudan, Yemen, Somalia, Pakistan, Iran, etc. As Secretary Panetta told the Marine Corps War College class, you're not going to fly an F-16 or put people on the ground in the Fatalist's not going to happen.⁴⁰ So, ultimately the Obama, Bush and subsequent administrations may find that they have few options other than the drone, even if it presses against the edges of the principle of humanity.

Overall, drone strikes that comply with the four criteria of IHL (Military Necessity, Discrimination or Distinction, Proportionality and Humanity or Unnecessary Suffering) are lawful. A case-by-case determination must be made, but it is legally permissible for military personnel to conduct drone strike against lawful combatants, or one who has forfeited their

protected status. It is well-established law that any weapon can be used illegally, but that fact, in and of itself, does not make the weapon illegal.⁴¹ Again, the most critical point for this discussion is that the IHL only applies in armed conflict between states (international armed conflict) or within the territory of a state (non-international armed conflict), and when the actors are armed combatants, or those that have forfeited their protected status.⁴² Drone strikes taking place outside those confines, either due to the nature of the conflict, or the actor (non-combatant status of the drone operator) would be inapplicable under the IHL and would be governed by one of the following groups of law.

Criminal Law Policing with Drones

One source of law potentially governing non-armed conflict related drone strikes is criminal law. Whereas IHL governs the law of war, domestic law and International Human Rights law is generally considered to control a state's right to use force for domestic civil law enforcement.

In general, targeted killing can occur only under an extremely limited set of facts under U.S. and Human Rights law. The purpose of criminal law is to arrest and bring a defendant to justice. Law enforcers may only use lethal force in two circumstances: the execution of those convicted of a capital crime in jurisdictions authorizing capital punishment, and in exigent circumstances when a malefactor poses an imminent threat of death or serious bodily injury to the officer or another person the officer is authorized by law to protect.⁴³

Personal self-defense and the lawful defense of others is a very narrow band for targeted killing. Personal self-defense for drones is an untested area of the law. Peter Singer, robotic and drone expert noted that Air Force policy is that drones may defend themselves during unmanned flights in the Persian Gulf.⁴⁴ Along similar lines, he also notes that legal groups, like the International Bar Association, have considered pet law as starting point for robotic rights.⁴⁵ This line of debate is cast largely on the concept that robots and drones will reach a status of being, as Singer describes it, using C3PO as an example.⁴⁶ A court may take this issue up in the future. However, under the current state of law a drone is almost certainly going to be considered a chattel, or property, not a person or being. That is somewhat problematic from a drone defense standpoint, because deadly force is almost never authorized to protect property.⁴⁷ This is codified in Department of Defense rules governing use of force for law enforcement, which specifically state that:

Normally, deadly force is not authorized to defend property. However, DOD personnel may use force up to and including deadly force to prevent the actual theft or sabotage of property that has been designated by the NCA as vital to national security, or property that is inherently dangerous. Property is inherently dangerous to others if, in the hands of an unauthorized individual, it presents an imminent danger of death or serious bodily harm to others, such as high risk, portable, and lethal: missiles; rockets; arms; ammunition; explosives; chemical agents; and special nuclear materials. [Emphasis added].⁴⁸

This is a distinct issue from a separate section of the DOD instruction that describes unit self defense.⁴⁹ Under unit self-defense a commander of an aircraft is specifically authorized, and in fact required, to defend to defend the aircraft against attack. This; however, is based upon the understanding that actual people are in the aircraft, ship or vehicle. Unit self defense has never been used to defend empty property, save the exception above for NCA (National Command Authority, i.e., the President and Secretary of Defense) declared national security property.

Even if drones are eventually considered beings and the Air Force policy is upheld, the limits of self-defense under the unit self-defense rubric, or the law enforcement

imminent threat of serious bodily injury or death standard, would still limit a targeted killing to situations in which the drone comes under attack. Clearly, it would not allow an al-Awlaki type of strike. To the contrary, al-Awlaki would have had to brandish a weapon and demonstrate intent to use it, before the drone could fire. It is also foreseeable that a cyber attack on the drone's control system might be justification for self defense, but again, the drone would have to be considered a being or national security property. Thus, this legal basis severely limits the ability of the drone to employ targeted killing.

The possible exception would be a defense of others justification. Assuming the local jurisdiction (nation) agreed to allow the United States to operate drones for this purpose, the target would still have to demonstrate actual intent and ability to cause serious bodily injury or death to some other protected person for the drone to employ deadly force. This would only slightly open the legal aperture under which the drone could act.

A law enforcement self-defense theory is probably not the best option for the administration in terms of targeted killing of terrorists; however, there is a broader self defense option that is gaining momentum with commentators and practitioners.

Self Defense, The Inherent Right of Self Defense

The United Nations is based upon peaceful resolution of conflict. In Article 2(4), the U.N. Charter states All Members shall refrain from the threat or use of force against the territorial integrity or political independence of any state.⁵⁰ There are two exceptions to this broad rule. First, Article 42, which allows the Security Council to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.⁵¹ This language is powerful, but allows military force against a state only after all other options have failed. It requires full UN Security Council approval, which means that it must survive potential veto by any one of the five permanent members of the Security Council, which, of course, includes Russia and China. So, a Chapter VII authorization is obviously rare, though it was the basis of authorization for the first Gulf War and the Korean War. There is no existing Chapter VII authorization that would justify targeted killings by drone. Turning to the second exception to Article 2(4), there is Article 51. Article 51 states that Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations⁵² This legal concept is based upon thousands of years of customary law, but as codified, it is quite restrictive and very controversial.

In terms of kinetic drone strikes against insurgents or terrorists, the key to the controversy is the interpretation of the much-debated phrase if an armed attack occurs. Two preeminent scholars on the issue of targeted killings, Professors Mary Ellen O'Connell and Kenneth Anderson, have staked out the two sides of the debate in a legal version of a mixed martial arts fight. Professor O'Connell, representing a strict reading of Article 51, asserts that the legitimacy of use of force stems from evidence of an armed attack occurring evidence of plots does not suffice.⁵³ In other words, the other side must actually fire the first shot, or at minimum, demonstrate immediate intent to fire. Following such a strict reading would allow, for example, a military response following 9/11, but would not support the present day fighting in Afghanistan. Because, Professor O'Connell suggests, such an authorization would have expired [o]nce the Taliban was driven from power.⁵⁴ This theory of self-defense is not too far afield from the law enforcement model explained above. The O'Connell stance essentially mirrors the imminent threat of serious death or bodily injury standard. To be fair, Professor O'Connell's stance is probably the most generally accepted view in the international community. It would, however, all but eviscerate the present drone strategy being employed by the United States Government.

On the other side of the ring, Professor Anderson suggests a view that is aligned pretty closely with the well-known Bush Doctrine.⁵⁵ President George W. Bush, in a

speech to cadets at West Point in 2002, stated that the United States would, be forward looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.⁵⁶ [Emphasis added]. The Bush Doctrine asserts that, given the cataclysmic damage that a terror strike (particularly weapons of mass destruction) can cause, it isn't acceptable to wait for a literal reading of armed attack. The thought is that by the time the attack is launched, or imminent, it is already too late. The damage will be done.

In line with the Bush Doctrine, Professor Anderson suggests that the United States can continue its drone program by asserting the broader right of preventative or preemptive self-defense that includes a corollary right of self defense against a continuing threat.⁵⁷ The theory is essentially that the United States action today, to include targeted drone strikes, is in response to an ongoing threat that began before 9/11 and still exists at present. It's a point of debate, but if the al-Qaeda the United States is chasing in Yemen, Sudan, Pakistan and elsewhere today is connected to the same Osama Bin Laden movement of the 1990.s and early 2000.s, then the theory would suggest that the United States is still lawfully embroiled in the same continuous conflict. Thus, despite the decade long duration, it is still the same enemy and the same fight that the United States is defending against.

Interestingly, as Professor Anderson points out, the basis for this theory actually pre-dates the second Bush administration and was an accurate statement of American policy in the 1980.s.⁵⁸ In 1989, Department of Defense attorney Hays Parks noted that a state could respond in self defense if there is sufficient reason to believe that a pattern of aggression exists.⁵⁹ Professor Anderson's reason for stating that point is probably to suggest that the theory has enough pedigree to elicit some value as customary law, through continued state practice. That assertion is sharply criticized by others, including O'Connell, who point out that the United Nations World Summit of 2005, reviewed and upheld the original Charter without dissent.⁶⁰ In this view, if the United States desired to assert a state practice contrary to the United Nations Charter, it probably should have argued its position (or at least made its position known) at the Summit. It is understandable that the United States would not risk the tremendous damage to the United Nations, or the United States. own international reputation, that would have ensued by a U.S. no vote on the Charter in 2005, or even an abstention. Rather, the United States seems to be operating from the standpoint that it is easier, or certainly more politically feasible, to expand the definition of armed attack to include continuing self defense, than it would be try to change the language of the charter itself. In fact, opponents could interpret a U.S. request to change the Charter as an admission that its current actions would, in fact, require a change. That is a very untenable position and not one that would behoove the United States in the long run, especially since even a casual observer of the United Nations would surmise that a change to Article 51 is not soon forthcoming.

Before continuing, it is vitally important to note that military drone strikes in self-defense are lawful when an armed attack has occurred, or when it is imminent. Such operations follow the right of inherent self-defense, even as codified in the restrictive U.N. Charter. The issue and controversy stems from the blurry edges of the law when the imminent nature of the threat is less certain, or when a military self-defense operation occurs many years after the original armed attack. The law is also problematic when a military operation is conducted by civilian members of the intelligence community or by government contractors, whom as stated above, are not lawful combatants under the IHL.

This debate illustrates the general split, not only among the academic elite in America, but also between the international community and the United States. Advancements in technology and tactics, for the United States and its enemies, are outpacing the international legal framework attempting to govern actions on both sides. The concept of self defense codified in the U.N. Charter grew out of antiquity. Only a generation ago, a general planning to attack a foe literally had to mobilize an army, build railroads along

interior lines, and drag cannons to the line of departure. Why is this important? Because the law of self-defense was created at a time when imminent threat was a function of days, weeks or months. Today, WMD in tandem with global shipping and transportation have made the world a much more accessible place. An attack can happen in minutes, and before any warning is sounded. Moreover, the advent of world wide communications brought about by the internet, VOIP, cell phones, Iridium, Inmarsat, etc., have similarly created networking possibilities for al-Qaeda and other extremist groups that didn't exist even 15 years ago. Worldwide communication is global, real-time, and inexpensive. Likewise, the drone is a leap in technology, and certainly a game-changer in the war against extremism, but the United States should have no misconceptions, the drone is ahead of curve in terms of international law to the extent that customary law and the United Nations Charter govern the inherent right of self defense.

This is not to say that the United States cannot, or should not, use self defense as a legal justification for targeted killing. However, the U.S. should be mindful that neither preventative or preemptive self defense nor the theory of continuing self defense is universally accepted. In fact, the United States and a few close allies are probably the only proponents of the current policy. The further a defensive strike is from the world view of imminent threat, or when it takes place at a time well after an attack, the harder it will be for the United States to demonstrate to the world community the legitimacy of its actions. It will have to continue to assert that these actions are a correct interpretation of customary law and, ultimately, drive the creation of a more flexible rule through customary practices with agreement of the international community. Customary law does not change quickly, but it might over time adopt a more adaptive rubric, and one that more closely mirrors current United States policy. This brings us to another set of law intelligence law.

Intelligence Law and Covert Operations: The law of secret drone strikes 61

Intelligence gathering, unlike drones and robots, is not new. Intelligence collection and other clandestine functions date back to the beginning of known human history. Moses is reported to have used spies 7000 years go; the Athenians and Spartans had spies in 500 B.C.E. and so probably did every major power since.⁶² Nathan Hale and Mata Hari are just a couple of the famous, or perhaps infamous, intelligence collectors who influenced a war. Intelligence operations exist in many forms today.

Officially, there is no acknowledged CIA-run drone program.⁶³ The following discussion is based entirely upon media reporting. That said, much of the ongoing discussion related to CIA involvement has been attributed to a single quip by now-Defense Secretary Leon Panetta (then CIA director) who said that drones are the only game in town.⁶⁴ Whether the program actually exists is not important for this discussion, because, even if there is no present program, a CIA-run program may take flight at some point in the future. The legal basis for such a future program raises important questions in either case.

International law regarding spying and intelligence collecting is, ironically, largely an interpretation of what is not written in the law of armed conflict, or IHL. The definition of combatant, found in article four of the Geneva Convention for the Treatment of Prisoners of War, specifically requires that the individual must be a member of the armed forces, wear distinctive clothing/insignia, carry arms openly, and be under the command of responsible military authority.⁶⁵ Those that do not fall into this category protected under the Convention include unlawful combatants, unprivileged combatant, spy, saboteur, and civilians who are participating in the hostilities.⁶⁶ These terms do not arise, or appear, in the text of The Hague or Geneva Conventions. Rather, they have been ascribed (by commentators and case law) to describe categories of persons that do not qualify for prisoner of war treatment. In other words, they are acknowledged to exist, but in an unprotected status. This has significant meaning under the law, as is detailed in part II of this paper. A lawful combatant

is not subject to prosecution in the state of capture, even when they violate peacetime laws. Their legal liability is strictly limited to trial for specific war crimes, if any were committed.⁶⁷ Equally important, they must be extended the full protections of The Geneva and Hague Conventions, as a Prisoner of War, upon capture. Unlawful combatants like spies and non-military intelligence gatherers have no such protections under international law. They can be tried in the host nation's domestic courts, before an international tribunal, and not insignificantly, they can be executed. So, there is inherent risk in any nation employing spies, or any civilian, to conduct operations in combat.

Turning to domestic law, the limits and authorities of the United States intelligence community are not codified in any wholesale fashion. The intelligence community includes the full gambit of occupations from analysts to lawyers to clandestine officers in sixteen different agencies from the CIA to the Coast Guard. Authorities flow from the Constitution to the Chief Executive with statutory enactments in titles 10 and 50 of the United States Code. Intelligence Community organization, missions, and some limitations are also included in Executive Order 12,333, which has the force of law.

The Central Intelligence Agency, in particular, is tasked in Title 50, U.S.C. section 403 with: (1) collection of intelligence; (2) correlation and evaluation of intelligence; (3) direction for the coordination of the collection of national intelligence outside the United States; and, (4) to perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct [emphasis added].⁶⁸ The so-called fifth function is related to the last clause authorizing other functions and duties.⁶⁹ Put simply, the fifth function is fueled by a blanket authorization contained in 50 USC 413(b) for the President to conduct covert operations with ANY element of the government, such as the sixteen members of the intelligence community which include the CIA, military, and law enforcement organizations. Interpreted broadly by the Agency and Congress, the fifth function has reportedly been used to justify clandestine intelligence operations from the Bay of Pigs; to Laos during the Viet Nam War, and even to authorize attempts to assassinate leaders in Cuba, Chile and Zaire.⁷⁰ Some covert functions are not intelligence per 50 USC 413(b), rather they encompass the broader role of clandestine activities.

It goes to follow, then, that kinetic drone strikes resulting in targeted killing would logically be a fifth function duty. At minimum, the broad authority might provide domestic law top cover for running clandestine drone strikes, even if a tribunal later determines those actions to be other than strictly legal under international law. This theory has precedent in United States actions as noted by Professor Anderson's observation that rightly or wrongly, justly or unjustly, the United States has often used force, not under color of law enforcement or in the context of IHL but instead under domestic authority.⁷¹ Drone strikes certainly fit that mold.

This raises an interesting question in terms of political and legal risk. What are the potential consequences of ordering, under U.S. domestic law, drone strikes to kill terrorists operating abroad if that law is contrary to International Law? It might not be that significant.

First, despite the high number of drone strikes, and the academic criticism of them, there appears to be relatively little political interest in stopping kinetic strikes against individuals connected with terrorism. There are few, if any, detractors on Capitol Hill and both political parties have been generally supportive. This is probably due in large part because two successive administrations - a Democrat and a Republican - have used drones to directly target known terrorists. President Obama was critical of President Bush, not for using drones, but for not acting aggressively enough to go after al-Aqua's leadership.⁷² President Obama, as a candidate, further stated that when he has actionable intelligence he would act to protect the American people. As the numbers dictate, President Obama has made good on that promise. As one commentator noted, he increased drone strikes by

1700%, many of which have been attributed in press reports to the CIA.

Second, challenges to drone operations have not met with success in the United States legal system. In the one seminal targeted killing case, Anwar al-Awakes father sued unsuccessfully in Federal Court to stop the extra-judicial killing of his son. The court dismissed the case primarily on two grounds. On the first ground, the court found that the action of the President to conduct drone strikes was covered by the political question doctrine. The political question doctrine is present when a court finds that the issue requires both expertise beyond the capacity of the judiciary and the need for unquestioning adherence to a political decision by the Executive.⁷³ Here, the court noted that it would not be appropriate for the judiciary to limit the circumstances under which the United States may employ lethal force against an individual abroad who the Executive has determined plays an operational role in AQAP planning terrorist attacks in the United States.⁷⁴ In other words, the court will defer to the President on an issue, like this one, that is entirely within the President's constitutional powers. This is significant, because Anwar al-Awlaki, unlike the vast majority of targets, was a United States citizen. That fact, though important, was not significant enough to convince the court to provide injunctive relief on the political question ground. The court stated that it was not aware of another case where a court refused to hear a U.S. citizen's claim on political question grounds when that citizen claimed their constitutional rights would be violated as a result of U.S action overseas. It is not clear, but that could be a signal that if there had not been another ground, the court might have taken the issue up. Nevertheless, it probably does not bode well for a non-citizen making the same kind of claim.

On the other substantial ground for dismissal, the court found that al-Awakes father lacked standing to sue on behalf of his son. This is probably the bigger hurdle for a targeted individual to clear. The court stated that All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. Citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities.⁷⁵ The court explains that in order to assert second party standing, the actual plaintiff must be reasonably unavailable. Incarceration and detention are lawful grounds to be deemed unavailable, but hiding from law enforcement is not. The court went on to suggest that if Anwar al-Awlaki wanted to bring the case, he could present himself to a U.S. Consulate or Embassy abroad and request to vindicate his rights in a U.S. court.⁷⁶ It is not insignificant that he would also be exposing himself to the criminal side of the judicial system, while attempting to adjudicate his civil claim. In other words, he would likely be arrested, but as the court also notes he would be safe from lethal action.⁷⁷

In terms of access to the courts, the combination of the political question doctrine and standing essentially force a terrorist to make a choice stay in hiding and risk a drone strike or turn themselves in and allow the legal system to adjudicate their civil and criminal proceedings. A terrorist might consider that a Hobson's choice, but it is a safe bet that few Americans will fret over it. That may very well empower the President to continue to use drones to hunt those that do not surrender.

A defendant/terrorist could also find him or herself before a United States Court even without a voluntary appearance, by a process called rendition. In 1985, Mr. Alvarez-Machain had been accused of torturing and murdering a DEA agent in Mexico. He refused to appear in the United States to face charges, and the Mexican Government refused extradition. Mr. Alvarez eventually arrived in the United States, as if by magic, having been deposited on a runway by an unidentified aircraft that only stopped long enough to eject its handcuffed passenger onto the tarmac. The Supreme Court, in *United States v. Alvarez*,⁷⁸ upheld the lower court's jurisdiction, despite Mr. Alvarez's objection to his unusual entry into the United States judicial system. This holding essentially allows a United States Court to try anyone brought before that court, no matter what the circumstances of the defendant's

arrival.

While rendition may assist U.S. officials in obtaining jurisdiction of foreign nationals accused of crimes against the United States, there should be some concern that the process could work in reverse. This is particularly threatening to a CIA drone pilot who does not share in the immunities guaranteed to military personnel as lawful combatants. As detailed above, a CIA officer is a non-combatant and could be treated as an unlawful combatant, if brought before a foreign tribunal or the International Criminal Court. If a drone pilot were captured from a forward location or even kidnapped from the United States, they could face trial under the laws of the target country. A military member could not be tried under similar circumstances. The secret nature of the CIA, and the fact that the CIA drone program doesn't officially exist, along with whatever safeguards the Agency has in place to protect its pilots may serve to protect CIA officers from discovery or rendition, however, to be sure, they are operating at great personal risk.

Lastly, customary international law works both ways. If the United States insists that there is, through state practice, or otherwise, a legal basis to use clandestine intelligence officers to carry out targeted killings, it will risk opening the door to enemy states. As Peter Singer and a host of other commentators have pointed out, the United States will not have a permanent monopoly on drone or robotic technology. U.S. attempts to broaden the law in this fashion could, like anything else, open the door to foreign powers using that law against us.

Ultimately kinetic drone strikes conducted by the CIA have a basis in domestic law and follow a general customary understanding that there is a clandestine aspect of warfare as old as war itself. There never has, nor will there probably ever be, a well-defined international framework of law for clandestine operatives, spies, and covert operations. Espionage, if illegal, is illegal under the law of the target country. One might say that is the nature of the business. For all the reasons stated above, the administration is likely to find that it can conduct drone strikes in this manner with little political threat at home, despite the potential for reputational damage abroad.

There is sufficient legal basis, to varying degrees, to conduct kinetic drone strikes under IHL, self-defense law and intelligence law. Criminal law is very limited, but could serve as a basis in some circumstances as detailed above. The next questions that must be asked are centered on who, where and for what purpose may a lethal kinetic strike be conducted?

II. TARGET ANALYSIS: (WHO & WHERE?)

To this point, this paper has largely discussed the issue of whether or not a kinetic strike can occur under domestic and international law with a conclusion that it can, under certain circumstances. With that broad overview of the legal structure in place, this paper will now address the issue of targeting. In particular, one must ask: who can be targeted for non-judicial killing, and what are the limitations based on the location where a drone strike can take place? As detailed above, there are many factors to consider in terms of whether the United States can pull the trigger, so now we turn to: who can be in the cross hairs.

Who is a lawful target?

The discussion will now focus on the categories of people that might, or might not, be legal targets for a lethal drone strike. Principally among these groupings are: lawful combatants, civilians participating in the hostilities, and civilian criminals. Each category is treated differently under the law, and creates its own set of unique challenges for the current drone strike policy.

Lawful combatants are unquestionably legal targets under IHL, and can be targeted by drone or any other lawful weapon system. However, as discussed above, lawful

combatant is a legal term of art that includes only those individuals meeting the specific criteria of the Geneva and Hague Conventions, to wit:

Militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates;(b) that of having a fixed distinctive sign recognizable at a distance;(c) that of carrying arms openly;(d) that of conducting their operations in accordance with the laws and customs of war.⁷⁹

Furthermore, the lawful combatant must be participating in an armed conflict, which must be an international or non-international conflict.⁸⁰ This essentially limits IHL armed conflicts to state-to-state (international) war, or non-international conflicts, which generally includes civil war. In the context of terrorism, state-to-state conflict is relatively unlikely unless an entire state is a terror group. This, perhaps, might have applied to the Taliban in Afghanistan in the time period of 9/11, but that justification was never used.

The second criteria noninternational conflict - is also an imperfect fit. It would require a state to be at war with a terrorist group inside its borders. An individual state can strike Al-Qaeda inside its borders, but al-Qaeda network has never remained inside the border of a single nation-state and has even utilized international borders to frustrate attempts to target them. Additionally, al-Qaeda has not attacked some of the states in which it resides, so those states do not necessarily have a self defense basis to perform lethal strikes against al-Qaeda, even if they wanted to. Moreover, in those cases a state cannot even grant permission to the United States to attack, since it can only allow another state to do what it can legally do itself. Thus, neither the international conflict nor the non-international conflict strictly fits the al-Qaeda organization and the United States efforts to stop them.

Because of this gap in law, the Bush administration took the stance that the Global War on Terror (as it was known at the time) fit neither category.⁸¹ The Bush position was that the conflict with al-Qaeda was not an international conflict, per se, because al-Qaeda was not a state signatory to the Geneva Convention.⁸² Secondly, the conflict was not noninternational because it was not contained within any one state's borders. This Argument was used to support the administration's position that members of al-Qaeda were not lawful combatants, and therefore not eligible for protection under the Geneva Convention.⁸³ The Supreme Court ultimately disagreed, and declared the conflict to be noninternational.⁸⁴ The Obama administration has followed that characterization.⁸⁵

This is the dilemma of the terrorist/combatant issue. If terrorists are declared to be lawful combatants, they can more easily be targeted; however, that designation also confers on them the full panoply of legal privileges of the Geneva Convention, which includes Prisoner of War status and immunity for lawful acts of war. Notably, al-Qaeda is neither a party to, nor in compliance with, the Geneva Convention. It is beyond debate that many of al-Qaeda's tactics, such as beheadings, direct targeting of civilians, etc., are abhorrent to the Geneva and Hague Convention principles.⁸⁶ To be clear, applying Geneva Convention protocols are not a particular constraint on U.S. policy when a terrorist is actually killed by the drone. The problem is that the declaring al-Qaeda a lawful combatant group could bestow a privileged status on the entire terrorist organization. It essentially forces the U.S. and its allies to follow strict treaty obligations with a belligerent organization that follows no rules itself - an untenable position in war. It means, not insignificantly, that detention and trial issues will remain in an international gray area - a position that has created a political nightmare for two Presidents at Guantanamo Bay. Thus, IHL does provide legal justification for targeted strikes against lawful combatants, as long as there is an armed conflict, but it carries with it certain obligations that may be politically difficult to apply to a terrorist

organization.

A second category worth discussion is the civilian who participates in the hostilities. This category of person is someone who does not meet the criteria of a lawful combatant, yet they take some action to participate in the conflict. Participating in the hostilities is not defined in law, but logically includes many combatant activities; munition making, planning attacks, and of course, direct participation in an attack.⁸⁷ Under IHL, these individuals forfeit their protected civilian status, are not entitled to be held as Prisoner of War, and are subject to arrest and prosecution under the domestic law of the captor.

There are two legal issues complicating this status. For one, experts have noted that it opens a potential revolving door that would purport to allow an individual to act as a terrorist by day and a farmer by night. In practice that means that an individual in this status is only subject to lethal action while actually participating in some terrorist act and could re-claim their protected civilian status at all other times.⁸⁸ For obvious reasons this would make a drone strike a complicated affair, since the operator would technically have to determine the exact nature of the target's activities at the time the shot was fired. Should it matter if the next Osama Bin Laden is washing his clothes when a drone acquires his position? In the pure legal sense, it might. Interestingly, the Israeli Supreme Court, a court with acknowledged expertise in terrorism, adjudicated this issue and ruled that a civilian could be deemed to be participating in a chain of hostilities.⁸⁹ This holding would solve the revolving door issue, since under the Israeli framework a person could be assimilated to civilian participating in the hostilities status on a permanent basis. This would solve the targeting problem, and allow for 24/7 strikes. But, it is presently the law only in Israel, and might be deemed a step too far by the international community, since it could be hard to define a point when a person's action fastens a permanent target on their head, or equally important, how they might permanently withdraw from participation. Under the IHL, a lawful combatant can legally withdraw (*hors de combat*) and gain protected non-combatant status. Similarly, under current law, a civilian may participate and later withdraw. The United States might be tempted to follow Israel, but should be careful of the unintended consequences of a law that would potentially swallow the *hors de combat* exception for all combatants.

Another legal complication with a civilian who participates in the hostilities framework is that, as one military law expert noted, the status requires an armed conflict.⁹⁰ This brings us back to the issue of international and non-international conflict, which as discussed above is problematic in terrorism cases.

Civilian criminal is a term offered by some who believe terrorists are not combatants (lawful or unlawful), but are simply villains.⁹¹ This option offers the fewest options militarily. As one expert notes, the targeted killing of a civilian, terrorist or not, would be an assassination homicide and domestic crime.⁹² Therefore, kinetic drone strikes except in narrow self-defense of others would be illegal, and as mentioned above self defense of an unmanned drone may not be lawful while self defense of others in a foreign land is troublesome without an international agreement granting jurisdiction to the officer/drone. Likewise, all captured terrorists would be treated no differently than any foreign criminal arrested aboard. That would grant far more than Prisoner of War status; it would give each the full benefit of the United States judicial system. That issue will remain beyond the scope of this paper, but obviously brings tremendous challenge rules of evidence, discovery, witness availability, etc. Perhaps most importantly, does the United States really want to bring all the worlds. terrorists to the United States? For our purposes, it is enough to say that law enforcement related drone strikes deliberately targeting civilian criminals is not lawful under U.S. law.

Finally, none of these categories perfectly fits the United States. desire to conduct lethal drone strikes by the military and potentially the Central Intelligence Agency. The IHL

and its corollary for civilians participating in the hostilities does authorize strikes against combatants (or assimilated combatants) in an armed conflict. That rubric appears to fulfill the needs of the military. To this point, U.S. military strikes have followed the IHL; however, as stated, alleged CIA strikes are not formally acknowledged. If CIA strikes are occurring, as widely reported, the United States has three options; (a) constrain drone strikes to the IHL criteria (which would limit strikes to combatants), (b) attempt to broaden the criteria formally, or (c) continue to remain silent on the fact that CIA strikes exist. For the most part, the U.S. has apparently followed a combination of (b) and (c). Since there is not a wealth of public information, the discussion rests upon the sole statement of a single administration official State Department Senior Counsel Harold Koh, who has asserted that all drone strike targeting is done in compliance with all applicable law.⁹³

What are the geographic limitations on drone targeting?

The location of drone strikes has been an area of controversy. International Humanitarian Law does not specifically define a combat zone, fighting zone, or theatre of war. Those terms are often used to generally describe an area where fighting is occurring, but they are not strictly defined.⁹⁴ The geographic area of a conflict is typically defined by documents or custom, including: declarations of war, U.N. resolutions, or by state boundaries. This is problematic in terms of the present conflict as there is no declaration of war, and no U.N. resolution authorizing force.⁹⁵ The U.S. position is based upon an Act of Congress signed on seven days after the attack of 9/11. Termed the Authorization for Use of Military Force (AUMF), it states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 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.⁹⁶

The AUMF is a broad authorization, and does not contain a geographic restriction. The AUMF has been used by the Bush and Obama Administrations to authorize a global fight. This has raised the ire of some international law scholars, who would more strictly define the battlefield.⁹⁷ Those arguments are based largely on moral and historical grounds. Again, IHL itself is silent on the issue of geography.

The broad domestic legal authorization and the lack of international guidance does not mean the United States has carte blanche authorization to conduct drone strikes in any country. State sovereignty (which includes airspace)⁹⁸ is the primary limiter. A State owns all of the airspace above its territory (within the atmosphere), including the territorial sea, which essentially extends 12 nautical miles from the shore.⁹⁹ Thus, the real issue for the geography of drone strikes, or even drone flight, is the political implications of state sovereignty.

Sovereignty was not an issue in Iraq or Afghanistan. There were a number of U.N. resolutions, including a no fly zone, that were applicable to Iraq, and the United States AUMF and U.N. recognition of its right of self defense against the Taliban made Afghanistan's sovereignty a non-issue.¹⁰⁰ These areas, defined by accepted national boundaries, also meet any historic or customary definition of combat zone. Thus, Afghanistan and Iraq are relatively simple in terms of legal analysis they are (or were in the case of Iraq) areas of armed conflict, subject to IHL, and kinetic drone strikes, as discussed above, are a lawful tool of war.

In terms of sovereignty in non war zones, the best answer from a legal standpoint is to gain permission to use the airspace. This would be helpful in the hypothetical sense in Canada, the U.K., etc., but kinetic drone strikes are unlikely to be requested by our developed allies. They would almost certainly employ their own capabilities. That said, they could legally do it, and with permission it would be lawful for us to operate drones at the request of a host nation. This use of drones would almost certainly be for some non-kinetic purpose, as there would likely be no armed conflict to justify a targeted killing. The law enforcement rubric above would likely apply.

The more difficult issue is in dealing with nations that have areas of ungoverned space, or whose governments are not capable or willing to act. This describes places such as Pakistan, Somalia, and Yemen. Articulating U.S. policy, Mr. Koh noted that whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.¹⁰¹ This is a vital statement, because it declares to the world the U.S. test for applying targeted drone strikes. This statement provides explicit notice that the United States will act on certain threats if a host state is unwilling or unable. This appears to have become the rationale in Pakistan, Yemen and elsewhere. This is certainly a point of controversy, but ultimately the U.S. position is that it will defend itself against al-Qaeda in ungoverned, or under-governed, areas. That appears to include unfriendly states, such as Iran, as well. To be sure, flying a drone and striking a target in any nation without permission is a violation of airspace and arguably an act of war. Yemen, Pakistan, Iran, etc., are entitled to defend against the drone if they can do so. So far, they've had minimal success.

CONCLUSION

It is too early to tell if the drone will transform warfare like the machine gun, submarine and aircraft carrier before it. However, the rapid rise of robotic technology, prevalence of drones on the battlefield, and the success of the U.S. drone strikes against Al-Qaeda certainly suggest that drones will be a growth industry for many years to come. The Predator Drone is 27-foot long, with a 55-foot wingspan. It is propeller driven, silent and can fly for 12 hours.¹⁰² The unit cost of a Predator is approximately \$20 million dollars and, most importantly, no pilot is ever at risk. Manned aircraft can fly faster, higher and carry a larger payload, but the shortfalls of manned flight are obvious. The U.S. Air Force B1-B bomber is flown by an onboard crew of four. It is 146 feet long, with a wingspan of 137 feet. It has four afterburning jet engines, and can be heard from several miles away. According to the Air Force, a single B1-B cost \$283 million dollars in 1998. The stealthy B-2 costs over 1 Billion dollars, per aircraft, and a single F-22 fighter (the most advanced in the world) costs between five and seven times as much as a Predator. In an austere budget environment, it is not hard to predict which direction policy makers will go. The drone is here to stay.

Under the principles of International Humanitarian Law, the United States armed forces may conduct kinetic drone strikes against al-Qaeda as part of the ongoing conflict against violent extremists. As discussed in this paper, the legal footing is weaker when those strikes are carried out by the Central Intelligence Agency, or in violation of a nation's sovereignty. In those cases, the President must decide when the threat to the United States justifies a departure from the IHL. Taking action to strike al-Qaeda in ungoverned or under-governed space may be a reasonable departure for self-defense when a threat requires it.

Actions outside established IHL principles carry political risk at home and overseas. Most significantly, the United States will not have a monopoly on drone strikes forever. Efforts to widen drone use to intelligence agencies and to conduct kinetic strikes in violation

of state sovereignty may return to haunt U.S. interests when the drones become available to non-state actors and unfriendly states, like Iran. Actions the United States conducts today may in fact help legitimize, through customary law, actions taken against U.S. interests at home or abroad in the years to come.

Thus, to the extent that the United States continues and/or escalates drone use, particularly by the CIA, it should ensure the highest standard of care is taken to meet IHL, domestic and international legal requirements, even if secrecy of those operations makes full transparency impossible. Recent statements to the Marine Corps War College by Secretary Panetta suggest that all U.S. drone strikes are conducted with an extraordinary high standard of care. Specifically he noted that there is Congressional oversight on all strikes, and that Congress sees the video and is provided the rationale for every strike. The Secretary of Defense further stated that each target is confirmed by all available sources, and must be determined to be an enemy of the United States before a drone is authorized to fire. The drone program is specifically targeting those who have attacked and those who plan to attack the United States. Finally, echoing his previous public statements, the Secretary noted that there are not a lot of options for reaching terrorists - this is it.¹⁰³

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38 Vogel, 128, citing a number of commentators criticizing the Obama administrations alleged kill, don't detain policy.

39 Vogel, 128

40 Secretary Leon Panetta, discussion with the Marine Corps War College class of 2012 on 27 January 2012.

41 Operational Law Handbook at 14.

42 See generally, Unnamed Author, Targeting Operations with Drone Technology: Humanitarian Law Implications Human Rights Institute, Columbia Law School (25 March 2011). (Contains an excellent discussion of the impact of international armed conflict and non-international armed conflict as it applies to drone usage.)

43 Coast Guard Publication, Maritime Law Enforcement Manual Change 4 (2010). Nearly all federal, state and local Law Enforcement use an imminent threat of death or serious bodily injury standard for deadly force in the defense of the officer or another. All U.S. jurisdictions allow an officer to defend another human, but that is not the case when the officer is outside the United States, where local jurisdiction and agreements would control. Without specific authorization by a foreign government, the officer could defend only him or herself.

44 Peter Singer, Wired For War: The Robotics Revolution and Conflict in the 21st Century (New York: Penguin Press, 2009), 406-407.

45 Singer, Wired for War, 404.

46 Singer, Wired for War, 404-407.

47 Deadly force can almost never be used to protect property, except National Security property as designated by the National Command Authority. Spring guns, booby traps, electrified fences when they carry sufficient amperage to kill a human and other similar devices are illegal in many states and open the user to substantial civil and criminal liability in most jurisdictions.

48 Chairman of the Joint Chiefs of Staff Inst, RULES ON THE USE OF FORCE BY DOD PERSONNEL PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES CJCSI 3121.02 (May 2000).

49 CJCSI 3121.02.

50 U. N. CHARTER, Article 2, Para 4.

51 U.N. CHARTER, Art. 42.

52 U. N. CHARTER, Art. 51.

53 Mary Ellen O'Connell, Drones Under International Law Washington University Law: International Debate Series, available at:

<http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf>. (Last Accessed 20 February 2012). Professor O'Connell has published numerous articles on drone strikes and targeted killing. She is unquestionably one of the nation's leading scholars in this area of law.

54 O'Connell, *Drones Under International Law*, 4.
55 President George W. Bush, *Speech to Cadets at West Point, May 2002*, (This speech is widely accepted to have partially defined the Bush doctrine of preemptive war. The key language is: Our security will require the best intelligence to reveal threats hidden in caves and growing in laboratories. Our security will require modernizing domestic agencies, such as the F.B.I., so they are prepared to act and act quickly against danger. Our security will require transforming the military you will lead. A military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives. [Emphasis added.]

56 President Bush *Speech to West Point*.

57 Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* working paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution [internet] available at: <http://ssrn.co/abstract=1415070>., (2009), 19.

58 Anderson, *Targeted Killing in the U.S. Counterterrorism Strategy and Law*, 20.

59 Anderson, *Targeted Killing in the U.S. Counterterrorism Strategy and Law*, 19, quoting Hayes Parks Memorandum on Assassinations (1989)

60 O'Connell, 3.

61 This paper is authored by a student at the United States Marine Corps War College, but it is UNCLASSIFIED and all discussions of alleged and/or reported CIA involvement with drone strikes is based on open source reporting. No CLASSIFIED material or other intelligence products were used in the development of this paper. Discussions of CIA related drone strikes are the conjecture of the author for academic purposes, and not a statement of existence of any program run by the United States Government, United States Marine Corps or the author's service the United States Coast Guard. Officially, a CIA drone program does not exist.

62 Denis Collins, *Spying: the Secret History of History*, (New York: Workman Books, 2004), 12.

63 Afsheen J. Radson and Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 4 U. ILL. L. REV 1202, 1218 (2011).

64 Shactman.

65 Convention (III), article 4, relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

66 See generally, *Handbook on Operational law* at 16 and Knut Dormann, *The legal situation of unlawful/unprivileged combatants*, 85 IRRC 849 (2003) available at: http://www.pegc.us/archive/Journals/irrc_849_Dorman.pdf.

67 Knut Dormann, 46.

68 50 U.S.C.A. 403 4(a) (as amended, 2012)

69 Anderson, 21.

70 Anderson, 21 quoting legal expert Phillip Trimble.

71 Anderson, 22.

72 Vincent Bataoel, *On the use of drones in military operations in Libya: ethical, legal, and social issues*, *Synesis: a Journal of Science, Technology, Ethics and Policy* (2011), 1.

73 *Nasser Al-Aulaqi v Obama*, et. al, Civil Action 10-1469 (memorandum opinion).

74 *Nasser Al-Aulaqi v Obama*, 19.

75 *Nasser Al-Aulaqi v Obama*, 19.

76 *Nasser Al-Aulaqi v Obama*, 20.

77 *Nasser Al-Aulaqi v. Obama*, 20.

78 *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

79 Convention (III), art. 4, relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

80 Gary Solis, Targeted Killing and the Law of Armed Conflict, *Naval War College Review* (2007), 7.

81 Hamdan v. Rumsfeld, 548 U.S. 557, 625-30 (2006).

82 Radson and Murphy, 1210.

83 Radson and Murphy, 1210.

84 Hamdan v. Rumsfeld, 630.

85 Vogel, 113.

86 James Joyner, U.S. Soldiers Beheaded by al Qaeda (w/video and images), [internet] available at:
http://www.outsidethebeltway.com/beheading_desecration_video_of_dead_us_soldiers_release_d_on_internet_by_al_qaeda_videoimages/. (note: the picture and videos linked to this site are particularly gruesome and disturbing. There is no question that these actions are in violation of international law.)

87 Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 90 INT.L. REV RED CROSS 991 (2008).

88 Radson and Murphy, 1212.

89 The Public Committee Against Torture in Israel v. The Government of Israel, [internet] available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf

90 Solis, 7.

91 O'Connell, 5. (Terrorist attacks are generally treated as criminal acts and not the kind of armed attacks that can give rise to the right of self defense.)

92 Solis, 7.

93 Harold Koh, Speech to ASIL on 26 March 2010.
http://insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law (Accessed on 15 March 2012).

94 Convention relative to the Treatment of Prisoners of War, Art 7., Geneva, 27 July 1929. (Mentions that POW's must be removed from the fighting zone, but does not define the term with any geographic reference.)

95 See O'Connell, 3 (note 4) The Security Council did refer to Article 51 and to a U.S. right of self-defense following the 9/11 attacks in Resolution 1368 (2001), but the Council did not authorize the use of force in that situation.

96 Authorization for Use of Military Force, September 18, 2001, Public Law 107-40 [S. J. RES. 23]

97 Mary O'Connell, House of Representatives, Subcommittee on National Security and Foreign Affairs, Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting April 28, 2010.

98 Michael Milde, *International Air Law and ICAO*, Eleven International Publishing, (2008).

99 Technically, under the Convention of the Law of the Sea the Territorial Sea extends 12nm from the baseline. For the purpose of this discussion, I'll use the term shore as to avoid the complexities (which aren't important for this paper) of determining baselines.

100 Vogel, 108.

101 Harold Koh, Speech to ASIL on 26 March 2010.
http://insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law (Accessed on 15 March 2012).

102 USAF Fact Sheet MQ-1B Predator Drone: available at:
<http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>

103 Secretary of Defense, Leon Panetta in a speech to the Marine Corps War College class of 2012 on 27 January 2012.

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