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Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists

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SOW WHAT YOU REAP? USING PREDATOR AND REAPER DRONES TO CARRY OUT ASSASSINATIONS OR TARGETED KILLINGS OF SUSPECTED ISLAMIC TERRORISTS

THOMAS MICHAEL MCDONNELL*

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Introduction

From the crossbow to the rifle, the biplane to the jet fighter, the mortar to the atomic bomb, advances in technology have often been adapted for military ends.[1] Because of their novel applications, however, new weapons sometimes have escaped the bounds of international law. For example, the military adaption of the airplane shortly following its invention at the beginning of the twentieth century dramatically changed the dimensions of warfare, making attacks far behind enemy lines much easier to carry out. Especially during World War II, all sides routinely violated the 1938 League of Nations Resolution on aerial bombardment, its purported customary law analog,[2] and the spirit, if not the exact letter, of Article 25 of the 1907 Hague Regulations. That article prohibits attacking an undefended city[3]; the 1938 Resolution requires air forces to take precautions to protect civilians, permits targeting

1. *See* William C. Martel, *Technology and Military Power,* 25 Summer Fletcher Foreign World Aff. 177, 178 (2001).

2. *See* Thomas M. McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?,* 44 Ariz. L. Rev. 31, 74–75 nn.168–71 (2002) [hereinafter McDonnell, *Cluster Bombs over Kosovo*] (quoting Resolution and discussing its status as custom). Some of the footnotes and citations are drawn from my previous work, especially the above-cited piece.

3. Usually, the cities were defended in that they possessed anti-aircraft batteries, but the principle underlying Article 25 is to protect civilians from direct attack. This principle was later more precisely expressed in the 1977 Additional Protocol I, which provides: "The civilian population, as such, as well as individual civilians, shall not be the object of attack." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter A.P. I].

military objectives only, and prohibits bombing civilians and civilian objects, such as homes and hospitals.[4]

In World War II, Germany engaged in terror bombing of London.[5] Britain and the United States engaged in target area bombing ("carpet bombing") of German cities, including the firebombing of Hamburg and Dresden.[6] The Japanese bombed Shanghai and Chungking.[7] The United States dropped nuclear weapons on the Japanese cities of Hiroshima and Nagasaki.[8] Indiscriminate bombing by all sides caused at least 1.5 million civilian casualties in that conflict.[9]

It took over thirty years after World War II (and the global reaction to the Vietnam War[10]) for the international community to reaffirm the principle that all combatants—including air forces—must discriminate between legitimate military targets and civilians. Not until the 1977 Additional Protocols to the Geneva Conventions of 1949 (AP I and AP II) were adopted did the world community again commit to the rule of the 1907 Hague Regulations and the 1938 League of Nations Resolution that, absent the presence of a military objective, civilians and civilian objects were immune from

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4. Third Committee to the Assembly, *Reduction and Limitation of Armaments and Protection of Civilian Population Against Bombing from the Air in Case of War*, League of Nations Doc. A.69 1938 IX (1938).

5. *See* McDonnell, *Cluster Bombs over Kosovo*, *supra* note 2, at 62 nn.123–24.

6. Alan J. Levine, The Strategic Bombing of Germany, 1940–1945, at 59–63, 17–80 (1992) (noting that the British Royal Air Force played a more significant role than the United States in the Hamburg attacks and carried out the incendiary bomb attack on Dresden, which was nevertheless part of an Anglo-American bombing program).

7. Takashi Yoshida, The Making of the "Rape of Nanking," History and Memory in Japan, China and the United States 27, 40 (2006); Gavan McCormack, The Emptiness of Japanese Influence 265 (2001).

8. John Hersey, Hiroshima 25, 75 (1946).

9. Kenneth Hewitt, *Place Annihilation: Area Bombing and the Fate of Urban Places*, 73 Annals Ass'n Am. Geographers 257, 257, 263 (1983) (citing numbers as large as 1.6 million); *see* Philip S. Meilinger, *Winged Defense: Airwar, the Law, and Morality*, Armed Forces & Soc'y 103, 104 (1993) (noting that of the thirty million people who died during World War II, 5% were victims of aerial bombings); *see also* Hugo Slim, *Why Protect Civilians? Innocence, Immunity and Enmity in War*, 79 Int'l Aff. 481, 490 (2003) (detailing that, in single rounds of attacks taking place between 1943 and 1945, 45,000 civilians were killed in aerial bombings of Hamburg, between 70,000 and 150,000 civilians were killed in aerial bombings of Dresden, and 100,000 civilians were killed in aerial bombings of Tokyo).

10. The United States dropped significantly more bombs on North and South Vietnam than all Allied Forces did in all theatres in World War II, causing a large part of the estimated 195,000 to 430,000 civilian deaths. Charles Hirschman, Samuel Preston & Vu Manh Loi, *Vietnamese Casualties During the American War: A New Estimate*, 21 Population & Devel. Rev. 783, 790 (1995) (citing Guenter Lewy, America in Vietnam app. I (1978); T.C. Thayer, War Without Fronts: The American Experience in Vietnam (1985))

attack.[11] Because of the previous state practice, the international community has had to work hard to re-establish the fundamental principle of discrimination, of protecting civilians in armed conflict.[12]

Like the advent of the airplane nearly a century earlier, the advent of the weaponized, remotely controlled drone has changed the dimensions of warfare. Now, an attacker can strike from the comfort of a control room, thousands of miles away from any action.[13] Governments possessing drones may, therefore, be tempted to carry out an increased number of attacks, perhaps legally questionable (if not absolutely illegal), because no member of their armed forces suffers any risk whatsoever. Remotely controlled drones were initially used for surveillance; then they were weaponized and used for attack.[14] In that capacity, they can directly support troops on the ground and attack enemy troops and enemy military installations.

Drones can also be used to carry out a targeted killing or assassination. Both the Bush-Cheney and Obama administrations have used drones, particularly for the purpose of carrying out targeted

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11. A.P. I, *supra* note 3, art. 35(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter A.P. II].

12. Most weapons that have been banned by international conventions fail to discriminate between civilians and military objectives. *See* McDonnell, *Cluster Bombs over Kosovo*, *supra* note 2, at 66 n.137 (discussing landmines, cluster bombs, and other indiscriminate weapons); Roger S. Clark, *Methods of Warfare that Cause Unnecessary Suffering or Are Indiscriminate: A Memorial Tribute to Howard Berman*, 28 CAL. W. RES. INT'L L.J. 379, 384 (1998); *see also* Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Poison Gas Protocol]; Hague Declaration Concerning Asphyxiating Gases, July 29, 1899, 187 Consol. T.S 453. Many argue that nuclear weapons, because they similarly lack the ability to discriminate between civilians and combatants, should likewise be banned, but neither the international community nor the International Court of Justice has expressly so decided. *See, e.g.*, Legality of the Threat of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter The Nuclear Weapons Case]. The International Committee of the Red Cross (ICRC) posits that other weapons not specifically covered by treaty fall within this ban, including, among others, incendiary weapons and nuclear weapons. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 70 (2005).

13. If the locations of these control rooms continue to be publicized, one can imagine the targets of drone attacks targeting the building housing such control rooms, or the people entering or leaving the buildings or military bases housing such rooms. Presumably, these would be heavily fortified and virtually immune from attack. Nevertheless, one could imagine such an attack being attempted. Far more likely is that terrorist organizations would opt to retaliate by going after soft targets, such as the May 2010 attempt in Times Square in New York City.

14. James M. Keagle & Baily Ann Cahill, *Attack of the Drones,* INT'L CONF. SCI. PAPERS AFASES 1220, 1226 (2011).

killing of suspected Islamic terrorists.[15] Just as the rule of discrimination suffered with the beginning of air warfare, the weaponized drone, particularly when employed for this purpose, challenges: (1) the international human rights law peremptory norm against extrajudicial killing, (2) the limits that military necessity places on combatants, (3) the prohibition on attacking civilians unless and until "they take a direct part in hostilities," (4) the international humanitarian and human rights law norms[16] protecting non-combatants from attack, and (5) the principle of chivalry.[17] To avoid some of the mistakes of the last century brought about by then-novel weapons technology, the international community must demand, at a minimum, that those using robotic weapons strictly follow international law.[18]

In the last decade, the weaponized drone, essentially a robotic aircraft with both reconnaissance and missile and bomb delivery capability, has helped fight the so-called "war on terrorism."[19] On November 5, 2002, a Central Intelligence Agency (CIA) official apparently sitting in an office in Langley, Virginia, with the push of a button, commanded a Predator Drone over Yemen to launch a missile attacking a jeep carrying six persons, including al Qaed Senyan, allegedly linked to the attack on the USS *Cole*.[20] This was

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15. *100 Drone Strikes in Pak in 18 Months Under Obama Compared to 45 in Entire Bush Term*, HINDUSTAN TIMES, July 28, 2010, *available at* 2010 WLNR 14983494; *Ms. Rice's Testimony*, GLOBE & MAIL, Apr. 9, 2004, *available at* 2004 WLNR 18401580; *Pak Says Recent Raids from Across Afghan Border Led to Hotel Bombing,* HINDUSTAN TIMES, Sept. 23, 2008, *available at* 2008 WLNR 18075424.

16. International human rights law applies during armed conflict as well as during peacetime. In armed conflict, however, the law of war generally prevails over conflicting human rights norms. In peacetime, human rights law prohibits the police from using deadly force to kill a suspect unless the suspect poses an imminent threat of death or serious bodily harm to another. In armed conflict, however, a soldier may kill opposing combatants unless the latter have clearly thrown down their arms. For more about *jus in bello,* see *infra* 112–142 and accompanying text.

17. "Chivalry and principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity." THEODOR MERON, THE HUMANIZATION OF THE INTERNATIONAL LAW 2 (2006).

18. Some commentators argue that Predator and Reaper drones have caused excessive and unnecessary civilian casualties; others, notably Professor Kenneth Anderson, argue that given the outstanding cameras and missile guidance systems that drones possess and their ability to observe a single location for hours, drones are far more accurate and limit civilian casualties better than other military attacks. Kenneth Anderson, *Predators over Pakistan*, WKLY. STANDARD (Mar. 8, 2010), http://www.weeklystandard.com/articles/predators-over-pakistan?nopager=1.

19. For a critique of this characterization, see THOMAS M. MCDONNELL, UNITED STATES, INTERNATIONAL LAW AND THE STRUGGLE AGAINST TERRORISM 36–37 (2010).

20. *CIA 'Killed Al Qaeda Suspects' in Yemen,* BBC (Nov. 5, 2005), http://news.bbc.co.uk/2/hi/2402479.stm; Craig Hoyle, *Yemen Drone Strike: Just the Start?,* JANE'S DEF. WKLY.,

the first known use of drones (also known as unmanned aerial vehicles (UAVs)) to carry out a targeted killing outside a theatre of war.[21] The Obama administration, in particular, has significantly expanded the use of drones in Afghanistan and Pakistan. Drones fired 74 missiles in 2007, 183 in 2008, and 219 in 2009, almost a three-fold expansion.[22] From June to September 2010, 2,100 missiles attacked Taliban forces in Afghanistan.[23] The Obama administration has similarly increased the number of drone attacks in the Pakistani tribal areas.[24] Since 2004, the CIA has carried out at least 310 such attacks, over 300 of them since January 2008—five times more than in the Bush-Cheney administration.[25]

A 2011 study shows that U.S. drones had logged a total of 2.7 million hours of flight time.[26] Predator drones alone flew 1.2 million hours since the beginning of the drone program up until the end of last year in more than 80,000 missions, 85% of which took place in combat situations.[27] Last year, Predator drones increased the figure by another 70,000 hours,[28] the rest accounted for by smaller weapons systems operated by the U.S. military.[29] The

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Nov. 13, 2002 (noting that "the CIA-operated RQ-1 Predator UAV, developed by General Atomics Aeronautical Systems destroy[ed] a civilian vehicle with an AGM-114 Hellfire air-to-surface missile at the target around 160km east of the Yemini capital, Sana'a").

21. *See RQ-1 Predator MAE UAV*, Fed'n Am. Scientists (Nov. 6, 2002), http://www.fas.org/irp/program/collect/predator.htm.

22. Christopher Drew, *Drones Are Playing a Growing Role in Afghanistan*, N.Y. Times (Feb. 19, 2010), http://www.nytimes.com/2010/02/20/world/asia/20drones.html.

23. Dexter Filkins, *U.S. Uses Attacks to Nudge Taliban Toward a Deal*, N.Y. Times (Oct. 14, 2010), http://www.nytimes.com/2010/10/15/world/asia/15afghan.html.

24. Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004–2011*, Long War J., http://www.longwarjournal.org/pakistan-strikes.php (last updated Aug. 24, 2012).

25. *Id.* This increase was apparently part of the Bush-Cheney Administration strategy. *See* Helene Cooper & David E. Sanger, *U.S. Will Widen War on Militants Inside Pakistan*, N.Y. Times, Dec. 1, 2010, at A1, A15. Because Vice-President Richard Cheney played such a critical role in fashioning his administration's counter-terrorism policies, this Article references that administration as the "Bush-Cheney administration."

26. Nick Turse, *Investigation Finds U.S. Military Drones Have Flown Close to 3 Million Hours*, AlterNet (Nov. 1, 2011), http://www.alternet.org/world/152925; *see also Executive Overview: Unmanned Aerial Vehicles*, Jane's Unmanned Aerial Vehicles & Targets, Oct. 8, 2010. Note that the amount of drone flying hours is increasing exponentially, having reached 250,000 hours after twelve years of flight in 2007, 500,000 in February 2009, and a million hours last year. *See* Jane's Sentinel Security Assessment – North America, Procurement (2011) (noting that "MQ-1s are currently recording some 19,000 hours per month, of which more than 95% is rated as 'combat time' over Afghanistan and Iraq") [hereinafter Procurement].

27. Blair Watson, *Unmanned Aerial Systems*, FrontLine Def., Sept. 2010, at 15, *available at* http://www.frontline-canada.com/downloads/10-5_UAV_training.pdf.

28. Turse, *supra* note 26.

29. *Id.*

United States, however, is not the only country using unmanned vehicles (UMVs). Over fifty countries and at least one non-state actor use them.[30] Reportedly, drone manufacturers are having a hard time keeping up with the demand.[31]

Drones have unquestionably achieved tactical successes. One report suggests that drones have killed well over three-dozen top al Qaeda and Taliban leaders in the mountainous, inaccessible

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30. Willam Wan & Peter Finn, *Global Race on to Match U.S. Drone Capabilities*, WASH. POST. (July 4, 2011), http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html. The United Kingdom, Israel, Russia, Turkey, India, Iran, and Hezbollah, among other others, are using unmanned aerial vehicles. Addendum on Targeted Killing to Report of the Special Rapporteur on Extrajudicial and Summary Killings, U.N. Human Rights Council, ¶ 27, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Report on Extrajudicial and Summary Killings]; *Turkey Unveils a Spy Drone of Its Own*, FOX NEWS (July 16, 2010), http://www.foxnews.com/scitech/2010/07/16/turkey-unveils-spy-drone.

31. *See* Noah Schactman, *Drone War Continues; UAV Production Sky High,* WIRED (Dec. 16, 2008), http://www.wired.com/dangerroom/2008/12/drone-war-conti; Michael Sirak, *U.S. Air Force Using MQ-9A Predator Operationally,* JANE'S DEF. WKLY., Mar. 16, 2005 (noting that the manufacturer of the Predator Drone doubled production and that, among other things, the Air Force wants a sixty-eight unit fleet of MQ-1 Predator Drones). The U.S. Congress approved President Obama's budget request for significantly more drone programs:

> The legislation also meets the president's request for USD554 million for Northrop Grumman RQ-4 Global Hawk unmanned aerial vehicles, along with USD489 million for 24 General Atomics Aeronautical Systems (GA-ASI) MQ-9 Reapers and USD481 million for 24 GA-ASI MQ-1C Sky Warrior drones. In addition, the legislation provides USD68 million - USD18.5 million more than the president's request - for targeting pods that allow aircraft to conduct precision strikes.

PROCUREMENT, *supra* note 26.

Aside from attack drones, the United States now employs an unprecedented number of other kinds of unmanned military vehicle systems (U.M.V.s) in warfare. Ajey Lele, *Unmanned Vehicles and Modern Day Combat*, INDIAN DEF. REV. (Feb. 11, 2011), http://www.indiandefencereview.com/interviews/unmanned-vehicles-and-modern-day-combat. Aside from unmanned aerial vehicles, the military operates unmanned ground vehicles, unmanned underwater vehicles, as well as unmanned surface vessels. *See id.* From less than 50 U.M.V.s a decade ago, the United States now operates an estimated 7,000 U.M.V.s. Elisabeth Bumiller & Thom Shanker, *War Evolves with Drones, Some Tiny as Bugs*, N.Y. TIMES, June 20, 2011, at A1. U.S. U.M.V.s range in size from the Hummingbird, which is 4.5 inches long with a 6.5 inch wingspan and capable of flight and audio and video surveillance, to the Global Hawk high-altitude spy plane, with a wingspan almost as long as a Stratofortress B52. *Id.* Still a prototype, the Hummingbird also has the capacity to hover. *Id.* at A10. The dimensions range from 122.2 to 130.9 feet (37.25 to 39.9 meters) depending on the model. *RQ-4A/B Global Hawk High-Altitude, Long-Endurance, Unmanned Reconnaissance Aircraft*, AIRFORCE TECH., http://www.airforce-technology.com/Projects/rq4-global-hawk-uav (last visited June 9, 2012). Israel has the largest drone in the world, the Eitan, which has a wingspan of eighty-six feet and is almost as large as a Boeing 737, with an endurance of twenty hours and the ability to launch missiles. Joe Pappalardo, *How Israeli's Biggest Drone Could Take Out Iranian Nukes*, POPULAR MECHANICS (Feb. 23, 2010), http://www.popularmechanics.com/technology/military/planes-uavs/4346921.

regions in Afghanistan and in Pakistani tribal areas.[32] Drones have also killed many lower-level Taliban and al Qaeda members as the Obama administration expanded the targets beyond al Qaeda and Taliban leadership.[33] This Article explores whether targeted killing of suspected Islamist terrorists comports with international law generally, whether any special rules apply in so-called "failed states,"[34] and whether deploying attack drones poses special risks

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32. The New American Foundation number for militant leaders killed in Pakistan is about 43. *The Year of the Drone*, NEW AM. FOUND. http://counterterrorism.newamerica.net/drones (last updated Aug. 24, 2012). Roggio puts the Pakistan number at 49. Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004–2012*, LONG WAR J., http://www.longwarjournal.org/pakistan-strikes.php (last updated Sept. 1, 2012); *see also* Mark Landler & Helene Cooper, *Qaeda Woes Fuel Talk of Speeding Afghan Pullback*, N.Y. TIMES, June 19, 2011, at A1 ("Of 30 prominent members of the terrorist organization [al Qaeda] identified by intelligence agencies as targets, 20 have been killed in the last year and a half.").

33. Greg Miller, *Increase U.S. Drone Strikes in Pakistan Killing Few High-value Militants*, WASH. POST (Feb. 21, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html; *see also* Fawaz Gergez, *The Truth About Drones*, NEWSWEEK (Mar. 30, 2010), http://www.newsweek.com/2010/05/30/the-truth-about-drones.html. The Obama administration has "reaffirmed support for the program." Martin Entous et al., *CIA Tightens Drone Rules*, WALL ST. J. (Nov. 4, 2011), http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html.

34. "Failed State" refers to a country whose armed forces, police, and judiciary are so powerless that neither law nor order is enforced or followed: "A feature of such conflict is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country." NEYIRE AKPINARLI, THE FRAGILITY OF THE "FAILED STATE" PARADIGM 11 (2010) (quoting Boutros Boutros-Ghali, *Introduction to the United Nations and Somalia 1992–1996*, *in* THE UNITED NATIONS BOOK SERIES 45–49 (1996)). Somalia has been a particularly troubled state, with one of its Islamic militant organizations recently pledging allegiance to al Qaeda, probably as a result of military defeats. *Compare Somalia's Al-Shabab Join Al-Qaeda*, BBC NEWS (Feb. 10, 2012), http://www.bbc.co.uk/news/world-africa-16979440 (reporting that al-Shabab's recent pledge of support to al Qaeda comes at a time when al Qaeda needs to project its operational power and al-Shabab is facing "pressure on several fronts," including a retreat from Mogadishu in the face of U.N.- and A.U.-backed government forces as well as lost national popularity due to the group's ban on foreign aid during a wide-ranging drought), *and* Bronwyn Burton, *Divisive Alliance*, N.Y. TIMES (Feb. 21, 2012), http://www.nytimes.com/2012/02/22/opinion/divisive-alliance.html?pagewanted=all (stating that the alliance between al Qaeda and al-Shabab will not strengthen terrorist efforts due to the retreat of al-Shabab from the capital, the infighting between al-Shabab's extremist and nationalist factions, whose loyalties are divided between jihad and building a moderate caliphate, and the looming threat of U.S. drone attacks), *with Al-Qaeda and Al-Shabab: Double the Trouble?*, AL JAZEERA (Feb. 11, 2012), http://www.aljazeera.com/programmes/insidestory/2012/02/201221017451210571 8.html (noting that despite al-Shabab's retreat from the capital, the group still poses a threat to international security because of recent use of terrorist tactics, such as bombing a Mogadishu café and killing fifteen people, and "sympathisers will continue to provide assistance not only to al-Qaeda but also to al-Shabab because of th[e] formal merger"); *see also Somali Al-Shabab Base Captured Outside Mogadishu*, BBC NEWS (Mar. 2, 2012), http://www.bbc.co.uk/news/world-africa-17231884 (describing how African Union and government forces cap-

for the civilian population, for humanitarian and human rights law, and for the struggle against terrorism.

Part I of this Article discusses the Predator Drone and its upgraded version Predator B, the Reaper, and analyzes their technological capabilities and innovations. Part II discusses international humanitarian law and international human rights law as applied to a state's targeting and killing an individual inside or outside armed conflict or in the territory of a failed state. Part III analyzes the wisdom of carrying out targeted killing drone attacks, even if otherwise legal, against the Taliban, al Qaeda and other Islamic terrorist organizations that have embraced suicide bombing.

I. The Predator and Reaper Drone

A. *The Predator*

Science fiction writers long ago thought of the creation of huge robots of war that would fight each other, reducing human casualties and making victory and defeat depend on the machines' strength rather than on human beings' grit, wit, and willingness to shed blood.[35] Although not intended for targeting an opposing UAV,[36] the Predator Drone is, nonetheless, a robot of war. The Predator MQ-1, the most common weaponized drone used by the United States, is about the size of a general aviation aircraft.[37] Depending upon wind, altitude, and ordnance weight, the Predator can remain flying from about nineteen hours to forty hours without refueling.[38] It can fly up to an altitude of 25,000 feet

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tured an al-Shabab base in the wake of the U.N. Security Council agreeing "to bolster the number of AU forces by more than 5,500 to 17,731 [and] to include the Kenyan troops that entered the country last October in pursuit of al-Shabab militants . . . [in order to implement] a stronger mandate to attack," as the group is construed as a regional threat).

35. *Cf., e.g.*, Isaac Asimov, I, Robot (1950) (anticipating the widespread use of robots but generally depicting robots in a positive light as a force that prevents, rather than causes, violence).

36. There is a report that in March 2003, a Predator Drone shot an air-to-air missile at an Iraqi MIG fighter jet before the MIG shot the Predator down. *See* Elizabeth Bone & Christopher Bolkcom, Cong. Research Serv., RL 31872, Unmanned Aerial Vehicles: Background and Issues for Congress 16 (2003).

37. *See* Joel Baglole, *MQ-1 Predator – Unmanned Aerial Vehicle*, About.com, http://usmilitary.about.com/od/uavs/a/mq1.htm (last visited June 10, 2012); *Factsheets: MQ-1B Predator*, U.S. Air Force (Jan. 5, 2012), http://www.af.mil/information/factsheets/factsheet.asp?id=122.

38. The Predator is twenty-seven feet long (8.2 meters) with a wingspan of 48.7 feet (14.8 meters). *Id.* There are some reports suggesting that the actual endurance of the Predator is less than the maximum rated forty-hour endurance, namely, around twenty-four hours. *See, e.g.*, Bone & Bolkcom, *supra* note 36, at 6; *see also RQ-1 Predator MAE UAV*,

(7,620 m.), with a cruising speed of eighty miles per hour (129 km/h.).[39] The Predator is equipped with highly advanced radar and infrared cameras.[40] Imaging radar is able to produce a high-resolution picture at night; the synthetic aperture radar provides images in all kinds of weather conditions.[41] As one pilot explained, with the infrared cameras, "you can actually see somebody smoking from about 25,000 feet."[42] The swivel camera enables the drone to focus on a single point for extended periods despite its flying around that point.[43]

The Predator Drone MQ-1 is equipped with two Hellfire missiles, each capable of destroying a tank.[44] After takeoff, the drones can

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supra note 21 (stating in a chart that the endurance is "24 hours on station at 500 NM [presumably up to] 40 hours"). Another report lists the endurance of the Predator at 29 hours. John Pike & Steven Aftergood, *Unmanned Aerial Vehicles (UAV)*, FED'N AM. SCIENTISTS (July 19, 2010), http://www.fas.org/irp/program/collect/uav.htm. Yet an official U.S. Army report indicates that the endurance of the Predator is twenty hours and that of the Predator B or Reaper is sixteen hours. *See* Jaysen A. Yochim, The Vulnerabilities of Unmanned Aircraft System Common Data Links to Electronic Attack 23 (Nov. 6, 2010) (unpublished Master's thesis, U.S. Army Command and General Staff College), *available at* www.fas.org/irp/program/collect/uas-vuln.pdf (reproducing table of UAS Capabilities from HEADQUARTERS, DEP'T OF THE ARMY, FIELD MANUAL 3-04.15, MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR THE TACTICAL EMPLOYMENT OF UNMANNED AIRCRAFT SYSTEMS 21 (2006)). These discrepancies may in part be explained by whether the Predator is carrying a full load of ordinance, whether it is flying in already high altitude mountainous regions like parts of Afghanistan and Pakistan, and by the speed at which it is being flown.

39. The normal operating altitude of the Predator is, however, 18,000 feet above mean sea level. *See* JOINT ARMED FORCES, JP 3-30, COMMAND AND CONTROL FOR JOINT AIR OPERATIONS III-33, fig.III-15 (2010).

40. The Predator is equipped with synthetic aperture radar and high resolution forward-looking infrared cameras with six fields of view, described as follows:

> An imaging radar works very like a flash camera in that it provides its own light to illuminate an area on the ground and take a snapshot picture, but at radio wavelengths. A flash camera sends out a pulse of light (the flash) and records on film the light that is reflected back at it through the camera lens. Instead of a camera lens and film, radar uses an antenna and digital computer tapes to record its images. In a radar image, one can see only the light that was reflected back towards the radar antenna.

Tony Freeman, *What* Is *Imaging Radar?*, NASA, http://southport.jpl.nasa.gov/desc/imagingradarv3.html (last updated Jan. 26, 1996).

41. *See RQ-1 Predator MAE UAV*, *supra* note 21 (describing the Predator Drone's sensors as follows: "The sensors include an electro-optic/infrared (EO/IR) Versatron Skyball Model 18 with a zoom lens and a spotter lens, and a Westinghouse 783R234 synthetic aperture radar (SAR)").

42. David Piper, *Trim Reaper: Streamlined Killer Drone Begins Combat Operations in Iraq*, FOX NEWS (July 24, 2008), http://www.foxnews.com/story/0,2933,389962,00.html.

43. *See* BONE & BOLKCOM, *supra* note 36, at 21 ("These cameras are housed in a ball-shaped gimbal turret that can be easily seen underneath the vehicle's nose.").

44. Adam Lange, *Hellfire: Getting the Most from a Lethal Missile System*, ARMOR, Jan.–Feb. 1998, at 25, 27 (noting that the Hellfire missile has "the explosive and penetrating force necessary to defeat the armor of a tank or destroy 'softer' targets"). A new payload has recently passed testing and will likely be used on Predator and Reaper Drones: Archer is a

be operated via satellite link by ground stations anywhere in the world, but the CIA reportedly runs them out of its office in Langley, Virginia.[45] The Air Force had operated its drones mainly from Creech Airbase near Las Vegas, Nevada, but now employs other

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light weight precision guided missile developed by Raytheon Corporation with a new 4.5 kg (10 lb) blast/fragmentation multi-purpose warhead is fitted, with the missile weighing about 16 kg (35 lb)." PROCUREMENT, *supra* note 26.

The Predator typically carries a laser target designator and rangefinder, permitting the drone to paint the target for the Hellfire missile to hit. A capable drone "pilot" is said to have the ability to put the Hellfire Missile through the window of a house. *See, e.g.*, Sue Baker, *Predator Missile Launch Test Totally Successful*, AM. FED'N SCIENTISTS (Feb. 27, 2001), http://www.fas.org/irp/program/collect/docs/man-ipc-predator-010228.htm (noting in test that AGM 114 missile "struck the tank-turret about 6 inches to the right of dead-center"). The Predator "pilots" can transmit the images that the Predator's cameras and sensors are returning directly to commanders in the base, troops on the ground, or jet fighters and attack helicopters in the air. *Mix and Match: Integrating UAVs into the Battlespace*, JANE'S DEF. WKLY. (July 31, 2009). Those in the field can view the images in real time, employing laptops or smaller, hand-held devices with computer screens. *Id.* The Predator Drone can also provide precise targeting coordinates or "paint the target" for commanders in the base or other actors in the field. In the war in Afghanistan, Predators worked with AC-130s to paint targets. *See* Sig Christenson, *AF Secretary Talks of 'Revolution' in Warfare Ideas: Roche Sketches Picture of New Technologies*, SAN ANTONIO EXPRESS-NEWS, Apr. 4, 2002, at 19A, *available at* 2002 WLNR 13896770.

Operating the Predator requires a runway with a length of 5,000 feet (1,524 meters), a ground station within sight of the place of landing and takeoff, and a satellite communication system for remote operation, from, for example, the United States. *Jane's Electronic Mission Aircraft, Radar Surveillance/Multisensory Systems, United States,* IHS JANE'S: DEF. & SECURITY INTELLIGENCE & ANALYSIS, (Oct. 5, 2010) ("Most recently, identified upgrades [of the Predator] have included the introduction of glycol-weeping wet wings (for ice mitigation), fuel injection dual alternators, longer wings, 'enhanced' maintainability, dual nose cameras, a split engine cowling, steel braided hoses and improved engine blocks. In this context the Block 15 configuration is known to incorporate an infra-red (IR) nose camera and a lower engine cowling that can be detached without removing the AV's (Aerial Vehicle's) propeller.") The manufacturer of the Predator provides four drones for each relay station, all of which can be fit into a single container, a "coffin" that fits within a C-4 cargo plane. *RQ-1 Predator MAE UAV*, *supra* note 21. As of late 2005, *Jane's* sources report that USAF NQ-1 Predators were no longer equipped with the AN/ZPQ-1 radar and were operating as primarily strike assets with an EO/IR surveillance and laser designation capability. Other planned upgrades include: "A USD71 million contract for systems to equip the MQ-1 Predator [with Airborne Signals Intelligence Payload (ASIP)] was awarded to Northrop Grumman in mid-2009; . . . ASIP delivers enhanced [Signals Intelligence] capabilities by detecting, identifying and locating radar and other types of electronic emitters." PROCUREMENT, *supra* note 26.

45. Jane Mayer, *The Predator War*, NEW YORKER (Oct. 6, 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_ fact_mayer. The CIA has long operated a drone base from Djibouti. Craig Whitlock & George Miller, *U.S. Building Secret Drone Bases in Africa, Arabian Peninsula, Officials Say*, WASH. POST, Sept. 20, 2011, at A1, A12. One report indicates that the United States currently operates 57 drone bases, including those in the United States and abroad. Nick Turse, *Mapping America's Shadowy Drone Wars,* TOM DISPATCH (Oct. 16, 2011), http://www.tomdispatch.com/archive/175454.

bases as well.[46] Recently, the Obama administration has established new drone bases in the Arabian Peninsula and in Africa, including Ethiopia and the Seychelles.[47] The drones are often kept in operation twenty-four hours per day.[48]

B. *The Reaper*

The Predator B, now generally called the Reaper,[49] is about 50% bigger than the Predator.[50] The Reaper can carry, among other ordnance, four Hellfire missiles (twice that of the Predator) plus two laser-guided 500-pound (227.3 kg.) bombs.[51] The Reaper is

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46. *See* PROCUREMENT, *supra* note 26 (stating that "[b]oth the Reaper and the Predator are flown remotely by pilots at Creech AFB, Nevada," but also observing that "21 MQ-1 Predator UAVs, associated support equipment and personnel were transferred to Air Force Special Operations Command at the end of May 2007 [and that number was increased to 28 later that year]"). Whiteman Air Force Base in Missouri has also recently become a home base for Predators. Elisabeth Bumiller & Thom Shanker, *G.O.P. Is Split as It Weighs Military Cuts,* N.Y. TIMES, Jan. 27, 2011, at A1. Other ground control stations in the United States for Reaper or Predator Drones include: Davis-Monthan Air Force Base in Arizona, Whiteman Air Force Base in Missouri, March Air Reserve Base in California, Springfield Air National Guard Base in Ohio, Cannon Air Force Base and Holloman Air Force Base in New Mexico, Ellington Airport in Houston, Texas, the Air National Guard base in Fargo, North Dakota, Ellsworth Air Force Base in South Dakota, and Hancock Field Air National Guard Base in Syracuse, New York. Turse, *supra* note 45.

47. Whitlock & Miller, *supra* note 45. The Seychelles base had apparently been used for drone reconnaissance flights previously but now is being used for weaponized drones. *See* Sara Sorcher, *U.S. Expanding Drone Bases in East Africa, Arabian Peninsula,* NAT'L J. (Sept. 21, 2011), http://www.nationaljournal.com/nationalsecurity/report-u-s-expanding-drone-bases-in-east-africa-arabian-peninsula-20110921.

48. Publicly available information indicates that the "crew" for the drone consists of two individuals: the pilot (a rated officer) and the sensor (an enlisted Air Force member who handles communications, the cameras, and the weapons), each putting in an eight-hour shift before another crew takes over. Scott Lindlaw, *Lack of Experience Causes Most Predator Crashes,* AIR FORCE TIMES, Sept. 15, 2008, *available at* 2008 WLNR 26671086 ("On rare occasions, pilots bank the aircraft so steeply that the drone loses contact with the satellite."); *see also* Dan Kois, *How Do You Fly a Drone?,* SLATE (Aug. 9, 2006), http://www.slate.com/id/2147400.

49. William Cole, *Hawaii Guard Gets Flock of Shadow UAVs,* HONOLULU STAR-ADVISER (Mar 25, 2011), http://www.staradvertiser.com/news/hawaiinews/20110525_hawaii_guard_gets_flock_of_shadow_UAVs.html (discussing how smaller drones, including the Shadow, about the size of a biggish model airplane are being used for reconnaissance and are designed to fly just ahead of the troops to observe enemy forces and weapon systems, if any).

50. It has a wingspan of 66 feet (20.12 meters) and a length of nearly 36 feet (11 meters). *See General Atomics Aeronautical Systems Altair/Guardian/Ikhana/Mariner/MQ-9 Reaper/Predator B,* IHS JANE'S: DEF. & SECURITY INTELLIGENCE & ANALYSIS, Jan. 8, 2010, at 4 [hereinafter *General Atomics Aeronautical Systems*].

51. *See* PROCUREMENT, *supra* note 26 (noting that the Reaper is "four times heavier than Predator, [and that] it has nine times the range, flies somewhat faster and twice as high and is far more heavily armed, being able to carry eight weapons, including AGM-114 Hellfire missiles, GBU-12 laser-guided bombs and GBU-38 Joint Direct Attack Munitions").

equipped with similar sensors, radars, and cameras. The Reaper's mission is "[to] search for surface objects[,] . . . track them [and] . . . then pass on targeting data to other platforms or strike the targets itself with its onboard complement of precision-guided weapons."[52] Reapers have been operational in Afghanistan since September 2007 and in Iraq since July 2008.[53] Although there are reportedly far more Predator Drones in the United States' inventories than Reapers, the CIA is said to fly the more powerful Reaper. Furthermore, its fleet is poised to more than double in the next year, if it has not already done so.[54]

C. *Shortcomings of Drones*

Weaponized drones have drawbacks, the most significant of which is replacing a human on-board pilot with remotely controlled robotics: "For instance, without direct human control or intervention, a weapon could potentially be delivered to a target that is no longer hostile, whereas a human could recognize the change in target profile and not [have] delivered the weapon."[55]

The Reaper can fly at altitudes up to 50,000 feet, but generally flies between 30,000 and 45,000 feet, double that of the Predator. Sirak, *supra* note 31.

52. *Id.*

53. The Reaper's endurance is ten hours less than the Predator's and even less if the Reaper is carrying a full payload. However, with its higher speed, the Reapers have significantly longer range. *See* PROCUREMENT, *supra* note 26. Note that an official U.S. Army report indicates that the endurance of the Reaper is sixteen hours, with a cruising speed of 90 knots and a maximum speed of 200 knots. *See* Yochim, *supra* note 38, at 23. *But see General Atomics Aeronautical Systems*, *supra* note 50 (putting the Reaper's endurance with a "clean airframe" at 32 hours); E-mail from Douglas Marshall, Professor, N.D. Univ., Sch. of Aviation, to author (June 13, 2011) (on file with author) (putting the average endurance of the Predator and Reaper, again depending upon conditions, at 19 to 22 hours).

Furthermore, the Reaper's endurance is considerably longer than the endurance of a jet fighter. The endurance of the F15 and F16 is about the same, but varies depending on whether either is flying with an external tank:

> F-15 and F-16 un-refueled are about the same. Even though the Eagle has two engines it carries much more fuel. Now depending on configuration 1, 2, 3 tanks vs. clean (no external tanks) will determine the endurance; drag, weapons configuration, altitude, etc. [For] [e]xample: F-16 cruise[s] at about FL330; 1 tank, 1.5 hours; 2 tank 2.5 hours; 3 tank 3.0 hours (because of drag did not increase time much)[.] Center line tank has 300 gallons, two external has 370 gallons.

See E-mail from Marshall to author, *supra*. Thus, the Reaper can project considerable force for a longer period of time over hostile territory.

54. Scott Shane & Eric Schmitt, *CIA Deaths Prompt Surge in Drone Strikes,* N.Y. TIMES (Jan. 22, 2010), http://www.nytimes.com/2010/01/23/world/asia/23drone.html ("By next year, the C.I.A. is expected to more than double its fleet of the latest Reaper aircraft—bigger, faster and more heavily armed than the older Predators—to 14 from 6, an Obama administration official said.").

55. Thomas P. English et al., Naval Surface Warfare Ctr., *The Safety of Unmanned Systems: The Development of Safety Precepts for Unmanned Systems (UMS)* 3–4 (June 1, 2009) (paper presented at 13th International Command and Control Research and Technology Sympo-

This observation applies especially to drones remotely controlled from the other side of the earth via satellite uplink since there may be more than a one second delay between the relayed images and the received command to attack.[56] On the other hand, drones can observe a potential target for hours, a capacity most other aircraft lack.[57] An enemy may, however, be able to jam transmissions to and from the drone,[58] and perhaps break through encryption protection and take over the drone.[59]

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sia, Seattle, Wash.), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA486748&Location=U2&doc=GetTRDoc.pdf; *see also* Yochim, *supra* note 38. Major Yochim notes that despite the advantages that unmanned aerial vehicles bring, UAV have distinct weaknesses: "[U]nmanned systems also have some disadvantages when compared to manned aircraft. They are still prone to human error due to their being flown by ground-based operators. Their development and procurement cost has grown exponentially as capabilities increase. Current systems are not autonomous and their control is contingent on uninterrupted communications. Their dependence on a constant control signal has contributed to a UAS accident rate 100 times greater than manned aircraft. A threat could exploit this need for an uninterrupted data feed by using Electronic Warfare to disrupt this signal, potentially crippling unmanned systems." Yochim, *supra* note 38, at iv.

On the other hand, some argue that the high quality cameras and drone's ability to hover over a target indefinitely make the drone a more discriminate weapon system than manned jet fighters, which pass over targets at such a high rate of speed that the pilot and crew are unable to make comparably good observations and whose pilots may suffer from combat stress. *Cf., e.g.*, Ian Ramage, Fully Autonomous Weapons Systems and International Humanitarian Law (Apr. 4, 2011) (unpublished student paper, Pace University School of Law) (on file with author) ("The advanced daylight and IR [infrared] cameras [of a robotic autonomous sentry SGR-A1] also provide for better assessment of potential targets than a tired soldier.").

56. Stuart Fox, *New System to Allow for Automated Drone Landings*, POPULAR SCI. (Aug. 4, 2009), http://www.popsci.com/military-aviation-amp-space/article/2009-08/new-system-allow-automated-predator-drone-landings (noting that there is a 1.2 second delay for the communication signal to travel from the United States to the satellite and then to the Predator Drone in Afghanistan or Pakistan). Another author notes as follows: "Satellite links have one big drawback: they are far out in space (22,000 miles for some) and the speed with which they can transfer data is considerably slower than land-based and under-ocean fibre optic cables. Data takes 500 milliseconds to travel by satellite. But with Hibernian Atlantic's Dublin connection [through fiber-optic cables under the ocean] it takes 60 milliseconds to cross the ocean. The effect is called latency: the Coolock connection has low latency, a Nevada-Afghan satellite link has high latency." x7o, *Ireland and Predator Drones*, WIKILEAKS CENT. (Jan. 20, 2011), http://wlcentral.org/node/999.

57. *See* Anderson, *supra* note 18.

58. For a detailed discussion on the ease to which unmanned systems may be subject to an electronic attack by jamming, see Yochim, *supra* note 38, at 70–73.

59. A study commissioned by the Pentagon identified twelve potential problems that the drones ("unmanned systems" or "UMS") may present:

> [1] Loss of control over the UMS; [2] Loss of communications with the UMS[;] [3] Loss of UMS ownership (lost out of range or to the enemy); [4] Loss of UMS weapons; [5] Unsafe UMS returns to base; [6] UMS in indeterminate or erroneous state; [7] Knowing when an UMS potentially is in an unsafe state; [8] Unexpected human interaction with the UMS; [9] Inadvertent firing of UMS weapons; [10] Erroneous firing of UMS weapons; [11] Erroneous target discrimination; [12] UMS injures operators, own troops, etc.

There has been at least one report of the United States having lost control of a drone, a Predator B (Reaper), over Afghanistan.[60] The Air Force had to shoot it down.[61] It is not clear whether the United States simply lost control of the drone or whether there was some other malfunction. One government report indicates that 11% of unmanned aerial systems fail because of communications problems—which may have caused the loss of control here.[62] (The

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English et al., *supra* note 55, at 3–4.

60. C.J. Chivers et al., *View Is Bleaker Than Official Portrayal of War in Afghanistan,* N.Y. TIMES (July 25, 2010), http://www.nytimes.com/2010/07/26/world/asia/26warlogs.html (citing a September 13, 2009 incident report concerning a "rogue" drone); *see also The War Logs,* GUARDIAN, July 26, 2010, *available at* 2010 WLNR 14821840 (releasing the actual logs). The log summary states as follows:

> An F15 was ordered to shoot down a REAPER UAV that had lost its control link in the south of Afghanistan. All efforts were made to re-establish the link before a decision was made to shoot the UAV down prior to crossing into TAJIKISTAN. The CAOC selected an unpopulated area over which to down the aircraft. An F15 fired on the REAPER and it destroyed its engine, however the link was re-established and the controller was able to guide it into a mountain in RAGH District . . . There were no sensitive items on board the REAPER but it did go down with its ordnance (Hellfire and GBU-12).

The War Logs, supra. The Hindustan Times made a similar report, apparently about a Pakistani Drone that was out of control and crashed in March of 2008. Gurinder Gill, *Spy Plane Crashes in Punjab,* HINDUSTAN TIMES, Mar. 21, 2008, *available at* 2008 WLNR 5535824. A Global Hawk drone crashed in Maryland after the pilots apparently lost control. Brian Bennett, *Military Global Hawk Drone Crashes in Maryland,* L.A. TIMES (June 11, 2012), http://articles.latimes.com/2012/jun/11/nation/la-na-nn-maryland-drone-crash-20120611.

61. *See The War Logs, supra* note 60.

62. *See* Yochim, *supra* note 38, at 40 (citing the Office of the Secretary of Defense 2003). U.S. unmanned systems require two communication links to operate properly: a Video Communication Link, which transmits images to a Ground Control Station, and a Common Data Link, by which the ground controllers remotely control the Unmanned Aerial Vehicle. *See id.* at 5. Maj. Yochim explains what happens when the Ground Control Station loses contact with the CDL: "If a CDL experiences frequency interference, the UA executes a self-recovery program known as a "lost link procedure" and attempts to reacquire the CDL from the GCS. If smaller UA, such as the RQ-11 Raven, fails to reacquire the CDL, it continues its self-recovery program and returns to a preprogrammed recovery point." *Id.*

Furthermore, the Predator Drone program has been plagued by a large number of crashes, particularly upon landing. *See id.* at 39–40 (citing the Office of the Secretary of Defense's proposition in 2003 that communications problems are one of the major causes of drone crashes). The number of crashes has gone down, but some reports indicate that Predator Drones were rushed into use after 9/11 before they had been adequately tested. *Drones in Afghanistan Suffer Frequent System Failures: Pentagon Report,* ASIAN NEWS INT'L, July 7, 2010, *available* at 2010 WLNR 13587475 (noting that there have been seventy-nine drone accidents overall costing at least one million dollars apiece and stating that "[t]hirty-eight Predator and Reaper drones have crashed during combat missions in Afghanistan and Iraq, and nine more during training on bases in the U.S. – with each crash costing between 3.7 million and 5 million dollars"); *see* Sirak, *supra* note 31 (noting that "Predators were rushed to the field and were maintained by specialists outside the service's normal support chain"). Regarding the crashes, see David Zucchino, *War Zone Drone Crashed Add Up,* L.A. TIMES (July 6, 2010), http://articles.latimes.com/2010/jul/06/world/la-fg-drone-crashes-

CIA has not publicly acknowledged that it carries out drone attacks in Pakistan, Afghanistan, Yemen, or Somalia and has not provided publicly available information about the drone's failure.[63])

Some critics have noted that often the drones show the controllers only a segment of the battlefield, allowing remote commanders to micro-manage decisions of officers and troops in the field without the (literally) broader perspective of those officers and troops.[64] The resolution of the drone's cameras, including its infrared cameras, is remarkable, as is its night vision. Nevertheless, when used for a targeted killing operation, the drones may not present a sufficiently definite image to assure remote controllers that

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20100706; *see also* Chivers et al., *supra* note 60 (noting that the Wikileaks classified documents suggest the number of drone crashes has been greater than previously reported). Some government reports indicate that unmanned aerial systems experience a failure rate 100 times greater than that of manned aircraft. *See* Yochim, *supra* note 38, at 67 ("[R]eports indicate that UAS are 100 times more likely to succumb to failure than their manned counterparts.") (citing CONG. RESEARCH SERV. 2005). Yochim notes that "[t]he most common causes for these failures are malfunctioning power plant or props, flight control malfunctions, human error, and communications failures." *Id.* (citing Office of the Secretary of Defense 2003); *see also* Gareth Jennings, *USAF Loses Second MQ-1 Predator in One Week*, JANE'S DEF. WKLY. (Apr. 11, 2008) (noting not only that two Predators had crashed within a week, but also that six had crashed within the previous fifteen months). In 2011, U.S. Predator and Reaper drones had been infected with a virus. Noel Shachman, *Computer Virus Hits U.S. Predator and Reaper Drone Fleet*, WIRED (Oct. 11, 2011), http://arstechnica.com/business/2011/10/exclusive-computer-virus-hits-drone-fleet.

63. Although not the focus of this Article, assigning the Central Intelligence Agency (CIA) a major combat role in piloting attack drones raises troubling issues. First, since CIA officers are not uniformed combatants, they lack combat immunities in much the same way that al Qaeda fighters lack them. Second, as a secret service, the CIA in its actions and its procedures is far less transparent than the regular armed forces. The CIA does not issue public "after action" reports or openly investigate targeted killing attacks. Holding open investigations is critical to ensuring United States' compliance with both international humanitarian law and human rights law. Third, given the CIA's intelligence failures in the run-up to the war in Iraq, the CIA's troubling history of assassinations in the 1960s and 1970s, and that its officers, unlike the military, are not subject to court martial under the Uniform Code of Military Justice, the United States should place the full responsibility for the drone attacks elsewhere, namely, on its military services alone. *See* Report on Extrajudicial and Summary Killings, *supra* note 30, ¶¶ 18–21; *see also* Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST (Mar. 12, 2010), http://www.washingtonpost.com/wp-yn/content/article/2010/03/11/AR2010031103653.html; Marc A. Thiessen, Op-Ed., *In CIA Drone Mission, Who Will Protect the CIA?*, WASH. POST (June 8, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060701986.html.

64. *See Mix and Match: Integrating UAVs into the Battlespace*, *supra* note 44 ("[D]ubbed 'Rummy TV' after the then U.S. Secretary of Defense, Donald Rumsfeld, who purportedly had the video feed [from Predator Drones] in his office and would immediately reach for his telephone to demand action from senior U.S. commanders when he saw targets he thought should be investigated or attacked.").

they are targeting the correct person.[65] Publicly available video links support the proposition that despite the rather high quality image that the drone cameras return from two continents away, it may still not be clear enough to enable remote operators to recognize a particular face with reasonable certainty.[66]

For attacks carried out by the U.S. Air Force and the CIA, recent claims of civilian casualties range from fifty to almost 2,000.[67] A

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65. Consequently, remote controllers have to depend heavily on intelligence on the ground and from other sources to be assured of attacking the right individual.

66. Aside from the quality of the image, the vertical perspective viewing the individual from above, as opposed to a direct horizontal view, may make positive identification difficult. *See* Editorial, *How a Drone Killed Innocents*, TAMPA BAY TIMES (Apr. 17, 2011), http://www.tampabay.com/news/perspective/how-a-drone-killed-innocents/1163822. Upgrades in the cameras and sensors may solve this problem. *But see* Eric Lichtblau & James Risen, *Hiding Details of Dubious Deal, U.S. Invokes National Security*, N.Y. TIMES, Feb. 20, 2011, at A1 (reporting on contractor who allegedly sold Pentagon fraudulent software purporting to be able to positively identify alleged terrorists from drone videos).

67. *Compare* David Pegg, *Drone Statistics Visualized*, BUREAU INVESTIGATIVE JOURNALISM (Aug. 10, 2011), http://www.thebureauinvestigates.com/2011/08/10/resources-and-graphs (reporting that 2,412 people have been killed in the drone strikes since 2004, 467 of whom were civilians), *with* Chris Woods & Christina Lamb, *Obama Terror Drones: CIA Tactics in Pakistan Include Targeting Rescuers and Funerals*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 4, 2012), http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals (noting that based on eyewitness reports, "since Obama took office three years ago, between 282 and 535 civilians have been credibly reported as killed[,] including more than 60 children."), *and* Roggio & Mayer, *supra* note 24 (reporting that 2,390 operatives from Taliban, Al Qaeda, and allied forces have been killed in drone strikes since 2006, while 138 civilians have been killed). Roggio implicitly claims that there has not been a single civilian casulaty since the website was last visited on February 28, 2012. The New America Foundation estimates that between June 2004 and April 7, 2011, "drone strikes killed somewhere between 1,435 and 2,283 people of whom 1,145 and 1,822 were described as militants in reliable press accounts." Peter Berger & Katherine Tiedemann, *Washington's Phantom War, The Effects of the U.S. Drone Program in Pakistan*, 90 FOREIGN AFF. 12, 13 (2011). They further note that "[t]his suggests that over the life of the program, the percentage of fatalities who were militants has been around 80 percent; in 2010, that figure rose to 95 percent." *Id.* at 16*; see also* Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A11 (noting that the CIA has made the claim that since May 2010, drone strikes have killed 600 militants and not a single non-combatant). *But see Civilian Deaths from U.S.-NATO Drone Attacks in Afghanistan and Pakistan Provoke Hatred and Violence*, VOICES FOR CREATIVE NONVIOLENCE (May 18, 2011), http://vcnv.org/civilian-deaths-from-u-s-nato-drone-attacks-in-afghanistan-and-pakistan-provoke-hatred-and-viole (noting that the Human Rights Commission of Pakistan estimates that drone strikes killed 957 civilians in 2010); *see also* Adnan Adil, *The State of Human Rights in Pakistan by the Human Rights Commission of Pakistan*, TIMES (Pakistan), Apr. 11, 2010, *available at* 2010 WLNR 7453573 (noting that the Pakistan Human Rights Commission criticized the coalition's use of drones because of the number of civilian deaths drones inflict compared with the number of terrorist leaders, adopting a figure of 700 civilians killed in 2009); Scott Shane, *U.S. Drone Strikes Are Said to Target Rescuers at the Sites*, N.Y. TIMES, Feb. 6, 2012, at A4, *available* at 2012 WLNR 2551970 (reporting that British journalists concluded that 50 civilians were killed by CIA drone strikes in attempting to rescue those who had just been subject to a drone attack).

New America Foundation study reported that in 2009, drone strikes killed at least 725 people, around 502 described as militants, suggesting that the civilian death rate is about 30%, three to ten ratio, three civilians for every ten militants.[68] A comparable 2011 study revealed that drone strikes killed at least 353 people; 337 were categorized as militants, suggesting that the civilian death rate is about 5% (one civilian to twenty militants).[69] Some studies of the CIA's use of drones in Pakistan conclude that, in 2011, for every twenty-five militants killed, drones killed roughly two to three civilians.[70]

In contrast, another study of the CIA's use of drones in Pakistan concludes that for every militant killed, the drones killed fifty civilians, a fifty-to-one ratio.[71]

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68. *2009: The Year of the Drone*, New Am. Found., http://counterterrorism.newamerica.net/drones/2009 (last visited June 11, 2012). Other reports yield a higher civilian to combatant ratio. *See* Gregg Carlstrom, *How Accurate Are U.S. Drones?*, Al Jazeera, http://english.aljazeera.net/focus/2010/05/2010530134138783448.html (last modified June 3, 2010) (citing one Pakistani study indicating that there were 687 civilians killed and only fourteen al Qaeda members killed (a fifty to one ratio), but also citing a study from University of Massachusetts Professor Brian Glyn Williams, who found only 44 confirmed civilians killed and 240 others whose affiliation, civilian, or militant, was unknown (only 3.5% civilians killed)). *But see* Gareth Porter, *Cover-up of Civilian Drone Deaths Revealed by New Evidence*, RealNews.com (Aug. 19, 2012, 8:20 AM), http://therealnews.com/t2/component/content/article/92-more-blog-posts-from-gareth-porter/1215-cover-up-of-civilian-drone-deaths-revealed-by-new-evidence (estimating that the majority of drone deaths are of non-combatants and criticizing the New American Foundation for using a flawed methodology). Updated figures for drone strikes in northwest Pakistan show that approximately 1,717 to 2,680 individuals have been killed since 2004 and that approximately 17% were non-militants (with only 5% in 2010). *The Year of the Drone*, *supra* note 32.

69. *The Year of the Drone: Estimated Total Deaths from U.S. Drone Strikes in Pakistan, 2004–2012*, New Am. Found., http://counterterrorism.newamerica.net/drones#2011chart (last updated Aug. 24, 2012).

70. *Compare* Roggio & Mayo, *supra* note 24 (showing that, as of October 31, 2011, there have been 397 militants and thirty civilians killed in drone strikes, a near 8% civilian casualty rate), *with* Pegg, *supra* note 67 (showing that, as of October 31, 2011, there have been 435 people killed in drone strikes, 51 of which were civilians, a near 12% civilian casualty rate). *But see* Porter, *supra* note 68 (concluding that mostly non-combatants have died in drone strikes).

71. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 1 (Notre Dame Law Sch., Legal Studies Research Paper No. 09-43), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144; *see also* Daniel L. Byman, *Do Targeted Killings Work?*, Brookings Inst. (July 14, 2009), http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman (estimating ten civilians are killed for every one militant killed). Part of the controversy involves the criteria for determining who is a militant or a "civilian taking active part in hostilities." *See infra* note 133. Part stems from the CIA's practice of targeting suspected lower level unidentified militants: "The [contentious] March 17[, 2011] attack [in the Pakistan Tribal Areas] was a 'signature' strike, one of two types used by the CIA, and the most controversial within the administration. Signature strikes target groups of men believed to be militants associated with terrorist groups, but whose identities aren't always known." Entous et al., *supra* note 33.

Despite some flaws, the remote controlled drone's ability to hover over remote areas for hours, its outstanding cameras that capture relatively clear images both day and night, its precision guided weaponry, and the ability to control the drone from thousands of miles away have earned the drone a place on the battlefield. Furthermore, drones will certainly occupy a larger battlefield role in the future.

II. Legality of Targeted Killing and Using Drones to Carry Out Such Killings

After 9/11, human rights advocates and the media gave much attention to the United States' disregarding the Geneva Conventions and international human rights in its treatment of detainees in Abu Ghraib, Bagram Air Base, and Guantánamo Bay,[72] but they largely ignored targeted killings (or "assassinations"[73]). Both the Bush-Cheney and the Obama administrations' increased reliance on drones has focused debate on whether state agents may legally target and kill a suspected terrorist, rather than attempting to capture or arrest.[74]

Whether denominated an "assassination" or "targeted killing," the government identifies an individual by name and instructs its agents to kill that person. The question is whether such premeditated and deliberate killing violates international law. The legal

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The Obama administration had banned this type of strike, *id.*, but has since permitted such strikes to continue, Adam Entous, Siobhan Gorman & Juliane E. Barnes, *U.S. Relaxes Drone Rules*, Wall St. J. (Apr. 26, 2012), http://online.wsj.com/article/SB10001424052702304723304577366251852418174.html.

72. Much of Part II.A, C, and D is drawn from the author's book, McDonnell, *supra* note 19, at 156–59.

73. Some scholars make no distinction between "targeted killing" and "assassination." *See, e.g.*, Nehal Bhuta, *States of Exception: Regulating Targeted Killing in a 'Global Civil War'*, *in* Human Rights, Intervention and the Use of Force 242, 246 n.20 (Philip Alston & Euan MacDonald eds., 2008). Others use the term "targeted killing" to refer to the killing of a "specific" combatant or a civilian "taking a direct part in hostilities," and "assassinations" to refer to intentional killings of previously identified individuals outside armed conflict. *See* Gary Solis, The Law of Armed Conflict 538–39 (2010).

74. President Bush signed executive orders authorizing Secretary of State Donald Rumsfeld to use "secret commando groups and other Special Forces units to conduct covert operations against suspected terrorist targets in as many as ten nations in the Middle East and South Asia." Seymour M. Hersh, *The Coming Wars; What the Pentagon Can Now Do in Secret,* New Yorker, Jan. 25, 2005, at 40 (noting that these authorizations completely escape normal congressional oversight of CIA covert operations). For an alternative interpretation of Article 2(4) of the U.N. Charter, *see* Jordan Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 536–37 (2002) [hereinafter Paust, *Use of Armed Force*].

question is complex, and, as noted international humanitarian law scholar Michael Bothe put it, the short answer is "it depends."[75]

A. *Peace Versus Hostilities*

Absent armed conflict, a state-sponsored transnational assassination violates international law.[76] Article 2(4) of the U.N. Charter prohibits the use of force in the territory of another state.[77] Such assassinations also violate international human rights law. Custom-

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75. *See* McDonnell, *supra* note 19, at 156.

76. *But see* Jordan Paust, *Permissible Self-Defense Targeting and the Death of bin Laden,* 39 Denv. J. Int'l L. & Pol'y 569, 580–81 (2011) [hereinafter Paust, *Death of bin Laden*]; E-mail from Jordan Paust to author (Dec. 29, 2011) (on file with author) (arguing that "the real issue is whether something is [an] 'assassination' (because it is treacherous) or a selective killing. . . . [P]eople are rightly killed during permissible uses of force in self-defense."). He argues that outside of armed conflict, armed force may be used to carry out what he terms "Self-Defense Targeting." E-mail from Paust to author, *supra.* Paust's position is discussed *infra* notes 184–187 and accompanying text.

Some have argued that assassinating/targeted killing of a country's leader or high military command may be justified in anticipatory self-defense. *See, e.g.*, Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609, 646 (1992). Such a position must meet the standards of Article 51 of the U.N. Charter, which, on its face, requires an "armed attack" to invoke the use of armed force. *See* U.N. Charter art. 51. Arguing that the customary law of self-defense permitted preemptive attack in narrowly defined circumstances, many scholars assert that Article 51 must be read broadly to include this pre-existing custom. *See* McDonnell, *supra* note 19, at 245–58. Others argue that there is an inherent natural law right of the oppressed to assassinate a tyrant. *See, e.g.*, Luis Kutner, *A Philosophical Perspective on Rebellion*, *in* International Terrorism and Political Crimes 51, 52–63 (M.C. Bassiouni ed., 1975).

Lastly the Convention on Preventing Crimes Against Internationally Protected Persons, had it been in force at the time of the Castro assassination attempts, might have been violated. *See generally* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. This Convention prohibits the murder or attempted murder of, among others, the "Head of State." *Id.* arts. 1(a), 2(a), 2(d). The Convention is generally interpreted as applying only when the protected person travels abroad. Schmitt, *supra* at 619.

77. Of course, a state (the "receiving state") could give another state (the "sending state") permission to carry out a targeted killing on the receiving state's soil, thus absolving the sending state from any Article 2(4) violation. Unless another exception applies, such a killing would still violate human rights law. Reportedly, the United States had the permission of Yemen, Pakistan, and now Somalia to carry out the drone attacks. Kimberly Dozier, *Survey Finds Growing US Drone Attacks on Terror Suspects Unpopular Around the World*, Associated Press (June 13, 2012), http://news.yahoo.com/survey-finds-growing-us-drone-attacks-terror-suspects-133013523.html; *see also* Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, New Yorker (Oct. 26, 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer; Indira A.R. Lakshmanan, *Pakistan Ends Drone Strikes in Blow to U.S. War on Terror*, Bloomberg (Mar. 12, 2012), http://www.bloomberg.com/news/2012-03-13/pakistan-tells-white-house-to-stop-drone-missions-after-disputes-fray-ties.html.

ary international law[78] and human rights treaties such as the International Covenant on Civil and Political Rights[79] bar extrajudicial killing.[80] For example, Chile's sending an assassin to Washington, D.C. to kill Orlando Letelier, Chile's former ambassador, violated both the U.N. Charter (as an impermissible use of armed force in the territory of another state (the United States)) and international human rights law (as an arbitrary, extrajudicial killing).[81] Other examples include the United States' bungled attempts to assassinate Fidel Castro and Syria's alleged complicity in the assassination of former Lebanon Prime Minister Rafik al-Hariri.[82]

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78. Unless permitted by international humanitarian law, an extrajudicial killing violates a peremptory norm of international law. *See* Derek Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights,* 4 ILSA J. INT'L & COMP. L. 465, 470 n.34 (1998); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987); *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), at 71 (Dec. 10, 1948) [hereinafter UDHR] ("Everyone has the right to life, liberty and security of person."); Alejandre v. Cuba, 906 F. Supp. 1239, 1252 (S.D. Fla. 1997) ("[S]o widespread is the consensus against extrajudicial killing that 'every instrument or agreement that has attempted to define the scope of international human rights has 'recognized a right to life coupled with a right to due process to protect that right.'") (citations omitted).

79. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

80. Applying the ICCPR and other human rights treaties requires interpreting the treaties to impose obligations on states when they are acting outside their own territory. Although some *travaux preparatoires* suggest that the drafters did not intend the ICCPR to apply extraterritorially, the trend in decision in international tribunals and bodies is toward imposing obligations under human treaties wherever a state's military or law enforcement agents are operating: "[Article 2.1] does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State." ANTONIO CASSESE, INTERNATIONAL LAW 385 (2d ed. 2005) (quoting Sergio Euben Lopez Burgos v. Uruguay, U.N. Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, A/36/40 (July 29, 1981)); *see also* MCDONNELL, *supra* note 19, at 55–57; Jordan Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 361–62 n.40 (2007); Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. 2011), *available at* http://www.echr.coe.int (holding that the European Convention applies extraterritorially to United Kingdom's alleged human rights abuses committed in Basra, Iraq over which U.K. forces had effective control). *But see* Michael J. Dennis, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory, Application of Human Rights Treaties in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005) (arguing that the original intent of the drafters limited human right treaties to the territory of the party).

81. Although the United States had not ratified the ICCPR at the time of Letelier's assassination, Chile had done so in 1972. *See* ICCPR Status: Ratifications and Reservations, UNTC, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated June 11, 2012); *see also supra* note 80 (discussing extra-territorial application of human rights treaties). In any event, such an extrajudicial execution at that time can be said to have violated customary international law as well as human rights treaties.

82. *See* S.C. Res. 1636, ¶¶ 10–15, U.N. Doc. S/RES/1636 (Oct. 31, 2005) (requiring Syria to cooperate with U.N. investigators concerning Prime Minister's al Hariri's murder).

B. Jus Ad Bellum: *The Right to Use Force against a Transnational Terrorist Organization*

In a state subject to armed conflict, different, more complicated rules may apply to targeting and killing a suspected terrorist than in a state or territory at peace. The first question deals with *jus ad bellum*,[83] namely, whether a state attacked by a transnational terrorist organization may use force against a state that is hosting the terrorist organization, and, if so, the amount of force permitted. The second question concerns *jus in bello*,[84] namely, the permissible methods and means of delivering such armed force, including the legality of targeting a particular individual in particular circumstances. The starting point of *jus ad bellum* concerning transnational counterterrorism operations is Article 3(g) of the U.N. General Assembly Resolution on Aggression (Resolution) and the International Court of Justice's (ICJ's) controversial interpretation of the same in *Nicaragua v. United States*.[85] In pertinent part, that rule defines an act of aggression as including a state's "sending . . . *armed bands, groups, irregulars* or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to . . . ['an armed attack' or the State's] substantial involvement

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The Security Council has since established the Special Tribunal for Lebanon to investigate the assassination. *See About the STL*, SPECIAL TRIBUNAL FOR LEB., http://www.stl-tsl.org/en/about-the-stl (last visited June 11, 2012). Such an assassination would also violate Syria's obligations as an occupying power. Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

83. The ICRC defines *jus ad bellum* as follows

> The *ius ad bellum* (law on the use of force) . . . seeks to limit resort to force between States. Under the UN Charter, States must refrain from the threat or use of force against the territorial integrity or political independence of another state (Art. 2, para. 4). Exceptions to this principle are provided in case of self-defence or following a decision adopted by the UN Security Council under chapter VII of the UN Charter.

IHL and Other Regimes—Jus ad Bellum and Jus in Bello, INT'L COMM. RED CROSS (Oct. 29, 2010), http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm.

84. The ICRC defines *jus in bello* as follows:

> [*Jus in bello* (law in war)] addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.

Id.

85. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

therein."[86] The ICJ has concluded that the Resolution on Aggression has crystallized into customary international law.[87]

The Resolution seeks to explicate Article 51 of the U.N. Charter, which grants states the right to use armed force in self-defense if they suffer an "armed attack."[88] Assume, for example, that a host state "sends" transnational terrorists ("armed bands, groups, irregulars") to launch a "large scale attack"[89] (an "armed attack") on a neighboring state. In such circumstances, the neighbor has the right to use proportionate armed force in self-defense under Article 51.[90] This right would presumably include the right to invade the host state or to launch aerial attacks, including weaponized drone attacks, on the host state.

If, however, the host state did not "send" the transnational terrorists to carry out a large scale attack or attacks in the neighboring state and was simply *unable* to stop any such attack, then under the Resolution and *Nicaragua v. United States,* the host state is not responsible for the attack under Article 51 of the U.N. Charter or under Article 3(g) of the Resolution.[91] Article 3(g) requires that the transnational terrorist be sent "by or on behalf of a State."[92] If, however, the transnational terrorists engaged in a large scale attack, even without the consent of the host state, the attacked neighboring state would have a right of self-defense under Article 51. That article does not require that the attack be carried out by a "state."[93] In that case, however, the neighboring state would have

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86. Definition of Aggression, G.A. Res. 29/3314, U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (Dec. 14, 1974) (emphasis added).

87. *Nicar. v. U.S.,* .1986 I.C.J. ¶ 195.

88. U.N. Charter art. 51 ("*Nothing* in the present Charter *shall impair the inherent right of individual or collective self-defence if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.") (emphasis added).

89. Armed Activities on the Territory of the Congo (D.R.C. v. Uganda), 2005 I.C.J. 168, ¶ 147 (Dec. 19).

90. *See Nicar. v. U.S.,* 1986 I.C.J. ¶¶ 176, 195.

91. The International Court of Justice (ICJ) went even further, requiring that the host state have "effective control" of the terrorist organization, observing that "the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or other support." *Id.* ¶¶ 115, 195.

92. *Id.* ¶ 195.

93. *See* U.N. Charter art. 51; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan,* 19 J. TRANSNAT'L L. & POL'Y 237, 238–41 & nn.3, 5 [hereinafter Paust, *Self-Defense Targetings*]. *But see Nicar. v. U.S.,* 1986 I.C.J. ¶ 35 (Kooijman, J., concurring) ("Resolutions 1368 (2001) and 1373 (2001) [those responding to 9/11] recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of inter-

to limit its use of force to target the transnational terrorists and havens they have enjoyed in the host state, rather than launching attacks on the host state as a whole.[94]

If, however, the terrorists ("armed bands, groups, irregulars") are not engaging, either in activities that reach the level of an armed attack within the meaning of the U.N. Charter or an imminent armed attack of that magnitude, then neither the Charter nor customary international law permits the victimized state to use armed force against the host state. "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does *not* allow the use of force by a State *to protect perceived security interests* beyond these parameters."[95] Such lower level violence could be characterized as a border incident or ordinary criminality, not giving rise to the right to respond militarily under the international law of self-defense.[96]

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national terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) *without ascribing these acts of terrorism to a particular State.* This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack *without saying that this armed attack must come from another State* even if this has been the generally accepted interpretation for more than 50 years.") (emphasis added).

94. *See D.R.C. v. Uganda*, 2005 I.C.J. ¶ 148; *see also* Theresa Reinhold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 Am. J. Int'l L. 244, 267–68 (2011) (reaching the same conclusion regarding Israel's attack on Lebanon for the acts of Hizbollah). If the terrorists are about to engage in an *imminent* "armed attack" and all peaceful measures have been exhausted, then under the doctrine of anticipatory self-defense, the neighboring state would likewise have the right to use proportionate force to stop the imminent attack. *Cf. British-American Diplomacy: The Caroline Case*, Avalon Project, http://avalon.law.yale.edu/19th_century/br-1842d.asp ("[The] 'necessity of that self-defence [must be] instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'") (citing letter from Daniel Webster to Lord Ashburton, Apr. 24, 1841).

95. *D.R.C. v. Uganda*, 2005 I.C.J. ¶ 148 (emphasis added). The ICJ added that "[o]ther means are available to a concerned state, including, in particular, recourse to the Security Council." *Id. But see* Reinhold, *supra* note 94, at 262 (noting that state practice in Africa suggests a broader right to self-defense than that which the ICJ is willing to recognize).

96. A border incident does not satisfy Article 51. Int'l Law Assoc., Hague Conference (2010): Use of Force, *Final Report on the Meaning of Armed Conflict in International Law,* at 3 [hereinafter *Report on the Meaning of Armed Conflict*]. Self-help in the form of counter-measures might be justified during a border incident, but not resort to armed conflict. *See* John L. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense,* 81 Am. J. Int'l L. 135, 138 (1987). *But see* Christian Tams, *The Use of Force Against Terrorists,* 20 Eur. J. Int'l L. 359, 388 (2009) (stating that the "accumulation of events" doctrine appears to be gaining more acceptance); Reinhold, *supra* note 94, at 246 (criticizing the so-called "accumulation of events" approach to constitute an "armed attack" though "attractive at first glance," for ultimately "undermin[ing] the imminency requirement" essential for justifying resort to force in self-defense).

In such situations, the victimized state would typically appeal through diplomatic channels to the host state to exert law enforcement efforts (a) to arrest and extradite or (b) to arrest and prosecute the irregulars (terrorists) in question. If the host state is unable to do so, but willing to cooperate with the victimized state, together both nations could engage in law enforcement efforts against the terrorist organization and possibly employ the military as well, but with a mandate to arrest rather than kill, except in an emergency. In other words, international human rights law requires states to resort to a law enforcement regime rather than a law of war regime here.

Under the law enforcement regime, deadly force may be used only upon a showing of absolute necessity, to protect oneself or another "against the imminent threat of death or serious injury."[97] Generally, law enforcement may be carried out only by the host state (or by a foreign state with the permission of the host state). A narrow exception, however, may permit a foreign state to use force in a host state without the host state's consent. Customary international law recognized before the U.N. Charter permitted a state to use proportionate force to protect its own nationals.[98] This preexisting custom probably survives in Article 51 within the ambit of

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97. Mary Ellen O'Connell, *The International Law of Drones,* AM. SOC'Y INT'L L., Nov. 12, 2010, at n.10 (citing U.N. Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 8th U.N. Cong. on the Prevention of Crime & Treatment of Offenders, U.N. Doc. A/Conf.144/28/Rev.1 (Aug. 27–Sept. 7, 1990)) (emphasis added). The complete article is as follows:

> Law enforcement officials shall not use firearms against persons except in self-defense or defense of others a*gainst the imminent threat of death or serious injury*, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when *strictly unavoidable* in order to protect life.

Id. (emphasis added).

98. Tom Ruys, *The 'Protection of Nationals' Doctrine Revisited*, 13 J. CONFLICT & SECURITY L. 233, 233, 236 (2008). Ruys explains:

> [T]he so-called 'protection of nationals' doctrine . . . suggests that states are allowed to forcibly intervene in other countries for the protection of their nationals abroad, subject to the following (cumulative) conditions: (i) there is an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them and; (iii) the action of the intervening state is strictly confined to the objective of protecting its nationals . . . . [Some argue] that nationals abroad form part of a state's population and are therefore one of its essential attributes, implying that an attack against nationals abroad can be equated to an attack against the state itself, thus triggering Article 51 UN Charter . . .

Id. (citations omited).

"the inherent right of self defense."[99] Consequently, upon a showing that a terrorist organization is subjecting a U.S. national to a threat of imminent death or serious bodily harm and the host state is doing nothing to prevent the threat from being carried out, the United States may use proportionate force against the terrorist or terrorists in question in the unwilling host state.[100]

September 11, 2001 transformed not only the United States' world-view, but that of the international community.[101] Within days of 9/11, the U.N. Security Council unanimously condemned the attacks and within the month, the Security Council prohibited any state from harboring or otherwise assisting terrorist organizations.[102] Acting under its Chapter VII powers,[103] the Security Council adopted measures to stop states from financing terrorist organizations, to ensure that states prosecute terrorists, and to require states to "afford one another the greatest measure of assistance in connection with criminal investigations."[104] Through its binding Resolution, the Security Council specifically prohibits states from "providing any form of support, active *or passive*" to terrorists or their organizations.[105] The Resolution adds that "all States *shall . . . .deny safe haven* to those who finance, plan, support, or commit terrorist acts, or provide safe havens . . . ."[106]

The Security Council, however, said little about the consequences of a host state's violating that Resolution. In the preamble, the Resolution does "reaffirm the need *to combat by all means, in accordance with the Charter of the United Nations*, the threat to interna-

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99. *See* U.N. Charter art. 51; *see also* Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 451, 478 (2008) (characterizing the Israeli Entebbe hostage rescue as "the gold standard," exemplifying the right to use force to protect one's nationals); Paust, *Self-Defense Targetings*, *supra* note 93, at 238–41 & n.3.

100. Paust, *Self-Defense Targetings*, *supra* note 93, at 238–41.

101. Part of this and the next paragraph are drawn from MCDONNELL, *supra* note 19, at 265. For a deeper discussion of the Security Council Resolution, see *id.*

102. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

103. U.N. Charter arts. 25, 39–51.

104. *See* MCDONNELL, *supra* note 19, at 265.

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

106. *Id.* ¶ 2(a), (c) (emphasis added). The preamble of this resolution also underscores the duty of states not to serve as safe havens for terrorists or their organizations:

> Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely[,] that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, . . .

Id. pmbl.

tional peace and security caused by terrorist acts."[107] Some have argued that this language authorizes states to act unilaterally with armed force against perpetrators of terrorist attacks in states that violate the Resolution.[108] The "combat by all means" preamble paragraph, however, begs the question, for it says states may engage in combat only "in accordance with the Charter of the United Nations."[109] The question is whether the Security Council authorized the use of force (which presumably would include weaponized drone targeting killing attacks) against violating host states. The Resolution does not answer this question.[110] Absent a terrorist organization's launching the equivalent of an armed attack from a host state's soil, the victim state's only armed force option, apparently, is to seek the Security Council's authorization to use force under Chapter VII.[111]

C. Jus in Bello*: The Rules of the Game*

Once hostilities begin, a different legal regime is triggered. Granted, *jus ad bellum* (principally now founded on the U.N. Charter and related custom) determines whether a state has the right to use armed force. On the other hand, *jus in bell*o is utterly indiffer-

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107. *Id.*

108. *See, e.g.*, Paust, *Use of Armed Force*, *supra* note 74, at 544–45.

109. S.C. Res. 1373, *supra* note 105, pmbl. Preambles to a treaty have no direct legal effect but are considered part of the "context of the treaty," which may be referred to in treaty interpretation. *See* Vienna Convention on the Law of Treaties arts. 31.1, 31.2, May 23, 1969, 1155 U.N.T.S. 331 ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including *its preamble* and annexes . . . ") (emphasis added).

110. This Resolution plus subsequent state practice has probably undermined the vitality of *Nicaragua v. United States*, which established the strict "effective control" test. Under that test, a state that has been victimized or imminently threatened by a terrorist organization may not use armed force against a haven state unless that state "effectively controls" the terrorist organization. *See* Nicar. v. U.S., 1986 I.C.J. 14, ¶ 115 (June 27). Even the *Tadic* court's lower standard, requiring that the haven state "have a role in organizing . . . the military operations" of the terrorist group still requires more than simply occupying a passive role vis-à-vis the terrorist group. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 137, at 59 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

111. September 11 did constitute an armed attack within the meaning of Article 51, but it could be argued that it was launched from Germany as much as it could be said to be launched from Afghanistan. There is little evidence to suggest that al Qaeda was an "organ" of the Taliban regime, such that the acts of al Qaeda could be directly attributed to the Taliban within the meaning of *Nicaragua v. United States*. *But see* McDonnell, *supra* note 19, at 259–69 (arguing that the post-9/11 legal regime plus humanitarian intervention justified a proportionate use of force).

ent as to which side possesses this right.[112] The *jus in bello* regime sets forth the rules of the game; the rules under which hostilities can be carried out. These rules are primarily found in the Hague Convention of 1907,[113] the four Geneva Conventions of 1949,[114] and their two Additional Protocols of 1977.[115] These multilateral treaties (and relevant international custom) constitute the major part of the regime of international humanitarian law (the law of war).[116] That regime immunizes individual soldiers and commanders from criminal liability for what otherwise would be murder (intentionally killing a combatant).[117]

The law of war and its accompanying combat immunities enter into effect, however, only upon a finding that there is a "state of armed conflict."[118] That term is not clearly defined, but available definitions, particularly of "non-international armed conflict,"

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112. In modern history, both sides typically claim that the other was the aggressor; determining which side was right in starting the armed conflict is so contentious that it fails to advance the parties' bearing the responsibility of carrying out the conflict within the bounds of humanitarian law: "To this day, the idea that animates the *jus in bello*, embodied in the ICRC's ethos, is that 'human suffering is human suffering, whether incurred in the course of a "just war" or not. . . . Humanity, not Justice, is its prime concern.'" Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus In Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 64 (2009) (quoting GEOFFREY BEST, HUMANITY IN WARFARE 4–5 (1980)).

113. *See* Regulations Respecting the Laws and Customs of War on Land, Convention with Respect to the Laws and Customs of War on Land (Hague Convention (IV)), Annex, art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations], *available at* http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument.

114. *See, e.g.*, Third Geneva Convention of 1949, Aug. 12, 1949, 75 U.N.T.S. 135.

115. A.P. I, *supra* note 3; A.P. II, *supra* note 11. War crimes and crimes against humanity are now principally codified in the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court arts. 7, 8, 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute].

116. It is also called "the law of armed conflict." *See* ICRC, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 1 (2004), *available at* http://www.icrc.org/eng/assets/files/other / what_is_ihl.pdf. Aside from these conventions, there are conventions banning certain weapons. *See, e.g.*, Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Poison Gas Protocol, *supra* note 12; Hague Declaration Concerning Asphyxiating Gases, *supra* note 12.

117. Intentional murder is defined by the Model Penal Code as follows: "A person is guilty of [intentional murder] if he [or she] purposely [or] knowingly . . . causes the death of another human being." MODEL PENAL CODE §§ 210.2(2), 210.3 (1985). Combat immunities also extend under the same principles to the destruction of property in armed conflict. A.P. I, *supra* note 3, art. 43(2).

118. *See Report on the Meaning of Armed Conflict*, *supra* note 96, at 2, 24, 32–33 (identifying organization of the parties and intensity of the fighting as the two principal characteristics of an armed conflict).

impose geographic limits. The International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that an armed conflict "exists whenever there is a resort to armed forces between States or *protracted armed violence* between governmental authorities and *organized armed groups* or between such groups *within the State*."[119] The Rome Statute of the International Criminal Court adopted the ICTY's definition.[120] Virtually any level of hostilities between states triggers international humanitarian law.[121] Hostilities between a state and a non-state actor, such as al Qaeda, however, must reach a certain threshold for the humanitarian law of a non-international armed conflict to apply.[122] Protracted armed conflict contemplates

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119. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 218 (2005) (quoting Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)) (emphasis added). For a detailed discussion of the meaning of "non-international armed conflict," including the requirement that the non-state actor have a sufficient level of organization and that the hostilities reach a sufficient intensity, see ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 14 (2010); *Report on the Meaning of Armed Conflict*, *supra* note 96, at 2, 24, 32–33.

120. The relevant article of the Rome Statute provides as follows:

> Paragraph 2 (e) [enumerating prohibited conduct] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups.

Rome Statute, *supra* note 115, art. 8(2)(e) (emphasis added). Criticizing the United States broad definition of armed conflict, Nils Melzer states as follows:

> The U.S. Government has identified its adversary in this war [the war on terrorism] as interchangeably as 'Al Qaida and its affiliates', as 'every terrorist group of global reach' or simply as 'terrorism' per se, and has emphasized that no distinction would be made between 'the terrorists' and 'those who knowingly harbor or provide aid to them.' These sweeping descriptions hardly meet the minimum requirements for a 'party to the conflict.' For the practical reasons pointed out above, the notion of armed conflict must remain restricted to armed contentions between groups of individuals that are sufficiently identifiable based on objective criteria. In order to prevent total arbitrariness in the use of force, this minimum requirement must be upheld in spite of the practical difficulties that doubtlessly arise in identifying the members and structures of loosely organized and clandestinely operating armed groups. No social phenomenon whether terrorism, capitalism, Nazism, communism, drug abuse or poverty can be a 'party' to a conflict.

NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 262 (2008).

121. *Report on the Meaning of Armed Conflict*, *supra* note 96, at 2 (disagreeing with the ICRC Commentary on the point, noting that, even between states parties, international armed conflict requires "fighting of some intensity").

122. Traditionally that strand of humanitarian law applied only to actions of such groups "within the State." A.P. II expressly covers non-international armed conflict. A.P. II first notes that it applies "in the territory of a high contracting party between its armed forces and dissident armed forces or *other organized groups* which, under responsible command, *exercise such control over a part of its territory as to enable them to carry out sustained and*

battles, fighting between the parties, and not merely a sporadic hit-and-run characteristic of many terrorist operations.[123] Protracted armed conflict also occurs within a specific territory: "While the area of war is extensive[,] it is *not unlimited* and does not in general extend for example to the territory of other states not party to the conflict, unless those states allow their territory to be used by one of the belligerents."[124]

In addition, A.P. II notes that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence . . . ."[125] In deciding whether the violence has risen to the level of an "armed conflict," government authorities and international tribunals should consider the "nature, intensity, and duration of the violence and the nature and organization of the parties."[126] "Critically, the non-state or insurgent groups that may constitute parties must be capable of identification as a party to the conflict and have attained a certain degree of internal organ-

concerted military operations." A.P. II, *supra* note 11, art. 1(1) (emphasis added). Although the United States has not ratified A.P. II, this article can be said to reflect customary international law.

123. Jordan Paust, Mike & Teresa Baker Law Center Professor, Univ. of Houston Law Ctr., Panel Discussion at the American Branch of the International Law Association, International Law Weekend: Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule (Oct. 22, 2011) [hereinafter Paust, Civilian Casualties].

124. DUFFY, *supra* note 119, at 223 (emphasis added). Professor Mary Ellen O'Connell also has stressed the geographic limitations on non-international armed conflict. Mary Ellen O'Connell, Professor, Notre Dame Law School, Panel at the American Branch of the International Law Association, International Law Weekend: What is War? (Oct. 21, 2005); *see also* CULLEN, *supra* note 119, at 140.

125. A.P. II, *supra* note 11, art. 1(2).

126. DUFFY, *supra* note 119, at 221 (emphasis added) (citations omitted); *see also* KRIANGAK KITTCHAISAREE, INTERNATIONAL CRIMINAL LAW 137 (2001) (noting that "situations of internal disturbances and tensions, unorganized and short lived insurrections, banditry, or *terrorist activities* are not subject to international humanitarian law") (emphasis added.). However, the line between non-international armed conflict and law enforcement jurisdiction has been difficult to identify. Charles Garraway, Professor, Royal Inst. of Int'l Affairs (Chatham House), Conference Brief at the U.S. Naval War College: Non-International Armed Conflict (NIAC) in the 21st Century (June 21–23, 2011) ("The challenge is if LOAC [Law of Armed Conflict] and human rights law are not to collide there has to be some compromise, where they differ, such as targeting. We need to know what law applies in which circumstances. The answer might lie in the intensity of the violence. Where the intensity is similar to IAC, LOAC has priority. Where the intensity is less, human right law has priority.").

ization."[127] Otherwise, the state may target an individual at its whim, without affording any legal process whatsoever.[128]

In an armed conflict, international humanitarian law permits the combatants on one side to attack without warning the combatants and other military targets of the other. Usually, there is no obligation to request surrender before attack or to capture, rather than kill, unless the enemy has clearly thrown down their arms.[129] During World War II, the United States learned that Admiral Isoroku Yamamoto, the Japanese naval commander, was on a military plane; to kill him, the U.S. Command deliberately targeted that plane.[130] Some would suggest that targeting Yamamoto was not chivalrous,[131] but he was a combatant and therefore, presumably, a lawful subject of attack.[132] Combatants may not, however, target

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127. DUFFY, *supra* note 119, at 221–22 (citing ICRC Report on International Humanitarian Law and Contemporary Armed Conflicts and noting control of territory is not necessary for armed conflict despite the language of A.P. II quoted above); *see also* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, FLETCHER F. WORLD AFF. 55, 60 (2003) (noting that "there can be no humanitarian law conflict without identifiable parties" and criticizing the formulation "war on terror," because "terror" cannot be a party). Meeting the threshold of being able to be identified as a party corresponds to the requirement that the group attain a sufficient level of organization. CULLEN, *supra* note 119, at 123–24 ("The general consensus is that armed groups opposing a government must have a minimum degree of organization and discipline—enough to enable them to respect international humanitarian law—in order to be recognized as a party to the conflict.") (quoting *Armed Conflicts Linked to the Disintegration of State Structures*, ICRC (Jan. 23, 1998), http://www.icrc.org/eng/resources/documents/misc/57jplq.htm). Given the decentralized nature of al Qaeda, with some adherents receiving little more than inspiration from Osama bin Laden (dead or alive), identification of parties to the alleged non-international armed conflict is problematic. Thomas M. McDonnell, *The Death Penalty—An Obstacle to the "War Against Terrorism"?*, 37 VAND. J. TRANSNAT'L L. 353, 397 n.205 (2004) [hereinafter McDonnell, *The Death Penalty*] (discussing so-called "leaderless resistance").

128. See CULLEN, *supra* note 119, at 125; MELZER, *supra* note 120, at 246–61.

129. DUFFY, *supra* note 119, at 311 n.177 (acknowledging this proposition, but noting that a preference for arrest rather than killing is "implicit . . . at least as far as [it] causes no military disadvantage"); *cf.* Schmitt, *supra* note 76, at 644 (noting that "targeting someone meeting the criteria of a combatant in armed conflict, but whose death is not 'necessary' would be illegal"). *But see* Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 884–85 (2005) (arguing that the right to quarter bars targeted killing). See *infra* notes 134–136 and accompanying text for a more detailed discussion of military necessity, and *infra* note 136 and accompanying text for a more detailed discussion of the right to quarter.

130. BRIAN MICHAEL JENKINS, UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES 172 (2006).

131. *See* MERON, *supra* note 17, at 2.

132. The targeted killing of Yamamoto does not appear to have violated the Hague Convention, which prohibits treacherous killing of the enemy. *See* Hague Regulations, *supra* note 113, art. 23 (noting that it is "especially forbidden . . . to kill or wound *treacherously* individuals belonging to the hostile nation or army") (emphasis added). Compare

civilians unless the civilian "takes a direct part" in the hostilities.[133] Even with respect to combatants in armed conflict, targeted killing must pass the test of military necessity.[134] For example, if enemy troops are *obviously* unarmed, the opposing military force should

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the assassination of S.S. General Reinhardt Heydrick, military governor of German-occupied Bohemia and Moravia in 1942. *See* Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 628 (1992). The Royal Air Force flew in two Free Czechoslovak soldiers who were not wearing uniforms. *Id.* After parachuting down, they threw a bomb into Heydrick's car, killing him. *Id.* In retaliation, the Germans killed 120 people in a church, executed 1,331 Czechs, and transported 3,000 Jews, who had been detained in Theresiestadt, to death camps. *Id.* Since the two who carried out the assassination were out of uniform, arguably they committed an act of perfidy, falsely trading on their apparent civilian status, thereby endangering the civilian population, and violating Article 23 of the Hague Regulations. *Id.* at 629–30; *see also* Schmitt, *supra* note 76, at 639 (killing an enemy during armed conflict constitutes an illegal killing if the actor feigns civilian status or wears a uniform of the enemy and notes that "irregular combatants commit treachery if they use their apparent noncombatant status to get closer to the target than they otherwise would."). *But see* Zengel, *supra*, at 629 (noting Heydrick's assailant made "no affirmative misrepresentation" nor betrayed any "personal trust or confidence"). On the other hand, the war crimes, genocide, and crimes against humanity perpetrated by the Nazi regime mitigate the violations of the laws of war by those opposing them.

133. A.P. I, *supra* note 3, art. 51(3). The ICRC Commentary on Article 51(3) of A.P. I notes that "'hostile acts' should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of armed forces." ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 618 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]. "Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities." *Id.* The ICRC Commentary notes that "the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon." *Id.* at 618–19, ¶ 1943. Although the United States has not ratified A.P. I, it considers Article 51 as reflecting customary international law. *See* U.S. ARMY, OPERATIONAL LAW HANDBOOK (2002), at 11 (Jeanne M. Meyer & Brian J. Bill eds., 2002) (United States considers as custom "[art.] 51 (protection of the civilian population, except para. 6 reprisals)." The A.P. I rule reaffirms Common Article 3 of the Geneva Conventions of 1949, which prohibits combatants from attacking "[p]ersons taking no active part in the hostilities." Geneva Convention III, *supra* note 114, art. 3(1). All states of the world are parties to the four 1949 Geneva Conventions.

The ICRC has published an interpretative guide on direct participation, with the challenge of international terrorism foremost in view. *See generally* NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). *But see* Eric T. Jensen, *Targeting Persons and Property*, *in* THE WAR ON TERROR AND THE LAWS OF WAR 37, 56–57 (2009) (defending the 2006 Military Commissions Act definition of "enemy combatant" as including not only individuals who have "engaged in hostilities," but also persons "who ha[ve] purposely and materially supported hostilities against the United States," a broader definition than that contained either in Common Article 3 or A.P. I).

134. MELZER, *supra* note 120, at 286–89; *see also* A.P. I, *supra* note 3, arts. 51, 57; Paust, *Self-Defense Targetings*, *supra* note 93, at 271–72; HENCKAERTS & DOSWALD-BECK, *supra* note 12, at 3, 25, 37, 61.

capture rather than kill them. Jean Pictet of the International Committee of the Red Cross, states as follows:

> If we can put a soldier out of action by capturing him, we should not wound him. If we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.[135]

The law of war permits armed forces to defeat the enemy but does not provide an unlimited license to kill.[136]

Humanitarian law also limits attacking a combatant when civilians and civilian objects lie nearby. Under the proportionality rule, a combatant may not carry out "an attack which may be expected to cause *incidental loss of civilian life*, injury to civilians . . . which would be excessive in relation to the *concrete and direct military advantage anticipated*."[137] This formulation, however, puts a thumb

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135. MELZER, *supra* note 120, at 289 (quoting JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 751 (1985)). Melzer underlines that combatants need not take unreasonable risks to capture, rather than kill, an enemy:

> [W]hile the operating forces can hardly be required to take additional risks in order to capture rather than kill an armed adversary, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity to surrender where the circumstances are such that there manifestly is no necessity for the immediate application of lethal force.

Id.

136. Furthermore, the ban on weapons that cause "superfluous injury or unnecessary suffering" stems again from limits military necessity imposes. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 12, at 240–41. One aspect of this ban is described as follows: "The preamble to the St. Petersburg Declaration states that the use of . . . weapons [that *render death inevitable*] 'would be contrary to the laws of humanity', and it was this consideration that led to the prohibition of exploding bullets by the Declaration." *Id.* at 241. The notion is that an armed force does not necessarily have to kill an enemy to achieve the military objective; wounding may be enough. A targeted killing operation, as its name suggests, demands the death of an enemy. Disregarding such a general obligation may not render the weaponized drone illegal, but so using drones does contradict the spirit of this ban.

Likewise, humanitarian law requires that armed forces give enemy troops quarter. The Hague Regulations, *supra* note 113, art. 23(d). Thus, enemy forces who surrender should be captured or arrested, but may not be killed. Putting it another way, a "take no prisoners" order is per se illegal. Targeted killing by drones challenges both principles. A drone (like a jet fighter) cannot capture or arrest a combatant. So while troops may capture unarmed combatants (rather than kill them), drones lack that ability. Likewise, a combatant cannot surrender to a drone (or a jet fighter). Even if an unarmed surrendering combatant might be easily captured by a patrol, the drone pilot often will be unable to ascertain that information and, in any event, lacks the ability to capture or arrest.

Given the parallel between drones and jet fighters, for example, one cannot assert that the limits on military necessity and on the ability to give quarter make weaponized drones an illegal weapon. Certainly, jet fighters are not. On the other hand, the inability of combatants (or non-combatants) to surrender in the face of or during such a drone attack adds to the terror drones inspire.

137. A.P. I, *supra* note 3, art 51. Although A.P. I applies only to international armed conflict and there is no express proportionality rule in A.P. II applying to non-interna-

on the scale in favor of military advantage to the detriment of potential civilian loss.[138] The official commentary of the International Committee of the Red Cross implies that an armed force could destroy a village to kill a single active duty enemy solider.[139]

Defenders of attack drones have argued that, far from disproportionately endangering civilians, the drones' precision guided missiles and capacity to hover over the target limit civilian casualties far more than other types of attack.[140] Others also point out that the precision nature of the attacks produces far fewer refugees than "ground combat" or "traditional air strikes."[141] On the other hand, international human rights law applying outside of armed conflict more sharply limits a state's use of armed force: "[L]ethal use of firearms may only be made when *strictly unavoidable* in order to protect life."[142] Consequently, a Hellfire missile, capable of destroying a tank (or killing everyone in a house) could never be employed in law enforcement operations even against an actor who poses an immediate threat to others.

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tional armed conflict, "there is a general consensus that the principles of targeting apply to armed conflict generally, whether Article 2 [international armed conflict] or Article 3 [non-international armed conflict]." Jensen, *supra* note 133, at 44.

138. *See* McDonnell, *supra* note 19, at 139.

139. The ICRC Commentary interprets the proportionality rule broadly: "The presence of a soldier on leave obviously cannot justify the destruction of a village." Commentary on the Additional Protocols, *supra* note 133, at 684. Had there been two soldiers on leave, could the village then have been destroyed? *See, e.g.*, Rome Statute, *supra* note 115, art. 8(b)(iv); Jensen, *supra* note 133, at 51–54. *But see* Prosecutor v. Galic, Case No. IT-98-29-T, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 3, 2003) (adopting a more civilian-protective interpretation in determining that the defendant carried out a disproportionate attack).

140. *See, e.g.*, Anderson, *supra* note 18. Professor Radsan argues, however, that because drone pilots are so far removed from actual combat conditions that they should be subject to a stricter proportionality rule than those facing actual combat. Afsheen John Radsan, Panel Discussion at the American Branch of the International Law Association, International Law Weekend: "Is Targeted Killing Legal?" (Oct. 23, 2010); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. Ill. L. Rev. 1201 (2011).

141. *See* Scott Shane & Thom Shanker, *Strike Reflects US Shift to Drones in Terror Fight*, N.Y. Times (Oct. 1, 2011), http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?pagewanted=all ("While experts argue over the extent of the deaths of innocents when missiles fall on suspected terrorist compounds, there is broad agreement that the drones cause far fewer unintended deaths and produce far fewer refugees than either ground combat or traditional airstrikes.").

142. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles for the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/Conf.144/28/Rev.1, Annex.

In that regard, international humanitarian law can no longer be considered in isolation from international human rights law.[143] Since the end of World War II, international human rights law has undergone revolutionary development. The world community has embraced the International Bill of Rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,[144] and several other multilateral treaties.[145] Three regional human rights regimes with their own international courts constituted under the following multilateral treaties have come into existence: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human Rights and People's Rights.[146] The International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Special Tribunal of Lebanon, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court, all established within the last two decades, have jurisdiction not only over war crimes, but also over genocide and crimes against humanity.[147] Lastly, the United Nations has established the Human Rights Council, and the Security Council

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143. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 201 (2005). Professor Kretzmer also argues that neither international humanitarian law nor human rights law precisely fits the challenge posed by highly organized, persistent non-state terrorist organizations and movements: "An armed conflict between a state and a transnational terrorist group is not an international armed conflict. However, as it transcends the borders of the state involved, it does not fully fit the mode of a non-international conflict either." *Id.*

144. *See, e.g.*, UDHR, *supra* note 78; ICCPR, *supra* note 79; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 4 U.N.T.S. 1976; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

145. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. Many of the human rights conventions through the assemblies of state parties have established monitoring committees that perform a quasi-judicial function. *See, e.g.*, *Human Rights Committee*, OFFICE U.N. HIGH COMMISSIONER FOR HUM. RTS., http://www2.ohchr.org/english/bodies/hrc (last visited June 13, 2012).

146. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

147. In addition, the Review Conference of the International Criminal Court (ICC) Assembly of State Parties recently adopted a definition of the crime of aggression. *See* Claus Kress & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179 (2010).

itself, in issuing binding resolutions concerning armed conflict, routinely calls upon states to respect human rights law.[148]

Applying international human rights law, the European Court of Human Rights (ECtHR), for example, has construed the proportionality rule in counterterrorism operations in non-international armed conflict in Chechnya as essentially requiring that the combatant "ensure that any risk to life is minimized."[149] Unless a drone pilot is almost certain that no innocent civilians are present in the attack zone, firing a Hellfire missile with the power to destroy a house and its inhabitants would violate the ECtHR's rule. Although probably constituting a progressive development of the law in the context of traditional humanitarian law, the ECtHR's approach is consistent with the Tactical Directive that U.S. commanders have adopted in Afghanistan to lessen civilian casualties and damage to homes and other civilian objects.[150]

Using drones to carry out targeted killing is, nonetheless, legal in certain circumstances in armed conflict. Targeted killing, however, enjoys a less favored place than other kinds of military attacks. Dr. Francis Lieber drafted the Lieber Code, one of the foundations of humanitarian law, at the request of Secretary of War Stanton of Abraham Lincoln's cabinet. It expressly forbids assassination:

> Section IX.—Assassination.
>
> 148. The law of war does *not* allow *proclaiming* either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government *an outlaw, who may be slain without trial* by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.[151]

While one could argue that the Lieber Code is referring only to individuals who are "slain" *after* capture, the spirit of the provision casts doubt on singling out for death a particular individual by

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148. *See, e.g.*, S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (declaring that "[s]tates must insure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, *in particular international human rights*, refugee, and humanitarian law") (emphasis added).

149. *See, e.g.*, Isaveya, Yusupova & Bazayeva v. Russia, 41 Eur. Ct. H.R. 39, ¶ 171 (2005); *see also* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751, ¶¶ 6–23, 77 (1998).

150. See *infra* notes 300–302 and accompanying text for a discussion of the Tactical Directive.

151. The Lieber Code of 1863, art. 148 (Apr. 24, 1863) (emphasis added).

name.[152] The ambivalence about targeted killings is likewise indicated by the long-standing practice of enemy forces refusing to assassinate the political leaders of the other side.[153] Even the run-up to the targeted killing of Admiral Yamamoto, who was clearly a combatant and certainly not a political leader, provoked intense debate in the upper echelons of the military and possibly in the Roosevelt White House.[154] This ambivalence almost certainly stems from the undeniable fact that picking out a named person to kill feels much more like murder than justifiable, honorable combat. As Justice John Paul Stevens, who as a Navy officer helped break the code that enabled the United States to bring down Yamamoto, stated, "The targeting of a particular individual with the intent to kill him [is] a lot different than killing a soldier in battle. . . ."[155]

Despite the questions surrounding targeted killing, the Bush-Cheney administration decided that the United States could engage in targeted killing of suspected terrorists. President Bush declared that the United States had entered into a state of worldwide armed conflict with terror, covering al Qaeda and all "associ-

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152. Forty-four years after the promulgation of the Lieber Code, the 1907 Hague Conventions outlawed "treacherous" killings, killings that today we would classify as perfidious. *See* A.P. I, *supra* note 3, art. 37. ("It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord protection under the rules of international law applicable in armed conflict, with intent to betray that confidence shall constitute perfidy.").

In 1998, the Rome Statute of the International Criminal Court reverted to the old fashioned "treacherous" language, but likewise reinforced the prohibitions on such killings. *See* Rome Statute, *supra* note 115, art. 8. The Rome Statute expressly forbids "[k]illing or wounding treacherously individuals belonging to the hostile nation or army" in international armed conflict and "[k]illing or wounding treacherously a combatant adversary" in non-international armed conflict. *Id.* art. 8(2)(e)(xi), (ix); *see also id.* art. 8(2)(e)(xvi)–(xxx) (defining war crimes to include, among other things, using poison, poison weapons, poison gas, dumdum bullets, and weapons causing superfluous injury).

153. *See* MARK R. AMSTUTZ, INTERNATIONAL ETHICS: CONCEPTS, THEORIES, AND CASES IN GLOBAL POLITICS 146 (2005). Notable exceptions include the Reagan administration's attempt at killing Mumar Kaddafi and the Bush-Cheney administration's attempt to kill Saddam Hussein on the eve of the war in Iraq. *See, e.g.*, Gregor Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 179 (1987).

154. William C. Banks & Peter Raven Hansern, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 688 (2003); *see also* THOMAS HUNTER, TARGETED KILLING: SELF-DEFENSE, PREEMPTION, AND THE WAR ON TERRORISM 87 n.30 (2009) (citing CAROL V. GLINES, ATTACK ON YAMAMOTO 1–2 (1998) (suggesting that Roosevelt authorized the attack)).

155. Mary Ellen O'Connell, Targeted Killing with Combat Drones 4, n.20 (May 10, 2010) (on file with author) (citing Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1583 (2006) (quoting a telephone interview with Justice John Paul Stevens on June 22, 2005)).

ated" groups,[156] thereby arguably permitting the United States to kill suspected terrorists anywhere without attempting to capture them.[157] In oral argument of *Rumsfeld v. Padilla*,[158] involving an alleged "enemy combatant," Justice Kennedy asked Solicitor General Clement "Could you shoot him when he got off the plane [in the United States, rather than try to arrest him]?"[159] The Solicitor General doubted we could.[160] The same prohibitory rule should apply in all other countries not undergoing armed conflict within *their* territory.[161]

D. *United States Counterterrorism Operations and International Law*

Those supporting the Bush-Cheney administration's position argued that al Qaeda's level and frequency of violence against the United States and our allies did satisfy the criteria both for "armed attack" and for "armed conflict." In particular, the 1993 attack on the World Trade Center, the 1998 attack on two of United States' African embassies, the 2000 attack on the USS *Cole*, the 9/11 attack in 2001, the 3/11 attack on Madrid in 2004, the 7/7 attack in London in 2005, and the 2002 and 2005 Bali bombings, (not to mention on-going attacks by al Qaeda and its affiliates in Iraq,

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156. Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 sec. 1(a) (Nov. 13, 2001) (noting that there exists "a state of armed conflict" between the United States and terrorists groups, including al Qaeda).

157. A Canadian judge advocate supports this position but argues that some who merely provide financial support for a terrorist organization should be immune from attack: "Mere financial donors or those providing moral support would not be targeted (although they may be arrested), but members of the organization employed in supplying weapons and or carrying out intelligence activities could be attacked." Kenneth Watkins, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives, and Targeted Killings*, 15 Duke J. Comp. & Int'l L. 281, 313 (2005); *see also* Paust, *Self-Defense Targetings*, *supra* note 93, at 271–72.

158. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

159. Transcript of Oral Argument at 17–18, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03–10027).

160. Solicitor General Paul Clement stated, "No, I don't think we could for good and sufficient reasons." *Id.*

161. A former international law advisor to the Army Judge Advocate General stated that although we should not carry out such a targeted killing attack (presumably as a matter of a discretion), international humanitarian law allows such a targeted killing. Geoff Corn, Statement at the ICRC Conference on Customary International Humanitarian Law (Oct. 1, 2005). The actual question to which he responded was whether U.S. military forces could kill Mohammed Khalid, the alleged mastermind behind 9/11, while he was in a swimming pool in Islamabad, Pakistan. *Id.*; *see also* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119 (2005) (arguing that the ICCPR, while not applying extraterritorially, does apply domestically, and hence such a killing would be a violation if committed on U.S. soil, but not if committed abroad).

Afghanistan, Pakistan and Somalia) met the "armed attack" requirement of the U.N. Charter self-defense provision for *jus ad bellum* and fulfill the "protracted" element of armed conflict for *jus in bello*.[162] Even if one characterizes these attacks as "sporadic," their intensity, particularly that of 9/11, they argued, satisfies both the U.N. Charter and the armed conflict requirement to invoke international humanitarian law.[163] Although on 9/11 al Qaeda used U.S. air passenger jets as weapons of mass destruction, it has reportedly been seeking other weapons of mass destruction, including an atomic bomb.[164] Some argue this development and the transnational character of al Qaeda and its affiliates, said to operate in about 100 countries, justified President Bush's declara-

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162. Jane G. Dalton, Professor, Naval War Coll., Presentation at the American Branch of the International Law Association International Law Weekend (Oct. 21, 2005) [hereinafter Dalton, American Branch Presentation]. One might add to this list, among others, the 2002 truck bombing of a Tunisian synagogue, apparently aimed at French and German vacationers; an attack on a French oil tanker off Yemen that same year; the 2003 suicide bombing of civilian targets in Morocco, targeting not only Moroccan nationals but possibly Spanish nationals; the 2003 bombing of the Marriott hotel in Jakarta, *see* McDonnell, *The Death Penalty*, *supra* note 127, at 414–15; and the bombing of Jordanian hotels. Sabrina Tavernise, *Suicide Bombing Leaves 29 Dead in Baghdad Café*, N.Y. TIMES (Nov. 11, 2005), http://www.nytimes.com/2005/11/11/international/worldspecial/11iraq.html?_r=1 (reporting that a group claiming to be al Qaeda took "credit" for bombing three Jordanian hotels and killing over fifty-five people).

163. Dalton, American Branch Presentation, *supra* note 162; *see also* Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 201–02 (2004). Sassoli notes that the Bush-Cheney administration has adopted a "very wide" concept of armed conflict:

> Its instructions to Military Commissions explain that it does not require 'ongoing mutual hostilities, or a confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis . . . so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.'

Sassoli, *supra*, at 202 (quoting DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2: CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION § 5(C) (2003)). "In other words, if I attack a single Montreal police officer with the intent to initiate an armed conflict between French-speaking and English-speaking Canadians, there is, according to the U.S. administration, an armed conflict (and the police may detain me as an enemy combatant without any judicial guarantees)." *Id.*

164. Proponents would also argue that, with modern technology and advanced communications, a transnational non-state terrorist group threatens democratic societies as much, if not more than, hostile states because such a terrorist group may wreak great damage and at the same time be undeterrable. *See, e.g.*, Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 117–19 (1986) ("With the development of small, highly portable and technologically sophisticated weapons, a terrorist group consisting of a very few members can hold a city anywhere in the world hostage—or destroy it.").

tion that the United States is in a global armed conflict, and thus entitled to extend geographic limits on non-international armed conflict and apply international humanitarian law worldwide.[165] As *lex specialis*,[166] the Bush-Cheney administration argued that international humanitarian law supplants international human rights law, thereby permitting targeted killing globally.[167]

The Bush-Cheney approach was overbroad. Although the 9/11 attacks constituted an "armed attack" within Article 51 of the U.N. Charter, publicly available evidence fails to show that the Taliban had effective control of al Qaeda within the meaning of *Nicaragua v. United States*.[168] Consequently, the United States had the right to use proportionate force to stop al Qaeda members in Taliban Afghanistan, but not the right to attack the Taliban and the entire country and, on that basis alone,[169] replace the Taliban regime.

Furthermore, given the protracted nature of the hostilities in Afghanistan (and formerly in Iraq) international humanitarian law has applied in those theatres, but not in the world as a whole.[170] Additionally, the Geneva regime contains no black holes: if an individual is considered an unprivileged combatant and ineligible for prisoner of war status under the Third Geneva Convention of 1949, then he or she defaults to civilian status, like saboteurs, who may be proceeded against criminally or held for security reasons under the Fourth Geneva Convention of 1949.[171] Unless there is evidence

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165. *See* Toni Pfanner, *Scope of Application, Perpetrators of Terror, and International Humanitarian Law, in* INTERNATIONAL LEGAL DIMENSION OF TERRORISM 275, 286 (Pablo Antonio Fernandez-Sanchez ed., 2009).

166. "[L]ex specialis" is short hand for "lex specialis derogat legi generali." Francoise J. Hampson, *The Relationship Between Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body,* INT'L REV. RED CROSS, Sept. 2008, at 549, 558, *available at* http://www.icrc.org/eng/assets/files/other/irrc-871-hampson.pdf. The translation of the full phrase is "the more specific law has precedence over the more general law." *Id.* at 558 n.37.

167. *See, e.g.*, The Nuclear Weapons Case, *supra* note 12, ¶ 25.

168. *See* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint,* 19 CONN. J. INT'L L. 127, 139–40 (2012); Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework, in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 157, 186 (Michael Schmitt & Jelena Pejic eds., 2007).

169. Under the totality of the circumstances, the United States invasion of Afghanistan probably was justified, but not only based upon the actions of al Qaeda, but also on the grounds of humanitarian intervention, particularly the brutal repression of women in Taliban Afghanistan. *See* MCDONNELL, *supra* note 19, at 267–68; *see also, e.g.*, Paust, *Death of bin Laden*, *supra* note 76, at 542–43.

170. Sassoli, *supra* note 163, at 197–98; MELZER, *supra* note 120, at 396.

171. MELZER, *supra* note 120, at 396. Note the authoritative ICRC commentary to Article 5 of the Geneva Convention IV supports this position as follows:

that a member of al Qaeda was involved in an imminent attack against the United States or its allies, a law enforcement approach under the human rights law model should be pursued in those areas.[172] Under human rights law, the government may not deliberately kill without trial "even the worst criminal [except] under the most extreme circumstances."[173] An overly broad definition of "armed conflict" can endanger the civilian population and potentially be a threat to peace, should the United States act in a country without its consent.[174]

> It may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or *irregular combatants*. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler to exclude them from the benefits of the Convention, if such a course had been possible, but the terms espionage, sabotage, *terrorism*, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences (2), that it was *not* advisable to leave the accused *at the mercy of those detaining them*.

ICRC, COMMENTARY TO CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 53 (1949) (emphasis added). *But see* Kretzmer, *supra* note 143, at 209 (noting that "[t]he assumption that terrorists are merely civilians taking a direct part in hostilities might make sense if the hostilities of an international nature were also taking place"). Such apparently is the case in Afghanistan where al Qaeda members are "taking a direct part" with the Taliban fighters against the United States and the new regime there. That analysis might also apply to Iraq, where al Qaeda members have apparently "tak[en] a direct part" in the Iraqi insurgents' efforts against the United States and against the new government. The Iraqi situation had been so chaotic and complex that it had been hard to categorize neatly. For a good description and analysis of the confusing legal nature of the current conflict, see Geoffrey S. Corn, *"Snipers in the Minaret—What Is the Rule?" The Law of War and the Protection of Cultural Property: A Complex Equation*, 2005 ARMY L. 28, 31 (2005).

172. Kretzmer, *supra* note 143, at 212–13.

173. Sassoli, *supra* note 163, at 213. *But see* Luis E. Chiesa & Alexander K.A. Greenawalt, *Beyond War: Justfying Targeted Killings in Law and Morality,* WASH. & LEE L. REV. (forthcoming 2012) (arguing, *inter alia,* that targeted killing may be morally and legally justifiable against extraordinarily dangerous individuals, such as the drug cartel head Pablo Escobar and al Qaeda leader Osama bin Laden, because of the virtual certainty of retaliatory murderous attacks on judges, prosecutors, witnesses, and other innocents should such individuals be arrested).

174. This reasoning suggests that the 2002 Predator drone strike violated international law because United States was not party to any armed conflict in Yemen and never argued it was intervening on the Yemeni government's behalf. *See* MELZER, *supra* note 120; *see also supra* note 20 and accompanying text. Therefore, the strike would only have been justified if resort to deadly force was permitted under the law enforcement approach. Since the CIA has not revealed any details of the strike, it is difficult to determine if the law enforcement approach would have permitted the use of deadly force there.

Apparently, this attack was carried out with the permission of the Yemeni government. Had the United States lacked such permission, only a state that committed an act triggering self-defense under Article 51 of the U.N. Charter would authorize the United States invoking its rights therein to act in individual or collective self-defense. Compare the majority and dissenting opinion in Nicar. v. U.S., 1986 I.C.J. 14, ¶ ¶ 166–77, 195 (June 27) (discussing when a state's support of an armed group rises to the level of armed attack

E. *Advocates of the Robust Self-Defense Argument Justifying Use of Drones Outside Areas of Armed Conflict.*

Admittedly, states that serve as havens for transnational terrorist organizations challenge international security. In states that either are unwilling or unable to stop al Qaeda, the Taliban or "associated forces" outside of armed conflict zones and even if such forces had not launched "armed attacks" from such states (such as Yemen and Somalia), the Obama administration apparently considers that "the inherent right of self defense"[175] permits attacking individuals belonging to such organizations.[176] The Obama administration has thus argued differently from the Bush-Cheney administration to achieve the same results. Unlike the Bush-Cheney administration's characterization, the United States is not in a global war against terrorism per se. Rather, the Obama administration argues that the United States is "in armed conflict with al Qaeda, the Taliban and associated forces."[177] The United States has asserted

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upon the state the group targets); *see also* KITTCHAISAREE, *supra* note 126, at 135–36. Assuming the target of the drone attack was not taking a "direct part" in the hostilities in Afghanistan or Iraq, some commentators have argued that the targeted killing may have violated international law. *But see* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L & FOREIGN AFF. 331, 374–75 (2005) (arguing that as an "enemy combatant," the al Qaeda member killed in the attack had no greater rights than a privileged combatant and therefore was a proper military target under international humanitarian law).

175. Printer, *supra* note 174, at 381–82. The Obama administration has taken the position that it does not have to analyze whether the international law of self-defense applies, irrespective of where the alleged suspected terrorist or terrorist organization is located, in armed conflict or not, stating the following:

> The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that —in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time.

John O. Brennan, Assistant to the President of Homeland Security & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; *see also* Eric Holder, Att'y Gen., Address to Northwestern School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

176. Harold H. Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm. President Obama's counter-terrorism adviser expanded on Koh's discussion, noting that the United States has the right to take unilateral action. Brennan, *supra* note 175; *see also* Holder, *supra* note 175.

177. Koh, *supra* note 176. Legal Adviser Koh explained the administration's view, namely, that the United States is in a non-international armed conflict with al Qaeda and associated forces and that it may strike both in "hot battlefields" as well as in any other country where al Qaeda terrorists are located if such a country is unable or unwilling to

that it can carry out targeted killing operations anywhere members of al Qaeda, the Taliban, and "associated forces" are, unless the host state in question is willing and able to arrest, capture, or kill them.[178]

Professors Paust and Anderson likewise support attacks outside zones of armed conflict on the basis of self-defense.[179] Professor Paust analogizes to the famous 1837 *Caroline* case, arguing that England, which then controlled Canada, had the right of self-defense to attack Canadian insurgents who were engaged in armed attacks against the British government and were using U.S. territory as a safe haven.[180] The *Caroline* rule is contained in the exchange of diplomatic notes between U.S. Secretary of State Daniel Webster and British Minister Lord Ashburton, consisting largely of Webster's language justifying the exact measure of self-defense (at least in this context) only when the "'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"[181] Paust asserts that the only question at issue there was whether the manner of the attack comported with the international law of self-defense.[182] In the event, Paust argues that the customary law of self-defense permitted Britain to use armed force to counter armed attacks engaged in by the insurgents,[183] that this customary law predating the U.N.

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capture the al Qaeda members. *Id.*; *see also* Holder, *supra* note 175. Koh insists that the Obama administration's formulation that the United States in an "armed conflict with the Taliban, al Qaeda, and associated forces," materially differs from the Bush-Cheney administration's "Global War on Terrorism" in that Obama's focuses only on transnational terrorists, presumably excluding "domestic" ones. Koh, *supra* note 177. *But see* McDonnell, *supra* note 19, at xvii–xviii. Koh's argument about precluding solely local terrorists from attack apparently did contribute to the Obama administration's ban on CIA attacks on unidentified suspected terrorists. *See* Entous et al., *supra* note 33. The ban on "signature strikes," however, has apparenly been lifted. Entous et al., *U.S. Relaxes Drone Rules*, *supra* note 71.

178. Koh, *supra* note 176. The Obama administration seems to suggest that there is no non-international armed conflict that extends to any state in the world that is either unwilling or unable to capture transnational terrorists. *See id.*; *see also* Holder, *supra* note 175. Holder also asserts that targeted killing of suspected terrorists do not constitute "assassinations" but lawful combat killings. Holder, *supra* note 175; *cf.* s*upra* note 73 and accompanying text (discussing whether and when targeted killings should be deemed assassinations).

179. Paust "disagree[s] with the Obama Administration that (a) we are at war with al Qaeda, and (b) that one can attack a state as such that is unwilling or unable to control terrorists from engaging in armed attacks emanating from their territory." E-mail from Jordan Paust to author (Dec. 22, 2011) (on file with author).

180. Paust, *Self-Defense Targeting*, *supra* note 93, at 241–44.

181. *British-American Diplomacy: The Caroline Case*, *supra* note 94.

182. Paust, *Self-Defense Targeting*, *supra* note 93, at 241–42.

183. *Id.*

Charter continues to run with the Charter, and that state practice reaffirms the continuing custom.[184]

Professor Anderson and Benjamin Wittes each argue that if terrorists are in a state unable or unwilling to arrest or capture them, then self-defense permits the U.S. to attack them, including using Predator or Reaper Drones to carry out a targeted killing operation.[185] Professor Anderson relies upon Abraham Sofaer, Legal Adviser to the U.S. State Department in the second Reagan administration and the first Bush administration, who asserted "the right of a state to strike terrorists within the territory of another State where the terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to demand that the attacks be stopped."[186] Anderson recognizes that his position is controversial.[187]

F. *Alston's Argument Opposing the Robust Defense Argument*

As attractive as the self-defense argument sounds, it falls more squarely within *jus ad bellum* (the law governing the right to use armed force in the first place) rather than *jus in bello* (the law governing the manner in which armed force may be used during the conflict). Philip Alston, the Rapporteur for the U.N. Human Rights Council, explains that "[w]hether the use of force is legal is a question that usually arises *at the start of an armed conflict* [*jus ad bellum*], while the law applicable to the conduct of that armed con-

184. *Id.* at 249, 252–53, 255. Professor Paust does not actually use the term "custom" but rather "general patterns of legal expectation," which appears substantially equivalent to the *opinio juris* element of customary international law. *Id.* at 241.

185. Anderson, *supra* note 18 ("Use of force is justified against terrorists anywhere they set up safe havens, including in states that cannot or will not prevent them . . . ."); Benjamin Wittes, Senior Fellow and Research Director in Public Law, Brookings Inst., Presentation at the American Branch of the International Law Association International Law Weekend: Is Targeted Killing Legal? (Oct. 23, 2010). Professor Anderson asserts that there is "a broader legal category [of self-defense] than 'armed conflict' (a subset of it), self-defense might consist of tiny strikes using, for example, covert CIA actors against terrorists, yet not rising to the full level of sustained fighting that crosses the legal threshold into 'armed conflict.' It might be invoked in places and ways outside of traditional theaters of armed conflict such as Afghanistan, Pakistan, or Iraq." Anderson, *supra* note 18.

186. *Id.*

187. *See* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a "Legal Geography of War"* 8 (Am. Univ. Wash. College of Law, Res. Paper No. 2011-16, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783. *But see* Paust, *Self-Defense Targetings*, *supra* note 93, at 238–41 & n.3.

flict applies *throughout it* [*jus in bello*]."[188] He notes that different proportionality rules apply to *jus ad bellum* and *jus in bello*:

> The limitations on each are distinct. Proportionality under self-defence requires States to use force only defensively and to the extent necessary to meet defensive objectives, whereas the test for proportionality under IHL [International Humanitarian Law] [*jus in bello*] requires States to balance the incidental harm or death of civilians caused by an operation to the military advantage that would result.[189]

He also explains how the principle of necessity under self-defense in *jus ad bellum* differs from its counterpart in *jus in bello*:

> Necessity under self-defence requires a State to assess whether it has means to defend itself other than through armed force, while necessity in international humanitarian law requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of international humanitarian law [*jus in bello*].[190]

Lastly, Alston notes that state and individual responsibility differ depending on whether there is a violation of the law of self-defense (under *jus ad bellum*) or a violation of international humanitarian law (under *jus in bello*): "Finally, the 'robust' self-defence approach fails to take into account the existence of two levels of responsibility in the event that a targeted killing for which self[-]defence is invoked is found to be unlawful."[191] If a state commits an act of aggression in violation of the constraints on self-defense, making a disproportionate response, for example, then the state has to make reparation for the act of aggression, and the individual commander who ordered the attack might be criminally responsible for the crime of aggression.[192] On the other hand, a state and commander who carry out a targeted killing in violation of international humanitarian law are subject to a different set of international legal obligations. For example, a commander who targets a civilian who has never ordered or planned attacks or in any other way participated in hostilities may be criminally responsible for a war crime under Article 8 of the Rome Statute of the International

188. Report on Extrajudicial and Summary Killings, *supra* note 30, ¶ 43 (emphasis added) (citations omitted).

189. *Id.*; *see also* O'Connell, *supra* note 71, at 15 (citing D.R.C. v. Uganda, 2005 I.C.J. 168); Reinhold, *supra* note 94, at 248.

190. Report on Extrajudicial and Summary Killings, *supra* note 30, ¶ 43.

191. *Id.*

192. The Review Conference of the International Criminal Court recently adopted a definition of a crime of aggression, albeit a highly qualified one. Kress & von Holtzendorff, *supra* note 147.

Criminal Court.[193] The state would be responsible under AP I, Article 51 and its customary law analog, prohibiting attacks on civilians as such. The lesson here is that mixing and matching *jus ad bellum* and *jus in bello* confuses the two separate international legal regimes.[194]

Alston concluded: "The legality of a specific killing depends on whether it meets the requirements of international humanitarian law [*jus in bello*] and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts)."[195] Drone-employed targeted killing falls within *jus in bello* rather than within *jus ad bellum,* because it amounts to a tactic—a method and means of carrying out warfare.

In the context of the tribal areas of Pakistan, it is hard to disagree with Professor Paust, who noted:

> [C]ontinuing al Qaeda and Taliban armed attacks planned, initiated, coordinated, or directed from inside Afghanistan and Pakistan on U.S. military personnel in Afghanistan who are engaged in an international armed conflict are necessarily part of such an armed conflict and that the *de facto* theatre of war has expanded into parts of Pakistan at least since 2004.

Nevertheless, as well reasoned as the *Caroline* rationale is, it says nothing about the modality of conducting hostilities. Furthermore, *Caroline* applies only in narrow circumstances,

> [A]llow[ing] a target state to act unilaterally against a planned terrorist act emanating from the territory of another state, if it were clear that either of two conditions obtained: (1) the state from whose territory the action was emanating could not, even with the information supplied to it by the target, respond *in timely fashion to prevent the terrorist act because of shortage of time;* or (2) the state from whose territory the action was emanating,

193. *See* Rome Statute, *supra* note 115, art. 8(b)(i) (criminalizing those who '[i]ntentionally direct[ ] attacks . . . against individual civilians not taking direct part in hostilities"). Afghanistan acceded to the Rome Statute of the International Criminal Court in 2003; the Yemen Parliament voted to ratify the Rome Statute, but later reversed itself. Nasser Arrabyee, *Yemen Parliament Recants Vote for ICC,* GULF NEWS (Apr. 9, 2007), http://gulfnews.com/news/gulf/yemen/yemen-parliament-recants-vote-for-icc-1.171658. Iraq, Pakistan, and Somalia have not ratified.

194. *See* Report on Extrajudicial and Summary Killings, *supra* note 30, ¶ 43. Justice Higgins of the International Court of Justice, stated in the Nuclear Weapons case as follows: "It is not permitted in the choice of weapons to cause unnecessary suffering to enemy combatants, *nor to render their death inevitable,* nor to aggravate their sufferings when disabled." The Nuclear Weapons Case, 1996 I.C.J. at 585, ¶ 12 (Higgins, J., dissenting) (emphasis added).

195. The Nuclear Weapons Case, 1996 I.C.J. ¶ 44.

> could not, even with adequate notice, act effectively *to arrest the terrorist action.*[196]

This observation reflects the restrictive language of *Caroline*, which presumptively discourages use of force against a state with which the victim state is "at peace." As British Minister Ashburton stated, only "a case of 'strong overpowering necessity' [would] satisfy Webster's 'instant, overwhelming, leaving no choice of means and no moment for deliberation' test."[197] If there were reliable evidence that alleged terrorists were planning an imminent attack, then resort to deadly force might be permissible under either anticipatory self-defense or the law enforcement approach.[198] Otherwise, arrest, preferably by a broad international coalition, would be permissible.[199]

The robust self-defense view appears to ignore the human rights revolution that has institutionalized far greater respect for individual rights than ever before. Aside from human rights directly influencing humanitarian law through the Martens clause,[200] through

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196. John E. Noyes, *The Caroline: International Law Limits on Resort to Force*, *in* INTERNATIONAL LAW STORIES 263, 301 (John E. Noyes et al. eds., 2006) (quoting YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 247, 249 (4th ed. 2005)) (emphasis added).

197. Noyes, *supra* note 196, at 290–91 (quoting Minister Ashburton's letter arguing that Britain had complied with Webster's *Caroline* test); *see also supra* note 94 and accompanying text.

198. If a state is unable to prevent non-state actors within its borders from threatening the United States (or another state for that matter) and the threat fulfills the stringent requirements of anticipatory self-defense, only then would United States have the right to make a proportionate attack. Absent such and where the haven state is essentially powerless to control the threatening non-state actor, the United States, preferably with an international coalition, at most could engage in a law enforcement type action within the haven state territory, once again limited by the principle of necessity, a fairly high threshold but less than that for anticipatory self-defense. Under human rights law, law enforcement may use deadly force only in egregious circumstances where the lives of U.S. troops or civilians are imminently threatened.

199. *Cf.* Antonio Cassese, *Ex Iniuria ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 29 (1999). Admittedly, this is a particularly challenging problem. Putting troops on the ground in a state characterized as "failed" could rightly be interpreted as a major violation of that state's sovereignty. Even if the purpose is to arrest rather than kill, the perceived violation of state sovereignty is significant. On the other hand, carrying out a targeted killing operation with a drone attack is an even greater violation. *But see* Berger & Tiedemann, *supra* note 67, at 14 (noting that Pakistan objected more forcefully to U.S. raids in the Pakistani tribal areas than to U.S. drone strikes). The issue resembles that of humanitarian intervention and a similar fact-specific analysis is required to determine whether gathering a broad coalition to carry out a law enforcement operation on a failed state's territory is justified under the core principles of international law, if not the precise letter of the U.N. Charter. *See infra* notes 208–226 and accompanying text.

200. Additional Protocol I to the Geneva Conventions of 1949 incorporates the Martens clause in its first substantive article: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and

Articles 1 and 72 of AP I,[201] and through the preambular paragraphs of AP II,[202] human rights influences humanitarian law indirectly:

> [I]nternational human rights norms have an expressive quality that affects the social conduct of groups and organizations independent of measures of judicial enforcement. . . . The infringement of widely held norms often causes anger and protest, and sometimes this anger and protest triggers a cycle of positive legal consolidation of these norms.[203]

For example, most international law scholars regard the prohibition of extrajudicial killing as having crystallized into a peremptory norm of international law.[204] Under the International Convention on Civil and Political Rights and other human rights treaties, the protection of life is non-derogable even in times of public emergency.[205] Furthermore, most nations have abolished the death

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authority of the principles of international law derived from established custom, *from the principles of humanity and from dictates of public conscience*." A.P. I, *supra* note 3, art. 1(2) (emphasis added).

201. From the section dealing with persons under the power of a party to armed conflict, Article 72 provides, as follows:

> The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law r*elating to the protection of fundamental human rights during international armed conflict.*

Id. art. 72 (emphasis added).

202. The preamble of A.P. II includes the Martens Clause and the following: "Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person." A.P. II, *supra* note 11, pmbl.

203. Volker Heins, *Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy*, 6 German L.J. 845, 850 (2005). The Tactical Directive may be a response to such concerns. *See supra* notes 300–302 and accompanying text; *see also supra* note 149 and accompanying text (noting the work of the ECtHR in applying human rights norms to counter-terrorism cases, arguably in non-international armed conflict). *But see* G.I.A.D. Draper, *Humanitarian Law and Human Rights*, Acts Juridica 193 (1979), *excerpted in* Henry J. Steiner et al., International Human Rights in Context 398 (3d ed. 2008) (stating that "[t]he two regimes [humanitarian law and human rights law] are not only distinct but diametrically opposed").

204. *See supra* note 78.

205. *See* Jean Marie Henckaerts, *Concurrent Application of Human Rights Law: A Victim's Perspective*, *in* International Humanitarian and Human Rights Law 237, 257 (Robert Arnold & Noelle Quenivet eds., 2008) (noting that non-derogable rights apply even during armed conflict); *see also, e.g.*, ICCPR, *supra* note 79, arts. 4(2), 6(1). Admittedly, the doctrine of *lex specialis* gives priority to certain humanitarian law rules during armed conflict immunizing combatants who kill other combatants under humanitarian law and taking such killings out of the category of "arbitrary" killings proscribed by Article 6.1 of the ICCPR. See *supra* note 167 and accompanying text for a brief discussion of *lex specialis*. *But see generally* Conor McCarthy, *Legal Conclusion or Interpretive Process? Lex Specialis and the Applicability of International Human Rights Standards*, *in* International Humanitarian and Human Rights Law, *supra*, at 121 (arguing that *lex specialis* as a rule of construction should undergo robust context specific interpretation rather than be applied mechanically).

penalty even during war.[206] The claim that a state may employ a weaponized drone to kill everyone in a house outside an area of armed conflict defies human rights norms over sixty years in the making.[207]

G. *Analogizing Humanitarian Intervention to the Unwilling/Unable Host State Challenge*

Yet even absent Security Council authorization, states attacked by terrorist organizations may seek to use armed force in such host states. The argument to do so resembles the doctrine of humanitarian intervention. There, proponents argue for foreign military intervention in a state to stop gross human rights abuses from being committed within the state. Here, proponents argue for foreign military intervention in a host state to stop terrorist organizations from using the host state as a haven to launch attacks against the victimized state. In both situations, the foreign intervenors' use of force generally violates the letter of U.N. Charter Articles 2(4), 42, and 51. These articles prohibit the use of force absent U.N. Security Council authorization under Chapter VII or absent an armed attack by the host state.

Neither basis for intervention has risen to the level of customary international law so as in effect to nullify, or redefine,[208] the U.N. Charter in these circumstances. Antonio Cassese argued, however, that there is emerging customary international law that would validate humanitarian intervention under highly qualified conditions.[209] Under his formulation, which was generally codified in the Responsibility to Protect (R2P),[210] (1) the host state is either

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206. *Abolitionist and Retentionist Countries*, AMNESTY INT'L, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited June 13, 2012) (listing 141 countries as having abolished the death penalty "in law or practice" and 57 countries as having retained the death penalty).

207. Kretzmer, *supra* note 143, at 201; MCDONNELL, *supra* note 19, at 104. *But see* Paust, *Self-Defense Targetings*, *supra* note 93, at 263–69.

208. *See* Vienna Convention on the Law of Treaties, *supra* note 109, art. 31.3(b) (authorizing the resort to subsequent state practice in treaty interpretation).

209. Cassese, *supra* note 199, at 26–27.

210. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT XI (2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf. The Responsibility to Protect (R2P) has been adopted by heads of state. *See* 2005 World Summit Outcome, ¶¶ 138–40, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); *see also* U.N. S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009); Cassese, *supra* note 199, at 27; Christine M. Chinkin, *Kosovo: A "Good or Bad War"*, 93 Am. J. Int'l L. 841, 844 (1999) ("Does not humanitarian intervention entail a responsibility to ensure that the methods used are appropriate for the achievement of the objectives sought?"); Richard A. Falk, *Kosovo, World Order, and*

unable or unwilling to stop the gross human rights violations; (2) all peaceful measures to end the abuses have been exhausted; (3) the Security Council is paralyzed by virtue of one or more of the five permanent (P-5) members' veto power; (4) the intervention is being carried out by a broad coalition of states and "not [by] a single hegemonic power" or "such a power with . . . [an] ally";[211] (5) the intervention is being conducted solely to end the gross human rights abuses, not for an ulterior purpose; (6) the intervention has been approved or largely unopposed in the U.N. General Assembly; and (7) the intervenors' use of armed force is narrowly proportioned to end the human rights abuses, with concomitant strict observation of international human rights and humanitarian law.[212]

Even under Cassese's sharply tailored criteria, humanitarian intervention absent Security Council authorization has not yet crystallized into customary international law, and there is debate whether humanitarian intervention and R2P constitute even "evolving custom."[213] Nonetheless, Cassese's formulation and R2P reflect a more internationally democratic approach than the current arbitrary system permitting a single P-5 member to veto, for example, any international military rescue to stop another holocaust, and may satisfy basic morality in the face of a humanitarian catastrophe. A coalition of states complying with his formulation almost certainly mitigates, if not absolutely cures, the international law violation. Consequently, the analysis of humanitarian intervention provides some guidance in confronting states that are either

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the Future of International Law, 93 Am. J. Int'l L. 847, 856 (1999) ("[T]he humanitarian rationale is also sustained or undermined by the extent to which tactics of warfare exhibit sensitivity to civilian harm . . . .").

211. Cassese, *supra* note 199, at 27; *see also* Paust, *Use of Armed Force*, *supra* note 74, at 545–47 (regarding permissible regional action).

212. Cassese, *supra* note 199, at 27. The National Atlantic Treaty Organization's (NATO) aerial bombardment of Milosevic's Serbia is often pointed to an example of a "proper" humanitarian intervention. Professor Sarah H. Cleveland characterized how that intervention was considered by international lawyers: "Illegal by some, illegal but legitimate by many, and legal [by others]." Panel Discussion at the American Branch of the International Law Association International Law Weekend: Libya and Lawfulness (Oct. 21, 2011) [hereinafter Libya and Lawfulness].

213. Panel Discussion at the American Branch of the International Law Association International Law Weekend: R2P Comes of Age? (Oct. 21, 2011) (panelist Prof. David P. Stewart stated that the evidence of R2P evolving seemed to suggest movement both for and against any such evolution; panelist Prof. John F. Murphy stated that the evidence indicated movement away from R2P gaining customary law status); *see also* The Responsibility to Protect and International Law 217–22 (Alex J. Bellamy et al. eds., 2011).

unable or unwilling to stop a transnational terrorist organization from operating on their soil.

For example, assume that a host state permits a terrorist organization to conduct training of thousands of terrorists on its territory and that the terrorist organization has committed, or vows to commit, crimes against humanity against the civilian population of another state. Such training does not amount to an armed attack and probably does not rise to the level of imminency for anticipatory self-defense either. If the host state is unable or unwilling to stop terrorist training on that scale, if all peaceful means have been exhausted, and if a P-5 member veto (or almost certain veto) blocks the Security Council from authorizing force, the victim state or potential victim state should be able to use some degree of force to thwart such a threat.

On the other hand just as Cassese recognized that his formulation might open a Pandora's Box and permit strong countries to abuse their power, there is grave danger that a powerful victim state will abuse its power in using force against terrorist organizations operating in such host states. To cabin that power, but also to recognize that sometimes the arbitrary exercise of the P-5 member veto may prevent a state from answering a dire threat to its security, requires the application of a set of requirements resembling that of Cassese's and R2P on humanitarian intervention.

Comparable to gross human rights violations, the magnitude of the acts or threatened acts must come close to that of "an armed attack" within the meaning of the U.N. Charter, if not yet reaching that threshold. All peaceful measures must have been exhausted, namely, diligent law enforcement efforts have been made in good faith and are generically unable to effectuate an arrest. There must be more than an alleged terrorist operating in a remote, hard-to-reach area. After all, if a dangerous criminal like Ted Kaczynski, the Unabomber,[214] were hiding out in a remote area of the United States that was difficult for law enforcement to get into, that would hardly justify law enforcement in shooting him from an airplane or launching a Hellfire missile at him from a Predator Drone. As a "last resort . . . [m]ilitary [humanitarian] intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored[.]"[215]

214. *After Kaczynski Was Seized, Bomb Blew Up Near Cabin*, N.Y. TIMES (July 20, 1996), http://www.nytimes.com/1996/07/20/us/after-kaczynski-was-seized-bomb-blew-up-near-cabin.html?ref=theodorejkaczynski.

215. ICISS, *supra* note 210, at XII.

From an international law perspective, the decision to carry out a targeted killing operation in a state that either is unable or unwilling to stop a terrorist organization should not rest solely with a hegemonic power or with the consent of a close ally. It should be that of a broad coalition. It might be objected that a state has the right, under the U.N. Charter, to act in individual self-defense and that a state should have the absolute right to make a determination of self-defense on its own. On the other hand, a state does not have the express right under the U.N. Charter to intervene in another state that has neither carried out an armed attack directly (nor indirectly through terrorist organizations), nor threatened to do so.[216] Furthermore, a broad, diverse coalition is the best insurance against a powerful victim state going beyond a narrowly proportioned use of force in these circumstances.[217]

Given the exceptional character of an attack on a state that has neither attacked nor threatened to attack the United States, the targeted killing operation must observe a higher standard than the collateral damage (proportionality) rule and aim to prevent all non-combatant casualties.[218] This is analogous to the exceptional proportionality requirement and the sole purpose requirement of humanitarian intervention. As a humanitarian intervention, the state is obligated to go beyond the normal rules of armed conflict. Given the exceptional situation of operating in a state that is either unable or unwilling to arrest or capture terrorists on its soil, but which has neither carried out an armed attack nor used terrorists to do so, states like the United States should comply with exceptional standards here as well. This would require operations more closely resembling the Navy Seals' operation against Osama bin Laden than the routine use of weaponized drones with explosive force of a Hellfire missile.[219] Admittedly, this would put members

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216. *See* Nicar. v. U.S., 1986 I.C.J. 14, 14 (June 27). One might argue that the 9/11 attacks satisfy the U.N. Charter definition of "armed attack." Al Qaeda and its affiliates, however, are so loosely organized that attributing those attacks to all who later take up the banner (at least initially more as a matter of prestige than as a matter of policy or loyalty to a top-down military organization) is far too attenuated.

217. *Cf.* Libya and Lawfulness, *supra* note 212 (consensus of the panel that a broad coalition of states carrying out a humanitarian intervention is the best way to insure that the intervention is not a pretext.). Note that the Obama administration claims authority to act unilaterally in failed or unwilling states. *See* Brennan, *supra* note 175.

218. *See generally* Chinkin, *supra* note 210; Falk, *supra* note 210; Kretzmer, *supra* note 143 (arguing that because of the human rights revolution, a state may resort to a targeted killing, in non-international armed conflict, only if, among other things, non-combatant civilians will be spared).

219. This is not to suggest that the United States or any other nation facing transnational terrorism should heavily rely on special forces who often carry out targeted killing

of the armed forces at risk, but it is submitted that a more limited use of armed force will ultimately reduce the cycle of violence carried out by systematic employment of drone attacks.

Like humanitarian intervention, such an intervention to stop a transnational terrorist organization can hardly be said to have ripened into a customary norm such as to nullify or modify the U.N. Charter. Some will surely argue that the post 9/11 international law regime has created an emerging norm to permit the use force against terrorist organizations in states that are either unwilling or unable to stop such organizations from operating on their territory.[220] But in the end, such attempts are unconvincing.[221] On the other hand, powerful states with high technology such as weaponized drones will be sorely tempted to (and have given into that temptation) to use them against perceived outstanding threats, even if such threats do not fit the definition of armed attack under Article 51 or armed conflict under the Geneva Conventions and their Protocols. Requiring such states to comply with criteria that are analogous to Cassese's and R2P's humanitarian intervention criteria will likely eliminate the worst abuses and will limit the use of weaponized drones to the truly exceptional case. Recognizing the inherent arbitrariness of the veto possessed by each of the five permanent Security Council members, Cassese has constructed criteria that create a more inclusive and ideologically neutral process for dealing with an international human rights catastrophe. Likewise, a narrow exception for foreign intervention in the face of dire threats that do not reach a level of imminence or armed attack should be permitted only where it would fit within a democratic and rights based regime not paralyzed by the veto of one of the P-5 members of the Security Council. The analysis would essentially be whether a democratically founded and rights-based Security Council[222] would have been compelled to authorize the use of force under its Chapter VII powers.

This unquestionably limits the United States in what steps it may take in dealing with terrorist organizations using states as havens. This rejects the unilateral action to carry out targeted killings

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attacks. On the contrary, the author thinks such attacks should be limited to the extreme case.

220. *See, e.g.*, Paust, *Self-Defense Targeting*, *supra* note 93; E-mail from Paust to author, *supra* note 179 (characterizing such organizations as "non-state armed attackers").

221. *See, e.g.*, Report on Extrajudicial and Summary Killings, *supra* note 30, ¶¶ 43–44.

222. Professor Cleveland, for example, suggests that the five permanent member veto be replaced by a super-majority requirement in the Security Council. Libya and Lawfulness, *supra* note 212.

attacks outside of armed conflict, requires a broad coalition of states, a heightened collateral damage rule akin to that of the European Court of Justice, and a higher requirement for exhaustion of peaceful remedies.

In general, this approach rejects the notion that the United States has apparently adopted that terrorists have an "elongated imminency" test,[223] which essentially makes them continuous targets even outside of armed conflict.[224] This rejects the notion that geography does not matter, that terrorists can be targeted virtually anywhere, especially if the host state is unwilling or unable to arrest or capture them. It does give the United States considerable leeway to go after the most dangerous terrorists and to encourage states around the world to engage in law enforcement and, sometimes, military action against them. If states join a broad coalition of states, and the other criteria are satisfied, this approach gives countries like the United States the right to use a limited amount of force in extreme cases.[225] This approach requires international cooperation and rejects the proposition that, outside of armed

223. Attorney General Holder asserts that "'imminent threat' incorporates the *relevant window of opportunity* to act[,] the possible harm that missing the window would cause civilians, and the likelihood of heading off *future* attacks against the United States." Holder, *supra* note 175 (emphasis added). The language "relevant window of opportunity" and heading off "future attacks" (presumably not immediate ones), tells us that the United States claims it may kill a suspected terrorist outside armed conflict zones even when the threat is far from imminent. One might make an exception for the unquestioned leader of a deadly terrorist organization like Osama bin Laden. The difficulty is that there is no limiting principle on the "elongated imminency" test. It could be applied to anyone in the terrorist organization or even to the so-called lone wolf who is merely inspired by a terrorist leader.

224. Professor Paust argues that we should answer this question by hypothetically looking at a moving picture rather than a snapshot of the alleged terrorist to determine if he or she is posing an imminent threat. *See* Paust, *Self-Defense Targeting*, *supra* note 93, at 572 n.16; Paust, Civilian Casualties, *supra* note 123. Such an approach appears to be taking the ICRC's continuous combat function definition of "directly taking part in hostilities" and applying it to areas outside of armed conflict. As appealing as the motion picture metaphor is, that approach risks an overbroad authorization for the use of force.

225. For example, suppose a state was unable to stop hundreds of members from an affiliate of al Qaeda from training on its soil. Such training would not amount to an armed attack, and not necessarily to an imminent armed attack, either. Yet such training is certainly threatening. The United States should first attempt to get the host state to stop the training. Failing that, the United States should attempt to get the U.N. Security Council to authorize the use of force against the terrorist organization in the host state. Failing that, the United States should attempt to assemble a broad coalition of states to deal with the terrorist threat. A broad coalition of states could, after trying all peaceful means to stop the training, launch a narrowly proportioned attack against the training operation.

conflict, the United States can order such an attack on its own (and especially not through its espionage agency, the CIA[226]).

III. Employing Attack Drones to Carry Out Targeted Killing of Suspected Islamic Terrorists—An Advance in World Public Order?

Under certain limited circumstances, using attack drones to target and kill a person complies with international law.[227] From a tactical perspective, both the Bush-Cheney and Obama administrations have considered the drone program a huge success; dozens of top al Qaeda and Taliban leaders have been killed, others remain under the constant watch of the attack drones.[228] The terrorists' havens in the tribal areas of Pakistan and in the remote, mountainous regions of Afghanistan are no longer safe. This came about with no loss of U.S. troops. Both the Bush-Cheney and Obama administrations endorse the drone program. Members of Congress have blessed it as well.[229]

Closer examination of the employment of drones to kill an individual previously identified by name calls for a different conclusion. In brief, this Section examines whether the United States' current employment of drones for targeted killing operations advances "world public order." Professors McDougal, Lasswell, and Chen identified this principle, noting that "[o]ur overriding aim is to clarify and to aid in the implementation of a universal international order of human dignity."[230] In the context of armed conflict, they acknowledged that "[t]he constructive use of the military instrument for collective security" is necessary "for the maintenance of minimum public order," but noted that "a general community aspiring toward human dignity values must seek to

226. For a brief discussion setting forth the reasons why the CIA should not be entrusted with carrying out targeted killing drone attacks, see *supra* note 63.

227. Targeted killings carried out against combatants or those carrying out a continuous combatant function in zones of armed conflict like Afghanistan, assuming the requirements of proportionality and military necessity are met, comply with humanitarian law.

228. There are reports that al Qaeda is moving to urban areas, which are "immune to drones," according to one Western diplomat. *See, e.g.*, Ali K. Chishti, *Al Qaeda Shifting to Pakistan's Urban Areas*, Daily Times (Pakistan) (Aug. 25, 2010), http://www.dailytimes.com.pk/default.asp?page=2010\08\25\story_25-8-2010_pg7_20. Some have argued that five years ago the drones pushed Osama bin Laden to Abbottobad, better enabling him to be killed. *See id.*; Pam Benson, *Bin Laden Documents: Fear of Drones*, CNN Security Clearance (May 3, 2012), http://security.blogs.cnn.com/2012/05/03/bin-laden-documents-fear-of-drones.

229. *See* Bone & Bolkcom, *supra* note 36, at 3.

230. Myres S. McDougal, Studies in World Public Order 16 (1986); Myres S. McDougal et al., Human Rights and World Public Order 236 (1980).

minimize the employment of such violence and coercion . . . , "[231] [using them only as] "a *last resort*."[232]

In this context, advancing world public order resembles legal philosopher John Rawls' most original contribution, "The Veil of Ignorance."[233] Rawls assumes that all relevant actors do *not* know their "place in society, . . . class position or social status, [their personal wealth], [their] intelligence and strength [,] . . . the circumstances of their own society, . . . its economic or political situation[,] or the level of civilization or culture it has been able to achieve."[234] The principle he espouses, therefore, requires the special interests of all groups in society (or here in the international community) be considered equitably in reaching a rule that applies to all.[235]

Rawls suggests that, in determining whether a victim state may use force within the territory of a failed or unwilling host state, one needs to assume the status of all stakeholders and attempt to reach a just solution.[236] In the context of weaponized drones, we should metaphorically stand in the shoes, not only of involved highly industrialized states, such as the United States and the North Atlan-

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231. McDougal et al., *supra* note 230, at 236. The approach of Yale University, where McDougal taught, has been criticized for the vagueness of its standard and, consequently, for its potential abuse by partisan interpreters. *See* Richard Falk, *Charybdis Responds: A Note on Treaty Interpretation*, 63 Am. J. Int'l L. 510, 512 (1969). Yet the purpose of such an approach is hard to dismiss, particularly when applied to those who advocate a right to use force on foreign territory in the absence of an armed attack by the foreign state itself. *See* Myres S. McDougal & Florentine Feliciano, Law and Minimum Public World Order 122 (1961).

232. McDougal et al., *supra* note 230, at 236 (emphasis added).

233. John Rawls, A Theory of Justice 118 (revised ed. 1999).

234. *Id.*

235. Professor D'Amato criticizes Rawls' philosophy as being too simplistic as applied to international law rather than to a single community or nation. *See generally* Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 Denv. J. Int'l L. & Pol'y 525 (1975). D'Amato's mainly criticizes Rawls' position on greater economic equality, as well as his generalizations about the use of armed force. *Id.* at 532–33. On the other hand, the challenge here is to articulate principles that policy makers should consider *in addition to* the minimum set of obligations that the law dictates. Aside from the basic moral principle to uphold life and to use military force only as a last resort, Rawls provides a more nuanced texture, considering the rights, perspectives, and interests of all stakeholder by hypothetically removing the interests of all. Rawls, *supra* note 233, at 118; *cf.* Ronald Dworkin, Taking Rights Seriously 88 (1978). Similarly, Amartya Sen criticizes Rawls for focusing on a "given people." Amartya Sen, The Idea of Justice 71 (2009). Sen notes, however, that "each country, or each society, may have parochial beliefs that call for more global examination and scrutiny, because it can broaden class and type of questions, and because factual presumptions that lie behind particular ethical and political judgements can be questioned with the help of the experiences of other countries or societies." *Id.* The author's approach attempts to embrace in part Sen's critique.

236. Rawls, *supra* note 233.

tic Treaty Organization nations, but also of (1) those developing states upon whose soil military actions are ongoing or contemplated, such as Afghanistan, Iraq, Pakistan, Somalia, and Yemen, (2) ethnic groups and peoples in such states such as the Pastuns and Tajiks, (3) the greater Islamic world, and (4) the international community as a whole. If we were nationals of Pakistan, Somalia, or Yemen, would we necessarily conclude that because our government is unwilling to root out transnational terrorists or is dysfunctional or non-existent, at least in some parts of the state, every other country that has been threatened by agents of terror could kill suspected terrorists on our soil? Using Rawls' veil of ignorance, we would expect some legal limits.[237] Even the term "failed state" may be only a rationalization for using military force in a country without its or its people's consent.[238] Something more than merely the fact that a state is unwilling or is failed, or partially failed, should justify a foreign state's use of deadly force.[239]

Granted, the drones have killed Taliban and al Qaeda leaders and supporters, and polls suggest that some residents, particularly those intimidated by the Taliban or al Qaeda, are not opposed to the drone attacks.[240] The drones, however, have also caused out-

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237. This argument is supported by the Yale School of treaty interpretation, which takes the position that where there is a gap in treaty law, the treaty should be interpreted so as to advance public world order. *See generally* MYRES S. MCDOUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967). A stated right of a foreign state to use armed force rather than law enforcement approaches in a failed state is surely presumptively contrary to advancing world public order.

238. AKPINARLI, *supra* note 34, at 230.

239. See *supra* notes 94, 180–187, 196 and accompanying text for a discussion of the *Caroline* case and its applicability to extraterritorial use of armed force against suspected terrorists. The author is indebted to Professor Mary Ellen O'Connell of Notre Dame Law School for suggesting the notion of last resort in the context of failed states. Panel Presentation on Targeted Killing, American Branch of the International Law Association International Law Weekend (Oct. 23, 2010) (the debate between Benjamin Wittes and Professor O'Connell can be viewed at http://www.lawfareblog.com/2010/10/wittes-v-oconnell-on-targeted-killing-and-drones); *cf.* Noyes, *supra* note 196, at 301 n.134 (quoting JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 179–80 (2002)) ("Necessity can excuse the wrongfulness of an illegal stat act, such as an illegal armed incursion into foreign territory [but] may be invoked only in narrow circumstances . . .[:] '(a) it the only means for the State to safeguard an essential interest against a *grave and imminent peril*; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.'") (emphasis added).

240. A Pew Global Research Poll indicated that 32% of Pakistanis approved of drone strikes. PEW RES. CTR., CONCERN ABOUT EXTREMISTS THREAT SLIPS IN PAKISTAN 12 (2010), *available at* http://pewglobal.org/files/pdf/Pew-Global-Attitudes-2010-Pakistan-Report.pdf. On the other hand, a New America Foundation survey indicated that more than half of respondents believed that the drone strikes killed mainly civilians and that two-thirds of

rage. Taliban leaders have called for two suicide attacks for every drone attack.[241] At least one study shows a direct correlation between drone targeted killings and corresponding suicide bombing attacks.[242] Rather than being confined to the remote tribal districts, many such attacks have taken place in the heart of Pakistan.[243] The May 2010 attempted car bombing in Times Square in New York was apparently retaliation for drone attacks in the Pakistan Tribal areas.[244]

On August 5, 2009, a CIA drone killed Baitalluh Mehsud, a warlord commanding 20,000 militants.[245] In express retaliation, Jordanian physician Humam Khalil Al-Balawi, whom the CIA had trusted as their agent, entered the U.S. base in Kost, Afghanistan near the Pakistan border on December 30, 2009, greeted his CIA handlers, and detonated a bomb, killing himself, seven CIA

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those polled in the Pakistan tribal areas believed that using suicide bombers against U.S. military targets was justified. Bergman & Tiedemann, *supra* note 67, at 14.

241. *See, e.g.*, *Taliban Vow to Avenge Drone Attacks*, DAILY POST (Pakistan), Mar. 23, 2011, *available at* 2011 WLNR 564911; *Pakistan Taliban Chief Vows Revenge*, AL JAZEERA, Oct. 5, 2009, *available at* 2009 WLNR 19601989 (reporting that Taliban leader said his group would avenge the death of Baitullah Mehsud, his predecessor, whom the United States killed in a drone attack); Amir Mir, *Suicide Attack on Lahore Police Intelligence Unit Kills 15*, DAILY NEWS & ANALYSIS (Mar. 9, 2010), http://www.dnaindia.com/world/report_suicide-attack-on-lahore-police-intelligence-unit-kills-15_1356935 ("Fifteen people were killed and 70 injured in a suicide attack on a police intelligence unit in Lahore on Monday. The Punjab chapter of the Tehrik-e-Taliban Pakistan (TTP) said it carried out the attack to avenge the February 24 killing of commander Qari Zafar, acting ameer of the al Qaeda-linked Lashkar-e-Jhangvi (LeJ) in a US drone attack in north Waziristan."); *Suicide Attacks Increased During March 2011*, CONFLICT MONITORING CTR. (Apr. 10, 2011), http://cmcpk.wordpress.com/2011/04/27/suicide-attacks-increased-during-march-2011.

Some drone attacks have mistakenly targeted the innocent and have provoked calls for revenge even by those who claim to be neither Taliban nor al Qaeda. Rahmatullah Khan, *Grand Jirga Vows to Avenge Drone Killings*, PAKISTAN OBSERVER, Mar. 19, 2011, *available at* 2011 WLNR 5823161 (Pakistan Grand Jirga calls for revenge against U.S. citizens for the killing in a drone attack of forty-one people during a *jirga* concerning a border dispute).

242. *New Pattern of Drone Attacks*, CONFLICT MONITORING CTR. (May 3, 2012), http://cmcpk.wordpress.com/2012/03/03/new-pattern-of-drone-attacks; *see also* Graham Usher, *Pakistan Spring*, AL-AHRAM (Apr. 3, 2008)), http://weekly.ahram.org.eg/2008/891/in2.htm (noting that in a "ferocious reprisal" against Predator Drone attacks, the Taliban carried out 17 suicide attacks in the last 10 weeks that killed 274 civilians, police and soldiers).

243. *See supra* note 242 and accompanying text.

244. Sami Yousafzai & Ron Morea, *Pakistan Taliban Source: Times Square Bombing Attempt Was 'Revenge Against America'*, NEWSWEEK (May 6, 2010), http://www.newsweek.com/blogs/declassified/2010/05/06/pakistan-taliban-source-times-square-bombing-attempt-was-revenge-against-america.html.

245. Forty-seven percent of Pakistanis, however, approved the drone attack killing Baitalluh Mehsud, allegedly behind the assassination of former Pakistani Prime Minister, Benazir Bhutto. *See* PEW RES. CTR., *supra* note 240, at 12. Baitalluh Mehsud denied this allegation. *Al Qaeda Militant Did Not Kill Bhutto: Spokesman*, ABC NEWS (Australia) (Dec. 29, 2007), http://www.abc.net.au/news/2007-12-29/al-qaeda-militant-did-not-kill-bhutto-spokesman/998732.

officers, and one Jordanian secret service agent.[246] In turn, the CIA launched eleven weaponized drone attacks in the following month, killing approximately ninety people, according to Pakistani and U.S. authorities.[247]

The outrage is not completely confined to the extremists. There is substantial evidence that the Pakistani population opposes use of drones in Pakistan.[248] Of the more than one-third of Pakistanis informed about drone attacks, 93% opposed weaponized drones, according to a Pew Global poll conducted in 2010.[249] The Pakistani Parliament recently passed a resolution banning drone strikes on Pakistani soil[250] and the Pakistani government has ordered that the United States cease operating drones out of the Shamsi base in south Pakistan.[251] Furthermore, most Afghans are also reportedly

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246. Stephen Farrell, *Video Links Taliban in Pakistan to C.I.A. Attack*, N.Y. TIMES (Jan. 9, 2010), http://www.nytimes.com/2010/01/10/world/middleeast/10balawi.html?pagewanted=all.

247. Jane Perlez & Pirzubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. TIMES (Apr. 4, 2010), http://www.nytimes.com/2010/04/05/world/asia/05drones.html?_r=1&ref=sirajuddin_haqqani.

248. *See* Declan Walsh, *Turbulent Pakistan Presents a Conundrum for Barack Obama*, GUARDIAN (U.K.) (Dec. 2, 2009), http://www.guardian.co.uk/world/2009/dec/02/barack-obama-surge-pakistan-reaction; *see also CIA Drones Damaging Pentagon Interest*, SUNDAY TIMES (Islamabad), May 15, 2011, *available at* 2011 WLNR 9712096 (noting that "from 2004 to 2011 CIA carried out 234 drone strikes [in Pakistan]. Out of revealed strikes 118 were during the last year and 21 launched just only in the last three months. According to the reports over 2,200 individuals have been killed which include innocent persons apart from militants.").

One commentator relates the effect of drone strikes on Taliban recruitment as follows:

> A prominent Taliban commander of the Pakistan Taliban recently said that when the Taliban try and do social welfare work in a village of 2,000 people, they may succeed in getting 20 to 30 people join their ranks. However, when the United States attacks the village with a drone flight it brings the whole village to support the Taliban.

Anwer Sher, *How Pakistan Can Regain Its Self-Respect*, AL ARABIYA NEWS (July 13, 2011), http://english.alarabiya.net/views/2011/07/13/157425.html.

249. *See* PEW RES. CTR., *supra* note 240, at 12; *see also* Gordon Bowen, *Has Outreach to the Muslim World by the Obama Administration Had an Impact on Muslim Attitudes Towards Terrorists and Terrorism?*, 15 MIDDLE E. REV. INT'L AFF. 65, 69 n.79 (2011) ("[M]ore than 60 percent of Pakistani journalists surveyed in early 2011 were found to regard U.S. drone attacks in Pakistan as 'terrorism.'") (quoting Lawrence Pintak & Syed Javed Nazir, *Inside the Muslim (Journalist's) Mind*, N.Y. TIMES (Feb. 12, 2011), http://www.nytimes.com/interactive/2011/02/12/opinion/20110213_pakistaniopart.html); STEVEN KULL, THE ROOTS OF MUSLIM ANGER 67 (2011) (noting that a World Public Opinion.org poll in 2009 indicated that eighty-two percent of Pakistanis polled believed drone attacks in the Pakistan Tribal areas were unjustified).

250. Dina al-Shibeeb, *Pakistani Legislators Denounce Stealth Operations, Worsening Bilateral Relations*, AL ARABIYA NEWS (May 14, 2011), http://english.alarabiya.net/save_pdf.php?cont_id=149052.

251. Salmon Masood & Eric Schmidt, *Tensions Flare Between U.S. and Pakistan After Strike*, N.Y. TIMES (Nov. 26, 2011), http://www.nytimes.com/2011/11/27/world/asia/pakistan-

opposed to the drone attacks.[252] That opposition is apparently shared by much of the Muslim world.[253]

Determining whether a counterterrorism policy advances world public order requires going beyond opinion polls, legislative acts, and the cycle of violence. Some empirical evidence, public policy, the history of colonization of much of the Islamic world, and other historical parallels also inform the debate. Ironically, U.S. policy toward civilians in Afghanistan is likewise compelling.

A. *The Public Policy Case for Broadly Interpreting Use of Force Rules and the Opposing Case for Narrowly Interpreting Combat Law Immunities*

Public policy supporting a broad interpretation of the use of armed force rules is relatively simple. Non-state actors like al Qaeda are capable of recruiting, training, and equipping private militia that can move from country to country and from armed conflict zones to areas outside such zones. Past and potential vic-

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says-nato-helicopters-kill-dozens-of-soldiers.html; *Pakistan Base Drones Are Sent Packing,* MX (Australia), June 30, 2011, *available at* 2011 WLNR 12970467.

252. Jeffrey Sluka notes as follows:

> Polls in Afghanistan and Pakistan show that a desire to strike back against the United States increases after every drone attack, and when Faisal Shahzad, the Pakistani-American who tried to plant a bomb in Times Square in May 2010 was asked at his trial how he could justify planting bomb that could kill children he answered: 'When the drones hit, they don't see children, they don't see anybody. They kill women, children, they kill everybody . . . I am part of the answer . . . I'm avenging the attack.'

Jeffrey A. Sluka, *Death from Above: UAVs and Losing Hearts and Minds*, Mil. Rev., May–June 2011, at 70, 75; *see also* Ibrahim Mothana, *How Drones Help Al Qaeda*, N.Y. Times, June 14, 2012, at A35, *available at* 2012 WLNR 12419394 (noting that drone strikes are causing more Yeminis to hate America and join radical groups).

President Hamid Karzai banned drone attacks on homes in Afghanistan after a NATO attack on two homes killed nine people, several of them children. Nathaniel Sheppard, *Is War with Taliban at a Cross-Roads?*, Al Arabiya News (June 2, 2011), http://english.alarabiya.net/articles/2011/06/02/151500.html.

The Taliban are not unique in their reaction to targeted killing. Reacting to Russia's "disappearing" Chechen and other Caucasus fighters and of targeted killing/assassinating Chechen presidents, the so-called Black Widows, the wives of Caucasus fighters killed by the Russians, exploded bombs on Moscow subways on March 31, 2010, killing forty people and injuring scores of others. Clifford Levy, *Second Bomber in Moscow Attacks Is Identified*, N.Y. Times (Apr. 6, 2010), http://www.nytimes.com/2010/04/07/world/europe/07moscow.html. The Black Widows have been responsible for at least sixteen other bombings, including the blowing up of two civilian airliners. Clifford Levy, *Russia Says Suicide Bomber Was Militant's Widow,* N.Y. Times (apr. 3, 2010), http://www.nytimes.com/2010/04/03/world/europe/03moscow.html; Michael Isikoff & Mark Hosenball, *Terror Watch: Web of Violence Attacks by the Black Widows and Other Chechen Militants May Have Al Qaeda Links*, Newsweek Web Exclusives, Sept. 1, 2004, *available at* 2004 WLNR 3642367.

253. *See, e.g.*, Rohan Gunaratna & Karunya Jayasena, *Global Support for Al Qaeda and Osama bin Laden: An Increase or Decrease?*, UNISCI Discussion Papers, Jan. 2011, at 199, 211.

tim states must be able to employ military force to combat such actors. If such actors are in a state that is unable or unwilling to arrest or capture them, then victim states are justified in attacking those actors in the host state's territory.[254]

The case for a narrow interpretation of humanitarian law immunities is also relatively simple. However dangerous non-state actors' organizations may be, they pale in comparison with the danger posed by using military force. The military resources of the nation state are far greater. It is true that asymmetric warfare by terrorist organizations can have extraordinary impact, such as the 9/11 attacks, but the greater threat to humankind remains with nation state armies and militaries. One only has to examine the history of the last 100 years to prove this proposition. Starting with World War I, through the Spanish Civil War through World War II, through the Korean Conflict, Vietnam, the 1991 Iraq-Iran War, the 2001 invasion of Afghanistan, the 2003 War in Iraq, and other conflicts, the number of casualties inflicted by states exceeds 170 million.[255] The number of terrorist killings carried out by private terror organizations in that time period measures in the low thousands.[256]

The strict interpretation of humanitarian law combat immunities comports with the fundamental principle that must be recognized, namely, the extraordinary nature of combat immunity and the remarkable legal regime that permits it. Immunizing individual soldiers and commanders from criminal liability for what otherwise

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254. *See* LINDSAY MOIR, REAPPRAISING THE RESORT TO FORCE 151 (2010) ("Both common sense and *realpolitic* dictate that military action against non-state actors in a situation where the host state is either unable or unwilling to take preventive action may well be necessary, in that there is no reasonable or effective alternative to the use of force.").

255. *See* Matthew White, *30 Worst Atrocities of the 20th Century*, HISTORICAL ATLAS TWENTIETH CENTURY, http://users.erols.com/mwhite28/atrox.htm (last updated Dec. 2004) (giving numbers only for the most lethal conflicts taking place during this time frame); Piero Scaruffi, *Wars and Genocides of the Twentieth Century*, SCARUFFI, http://www.scaruffi.com/politics/massacre.html (last vistied June 16, 2012) (citing numbers adding up to roughly 190 million); R.J. Rummel, *20th Century Democide*, HAWAII.EDU, http://www.hawaii.edu/powerkills/20TH.htm (citing numbers adding up to 262 million); *see also List of Wars and Anthropogenic Disasters by Death Toll*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_wars_and_anthropogenic_disasters_by_death_toll (last updated June 16, 2012).

256. *See* Andrew Blum et al., *Nonstate Actors, Terrorism, and Weapons of Mass Destruction*, 7 INT'L STUD. REV. 133, 153–154 (2005) (citing Robert Johnston, *Incidents of Mass Casualty Terrorism*, JOHNSTON ARCHIVE, http://www.johnstonsarchive.net/terrorism/wrjp394.html (last updated Apr. 30, 2012)); *see also* GLOBAL TERRORISM DATABASE, http://www.start.umd.edu/gtd/search/Results.aspx?chart=casualties&search=casualties&count=100 (last visited June 16, 2012) (defining terrorist acts as those committed by non-state actors).

would be murder[257] demonstrates that humanitarian law (the law of war) is an *exceptional* legal regime. Furthermore, immunity is not limited to killing combatants; it covers killing civilians as long as the civilians fit within the expansive category of "collateral damage" under the proportionality rule.[258] The penalty for murder is the gravest in most countries' criminal justice systems. Because immunity may undermine one of the international community's fundamental values, combat immunities should be narrow, limited to areas of armed conflict and only when troops have complied with the law of armed conflict, including the principle of discrimination, the demonstration of military necessity, and the principle of proportionality.[259] So outside areas of armed conflict, law enforcement as dictated by international human rights law should control, permitting resort to deadly force only in an emergency.[260] For "[i]f the U.S. can claim it has the legal authority to carry out assassinations/targeted killings worldwide, then other countries facing 'transnational terrorists threats' can do likewise."[261] Should Russia, China, India, Pakistan, Iran, North Korea, or any other country be allowed to assassinate or kill suspected terrorists outside an armed conflict anywhere in the world (even in so-called unwilling or failed states)?[262]

The United States' temptation to use attack drones may derive, in part, from love of technology[263] and of the apparent ease of eliminating a threat with attack drones, a method that does not put

257. Intentional murder is defined by the Model Penal Code as "purposely [or] knowingly . . . caus[ing] the death of another human being." MODEL PENAL CODE §§ 210.2(2), 210.3.

258. *See* A.P. I, *supra* note 3, arts. 51, 57. The ICRC interprets the proportionality rule broadly: "The presence of a soldier on leave obviously cannot justify the destruction of a village." Had there been two soldiers on leave, could the village then have been destroyed? COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 133, at 684; *see also* Rome Statute, *supra* note 115, art. 8(b)(iv).

259. See *supra* notes 131, 134–136 and accompanying text for a discussion of military necessity.

260. *See* McCann v. United Kingdom, 21 Eur. Ct. H.R. (ser. A) at 97, 97 (1995) (holding the United Kingdom responsible for its Special Air Services (SAS) troops killing unarmed suspected Irish Republican Army (IRA) terrorists, but absolving the SAS soldiers from responsibility under a human rights-based law enforcement approach because the soldiers were instructed that the IRA members had radio controlled detonators to a bomb that they could instantly activate, even though such detonators were never found). For a more detailed discussion of *McCann* and the flexibility of human rights law in the context of the terrorist threat, see MCDONNELL, *supra* note 19, at 159–60.

261. MCDONNELL, *supra* note 19, at 160.

262. *Id.* at 161.

263. *See* ALAN R. DRENGSON, THE PRACTICE OF TECHNOLOGY 80–81 (1995); P.W. SINGER, WIRED FOR WAR 1 (2009) ("Why a book on robots and war? . . . Because robots are freakin' cool.").

United States' personnel at risk. Our cultural expectation of quick solutions to foreign wars and entanglements may, on a policy level, make using attack drones more appealing.[264] Emphasizing the numbers of al Qaeda and Taliban killed in this manner suggests progress in the war in Afghanistan and in the "war against terror."[265] The War in Vietnam, however, taught that body counts may not correlate with progress towards victory[266] and may give the military (and the CIA) incentives to engage in illegal or immoral behavior.[267]

B. *Empirical Evidence Suggesting that Targeted Killing of the Leaders of Islamic Terrorist Organizations is Counterproductive*

Some empirical evidence supports the proposition that intentionally killing the leaders of the Taliban, al Qaeda, and other Islamic terror organizations may ultimately impair the U.S. counterterrorism effort. Jenna Jordan, a doctoral candidate at the University of Chicago, exhaustively studied the "decapitation" of 298 terrorist organizations.[268] She concluded that while targeted killing of the organizations' leaders is more effective against merely ideological organizations (like the Baader Meinhof gang) as contrasted with religiously motivated terror groups, such targeting generally helps such organizations endure longer than terrorist organizations whose leadership is not targeted.[269] Furthermore, she found that targeted killing of terrorist leaders is particularly ineffective against what she calls "separatist" terrorist organizations (like the Irish Republican Army) and is least effective against relig-

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264. The war in Afghanistan is becoming the longest fought war in the United States history. That may give policy makers even greater impetus to use what they perceive as the tools to bring an end to it misguided that approach might ultimately be.

265. The Obama administration has termed it "the war against al Qaeda." *See supra* note 176 and accompanying text.

266. *See* GREGORY A. ADDIS, NO SURE VICTORY: MEASURING U.S. ARMY PROGRESS AND EFFECTIVENESS IN THE VIETNAM WAR 270–73 (2009). Regarding potential abuse of the body count, see KENNETH J. CAMPBELL, GENOCIDE AND THE GLOBAL VILLAGE 40 (2001) (citing MICHAEL WALZER, JUST AND UNJUST WARS 97–101 (1992)).

267. *Accord* CAMPBELL, *supra* note 266.

268. Jenna Jordan, *When Heads Roll*, 18 SECURITY STUD. 719, 746 (2009). Jordan uses the term "decapitation" to refer not only to the killing of terrorist leaders, but also to their arrest. *Id.*

269. *Id.*

ious terrorist organizations.[270] Against the latter two groups, targeting their leaders ends up strengthening the organization.[271]

The Taliban, al Qaeda, and their allied groups are in both categories. These organizations are religious and "separatist." The Taliban came from Islamic fundamentalist madrassas.[272] They are separatist because they seek control of land that they believe their Pashtun tribal identity entitles them.[273] One could say the same about al Qaeda. Inspired by the Muslim Brotherhood and Sayyid al Qutb, the executed prophet of that organization, al Qaeda seeks return to Muslim hands all of the territory that was once under Muslim control.[274] Thus, the Islamic terrorist organizations against which the United States struggles are both religious and nationalistic.[275] Jordan also observes that the social networking literature concludes that decentralized organizations are less likely to be seriously affected by "decapitation" than hierarchical ones.[276] Al Qaeda, if not the Taliban, is noteworthy for its decentralized character.[277] Al Qaeda has traditionally worked as a loose franchise system rather than a top down military organization.[278] All the more reason that targeting al Qaeda leaders is likely to be ineffective.[279]

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270. *Id.* at 723 ("The data show that independent of other measures, going after the leaders of older, larger, and religious groups is not only ineffective, it is counterproductive. Moreover, the decentralized nature of many current terrorist organizations has proven to be highly resistant to decapitation and to other counterterrorism measures.").

271. *Id.* at 748 ("Religious groups that have undergone decapitation are 16 percent less likely to fall apart than those that did not. Finally, separatist groups that have had a leader removed are 31 percent less likely to cease activity than separatist groups that have not.").

272. ROBERT D. CREWS & AMIN TARZI, THE TALIBAN AND THE CRISIS OF AFGHANISTAN 9 (2008).

273. *Id.* at 20, 76–77 (noting that ethnic solidarity and the Taliban's familiarity with Pashtun society and culture helped the Taliban succeed).

274. After being imprisoned in Egypt, al Qutb went much further, asserting that the entire world should be ruled by Islamic governments. *See* Andreas Krieg, *From al Banna to Qutb to Zawahiri – How the Ideology of al Banna Set the Foundations for Modern Islamic Fundamentalism*, PICA, http://www.thepicaproject.org/?page_id=191 (last visited June 14, 2012).

275. The nationalism is defined more broadly than that tied to a particular nation-state to embrace a pan-Islamic nation closely resembling that which existed under the Ottoman Empire.

276. Jordan, *supra* note 268, at 755 ("The literature on social network analysis argues that decentralized organizations are less likely to suffer setbacks than hierarchically structured organizations.").

277. See MCDONNELL, *supra* note 19, at 173, for a fuller discussion of this point.

278. For example, the relationship between al Qaeda and "al Qaeda in Iraq" has been described as a marriage of convenience, not a true partnership. *See* Brian Fishman, *After Zarqawi: The Dilemmas and Future of Al Qaeda in Iraq*, WASH. Q., Fall 2006, at 19, 19.

279. Jordan, *supra* note 268, at 739. She states as follows:

> *Religious organizations should be most difficult to destabilize after the removal of a leader.* Studies in network analysis have found that religious organizations tend to be more decentralized and are thus harder to weaken. Moreover, religion has a

As to the Taliban, little evidence suggests that they have been substantially weakened militarily by the drone strikes.

Although Jordan's may be the most detailed empirical study of leadership "decapitation," other researchers' work supports her findings. After studying sixty instances in which terrorist organizations lost their leaders by arrest or killing, Professor Mannes with some other researchers reached the same conclusion: "The result that consistently stood out from this research was the propensity of decapitation strikes to cause religious organizations to become substantially more deadly."[280] Professor Cronin observed that relig-

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> sacred element that inspires a level of dedication not seen in other movements, resulting in greater resilience and longer lifespan. Religion is often integral to individual identity, particularly to those involved in religiously motivated terrorist organizations. According to Stohl and Stohl identity based organizations, which can include both religious and separatist organizations, are hard to penetrate. Religious and separatist movements also tend to have a strong base of community support. Cronin argues that "broader popular support is usually the key to the greater average longevity of ethnicnationalist/separatist groups in the modern era." Thus separatist organizations should also be highly resistant to leadership decapitation.

Id. (emphasis added) (citations omitted).

280. Aaron Manes, *Testing the Snake Head Strategy: Does Killing or Capturing Its Leaders Reduce a Terrorist Group's Activity?*, 9 J. INT'L POL. SOLUTIONS 41, 43 (2009); *see also* GARY LAFREE ET AL., DETERRENCE AND DEFIANCE MODELS OF TERRORIST VIOLENCE IN NORTHERN IRELAND, 1969–1992, at 2 (2006) (examining five major counter-terrorist operations and their consequences and concluding that "imposing harsh criminal justice and military interventions to reduce terrorism may well be counterproductive"); Robert White, *From Peaceful Protest to Guerilla War: Micromobilization of the Provisional Irish Republican Army*, AM. J. SOC. 94 (1989); Edward H. Kaplan et al., *What Happened to Suicide Bombings in Israel? Insights from a Terror Stock Model*, 28 STUD. CONFLICT & TERRORISM 225, 225, 227 (2005) (after examining 75 Israeli targeted killing operations, the authors conclude these operations "spark[ed] estimated recruitment to the terror stock . . . rather than decreases the rate of suicide bombing"); Tom Parker, *Fighting an Antaean Enemy: How Democratic States Unintentionally Sustain the Terrorist Movements They Oppose*, 19 TERRORISM & POL. VIOLENCE 155, 163, 173 (2007) (a comparative study of five democracies involved in counter-terrorism operations concluding that repressive measures such as targeted killing is a "major factor explaining the development of political violence") (quoting White, *supra* note 280, at 1298). *But see* Mohammed M. Hafez & Joseph M. Hatfield, *Do Targeted Assassinations Work? A Multivariate Analysis of Israeli Counter-Terrorism Effectiveness during Al-Aqsa Uprising*, 9 STUD. CONFLICT & TERRORISM 359 (2006) (concluding that Israeli targeted killing operations have no effect on the number of Palestinian attacks, neither increasing nor decreasing them); Patrick B. Johnston, Assessing the Effectiveness of Leadership Decapitation in Counterinsurgency Campaigns (Sept. 24, 2010) (unpublished post-doctoral research paper, Harvard University), *available at* http://scholar.harvard.edu/johnston/files/decapitation.pdf (indicating that targeting killing of terrorist leaders can effectively destroy the capacity of the terrorist group); Daniel Byman, *Predator v. Taliban*, FOREIGN AFF. (Mar. 18, 2009), http://www.foreignaffairs.com/articles/64901/daniel-byman/taliban-vs-predator (arguing that despite risks, targeting killing of the Taliban is an effective counter-terrorism practice); Abraham Kantor, Democratic Assassination: The Morality and Efficiency of Targeted Killings as a Policy Tool (June 2007) (unpublished B.A. honors thesis, Ohio State University), *available at* https://kb.osu.edu/dspace/bitstream/handle/1811/28452/Copy_of_06_07_07_FINALCOPY.pdf?sequence=1.

iously motivated terrorists pose special dangers[281] because, among other things, they consider themselves engaged in

> a Manichaean struggle of good against evil, implying an open-ended set of human targets . . . Second, religious terrorists engage in violent behavior directly or indirectly to please the perceived commands of a deity . . . . Moreover, religious terrorists may not be as constrained in their behavior by concerns about the reactions of their human constituents. (Their audience lies elsewhere.) Third, religious terrorists consider themselves to be unconstrained by secular values or laws . . . .[282]

Given their spiritual bonds to their cause, the loss of a leader to a remotely controlled drone may make such individuals view the lost leader as a martyr to that cause, rather than discourage them from further acts of violence.[283] Despite the ever increasing deployment of drones to carry out targeted killing operations and despite their having killed so many Taliban and al Qaeda leaders, few claim that the drones will eliminate the threat that the Taliban and al Qaeda, its affiliates, and adherents pose.[284] More importantly, this research suggests that the tactical victories that have been achieved through drone attacks may ultimately result in strategic defeat.

Professor Cronin also notes that the growth of Islamic fundamentalist terrorism is, in part, a response to globalization, epitomized by the United States' superiority in technology and scientific

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281. Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SECURITY 30 (2002–2003). *But see* G. Gvineria, *How Does Terrorism End?*, *in* SOCIAL SCIENCE FOR COUNTER-TERRORISM 257, 271 (2009) ("Some authors suggest that killing political leaders [of a terrorist organization] is more likely to backfire than killing operational leaders as the latter are usually less known to the public and their deaths tend to get far less attention.").

282. Cronin, *supra* note 281, at 41–42.

283. It is too early to evaluate whether the killing of Osama bin Laden by United States Navy Seals will weaken or strengthen al Qaeda and its associated groups. Despite the euphoria on the part of many in the United States about the killing, Jordan's research suggests that it will strengthen these extremist religious terrorist groups. One Pakistani commentator has noted that "Che Guevara was far more valuable to Cuban militancy dead than alive." Omar Ashour, *Was Killing Him a Mistake*, PAKISTAN OBSERVER, May 18, 2011, *available at* 2011 WLNR 9924333. As of June 2, 2011, the Taliban had conducted a series of retaliatory suicide attacks resulting in the deaths of 150 people in Pakistan, most of them soldiers. Sheppard, *supra* note 252, at 248.

284. There are probably other reasons for this phenomenon aside from the targeted killing drone attacks. On the other hand, one could hardly claim that the drone attacks have effectively thwarted the Taliban. *See also* Berger & Tiedemann, *supra* note 67, at 14 ("Although the [drone] strikes have killed more than 1,000 militants, including 33 insurgent leaders, violence in Pakistan has gone up dramatically since the program began, from only 150 terrorist incidents in 2004 to a peak of 1,916 in 2009 (according to the U.S. National Counterterrorism Center) although the increase first ticked up in 2007, a year before the frequency of the drone strikes began to pick up.").

development.[285] The use of highly advanced weapon systems exemplified by remotely operated attack drones may thus feed even more deeply into outrage and retaliation by the Taliban and al Qaeda, who generally have to rely on low-technology to fight their battles.[286] It is hard to imagine a more representative feature of technology and scientific development than a robotically operated weapon of war from which, a controller, with the press of a finger 7,000 miles away, can launch a precision guided missile wreaking destruction on all those in its wake.[287] Furthermore, from the Islamists' perspective, drones are a cowardly means of warfare that violate elemental chivalry.

Some scholars have argued that taking out a charismatic leader of a terrorist organization will result in the destruction of that organization. The arrests of the leaders of the Kurdish Workers Party (PKK), and the Peruvian Sendero Luminoso may have been successful decapitations,[288] but government forces killed neither of those leaders, and it is far from clear that the PKK has collapsed, though the Sendero Luminoso's activities have declined markedly.[289] In any event, neither of these organizations had religion as their focus. Unless the United States is willing to engage in repressive counter-terrorism polices on the level of Nazi Germany, the former Soviet Union or perhaps the current Russia, routinely employing the explosive counter-terrorism device of weaponized

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285. Cronin, *supra* note 281, at 46; *see* KAREN ARMSTRONG, ISLAM, A SHORT HISTORY 157–58, 171–72 (2000) (noting that religious fundamentalism, be it Christian, Jewish, or Islamic, is primarily a response to the modernism and secularism exemplified by globalization).

286. Rick Smith, *Dirty Secret of War on Terror? Low-tech Can Defeat High-tech, Author Warns*, WRALTECHWIRE, http://wraltechwire.com/business/tech_wire/opinion/blogpost/6420771 (last updated Nov. 16, 2009).

287. Cronin's assessment is shared by Armstrong, who concludes that Islamic fundamentalism has arisen as "a reaction against the scientific and secular culture that first appeared in the West." KAREN ARMSTRONG, THE BATTLE FOR GOD xi (2000). Armstrong underlines the proposition that Islamic fundamentalism like Christian and Jewish fundamentalism is, to a great extent, a response to modernism, to the highly developed technological state and to the decline of traditional, conservative agrarian society: "It [fundamentalism] is a reaction against the *scientific* and secular culture that first appeared in the West, but which has since taken root in other parts of the world." *Id.* (emphasis added).

288. *See* Jordan, *supra* note 268, at 721.

289. *See, e.g.*, REGIONAL SURVEYS OF THE WORLD: SOUTH AMERICA, CENTRAL AMERICA AND THE CARIBBEAN 652 (10th ed. 2002) ("The capture of Abimeal Guzman and subsequently many others among its senior leaders inflicted serious damage on the movement for which is seems unlikely to recover.").

drones for targeted killing of listed individuals runs a substantial risk of being counter-productive.[290]

C. *The Scarring Colonization of Islamic Lands by Europe and Russia*

Aside from empirical evidence, those fashioning counterterrorism policy should also consider history. Nearly all Muslim countries were once Russian or Western European colonies. Most Muslim countries became independent after World War II. Colonization has cast a long, dark shadow of racism, economic exploitation, and deliberate humiliation of the colonized peoples. This statement by Jules Harmand typifies colonizers' attitudes:

> It is necessary then to accept as a principle and point of departure the fact that there is a hierarchy of races and civilizations, and that *we belong to the superior race* and civilization, while still recognizing that white superiority confers rights, it imposes strict obligations in return. *The basic legitimization of conquest over native peoples is the conviction of our superiority not* merely our mechanical, economic, and military superiority, *but our moral superiority.* Our dignity rests on that quality and it underlies our right to direct the rest of humanity.[291]

The British colonized Iraq, Pakistan, and Afghanistan. In 1948, the United Kingdom divided the South Asia subcontinent into India and Pakistan, who remain bitter enemies to this day.[292] Britain has had a long history with Afghanistan, waging war three times, "invading in 1838 and 1878, and fighting a rebellion in 1919."[293] The British literally drew the borders of Iraq, cobbling it together from three provinces of the Ottoman Empire.[294]

The United States never colonized an Islamic country. However, U.S. policy in the Middle East since the end of the Second World War and the U.S. invasions of Iraq and Afghanistan have meant, at least for Muslims, that the United States assumed the mantle of the

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290. *See* Parker, *supra* note 280, at 127 ("The introduction of such 'extremely repressive' measures is simply not an option open to democratic states characterized as they are by the rule of law, an independent judiciary, and a foundation of basic civil rights," making resort to "authoritarian half-measures" ultimately self-defeating, de-legitimizing the democratic state and handing a propaganda victory to the terrorist group) (citing DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970 (1982)).

291. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonist Notion*, 12 AM. J. INT'L L. & POL'Y 903, 933 n.153 (emphasis added) (quoting Edward Said).

292. James Fallows, *The Fifty-First State?*, ATLANTIC (Nov. 2002), http://www.theatlantic.com/magazine/archive/2002/11/the-fifty-first-state/2612.

293. MCDONNELL, *supra* note 19, at 1. Part of this subsection is drawn from the first chapter of the author's book. *Id.* at 1–35.

294. Fallows, *supra* note 292.

former European colonial powers.[295] Since 1945, the United States has "supported authoritarian regimes in the Arab world, including the House of Saud in Saudi Arabia, Hosni Mubarak in Egypt, the Shah of Iran, and, initially, Saddam Hussein in Iraq, and the autocratic leaders of the tiny oil-rich gulf states."[296] The Arab spring is a direct and welcome response to authoritarianism, but arose in the face of U.S. policy coddling up to repressive governments.[297]

History should inform counterterrorism policy. The United States should be particularly sensitive to the experience of the Pakistani, Afghan, Iraqi, Somali, Yemini, and other Islamic peoples and to avoiding any practice that recalls colonial rule. Thus, the United States must ensure that it does not subject Afghans, Pakistanis, Iraqis, Somalis, or Yeminis to invidious discrimination. United States governmental officials and armed services must treat such peoples as they would like U.S. citizens to be treated. In the words of former U.S. commander General McChrystal to troops in Afghanistan, "Think of how you would expect a foreign army to operate in your neighborhood, among your families and your children, and act accordingly."[298] Furthermore, any assertion of military power on Muslim land must be kept to the absolute minimum necessary.

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295. See McDonnell, *supra* note 19, at 1–35, for a more detailed discussion of this issue. For a Muslim perspective, see Mazhar Qayyum Khan, *Give Political Solution a Chance*, Nation (Pakistan) (Apr. 2, 2008), http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/columns/02-Apr-2008/Give-political-solution-a-chance, stating as follows:

> The American and Western allies have to accept that force cannot subdue an indomitable will. They must vacate Muslim lands in letter and in spirit. Not only physical occupation ought to end but also the exploitation of their resources. They cannot make up for the historical injustice Imperialist powers had caused, but they can stop their neo-imperialist bent of mind. The Muslims do not resent the freedoms Americans enjoy. They only demand democratic rights for themselves. The root causes of hatred of the West and militancy lie in past and present discrimination they have suffered. It is time to grasp this truth to the end of terrorism.

296. McDonnell, *supra* note 19, at 14. For a discussion of Israel and United States policy, see *id.* at 14–16.

297. The Obama administration has commendably (however abruptly) attempted to change the course of U.S. policy to support the Arab democratic movements and has supported the U.N. approved military intervention in Libya to protect civilians. Yet the administration is countering a half-century of U.S. policy favoring repressive Arab regimes. By providing a democratic avenue to effect change and remedy legitimate grievances, the Arab Spring threatens to take the air out of the extremists' balloon. Al Qaeda's decision to attack other Muslims rather than directing its fire solely on the West has also contributed to al Qaeda's decline in popularity in the Muslim world.

298. Dexter Filkins, *Stanley McChrystal's Long War,* N.Y. Times (Oct. 14, 2009), http://www.nytimes.com/2009/10/18/magazine/18Afghanistan-t.html?pagewanted=13&_r=2.

Reversing previous United States policy, General McChrystal recognized this issue:

> Gentlemen, we need to understand the implications of what we are doing. Air power contains the seeds of our own destruction. A guy with a long-barrel rifle runs into a compound, and we drop a 500-pound bomb on it? Civilian casualties are not just some reality with the Washington press. They are a reality for the Afghan people. If we use airpower irresponsibly, we can lose this fight.[299]

These statements reflect the Tactical Directive General McChrystal issued and his successor, General David Petraeus, reissued with modifications, severely limiting air strikes and other attacks that might result in civilian casualties or damage to civilian property.[300] Thus, from a policy viewpoint, McChrystal and Petraeus (and General John R. Allen, the current International Security Assistance Force (Commander) have endorsed close to zero tolerance for killing innocent civilians and destroying civilian homes and other property.[301] It was not enough, in their view, to comply with

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299. *Id.*

300. Memorandum from Int'l Sec'y Assistance Force Headquarters regarding General Stanley A. McChrystal's Tactical Directive (July 6, 2009), *available at* http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf. In the Tactical Directive, General McChrystal further explained: "We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people." *Id.* Upon assuming command from General McChrystal, General Petraeus issued a revised tactical directive, clarifying that U.S. and NATO troops may always use force in self-defense when necessary, but reaffirming the overriding concern about avoiding civilian casualties:

> Hunt the enemy aggressively, but use only the firepower needed to win a fight. We can't win without fighting, but we also cannot kill or capture our way to victory. Moreover, *if we kill civilians or damage their property in the course of our operations, we will create more enemies than our operations eliminate.*

Letter from David H. Petraeus, Commander, Int'l Sec'y Assistance Force, to the Troops (Aug. 1, 2010) (emphasis added), *available at* http://graphics8.nytimes.com/packages/pdf/world/2010/COMISAF-MEMO.pdf. Some military officials have argued that as a "'rule of engagement," the Tactical Directive should not be considered state practice that evidences evolving custom. *See, e.g.*, George Cadwalader, Military Professor, U.S. Naval War Coll., Panel Discussion at the American Branch of the International Law Association International Law Weekend: Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule (Oct. 22, 2011).

301. This policy, the first tactical initiative, caused some controversy because it appeared to limit the use of force by U.S. troops even in self-defense. General Petraeus issued the second tactical initiative, which, although it made clear troops could use deadly force in self-defense, still emphasized the protection of civilian and civilian objects. *See supra* note 300 and accompanying text. Now that General Petraeus has been confirmed as CIA Director, it will be interesting to see if he applies the Tactical Directive to the drone program. Note that General Allen has continued the Tactical Directive: "I expect every member of ISAF to be seized with the intent to eliminate civilian casualties caused by ISAF." Letter from John R. Allen, Commander, ISAF and USFOR-A, to the Troops 2 (July 18, 2011), *available at* http://www.isaf.nato.int/images/stories/File/COMISAF-Guidance/

humanitarian law, which, under the rubric of proportionality and collateral damage, allows a sizable number of civilians to be killed and civilian objects to be destroyed in most operations against a military objective.[302] Given Afghans' long experience with dominating colonial powers, military success there requires a far more measured use of force so as to cool, rather than excite, Afghan hostility to the United States' effort.

Given the history of colonial exploitation and the United States' current role, our country should use the utmost caution in employing weaponized drones against previously selected individuals in this region of the world. As discussed above, even when legal, targeted killing occupies a less honored place in combat. The United States has not used drones against Caucasian peoples. United States does not permit operating weaponized drones in civilian airspace on its own territory—and has thus far only permitted non-weaponized drones for surveillance along the U.S. border.[303] In contrast, many people in some Muslim countries hear the constant buzzing of U.S. weaponized drones flying overhead, apparently ready to strike at any time.[304]

2011-07-18%20COMISAF%20Ltr%20to%20Troops%20Upon%20Taking%20Command.pdf.

302. For an instructive exposition of the rationale behind the Tactical Directive, see Richard Gross, Presentation in Panel at the American Society of International Law Annual Meeting: New Battlefields/Old Laws: Shaping a Legal Environment for Counter-insurgency (Mar. 25, 2011) (noting that "sometimes tactical success can lead to strategic defeats" and that "counterinsurgency is a fight for the will of the people"; and lastly that when "you take out two Taliban you are not minus two in the fight; in many cases you're plus ten"). For a much fuller discussion of the proportionality rule and the acceptance of collateral damage under humanitarian law, see McDonnell, *supra* note 19, at 137–48.

303. *See General Atomics Aeronautical Systems, supra* note 50. Drones are now engaged in patrolling the US-Mexican border. Eric Lichtblau, *U.S. Takes Steps to Tighten Mexican Border*, N.Y. Times (Mar. 16, 2004), http://www.nytimes.com/2004/03/16/us/us-takes-steps-to-tighten-mexican-border.html?pagewanted=all; Randall C. Archibold, *U.S. Adds Drones to Fight Smuggling*, N.Y. Times (Dec. 7, 2009), http://www.nytimes.com/2009/12/08/us/08drone.html?_r=1&ref=drugtrafficking.

304. *See* Clive Stafford Smith, *For Our Allies, Death from Above,* N.Y. Times (Nov. 3, 2011), http://www.nytimes.com/2011/11/04/opinion/in-pakistan-drones-kill-our-innocent-allies.html ("American drones would circle their homes all day before unleashing Hellfire missiles, often in the dark hours between midnight and dawn."); Jane Perlitz, *Drones Batter Al Qaeda and Their Allies in Pakistan*, N.Y. Times (Apr. 4, 2010), http://www.nytimes.com/2010/04/05/world/asia/05drones.html ("The drones, operated by the C.I.A. fly overhead sometimes four at a time, *emitting a beelike hum virtually 24 hours a day*, observing and tracking targets, then unleashing missiles on their quarry.") (emphasis added).

D. *Applying International Humanitarian Law and International Human Rights Law to Two United States Drone Strikes*

This analysis suggests that the drone strike against Anwal al Awlaki, the U.S. al Qaeda member, was probably illegal and that the strike against Baitalluh Mehsud was legal, but probably unwise. Since the Awlaki killing took place outside an armed conflict to which United States is a party, but in an area of Yemen in which it was difficult to exercise law enforcement, the question becomes whether under, international human rights law, killing Awlaki was absolutely necessary to stop an imminent threat of death or serious bodily harm. Furthermore, Awlaki's status as a civilian "active[ly] . . . tak[ing] . . . part in hostilities"[305] has been questioned; some claim he was a mere propagandist, but the U.S. State Department asserts that he played an operational role.[306] As of this writing, the evidence on these matters is unclear;[307] consequently, at a very minimum, both the executive branch and the U.S. Congress should conduct open, independent investigations into the operation.[308]

By launching from the Pakistani tribal areas large scale attacks into Afghanistan, the Taliban, with the acquiescence of Pakistan, have made such areas an extension of the Afghani armed conflict.[309] As a leader of 20,000 Taliban militants, Mehsud's status as a combatant is beyond dispute. The CIA drone attack in the tribal areas killed not only Mehsud, but also his second wife and destroyed his in-laws' house, all consequences well within the pro-

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305. Third Geneva Convention of 1949, *supra* note 114, art. 3(1).

306. *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 9, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all.

307. *Id.* (citing unnamed sources that U.S. intelligence agencies concluded that Awlaki "played a direct role in terrorist operations against the United States, that he was affiliated with Al Qaeda's terrorist network[,] and that he was beyond the reach of Yemen's authorities"). Attorney General Holder stated that Farouk Abdulmutallab, the Christmas underwear bomber, admitted that "he made contact with" Awlaki. Holder, *supra* note 175. Note, however, that recent reports suggest that the use of drone strikes in Yemen has aided in terrorist recruitment. *See, e.g.*, Mothana, *supra* note 252; *see also* Complaint, Al-Aulaqi v. Panetta (D.D.C. filed July 18, 2012), *available at* http://www.ccrjustice.org/files/July-18-2012-Nasser-Al-Aulaqi-Complaint.pdf (filed by the American Civil Liberties Union and Center for Constitutional Rights, suing the Secretary of Defense for allegedly violating Al-Aulaqi's rights as an American citizen in targeting and killing him in the drone strike).

308. At a minimum, such investigations should be carried out by the CIA Inspector General, the U.S. Department of Defense Inspector General, and Congress.

309. *See, e.g.*, C.J. Chivers, *Tensions Flare as G.I.'s Take Fire out of Pakistan*, N.Y. TIMES, Oct. 17, 2011, at 1 (noting that "[g]round-to-ground rockets fired within Pakistan have landed on or near American military outposts in one Afghan border province at least 55 times since May"); *see also* Paust, *Self-Defense Targetings*, *supra* note 93, at 250–51.

portionality-collateral damage rule.[310] Yet the retaliatory suicide double agent bomb attack against the CIA indicates the anger that the drone attack inspired, despite having received broad approval by Pakistanis. Along with the historical evidence of Islamic colonization and empirical evidence regarding targeting religiously motivated terrorists, this response raises, among others, the question whether attacks on such a leader will dampen rather than inflame violence.

Conclusion

The major industrial states are racing to produce robotic weapons; at least fifty-six nations are developing them.[311] Furthermore, there now is "massive spending" to develop completely autonomous weapons that take "humans out of the loop."[312] The combination of advances in robotic weaponry and threats from terrorist non-state actors is incendiary. It enables government officials to call the Geneva Conventions quaint and obsolete and even more liberal governmental officials to offer far-reaching legal interpretations justifying targeted killing with remotely operated weapon systems.

Drones raise the ante. The ease of using drones and the lack of danger to the attackers increase the likelihood of using attack drones more than ever before and in areas far from armed conflict, thereby eroding humanitarian law and human rights law. For the attacked people—generally technologically limited, but united by an extreme fundamentalist religious ethos—targeted killing by such means must be particularly infuriating.

At the very least, there is a reasonable doubt that using drones for targeted killing operations of suspected Islamic terrorists will, in the long run, seriously disable the terrorist organizations they lead. Despite the decapitation of numerous Taliban and al Qaeda leaders and the Obama administration's belief that the strikes have effectively paralyzed al Qaeda in the Pakistan tribal areas, there is some evidence to suggest that such operations might actually strengthen such organizations both internally and externally.

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310. Yet as an attack in a partially failed state (the tribal areas of Pakistan), it is submitted that NATO and the United States should observe a higher standard, to strive to eliminate civilian casualties. *See supra* note 218.

311. John Markoff, *War Machines: Recruiting Robots for Combat*, N.Y. Times (Nov. 27, 2010), http://www.nytimes.com/2010/11/28/science/28robot.html.

312. Noel Sharkey, *Grounds for Discrimination: Autonomous Robot Weapons*, Rusi Defence Systems, Oct. 2008, at 89; *see also* Ramage, *supra* note 55.

Employed against these targets, the unchivalrous, seemingly cowardly, method of warfare might result in greater support for terrorists and more terrorist recruits in the Islamic world.

Perhaps even more important, compiling hit lists and then using a machine remotely operated from a distant land, to take the life of listed suspected terrorists appears much more like murder than honorable combat and, thereby, undermines world public order. Furthermore despite their precision, drone missile attacks often endanger non-combatants. The United States and its allies should restrict the targeted killing of suspected Islamic terrorists to the exceptional case where a militant poses an imminent threat to the United States, allied troops or civilians, and, as a matter of policy, if not crystallized, international law, ensure that innocent civilians be spared.

The West and the United States should learn from their own experience in Afghanistan resulting in the Tactical Directive and from the history of air warfare in Vietnam, and World War II that interpreting combat immunities strictly and human rights and humanitarian law protections broadly is our best hope for upholding the United States' moral authority and for lessening rather than inflaming conflict, especially with religiously motivated terrorist movements in repressed societies largely colonized by Western hands.