

## XII

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# Lawfare Today . . . and Tomorrow

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**Charles J. Dunlap, Jr.\***

*A principal strategic tactic of the Taliban . . . is either provoking or exploiting civilian casualties.*

Secretary of Defense Robert Gates<sup>1</sup>

### *I. Introduction*

**A**lthough he does not use the term “lawfare,” Secretary Gates’ observation reflects what is in reality one of the most common iterations of lawfare in today’s conflicts. Specifically, the Taliban are aiming to achieve a particular military effect, that is, the neutralization of US and allied technical superiority, especially with respect to airpower. To do so they are, as Secretary Gates indicates, creating the perception of violations of one of the fundamental norms of the law of armed conflict (LOAC), that is, the distinction between combatants and civilians.

While “provoking or exploiting civilian casualties” is clearly a type of lawfare, it is by no means its only form. Although the definition has evolved somewhat since its modern interpretation was introduced in 2001,<sup>2</sup> today I define it as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”<sup>3</sup>

As such, it is ideologically neutral, that is, it is best conceptualized much as a weapon that can be wielded by either side in a belligerency. In fact, many uses of legal “weapons” and methodologies avoid the need to resort to physical violence

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\* Major General, US Air Force (Ret.); Visiting Professor of the Practice of Law and Associate Director, Center on Law, Ethics, and National Security, Duke University School of Law.

and other more deadly means. This is one reason, for example, that the United States and other nations seek to use sanctions before resorting to the use of force whenever possible.

Another illustration would be the use of a contract “weapon” during the early part of Operation Enduring Freedom to purchase commercially available satellite imagery of Afghanistan.<sup>4</sup> This approach was equally or, perhaps, *more* effective than other more traditional military means might have been in ensuring the imagery did not fall into hostile hands. Additionally, most experts consider the re-establishment of the rule of law as an indispensable element of counterinsurgency (COIN) strategy. Finally, few debate that the use of legal processes to deconstruct terrorist financing is an extraordinarily important part of countering violent extremists.

In short, there are many uses of what might be called “lawfare” that serve to reduce the destructiveness of conflicts, and therefore further one of the fundamental purposes of the law of war. All of that said, others have given the concept a rather different meaning. Some couch it in terms of what is alleged to be the “growing use of international law claims, *usually factually or legally meritless*, as a tool of war.”<sup>5</sup> Similarly, the privately run Lawfare Project openly acknowledges it concentrates “on the *negative* manipulation of international and national human rights laws” for purposes, it asserts, that are “other than, or contrary to, that for which those laws were originally enacted.”<sup>6</sup>

Some go even further. In 2007 respected lawyer-writer Scott Horton expressed concern that unnamed “lawfare theorists” purportedly consider that attorneys who aggressively use the courts in the representation of Guantanamo detainees and other terrorism-related matters “might as well be terrorists themselves.”<sup>7</sup> More recently, much discussion of lawfare has centered on legal maneuvering associated with the Israeli-Palestinian confrontation. For example, some individuals and organizations see lawfare as “the latest manifestation in the sixty-year campaign to isolate the State of Israel.”<sup>8</sup>

In any event, these sometimes hyperbolic permutations on lawfare theories are not that espoused by this article. Among other things, it is certainly not the view of this writer that any party *legitimately* using the courts is doing anything improper. Instead, this brief article will focus more narrowly on the role of law in contemporary conflicts, principally that in Afghanistan.

It is true, as Secretary Gates’ comment suggests, that lawfare in the Afghan context has typically taken the form of the manipulation of civilian casualties to make it appear that US and allied forces have somehow violated legal or ethical norms. Thus, it could be said that lawfare itself is an asymmetrical form of warfare, one that is value-based and that seeks to outflank, so to speak, conventional military means.

Regardless, from this writer's perspective, the use of the term "lawfare" was always intended as a means of encapsulating for non-lawyer, military audiences the meaning of law in today's war. It was *not* intended to fit neatly into some political science construct. Rather, the sobriquet of "lawfare" was meant to impress upon *military* audiences and other non-lawyers that law is more than just a legal and moral imperative; it is a *practical* and *pragmatic* imperative intimately associated with mission success. In that respect, the growth of the term seems to have had some positive results.

## *II. Lawfare Today: Airpower and Civilian Casualties*

Perhaps no aspect of what this writer would characterize as lawfare is more prominent than the restrictive rules of engagement imposed upon allied forces in Afghanistan in an effort to win "hearts and minds" by limiting civilian casualties. These restrictions go far beyond what LOAC requires, and are a classic example of efforts to "improve upon" LOAC via policymaking that insufficiently appreciates unintended consequences that can have, at the end of the day, decidedly counterproductive results. As a noncommissioned officer explained to columnist George Will in June of 2010, the rules of engagement in Afghanistan are "too prohibitive for coalition forces to achieve sustained tactical success."<sup>9</sup> And other troops fighting there have raised similar concerns.

Airpower in particular has been cast—wrongly in my view—as a villain with respect to the civilian casualty issue. The Army and Marine Corps' COIN Field Manual (FM) 3-24,<sup>10</sup> for example, discourages the use of the air weapon by claiming that "[b]ombing, even with the most precise weapons, can cause unintended civilian casualties."<sup>11</sup> Of course, *any* weapon "can" cause civilian casualties,<sup>12</sup> so it is not clear why air-delivered munitions should be singled out for "exceptional care," as FM 3-24 demands.

More important, the data show that *ground* operations can be vastly more dangerous to civilians than airstrikes. A study by the *New England Journal of Medicine* found that fewer than 5 percent of civilian casualties in Iraq during the 2003–8 time frame were the result of airstrikes.<sup>13</sup> Regarding Afghanistan, a 2008 Human Rights Watch study of airstrikes found that it was the presence of troops on the ground that created the most risk to civilians, as the "vast majority of known civilian deaths" came from airstrikes called in by ground forces under insurgent attack.<sup>14</sup>

Even more recently, a National Bureau of Economic Research study found that only 6 percent of the civilian deaths attributed to International Security Assistance Force (ISAF) were the result of airstrikes. In fact, traffic accidents with ISAF vehicles

were two and a half times more likely to be the cause of the deaths of Afghan women and children than were airstrikes.

Nevertheless, ground commanders have insisted that civilian deaths could be curtailed with more troops. Army Brigadier General Michael Tucker suggested as much when he told *USA Today* in late 2008 that “[i]f we got more boots on the ground, we would not have to rely as much on [airstrikes].”<sup>15</sup> Unsurprisingly, therefore, when General Stanley McChrystal assumed command in Afghanistan in June of 2009, he immediately issued orders that significantly restricted the use of the air weapon,<sup>16</sup> and shortly thereafter called for a “surge” of mainly ground forces.<sup>17</sup>

It should be said that even before General McChrystal’s orders the coalition’s ability to use the air weapon was complicated by NATO’s own public pronouncements that distorted the understanding of the law of war, with tragic consequences.<sup>18</sup> Specifically, in June of 2007 NATO declared that its forces “would not fire on positions if it knew there were civilians nearby.”<sup>19</sup> A year later its statement was even more egregious, when a NATO spokesman preened that “[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there.”<sup>20</sup>

This statement was not only insensitive to Americans cognizant of the horror of the bin Laden–inspired 9/11 attacks; it also works counter to the basic purposes of LOAC. Of course, zero casualties are *not* what LOAC requires; rather, it only demands that they not be excessive in relation to the military advantage anticipated. The law is this way for good reason: if “zero casualties” were the standard, it would invite adversaries to keep themselves in the company of civilians to create a sanctuary from attack. The Taliban heard NATO’s invitation and did exactly that.<sup>21</sup>

In any event, if the intent of the June 2009 airpower restrictions was to save civilian lives, it did not succeed. Although civilian deaths from the actions of NATO forces did decline,<sup>22</sup> *overall* civilian deaths in Afghanistan nevertheless reached an all-time high in 2009.<sup>23</sup> And civilian deaths soared 31 percent in 2010 over 2009’s record-breaking figures. I would suggest that an obvious (albeit unintended) result of forgoing opportunities to kill extremists via airstrikes is that they live another day to kill more innocents.<sup>24</sup>

This may be why the UN reported on June 19, 2010—about a year after General McChrystal’s order—that security in Afghanistan has “deteriorated markedly” in recent months.<sup>25</sup> Moreover, in terms of “winning hearts and minds,” analyst Lara M. Dadkhah raises the interesting point worth pondering in a February 2010 *New York Times* op-ed that the “premise that dead civilians are harmful to the conduct of the war [is mistaken, as] no past war has ever supplied compelling proof of that claim.”<sup>26</sup> That is proving to be the case in Afghanistan.

To his credit, General McChrystal did admit in December 2009 that there was “much about Afghanistan that [he] did not fully understand.”<sup>27</sup> In that respect, his assumption that seems to underlie his order—that civilian deaths inevitably work against the perpetrators’ cause—may be one of the things he did not correctly understand. For example, Ben Arnoldy of the *Christian Science Monitor* reports that the Taliban—not NATO forces—were responsible for the majority of civilian deaths in 2009.<sup>28</sup> Even though those deaths reflect a 41 percent increase over 2008, Arnoldy says that “there is little indication these Taliban indiscretions have backfired on the movement so far.”<sup>29</sup>

Consider as well the Afghan reaction in September of 2009 when General McChrystal sought to apologize for the bombing of a hijacked oil tanker near Kunduz that allegedly killed seventy-two Afghans. The *Washington Post* reports that when General McChrystal began to apologize, a local “council chairman, Ahmadullah Wardak, cut him off” with demands for a tougher approach.<sup>30</sup> “McChrystal,” the *Post* recounts, “seemed to be caught off guard [by Wardak’s reproof]” as Wardak asserted that the allies have been “too nice to the thugs.”<sup>31</sup>

Jeremy Shapiro, a Brookings Institution scholar who served on a civilian assessment team for General McChrystal, analyzes Wardak’s remarks as saying that if the coalition is going to be a genuine provider of security for the people, that means: “[Y]ou’ll do what is necessary to establish control, and the very attention that the coalition pays to civilian casualties actually creates the impression among many Afghans that [coalition forces] in fact are not interested in establishing control and not interested in being the provider of security.”<sup>32</sup> Shapiro concedes that the Afghan government has “highlighted” the civilian casualty issue but argues that it is doing so “because it serves to demonstrate [its] independence from the coalition and gives [it] leverage with the coalition.”<sup>33</sup> To his surprise, Shapiro says, local officials in his experience “tend actually not to be too concerned” with the civilian casualties.<sup>34</sup> In short, he concludes that while the civilian casualty issue “clearly resonates very strongly [in the United States] and in Europe . . . [it is] not clear that Afghans actually see this as a key issue.”<sup>35</sup>

A Gallup poll released in February 2010 provides further data as to Afghan perceptions. Although the question of airstrikes was not directly addressed, it did show that beginning in June of 2009 (coinciding with the new restrictions on airpower) through the end of the survey period in late 2009, Afghans’ approval of US leadership in Afghanistan declined, as did their support for additional troops.<sup>36</sup>

Obviously, the restrictions on airpower did not have the hoped-for “hearts and minds” effect. Further complicating the issue is the fact that, like those of Afghan civilians, *coalition* casualties also reached an all-time high in 2009.<sup>37</sup> And these disturbing casualty trends are continuing into 2010; by the end of September the

number of coalition casualties exceeded the record-breaking high of 2009.<sup>38</sup> Thus, however well-intentioned the airpower restrictions may have been, evidence of their efficacy is not apparent.

The deleterious effect on operations is unmistakable, as the deteriorating security situation noted in the UN report above attests.<sup>39</sup> At one time Taliban fighters cowered at American airpower.<sup>40</sup> Today, however, the *Air Force Times* reports that because of the new directive, the Taliban “no longer run and hide when they see a fighter jet overhead.”<sup>41</sup> The *Times* quotes an Air Force pilot as expressing frustration “when you can see them shooting at our guys” and are obliged not to attack.<sup>42</sup> The pilot laments that the enemy knows that “we are not allowed to engage in certain situations.”<sup>43</sup>

At the same time airpower technology continues to develop even more discrete and effective ways to hunt the terrorists without the need to put thousands of young Americans in harm’s way. According to the *Washington Post*, “a new generation of small but highly accurate missiles” designed to limit collateral damage is being fielded for employment on remotely manned vehicles.<sup>44</sup> Such technology, the *Post* reports, along with better intelligence, has caused the “clamor over [drone] strikes [to have] died down considerably over the last year.”<sup>45</sup>

While airpower alone is not—and *can never be*—the whole solution to today’s wars, rethinking it in the context of what today’s technology can provide might produce opportunities to fulfill the President’s intent of protecting Americans against terrorist attack in a less resource-demanding way,<sup>46</sup> and at the same time serve the interests of international humanitarian law’s effort to ameliorate the horror of war, and especially its impact on innocent civilians.

### *III. Lawfare Tomorrow: The Emerging Issues*

The increasing controversy concerning “drones,” or, more accurately, remotely piloted vehicles (RPVs), is raising some interesting legal and policy issues with lawfare implications. By all reports, these weapon systems are extremely effective, particularly in eroding enemy leadership cadres. Yet a variety of objections have been offered as to their use.

Some of the attacks border on the absurd, and are reminiscent of medieval legal debates. For example, in A.D. 1139 Pope Innocent II and the Second Lateran Council condemned the missile warfare that was devastating Europe’s knighted aristocracy by calling slingers and archers “dastards” that are practicing a “deadly and God-detested art” with their stones and arrows.<sup>47</sup> Fast-forward to 2009, and we find former Australian Army officer David Kilcullen condemning the missile warfare that is devastating the terrorist aristocracy of the Taliban and Al Qaeda by

telling Congress to “call off the drones” in part because the militants view aerial attacks as “cowardly and weak.”<sup>48</sup>

It is not clear why anyone should be concerned about the sensibilities of Taliban and Al Qaeda militants. Although Kilcullen and others seem to view the militants as courageous fighters seeking man-to-man fights, their use of indiscriminate improvised explosive devices—which grew 94 percent over the past year<sup>49</sup>—plainly shows that *they* embrace remotely operated systems (albeit on the ground and not in the air). In addition, reports indicate that the Taliban are not only intermingling with civilians in the hopes of being shielded; media reports also say they are engaging in the vile practice of buying children to use as suicide bombers.<sup>50</sup>

Almost as problematic as the “cowardly” objections to advanced warfighting systems is the emergence of the “targeted killings” debate. This has become something of a cottage industry within the human rights establishment. Many commentators seem to be frantically searching for ways to find the use of the highly effective RPVs somehow improper. A good example is the recent report of the UN’s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.<sup>51</sup>

One of the most disappointing aspects of the report was the allegation that RPV operators might adopt a “Playstation mentality.” This wholly speculative and unproven allegation questioning the professionalism of RPV operators is but one illustration of the report’s deficiencies. Moreover, the illogical suggestion that military or intelligence professionals would prefer to kill a terrorist as opposed to capturing and interrogating him is yet another indication of the report’s flaws.

Yet there *are* issues associated with RPVs. For example, in a recent issue of *Armed Forces Journal*, Peter Singer of the Brookings Institution raises issues about the status of RPV operators by questioning the propriety of the operation of the aircraft by other than military personnel.<sup>52</sup> Perhaps as interesting—or more so—is the question of fully autonomous RPVs or other weapon systems.

As a practical matter, the current generation of RPVs generally requires a very permissive air environment to survive. To use the systems in contested airspace presents a variety of daunting technical challenges that must be overcome, not the least of which is the maintenance of continuous contact between the vehicle and its distant operator. Many experts believe that in the future the vehicle would have to operate autonomously, at least part of the time.

The world has not, however, been receptive to autonomous weapons systems. Exhibit “A” would be the near-universal ban on landmines we have today. When one examines the history of the ban, it becomes clear that emotional arguments predominated as opposed to tempered, rational discussions of how the weapons might be used in ways that actually reduce the destructiveness of war. Regardless, the experience of the landmine campaign may be something of a portent for

policymakers to consider, as science will inevitably provide the opportunity for the development of a whole family of partly or even fully autonomous weapons systems for use in air, land, sea and cyber domains.

#### *IV. Concluding Observations*

Any discussion of lawfare seems to invite conclusions that “the law” is somehow an impediment to successfully warfighting, especially in an era of irregular warfare waged by non-State actors.<sup>53</sup> It is true, as mentioned earlier in this article, that there certainly will always be those who will abuse the law for perverse purposes. That should not, however, suggest abandoning the law. Consider the thoughtful observations of Lawrence Siskind in response to the “lawfare” strategies of Hamas leveled at Israel:

When al-Qaeda terrorists used jet planes as weapons to crash into skyscrapers in 2001, the West did not abandon its airports and office buildings. Instead, it found ways to cope with danger without making fundamental changes to its business life. The fact that Hamas terrorists are cynically using another Western institution, the rule of law, as a weapon today does not mean that Western nations should abandon it. Instead, they must learn to adjust and cope.<sup>54</sup>

In the twenty-first century we should expect to see further developments of lawfare. We may not like all of its iterations, but we should never forget that legal battles are always preferable to real battles, and modern democracies are well-suited to wage—and win—legal “wars.”

#### *Notes*

1. Press Conference, Secretary of Defense Robert Gates & Chairman, Joint Chiefs of Staff Michael Mullen, Leadership Changes in Afghanistan (transcript), DEFENSELINK (May 11, 2009), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4424>.

2. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited Jan. 21, 2011).

3. The author originally cast the definition to say “achieve an operational objective” but changed the wording so as to preclude an interpretation that was linked to a particular level of war. Charles J. Dunlap, Jr., *Lawfare Today*, YALE JOURNAL OF INTERNATIONAL AFFAIRS, Winter 2008, at 146, available at <http://www.nimj.org/documents/Lawfare%20Today.pdf>.

4. See John J. Lumpkin, *Military Buys Exclusive Rights to Space Imaging's Pictures of Afghanistan War Zone*, ASSOCIATED PRESS, Oct. 15, 2001, available at <http://www.fas.org/sgp/news/2001/10/ap101501.html>.

5. David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL STREET JOURNAL, Feb. 23, 2007, at A11, available at <http://online.wsj.com/article/SB117220137149816987.html> (emphasis added).
6. *What is Lawfare?*, THE LAWFARE PROJECT, available at <http://www.thelawfareproject.org> (last visited Jan. 21, 2011).
7. Scott Horton, *State of exception: Bush's war on the rule of law*, HARPER'S MAGAZINE, July 2007, at 74, available at <http://www.harpers.org/archive/2007/07/0081595>.
8. Lawrence J. Siskind, *Lawfare*, THE AMERICAN THINKER (Feb. 7, 2010), [http://www.americanthinker.com/2010/02/lawfare\\_1.html](http://www.americanthinker.com/2010/02/lawfare_1.html).
9. George Will, Editorial, *Futility in Afghanistan; An NCO fires off a round of illumination*, WASHINGTON POST, June 20, 2010, at A19.
10. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, *Counterinsurgency* (2006), available at <http://www.scribd.com/doc/9137276/US-Army-Field-Manual-FM-324-Counterinsurgency>.
11. *Id.*, app. E, para. E-5.
12. See, e.g., *Afghan Official: Troops Killed Civilians*, CNN.COM (May 14, 2010), <http://afghanistan.blogs.cnn.com/2010/05/14/afghan-official-troops-killed-civilians/>.
13. Madelyn Hsiao-Rei Hicks et al., *The Weapons That Kill Civilians – Deaths of Children and Noncombatants in Iraq, 2003–2008*, NEW ENGLAND JOURNAL OF MEDICINE, Apr. 16, 2009, at 1585, 1586, available at <http://content.nejm.org/cgi/reprint/360/16/1585.pdf> (emphasis added).
14. HUMAN RIGHTS WATCH, "TROOPS IN CONTACT": AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 29 (2008), available at <http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf>.
15. Jim Michaels, *Airstrikes in Afghanistan increase 31%*, USA TODAY, Nov. 5, 2008, at 1, available at [http://www.usatoday.com/news/world/2008-11-05-afghanstrikes\\_N.htm](http://www.usatoday.com/news/world/2008-11-05-afghanstrikes_N.htm).
16. Dexter Filkins, *U.S. Toughens Airstrike Policy in Afghanistan*, NEW YORK TIMES, June 22, 2009, at A1.
17. The author discussed this issue in *Could Airstrikes Save Lives?*, WASHINGTON POST, Oct. 22, 2010, at A25.
18. The North Atlantic Treaty Organization nations are the principal but not exclusive contributors of foreign forces for the International Security Assistance Force in Afghanistan.
19. Noor Khan, *US Coalition Airstrikes Kill, Wound Civilians in Southern Afghanistan*, *Official Says*, ASSOCIATED PRESS, INTERNATIONAL HERALD TRIBUNE, June 30, 2007 (quoting Major John Thomas, spokesman for NATO's International Security Assistance Force), available at <http://www.iht.com/articles/ap/2007/06/30/asia/AS-GEN-Afghan-Violence.php>.
20. Pamela Constable, *NATO Hopes to Undercut Taliban with Surge of Projects*, WASHINGTON POST, Sept. 27, 2008, at A12 (quoting Brigadier General Richard Blanchette, chief spokesman for NATO forces), available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452_pf.html).
21. See, e.g., *Inside US Hub for Air Strikes*, BBC AMERICA, Nov. 29, 2008 (quoting Colonel Eric Holdaway as saying, "[S]ome of our enemies have clearly located themselves amongst civilians"), available at [http://news.bbc.co.uk/2/hi/south\\_asia/7755969.stm](http://news.bbc.co.uk/2/hi/south_asia/7755969.stm).
22. "Pro-government forces reduced civilian killings by 28 percent." See Ben Arnoldy, *History sides with Taliban, for now*, CHRISTIAN SCIENCE MONITOR, May 10, 2010, at 9.
23. See Dexter Filkins, *'09 Deadliest Year for Afghans*, *U.N. Says*, NEW YORK TIMES, Jan. 14, 2010, at A6, available at <http://www.nytimes.com/2010/01/14/world/asia/14kabul.html>.
24. See *supra* note 17.

25. Ernesto Londono, *U.N. Report on Afghanistan Notes Surge in Attacks and Killings*, WASHINGTON POST, June 20, 2010, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/19/AR2010061902715.html>.

26. See Lara M. Dadkhah, Op-Ed, *Empty Skies Over Afghanistan*, NEW YORK TIMES, Feb. 18, 2010, at A27, available at <http://www.nytimes.com/2010/02/18/opinion/18dadkhah.html>.

27. *Afghanistan: The Results of the Strategic Review, Part II: Hearing Before the House Armed Services Committee*, 111th Cong. 61 (2009) (statement of General Stanley R. McChrystal), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57832/pdf/CHRG-111hhrg57832.pdf>.

28. Arnoldy, *supra* note 22.

29. *Id.*

30. Rajiv Chandrasekaran, *Sole Informant Guided Decision On Afghan Strike*, WASHINGTON POST, Sept. 6, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/05/AR2009090502832.html>.

31. *Id.*

32. Jeremy Shapiro, Remarks at the Proceedings of the Afghanistan and Pakistan Index and Assessments Project at the Brookings Institution 33 (Oct. 5, 2009) (transcript available at [http://www.brookings.edu/~media/Files/events/2009/1005\\_afghanistan\\_pakistan/20091005\\_afghanistan\\_pakistan.pdf](http://www.brookings.edu/~media/Files/events/2009/1005_afghanistan_pakistan/20091005_afghanistan_pakistan.pdf)).

33. *Id.* at 32.

34. *Id.*

35. *Id.*

36. Julie Ray & Rajesh Srinivasan, *Afghans More Skeptical of U.S. Leadership, Troops*, GALLUP (Feb. 3, 2010), available at <http://www.gallup.com/poll/125537/afghans-skeptical-leadership-troops-2009.aspx>.

37. See *Operation Enduring Freedom: Coalition Military Casualties by Year and Month*, ICASUALTIES.ORG, available at <http://www.icasualties.org/OEF/ByMonth.aspx> (last visited Dec. 2, 2010).

38. *Id.*

39. See Londono, *supra* note 25.

40. See, e.g., Rowan Scarborough, *Pentagon Notebook: McPeak calls McCain too fat*, WASHINGTON TIMES, June 26, 2008, at B01 (quoting a Taliban commander as saying, “Tanks and armor are not a big deal—the planes are the killers. I can handle everything but the jet fighters.”), available at <http://www.washtimes.com/news/2008/jun/26/pentagon-notebook-mcpeak-calls-mccain-too-fat?page=2>.

41. Michael Hoffman, *Looking Down in Frustration: McChrystal Order Limiting Afghan Airstrikes Takes Punch Out of Pilots*, AIR FORCE TIMES, May 3, 2010, at 16.

42. *Id.*

43. *Id.*

44. Joby Warrick & Peter Finn, *In Pakistan, CIA Refines Methods to Reduce Civilian Deaths*, WASHINGTON POST, Apr. 26, 2010, at A8.

45. *Id.*

46. Even critics concede that attacks on high-value targets—mainly by remotely piloted vehicles but also by other means—can be extremely effective when properly calibrated and conducted. See Mathew Frankel, Remarks at the Defense Challenges and Future Opportunities Symposium, at the Brookings Institution 4–13 (Mar. 26, 2010) (transcript available at [http://www.brookings.edu/~media/Files/events/2010/0326\\_defense\\_challenges/20100326\\_defense\\_challenges\\_panel1.pdf](http://www.brookings.edu/~media/Files/events/2010/0326_defense_challenges/20100326_defense_challenges_panel1.pdf)).

47. Jonah Goldberg, *Crossbows & Suicide Bombers*, NATIONAL REVIEW ONLINE (Aug. 10, 2001), <http://www.nationalreview.com/articles/204995/crossbows-suicide-bombers/jonah-goldberg>.

48. Doyle McManus, *U.S. Drone Attacks in Pakistan 'Backfiring,' Congress Told*, LATIMES.COM (May 3, 2009), <http://www.latimes.com/news/opinion/commentary/la-oe-mcmanus3-2009may03,0,7133284.column>.

49. See Londono, *supra* note 25 (citing UN report).

50. Sara A. Carter, *Taliban Buying Children to Serve as Suicide Bombers*, WASHINGTON TIMES, July 2, 2009, at 1.

51. See U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

52. P.W. Singer, *Double-Hatting Around the Law*, ARMED FORCES JOURNAL, June 2010, at 44, available at <http://www.armedforcesjournal.com/2010/06/4605658>. See also Gary Solis, *America's unlawful combatants*, WASHINGTON POST, March 12, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

53. The Department of Defense defines "irregular warfare" as a "violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary's power, influence, and will." See Chairman of the Joint Chiefs of Staff, Joint Publication 1-02, *Dictionary of Military and Associated Terms* (Nov. 12, 2010, as amended through Dec. 31, 2010), available at [http://www.dtic.mil/doctrine/dod\\_dictionary/](http://www.dtic.mil/doctrine/dod_dictionary/).

54. Siskind, *supra* note 8.