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Use of Unmanned Systems to Combat Terrorism

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I. Introduction

As the number of unmanned systems to support military operations has proliferated over the past decade, so too have the legal issues associated with their use in conventional warfare and the "war on terrorism." Between 2000 and 2008, the number of unmanned aerial systems (UAS) in the US Department of Defense (DoD) inventory jumped from under fifty to over six thousand.¹ By March 2010, the number had increased to over seven thousand.² In fiscal year 2009, UAS conducted over 450,000 flight hours; the number of hours in 2010 was expected to exceed 550,000.³ To support this increasing reliance on unmanned systems, the Air Force is expanding the number of UAS pilots and air operations staffers from 450 to 1,100 by 2012.⁴ In 2009, the Air Force trained more UAS pilots than fighter pilots.⁵

Today, unmanned systems are being used across the entire spectrum of operations, from their traditional role of intelligence, surveillance and reconnaissance (ISR) to an emerging role of offensive strike operations. UAS have clearly become the weapon of choice to target terrorists and other militants in isolated locations within Pakistan and Yemen. In 2007, for example, there were only 5 UAS attacks in Pakistan.⁶ The number of aerial attacks increased to 36 in 2008, and during the first year of the Obama administration the number jumped to 53.⁷ During the first

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four months of 2010, UAS have conducted 60 attacks in Pakistan.⁸ If the current pace continues, the number of UAS attacks could well exceed 150 in 2010.

The importance of the relationship between the use of unmanned systems and the law is not lost on our military and civilian leaders. At a session on unmanned naval technologies at the Brookings Institution in November 2009, the Chief of Naval Operations, Admiral Gary Roughead, acknowledged that “as unmanned systems become ubiquitous on the modern battlefield in everything from targeting to disrupting the flow of enemy information . . . , there are going to be legal issues that come up and issues related to the law of war.”⁹ Four months later, the State Department Legal Adviser, Harold Koh, defended the Obama administration’s use of UAS to engage terrorist targets in Pakistan and elsewhere, indicating that “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”¹⁰

Not everyone agrees, however, that the use of unmanned systems to attack terrorist targets outside traditional “combat zones,” like Afghanistan and Iraq, is consistent with international and domestic law. Some of the criticisms that will be examined in this paper include:

- The United States is not engaged in an armed conflict with al-Qaeda or any other militant group. Terrorist attacks are criminal acts that must be addressed with law enforcement measures, not armed attacks that give rise to the use of military force in self-defense. The use of force in this context is governed by international human rights law (IHRL), not international humanitarian law (IHL). Because armed drones are warfighting, not law enforcement, tools, they may not be used to strike terrorist targets outside the combat zone.
- Targeting individual terrorist leaders constitutes an unlawful extrajudicial killing in violation of IHRL, as well as the ban on assassination under Executive Order (E.O.) 12333.
- Conducting UAS strikes against terrorist targets within the territory of another nation without the consent of that nation violates Article 2(4) of the UN Charter, which restricts nations from using force against the territorial integrity or political independence of any State.
- Even if the right of self-defense applies, the use of UAS to attack terrorist targets outside Afghanistan and Iraq violates the IHL principles of military necessity, proportionality and distinction.
- If the United States is engaged in an armed conflict, civilian UAS operators (e.g., Central Intelligence Agency (CIA) operatives) are unlawful combatants and may not participate in hostilities. Only lawful combatants have a right to use force during an armed conflict.

- UAS strikes may only be conducted against civilians who have taken a direct part in hostilities. Although acts of terrorism may cause harm, most do not meet the criteria for direct participation in hostilities (DPH). State responses to these acts must conform to the lethal force standards applicable to self-defense and law enforcement.
- The use of advanced weapons systems in lethal operations against terrorists is illegal under international law.

II. Armed Attack or Threat of Attack by Non-State Actors and the Right of Self-Defense

Opponents to the use of drones outside of Afghanistan and Iraq argue that the “war on terrorism” is a myth because al-Qaeda’s actions and US responses thereto “have been too sporadic and low-intensity to qualify as armed conflict.”¹¹ They cite *Prosecutor v. Tadić* and Additional Protocol II (AP II) to support their position. In *Tadić*, the International Criminal Tribunal for the former Yugoslavia determined that an “armed conflict exists wherever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”¹² AP II similarly provides that armed conflicts do not include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹³ These opponents further argue that an armed military response to a terrorist attack will almost never meet the requirements for the lawful exercise of self-defense, because “terrorist attacks are generally treated as criminal acts . . . , not armed attacks that can give rise to the right of self-defense.”¹⁴ They additionally argue that the use of military force “long after the terror act . . . loses its defensive character and becomes unlawful reprisal.”¹⁵

These arguments are incorrect as a matter of law and are clearly not supported by State practice. Foremost, they ignore the fact that more innocent victims have died at the hands of terrorists since 9/11 than on the battlefields of Afghanistan and Iraq combined. These numbers do not include the thousands of innocent civilians killed by al-Qaeda, the Taliban and other militant groups in Afghanistan and Iraq since 2002. These figures also do not take into account the fact that the number of deaths and injuries would have been much higher had several planned terrorist attacks been successful. To argue that al-Qaeda’s actions have been too sporadic and low-intensity to qualify as an armed conflict is disingenuous, at best. Al-Qaeda operatives have attacked US embassies and consulates, US naval vessels, US military bases, the Pentagon and the US financial center in New York. With operations in over sixty countries, al-Qaeda has trained, equipped and supported

a potent armed force that continues to plan and execute attacks against the United States and its interests worldwide on a scale that requires a proportionate military response. Despite coalition successes in Iraq, Afghanistan and around the world, al-Qaeda continues to pose a significant and imminent threat to the United States and its allies. In short, the armed conflict against the organization and its affiliates is far from over.

The opponents' arguments likewise disregard the fact that the law regarding armed attacks by non-State actors and the application of IHL (i.e., the law of armed conflict (LOAC)) to these armed groups have evolved dramatically since the mid-1990s, particularly after 9/11. Based on actions taken by the UN Security Council, the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) after the 9/11 terrorist attacks, it is now well recognized that non-State actors can engage in an armed attack that gives rise to the right of national and collective self-defense.

A. Armed Attacks by Non-State Actors

On September 11, 2001, terrorists associated with al-Qaeda crashed two commercial jets into the twin towers of the World Trade Center (WTC), another jet into the Pentagon and a fourth in a field in rural Pennsylvania. Nearly three thousand people, mostly civilians, were killed and thousands of others were injured.

Immediately following these brutal and unprovoked attacks, the Security Council determined that al-Qaeda, a non-State actor, had conducted an armed attack against the United States, giving rise to the right of individual and collective self-defense under Article 51 of the Charter.¹⁶ Security Council Resolution 1368 (2001) further determined that the 9/11 attack, "like any act of international terrorism," was a "threat to international peace and security" and expressed a readiness "to take all necessary steps to respond to the terrorist attacks of . . . [9/11], and to combat all forms of terrorism."¹⁷

NATO soon followed suit, invoking Article 5 of the Washington Treaty for the first time in its history. Article 5 provides that if a NATO ally is the victim of "an *armed attack*," each and every member of the alliance will consider that act as an armed attack against all members and will take actions they deem necessary in collective self-defense to assist the ally that has been attacked (emphasis added).¹⁸ A few weeks later, recalling the inherent right of individual and collective self-defense, the OAS adopted a resolution on September 21 acknowledging that the 9/11 attack against the United States was an attack "against all American states and that in accordance with [Article 3 of] . . . the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) . . . , all States Parties . . . shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks

against any American state”¹⁹ The resolution further decided that “the States Parties shall render additional assistance and support to the United States and to each other . . . to address the September 11 attacks, and also to *prevent future terrorist acts*”²⁰ (emphasis added).

Domestically, the US Congress responded by adopting a joint resolution—Authorization to Use Military Force (AUMF)—that authorized the President “to use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the *terrorist attacks* that occurred on September 11, 2001, or harbored such organizations or persons, in order to *prevent any future acts* of international terrorism against the United States by such nations, organizations or persons”²¹ (emphases added). The US Supreme Court subsequently “recognized the AUMF as the functional equivalent of a declaration of war” in the *Hamdi* and *Hamdan* decisions and the 2010 National Security Strategy continues to reflect the view that the United States is “at war with . . . al-Qa’ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.”²²

Based on these international and domestic authorities, the United States commenced military operations in self-defense against al-Qaeda and the Taliban in Afghanistan on October 7, 2001. Of note, military operations against non-State actors are consistent with prior US practice. Throughout its history, the United States has engaged in a number of armed conflicts with groups that it has not recognized as sovereign nations in such conflicts as the US Civil War, Indian wars, Philippine Insurrection and Vietnam War (Viet Cong).²³ The question today is whether these historical precedents and the 2001 authorities remain viable in 2010, and whether they (along with the inherent right of self-defense) can be extended to apply to terrorist forces that continue to plan and conduct acts of aggression against the United States and its allies outside the borders of Afghanistan and Iraq.

Clearly, the answer to both of these questions is yes. Following 9/11, the Security Council, NATO and OAS all determined that the United States had been “attacked” by al-Qaeda, giving rise to the right of national and collective self-defense. These determinations are consistent with the plain language of Article 51 of the UN Charter, which simply refers to armed attacks against a member State (i.e., “nothing . . . shall impair the inherent right of individual or collective self-defense if an *armed attack occurs* against a Member of the United Nations” (emphasis added)). The Charter does not require that the attack be conducted by a nation-State. Moreover, none of these organizations placed temporal or geographic restrictions on the use of force in self-defense. On the contrary, the opposite is true. Resolution 1368 specifically decided that “*any act of international terrorism* [is] . . . a threat to international peace and security” (emphasis added). Moreover, the

resolution expressed a readiness “to take all necessary steps . . . to combat *all forms of terrorism*,” not just the 9/11 attack (emphasis added). The OAS resolution similarly provided that the States parties would provide assistance and support to the United States to address the 9/11 attacks, as well as “the *threat of any similar attacks* against any American state . . . to *prevent future terrorist acts*” (emphases added). And while NATO simply decided that all member States should take the actions they deemed necessary to assist the United States following the 9/11 attacks, it did not limit that assistance to a particular country or military operation. Likewise, although the AUMF adopted by Congress focuses on the nations, organizations or persons that planned, authorized, committed or aided the 9/11 attacks (or harbored such organizations or persons), the law does not place any temporal or geographic restrictions on the use of force. It simply provides that the President can use all necessary and appropriate force against those responsible for the 9/11 attacks “in order to *prevent any future acts* of international terrorism against the United States by such nations, organizations or persons” (emphasis added).

Despite the use-of-force measures authorized by these international and regional organizations, as well as the US Congress, opponents to the use of drones to attack terrorists outside of Afghanistan and Iraq nevertheless argue that these authorities are dated and that use of force based on continued reliance on these authorities has lost its defensive character and amounts to unlawful reprisals. Assuming for the sake of argument that the opponents are correct in saying that the United States is not at war with al-Qaeda and that the 2001 authorities have somehow lapsed, that does not end the debate. The inherent right of self-defense still provides an adequate legal basis to use lethal force against terrorist targets in Pakistan and elsewhere that demonstrate a continuing and imminent threat of armed attack against the United States and its interests.

B. The Inherent Right of Self-Defense

Customary international law, as reflected in Article 51 of the UN Charter, recognizes that all nations enjoy an inherent right of individual and collective self-defense. Included within this right is the right of anticipatory self-defense—the right of a nation to protect itself from an imminent attack where peaceful means are not reasonably available to prevent the attack.²⁴ Clearly, it would be inconsistent with the purposes of the Charter if a nation was required to absorb a first strike, e.g., another 9/11 or a weapon of mass destruction attack, before taking necessary and proportionate military measures to prevent an imminent attack by an armed aggressor. In this context, “imminent” does not necessarily mean immediate or instantaneous. As indicated in the 2006 US National Security Strategy:

[T]he first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. . . .

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.²⁵

The determination of whether an attack is imminent is therefore based on an assessment of all facts and circumstances known at the time—real-time intelligence, heightened political tensions, previous and current threats by the aggressor, pattern of aggression/attacks, stated intentions of the aggressor, etc.

The pivotal question today is whether the ongoing activities of al-Qaeda and its supporters continue to pose an imminent threat to the United States and its allies that would justify the use of armed force in self-defense to preempt future attacks against US interests at home and abroad. If one examines past and current acts of aggression committed by al-Qaeda and its affiliates against the United States and its allies, the answer to that question is clearly yes.

Since the first attack on the WTC in 1993, there have been over seventy major terrorist attacks against the United States and its allies that have resulted in the deaths of over five thousand people, most of whom were innocent civilians.²⁶ These deaths exceed the total number of US soldiers killed in action in Afghanistan and Iraq since the beginnings of Operation Enduring Freedom and Operation Iraqi Freedom.²⁷ Over sixty of these incidents have occurred since 9/11, resulting in over sixteen hundred deaths and thousands of others injured. These numbers would be much higher if you count the thousands of innocent civilians that have been killed by al-Qaeda and the Taliban in Iraq and Afghanistan or had several planned attacks—such as the December 1999 plot to bomb the Los Angeles airport, the December 2001 failed “shoe bomber” attack, the foiled attack on a British airliner in Saudi Arabia in August 2003, the August 2006 plot to blow up ten planes bound for the United States, the June 2007 failed car bombings in London, the December 2009 failed “underwear bomber” attack and the May 2010 failed bombing in Times Square—been successful.

It is clear from these incidents that al-Qaeda continues to pose an imminent threat to the United States and its allies and continues to threaten large-scale attacks against the United States and US interests. For instance, in November 2008, a former senior Yemeni al-Qaeda operative told the London-based *Al-Quds Al-Arabi* newspaper that Osama bin Laden was planning an attack against the United States that would outdo 9/11 and that al-Qaeda was reinforcing “training camps around the world that will lead the next wave of action against the West.”²⁸ In June 2009, Al-Jazeera television broadcast a message from bin Laden that threatened Americans with revenge for supporting Pakistan’s military offensive to expel the Taliban from Swat Valley.²⁹ Six months later, a Nigerian man (Umar Farouk Abdulmutallab, the “underwear bomber”) with links to al-Qaeda attempted to ignite an explosive device on board a Northwest Airlines flight with 278 passengers on board as the plane prepared to land in Detroit on Christmas day.³⁰ Fortunately, the device failed to ignite, but bin Laden nevertheless claimed responsibility for the attempted bombing.³¹ In January 2010, the US embassy in Yemen was closed in response to ongoing threats by al-Qaeda.³² An attack on the embassy in 2008 had killed nineteen, including an eighteen-year-old American woman.³³ In March 2010, Al-Jazeera aired a tape in which bin Laden threatened to kill any American captured by al-Qaeda if the United States executed Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attack.³⁴

In early May 2010, a naturalized US citizen from Pakistan, Faisal Shahzad, unsuccessfully attempted to ignite a car bomb that contained gasoline, propane, fertilizer and fireworks in Times Square.³⁵ According to Attorney General Holder, it was “clear that this was a terrorist plot aimed at murdering Americans in one of the busiest places in the country.”³⁶ Shahzad was arrested by the Federal Bureau of Investigation on May 4. During his interrogation, he admitted his role in the attempted attack and that he had received explosives training in Pakistan during a then-recent visit.³⁷ On June 21, Shahzad pled guilty to ten criminal counts, including the attempted use of a weapon of mass destruction, and indicated that until the United States “stops the occupation of Muslim lands and stops killing the Muslims . . . we will be attacking [the] U.S.”³⁸ The Pakistani Taliban immediately took credit for the attack and there is now evidence that the group was intimately involved in the failed attack.³⁹ Several additional suspects have been arrested in Pakistan, including an executive (Salman Ashraf Khan) of a catering company that routinely organizes events for the US embassy, and three Pakistanis were taken into custody in the United States for their suspected roles in the attack.⁴⁰

In mid-May, Indonesian police foiled an al-Qaeda plot to assassinate President Susilo Bambang Yudhoyono and other senior government officials at the upcoming Independence Day (August 17) celebrations in Jakarta. The plan also included

attacking hotels and killing foreigners—in particular, Americans. In addition to arresting a large number of suspected militants at an al-Qaeda training camp in Aceh, the Indonesian police also seized a large number of assault rifles, thousands of rounds of ammunition and jihadist literature.⁴¹

And on May 17, 2010, Iraqi security forces announced they had arrested a known al-Qaeda militant, Abdullah Azam Saleh al-Qahtani, who was planning an attack at the World Cup in South Africa and on June 26, 2010, a Pakistani suspect in the 2008 Mumbai attacks was arrested in Zimbabwe when he tried to cross into South Africa with a false Kenyan passport.⁴² Finally, on July 11, 2010, the Somali insurgent group al-Shabab, which has ties to al-Qaeda, claimed responsibility for a coordinated attack that killed more than seventy people, including a number of foreigners (one was an American), that were watching the final match of the World Cup on outdoor screens in Kampala, Uganda.⁴³

In discussing the ongoing terrorist threat against the United States and its allies, Director of National Intelligence Michael McConnell told Congress in November 2008 that al-Qaeda was “improving the last key aspect of its ability to attack the US: the identification, training and positioning of operatives [i.e., Western recruits, including American citizens] for an attack on the homeland.”⁴⁴ According to a study by the New America Foundation, “between 100 and 150 Westerners are believed to have traveled to the [Federally Administered Tribal Areas] FATA in 2009” to train with Taliban militants.⁴⁵ Arguably, these new recruits will be able to move around the United States and Europe more easily and be more difficult to detect than traditional foreign operatives.

There is also growing evidence that al-Qaeda’s anti-American/anti-Western ideology has been adopted by a number of Islamist extremist groups in Europe and North America.⁴⁶ A Pennsylvania woman (Colleen LaRose, a.k.a. Jihad Jane), for example, was indicted in March 2010 for “conspiracy to provide material support to terrorists and kill a person in a foreign country.”⁴⁷ LaRose conspired with five unnamed coconspirators to, *inter alia*, recruit “men online to wage violent jihad in South Asia and Europe . . . [and] women online who had passports and the ability to travel to and around Europe in support of violent jihad.”⁴⁸ According to the indictment, LaRose believed that “her physical appearance would allow her to blend in with many people.”⁴⁹ A second US citizen, Jamie Paulin Ramirez, was indicted in April 2010 for her involvement in the conspiracy with Jihad Jane.⁵⁰ Irish police have since arrested seven additional individuals involved in the conspiracy.⁵¹

In June 2010, a federal grand jury in Houston indicted Barry Walter Bujol, a US citizen from Hempstead, Texas, for attempting to provide material support to al-Qaeda, including personnel, money, prepaid phone cards, SIM cards, global positioning systems, cell phones and restricted publications on the effects of US

military weapons (e.g., UAS) in Afghanistan.⁵² On the same day, an Ohio couple from Toledo, Hor I. and Amara A. Aki, dual US-Lebanese citizens, were arrested for conspiring to provide material support to Hezbollah.⁵³ And on June 5, 2010, two New Jersey men (Mohamed Mahmood Alessa and Carlos Eduardo Almonte) were arrested at Kennedy International Airport as they attempted to board separate planes for Somalia. The two men intended to join al-Shabab and receive training in Somalia in order to kill American troops.⁵⁴ Finally, to further illustrate the ability of al-Qaeda to recruit and direct terrorist operations in the West, on July 8, 2010, Norwegian officials announced the arrest of three al-Qaeda operatives for their roles in plotting a foiled 2009 New York subway attack and planning to blow up a shopping center in Manchester, England.⁵⁵

In response to continuing al-Qaeda activities and threats aimed at US interests at home and abroad, President Obama indicated in November 2009 that terrorist networks like al-Qaeda remained the greatest threat to US security.⁵⁶ Similarly, Secretary of State Clinton stated in February 2010 that the greatest threat to the United States was transnational non-State terrorist networks like al-Qaeda, commenting that al-Qaeda was a “very committed, clever, diabolical group of terrorists who are always looking for weaknesses and openings.”⁵⁷ On March 9, 2010, the US Maritime Administration issued an advisory that warned ships transiting the Bab-el-Mandeb Strait, Red Sea and the Gulf of Aden along the coast of Yemen that al-Qaeda remains interested in maritime attacks in these waters and that the attacks could be similar in nature to the attack against the *USS Cole* (2000) or the *M/V Limberg* (2002), “where a small to mid-size boat laden with explosives was detonated in the vicinity of the targeted ships.”⁵⁸ The advisory further indicated, however, that “it cannot be ruled out that the extremists may be capable of other[,] more sophisticated methods of targeting, such as the use of missile[s] or projectiles to target ship[s] such as the mortars used to target a Navy ship in Jordan in 2005.” Finally, a May 2010 Department of Homeland Security memo indicates that “the number and pace of attempted [terrorist] attacks against the United States over the past nine months have surpassed the number of attempts during any other previous one-year period” and that terrorists will attempt to conduct strikes within the United States with “increased frequency” and with “little or no warning.”⁵⁹

In short, despite the substantial progress that has been made toward eliminating the threat posed by terrorists, al-Qaeda and its affiliates remain a potent and determined force with the capability and intent to strike the US mainland, its allies and US interests abroad at every opportunity with the most destructive means at their disposal. The militant groups continue to train and equip their fighting forces in order to plan and execute devastating attacks against the United States and its allies

around the world. Under these circumstances, international law allows the United States to preemptively use proportionate force in self-defense to eliminate the continuing and imminent threat posed by al-Qaeda and other terrorist groups. Whether one agreed or disagreed with the former Bush administration's initiatives following 9/11, the President's statement in 2004 regarding the war on terror cannot be ignored:

The war on terror is not a figure of speech. It is an inescapable calling of our generation. . . . There can be no separate peace with the terrorist enemy. Any sign of weakness or retreat simply validates terrorist violence and invites more violence for all nations. The only certain way to protect our people is by early, united, and decisive action.⁶⁰

Until the threat is effectively eliminated, the United States can continue to use force in self-defense against al-Qaeda and its supporters, to include the use of unmanned systems.

Despite disagreements with some of the Bush administration's policies with regard to the wars in Afghanistan and Iraq, the Obama administration appears to have adopted the Bush approach to the use of drones in Pakistan and elsewhere. On March 24, 2010, Department of State Legal Adviser Harold Koh delivered the keynote speech at the Annual Meeting of the American Society of International Law (ASIL). In part, Mr. Koh discussed the strategic vision of international law that the Obama administration was attempting to implement, what he called "The Law of 9/11: detentions, use of force, and prosecution."⁶¹ In defending US targeting of terrorists in Pakistan and elsewhere, Mr. Koh indicated that, as a matter of international law, the United States is engaged in an "armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."⁶² Mr. Koh further emphasized that al-Qaeda continues to pose an imminent threat to the United States: "[A]l-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us."⁶³ Accordingly, he continued, "the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks."⁶⁴

III. Lawful Targeting of Belligerents v. Extrajudicial Killings/Assassination

Opponents to the use of drones argue that IHRL is the governing body of law that must be applied when using deadly force against terrorists outside the traditional combat zone. They further argue that IHRL prohibits extrajudicial killing. Under

an IHRL/law enforcement construct, deadly force should only be used as a last resort to save lives and only after lesser means have failed. Accordingly, before using deadly force, an attempt should be made to capture the terrorist or allow him/her an opportunity to surrender. They argue that the use of UAS to target terrorists in Pakistan, Yemen, Somalia and elsewhere violates the IHRL prohibition on extrajudicial killing, as well as the US ban on assassination in E.O. 12333.

These arguments incorrectly assume that the United States is not engaged in an armed conflict with al-Qaeda and that the targeted terrorist groups do not pose an imminent and continuing threat to the United States, either of which gives rise to the inherent right of self-defense. In short, nothing in E.O. 12333 or IHL/LOAC restricts the lawful use of force in self-defense against an enemy belligerent (privileged or unprivileged) or against a group that poses an imminent or continuing threat to the United States and its interests.

A. The Assassination Ban under E.O. 12333

Assassination of foreign nationals has been prohibited as a matter of US domestic policy since 1976 when President Ford signed E.O. 11905. Section 5(g) provides that “no employee of the United States Government shall engage in, or conspire to engage in, political assassination.”⁶⁵ The reference to “political” assassination was dropped by the Carter administration in E.O. 12036, opting instead to generically prohibit “assassination.”⁶⁶ An identical prohibition is found in section 2.11 of E.O. 12333.⁶⁷ Although “assassination” is not defined in the executive orders, the term involves the intentional killing (or murder) of a targeted individual committed for political purposes.⁶⁸ The purpose of E.O. 12333 is, therefore, to prevent the killing of foreign public officials for political purposes. It does not, however, limit the lawful use of force in self-defense against terrorists or other groups that pose an imminent or continuing threat to the security of the United States and its citizens.⁶⁹

It is widely recognized that enemy belligerents—whether members of the armed forces of a State or civilians and non-State actors directly participating in hostilities—may be lawfully targeted and killed at all times, subject to the IHL principles of military necessity and proportionality.⁷⁰ Therefore, the ambush by US aircraft and downing of the Japanese aircraft, over Bougainville, on April 18, 1943, carrying Admiral Isoroku Yamamoto, the Japanese commander of the Pearl Harbor attack, was not considered an assassination, but rather a lawful attack on an individual combatant—a legitimate military target.⁷¹ Likewise, President Reagan’s authorization to attack Moammar Gadhafi’s home in Libya following the 1986 Berlin discotheque bombing that killed an American service member and injured 230 others was not considered a violation of the executive order’s ban on assassination,

because Gadhafi was a legitimate military target.⁷² During the first Gulf War (1991), coalition aircraft targeted 580 command and control targets, including 260 leadership targets (e.g., Saddam Hussein's palaces and places that he frequented).⁷³ These attacks were not considered as violations of the assassination ban. Similarly, President Clinton authorized missile attacks against the Iraqi Intelligence Service (the *Mukhabarat*) headquarters on June 26, 1993 after he was informed that Kuwaiti forces had foiled an Iraqi-sponsored assassination attempt against former President George H.W. Bush.⁷⁴

Five years later, President Clinton again authorized cruise missile strikes, on this occasion against a chemical plant in Sudan and al-Qaeda training camps in Afghanistan after terrorists bombed the US embassies in Kenya and Tanzania, killing 224 people and injuring over 4,500 others.⁷⁵ None of the strikes authorized by President Clinton were considered violations of E.O. 12333. Finally, following 9/11, the Bush administration concluded that the assassination ban did not prevent the United States from targeting terrorist leadership and command and control capabilities in self-defense.⁷⁶ This determination was later used to justify the 2002 targeted killing of Qaed Salim Sinan al-Harethi, a senior al-Qaeda leader, in Yemen by a CIA drone.⁷⁷

Similarly, since 9/11, it is equally clear that under UN Security Council Resolution 1368 (2001) a State may use force in self-defense against acts of aggression by terrorist groups. It is also clear under customary international law and Article 51 of the Charter that a nation may use force in self-defense against the imminent or continuing threat of attack by these groups. Therefore, killing al-Qaeda members and other militants who are engaged in ongoing acts of violence against the United States and its allies, and who have the capabilities and stated intentions to continue to conduct such attacks in the future, is an act of self-defense, not murder, hence not assassination.

Based on the increased number of drone attacks authorized by President Obama against suspected terrorist targets in Pakistan's FATA, it appears that the Obama administration has taken a similar approach to that of its predecessor.⁷⁸ The administration's position on the issue of assassination was clearly articulated by the State Department Legal Adviser at the ASIL meeting. During his keynote address, Mr. Koh stated that

individuals who are part of . . . an [enemy] armed group are belligerents and, therefore, lawful targets under international law. . . .

[A] state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. . . .

[U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”⁷⁹

B. Extrajudicial Killing under International Law

1. Reports and Correspondence of the Special Rapporteur to the UN Human Rights Council

In January 2003, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (hereinafter Special Rapporteur) submitted a report to the UN Human Rights Council indicating that a November 2002 UAS strike that killed six al-Qaeda militants in Yemen was a “clear case of extrajudicial killing.”⁸⁰ Despite finding that (1) the government of Yemen had approved the attack; (2) the militants (including a senior al-Qaeda official, Abu Ali al-Harithi) had been involved in the attacks on the *Cole* and the French oil tanker *Limburg*; (3) prior attempts to apprehend the suspects had been unsuccessful; and (4) “governments have a responsibility to protect their citizens against the excesses of non-State actors or other authorities” the Special Rapporteur determined that the actions by the United States and Yemen violated IHRL and IHL.⁸¹

In August 2005, a new Special Rapporteur (Philip Alston) sent a letter to the US government requesting information on the use of UAS to target and kill Haitham al-Yemeni, a senior al-Qaeda figure, on the Pakistan-Afghanistan border on May 10, 2005. The Special Rapporteur reiterated the view that questions of IHL fall squarely within his mandate and that “efforts to eradicate terrorism must be undertaken within a framework” governed by IHRL, as well as IHL.⁸² Dissatisfied with the US response to the August letter, the Special Rapporteur submitted a report to the Human Rights Council in May 2009 alleging that the United States is using drones to engage in targeted killings on the territory of other States and that these attacks have caused a number of civilian casualties. Mr. Alston additionally alleged that the United States had been evasive in responding to his questions regarding the legal basis for its targeting decisions and urged the Obama administration to reconsider the previous administration’s “positions and move to ensure the necessary transparency and accountability” for its drone program.⁸³ Having failed to receive a response from the new administration, Mr. Alston took his case to the “court of public opinion.” In October 2009, he reiterated his position in a *New York Times* article stating that “the United States must demonstrate that it is not randomly killing people in violation of international law through its use of drones

on the Afghan border" and that the US refusal to respond to UN "concerns that the use of drones might result in illegal executions was an 'untenable' position."⁸⁴

2. US Responses to the Special Rapporteur

The United States responded to the January 2003 al-Harithi report on April 14 of that year, indicating that "inquiries related to allegations stemming from any military operation conducted during the course of an armed conflict . . . [did] not fall within the mandate of the Special Rapporteur" and that the United States disagreed with his conclusion that "military operations against enemy combatants could be regarded as extrajudicial executions by consent of Governments."⁸⁵ In support of its position, the United States pointed out that military operations conducted by a government against legitimate military targets like al-Qaeda were governed by IHL/LOAC, which allows enemy combatants to be attacked unless they have surrendered or are otherwise rendered *hors de combat*. The US response further emphasized that the United States was at war with al-Qaeda and related terrorist networks and that, despite coalition successes around the world, the war was far from over. With operations in more than sixty countries, al-Qaeda had effectively trained, equipped and supported armed forces that have planned and executed attacks worldwide against the United States "on a scale that far exceeds criminal activity."⁸⁶ More important, al-Qaeda terrorists continued to plan additional attacks against the United States and its allies and were, therefore, subject to armed attack by US forces. In conclusion, the United States stressed that the military operations conducted against the United States and its nationals by al-Qaeda both before and after 9/11 "necessitate a military response by the armed forces of the United States"; to conclude otherwise would "permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself."⁸⁷

The United States submitted a similar response to the Special Rapporteur's letter requesting information regarding the killing of Haitham al-Yemeni on the Pakistan-Afghanistan border in May 2005. Recalling its April 2003 letter, the United States reemphasized that legitimate military operations conducted by a government during an armed conflict do not fall within the mandate of the Special Rapporteur and that the conduct of such operations is governed by IHL/LOAC. For the reasons previously stated in 2003, the United States reiterated that it was engaged in a continuing armed conflict with al-Qaeda and that the military operations conducted and planned against the United States and its nationals by the terrorist organization both before and after 9/11 necessitated a military response. The US response then went on to rebut the Special Rapporteur's position that his mandate included issues arising under IHL/LOAC. In response to the Special Rapporteur's assertion

that all major Human Rights Council and UN General Assembly resolutions in recent years referred explicitly to IHL, the United States pointed out that the mention of IHL in these resolutions is in the context of suggestions or admonitions to governments and “does not . . . impart upon the Special Rapporteur a mandate to consider issues arising under” IHL/LOAC.⁸⁸ The US response similarly rejected the Special Rapporteur’s argument that General Assembly Resolution 59/197 (2004) urged governments to take all necessary and possible measures, in conformity with IHRL and IHL, to prevent loss of life during armed conflicts. The United States pointed out that the Resolution did not expand or modify the mandate of the Special Rapporteur, but rather urged governments to take action, while directing the Special Rapporteur to continue to operate within his mandate. Finally, in response to the Special Rapporteur’s assertion that “every single annual report of the Special Rapporteur since at least 1992 has dealt with violations of the right to life in the context of international and non-international armed conflicts,” the United States noted that “while the Special Rapporteur may have reported on cases outside of his mandate, this does not give” him the competence to address such issues.⁸⁹

Regarding the scope of the Special Rapporteur’s mandate, it is also important to note that nothing in Commission on Human Rights Resolution 1982/29, which appointed the first Special Rapporteur to examine the questions related to summary or arbitrary executions, empowers the Special Rapporteur to consider matters involving armed conflict or IHL.⁹⁰ Similarly, nothing in General Assembly Resolution 60/251, which created the Human Rights Council as the replacement for the Commission on Human Rights, grants the Council competence over matters regarding IHL in general, or armed conflict in particular.⁹¹ Moreover, the Council is established as a subsidiary organ of the General Assembly; matters affecting international peace and security, aggression and the use of force in self-defense are under the cognizance of the Security Council, not the General Assembly.

3. Obama Administration’s Position

As evidenced by the Koh speech, the current administration’s position on the legality of using UAS to target al-Qaeda operatives in areas like the FATA parallels that of the previous administration:

[I]n all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed . . . to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, . . . *it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that US targeting*

practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war. . . .

[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day. . . .

[A]-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. . . . [T]his is a conflict with an organized terrorist enemy that . . . plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior . . . makes the application of international law more difficult and more critical for the protection of innocent civilians. . . . [T]his Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including . . . the principle of *distinction* . . . and . . . the principle of *proportionality*. . . . In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum. . . .

[I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. . . . [S]ome have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. . . . [S]ome have [also] argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”⁹²

C. Application of IHL v. IHRL in the War on Terrorism

As discussed above, human rights advocates argue that targeting decisions in the war on terrorism are governed by both IHL and IHRL. The US government, on the other hand, has correctly taken the position that the targeting of enemy belligerents, including al-Qaeda terrorists outside the traditional combat zone, is governed solely by IHL. In short, enemy belligerents, whether members of the

armed forces of a nation, terrorists or other civilians directly participating in hostilities, do not enjoy a “right to life” during an armed conflict, irrespective of their location.

1. Are IHL and IHRL Complementary Regimes?

Proponents of the assassination/extrajudicial killing argument take the position that al-Qaeda terrorists are criminals to whom law enforcement rules and IHRL, not major military force and IHL, apply. Military force, they argue, may only be used in self-defense or as authorized by the UN Security Council. They argue that outside of these situations, States may only use law enforcement measures to combat terrorists,⁹³ and that drones are warfighting weapons, not law enforcement tools, and may, therefore, not be used to target terrorists outside the traditional combat zone.⁹⁴ Rather, law enforcement rules, such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), govern when police can use force against civilians, including terrorists. They include such provisions as:

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

...

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against 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.⁹⁵

The proponents of IHRL applicability to the targeting of terrorists also cite the International Court of Justice (ICJ) *Nuclear Weapons* and *Wall* advisory opinions to support their position. In discussing the right to life in paragraph 25 of the *Nuclear Weapons* opinion, the ICJ stated that

[t]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be

deprived of [one's] life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁹⁶

Similarly, in the *Wall* opinion, the Court indicated in paragraph 106 that

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁹⁷

2. Targeting of Enemy Belligerents Is Governed by IHL

Arguments advanced by proponents of the complementary IHL/IHRL model are misplaced from both a practical and a legal point of view. Human rights advocates would argue that US forces must first attempt to capture a suspected terrorist or provide him/her an opportunity to surrender before using lethal force.⁹⁸ From a practical perspective, such a suggestion borders on the ridiculous. These terrorists are hiding and operating in camps and strongholds located in some of the most remote and inaccessible areas in the world—in the FATA, Yemen, Somalia and elsewhere. Any attempt by US Special Forces to capture these terrorists would be virtually impossible to undertake—and likely suicidal. Moreover, what human rights advocates are suggesting is a retrospective approach to combating terrorism—capture and prosecute the terrorists, hopefully before and not after another 9/11 attack occurs. Such an approach is wishful thinking, at best.

A prospective approach—preventing attacks before they are planned and successfully executed—is necessary to protect the United States and its citizens against the real and continuing threat from al-Qaeda and its supporters.⁹⁹ There is simply no obligation in domestic or international law to provide due process (e.g., judicial review, offer to surrender, attempted capture, etc.) before using lethal force against known enemy belligerents, including terrorists, who present an imminent and continuing threat to the United States and its citizens. The Convention for the

Protection of Human Rights and Fundamental Freedoms (European Convention) recognizes that there is no “right to life” during armed conflict, by providing in Article 15.2 that “deaths resulting from lawful acts of war” are outside the scope of the Convention.¹⁰⁰

Reliance on the ICJ advisory opinions to support the position that IHRL applies to the targeting of al-Qaeda and other terrorists is also misplaced. The focus of the *Nuclear Weapons* opinion was not on the targeting of combatants, but rather on the catastrophic effects a nuclear weapon detonation would have on the civilian population. The Court questioned whether the use of nuclear weapons could discriminate between the civilian population and combatants and civilian objects and military objectives, indicating that the number of casualties that would ensue following the use of such a weapon would be enormous.¹⁰¹ UAS, with their enhanced ISR and precision targeting capabilities, can easily distinguish between military targets and protected people and places. Moreover, although there have been incidental civilian deaths associated with the use of drones, the numbers (as discussed below in the sections on proportionality and military necessity) are not excessive in terms of the military advantage that has been achieved, and would certainly not fall within the scope of casualties envisioned by the use of a nuclear weapon. Had the Court been asked, “Does an enemy combatant or civilian directly participating in hostilities have a ‘right to life’ during an armed conflict?” the Court would have said no. It is also important to note that, other than the reference to human rights in dicta in paragraphs 24 and 25, the Court applies IHL, not IHRL, in its analysis of the issues (paragraphs 74–96). Nor does the Court cite any authority for its novel declaration that IHRL applies during an armed conflict. Finally, in issuing its decisions, the Court relies on IHL, not IHRL, stating:

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the *principles and rules of international humanitarian law*, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President’s casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the *principles and rules of humanitarian law*;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹⁰²

Similarly, the *Wall* advisory opinion focused on an occupation setting. It did not address the issue of targeting enemy combatants or civilians directly participating in hostilities. In fact, the Court recognizes in paragraph 106 that there are situations in which only IHL applies:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: *some rights may be exclusively matters of international humanitarian law*; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law (emphasis added).

Clearly, targeting of enemy combatants and civilians directly participating in hostilities falls into the first category—exclusively matters of IHL. Additionally, as was the case in the *Nuclear Weapons* opinion, the Court relies on IHL, not IHRL, in deciding the case:

For these reasons,

The Court . . . [decided]

D. By [a vote of] thirteen votes to two, [that]

[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with *international humanitarian law* as embodied in that Convention.¹⁰³

Finally, some opponents to the use of drones have suggested that the rules should be different if the suspected terrorist is a US citizen. The fact that the intended target of a drone strike is an American citizen, such as radical cleric Anwar al-Awlaki who is hiding in Yemen, does not change the analysis. The citizenship of the belligerent is irrelevant in the targeting decision. In an al-Qaeda video posted on the Internet on May 23, 2010, al-Awlaki advocates the killing of American

civilians in retaliation for the death of Iraqi and Afghan civilians killed by US forces.¹⁰⁴ Americans do not have a right to wage war against the United States. If they do, they become lawful targets and may be engaged without “due process.” The Supreme Court held in *Ex parte Quirin* that US citizenship did not bar the prosecution of individuals as “enemies who have violated the law of war.”¹⁰⁵ The same logic would allow the direct engagement of a US citizen who has actively sided with al-Qaeda.¹⁰⁶

3. Does It Really Matter If IHRL Applies in an Armed Conflict?

Even if IHRL complemented IHL during periods of armed conflict, use of drones to conduct strikes against terrorists outside the combat zone in self-defense would not constitute a violation of IHRL. Although the ICJ indicated in the *Nuclear Weapons* advisory opinion that the right to life found in Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR) applies in times of war, the Court went on to explain that

[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰⁷

Under IHL, enemy belligerents, like the al-Qaeda terrorists, who have not surrendered and are not *hors de combat* may be lawfully engaged at all times, subject only to the principles of military necessity and proportionality. Such attacks would not constitute an arbitrary deprivation of life under the ICCPR.¹⁰⁸

It is also questionable whether the ICCPR would even apply to targeted killings in Pakistan and other places outside the traditional combat zone. Article 2.1 provides that “[e]ach State Party . . . undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” (emphasis added). The ICJ similarly held in paragraph 111 of the *Wall* advisory opinion that the ICCPR is only “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” (e.g., in an occupation situation). The question of applicability of the Covenant therefore turns on whether the terrorist being targeted “is within the jurisdiction, actual power, or effective control of the state using the drone.”¹⁰⁹ Al-Qaeda terrorists and their supporters operating out of the FATA, Yemen or Somalia are not within the territorial

jurisdiction of the United States nor are these individuals within the actual power or control of the United States. In these circumstances, the ICCPR does not apply.

4. So What Are Human Rights Advocates Really After?

From the foregoing, it appears that there is nothing to gain by applying IHRL in an armed conflict scenario. In fact, application of the IHRL "arbitrary deprivation of life" standard would arguably provide far less protection than the IHL principles of military necessity and proportionality. So what are human rights advocates really trying to accomplish by arguing that IHRL applies in armed conflicts? The answer is simple: change the outcomes governed by IHL by adding IHRL into the equation, thereby making IHL more restrictive and channeling the enforcement of IHL through human rights mechanisms such as the Human Rights Council and regional human rights courts. To quote a human rights advocate:

We wish to (boldly) take human rights to places, be they extraterritorial situations, or those of armed conflict, where, as a matter of practical reality, no human rights have gone before. . . . [A] purpose of the IHL/IHRL project is the enforcement of IHL through human rights mechanisms. Thus, even if human rights substantively added nothing to IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced before political bodies, such as the Human Rights Council or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the International Court of Justice, the European Court of Human Rights, the UN treaty bodies or domestic courts.¹¹⁰

The danger of allowing human rights mechanisms to review lawful military operations, whether in a traditional armed conflict or in the war on terrorism, is illustrated by the absurd decision of the European Court of Human Rights in the *McCann* case.¹¹¹ The British government had information that three known IRA terrorists were going to conduct a terrorist attack in Gibraltar by detonating a car bomb by remote control. While several UK soldiers were following them, it appeared that the terrorists were preparing for an attack. As one of the soldiers moved forward to arrest the suspects, he observed one of the terrorists move his hand as if he was about to press a button to detonate the bomb, and shot the suspect. A second terrorist then appeared as if she was going to donate the bomb and was shot. The third terrorist was also shot. A bomb was subsequently discovered in the car. After hearing seventy-nine witnesses, a jury in the United Kingdom brought back a verdict of lawful killing. Dissatisfied by that result, the decedents' estates brought the case to the European Court of Human Rights. Despite finding that "the soldiers honestly believed . . . that it was necessary to shoot the suspects in order to prevent

them from detonating a bomb and causing serious loss of life,” the Court nevertheless found by a vote of ten to nine that there had been a violation of Article 2 of the European Convention because the UK authorities had not taken “appropriate care in the control and organisation of the arrest operation.” Article 2.2 of the Convention provides that “deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence”¹¹²

A second example of this dangerous approach is the continuing efforts by Philip Alston, the current Special Rapporteur, to obtain information (much of which is classified) on the use of UAS to target terrorists in the FATA and other areas outside Afghanistan and Iraq. In May 2010, Mr. Alston called on the United States to stop using CIA operatives to conduct drone strikes against al-Qaeda terrorists.¹¹³ In a report delivered to the Human Rights Council on May 28, Alston argues that “intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely.”¹¹⁴ Alston’s report also questions the validity of a portion of the International Committee of the Red Cross’s (ICRC’s) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* that allows for the targeting of civilians who are members of an armed group who have a continuous combat function (CCF). According to the report, the “ICRC’s Guidance raises concern from a human rights perspective” because the CCF category of armed group members may be targeted anywhere, any time. The report concludes that “the creation of CCF category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to ‘for such time’ as opposed to ‘all the time.’”¹¹⁵ The report therefore recommends, *inter alia*, that “[t]he High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of ‘direct participation in hostilities.’”¹¹⁶ It would appear from this report that Mr. Alston believes that the Special Rapporteur and human rights organizations like the Human Rights Council are more qualified than the ICRC and States parties to the Geneva Conventions to decide IHL issues of this nature. I would suggest that determining whether a civilian has directly participated in hostilities under the Geneva Conventions and may therefore be targeted by belligerent forces is clearly outside the mandate of the Special Rapporteur contained in Resolution 8/3 of the Human Rights Council and further demonstrates the overreaching by human rights advocates and organizations.¹¹⁷

In short, the United States has nothing to gain by acknowledging that IHRL applies alongside IHL in armed conflict situations, particularly in the targeting

process. Human rights groups, whether non-governmental or governmental, are generally biased against military operations conducted by any state and military operations conducted by the United States, in particular. They (and their financial supporters) generally oppose a strong military establishment, seek to level the playing field between modern armed forces and insurgent groups/terrorists and endeavor to create a standard of zero collateral damage and incidental injury in war. Any report or decision issued by these organizations would inevitably be critical of US operations and would provide yet another source of information that can be exploited by our enemies.

IV. Host Nation Consent v. Self-Help in Self-Defense

Following setbacks in Iraq and Afghanistan, al-Qaeda has been able to reconstitute and establish bases of operation in the FATA, which have served as a “staging area for al-Qaeda attacks in Afghanistan,” as well as a base for its worldwide training operations.¹¹⁸ In fact, most of the high-priority terrorists, who continue to actively plot against the United States, remain in hiding in some of the most remote, inaccessible parts of the world, including the FATA.¹¹⁹ To date, Pakistan has been unable or unwilling to prevent cross-border attacks against coalition forces in Afghanistan or to disrupt terrorist planning and training efforts to conduct attacks against the United States and its allies worldwide. That leaves the United States with two options—wait for another terrorist attack or use UAS to conduct strikes against these inaccessible targets.

A. Host Nation Consent

Opponents to the use of UAS to strike targets in nations outside the combat zone argue that host nation consent is required for such attacks, “unless the state where the group is present is responsible for their actions.”¹²⁰ Although there is some evidence that senior leadership within Pakistan tacitly consented to the drone strikes by providing bases for UAS operations and targeting information to US forces and the CIA, Pakistan has not officially consented to the attacks and has often publicly protested the strikes as a violation of its sovereignty and territorial integrity.¹²¹ Accordingly, the opponents to the use of UAS argue that there is no legal basis for the United States to attack terrorist targets in Pakistan or in any other nation outside of the combat zone.

B. Sovereignty v. Inherent Right of Self-Defense

The opponents’ position appears to be premised on the flawed assumption that territorial integrity and State sovereignty are paramount in international law. The

long-standing view of the United States on the issue of sovereignty, as articulated by a former legal adviser to the US Department of State and a leading international law scholar, is that “[t]erritorial integrity is not entitled to absolute deference in international law, and our national defense requires that we claim the right to act within the territory of other States in appropriate circumstances.”¹²² President Obama reaffirmed this long-standing position in an address at West Point in 2009, indicating that the United States “cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear.”¹²³ The US position is supported by Articles 2(4) and 51 of the Charter, which make clear that territorial integrity and sovereignty give way to the right of self-defense.

C. Self-Help

It is equally well settled that States have an obligation under international law “to control persons within their borders to ensure that they do not utilize their territory as a base for criminal activity.”¹²⁴ Both domestic courts and international tribunals have acknowledged this obligation. For instance, the US Supreme Court held in 1887 that “[t]he law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”¹²⁵ The ICJ has similarly held that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹²⁶

It is equally well settled that, if a nation is unwilling or unable to stop terrorists or other armed groups from using its territory as a location from which to launch attacks against another nation or its citizens, the aggrieved State has the right to strike the terrorists or other armed groups within the territory of the host nation.¹²⁷ The State Department Legal Adviser reiterated this right in his remarks at the ASIL meeting:

[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the *willingness and ability of those states to suppress the threat the target poses*.¹²⁸

Much of the FATA is inaccessible to Pakistani security forces. Additionally, the Pakistani army has been reluctant to conduct offensive military operations against militant groups in North Waziristan “because it does not want to antagonize powerful insurgent groups there that have so far attacked only targets in Afghanistan.”¹²⁹ In short, Pakistan has been unable and unwilling to prevent use of its territory by al-Qaeda and other militant groups that continue to plan and

conduct terrorist attacks against the United States and its allies. Under these circumstances, the United States has the inherent right under international law to use force in self-defense against terrorist targets in Pakistan.

D. A History of Self-Help

Self-help is nothing new to the United States—our history is replete with examples of the use of necessary and proportionate force in self-defense where a “neutral” nation has been unable or unwilling to prevent the use of its territory as a staging base for attacks. Some examples include:¹³⁰

- 1814, 1816 and 1818 Seminole Indian attacks. The United States used force in self-defense against attacks by Indians and former slaves emanating from Spanish Florida without the consent of Spain. The attacks were not directed at Spain nor was the United States at war with Spain at the time.

- 1817 Amelia Island occupation. The United States used force in self-defense to attack non-State actors (pirates, smugglers and privateers) on Amelia Island, relying, in part, on “Spain’s inability to control misuse of its islands to prevent armed attacks on U.S. territory and shipping . . . emanating from the islands.” At the time, the United States was not at war with Spain and assured Spain that the temporary occupation of Amelia Island was not a threat to its sovereignty. The US military actions were taken without Spanish consent.

- 1837 *Caroline* incident. The *Caroline* case also provides an example of the use of force in self-defense against non-State actors without the consent of the host nation. The United Kingdom was not at war with the United States when it attacked the *Caroline* in US waters to prevent future insurgent attacks emanating from the United States into Canada. The attack was directed at the insurgents, not the United States, and was not viewed as an act of war by the US government.

- 1854 Greytown bombardment. The US Navy bombarded the town of Greytown, Nicaragua after the citizens of the town forcibly took possession of the town, established their own government (not recognized by the United States), and attacked a US diplomat and engaged in other acts of violence against US nationals. In deciding whether the President had the power to order such an attack, Justice Nelson of the US Supreme Court held that the President had the authority to use force “as part of a power of protection of US nationals abroad against acts of lawless violence and an irresponsible and marauding community.” The bombardment was conducted without the consent of Nicaragua.

- 1916 Pancho Villa raids. In 1916, President Wilson authorized US forces to attack Pancho Villa’s forces in Mexico after they had crossed into the United

States and attacked towns in Texas and New Mexico. A second incursion was authorized later that year when Mexican bandits attacked Glen Springs, Texas.

- 1998 cruise-missile strikes. President Clinton authorized cruise-missile strikes against al-Qaeda training camps in Afghanistan without the consent of the Taliban government after al-Qaeda bombed the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The terrorist attacks killed more than 250 persons and injured over 5,500. The strikes were justified as self-defense in response to prior armed attacks and to prevent future attacks against the United States by al-Qaeda.

As these examples illustrate, while a nation's sovereignty is an important factor that must be taken into consideration before conducting a cross-border strike, it does not take precedence over a right of self-defense where that nation has been unable or unwilling to prevent the use of its territory as a base of operations for attacks. Article 51 of the Charter also makes clear that sovereignty and territorial integrity give way to this inherent right of self-defense against an armed attack or imminent threat of armed attack. Pakistan has been unable (due to inaccessible terrain) or unwilling (due to political considerations) to prevent militant groups from using the FATA to plan and attack the United States and its allies. Under these circumstances, the United States is legally justified in using force in self-defense, including UAS strikes, to prevent future attacks from Pakistani territory.

V. Do Drone Strikes Violate Traditional Principles of IHL/LOAC?

Basic principles of IHL affect all phases of the targeting cycle. This is particularly true during the target development, validation, nomination and prioritization phase, as well as the mission planning and force execution phases. However, IHL recognizes that military forces cannot engage in hostilities without some degree of incidental injury to protected persons and collateral damage to protected objects. The key is the determination of how to minimize incidental injury to civilians and collateral damage to civilian objects consistent with mission accomplishment and the law.

As a general rule, "the right of belligerents to adopt means of injuring the enemy is not unlimited."¹³¹ Additionally, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."¹³² In this regard, when conducting military operations, commanders must

- do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . but are military objectives . . . ;

- take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [and]
- refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.¹³³

Commanders must also be prepared to cancel or suspend an attack

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.¹³⁴

Based on the foregoing, it is clear that incidental injury of civilians and collateral damage to civilian objects is not prohibited by IHL; what is prohibited is excessive injury or damage in relation to the military advantage expected to be gained by the use of force. In other words, the wanton destruction of life and property as an end in itself violates IHL, but the law does not prohibit the use of force, even overwhelming force, by a military commander to compel the complete submission of the enemy in order to protect the safety of his force and facilitate the success of his mission.¹³⁵ Therefore, attacks by UAS that unintentionally cause incidental injury to civilians or damage to civilian property, in addition to killing the intended targets, e.g., an insurgent leader, are fully consistent with IHL to the extent the injury or damage is not excessive when compared to the military advantage gained by the attacks.

Compliance with IHL is much more complex in the current conflict with al-Qaeda because insurgent forces routinely commingle with the civilian population and operate from protected places. It becomes exceedingly more difficult to minimize incidental injury and collateral damage in such situations because of the difficulties encountered in distinguishing combatants from civilians and military objects from civilian objects. Under these circumstances, al-Qaeda and its supporters must be held primarily responsible for any collateral damage and incidental injury in such cases because they have failed to comply with their obligation to "avoid locating military objectives within or near densely populated areas."¹³⁶ Additionally, one must consider whether the civilians are deliberately acting as voluntary human shields for the insurgent forces, in which case, they may be considered to be directly participating in hostilities and therefore subject to attack.¹³⁷

A. Military Necessity

The purpose of IHL is to ensure that hostilities are directed toward the enemy and not used to cause unnecessary human suffering and physical destruction. The principle of military necessity limits suffering and destruction to that which is necessary to achieve a valid military objective. When applying this principle, the commander should ask whether the object of attack is a valid military objective and, if so, whether the total or partial destruction, capture or neutralization of the object will constitute a definite military advantage under the circumstances existing at the time of the attack. This does not mean, however, that overwhelming force cannot be used to destroy a valid military objective if consistent with the principles of distinction and proportionality discussed below.¹³⁸

Opponents to the use of UAS to conduct strikes outside the traditional combat zone argue that drone attacks violate the principle of military necessity because they fuel anti-Americanism in the FATA and do little to weaken the al-Qaeda organization.¹³⁹ Opponents argue that killing innocent civilians invites retaliation and aids al-Qaeda recruitment efforts in the FATA and elsewhere by antagonizing the local population, alienating surviving family members and creating martyrs.¹⁴⁰ The opponents point to statements by some Pakistani military officers who have confirmed that drone strikes motivate local tribesmen in the FATA to fight against the Pakistani government because the attacks are viewed as a breach of Pakistan's sovereignty.¹⁴¹ It is therefore argued that, if the military objective of defeating al-Qaeda cannot be achieved because drone strikes do not weaken the terrorist organization as intended, but rather have had unforeseen consequences of fueling anti-American sentiments and assisting al-Qaeda's recruitment efforts, the attacks violate the principle of military necessity.¹⁴²

These arguments, which are not supported by independent studies, are based on exaggerated civilian casualty figures. They also fail to acknowledge that, in the past two years alone, UAS strikes have killed over 500 militants, including 39 top-tier and mid-to-high-level leaders, thereby disrupting al-Qaeda's ability to operate with impunity from the FATA.¹⁴³ An independent study by the New America Foundation puts the number of militants killed at between 618 and 966.¹⁴⁴ More important, since December 2009, the terrorist organization has been dealt a number of serious blows by successful drone attacks against several high-ranking al-Qaeda officials. In December, Saleh al-Somali, a senior planner responsible for al-Qaeda operations outside Afghanistan and Pakistan, was killed by a drone strike in northern Waziristan.¹⁴⁵ Al-Qaeda operations were dealt further crippling blows in April 2010 and May 2010 with the deaths of the two top al-Qaeda leaders in Iraq, Abu Ayyub al-Masri and Abu Umar al-Baghdadi, and the death of the number-three official in the organization and overall commander for al-Qaeda in Afghanistan,

Mustafa Abu al-Yazid.¹⁴⁶ Equally important, drone strikes have effectively impaired al-Qaeda operations by creating an "atmosphere of fear and distrust among members" of the organization, with reports indicating that militant leaders sleep outside of their homes for fear of being targeted by a drone and suspected spies are routinely executed for providing information to the United States.¹⁴⁷

Independent studies by the New America Foundation and the Aryana Institute for Regional Research and Advocacy (AIRRA), as well as *Reuters* reporting, also do not support the allegations that civilian casualties in the FATA are fueling anti-American sentiments and assisting al-Qaeda recruiting efforts. First, despite claims to the contrary, there have been no major public protests in the FATA against the use of drones. Moreover, the number of civilian casualties in the FATA is much lower than the numbers claimed by militant groups and opponents to the use of drones in Pakistan. The New America Foundation study shows that the 131 reported drone strikes in the FATA since 2004 "have killed approximately between 908 to 1,347 individuals, of whom around 618 to 966 were described as militants in reliable press accounts"; thus less than 30 percent of the total casualties were civilians.¹⁴⁸

The AIRRA study also concluded that anti-Americanism in the FATA has not increased significantly due to US drone attacks.¹⁴⁹ Between November 2009 and January 2010, AIRRA sent five teams of five researchers each to conduct a public opinion survey about UAS attacks in areas of the FATA most often targeted by US drones. The following are the questions posed by the survey teams and the responses of the people of the FATA:

- Do you see drone attacks bringing about fear and terror in the common people? (Yes 45%, No 55%)
- Do you think the drones are accurate in their strikes? (Yes 52%, No 48%)
- Do you think anti-American feelings in the area increased due to drone attacks recently? (Yes 42%, No 58%)
- Should Pakistan military carry out targeted strikes at the militant organisations? (Yes 70%, No 30%)
- Do the militant organisations get damaged due to drone attacks? (Yes 60%, No 40%)

Local residents were also asked questions concerning sovereignty and civilian casualties. Regarding territorial integrity, people were asked if US drone attacks on

the FATA were viewed by the local population as a violation of Pakistani sovereignty. More than two-thirds said they were not. "Pakistan's sovereignty, they argued, was insulted and annihilated by Al-Qaeda and the Taliban, whose territory FATA is after Pakistan lost it to them. The US is violating the sovereignty of the Taliban and Al-Qaeda, not of Pakistan."¹⁵⁰ Moreover, more than two-thirds of the people interviewed consider "Al-Qaeda and the Taliban as enemy number one" and a large majority (nearly two-thirds) want the United States "to continue the drone attacks because the Pakistani army is unable or unwilling to retake the territory from the Taliban."¹⁵¹ Although there was some concern over civilian casualties and collateral damage, most of the people interviewed indicated that most of the drone attacks hit their intended targets. In fact, they indicated that most of the collateral damage is to houses rented to the militants. Additionally, local residents indicated that the Taliban and al-Qaeda terrorists normally seal off the area after a drone attack in order to remove everything, including militant casualties, from the site before allowing locals to return to their homes. As a result, an accurate battle damage assessment is not possible. In short, the AIRRA study contradicts the assertion of the impact of civilian casualties on anti-Americanism and "the mantra of violation of the sovereignty of Pakistan perpetuated by the armchair analysts in the media."¹⁵²

The results of the AIRRA study were subsequently confirmed by a *Reuters* special report. In a May 2010 interview, a tribal elder from the FATA told a *Reuters* reporter that the residents of northern Waziristan "want to get rid of the Taliban and if the Pakistani army cannot do it now, then . . . drone attacks . . . [are] fine with them."¹⁵³ He further indicated that "[t]here is no anger against the strikes as long as civilians are safe" and that "[t]here have been civilian deaths but not in big numbers."¹⁵⁴ A second tribal leader indicated: "We prefer drone strikes than army operations because in such operations, we also suffer. But drones hit militants and it is good for us."¹⁵⁵ Based on these independent reports and surveys, allegations that drone strikes violate the principle of military necessity are clearly misplaced.

B. Proportionality

The principle of proportionality is concerned with weighing the military advantage one expects to gain by an attack against the unavoidable and incidental harm to civilians and damage to civilian property that will result from the attack. This principle requires the commander to determine whether incidental injury to civilians and damage to civilian objects that may result from the attack will be excessive in relation to the concrete and direct military advantage expected to be gained.¹⁵⁶

Opponents to the use of drones outside the traditional combat zone also argue that killing a large number of civilians in an attempt to kill one terrorist leader violates the principle of proportionality.¹⁵⁷ This argument is based on alleged civilian

casualty rates of fifty innocent civilians killed to each militant targeted—"[a]t a ratio of 50 to 1, the disproportionate impact of drone attacks in Pakistan represents a serious violation of the traditional rules of war."¹⁵⁸

The opponents' position that UAS cause unnecessary and disproportionate harm to the civilian population is flawed for a number of reasons. First, as indicated above, the number of actual civilians killed by UAS strikes in Pakistan is significantly lower than the numbers reported by the opponents to the use of drones. The New America Foundation study shows innocent civilian casualties caused by drone strikes at around 30 percent.¹⁵⁹ These figures have been confirmed by a senior Pakistani military officer who indicated that "he believed that a third of the dead were militants, a third sympathizers and a third innocent civilians."¹⁶⁰ And some US and Pakistani intelligence estimates put the number of non-combatant civilian casualties—primarily family members who live and travel with targeted militants—as low as 5 and 20 percent, respectively.¹⁶¹ Second, the opponents' argument incorrectly assumes that the principle of proportionality requires a comparison between the number of innocent civilians killed or wounded and the number of terrorists killed or wounded. Rather, what the proportionality principle actually requires is a balancing of incidental injury to civilians and collateral damage to civilian property against the military advantage expected to be gained by the attack, as determined by the military commander—*not* by the ICRC, Human Right Council, Human Rights Watch or the Special Rapporteur. The commander's decision is based on validated, real-time, reliable intelligence; target evaluation in light of the campaign plan (e.g., top-tier, high-level, mid-level leader or low-level operative); presence of civilians at the target and their statuses (e.g., voluntary or involuntary human shields, women and children); location of the target (e.g., protected place, civilian object, safe house, terrorist training camp); and his or her experience as a commander. Each target is carefully scrutinized and analyzed through a complex targeting approval process which considers all of these factors in light of the most recent real-time intelligence.

C. Distinction

The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize harm to civilians and damage to civilian property.¹⁶² To achieve this result, military commanders have a duty to distinguish their forces from the civilian population (e.g., through the wearing of uniforms or other distinctive signs) and distinguish valid military objectives from civilians or civilian objects before attacking.¹⁶³

Opponents of the use of drones argue that, even if a US drone operator is reasonably certain that the intended target is a valid military objective (e.g., an

al-Qaeda terrorist), he or she is still obligated to minimize civilian injuries. Because suspected terrorists wear civilian clothes and commingle with the local population, they cannot be clearly distinguished from the innocent civilians, even by high-tech drones. Citing Article 50(1) of Additional Protocol I (AP I), which provides that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian,” opponents to the use of drones argue that if there is any uncertainty as to whether or not a person is a suspected militant (because he is wearing civilian clothes or has commingled with the civilian population, etc.), IHL presumes that the person is a protected civilian.¹⁶⁴

Such a position rewards terrorists for violating the very laws that opponents to the use of drones seek to use to protect them from attack. Moreover, it encourages further violations by the militants, thereby increasing the danger to the civilian population. It also ignores the enhanced precision and restraint drones bring to the targeting process as compared to a pilot with limited information in the cockpit or the commander of a long-range artillery battery.¹⁶⁵ Improved ISR capabilities, “lack of fear-induced haste, reduced anger levels” and clearer battle damage assessments all combine to enhance awareness of protected persons and objects in the target area and restraint on the part of drone operators to engage such persons or objects.¹⁶⁶ More important, the opponents’ position ignores basic rules of IHL that prohibit belligerents from using protected persons and protected objects to render certain areas, objects or belligerent forces immune from attack.¹⁶⁷ In this regard, Article 51(7) of AP I provides that “[t]he Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” Article 58(b) additionally provides that “[t]he Parties to the conflict shall, to the maximum extent feasible[,] . . . avoid locating military objectives within or near densely populated areas.” Militants violate these principles on a daily basis by commingling with the civilian population and enlisting the voluntary and involuntary aid of human shields to enhance their operations and mobilize public opinion against the United States when UAS strikes cause incidental injury or collateral damage. They store their ammunition in mosques, place weapons on top of schools and hospitals, use ambulances to deliver suicide bombs and set up command and control centers in private homes, and then exploit the resulting injury or damage when these protected places or objects are attacked.¹⁶⁸

Even though UAS are among the most precise weapons in the US inventory today, incidental injury to innocent civilians and collateral damage to civilian property is inevitable, particularly in light of the manner in which terrorists fight and operate. The State Department Legal Adviser highlighted this fact in his remarks:

[T]his is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior . . . makes the application of international law more difficult and more critical for the protection of innocent civilians.¹⁶⁹

Although these repeated IHL violations do not relieve the United States of its obligation under the law to take all feasible precautions to minimize incidental loss of civilian life and damage to civilian objects, the terrorists' actions must be taken into consideration when determining the legality and proportionality of an attack against militants who have taken refuge in the civilian population and engaged in hostilities from protected places.¹⁷⁰

D. US Adherence to IHL in the Targeting Process

The Obama administration (as well as the previous administration) has continued to adhere to basic principles of IHL when targeting al-Qaeda terrorists outside the traditional combat zone. Koh emphasized that administration officials have

carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including: . . . the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians and civilian objects shall not be the object of the attack; and . . . the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated. In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.¹⁷¹

In short, drone attacks are being conducted in accordance with US obligations under IHL.

VI. Use of Civilian UAS Operators to Target Terrorists

Today, more than ever, civilian contractors are increasingly being utilized to support combat forces across the entire spectrum of military operations, to include intelligence, planning, technical support, logistics and communications support functions. Civilian contractors play critical roles as analysts, trainers, computer programmers and maintenance technicians for high-tech unmanned systems. The 1907 Hague Regulations and the 1949 Third Geneva Convention both recognize that civilians will support and accompany the armed forces in times of armed

conflict.¹⁷² AP I, Article 50 further recognizes that these individuals, notwithstanding their affiliation with the armed forces, are still considered to be “civilians” for purposes of targeting and Article 51 specifies that civilians “shall not be the object of attack.”¹⁷³ Article 27 of the Fourth Geneva Convention similarly provides that “protected persons . . . shall at all times be . . . protected . . . against all acts of violence.”¹⁷⁴ Therefore, although the nature of their duties, and/or proximity to or presence in the combat zone, may increase the risk that these civilian contractors may be incidentally injured or killed, as long as they do not directly participate in hostilities, they are not subject to direct attack.

Civilians lose their protected status if they directly participate in the hostilities. AP I, Article 51 provides that “[c]ivilians shall enjoy the protection afforded by this section, *unless and for such time as they take a direct part in hostilities*” (emphasis added). Similarly, Common Article 3 of the 1949 Geneva Conventions provides that “persons *taking no active part in the hostilities* . . . shall in all circumstances be treated humanely” (emphasis added). Consequently, civilian contractors or CIA operatives who conduct drone strikes against military objectives would be considered to be directly participating in hostilities and could be lawfully targeted by the enemy.

A. Inherently Governmental Functions

DoD avoids this issue by prohibiting its civilian personnel and contractors from engaging in functions that are inherently governmental, including combat operations.¹⁷⁵ Pursuant to DoD guidelines, civilians are prohibited from participating in combat operations if the planned use of disruptive and/or destructive combat capabilities is an inherent part of the mission.¹⁷⁶ Combat operations include actively seeking out, closing with and destroying enemy forces, including employment of firepower and other destructive and disruptive capabilities on the battlefield.¹⁷⁷ Consistent with this guidance, only US military personnel may operate US weapons systems against the enemy.

B. Direct Participation in Hostilities

Opponents to the use of UAS to conduct strikes outside the traditional combat zone argue that CIA operatives and civilian contractors conducting such strikes are unlawful combatants and may not participate in hostilities.¹⁷⁸ This position is contrary to the majority view expressed by most law of war scholars, who hold that it is not a war crime for civilians to participate in hostilities, but if they do, they are not entitled to combatant immunity under domestic law for their belligerent acts.¹⁷⁹ Even the Special Rapporteur (Philip Alston) would agree that under IHL “civilians . . . are not prohibited from participating in hostilities.”¹⁸⁰ In his report filed with

the Human Rights Council in late May, Alston indicates that direct participation in hostilities is not a war crime, but that there are consequences that flow from such participation.

First, because they are directly participating in hostilities by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. Thus CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.¹⁸¹

The aforementioned discussion assumes, of course, that the United States is engaged in an armed conflict with al-Qaeda and its affiliates. If the opponents to the use of drones are correct in arguing that the United States is not at war with al-Qaeda, then civilian operators would not be considered "unlawful combatants" and their actions could be legally justified as a "lawful exercise of the customary sovereign right of self-defense against a non-state actor."¹⁸²

VII. Targeting Terrorists Who Directly Participate in Hostilities

Questions concerning who may be targeted by a UAS strike have also been raised by opponents to the use of drones. These questions center on what activity constitutes direct participation in hostilities (DPH) and how long individuals who have directly participated in hostilities may be targeted. In his May 2010 report, Philip Alston indicates that

regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does [sic] not constitute direct participation. . . . Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation *in hostilities*, then States' response must conform to the lethal force standards applicable to self-defence and law enforcement.¹⁸³

Other critics have similarly argued that IHL "supports decisions in favor of sparing life and avoiding destruction in close cases."¹⁸⁴

Neither the Geneva Conventions nor the Additional Protocols define DPH. In an effort to fill this gap, the ICRC issued the non-binding *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.¹⁸⁵ In essence, the ICRC guidelines address three questions:

- Who is considered a civilian for the purposes of the principle of distinction?

- What conduct amounts to direct participation in hostilities?
- What modalities govern the loss of protection against direct attack?

A. Who Is a Civilian?

The ICRC takes the position that, in an international armed conflict, “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and . . . entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”¹⁸⁶ For a non-international armed conflict, the ICRC maintains that

all persons who are not members of State armed forces or organized armed groups of a party to the conflict [i.e., armed forces of a non-State party to the conflict who continuously take a direct part in hostilities (continuous combat function)] are civilians and . . . entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.¹⁸⁷

B. What Constitutes DPH?

An act must meet the following criteria in order to constitute DPH under the *Interpretive Guidance*:¹⁸⁸

- **Threshold of Harm.** An act likely to adversely affect the military operations or military capacity of a party to an armed conflict or to inflict death, injury or destruction on protected persons or objects.
- **Direct Causation.** There must be a direct causal link between the act and the harm likely to result from that act or from a coordinated military operation of which that act constitutes an integral part.
- **Belligerent Nexus.** The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

C. Loss of Protected Status

The third question, concerning belligerent nexus, addresses a number of issues, including the length of the period during which civilians lose their protected status if they directly participate in hostilities. According to the *Interpretive Guidance*, civilians lose their protection against direct attack only for the “duration of each specific act amounting to [DPH],” which includes measures preparatory to the execution of the act, “as well as the deployment to and the return from the location of its execution.”¹⁸⁹ When civilians cease to directly participate in hostilities, they regain their status as civilians and are protected against direct attack (the so-called

"revolving door" of civilian protection). The only exception to this rule is that civilians who assume a CCF as members of an organized armed group belonging to a non-State party to the conflict lose their protected status for as long as they remain members of the group.

D. Problems with the ICRC Approach

The ICRC guidelines concerning the "revolving door" of civilian protection and the application of the CCF are problematic, at best, and appear to be biased against modern military forces, particularly when applied in the UAS context. To illustrate: under the "revolving door" of civilian protection, if an Afghan baker leaves his shop with an improvised explosive device (IED), places it on the side of the road, detonates it when a convoy drives by, killing five coalition soldiers, then safely returns to his home without being detected, the baker can no longer be directly targeted, because he has regained his protected status as a civilian (assuming of course that he has not assumed a CCF). This "baker by day, terrorist by night" can be apprehended and prosecuted for his criminal acts, but he is no longer considered to be directly participating in hostilities and is not subject to direct attack.

Application of the ICRC guidelines to individuals involved in the use of IEDs against coalition forces also produces anomalous results. The ICRC maintains that a person who purchases and smuggles components for an IED and the person who assembles and stores the IED in a workshop do not cause direct harm and are, therefore, not directly participating in hostilities and may not be directly targeted. According to the ICRC, only the person planting or detonating the IED meets the requirement of direct causation for the purposes of direct participation in hostilities. Purchasing, smuggling, assembling and storing an IED that is later used in an attack against coalition forces are not considered by the ICRC to be "integral parts of a concrete and coordinated tactical operation."

Compare the ICRC's "integral part" analysis to the use of drones. The ICRC considers all the following individuals to be directly participating in hostilities and therefore subject to direct attack:

- the individual who loads the missile on a drone that is used to conduct a strike against terrorist targets;
- the individual who launches (or recovers) the UAS, even though control of the drone is transferred to uniformed combat forces when it arrives on station;
- the computer specialist who operates the UAS through remote control;
- the operator collecting intelligence data;
- the individual illuminating the target;

- the specialist controlling the firing of the missile;
- the radio operator transmitting orders to fire the missile; and
- the overall mission commander.

While acknowledging that only a few of these individuals carry out activities that, in isolation, could be said to directly cause the required threshold of harm, the ICRC interprets the standard of direct causation more broadly in the UAS context to include conduct that causes harm in conjunction with other acts. In other words, even if a specific act does not on its own directly cause the required threshold of harm, “the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”¹⁹⁰

It is clear from these examples that the *Interpretive Guidance* guidelines are internally inconsistent and provide greater protection for terrorists and insurgents than they do for civilians and civilian contractors accompanying the force. It is inconceivable that the ICRC does not consider the purchasing, smuggling of components, assembling or storing of an IED that is later used in an attack on coalition forces to be an “integral part of a concrete and coordinated tactical operation,” thereby fulfilling the requirement of direct causation/harm. Yet, the ICRC would say that a contractor loading a missile on a UAS that is later dropped on a terrorist target is directly participating in hostilities because the act of loading the missile is an integral part of a concrete and coordinated tactical operation that directly causes harm to the enemy. Such a conclusion is absurd and completely ignores the fact that IED attacks “are the No. 1 killer of US troops in Afghanistan” and “more than half of American combat deaths [in 2008] were the result of IED” attacks.¹⁹¹

The ICRC is supposed to act as a neutral and independent humanitarian organization to protect innocent civilians and promote and work for a better understanding of IHL; its job is not to level the playing field between opposing belligerents. Unfortunately, in the case of DPH the ICRC has lost its impartiality by attempting to penalize the use of civilian contractors and high-tech unmanned systems, while at the same time providing additional protection to supporters of terrorist groups like al-Qaeda.

E. The Israeli Approach

The Israeli Supreme Court has taken a different, yet similar, approach to DPH. In the *Public Committee against Torture in Israel v. Government of Israel* decision, the Court determined that a civilian is considered to have taken part in hostilities when

- using weapons in an armed conflict, while gathering intelligence or while preparing himself/herself for the hostilities;

- acting as a voluntary human shield;
- sending a person to commit a hostile act, directing the hostile act and planning a hostile act; or
- joining a terrorist organization and committing a chain of hostilities, with short periods of rest between them.¹⁹²

The Court additionally determined that lethal force could only be used against a civilian that is considered to have taken a direct part in hostilities if the following criteria were satisfied:¹⁹³

- well-based information is needed before categorizing a civilian as directly participating in hostilities;
- a civilian taking a direct part in hostilities cannot be attacked if a less harmful means can be employed (e.g., arrest) unless such means involve a risk so great to the lives of the soldiers that they are not required or harm to nearby innocent civilians might be greater than that caused by refraining from using lesser means; and
- after an attack on a civilian suspected of taking an active part in hostilities, a thorough, independent investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed.

Although not a perfect solution, the Israeli approach is more realistic and offers sufficient safeguards to ensure protection of innocent civilians in the targeting decision.

VIII. Use of Advanced Weapons Systems

A final argument, which merits little attention, has been advanced by some opponents to the use of drones. In general, they argue that the use of advanced weapons systems in lethal operations against terrorists is illegal under international law. In response to this argument the State Department Legal Adviser correctly noted that “the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict . . . so long as they are employed in conformity with applicable laws of war.”¹⁹⁴ In this regard, DoD regulations require that all acquisition and procurement of DoD weapons and weapon systems be consistent with all applicable domestic law, treaties and international agreements, customary international law and the law of armed conflict. To ensure compliance with international law and US treaty obligations, all intended acquisitions of weapons and weapons systems are subject to a legal review by a DoD attorney authorized to conduct such reviews.¹⁹⁵ Drones have been determined to be consistent with all US

treaty obligations and international law. A similar requirement applies to non-lethal weapons. Each military service is required to conduct a legal review of the acquisition of all non-lethal weapons to ensure consistency with US treaty obligations, customary international law and, in particular, the laws of war.¹⁹⁶

IX. Conclusion

The position being advocated by human rights advocates and the opponents to the use of drones is a position of weakness that, if adopted by the Obama administration, will provide al-Qaeda and its affiliates with a substantial advantage in their war of aggression against the United States and its allies. J. Cofer Black, the State Department Coordinator for Counterterrorism, got it right when he testified before the House Subcommittee on International Terrorism, Nonproliferation and Human Rights in 2004:

No country is safe from the scourge of terrorism. No country is immune from attack, and neither policies of deterrence nor accommodation will ward off attack. Al-Qaeda seeks only death and chaos, which is why we will continue to pursue the only viable course of action before us, which is to destroy this enemy utterly, both with the cooperation of our allies and by unilateral action when necessary. . . . This is definitely a long-term fight. This is a war. . . . [W]hile we have made substantial progress toward eradicating the threat posed by al-Qaeda, we are on a long, tough road. We cannot afford to falter [I]n counterterrorism . . . weakness is exploited, and it must not be shown.¹⁹⁷

Mr. Black's testimony is equally applicable today. The United States must continue to attack al-Qaeda and its affiliates wherever they may be found in order to achieve victory in this protracted war. In the short term, the use of UAS appears to be the best (if not the only) viable option to target terrorists operating from the remote areas of the FATA, Yemen, Somalia and other places. As Harold Koh emphasized, al-Qaeda continues to pose an imminent threat to the United States and the terrorist organization

has not abandoned its intent to attack the United States, and indeed continues to attack us. . . . [Accordingly,] the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.¹⁹⁸

If you've seen the movie *Patton* you will recall General Patton's address to the Third Army on the eve of the D-Day invasion in 1944, which begins with his

famous quip: "I want you to remember that no bastard ever won a war by dying for his country. He won it by making the other poor dumb bastard die for his country."¹⁹⁹ Opponents to the use of drones argue that US forces must first warn or attempt to capture suspected terrorists before they are engaged with lethal force, even if the terrorists are operating out of remote and inaccessible areas like the FATA. This "capture first" mentality violates the first tenet of Patton's clever remark by turning a blind eye to reality—such a limitation on the use of force in an armed conflict will provide greater protection for suspected terrorists and will inevitably result in large numbers of US casualties. Fortunately, Presidents Bush and Obama chose the Patton alternative—providing al-Qaeda terrorists the opportunity to die for their cause. Accordingly the United States will continue to use UAS to attack enemy belligerents, including al-Qaeda operatives, consistent with the inherent right of self-defense and the laws of war.

Notes

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

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18. See *Collective Defence*, NATO.INT, http://www.nato.int/cps/en/SID-05DFBDA5-8B11FC93/natolive/topics_59378.htm (last visited July 27, 2010). Article 5 provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Text of Washington Treaty available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

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The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

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119. Entous, *supra* note 8.
120. O'Connell, *supra* note 14.
121. Dawar, *supra* note 39; Mary Ellen O'Connell, *Combat Drones: Losing the Fight Against Terrorism*, PEACE POLICY (Oct. 1, 2009), *available at* <http://peacepolicy.nd.edu/2009/10/01/combat-drones/>. *See also* O'Connell, *supra* note 11, at 18, 21; Entous, *supra* note 8.
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131. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 60 [hereinafter Hague Regulations]. *See also* AP I, *supra* note 70, art. 35(1).
132. AP I, *supra* note 70, art. 51(2).
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134. *Id.*
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147. Bergen & Tiedemann, *supra* note 45, at 5; accord Entous, *supra* note 8.

148. New America Foundation Study, *supra* note 144; Bergen & Tiedemann, *supra* note 45, at 5.

149. AIRRA, a think tank of researchers and political activists from the North-West Frontier Province and FATA, conducts research, surveys and collects statistics on various issues concerning the Taliban and al-Qaeda terrorism and human security in those areas. AIRRA research teams go deep inside Taliban- and al-Qaeda-occupied areas of the FATA to collect information. Most of the areas are not accessible to journalists. Farhat Taj, *A Survey of Drone Attacks in FATA*, THE NEWS INTERNATIONAL (Mar. 5, 2009), <http://www.khyberwatch.com/forums/showthread.php?6217-Farhat-Taj-A-survey-of-Drone-Attacks-in-FATA>.

150. *Id.*

151. *Id.*

152. *Id.*

153. Entous, *supra* note 8.

154. *Id.*

155. *Id.*

156. AP I, *supra* note 70, arts. 57(2)(a)(iii), 57(2)(b); Commander's Handbook, *supra* note 138, ch. 5.

157. O'Connell, *supra* note 121.

158. O'Connell, *supra* note 94; O'Connell, *supra* note 140.

159. New America Foundation Study, *supra* note 144; Bergen & Tiedemann, *supra* note 45, at 5.

160. Loyd, *supra* note 141.

161. Entous, *supra* note 8.

162. AP I, *supra* note 70, art. 51(2).

163. *Id.*, arts. 44(3), 48.

164. O'Connell, *supra* note 94.

165. Anderson statement, *supra* note 123, at 3; O'Connell statement, *supra* note 98, at 1–2.

166. Rise of the Drones, *supra* note 2 (statement of Edward Barrett, Director of Research, Stockdale Center for Ethical Leadership, U.S. Naval Academy at 2, available at <https://hsdl.org/?view&doc=120460&coll=limited>); accord Glazier statement, *supra* note 22, at 3.

167. See Hague Regulations, *supra* note 131, art. 27; Convention No. IX Concerning Bombardment by Naval Forces in Time of War art. 5, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 1080; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21,

Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in id.* at 461; Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in id.* at 580 [hereinafter GC IV]; AP II, *supra* note 13, art. 13.

168. Etzioni, *supra* note 99, at 67.

169. Koh, *supra* note 10.

170. AP I, *supra* note 70, art. 51(8) (“Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”).

171. Koh, *supra* note 10.

172. Hague Regulations, *supra* note 131, art. 13; GC III, *supra* note 70, art. 4A(4).

173. AP II, *supra* note 70, art. 50(1) provides that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” *Id.*, art. 51(2).

174. GC IV, *supra* note 167, art. 27.

175. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998); Office of Mgmt. & Budget, Circular No. A-76: Performance of Commercial Activities, Aug. 4, 1983 (revised 1999), *available at* <http://www.whitehouse.gov/omb/circulars/a076/a076.html>; Deputy Secretary of Defense, Department of Defense Directive 1100.4, Guidance for Manpower Management ¶ 3.2.3 (Feb. 12, 2005); Under Secretary of Defense for Personnel and Readiness, Department of Defense Instruction 1100.22, Policy and Procedures for Determining Workforce Mix ¶ 4.c, encl. 4 ¶ 1.c (Apr. 12, 2010) [hereinafter DoDI 1100.22]; Under Secretary of Defense for Acquisition, Technology and Logistics, Department of Defense Directive 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces ¶ 6.1.5 (Oct. 3, 2005).

176. DoDI 1100.22, *supra* note 175, encl. 4 ¶ 1.c.

177. *Id.*

178. O’Connell, *supra* note 94; O’Connell, *supra* note 11, at 12–13, 22, 24.

179. Glazier statement, *supra* note 22, at 5.

180. Study on Targeted Killings, *supra* note 114, ¶¶ 70–71.

181. *Id.*, ¶ 72.

182. Anderson statement, *supra* note 123, at 9.

183. Study on Targeted Killings, *supra* note 114, ¶¶ 60, 64.

184. O’Connell statement, *supra* note 98, at 5.

185. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf). The document is not legally binding, but it does provide the ICRC’s official recommendations on how IHL relating to the notion of DPH should be interpreted in contemporary armed conflict. The US government is reviewing the document and has not yet taken an official position on whether it agrees or disagrees with the ICRC’s recommendations.

186. *Id.* at 20.

187. *Id.* at 27.

188. *Id.* at 46.

189. *Id.* at 65.

190. *Id.* at 54.

191. Jim Michaels, *IED Beam Could Change Face of War*, USA TODAY, June 7, 2010, at 8A, *available at* http://www.usatoday.com/printedition/news/20100607/ieds07_st.art.htm; James

Dao & Andrew W. Lehren, *Grim Milestone: 1,000 Americans Dead*, NYTIMES.COM (May 18, 2010), <http://www.nytimes.com/2010/05/19/us/19dead.html?th&emc=th>.

192. Public Committee against Torture in Israel v. Government of Israel ¶¶ 33, 36, 37, 39, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

193. *Id.*, ¶ 40.

194. Koh, *supra* note 10.

195. Deputy Secretary of Defense, Department of Defense Directive 5000.01, The Defense Acquisition System ¶ E1.1.15 (May 12, 2003).

196. Deputy Secretary of Defense, Department of Defense Directive 3000.3, Policy for Non-Lethal Weapons ¶ 5.6.2 (July 9, 1996).

197. Black statement, *supra* note 46, at 14, 20–21.

198. Koh, *supra* note 10.

199. Opening speech from the movie *Patton*, transcript available at <http://www.historyinfilm.com/patton/speech.htm>.