
THE USE OF DRONES AND TARGETED KILLING IN COUNTERTERRORISM

By Michael W. Lewis and Vincent J. Vitkowsky*

Shortly after September 11, 2001, President George W. Bush, as Commander in Chief, authorized unmanned aerial vehicles (UAVs), or drones, to target and kill enemy leaders pursuant to Congress' Authorization for Use of Military Force (AUMF) against al Qaeda.¹ The President designated "Afghanistan and the airspace above" a combat zone,² but the United States also launched drone strikes against al Qaeda targets in other countries. The drone program received widespread attention in November 2002, when the C.I.A. launched a Predator drone strike in Yemen, killing the mastermind of the October 2000 attack on the U.S.S. Cole and six other men. Following the Yemen attack, the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions asserted that the attack in was "a clear case of extrajudicial killing."³ In response, the U.S. defended the drone strike as permissible under international law of armed conflict, broadly asserting that al Qaeda terrorists who continue to plot attacks may, in appropriate circumstances, be lawful subjects of armed attack without regard to their location.⁴

Since taking office, President Obama has expanded the previous Administration's use of drones to target al Qaeda and Taliban leaders. C.I.A. director Leon Panetta has called the Predator program "the only game in town" in terms of disrupting the al Qaeda leadership.⁵ Many have urged the Obama Administration to articulate legal justification for the continued use of drones to target and kill terrorists. The Administration addressed such concerns on March 25, 2010, when Harold Koh, State Department Legal Adviser, made a speech to the American Society of International Law (ASIL).⁶

In his speech, Mr. Koh defended targeted drone killings: "[I]t is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."⁷ Koh cites both domestic law, under the AUMF,⁸ and international law as proof that the U.S. is engaged in armed conflict with al Qaeda, the Taliban, and "associated forces."⁹ Targeted killings, a vital tool in this war, are justified because they are performed in accordance with the laws of war. The U.S., according to Koh, conducts targeted strikes consistent with the principles of "distinction" and "proportionality" to ensure that the targets are legitimate and collateral damage minimized.¹⁰

Koh lists four reasons why targeted drone killings are legal. First, enemy leaders are legitimate targets because they

are belligerent members of an enemy group in a war with the U.S.¹¹ Second, drones are appropriate instruments for such missions, so long as their use conforms to the laws of war.¹² Third, enemy targets selected through "robust" procedures require no legal process and are not "unlawful extrajudicial" killings.¹³ Finally, Koh argues that using drones to target "high level belligerent leaders" does not violate domestic law banning assassinations.¹⁴

The Administration's arguments raise four important questions about the Administration's targeted killings policy. Who may be targeted? Where may the targeting take place? Does the use of UAVs for targeted killings comport with International Humanitarian Law (IHL)?¹⁵ And finally, are targeted killings illegal assassinations under U.S. domestic law?

First, who may be targeted under IHL? In answering this question IHL divides people into two groups: combatants and civilians.¹⁶ Combatants are entitled to the "combatants' privilege," which immunizes them from prosecution for violating domestic law, such as destruction of property, assault, murder, etc., but it also subjects them to targeting at any time. A combatant may be legitimately killed at any time, regardless of his current dangerousness, because of his status as a combatant. The only time in which a combatant may not be targeted is when he is *hors de combat*.¹⁷ Those that are not combatants are civilians.

A civilian does not become a combatant merely by picking up a weapon. In order to qualify as a combatant an individual must belong to a group that has an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.¹⁸ Because al Qaeda and the Taliban do not meet these criteria, its members are not combatants and can never acquire the combatants' privilege. Therefore they are civilians that are immune from targeting unless they "directly participate in hostilities."¹⁹ What does it mean to "directly participate in hostilities" (DPH)? Are legitimate targets limited to those on the battlefield or in leadership roles, or can this group also include those who provide physical or logistical support?²⁰ In its interpretive guidance on international law, the International Committee for the Red Cross (ICRC) gives a narrow answer to this question by defining "direct participation in hostilities" as only occurring in close temporal and geographic proximity to a hostile act.²¹ In other words, civilians may not be targeted for DPH unless they are prosecuting an attack or in its immediate aftermath. However, the ICRC does allow the targeting of a subset of civilians that perform a "continuous combat function" for an "organized armed group."²² According to the ICRC, this group of targetable civilians includes leadership but would not include support personnel.²³ While the ICRC definition carries significant weight, it is not dispositive on the issue of what constitutes a continuous combat function. The United States has not formally announced its interpretation of what constitutes a continuous combat function, but an interpretation that includes recruiters and military trainers (functions performed by the uniformed

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force against al Qaeda and the Taliban,⁴⁴ but as a *Washington Post* editorial recently noted, the self-defense justification can legitimize attacks against threats to the U.S. long after these hostilities have ended.⁴⁵

Questions have also been raised about the legitimacy of the C.I.A.'s role in targeted killings. The C.I.A. insists the drone program is legal.⁴⁶ Nevertheless, the C.I.A. is a civilian agency, and, under IHL, its members are noncombatants.⁴⁷ As such, the applicable laws of war for the military do not apply. Professor Gary Solis argues that C.I.A. agents are fighting in an armed conflict in Afghanistan and Pakistan to the same degree as the U.S. military, yet they do so as "unlawful combatants" because they do not wear uniforms.⁴⁸ Citing the 1977 protocols to the 1949 Geneva Conventions,⁴⁹ Solis considers C.I.A. agents, even those sitting at desks in Langley, Virginia, to be lawful military targets and would essentially place them within the same legal framework as al Qaeda: civilians performing a continuous combat function.⁵⁰ The IHL solution to this problem would involve incorporating the C.I.A. into the armed forces for purposes of IHL compliance and accountability.⁵¹ An advantage of the self-defense justification is that questions of the C.I.A.'s status in an armed conflict is not raised.

However, relying solely on the self-defense justification has its potential downside. As with any strike actions taken in self-defense must still conform to the requirements of necessity and proportionality, but they also generally require a showing of imminent harm that is not required for actions taken during an armed conflict. The *Caroline* standard that has broadly defined the scope of self-defense in international law for over 150 years requires that the necessity for self-defense be "instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁵² Commentators have pointed out that recent state practice in the realm of preventative self-defense casts doubt on the continued viability of the *Caroline* standard when questions of international terrorist organizations or weapons of mass destruction are concerned.⁵³ Nevertheless, opponents of such strikes will challenge any self-defense claim, absent a showing of a specific and immediate harm that was threatened.

The revelation that the Obama Administration authorized the killing of radical Muslim cleric Anwar al-Aulaqi—a United States citizen—adds a new wrinkle to the targeted killings debate. Mr. Aulaqi, an operative of al Qaeda in the Arabian Peninsula, has been linked to Major Nidal Malik Hasan, who killed thirteen people at Fort Hood in November 2009, and to Umar Farouk Abdulmutallab, who, on Christmas Day 2009, attempted to detonate explosives on a Delta Airlines flight from Amsterdam to Detroit. It is "rare, if not unprecedented," for the U.S. government to approve an American for targeted killing, and, according to U.S. officials, Mr. Aulaqi's inclusion on the list of terrorists approved for capture or killing was approved by the National Security Council.⁵⁴ On August 31, 2010, the ACLU and the Center for Constitutional Rights filed suit on behalf of Aulaqi's father, seeking an injunction against strikes targeting Aulaqi. This suit contends that Aulaqi's due process rights are violated by the application of deadly force without first offering the opportunity of surrender, and it addresses both the law of war and the self-defense arguments.⁵⁵ With regard

to self-defense, the organizations claim that there must be a showing that Aulaqi presents a "concrete, specific and imminent threat to life" at the time he is targeted.⁵⁶ They assert that any such killing in Yemen would be "outside the context of armed conflict" because the United States "is not at war with Yemen, or within it."⁵⁷ Although Judge Bates dismissed the lawsuit on standing grounds in December,⁵⁸ the complex questions raised by this case concerning the separation of powers and the boundaries of the battlefield remain.

Debates over the legitimacy of U.S. actions will continue regardless of the Obama Administration's official position. Nevertheless, Koh's declaration that either the laws of war or self-defense are sufficient to justify the targeted drone killings certainly broadens the legal grounds on which these debates will take place. Koh's vision for targeted strikes involves a flexible, possibly widespread use anchored in international law principles.

Endnotes

1 S. J. Res. 23, 107th Cong. (2001) (enacted).

2 Exec. Order No. 13,239, 66 Fed. Reg. 64907 (Dec. 14, 2001).

3 Letter from Jeffrey De Laurentis, Chief of Section, Political and Specialized Agencies of the Permanent Mission of the United States of America, to the Secretariat of the Commission on Human Rights, United Nations Office at Geneva (E/CN.4/2003/3).

4 *Id.*

5 See Pam Benson, *U.S. Airstrikes in Pakistan Called "Very Effective,"* CNN.COM, May 18, 2009, available at <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

6 Harold Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

7 *Id.*

8 S. J. Res. 23, 107th Cong. (2001) (enacted) (authorizing the use force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons").

9 See Koh, *supra* note 6.

10 *Id.*

11 See *id.*

12 See *id.*

13 See *id.*

14 *Id.*

15 International Humanitarian Law is the term given to the body of law that governs armed conflicts. It is also referred to as the Law of Armed Conflict (LOAC) and encompasses the Geneva and Hague Conventions, the Additional Protocols to the Geneva Conventions, and the customary law that has developed around these treaties.

16 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter API], Art. 43 & 51. Article 43 discusses combatants, while Article 51 describes civilians and their immunity. Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law.

17 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 12; Convention (III) relative to the Treatment of Prisoners of War, Geneva,

12 August 1949, Art. 13 (This would include wounded that are unable to continue fighting and combatants that have surrendered.).

18 API Art. 43(1).

19 API Art. 51.

20 See, e.g., Chris Rogers, *Are Drone Strikes Legal? Koh Offers Assurances, Not Answers*, HUFFINGTON POST, Apr. 4, 2010, http://www.huffingtonpost.com/chris-rogers/are-drone-strikes-legal-k_b_524115.html.

21 See NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 43-64 (2009).

22 See *id.* at 32-34.

23 See *id.*

24 See Kenneth Anderson, *Predators Over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010 [hereinafter *Predators*], available at <http://www.weeklystandard.com/articles/predators-over-pakistan>.

25 See *id.*

26 See Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html?hpid=topnews>.

27 Mary Ellen O'Connell, *Respect the Battlefield*, CBSNEWS.COM, Apr. 9, 2010, available at <http://www.cbsnews.com/stories/2010/04/08/opinion/main6377556.shtml> (“[T]he vast majority of our attacks [in Pakistan] are not part of that battle, and they are unlawful.”).

28 While Prof. O'Connell cites a great deal of academic support for her position, academics alone are not capable of making customary international law. Such law must be supported by *opinio juris* or state practice comporting with that law out of a sense of legal obligation to do so. Colombia's strikes against the FARC in Ecuador, Turkey's strikes against the PKK in northern Iraq, and the American incursion into Cambodia in the 1970s (just to name a few) are all counter-examples to any claim that state practice supports such boundary-driven limitations.

29 See, e.g., *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform* [hereinafter *Drones II*], 111th Cong. (2010) (statement of David W. Glazier), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/20100428Glazier.pdf>.

30 See *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 111th Cong. (2010) (statement of Kenneth Anderson) [hereinafter *Drones*], available at <http://ssrn.com/abstract=1579411> (elaborating on the self-defense justification for strikes discussed later); see also *Drones II* (statement of Michael W. Lewis), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/LewisDrones.doc> (describing the law of armed conflict justification for strikes outside Afghanistan and Iraq).

31 See Pamela Hess, *AP Sources: Tenet Canceled Secret CIA Hit Teams*, ABC NEWS, July 15, 2009.

32 See Koh, *supra* note 6.

33 See *supra* notes 30 and 31. All testimony at the H.R. Subcommittee Hearings agreed on this point.

34 See *U.S. Use of Drones Queried by U.N.*, N.Y. TIMES, Oct. 28, 2009, at A17, available at <http://www.nytimes.com/2009/10/28/world/28nations.html>. Philip Alston, Special Rapporteur on Extrajudicial Executions, pursued an inquiry into the U.S. drone program over concerns that it “is killing significant numbers of people and there is absolute no accountability in terms of international law.” *Id.*

35 See, e.g., Exec. Order 11,905, 41 Fed. Reg. 1041 (Jan. 6, 1976); Exec. Order 12,036, 43 Fed. Reg. 3674 (Jan. 24, 1978); Exec. Order 12,333, 46 Fed. Reg. 12333 (Dec. 4, 1981) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”).

36 Colonel W. Hayes Parks, Memorandum on Executive Order 12333 and Assassination, Nov. 2, 1989, available at <http://www.hks.harvard.edu/cchrp/>

Use%20of%20Force/October%202002/Parks_final.pdf.

37 *Id.*

38 Kenneth Anderson, *Assassination and the Koh Speech*, OPINIO JURIS, Mar. 28, 2010, <http://opiniojuris.org/2010/03/28/assassination-and-the-koh-speech/>.

39 Koh, *supra* note 6.

40 See *Predators*, *supra* note 24.

41 The *jus ad bellum* is the law of war which governs when states may use force and is currently embodied by the UN Charter. The *jus in bello* (Geneva law) describes how force may be lawfully employed during an armed conflict.

42 See *Predators*, *supra* note 24.

43 *Id.*

44 S. J. Res. 23, 107th Cong. (2001) (enacted).

45 Editorial, *Defending Drones: The Laws of War and the Right to Self-Defense*, WASH. POST, Apr. 13, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/12/AR2010041204086.html>.

46 See Keith Johnson, *U.S. Defends Legality of Killings with Drones*, WALL ST. J., Apr. 6, 2010, available at <http://online.wsj.com/article/SB10001424052702303450704575159864237752180.html?KEYWORDS=keith+johnson+us+defends+legality+killings+drones> (quoting the CIA's spokeswoman Marie Harf, who declared the CIA's counterterrorism operations “lawful and precise”).

47 *Id.*

48 Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

49 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

50 Solis, *supra* note 48.

51 See API Art. 43(3) (allowing members of paramilitary or armed law enforcement organizations to obtain combatant status by incorporating themselves into the armed forces for the purposes of IHL compliance and accountability). It should be noted that the CIA has been receiving advice on compliance with the law of armed conflict from military JAG lawyers since shortly after 9/11, although the extent to which this advice could be considered legal oversight is less clear.

52 MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY 545 (3d ed. 2006) (In a dispute over a British raid into the United States that destroyed an American vessel, the steamboat *Caroline*, that had been aiding Canadian insurgents, Secretary of State Daniel Webster and British Minister Lord Ashburton agreed that actions taken in self-defense had to display these characteristics. This agreement has long been the standard for defining the requirements for legitimate self-defense.)

53 See generally Vincent J. Vitkovsky, *Remarks on Customary International Law and the Use of Force Against Terrorists and Rogue State Collaborators*, 13 ILSA J. OF INT'L & COMP. LAW 371 (2007).

54 Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, at A12, available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>. But see *Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding the jurisdiction of a military tribunal over an American saboteur that allowed the American to be executed).

55 See Complaint for Declaratory and Injunctive Relief, *Al-Aulaqi v. Obama*, 1:10-cv-01469 (D.D.C. Aug. 31, 2010), available at <http://www.aclu.org/national-security/al-aulaqi-v-obama-complaint>.

56 *Id.* at 8-11.

57 *Id.* at 2.

58 See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (2010).