

Clarifying the Rules for Targeted Killing

An Analytical Framework for Policies Involving Long-Range Armed Drones

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Key findings

- To be deemed legitimate under international law, a targeted killing using drones must successfully pass through a series of interlocking “gates” that guide policy decisions; our analysis of the issues raised by international law shows that governments need to make multiple interpretive judgments.
- Current U.S. policies for targeted killing are characterized by ambiguities in interpretations of international law, generality in end-use requirements for recipients of drones, and willingness to allow international norms to arise from the practices of countries, including those of the United States.
- Policymakers in the United States and other countries need to define an overall approach to targeted killing using drones that protects civilians and human rights while also allowing reasonable latitude in the fight against terrorism.
- Built on critical elements of international law, we have designed an analytical framework for use in defining such an overall approach and defined three illustrative policy approaches with clear differences in their emphases on flexibility or restrictions in drone operations.
- Adopting an overall approach for the use of drones in targeted killing would provide clarity and specificity in U.S. policies and operations, a basis for building public support both at home and abroad, and assurance that trade partners comply with U.S. requirements for their lawful use.
- Countries with long-range armed drones could also employ our analytical framework to define international norms based on the calculus of preventing the unlawful use of drones by other countries by agreeing to restrictions on their own operations.

U.S. use of long-range armed drones has increased over the past decade, both in the number of strikes and the number of terrorist groups being targeted.¹ At the same time, more countries are starting to acquire and utilize drones, opening up the possibility that their use could threaten stability in different regions of the world—and potentially undermine U.S. interests.

Debates have arisen over many aspects of U.S. targeted killing, with one important focus being on whether the United States has been conducting drone operations in conformity with international law.² The use of so called “signature” strikes against suspected terrorists has been singled out by critics who allege that some targets have been neither combatants in a war zone nor positively identified as al Qaeda or other terrorist leaders. Worries also have arisen that other countries might use armed drones in secret, without clear legal foundation, against those not clearly identified as combatants in a conflict, and to threaten a nation’s sovereignty and domestic rule of law.³

What is striking in the debates over questions related to international law and U.S. targeted killing policies is how U.S. government officials have left (1) ambiguities in their interpretations of international law covering drone strikes, (2) inconsistencies in their policy statements, (3) generality in U.S. export control policy with respect to the requirements and expectations for use by recipients, and (4) a willingness to allow international norms to arise from the practices of countries, including those of the United States.

Our analysis highlights a need for greater clarity, specificity, and consistency in U.S. international legal policies involving targeted killing using drones. To meet this need, we have designed a framework for policymakers

to use in defining policies that would serve to protect civilians and human rights while also allowing reasonable latitude in transnational conflicts with organized terrorist groups.

The framework is built on the critical elements of international law related to the use of drones. For each of these elements, we identify alternative policy interpretations, drawn from administration officials and from those critical of U.S. policies. Our aim is to provide a full range of policy interpretations, not to make judgments regarding their legality. Using these alternative policy interpretations as building blocks, we define three policy approaches that are internally consistent but differ in the amount of flexibility given to states for drone operations. The approaches are illustrative, but we believe they encompass the policies of the Obama administration and those of its critics.

If the current administration (or a future one) were to adopt the framework and define an overall approach to targeted killing using drones, this would provide not only clarity and specificity to policies but also a basis for persuading those outside the government—and not just critics—that U.S. policies are consistent with international law. Defining such an approach could serve U.S. interests in two other ways: (1) by helping to ensure that trade partners who receive U.S. drones comply with the U.S. requirements for their lawful use and (2) by contributing to the design of international norms on the use of drones, so as to dissuade other countries from using drones in ways that might undermine the interests of the United States and the broader international community. Finally, defining an overall policy approach could provide a way to structure a public debate over U.S. policies on targeted killing, with reference back to international laws and their interpretations.

In this report, we focus on targeted killing using drones, given the debate that surrounds the legality of U.S. use. But our analysis, as well as our analytical framework, could be used to design policies involving any weapon involved in targeted killing (for example, fighter aircraft, cruise missiles), or more generally for policies involving the use of lethal force. We are not suggesting that drones are unique in the applicability of international law.

Because international law covers the use of lethal force, we appreciate that adopting a policy approach to targeted killing using drones could have wider military implications. If a restrictive approach for the use of drones in targeted killing were adopted, for example, it could be hard to argue for a more permissive policy approach for use of other weapons in other types of military operations. In fact, this could be one reason why the Obama administration has been reluctant to give up its flexibility in interpreting international law or clarifying the ambiguities

in its policies. This concern is not persuasive in our view, given that the approach that would emerge from using our framework would clearly involve policies focused on the use of drones in targeted killing. It would be possible to distinguish these from other policies and to provide a rationale for why policies might be the same or different for other types of military operations.

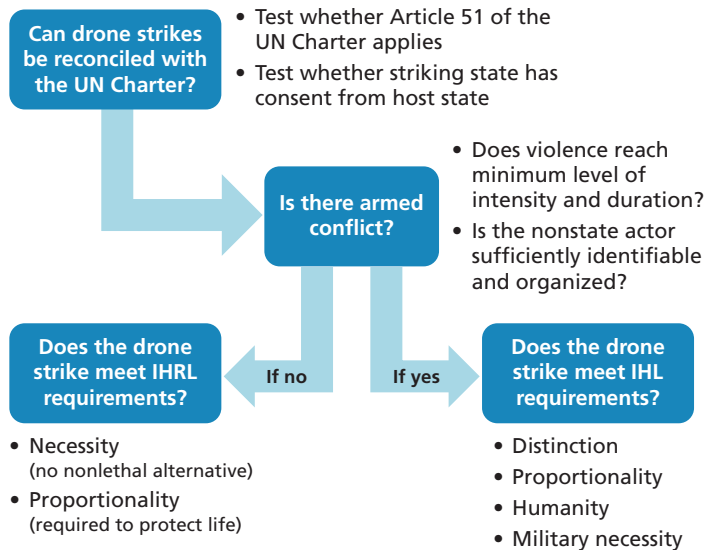
We also recognize that decisions on the legal aspects of the use of drones will be taken within a broader context of how one views targeted killing and one's assessment of the value of drone operations in achieving counterterrorism goals. In other words, whether one is skeptical or convinced of the military effectiveness of drones and targeted killing could color one's views on whether to adopt more- or less-restrictive legal interpretations. An analysis of these broader issues is beyond the scope of this report, but we appreciate that such considerations will arise for policymakers in choosing a policy approach.

Any discussion of international law and targeted killing using drones needs to begin with an acknowledgment of nomenclature. Past commentary and scholarship in this area sometimes refers to “international law,” “norms,” and “policies,” without much clarity about the definitions or distinctions, if any, between the terms. In this report, *international law* refers to rules that have been established by the international community in treaties or agreements that are intended to restrict the behavior of nations on the international stage. *International norms* are collective standards of appropriate behavior, drawn from the interpretation of international law and shared by nations, while the term *policies* refers to what a nation or nations are actually doing in practice in interpreting and applying international law.

INTERNATIONAL LAW AND TARGETED KILLING: DIAGRAMMING THE LANDSCAPE

In this section, we analyze some of the major international legal issues pertaining to drones and targeted killing.⁴ We will do this through a series of interlocking “gates” that guide a nation's policy decisions. In order for a targeted killing to be deemed legitimate under international law, it must successfully pass through each of the gates by meeting a corresponding set of review criteria. A simplified version of our gating logic is depicted in the illustrative figure. What emerges from our analysis is that governments confront considerable ambiguity and a need for interpretive judgments as they define their policies.

Figure: Charting the International Law Through Policy “Gates” for Decisions on Drone Strikes and Targeted Killing



NOTE: IHRL = International Human Rights Law; IHL = International Humanitarian Law; UN = United Nations.

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Although there is more than one possible version of the “gating logic,” any sovereign state that considers undertaking drone strikes will necessarily need to do so through a series of decisions that impose some order of priority on the application of international law standards in reviewing new cases.⁵ For policymakers, distilling the logical sequence of review is a basic step for making subsequent operational decisions—and for formalizing the review process.

At the outset, we note that any attempt to distill and summarize the vast body of international law pertaining to targeted killing will necessarily leave out some details. In addition, there is no universal consensus on the application and meaning of some of the relevant international law standards. Moreover, the viewpoint of any individual state, including the United States, may differ on specific elements of international law, in part as a function of the treaties to which that state is a party. Rather than trying to offer a definitive view of international law, this chapter draws on widely recognized views to illustrate major legal questions that will arise in any targeted killing operation against terrorist suspects.

For a nation that is contemplating drone strikes, the gates illustrated in the figure translate into a series of policy choices, which would govern the review process for potential strikes. Later in this report, we examine U.S. policies related to drones and targeted killing in detail.

When Are Drone Strikes Consistent with the United Nations Charter?

The basic provisions of the United Nations (UN) Charter include both a broad injunction against international uses of force by member states,⁶ together with an explicit exception for instances of national self-defense. Thus, Article 2(4) says, in part, that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁷

But Article 51 then goes on to say that

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.⁸

Article 51 further asserts that any such [self-defense] actions must be immediately reported to the Security Council, and that regardless of such actions, the Security Council will continue to have responsibility to act as it deems necessary to maintain and restore international peace and security.

Without delving too deeply into the ambiguities of Article 51, it is notable that the text refers to the “inherent right of self-defense” in the context of “an armed attack.” Taken at face value, the language suggests that a nation can respond with forceful, extraterritorial military action when targeted by violent aggression. Further, the expression “armed attack” implies perpetrators bearing weapons that carry out a violent strike (or strikes) against the target state and/or its citizens, these rising to a level of salience such that a national “self-defense” response is both meaningful and appropriate. Note that international law principles for construing “self-defense” extend somewhat beyond responding to armed attacks already carried out, and include anticipatory responses to “imminent threats” of armed attack that have not yet materialized.⁹

Exactly how these self-defense standards apply in practice is less than clear. For policymakers considering drone strikes, there are a series of corresponding judgment calls that need to be made in order to figure out whether Article 51 self-defense is appropriate as a justification for the use of military force under the UN Charter:¹⁰

1. How imminent and specific does an armed (terrorist) threat need to be for the “target” state to meet the criterion

for responding in “self-defense”? Is operational intelligence required concerning plans for a specific, future attack? Or is less definitive evidence sufficient, as concerning a more diffuse or chronic threat or the simple intent to perpetrate future attacks? And how much certainty or confidence is required, on the part of the defending state, to justify an anticipatory self-defense response? None of these are questions with simple answers under international law.

2. How much aggregation is permissible and appropriate in construing whether the nature and breadth of a terrorist threat constitutes an “armed attack”? Do strikes carried out previously matter in assessing the likelihood and imminence of further strikes? Does the geographic proximity of strikes or threats matter when assessing the appropriate scope of a self-defense response? In principle, either a narrower or broader self-defense response might be appropriate, depending on the nature of an “armed attack,” and the identity of the group that is threatening to carry out the attack. The analysis will also involve greater complexity when the attacker is a nonstate actor group, as opposed to another sovereign power. In the former case, questions regarding the coherence of the group and its scope of operations may be very pertinent to construing a threat of “armed attack”—and, consequently, what actions in national self-defense might be appropriate.
3. Who gets to make the decision that the criteria for self-defense are met, and how much disclosure and formal oversight at the national and international levels ought to apply, for example, whether and when the Security Council is notified?¹¹ It is beyond the scope of our analysis in this report to address procedural oversight issues in any detail. But it does bear acknowledgment that any government process for making these determinations that involves outside scrutiny is likely to reach more-conservative decisions, in weighing the parameters for “self-defense” under the UN Charter.

Note that even where Article 51 self-defense does not apply, there are other exceptions under the UN Charter that may provide a basis for military action by a member state outside of its own territory, notably under a long-standing UN resolution sanctioning the use of military force with the consent of a host state.¹² This kind of national consent offers another basis for one country to engage in forceful, military action within the territorial boundaries of another without violating the latter’s sovereignty and apart from considerations of self-defense. The assessment of “consent” can involve its own problems and complexities, however, in light of historical cases in which one state has covertly consented to the

military actions of another, while overtly remaining silent or even denying that consent has been given.¹³

In sum, all of the logic concerning the UN Charter involves a threshold set of legal questions and standards, which help to define the legitimate, extraterritorial use of military force without conflict of sovereignty. Where a use of force (such as drone strikes) involves a direct violation of the UN Charter, then by definition it also constitutes a violation of international law. This being said, compliance with the UN Charter and related rules is only the first hurdle in determining whether targeted killing drone strikes can withstand international legal scrutiny. Put another way, compliance with the UN Charter is necessary but not sufficient as a condition to establish the legality of drone operations overseas.

When Does International Humanitarian Law Apply to Drone Strikes, and What Is Required When It Applies?

International humanitarian law (IHL) involves a body of legal standards that define the acceptable use of force in connection with armed conflicts or wars as between nation-states or between a nation-state and a nonstate actor group such as the Islamic State (ISIL) or al Qaeda.¹⁴ Where a nation is using military force pursuant to IHL and in connection with an “armed conflict,” a corresponding set of IHL standards applies in determining what sorts of forceful actions can lawfully be undertaken against enemy combatants. Broadly speaking, the battlefield standards governing deadly force under IHL are somewhat more permissive than legal standards, drawn from international human rights law (IHRL), which would generally apply outside armed conflict situations.

Determining Whether IHL Applies

The threshold determination for the applicability of IHL involves establishing that an “armed conflict” exists. According to several commentators (and going back to original authority established under the Geneva Conventions), the presence of an “armed conflict” is supposed to be based on objective criteria and verifiable facts.¹⁵ In practice, the threshold for making this determination seems less than fully clear, but involves “violence reaching a minimum level of intensity and duration” (meaning, more than isolated attacks), and in the case of conflicts involving nonstate actors, also touches on whether those actors are “sufficiently identifiable and organized.”¹⁶ Thus, prolonged military action between two nation-states that follows from

openly declared hostilities would meet the classic criterion for an “armed conflict.” An isolated terrorist attack unconnected to any organized political group would probably not. Less analytically clear are in-between situations that involve nonstate actors who engage in more than a single, isolated attack.

Another question is exactly how organized and tightly controlled such groups need to be, and how committed, geographically focused, and frequent their attacks, for an “armed conflict” to exist and for IHL to apply. Put another way, the semantics of whether there is an “armed conflict,” and what the scope of that conflict is may involve considerable judgment in these cases.¹⁷

It is also important to acknowledge that there is ongoing debate regarding whether international law allows “a state [to] assert the same belligerent rights against a nonstate actor as would be permissible against an opposing sovereign state.”¹⁸

Implicitly, the determination of “armed conflict” is also defined by the direct participation of one or more state actors. Thus, the fact that two sovereign entities (or alternately, a state and a nonstate actor) are involved in an armed conflict does not imply that another, third-party state is automatically party to the same armed conflict, simply by virtue of its desire to intervene. This issue might come up in a hypothetical drone strike against a terrorist target, where the terrorists in question are in an “armed conflict” with someone, but not with the state that is considering whether to undertake the drone strike. Situations like this may involve a complex review process, in which questions about the applicability of self defense, sovereign consent, and “armed conflict” are all simultaneously in play, and in which the answer to any one of these questions is likely to depend simultaneously on answers to the others.

To illustrate the considerations in determining whether IHL applies in real-world scenarios, Table 1 presents four cases of drone strikes outside Afghanistan or Iraq. For each case, we describe a rationale for arguing that the strikes were made in the situation of an armed conflict—that is, the criteria of the violence reaching a minimum level of intensity and duration and of a sufficiently identifiable and organized group are met. Whether this was the basis for U.S. government decisions is not known from the information that is publicly available. But again, we are using these cases only to illustrate the challenges in determining whether an armed conflict exists and IHL applies.

Four-Pronged Standard for Assessing Military Action Under IHL

Assuming that an “armed conflict” does exist, IHL requires that the principles of distinction, proportionality, humanity,

and military necessity be followed in any use of violent or lethal military force by a state. In order, these basic IHL principles have the meanings outlined in Table 2.

Taken collectively, the rules of IHL serve to distinguish legitimate military actions from acts of terrorism, in large part by restricting harm to civilians. Unnecessary uses of force, inappropriate targeting of noncombatants and unreasonable collateral damage are all prohibited under the basic standards of IHL. Here again, however, interpretive judgment is required in applying the standards, as in determining what “military necessity” means, or what constitutes “excessive harm to civilians,” in any given set of circumstances. Even in the context of conventional warfighting, the application of IHL standards often involves nuance and judgment, and historical cases that defy easy analysis under the rules.¹⁹

The primary challenge in applying IHL to drone strikes involves ensuring valid targeting decisions, especially when it is difficult to distinguish between terrorist fighters and noncombatant civilians. When an individual is known to be an operational leader of an enemy combatant group, targeting him is relatively straightforward under IHL.²⁰ Situations that are somewhat more difficult to analyze are those in which the identity of the target is not known with certainty, or in which the military value of the target is lower (for example, a “foot soldier” rather than a leader). “Signature strikes,” which base targeting on suspicious behavioral patterns rather than direct evidence of combatant activity, present an extreme version of this kind of situation. Note that in a conventional warfighting context, the problem of evaluating signature strikes under IHL does not usually come up because targets are mostly uniformed and are often chosen based on their military value rather than in defense of an immediate tactical threat. By contrast, when a nation in an armed conflict with a nonstate actor terrorist group is using drone strikes to target members of that group, the principles of IHL require identifying and protecting civilians. By extension, a basic legal question under IHL is when, if ever, the probabilistic determination of threat and affiliation to a terrorist group is sufficient to justify the decision to target a drone strike.²¹

A related targeting problem for drone strikes under IHL involves how the rules apply to people with only hazy or sometime affiliations with the terrorist group in question. This is a subject of significant controversy, and the International Committee of the Red Cross (ICRC) has published guidance in this area, seeking to distinguish between civilians who maintain a “continuous combatant function” (that is, legitimate targets) and those who have merely participated in a specific hostile act (meaning potentially not legitimate targets, if they are not appropriately deemed to be a

Table 1: Defining Armed Conflict

Criteria for Defining Whether Armed Conflict Exists	Is Group Sufficiently Identifiable and Organized?	Does Violence Reach a Minimum Level of Intensity and Duration?
Yemen November 2002^a Qaed Salim Sinan al-Harethi, suspect in October 2000 USS <i>Cole</i> bombing, killed along with American citizen Ahmed Hijaz and other low-level al Qaeda operatives.	Several senior al Qaeda members took refuge in Yemen after United States began operations in Afghanistan in 2001; Harethi reported to be al Qaeda's top operative in Yemen.	Al Qaeda members carried out suicide bombings and other attacks in Yemen and planned attacks against United States and other countries.
Yemen June 2015^b Nasir al-Wuhayshi, leader of al Qaeda in the Arabian Peninsula (AQAP), killed along with two AQAP operatives. Identities of targets not known prior to strike. Targeting based on patterns of suspected militant activity.	Al-Wuhayshi founded AQAP in 2009, official affiliate of al Qaeda.	AQAP involved in violence in Yemen and claimed responsibility for failed attempt to bomb transatlantic flight Christmas Day 2009; in March 2014, al-Wuhayshi vowed to attack United States.
Pakistan Tribal Areas January 2016^c Maulana Noor Saeed, a top Tehrik-e Taliban Pakistan (TTP or Pakistani Taliban) commander, reported killed along with four suspected militants.	TTP has close ties to the Afghan Taliban and al Qaeda. Seeks overthrow of Pakistan's government and attacks against United States. U.S. State Department designated TTP a Foreign Terrorist Organization in September 2010.	TTP conducts frequent attacks in Pakistan and claims responsibility for failed vehicle-bomb attack in Times Square, New York City, on May 1, 2010. In June 2011, leader vowed to attack United States and Europe, although it has not succeeded.
Somalia June 2011^d Jabreel Malik Muhammed, a senior member of al Shabaab, killed in the first U.S. drone strike in Somalia, near the coastal town of Kismaayo. One other militant reported killed.	Al Shabaab is a clan-based insurgent and terrorist group that has held various amounts of Somali territory. Al Shabaab was affiliated with al Qaeda and undertook a partial merger with it in February 2012. U.S. State Department designated al Shabaab a Foreign Terrorist Organization in 2008.	Al Shabaab has conducted frequent guerrilla and terrorist attacks against Somali, African Union, and other targets, including Westgate Mall in Kenya in September 2011. Also conducted attacks in Uganda and Djibouti and called for attacks against United States, but it has not attempted any.

^a Bureau of Investigative Journalism, "Yemen: Reported US Covert Actions 2001–2011," March 2012 (as of February 29, 2015: <https://www.thebureauinvestigates.com/2012/03/29/yemen-reported-us-covert-actions-since-2001/>). See also John Sifton, *Violence All Around*, Cambridge: Mass., Harvard University Press, 2015, p. 88; "U.S. Kills al-Qaeda Suspects in Yemen," Associated Press, November 2002 (as of February 29, 2016: http://usatoday30.usatoday.com/news/world/2002-11-04-yemen-explosion_x.html).

^b Greg Miller, "CIA Didn't Know Strike Would Hit al-Qaeda Leader," *Washington Post*, June 17, 2015 (as of February 29, 2016: https://www.washingtonpost.com/world/national-security/al-qaedas-leader-in-yemen-killed-in-signature-strike-us-officials-say/2015/06/17/9fe6673c-151b-11e5-89f3-61410da94eb1_story.html). See also International Security, "Drone Wars: Yemen," June 12, 2015 (as of February 29, 2016: <http://securitydata.newamerica.net/drones/detail.html?id=38e8b092>); Yara Bayoumy, "Al Qaeda's Second-In-Command Vows to Strike America in New Video," Reuters, April 2014 (as of February 29, 2016: <http://www.businessinsider.com/yara-bayoumy-al-qaeda-vows-to-strike-america-in-new-video-2014-4?IR=T>); Bureau of Investigative Journalism, "Yemen: Reported US Covert Actions 2015," January 2015 (as of February 29, 2016: <https://www.thebureauinvestigates.com/2015/01/26/yemen-reported-us-covert-actions-2015/>).

^c Bureau of Investigative Journalism, Drones Team, "Obama 2016 Pakistan Drone Strikes," January 2016 (as of February 29, 2016: <https://www.thebureauinvestigates.com/2016/01/11/obama-2016-pakistan-drone-strikes/>). See also International Security, "Drone Wars: Pakistan," January 2016 (as of February 29, 2016: <http://securitydata.newamerica.net/drones/detail.html?id=e33726e1>); National Counterterrorism Center, "Tehrik-e Taliban Pakistan (TTP)," undated (as of February 29, 2016: <http://www.nctc.gov/site/groups/ttp.html>); Ben Brumfield, "Who are the Pakistani Taliban?" CNN, December 2014 (as of February 29, 2016: <http://www.cnn.com/2014/12/17/world/asia/pakistan-taliban-explainer/>).

^d Greg Jaffe and Karen DeYoung, "U.S. Drone Targets Two Leaders of Somali Group Allied with al-Qaeda," *Washington Post*, June 29, 2011 (as of February 29, 2016: https://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFzrH_story.html?hpid%3Dz1&sub=AR). See also: National Counterterrorism Center, "Al-Shabaab," undated (as of February 29, 2016: <http://www.nctc.gov/site/groups/al-shabaab.html>); Bureau of Investigative Journalism, Drones Team, "Somalia: Reported US Covert Actions 2001–2016," February 2012 (as of February 29, 2016: <https://www.thebureauinvestigates.com/2012/02/22/get-the-data-somalias-hidden-war/>).

Table 2: Summary of IHL Principles for Legitimate Acts of Force in Warfare

IHL Principle	Explanation
Distinction	Civilians shall not be the object of attack. Acts of terrorism are prohibited.
Proportionality	Attacks that would cause excessive harm to civilians, in relation to the military advantage anticipated therefrom, are prohibited.
Humanity	Requires restraining, to the greatest extent possible, the effects of armed violence on people's security and health.
Military necessity	Kind and degree of force used [against a legitimate target in an armed conflict] must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstance.

NOTE: See Stanford Law School and N.Y.U. Law School, 2012, p. 112, which cites several ICRC documents, together with the Geneva Conventions, for authoritative support.

part of the terrorist group). Judgment is required in the application of these sorts of standards, even given strong operational intelligence about the identity and background of specific targets.²²

Targeting known terrorist leaders presents fewer challenges in applying IHL principles because they are by definition easier to distinguish from civilians. They have been assessed to be high-value targets, their identity has been confirmed, and they are clearly hostile combatants. Targeting operatives closely identified with a terrorist group is more challenging, because their military value is not as high and their “continuous combat function” may be more difficult to confirm. Such a person may be described as a “leader” if that term is used loosely, or he may be labeled a generic militant if overshadowed by a more senior affiliate. Regardless of their exact status, the question for such operatives is “do they pose a continuing threat sufficient to warrant killing them?” Suspected affiliates based on behavior encompass the most challenging category, because their military value and combat function may be the least clear, sometimes to the point where it cannot be said for certain they are even hostile combatants.

To appreciate the challenges in applying IHL principles in validating a target, Table 3 presents individual cases of U.S. drone strikes using these three categories of potential targets: terrorist leaders, closely identified terrorist operatives, and suspected terrorist affiliates based on behavior. The columns represent the questions that need to be considered in validating a target under IHL: Is the target of high value; is the target identified; is the target reasonably believed to be a hostile combatant? In this table, we present our understanding of the answers to these questions, while recognizing that we are limited in the information that is available and in our knowledge of the considerations that went into U.S. decisions on these drone strikes. Our aim again is only to illustrate the complexity of applying IHL principles.

When Does International Human Rights Law Apply to Drone Strikes, and What Does IHRL Require When It Applies?

International Human Rights Law (IHRL) is a body of law governing the extraterritorial use of force by a sovereign state even in the absence of an armed conflict.²³ In these situations, the state is basically acting in a police (or law enforcement) capacity when it uses force against hostile individuals outside its own borders. Where a sovereign state undertakes such a response, and the underlying provocation or terrorist attack has not escalated to the level of an “armed conflict,” then IHRL will apply in assessing the legality of the state’s actions. By extension, the rules of IHRL will apply to drone strikes that target terrorist groups abroad, even when IHL rules do not.

A summary of widely recognized IHRL principles is offered by Alston, who writes

A state killing [under IHRL] is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*). (emphasis added)²⁴

Thus, the basic principles of IHRL include necessity and proportionality, which are noteworthy for their overlap with the principles of IHL listed in Table 2. Still, the meaning of these terms is considerably more restrictive under IHRL than IHL, congruent with a sovereign state acting in an extraterritorial law enforcement capacity, rather than in a war-fighting capacity.

In sum, the most difficult drone strikes for a sovereign state to validate under international law will likely occur pursuant to IHRL. In all such situations, the question for policymakers will

Table 3: Applying IHL Principles

Target	Cases of Drone Strike(s)	High-Value Target?	Identity Confirmed?	Hostile Combatants?
Terrorist leader	May 2016 ^a Mullah Akhtar Mansour Taliban leader Killed with driver	Yes Oversaw attacks in Afghanistan	Yes By intercepted communications and drone video	Yes Evidence of attacks planned for Kabul
Closely identified terrorist operatives	December 2015 ^b Abdirahman Sandhere Senior al Shabaab fighter in Somalia Killed with two other al Shabaab–affiliated associates	No Not among six al Shabaab members listed on Department of State U.S. Rewards for Justice Program	Yes U.S. Department of Defense report was specific target	Yes Active role in al Shabaab
Suspected terrorist affiliates based on behavior	July 2015 ^c Series of drone strikes in Somalia Killed undisclosed number of people	No Defense forces on ground	No	Yes Massing for attack against African Union troops
	February 2016 ^d Multiple drone strikes on a jihadist safe haven in Pakistan Reportedly killed three or four suspected militants from the Haqqani Network, a Taliban subgroup closely allied with al Qaeda	No	No	Yes Villagers reported militants used remote safe houses before and after attacks against foreign and Afghan forces in Afghanistan
	February 2010 ^e Attack by helicopter gunships and a Predator drone of suspected Taliban vehicle convoy in Afghanistan Killed at least 15 unarmed civilians	No	No	No After strike, predator crew recognized targets as civilians, but noted “no way to tell [beforehand] from here”
	January 2015 ^f Drone strike in Pakistan Killed four suspected al Qaeda militants plus two western hostages	No	No Activities met “pattern of life” criteria	Yes/No Intelligence assessed with “high confidence” compound being used by al Qaeda operatives

^a Mujib Mashal, “Taliban Chief Targeted by Drone Strikes in Pakistan, Signaling a U.S. Shift,” *New York Times*, May 22, 2016 (as of May 31, 2016: http://www.nytimes.com/2016/05/23/world/asia/afghanistan-taliban-leader-mullah-mansour.html?_r=0); Adam Entous and Jessica Donati, “How the U.S. Tracked and Killed the Leader of the Taliban,” *Wall Street Journal*, May 25, 2016 (as of May 22, 2016: <http://www.wsj.com/articles/u-s-tracked-taliban-leader-before-drone-strike-1464109562>).

^b Kristina Wong, “US Says Airstrike Killed al Qaeda Leader in Somalia,” *The Hill*, December 7, 2015 (as of February 29, 2016: <http://thehill.com/policy/defense/262310-pentagon-us-military-airstrike-killed-senior-al-qaeda-leader-in-somalia>).

See also Bureau of Investigative Journalism, Drones Team, February 2012.

^c Bureau of Investigative Journalism, Drones Team, February 2012. See also W. J. Hennigan and David S. Cloud, “U.S. Airstrikes in Somalia Signal a More Direct Role Against Shabab,” *Los Angeles Times*, July 23, 2015 (as of February 29, 2016: <http://www.latimes.com/world/la-fg-us-airstrikes-somalia-20150723-story.html>).

^d Bill Roggio, “US Drones Target Jihadist ‘Hideouts’ in Pakistan’s Tribal Areas,” *The Long War Journal*, February 22, 2016 (as of February 29, 2016: <http://www.longwarjournal.org/archives/2016/02/us-drones-target-jihadist-hideouts-in-pakistans-tribal-areas.php>). See also Mushtaq Yusufzai, “Suspected U.S. Drone Strike Hits Pakistan’s Kurram Tribal Region,” NBC News, February 22, 2016 (as of February 29, 2016: <http://www.nbcnews.com/news/world/suspected-u-s-drone-strike-hits-pakistan-s-kurram-tribal-n523321>).

^e David S. Cloud, “Anatomy of an Afghan War Tragedy,” *Los Angeles Times*, April 10, 2011 (as of February 29, 2016: <http://articles.latimes.com/2011/apr/10/world/la-fg-afghanistan-drone-20110410>).

^f Mark Mazzetti and Eric Schmitt, “First Evidence of a Blunder in Drone Strike: 2 Extra Bodies,” *New York Times*, April 23, 2015 (as of February 29, 2016: <http://www.nytimes.com/2015/04/24/world/asia/fatal-blunder-was-apparent-in-aftermath-of-drone-strike-in-pakistan.html>). See also Peter Baker, “Obama Apologizes After Drone Kills American and Italian Held by Al Qaeda,” *New York Times*, April 23, 2015 (as of February 29, 2016: http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html?_r=0).

be whether the target truly presents a lethal threat (and if so, how immediate and imminent), and whether there are any nonlethal alternatives for incapacitating the target. Note that the concept of “imminence” arises again in the context of applying IHRL standards, but the term arguably means something different here than it does under the self-defense “gate” and the UN Charter. In the IHRL context, a state killing can only be undertaken when there is no alternative for preventing a threat to life. Almost by definition, the lack of alternatives under IHRL implies that a violent threat is both immediate and unavoidable—as when a terrorist literally has pointed a gun at someone’s head with clear intent to fire. By contrast, “imminence” in the context of sovereign self-defense may or may not require the same degree of immediacy and focus when analyzing the nature of a threatened armed attack on the part of a nonstate actor.

Signature strikes raise a particular challenge in applying IHRL standards: Can a lethal strike with probabilistic targeting based on suspicious behavior be justified as “necessary” and “proportionate”? Here again, analysis of a hypothetical strike is likely to depend on how broadly the relevant legal standards (for example, regarding the putative “threat to life” posed by the target) are interpreted.

Additional Considerations of International Humanitarian Law and International Human Rights Law

Any attempt to rationalize international law standards pertaining to drone strikes and targeted killing will tend to run afoul of some recursive elements. Some of the basic legal concepts tend to get invoked in more than one place within the gating logic, in ways that are confusing and difficult to untangle. Thus, “imminence” is relevant to judging whether the threat of an armed attack justifies a sovereign self-defense response. But “imminence” is also related to the IHRL principle of necessity, and to when a state (outside the context of an armed conflict) is justified in using lethal force in response to a threat against life. There are multiple elements within the international law framework that have a similarly recurring quality when we step through the gating logic for the review of hypothetical targeted killing operations. For practical decisionmaking purposes, one take-away is that terms like “necessity,” “proportionality,” and “imminence” may mean somewhat different things, depending on what aspect of the international law we are attempting to apply. Another take-away is that conclusions about legality that

are drawn in one part of the review process can have an influence on subsequent analytic and review steps.

U.S. POLICIES ON TARGETED KILLING USING DRONES

U.S. policies on targeted killing using drones have both a domestic and an international component, and this makes describing these policies more complicated than simply matching the policies to the policy gates described in the previous chapter. Understanding these policies is also made difficult because public documentation is limited to a few speeches by senior officials, drone operations themselves are highly classified, and public reporting is, at best, very incomplete.

Here, we will describe how the United States has defined the domestic legal basis for targeted killing using drones, its interpretation of international law for purposes of conducting these strikes, and how it has combined these into overall policy statements for the use of lethal force outside areas of active hostilities.

Domestic Legal Basis

The legality of any U.S. military operation overseas depends on its being lawfully authorized by the U.S. government under the Constitution and separation of powers. The President is the commander in chief of the armed forces, but the Congress has the power to declare war and to raise and support the nation’s armed forces.

Congress granted the executive branch broad authority to use military force in the aftermath of the September 11 terrorist attacks. The Authorization for the Use of Military Force (AUMF) in 2001 is both a declaration of war and a statement by Congress that the self-defense of the United States requires the use of “all necessary and appropriate force against nations, organizations and persons” that pose an international terrorist threat to the United States as a means to prevent future attacks.²⁵ Congress authorized the Iraq War in 2002—and, although focused on removing Saddam Hussein, this authorization has subsequently been used to support the war against ISIL.²⁶

Congress has also given the President authority under the Covert Action Statute for covert operations against terrorists presenting an imminent threat.²⁷ While President George W. Bush’s memorandum of notification following the 9/11 attack remains classified, the authorities given the Intelligence Com-

munity are reportedly broad and aimed at al Qaeda and any affiliated groups.²⁸

Debate has focused over the past decade on how these various authorities apply, given that U.S. use of drones has expanded beyond the wars in Afghanistan and Iraq to other locations (Somalia, Libya, and Yemen) and against groups other than the Taliban and “core” al Qaeda, to include AQAP, the al Qaeda-affiliated group al Shabaab in Somalia, the al Qaeda-affiliated Nusra Front in Syria, and (more recently) ISIL in Iraq, Syria, and Libya. Two questions have been particularly controversial: Does the 2001 AUMF cover the loosely linked al Qaeda affiliates with principally local aims, and is ISIL covered by the 2002 AUMF by being ideologically similar to al Qaeda, even though the two organizations are at war with each other in Syria and Iraq?

The Obama administration starts with the view that there are limits on the authorities in the 2001 AUMF. According to Jeh Johnson, former General Counsel of the Department of Defense and current Secretary of Homeland Security, the AUMF is not open-ended and “does not authorize military force against anyone the Executive labels as ‘terrorist’. Rather it encompasses only the groups or people with a link to the terrorist attack on 9/11 or associated forces.”²⁹ He goes on to state that the concept of an “associated force” is also not open-ended and does not cover any terrorist group that merely embraces al Qaeda ideology. The group must be an organized group and a threat to the United States.³⁰

Nevertheless, the administration defines broadly what groups fit into their definition. According to Stephen Preston, General Counsel of the Department of Defense, authority comes from the 2001 AUMF with respect to targeting of “al Qaeda and associated forces” and these groups include: al Qaeda, the Taliban and “certain other terrorist or insurgent groups in Afghanistan,” AQAP in Yemen, individuals who are part of al Qaeda in Somalia and Libya, the Nusra Front and Khorasan Group in Syria, and ISIL. Preston argues that ISIL is directly associated with al Qaeda, based on the history of the relationship between al Qaeda and ISIL, and the recent split does not remove ISIL from coverage.³¹

Notwithstanding their view that ISIL is covered by the 2001 AUMF, the Obama administration over the past two years has sought to gain congressional support for a new AUMF. The primary goal is to gain support for current operations against ISIL as a way to signal U.S. commitment to combating terrorism globally. So, the debate has shifted to whether Congress wishes to play a role in authorizing the future use of U.S. military force

and how broad or narrow the authorization should be in terms of the groups to be targeted and the range of permitted military operations (for example, the use of ground forces).³²

The use of drones to kill American citizens overseas raises additional questions. Issues in such cases include the protections that the U.S. Constitution’s Bill of Rights provides American citizens and criminal prohibitions against killing American nationals abroad.³³ President Obama in May 2013 was clear: “When a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.”³⁴ The 2011 targeting and killing of senior leaders of AQAP (including U.S. citizen Anwar al-Awlaki) in Yemen is the case that brought this issue to public attention.³⁵

Interpreting International Law

We next present our assessment of how the U.S. government has been interpreting international law pertaining to drones and targeted killing in reaching the conclusion that drone operations against varied targets have been legitimate and legally defensible over the past decade.

Self-Defense, Sovereignty, and Imminence Under the UN Charter

The international component of U.S. drone policies starts with UN Charter Article 51 and includes the U.S. exercise of its right to self-defense following the 9/11 attacks and, more recently, in operations in Syria. In 2010, Harold Koh, then-legal adviser to the U.S. State Department, said, “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 inherent right to self-defense under international law.”³⁶

Consistent with Article 51 of the UN Charter, the Bush administration in 2001 notified the UN Security Council that the United States was taking action in exercise of its right of self-defense in response to the 9/11 attacks following operations in Afghanistan on October 7 of that year. The Obama administration views its operations against ISIL in Iraq to be with the consent of the government of Iraq, and in Syria it is using force against ISIL in the “collective self-defense of Iraq and U.S. national self-defense.”³⁷ Again, consistent with Article 51 of

the UN Charter, the administration notified the UN Security Council that it was taking actions in Syria.³⁸

With respect to the extraterritorial use of military force under the UN Charter, the Obama administration extends the right to self-defense under certain circumstances to include unilateral action inside the territory of other states even absent their consent. According to John Brennan, then–assistant to the President for homeland security and counterterrorism, “we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”³⁹

At the same time, U.S. policies have recognized the need to take account of a nation’s sovereignty. According to Brennan, “international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.”⁴⁰ U.S. Attorney General Eric Holder says protecting the nation from terrorist threats “does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”⁴¹

These officials seem to state a broad interpretation of the right to self-defense. However, the Obama administration has also been sensitive to the sovereignty of other countries. Where conflicts with terrorist groups have intruded into the territory of independent sovereign states, the United States has made efforts to gain authority for drone strikes through the agreement of a host government, as in Pakistan. Table 4 applies the UN Article 51 (self-defense) notification and host nation consent criteria to each of the countries in which the U.S. government has conducted drone strikes.

Absent the consent of a government, Brian Egan, legal adviser in the U.S. Department of State, makes clear that if the United States plans to rely on self-defense to use force against a nonstate actor on another state’s territory, it must “determine that the territorial State is ‘unable or unwilling’ to address the threat posed by the non-State actor on its territory.”⁴² This is the justification being used by the Obama administration in its use of force against ISIL in Syria.⁴³

As part of its expansive interpretation of “self-defense,” the U.S. government has adopted a broad definition of the immi-

nence of the threat posed by al Qaeda and its associated groups. Brennan argues for a flexible understanding of “imminence” for dealing with transnational terrorist groups, given their ability to strike with little notice and cause significant civilian or military casualties.⁴⁴ Egan states “the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.”⁴⁵ He goes on to say that once a state has lawfully resorted to force in self-defense against a particular armed group, “it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended.”⁴⁶

Armed Conflict and Application of IHL

The Obama administration has offered a number of arguments supporting its broad definition of when IHL principles apply to targeted killing using drones. One set of arguments uses their broad definition of al Qaeda and associated groups under the 2001 AUMF and their broad definition of self-defense and existence of imminent threat to view areas where al Qaeda and its associated groups are operating as the theater of an “armed conflict,” such that IHL therefore applies.

Another set of arguments begins with the view that the 2001 AUMF does not provide legal justification as to what is an area of armed conflict for purposes of international law; thus, the argument can be made that where there is no government (in areas of anarchy and violence), wartime targeting rules apply. In other words, “policing rules of engagement” cannot apply in an area of anarchy, where there is no conventional government authority.⁴⁷

Having claimed it met the requirements under the UN Charter and the threshold test of armed conflict for IHL (i.e., war), the U.S. government has provided some insight into how it approaches applying the four fundamental laws of war principles governing the use of force. According to Holder, “the principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets—such as combatants, civilians directly participating in hostilities, and military objectives—may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.”⁴⁸

Table 4: U.S. Drone Strikes: Self-Defense and Host Nation Consent

Country	Self-Defense Notification	Host Nation Consent
Afghanistan	October 2001 ^a	December 2001 (Bonn Conference establishment of Afghan Transitional Administration)
Iraq	February 2003 citing UN Resolution 1441 ^b	June 2004 (Iraqi Interim Government)
Pakistan	October 2001	Private
Yemen	October 2001	Private As of March 2015: host nation unwilling/unable to address threat
Somalia	October 2001	Host nation unwilling/unable to address threat
Libya	UN Security Council Resolution 1973, March 2011	Host nation unwilling/unable to address threat
Syria	September 2014 ^c	Host nation unwilling/unable to address threat

^a John Negroponte, U.S. Ambassador, letter to the President of the UN Security Council, S/2001/946, October 7, 2001. In this letter, the United States reserved the right to take actions in other countries: "We may find that our self-defence requires further actions with respect to other organizations and other States."

^b Colin Powell, U.S. Secretary of State, presentation to the UN, February 6, 2003 (as of February 29, 2016:

<http://www.cnn.com/2003/US/02/05/sprj.iq.powell.transcript/index.html>).

^c Marty Lederman, The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group [UPDATED to add statement of the U.N. Secretary-General], September 23, 2014 (as of July 8, 2016:

<https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group>).

Policy Statements on Use of Lethal Force

For a variety of reasons, the Obama administration in 2013 decided to present publicly its policies for the use of drones in counterterrorism operations. These policies were based on a classified Presidential Policy Guidance (PPG): "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities." In 2016, the administration released a redacted version of the PPG.⁴⁹

The preference in the PPG is for the capture of terrorist suspects. The standards for the use of lethal force start with two preconditions: "there must be a legal basis for using lethal force" and the target must pose "a continuing, imminent threat to U.S. persons." The PPG then goes on to establish "conditions" that must be met before lethal action may be taken:

- near certainty that the terrorist target is present
- near certainty that noncombatants will not be injured or killed
- assessment that capture is not feasible at the time of the operation
- assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons

- assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons.

The PPG includes the requirement that, in the use of lethal action, U.S. government departments and agencies "must employ all reasonably available resources to ascertain the identity of the target so that the action can be taken." It also makes clear that "international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and the way in which the United States can use force."⁵⁰

According to Egan, "areas of active hostilities" is a term specific to the PPG, and the determination "takes into account, among other things, the scope and intensity of the fighting."⁵¹ He said the administration currently considers Afghanistan, Iraq, and Syria to be such areas, thereby signaling that the PPG applies to drone operations in other countries.⁵² He goes on to say that the PPG imposes "certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting." He singles out the measures to minimize risks to civilians and the threshold of "near certainty" that noncombatants will not be injured or killed.⁵³

In July 2016, the Obama administration issued an Executive Order to address civilian casualties in U.S. military operations that apply to areas inside and outside active hostilities. While admitting that civilian casualties are a tragic—and at times unavoidable—consequence of the use of force, the Executive Order stated: “As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.”⁵⁴

The Fact Sheet accompanying the Executive Order elaborated on how the armed conflict principle of distinction “requires that attacks be directed only against military objectives and not against civilians and civilian objects,” and uses as an example, “an individual may be targetable if the individual is formally or functionally a member of an armed group against which we are engaged in an armed conflict,” looking for the “extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces.” Returning to the conditions outlined in the PPG, the Fact Sheet focused on the “near certainty” standard that a target is present and that noncombatants will not be killed or injured; it also noted that the PPG “in many circumstances applies policy standards that offer protections for civilians that exceed the requirements of the law of armed conflict.”⁵⁵

The problem is that in seeking to clarify its policies, at least in their public presentation, the administration has opened up a number of questions that warrant clarification:

- **Sovereignty:** How, specifically, does respect for sovereignty alter the extraterritorial reach of the U.S. self-defense determination under the UN Charter?
- **Imminence:** Do the PPG conditions for the use of lethal force alter in any way the Obama administration’s earlier flexible understanding of imminence for dealing with transnational terrorist groups?
- **Armed conflict:** What is the relationship between areas of “active hostilities” and areas of armed conflict as defined in international law?
- **Targeting criteria and practices:** Has the administration adopted constraints resembling human rights or law enforcement principles (IHRL) to areas “outside active hostilities” rather than warfighting principles (IHL)? Does the criteria of “near certainty that terrorist target is present” and “near certainty that noncombatants will not be injured or killed” rule out signature strikes?

What the Obama administration seems to have done is issue a statement (the PPG) describing the operational restraint that the United States chooses to apply as a matter of policy outside areas of active hostilities, while its interpretation of international law retains the flexibility to define broadly where armed conflict exists (for example, where al Qaeda and associated groups operate) and when it may wish to apply warfighting principles. Koh seems to admit to such an interpretation when he says the Obama administration “has combined a law-of-war approach with law-enforcement methods to bring all available tools to bear against Al Qaeda.”⁵⁶

ALTERNATIVE POLICY APPROACHES FOR USE OF DRONES IN TARGETED KILLING

Our presentation of the international law covering targeted killing using drones has shown the inherent ambiguities and the need for interpretive judgments on the part of policymakers. The policies of the Obama administration reveal the challenges in balancing the need for operational military flexibility with the protection of civilians and human rights. Nevertheless, governments need to make choices. We have designed an analytical framework that can be used by the United States and other countries to define future policies for the use of drones in targeted killing.

Our framework is built on the critical elements of international law related to targeted killing, drawing on the earlier analysis we have presented.⁵⁷ In Table 5, we list these international law elements in the order of the “gates” in our illustrative figure and relate these back to the issues raised in interpreting the international law. Again, it is important to note that the policy interpretations are interrelated and there is no priority in the listing of the elements. For each of these international law elements, we identify alternative policy interpretations, drawing on views cited in our earlier analysis as well as those of the Obama administration. Our aim is to provide a full range of policy interpretations, not to make judgments as to the legality of any of these interpretations.

Using the alternative policy interpretations for each of the international law elements as building blocks, we define three policy approaches to targeted killing in Table 6. While there are many different combinations of the policy interpretations in Table 5, we have sought to define internally consistent policy approaches that differ clearly in their emphasis on flexibility or restrictions in drone operations. So the *Permissive Policy Approach* interprets the legal norms to allow for much more military operational freedom, whereas the *Restrictive Policy Approach* favors

Table 5: Building Blocks for Designing Policy Approaches for Use of Drones in Targeted Killing

International Law Elements	Issues Raised	Alternative Policy Interpretations
Support of host government	Relates to sovereignty commitments under UN Charter	• Gain public approval • Gain private approval or host government unwilling or unable to act • Unilateral action
Declaration of self-defense and notification of Security Council	Relates to Article 51 commitments under UN Charter	• Establish legal authority in advance • Act on own
Imminence of threat	Relates to “self-defense” in anticipation of an attack and to use of lethal force to “protect life” under IHRL principles	• Immediate, knowable • Any opportunity
Characteristics of terrorist group: • How organized in geographic area • Link of local group with terrorist organization	Relates to whether “armed conflict” exists between state using drones and terrorist group and affiliates, and to breadth of “legitimate targeting” under IHL principles	• Organized and close links • Little aggregation and uncertain links
Intensity of violence	Relates to whether “armed conflict” exists between state using drones and terrorist group and affiliates, and to assessing response under IHL (proportionality) and IHRL (law enforcement)	• High • Sporadic
Threat of terrorist group to country’s interests and persons	Relates to whether “armed attack” under UN Charter has occurred and whether “armed conflict” exists between state and terrorist group and its affiliates	• Direct • Possible links
Presence of terrorist target	Relates to targeting decisions under IHL and IHRL principles (such as signature strikes)	• Near certainty • Possibility
Identification of targeted individuals with terrorist group	Relates to targeting decisions under IHL and IHRL principles	• Leaders plus suspected affiliates • Leaders plus closely identified operators • Leaders only
Target in relation to civilian casualties	Relates to targeting decisions under IHL and IHRL principles	• Near certainty of no civilian casualties • Flexibility, latitude

stronger protection for human rights and for the lives of potential targets. The *Hybrid Policy Approach* falls somewhere in between.

These policy approaches are designed to represent the range of choices available to the United States and other countries as they undertake targeted killing using drones. In place of policies for each of the individual international law elements, a country would be adopting a logically coherent overall approach, giving specificity to how the country would strike the balance between operational flexibility and restraint in its drone operations; the characteristics of the threat that would need to exist in order to conduct targeted killing; and the types of targets that would be attacked in terms of terrorist leaders, terrorist sympathizers, and noncombatants.⁵⁸

As these are illustrative, we are not matching any one of these policy approaches to Obama administration policies. Some

elements of the administration’s policies are in the Permissive Policy Approach and others in the Hybrid Policy Approach. Similarly, it is not possible to say that all critics of administration policies would only favor the Restrictive Policy Approach.

Earlier, we presented a series of cases of the use of U.S. drones to illustrate the considerations in defining whether armed conflict exists (Table 1) and in validating targets under IHL (Table 3). Using these same cases, we determined that the policy approaches would differ in terms of whether the drone strike would be permitted. All of these drone strikes would be permitted based on the interpretations of the international law elements under the Permissive Policy Approach. The Restrictive Policy Approach would not permit any of them, based on interpretations of the law elements: imminence of the threat and the characteristics of the target. The

Table 6: Policy Approaches for Use of Drones in Targeted Killing

International Law Elements	Permissive Policy Approach	Hybrid Policy Approach	Restrictive Policy Approach
Support of host government	Unilateral action	Gain private approval or host government unwilling or unable to act	Gain public approval
Declaration of self-defense and notification of Security Council	Act on own	Establish legal authority in advance	Establish legal authority in advance
Imminence of threat	Any opportunity	Any opportunity	Immediate, knowable
Characteristics of terrorist group: • How organized in geographic area • Link of local group with terrorist organization	Little aggregation and uncertain links	Little aggregation and uncertain links	Organized and close links
Intensity of violence	Sporadic	Sporadic	High
Threat of terrorist group to country's interests and persons	Possible links	Possible links	Direct
Presence of terrorist target	Possibility	Near certainty	Near certainty
Identification of targeted individuals with terrorist group	Leaders plus suspected affiliates	Leaders plus closely identified operators	Leaders only
Target in relation to civilian casualties	Flexibility, latitude	Near certainty of no civilian casualties	Near certainty of no civilian casualties

Hybrid Policy Approach would permit some, but not all cases. Interpretations of the law elements having to do with possible links of the target to the terrorist organizations and uncertainties as to the presence of the target would rule out some of the cases.

Our aim is not for policymakers to choose one of the illustrative policy approaches. Instead, policymakers would go through each of the international law elements and make a policy interpretation. From these an overall policy approach would emerge.

Because international law covers the use of lethal force, we appreciate that adopting a policy approach for targeted killings using drones could have implications for other types of military operations. If a restrictive approach were adopted, for example, it could be hard to argue for a more permissive policy approach for the use of other weapons in other types of military operations. In fact, this could be one reason why the Obama administration has been reluctant to give up its flexibility in interpreting international law or clarifying the ambiguities in its policies. This concern is not persuasive in our view, given the approach that would emerge from using our framework would involve policies for the use of drones in targeted killing. It would be possible to distinguish these from other policies and to provide a rationale for why they would be the same or different for other types of military operations.

The design of a policy approach would turn primarily on how one views the balance between ensuring operational military

flexibility and protecting civilians and human rights. But the choice will also be influenced by assessment of the value of drone operations and targeted killing in achieving overall counterterrorism goals. In other words, whether one is skeptical or convinced of the military effectiveness of drones and targeted killing could color one's views on whether to adopt more- or less-restrictive legal interpretations. An analysis of these broader issues is beyond the scope of this report, but we appreciate that such considerations will arise for policymakers in making these choices.

TRANSLATING INTERNATIONAL LAW INTO EXPORT POLICIES AND INTERNATIONAL NORMS

U.S. Export Control Policy for Drones

Until recently, the United States had been the only country using long-range drones for targeted killing, but this is changing as more countries are developing and seeking to acquire these systems.⁵⁹ Recognizing that the United States has an interest in how drones will be used by other countries, the Obama administration in 2015 announced that before authorizing sales or transfers of these systems, it would require that recipients agree to a set of "principles guiding proper use." These principles include:

- Recipients are to use these systems in accordance with international law, including international humanitarian law and international human rights law, as applicable;
- Armed and other advanced UAS [unmanned aerial systems, or drones] are to be used in operations involving the use of force only when there is a lawful basis for use of force under international law, such as national self-defense;
- Recipients are not to use military UAS to conduct unlawful surveillance or use unlawful force against their domestic populations; and
- As appropriate, recipients shall provide UAS operators technical and doctrinal training on the use of these systems to reduce the risk of unintended injury or damage.⁶⁰

For years, the United States has sought in its arms transfer policies to ensure that arms transfers do not contribute to human rights violations, and this criterion is clearly stated in the U.S. Conventional Arms Transfer policy.⁶¹ What is unique about this U.S. export policy on military drones is that it singles out a military system for restrictions and covers the different aspects of international law involved in drone operations.

The problem is that the language with respect to using the systems “in accordance with international law” and having a “lawful basis” is very general, and the United States has not clarified what it means by these principles or what its expectations are with respect to how countries should interpret them. Giving countries such flexibility will not necessarily prevent them from using drones in ways that undermine U.S. interests. Moreover, the ability of the United States to influence how countries will use these systems *ex post facto* is always limited, as demonstrated by Saudi Arabia’s use of U.S.-provided F-15s in Yemen. The United States could ask recipient countries to use U.S. policies as a guide in their use of drones, but these too are unclear, as we have already described.

The United States could take the opportunity to translate the export principles into specific policies as a way of encouraging the legitimate use of drones. Our analytical framework (international law elements and policy interpretations) offers a way to clarify and fill in the details of the U.S. export policy. Absent such a step, the U.S. drone export control principles remain only general goals with no specificity regarding what policies the United States wishes the recipients of drones to adopt or how the United States will evaluate their actual use.

International Norms: Case For and Against

Given that most countries will be developing their own drones rather than buying U.S. ones, the question arises as to whether the United States and the broader international community should seek to establish international norms for the use of drones in targeted killing. Again, by “international norms,” we mean a common set of policies that countries would agree on for interpreting international law for the use of drones. So far, the Obama administration has not shown any interest, letting international norms arise from the practices of countries.

The arguments against the establishment of international norms come from both supporters and critics of drone operations. Opponents argue that drones are inherently destabilizing and illegitimate, and establishing standards for their use—norms—would create an aura of legitimacy where none should exist. Proponents argue that drones are just like any other weapon, and attempts to develop norms will only tie the hands of the U.S. government, while doing nothing to constrain the operations of other countries.

Moving beyond these overall perspectives, the first set of arguments against international norms focuses on the norms themselves and the fact that international law already covers the use of military weapons, so the requirements for how drones are to be used purportedly already exist. Moreover, this position holds that it is not possible to differentiate drones from traditional aircraft for purposes of how they are used, nor will it be possible to define clearly the situations in which the use of drones would be permitted and not permitted. Only a few precedents exist for singling out weapons for establishing international norms—and in these cases, the systems are banned entirely. Formalizing international norms for the particular system of drones could be risky, as it could increase pressures to have drones included in the current efforts to ban autonomous systems or, alternatively, to establish international norms for other specific types of military systems. The existence of international norms on drones could also create incentives to use a different platform for targeted killing.

The second set of arguments against establishing international norms focuses on the lack of confidence that other countries will cooperate, especially those whose misuse the U.S. might worry about, such as Russia or China. The United States, in this view, lacks leverage to gain cooperation from these countries and therefore an incentive to champion a set of norms that might constrain U.S. drone operations without advancing its foreign policy interests elsewhere.

These arguments notwithstanding, the reluctance on the part of the Obama administration to take a leadership role in establishing international norms seems shortsighted. The use of drones can

be legitimate or illegitimate, and the U.S. has strong interests in ensuring its own ability to pursue legitimate uses against terrorists and counterinsurgents while preventing misuse by other countries. In the future, other countries and nonstate actors could employ drones in a secretive fashion, without clear legal foundations, against dissidents or in support of foreign counterinsurgencies. It is easy to imagine drones being employed in ways that exacerbate regional tensions, that undermine the laws of war (for example, assassinating foreign leaders), or that threaten a nation's sovereignty and domestic rule of law. Such future misuse could easily be to the detriment of U.S. foreign policy interests.

There is also the problem that U.S. use of drones since 2001 is establishing precedents that other nations might follow. The U.S. could find it beneficial to take the initiative to demonstrate that its own use of these systems is consistent with a broader set of international norms, as a model for the behavior of other states. Such an initiative could also help diffuse domestic and international criticism of how the United States has been using its drones against insurgents and terrorists. Refusing to consider international norms may also be an unsustainable long-term strategy, particularly given pressures to include drones in the Convention on Certain Conventional Weapons (CCW) and its consideration of constraints on lethal autonomous systems.

A Way to Define International Norms

To date, the debate over international norms has been at a high level of generality without a clear sense of what norms might actually encompass or how in practice they could be designed to balance the need for operational flexibility with respect for human rights.

One avenue in designing international norms would be simply to restate the language in the existing legal documents (that is, the Geneva Conventions of 1949) and have countries agree to apply these in their use of long-range armed drones. But such an approach would leave the same ambiguity in the language and governments would retain the flexibility they have today in interpreting the laws. Such a restatement could be combined with requirements for more transparency on the part of governments regarding their internal policies. But the result in terms of the actual use of drones would not be very different from what would happen without such agreement.

Another avenue would be to initiate discussions among countries that have acquired long-range armed drones with the goal of agreeing on international norms for their use that would be specific in their interpretation of the critical international law

elements. In such discussions, the same issues will arise in defining these restrictions that countries face in designing their own drone policies. *But the calculus will be different:* Would there be value in placing restrictions on one's own use of drones, in return for similar restrictions on their use by others? In answering this question, a country might make different choices as to its own policies to gain support for similar policies on the part of others.

Of course, similar logic can apply to state policy in regard to other aspects of counterterrorism operations, such as forcible rendition, the treatment of captive combatants, and torture as an intelligence-gathering device. Short-term security imperatives and operational flexibility may easily favor a more permissive approach to these issues, as illustrated by various facets of U.S. security policy during the early years of the post-2001 wars in Afghanistan and Iraq.⁶² On the other hand, critics of U.S. policy, including some former high officials within the Bush administration, argued that more-moderate policies on detainee rights, due process, and restrictions against torture were desirable. In part, their argument was that these policies set a standard that other countries would look to in the future, including in their subsequent dealings with U.S. troops and nationals as captive combatants.⁶³ Regardless of the merits of the argument, it reflects the fact that sovereign states sometimes navigate a tension between their own short-term and long-term interests in deciding what policy to adopt on counterterrorism issues.

The adoption of international norms on drones and targeted killing would likewise involve a similar balancing of interests—and of operational flexibility with protection for human rights—on the part of all countries involved. The three policy approaches that we presented in Table 6 offer a possible starting point for negotiating such a balance, as each approach involves different policy interpretations for each of the important international law elements. But instead of being viewed as the unilateral policy choices for an individual country (like the United States), they would instead become choices to be made collectively by those countries operating long-range armed drones.

Going back to Table 6, the Permissive Policy Approach would involve adopting a very permissive set of international norms in regard to drones and targeted killing operations. Under this approach, many of the elements of international law that pertain to sovereignty, IHL, and IHRL would be interpreted to give states operating latitude, in deciding when transnational terrorist threats justify a self-defense response, when an “armed conflict” exists, and what kind of targeting policy is appropriate when engaging a terrorist group and its affiliates. Sovereign self-defense determinations would be explicitly

recognized as primarily autonomous in nature; the “threat of an armed attack” by a terrorist group would be construed in a broad way (for example, based on intent and capability), rather than an immediate, narrow way (i.e., based on intelligence concerning a specific and immediate attack); securing a host government’s consent to an operation would be recognized as an unnecessary step given that a sovereign self-defense determination has already been made, and so on.

A more restrictive set of international norms that the international community could adopt would be that based on the Hybrid Policy Approach. Referring back to Table 6, this policy approach is intended to give states considerable flexibility in undertaking targeted killing operations, but with greater deference to human rights than under the Permissive Policy Approach. While the Hybrid Policy Approach involves a permissive interpretation of some international law elements, such as those regarding the nature and organization of a terrorist threat (so as to justify a self-defense response), and in construing an “armed conflict” in a geographically broad way, it would also involve a more restrictive interpretation of the international law elements, such as the need to seek consent from a host government to conduct operations, or the need to declare specific operations in advance to the UN as an assertion of “self-defense.” Likewise, the Hybrid Policy Approach would apply a more restrictive lens to choosing valid targets under IHL principles, and moreover would be more restrictive in applying the IHRL standard for targeting, at least in geographic areas outside of “armed conflict.”

Finally, still another alternative would be for the international community to adopt a set of international norms based on the Restrictive Policy Approach. Per Table 6, the Restrictive Policy Approach is intended to reflect a consistently restrictive reading of international law requirements with regard to targeted killing operations, in a manner that is strongly protective of human rights. Thus, a set of international norms based on this policy approach would require advance notification to the UN to establish a self-defense response; the default assumption of need for approval from a territorial host government as a precursor to drone operations; a very restrictive standard concerning the “imminence” of a terrorist threat that would justify a lethal, self-defense response; an equally restrictive interpretation of when the activities of a terrorist group can be construed as “armed conflict” for purposes of the application of IHL targeting principles; and so on.

Note that many of the interpretations in the Permissive Policy Approach would be viewed as highly problematic by

international law experts and by critics of current U.S. drone policy, as would many of the interpretations of the Restrictive Policy Approach by those involved in drone operations against ISIL and other al Qaeda affiliate groups.

In practice, negotiations would be needed in designing the international norms to translate the international law elements into specific restrictive or permissive language so that countries would know what they were agreeing to in terms of future drone operations.

If the aim in adopting international norms is to constrain the illegitimate use of drones by other countries, we sought to understand the types of drone operations that one might wish to restrain (by defining hypothetical cases) and what the implications would be of adopting the different policy approaches. Table 7 illustrates the key point involved in interpreting international law for each of the hypothetical cases.

What countries negotiating international norms would confront is the question of whether the uses of drones in these hypothetical cases warrant seeking restrictions through international norms in return for similar restrictions on their own drone operations. In other words, a country would adopt the same policy approach for their drone operations and for the design of international norms.

There are different ways that agreement on a set of international norms could be codified, ranging from a formal treaty to a more informal understanding. One possibility would be to negotiate a “rules of the road document” that would include specific commitments combined with requirements for transparency. Because countries are going to want to retain flexibility to use drones in extraordinary circumstances, such a reservation would need to be included.

In looking ahead to the future of international norms, U.S. policies will be critical. Absent the United States taking the lead, there is little reason to believe that other governments will have any interest. The logical first step would be to begin discussions among the United States, its allies, and those seeking to buy U.S. drones. Who might be willing to join an agreement on international norms is uncertain, but the United States has had success in the past in forging an international consensus on nuclear, missile, and conventional export controls. Russia and China are parties to the amendments and protocols of the CCW, thereby having committed to limitations on certain weapons systems.⁶⁴ So, it could be possible to build on their support for these conventions. And to the extent that other countries are willing to pursue international norms, Russia and China could wish not to be isolated.

Table 7: Will Policy Approach Restrict Drone Strike in the Hypothetical Case?

Hypothetical Cases of Drone Strikes	Permissive Policy Approach	Hybrid Policy Approach	Restrictive Policy Approach
After a resurgence of violence in Mali, France uses drone strikes against insurgents <i>Key point: Malian government unwilling to act</i>	No	No	Yes
China uses drones to strike Uighur separatists operating in Tajikistan <i>Key point: No evidence that targets are hostile combatants</i>	No	Yes	Yes
United Arab Emirates uses drones in strikes against Islamist militias in Libya on behalf of the government <i>Key point: No declaration or evidence of self-defense requirement</i>	No	Yes	Yes
Russia uses drones in Georgia to strike family members of Chechen rebels <i>Key point: Targeting civilians</i>	Yes	Yes	Yes
Israel uses drones in strikes against Hezbollah in Syria <i>Key point: Targets include leaders and closely identified operatives</i>	No	No	Yes
United Kingdom uses drones in strikes against Boko Haram militants and their supporters <i>Key point: Boko Haram responsible for attack in UK and vows more</i>	No	No	No
Uganda uses drones in strikes against Lord's Resistance Army militants in Central African Republic <i>Key point: Disproportionately high civilian casualties</i>	Yes	Yes	Yes
Saudi Arabia uses drones in strikes against Assad government leadership in Syria <i>Key point: No direct threat to Saudi government interests</i>	No	No	Yes

CONCLUSION

The lack of transparency and clarity in the U.S. government's policies for drones and targeted killing raises some problems. First, it prevents a serious and informed debate on the policies by those outside and undermines public support for the policies both in the United States and around the world. It provides U.S. allies with little incentive to define and clarify their policies as they begin to conduct their own drone strikes and will make it hard for the United States to criticize the policies of other countries (such as Russia and China), were they to use their drones in ways antithetical to U.S. interests.

The arguments for this lack of clarity are not persuasive. The evolution of the terrorist threat, including from ISIL, does not change the characteristics of warfare in such a way as to rule out applying international law. The ambiguity in international law does not preclude making clear interpretations and engaging more

openly with the wide array of stakeholders outside the U.S. government. A balance can be found to ensure operational flexibility as well as protection of human rights, even though there will be differences of view as to how that balance should be struck.

Policy choices need to be made on the critical international law elements notwithstanding the difficulties. We have designed an analytical framework that could be used to make these policy choices based on different views of how international law should be interpreted and harmonized to protect human rights while allowing for reasonable operational latitude in transnational conflicts with organized terrorist groups. It could be used by the current and next administrations to clarify their policies on drones and targeted killing and to structure a serious, open, and informed debate on these policies. The framework could also form the basis for the design of international norms starting with U.S. allies and partners and then with the global international community.

NOTES

¹ In this report, we use the term *drone* to mean long-range armed drone, while noting that the more technical terms are *long-range armed unmanned aerial system* (UAS) or *remotely piloted aircraft* (RPA). For a background discussion of the issues arising from the use of long-range armed drones, see Lynn E. Davis, Michael J. McNerney, James S. Chow, Thomas Hamilton, Sarah Harting, and Daniel Byman, *Armed and Dangerous? UAVs and U.S. Security*, Santa Monica, Calif.: RAND Corporation, RR-449-RC, 2014 (as of July 18, 2016: http://www.rand.org/pubs/research_reports/RR449.html).

² Many other debates have arisen over U.S. drone operations, including the effectiveness of targeted killing in counterterrorism operations, the rise in the number of civilian casualties, and the morality of drone strikes. These are not the subject of this report.

³ For a discussion of these issues, see Davis et al., 2014, pp. 17–22.

⁴ Advocates and critics of U.S. drone policies have sometimes reached very different conclusions when it comes to assessing the legality of U.S. armed drone strikes. For example, Harold Koh prominently argued that U.S. policy and drone strike operations were fully compliant with the requirements of international law, while Philip Alston essentially argued the opposite, at least in some respects. See Harold Koh, Legal Adviser, U.S. Department of State, speech before the annual meeting of the American Society of International Law, Washington, D.C., March 25, 2010 (as of July 8, 2016: <http://www.state.gov/s/l/releases/remarks/139119.htm>); Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, United Nations Human Rights Council*, May 28, 2010.

⁵ Somewhat different versions of “gating logic” for organizing this material are implicit in Alston (2010) and Jennifer K. Elsea, *Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities*, memorandum to congressional offices, Washington, D.C.: Congressional Research Service, 7-5700, May 4, 2012 (as of July 8, 2016: <https://www.fas.org/sgp/crs/natsec/target.pdf>).

⁶ For illustrative overview perspectives on the UN Charter and related aspects of international law bearing on armed drone operations, see Elsea, 2012; Daniel K. Bethlehem, “Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors,” *American Journal of International Law*, Vol. 106, 2012, pp 1–8 (as of July 8, 2016: <http://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>); Stanford Law School and N.Y.U. Law School, “Legal Analysis,” in Stanford Law School and N.Y.U. Law School, *Living Under Drones: Death, Injury and Trauma to Civilians from U.S. Drone Practices in Pakistan*, September 2012.

⁷ UN, *Charter of the United Nations and Statute of the International Court of Justice*, 1945.

⁸ UN, 1945.

⁹ See Alston, 2010, “Anticipatory and Pre-Emptive Self-Defense,” p. 15, paragraph 45.

¹⁰ See Bethlehem, 2012.

¹¹ Alston, 2010, p. 15, notably draws a sharp distinction between acts of “anticipatory self-defense” against real, imminent, and immediate terrorist threats and what he describes as a much looser policy of preemptive self-defense against nonimminent threats, with uncertainty about the time and place of an enemy’s hypothetical future attack. Alston describes the latter policy as being “deeply contested and lack[ing] in support under international law.”

¹² See UN General Assembly, G.A. Res 36/103, UN Doc A/RES/36/103, December 9, 1981; see also discussion in Stanford Law School and N.Y.U. Law School, 2012, p. 105.

¹³ For a discussion of exactly this situation in regard to U.S. drone operations in Yemen, see Charlie Savage, *Power Wars: Inside Obama’s Post 9/11 Presidency*, Boston, Mass.: Little Brown, 2015, p. 224. Meanwhile, note that another, non-self-defense legal basis for justifying extraterritorial military action in the absence of self defense involves a situation where a sovereign state is “unable or unwilling” to remove a threat of armed attack that originates from within its own territory. A cogent summary of the legal nuances surrounding “unable and unwilling” as a justification for military intervention in a range of different circumstances can be found in Elsea, 2012, p. 7.

¹⁴ Note that the U.S. government also uses the term “Law of Armed Conflict,” or LOAC, to refer to the same body of legal standards that we refer to here under the heading IHL.

¹⁵ For example, see pp. 15–18 of Alston, 2010, and p. 110 of Stanford Law School and N.Y.U. Law School, 2012, with additional reference to several provisions under the Geneva Conventions.

¹⁶ Stanford Law School and N.Y.U. Law School, 2012, p. 110.

¹⁷ Note that a similar ambiguity regarding the appropriate threshold for geographic aggregation of activities by a terrorist network can apply to the analysis of “armed conflict” under IHL, as it does to the analysis of an “armed attack” under the UN charter. Note also that the “armed conflict” standard is subject to other ambiguities as well, such as whether thwarted attacks ought to “count” for purposes of evaluating the scope, intensity, and geographic specificity of activities undertaken by a terrorist group.

¹⁸ Alston, 2010, pp. 16–18, offers a lengthy set of probative criteria under international law for evaluating whether hostilities between a sovereign state and a nonstate actor group can be construed as a “non-international armed conflict.” Elsea, 2012, pp. 2–4, offers a somewhat contrasting perspective on relevant international laws, in regard to whether hostilities with a nonstate actor group can ever be construed as “armed conflict” for purposes of invoking the laws of war.

¹⁹ For a discussion of historical cases, see Bryan Frederick and David E. Johnson, *The Continued Evolution of U.S. Law of Armed Conflict Implementation: Implications for the U.S. Military*, Santa Monica, Calif.: RAND Corporation, RR-1122-OSD, 2015 (as of July 8, 2016: http://www.rand.org/pubs/research_reports/RR1122.html).

²⁰ Again, a strike even against this kind of target might violate the proportionality rule if collateral harm to civilians outweighs the military advantage of killing the target.

²¹ Some critics have interpreted international law in such a way as to make “signature strike” targeting decisions difficult to validate, at least in regard to putative affiliates of a terrorist network like al Qaeda. See, for example, Alston, 2010, particularly with regard to what it means for civilians to “directly participate in hostilities” on pp. 19–20. Notwithstanding the guidance published by the International Committee of the Red Cross on this point, Alston acknowledges that “Because there is no commonly accepted definition of DPH, [the term] has been left open to States’ own interpretation.”

²² Alston, 2010, pp. 19–21.

²³ Alston, 2010, p. 10, paragraph 31; Elsea, 2012, p. 8.

²⁴ Alston, 2010, p. 11.

²⁵ Public Law 107-40, AUMF Against Terrorists, 2001. The law authorizes “That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

²⁶ Public Law 107-243, AUMF Against Iraq, 2002.

²⁷ For a discussion of the issues and views raised by targeted killing and U.S. domestic law, the AUMF and this covert action authority, see Lawfare Institute, *Legality of U.S. Government’s Targeted Killing Program Under Domestic Law*, Lawfare blog, undated (as of July 8, 2016: <https://www.lawfareblog.com/legality-us-governments-targeted-killing-program-under-domestic-law>).

²⁸ Savage, 2015, pp. 236–237.

²⁹ Jeh Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration,” speech at Yale Law School, February 22, 2012 (as of July 8, 2016: <https://www.lawfareblog.com/jeh-johnson-speech-yale-law-school>). See also Harold Koh, “How to End the Forever War,” *YaleGlobal Online*, May 7, 2013 (as of July 8, 2016: <http://yaleglobal.yale.edu/content/how-end-forever-war>).

³⁰ Johnson, 2012. According to Johnson, “an ‘associated force,’ as we interpret the phrase has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda and (2) is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners.”

³¹ Stephen Preston, “The Legal Framework for the United States’ Use of Military Force Since 9/11,” speech before the Annual Meeting of the American Society of International Law, Washington, D.C., April 10, 2015 (as of July 8, 2016: <http://www.defense.gov/News/Speeches/Speech-View/Article/606662>). According to Preston, there are no other associated groups and the decision to identify a new group as an associated force is not done lightly under the AUMF.

³² For a discussion of the arguments in favor and against different types of restrictions, see Christopher S. Chivvis and Andrew M. Liepman, *Authorities for Military Operations Against Terrorist Groups: The State of the Debate and Options for Congress*, Santa Monica, Calif.: RAND Corporation, RR-1145/1-OSD, 2015, pp. 16–22 (as of July 8, 2016: http://www.rand.org/pubs/research_reports/RR1145-1.html).

³³ For a discussion of the Obama administration’s legal arguments, see U.S. Department of Justice, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force,” White Paper, Draft, November 8, 2011 (as of July 8, 2016: <http://fas.org/irp/eprint/doj-lethal.pdf>). See also Elsea, 2012.

³⁴ White House, “Remarks by the President at the National Defense University,” Office of the Press Secretary, May 23, 2013 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>). See also U.S. Department of Justice, 2011.

³⁵ For a description of the internal U.S. government consideration of the legality of killing Anwar al-Awlaki, an American citizen in Yemen, see Savage, 2015, p. 224.

³⁶ Koh, 2010.

³⁷ Preston, 2015. See also Brian Egan, Legal Adviser, U.S. Department of State, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign,” April 1, 2016 (as of July 8, 2016: <https://www.documentcloud.org/documents/2782178-Egan-ASIL-Speech.html>).

³⁸ Preston, 2015.

³⁹ John Brennan, “Strengthening Our Security by Adhering to Our Values and Laws,” White House, September 16, 2011 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>).

⁴⁰ Brennan, 2011.

⁴¹ Attorney General Eric Holder, speech at Northwestern University School of Law, March 5, 2012 (as of July 8, 2016: <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>).

⁴² Egan, 2016.

⁴³ Egan, 2016.

⁴⁴ Brennan, 2011. According to Egan, 2016, “under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to *imminent* ones before they occur.”

⁴⁵ Egan, 2016, details the many factors used to determine whether an attack is imminent, including the immediacy of the threat and the probability of an attack.

⁴⁶ Egan, 2016.

⁴⁷ Savage, 2015, pp. 245–249.

⁴⁸ According to Holder, 2012, “these principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations and that the risk of civilian casualties can be minimized or avoided altogether.”

⁴⁹ White House, Office of the Press Secretary, “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” May 23, 2013 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>). White House, “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities,” May 22, 2013, ACLU website, released August 5, 2016 (as of August 8, 2016, https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf).

⁵⁰ The PPG also includes detailed procedures for how plans for the use of lethal action are designed and approved through the interagency process.

⁵¹ Egan, 2016.

⁵² In a follow-on Q&A, Egan stated that the tribal areas of Pakistan are part of the battlefield. See Charlie Savage, Power Wars blog, April 2, 2016 (as of July 8, 2016: <http://www.charliesavage.com/?p=954>).

⁵³ Egan, 2016. Asked why the United States was killing scores of people at a time in Somalia, Libya, and Yemen, President Obama said the U.S. actions are directed “for the most part” at high-value targets but strikes are taken where individuals identified with al Qaeda or ISIL are couriers, loading explosive materials, or engaging in small arms training. White House, Office of the Press Secretary, “Press Conference by President Obama,” April 1, 2016 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2016/04/01/press-conference-president-obama-412016>).

⁵⁴ White House, Office of the Press Secretary, “Executive Order: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,” July 1, 2016 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>).

⁵⁵ White House, “Fact Sheet: Executive Order on the U.S. Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force and the DNI Release of Aggregate Data on Strikes Outside Areas of Active Hostilities,” July 1, 2016 (as of July 8, 2016: <https://www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>).

⁵⁶ Koh, 2013. Modirzadeh views the PDD as a mixture of IHL and IHRL that “does not, ultimately, seem bound by international law.” Naz Modirzadeh, “Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance,” *Harvard National Security Journal*, Vol. 5, 2014 (as of July 11, 2016: <http://harvardnsj.org/wp-content/uploads/2014/01/Modirzadeh-Final.pdf>). Savage describes the Obama administration policies as “a lawyerly response—adding an additional layer of rules, standards, and procedures to the unsettling premise that the United States was still at war and would, of necessity, remain so with no end in sight.” Savage, 2015, p. 691.

⁵⁷ This analytical framework could be used to design policies regarding any weapon involved in targeted killing (for example, fighter aircraft, cruise missiles), or more generally for policies involving the use of lethal force.

⁵⁸ Note that there is an additional subtlety here, with regard to the way in which a country might design an overall policy approach. For example, in the case of the international law element, the presence of a terrorist target (Table 5), a country could adopt “possibility” as its interpretation of international law but conduct drone operations only when “near certainty” existed as a matter of policy. Given the significant ambiguities contained in international law, such an approach is possible, though potentially difficult to explain and implement.

⁵⁹ For the countries developing and operating different types of armed drones, see New America, “World of Drones: Military,” *International Security*, undated (as of March 3, 2016: <http://securitydata.newamerica.net/world-drones.html>).

⁶⁰ U.S. State Department, “U.S. Export Policy for Military Unmanned Aerial Systems,” Fact Sheet, February 17, 2015 (as of July 11, 2016: <http://www.state.gov/r/pa/prs/ps/2015/02/237541.htm>).

⁶¹ White House, “Presidential Policy Directive—United States Conventional Arms Transfer Policy,” January 15, 2014 (as of July 11, 2016: <https://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>). See also Gregory M. Kausner, “Conventional Arms Transfer Policy: Advancing American National Security Through Security Cooperation,” Remarks to IISS, Washington, D.C., April 23, 2014 (as of July 11, 2016: <http://www.state.gov/t/pm/rls/rm/2014/225118.htm>).

⁶² See, for example, accounts of U.S. policy toward prisoners in Guantanamo: John Gibeaut, “A Uniform Complaint,” *ABA Journal*, September 1, 2007 (as of July 11, 2016: http://www.abajournal.com/magazine/article/a_uniform_complaint); Jane Mayer, “The Hidden Power,” *The New Yorker*, July 3, 2006 (as of July 11, 2016: <http://www.newyorker.com/magazine/2006/07/03/the-hidden-power>).

⁶³ Gibeaut, 2007. See also Donald Guter (RADM, ret.), “Ending Torture Would Elevate U.S. Moral Standing,” *Houston Chronicle*, June 16, 2015 (as of July 11, 2016: <http://www.chron.com/opinion/outlook/article/Ending-torture-would-elevate-U-S-moral-standing-6328852.php>).

⁶⁴ The CCW’s purpose is to “ban or restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately.” See UN, “The Convention on Certain Conventional Weapons,” undated. (as of July 11, 2016: [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument)).

About This Report

This report is the second in a series of RAND reports on long-range armed drones. The first, *Armed and Dangerous? UAVs and U.S. Security*, sought to dispel a number of myths, including that drones are transforming global warfare, that global proliferation demands new arms control efforts and blanket restrictions on sales, and that it would be counterproductive to develop international norms for their use.

This report highlights a need for greater clarity, specificity, and consistency in U.S. international legal policies involving the use of long-range armed drones in targeted killing. To meet this need, researchers designed a framework for policymakers to use in defining policies that would serve to protect civilians and human rights while also allowing reasonable latitude in transnational conflicts with organized terrorist groups.

These two reports will be of interest to those involved in defining policies for the use of drones in targeted killing and to those outside the government looking for more clarity and specificity in the policies of the U.S. government.

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