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Combating Terrorists: Legal Challenges in the Post-9/11 World

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Introduction

It is a great pleasure to be back at the Naval War College and an extraordinary honor to be opening this conference. As I look out, I see colleagues of long standing. More important than that, although that fact is important, I see colleagues who have been my teachers as I have pursued my own work.

The annual International Law Department conferences famously address the most difficult and contentious topics in the field known variously as the law of armed conflict, laws of war and international humanitarian law (IHL). (While I regard these terms as coextensive, not everyone does, which itself is a source of confusion and controversy.) The coverage of this conference is equally broad and challenging: detention, civilianization of warfighting, the meaning of "direct participation in hostilities," the impact of drones, asymmetric warfare, and issues of enforcement and accountability. I imagine discussion also will touch on embargoes and blockades. These topics are of operational, not just academic, interest. Participants here are well known for taking real-world concerns into account. This fact alone sets the conference apart.

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The themes to be examined over the next few days highlight different perspectives within the legal and political communities worldwide. While Americans may have fewer difficulties with seeing terrorists in the context of armed conflict than Europeans and others, this phenomenon is only a shorthand way of referring to differences of view that are of legal, political and social significance. At a conference in England recently, a US official was surprised to discover that the health of the International Criminal Court was the thermometer for gauging the health of the entire international legal system.

I thought therefore to begin our conference with some thoughts about the UN Human Rights Council Report, dated May 28, 2010, of Professor Philip Alston of the New York University School of Law on “extrajudicial, summary or arbitrary executions,” including “targeted killings.”¹ It merits attention because the subject is at the center of debate about the lawful use of lethal force against terrorists and those who support, harbor, direct or finance them. It takes us back to September 2001 and the rejection of a law enforcement—only—or mainly law enforcement—approach to combating terrorism.

Alston’s approach raises a number of questions and highlights a number of issues. I shall therefore begin with a summary of the argument and then note some questions about its assumptions and conclusions.

The Alston Report

Legal questions in armed conflict turn most often on the weapon chosen, the target and collateral damage. Lately, the extent and definition of the battlefield, particularly when combating terrorists, also are issues for analysis and debate. In addition, as a result of the International Court of Justice advisory opinion on the Israeli “wall,”² whether or not a State has a right of self-defense under international law against attacks—either planned or executed—by terrorist groups, that is, non-State actors, continues to concern policymakers and commentators alike. To begin, I should make clear my views on this issue: terrorist groups such as Al Qaeda and others are engaged in hostilities with the United States and other States even though they are not themselves States. States from which they operate have an obligation under international law, whether customary or derived from binding UN Security Council resolutions, such as Resolution 1373 (2001),³ or treaties, to prevent terrorist groups from engaging in attacks and to put a stop to active and passive support for terrorism. When a State is unable to carry out this duty, the State suffering attack is not without recourse, including an inherent right to use force if necessary and proportionate in self-defense. The necessity requirement is hardly trivial. Nor is the proportionality requirement: that quantum of force reasonably

necessary to bring an end to the condition giving rise to the right to use force in self-defense in the first instance. The use of force must conform to requirements in the law of armed conflict as well.⁴

Alston's Report has stimulated much interest because it addresses subjects of current concern. He begins by focusing on unmanned aerial vehicles and weapons fired from them as among the most controversial instruments in the conflict with terrorists. He asserts that "a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL."⁵ Alston concludes that assessment of each use of force to ensure compliance with the requirement of proportionality must be made with respect to "each attack individually, and not for an overall military operation."⁶ He thus elides the *jus ad bellum* and the *jus in bello*. Each operates in different contexts and with different understandings; treating them as one leads to confusion, mistake of law and uncertainty. Recognizing that the proportionality standard must be met for a use of force to be lawful and that the principle of discrimination between military and civilian targets is at the core of the modern law of armed conflict, Yoram Dinstein put it better than Alston: those who plan attacks need to take into account the duty to minimize civilian casualties.⁷

Perhaps because his audience is the UN Human Rights Council and perhaps because the focus of his own work is international human rights law, Alston looks at uses of force with international human rights concerns foremost in his mind. (This observation in no way suggests that I do not share his aspirations for a world that respects and protects human rights.) Let us see what Alston does with his perspective.

First, he takes a more limited view than I suspect would be shared in this auditorium of what constitutes a legitimate target for killing in armed conflict: "'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities.'"⁸ Alston states, without analysis,

It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not "reward" an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize 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.⁹

Alston asserts that “direct participation” excludes activities that may support “the general war effort,” e.g., “political advocacy, supplying food or shelter, or economic support and propaganda.”¹⁰ He adopts what he calls the “farmer by day, fighter by night”¹¹ distinction to protect the daytime farmer from being a legitimate target. Such an approach, which is included in Additional Protocol I¹² (and one of the reasons the United States is not a party), favors the terrorist. (My lawyer would have me say “arguably favors.”) Alston prefers the guidance of the International Committee of the Red Cross with respect to direct participation in hostilities—it may stop and start on a continuing basis. One becomes a legitimate target only when engaged in a targetable activity.¹³ This is not a position that will win many advocates among those engaged in combating terrorists and their attacks. Further, if his goal is “to protect the vast majority of civilians,”¹⁴ then one might have thought he would have emphasized the importance of suppressing terrorism. Thus, Alston’s Report suffers by seeming not to take terrorism so seriously as governments and publics do.

The UN Security Council has suggested that one take a broader view. In Resolution 1373, adopted following the 9/11 attacks, the Security Council “decided” that all States shall

[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.¹⁵

While engaging in criminal support for terrorism may not per se make one a lawful target, it does suggest that Alston is rather too quick to narrow the categories of legitimate military targets. I assume that he would regard command and control, training and supplying of materiel as putting one in the category of legitimate target, but the fact that he excludes financiers raises a question. By not evaluating the impact of UN Security Council resolutions on his assumptions, Alston undermines the usefulness of his work.

Achieving a general definition of terrorism has bedeviled the international community. At the same time, through a series of UN Security Council resolutions and multilateral treaties, the same community has narrowed the definitional gap for disagreement about whether a particular act is, or is not, terrorist by defining acts usually committed by terrorists as “terrorist.” Alston seems to define “terrorist” in such a way as to make status severable, as Professor Harvey Rishikof likes to say.

Thus, for Alston, the terrorist can be many things at once, each one separable from the other, with different legal consequences for each.

Second, Alston's emphasis on international human rights law in the fight against terrorists creates a legal unreality for those who combat terrorism. UN Security Council resolutions are both more inclusive and more vague. Their language reflects political compromises achieved through the drafting process, compromises that allow unanimous adoption of counterterrorist resolutions. Thus, UN Security Council resolutions routinely reaffirm

that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security . . . [and] the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts.¹⁶

Those engaged in combating terrorism can use this Security Council language as a standard against which to evaluate plans. Alston's failure to consider the impact of Resolution 1373 and other Security Council counterterrorism resolutions limits the operational utility of his work.

Alston insists that the laws of war and international human rights law apply in the context of armed conflict without analyzing either how they do or the consequences for military operations. Thus, Alston asserts, where the law of armed conflict is unclear or uncertain, "it is appropriate to draw guidance from human rights law."¹⁷ He does not specify the content of such law and whether, to the extent it derives from treaties, all or just some States are parties. The same is true in his treatment of the law of armed conflict as his references to the 1977 Geneva Additional Protocols show.

Alston's operational concern is procedural. He argues that, as a result of failing to disclose the legal basis for individual targeting decisions and who has been killed with what collateral consequences, "clear legal standards [have been displaced] with a vaguely defined license to kill, and the creation of a major accountability vacuum."¹⁸ As Alston notes, targeted killings have taken place in a variety of contexts—Russia's war in Chechnya, the US war with Al Qaeda, Sri Lanka's war with rebel groups, and Israel's wars with Arab States, quasi-States and groups are a few examples. Alston sums up the situation as follows:

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which "targeted killing" has sometimes been interchangeably used, such as

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“extrajudicial execution,” “summary execution”, and “assassination”, all of which are, by definition, illegal.¹⁹

This approach to conceptually distinct acts reflects a rush to conclusion based on insufficient and imprecise analysis. The US official position, for example, is different.

The US View

Harold Koh, the State Department Legal Adviser, gave the Obama administration position in a speech in March 2010 to the American Society of International Law.²⁰ He made a number of significant points that assist in deciding who is and who is not a lawful target. First, Mr. Koh said that the United States is engaged in a number of armed conflicts simultaneously: “In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).” With respect to targeting, he stated, “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.”

With regard to the authority to use force, Mr. Koh stated, “As 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.” He continued, “[I]n 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.” This point is important as all decisions about targeting, the location of the conflict and treatment of prisoners flow from it.

Mr. Koh stated that the United States recognizes the applicability of the law of armed conflict, and the core principles of distinction and proportionality. Targeting individuals who are legitimate military objectives, such as commanders, planners, supporters and the like, is within international law. Killing such persons is not to deprive them of judicial due process, for none is due, and does not violate US legal prohibitions on assassination for the same reason: legitimate and lawful acts of self-defense are not crimes. Finally, Koh defends the use of unmanned vehicles as increasing the precision of attacks and limiting collateral damage. In this respect, Alston shares the US view.

The US position raises questions just as the Human Rights Council report does. The question of the use of precision weapons is one such issue. What legal consequences flow from possession of them? Do they affect the way a State, as a matter of

law, must conduct military operations, including those in exercise of the inherent right of self-defense codified in Article 51 of the UN Charter? Do precision weapons eliminate recognition that error is endemic to warfare and mean that civilian casualties, if they occur, must be intended (as the Goldstone Report suggests)?²¹ How does the requirement to distinguish between military and civilian targets affect, if it does, the right to use force in self-defense when the State with the right does not possess precision weapons, and its enemy hides among, or otherwise exploits, civilians?

These and other questions spring to mind in the course of studying the Alston Report and such other Human Rights Council documents as the Goldstone Report.²² Each of them raises more questions than it answers. Alston raises a further issue: the status of Central Intelligence Agency officers engaging in armed conflict with Al Qaeda and its allies. Do they, as Alston asserts, not enjoy combatant status even if they meet the requirements of the Geneva Conventions? Should one distinguish between the CIA officer engaged in cloak and dagger and those who engage in military operations and look and behave like the regular armed forces except for the source of their paychecks?

Conclusion

We shall be discussing these and other issues in the next few days. Their importance to success in the effort to combat terrorism and terrorists is hard to overstate. Other issues are significant as well. They include the fact, which seems often to be forgotten, that the use of force is a political act aimed at political objectives. This is true whether the goal is capitulation or change of policy. For the United States, the goals invariably include persuading the adversary to comply with international legal standards of behavior. At the same time, the tactical choices made also have political consequences. These need to be considered as one goes forward with a use of force. In addition, calls for the introduction of judicial process into military decisions, not just the detention of prisoners, seem to be growing louder. Is such involvement of the judiciary necessary or wise? And what are the consequences of introducing judicial process as a routine part of military operations?

As the war with Al Qaeda and its associates continues with no end in sight and with some groups pressing for criminal prosecutions of those fighting terrorists, getting the analysis and argument right is a political and legal necessity. Professor Alston's Report is not wrong in every respect; neither is it right—therefore more and better needs to be done. This conference will do some of that work.

Notes

1. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].
2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
3. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
4. See, e.g., C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455 (1952); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* (4th ed. 2005); and my own discussion in *Wall of Reason: Alan Dershowitz v. The International Court of Justice*, 71 ALBANY LAW REVIEW 953 (2008).
5. Alston Report, *supra* note 1, ¶ 79.
6. *Id.* ¶ 93.
7. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 126 (2004). (Of course, the nuclear weapon raises a question about all these principles.)
8. Alston Report, *supra* note 1, ¶ 30. Alston cites Common Article 3 of the Geneva Conventions as support for his assertion. It does not provide support but deals with an entirely different subject.
9. *Id.* ¶ 60 (citation omitted).
10. *Id.* ¶ 61.
11. *Id.*
12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in *DOCUMENTS ON THE LAWS OF WAR* 422 (Adam Roberts & Richard Guelf eds., 3d ed. 2000).
13. Alston Report, *supra* note 1, ¶ 62.
14. *Id.* ¶ 60.
15. S.C. Res 1373, *supra* note 3, ¶ 2(e).
16. See, e.g., S.C. Res. 1904, pmb. ¶¶ 3–4, U.N. Doc. S/RES/1904 (Dec. 17, 2009).
17. Alston Report, *supra* note 1, ¶ 29.
18. *Id.* ¶ 3.
19. *Id.* ¶ 10 (citations omitted). Alston cites Michael Schmitt and Hays Parks for the proposition that “extrajudicial execution,” “summary execution” and “assassination” are illegal.
20. Harold Hongju Koh, Legal Adviser, US Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.
21. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict* ¶¶ 61, 730, 838, 985, U.N. Doc. A/HRC/12/48 (Sept. 29, 2009) (Richard Goldstone), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.
22. See, e.g., Nicholas Rostow, *The Human Rights Council (Goldstone) Report and International Law*, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS 275 (2010).