Targeted Killing Court: Why the United States Needs to Adopt International Legal Standards for Targeted Killings and How to Do So in a Domestic Court

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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Bruce W. Bean
Spring, 2011
**TARGETED KILLING COURT: WHY THE UNITED STATES NEEDS TO ADOPT INTERNATIONAL LEGAL STANDARDS FOR TARGETED KILLINGS AND HOW TO DO SO IN A DOMESTIC COURT**

**BY MICHAEL EPSTEIN**

**ABSTRACT**

In light of the fact that the Obama Administration appears committed to continuing and expanding the use of drones and targeted killing as a primary counter-terrorism method, addressing both domestic and international concerns about the legality of our drone use is no simple task. Much has been written on the topic, and various definitions and interpretations of international law have been proposed; in order to address all of these concerns simultaneously while balancing the obvious reality that drone strikes will not stop anytime soon, I propose that a domestic judicial mechanism is required. Part I of this paper demonstrates the continuing development and use of drone technology, and the international criticism and debate it has sparked. Part II of this paper examines the history of targeted killings and drone strikes. Part III of this paper examines the past and current U.S. policy regarding targeted killings and drone strikes, including justifications under domestic and international law. Part IV analyzes international legal standards, and attempts to grasp “what law applies” in the gray area of counter-terrorism targeted killings. Part V compares Israel’s history and policy of targeted killings and drone use, and analyzes the first prominent judicial opinion regarding the use of targeted killings as a counter-terrorism tool. Part VI proposes a domestic U.S. Court designed to deal with the international and domestic concerns about the questionable legality of targeted killings.

The proposed court is intended to address the basic problem confronting the continued use of drones: how do we protect our citizens and ensure our national security under international law against threats posed by non-state actors who follow no laws or rules, while simultaneously retaining our credibility abroad and at home?
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TARGETED KILLING COURT: WHY THE UNITED STATES NEEDS TO ADOPT INTERNATIONAL LEGAL STANDARDS FOR TARGETED KILLINGS AND HOW TO DO SO IN A DOMESTIC COURT

BY MICHAEL EPSTEIN

I. INTRODUCTION – TARGETED KILLING AND INTERNATIONAL CONTROVERSY

Targeted killing, or action by a nation-state specifically intended to eliminate a specific individual who has been identified as a threat, has emerged as a central part of the United States’ strategy for counter-terrorism abroad. The U.S.’s policy of targeted killing is being carried out “increasingly often by means of high technology, remote-controlled Predator drone aircraft wielding missiles.” The U.S. has found that “targeted killing [is] an inevitable means of frustrating the activities of terrorists who are directly involved in plotting and instigating attacks from outside their territory.” Some have argued that these killings are arbitrary, illegal extrajudicial killings in violation of international law. Others have argued that, despite the civilian casualties and collateral damage frequently involved in such attacks, these strikes are necessary and justified in the U.S.’s ongoing “war on terror.”

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2 Anderson, supra note 1, at 2.
3 Gabriella Blum & Philip Heymann, 1 HARV. NAT'L SEC. J. 145, 147 (2010).
5 Anderson, supra note 1, at 2. Anderson argues that drone strikes are “often the most expedient – and, despite civilian casualties that do occur, most discriminatingly humanitarian-manner to neutralize a terrorist without unduly jeopardizing either civilians or American forces.” Id. See also 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; Jordan J. Paust, Self-Defense Targetings of Non-State
As of 2009, the U.S. military employed two different types of unmanned aerial vehicles (UAVs), or drones: the MQ-1, or Predator, and the MQ-9, or Reaper. The U.S. is not alone in utilizing drones for military and combat operations; many states, such as Israel, Russia, Turkey, China, India, Iran, the United Kingdom, France, and Pakistan either have or are seeking to acquire drones. Some non-state actors, such as Hezbollah, and Hamas, have also been reported to have acquired and used armed drones. The Predator system is not simply the drone craft; it consists of up to four aircraft, a ground crew and is linked to a satellite monitored by an operations team. The crafts themselves are approximately 27 feet long, and can fly at speeds of up to 135 miles per hour. These drones are capable of staying airborne for up to 24 hours, at altitudes upwards of 60,000 feet. Drone technology is evolving at a steady rate, and new models reportedly have the capability to fire laser-guided missiles that weigh from 35 to 100 pounds. The current Predator targeting system “integrates an infrared sensor, a color/monochrome daylight TV camera, an image-intensified TV camera, a laser designator and a laser illuminator.”

Drones became quickly favored due to their relatively cheap cost compared to costs associated with deploying pilots in jets for reconnaissance during military operations; they are

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7 Alston Report, supra note 4, at para. 27.  
8 Id.  
10 U.S. Air Force Fact Sheet, supra note 6.  
11 O’Connell, supra note 4, at 4.  
12 Id. at 27.  
also favored because of the decreased risk to the lives of military pilots.\textsuperscript{14} While manned fighter jets can cost over $120 million, a Predator drone only costs a relatively paltry $4.5 million.\textsuperscript{15} The U.S. has reportedly carried out over 120 drone strikes since late 2001\textsuperscript{16}. Drone technology has become a large part of U.S. military spending, despite its relative in-expense; contracts for drone technology in 2010 ranged from $69 million to $250 million alone. Analysts have predicted that U.S. drone expenditures will grow to approximately $40 billion annually.\textsuperscript{17}

The fact that these strikes can be carried out a safe distance from the battlefield, combined with the removal of risk of injury to the pilots, has contributed to their increased use. Removal of the human pilot has also allowed the U.S. to gather information for hours on end; drones used in Afghanistan and Iraq reportedly record thousands of hours of surveillance per month,\textsuperscript{18} and have the capability to stream live video into multiple imagine sensors.\textsuperscript{19} The difficult desert and mountain terrains of Afghanistan, Iraq and other Middle Eastern nations were drones are frequently used also necessitates drone use, especially when surveying or targeting areas where human troops would have difficultly accessing them otherwise.\textsuperscript{20}

These drone strikes have reached a level of sophistication\textsuperscript{21} where the strikes can be carried out against target in Yemen by pilots located within the continental U.S.; the U.S.

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\textsuperscript{14} O’Connell \textit{supra} note 4, at 4.
\textsuperscript{15} U.S. Air Force Fact Sheet, \textit{supra} note 6 (“Unit Cost: $20 million (fiscal 2009 dollars) (includes four aircraft, a ground control station and a Predator Primary Satellite Link.”).
\textsuperscript{16} Alston Report, \textit{supra} note 4, at 19.
\textsuperscript{18} O’Connell at 5.
\textsuperscript{19} U.S. Air Force Fact Sheet, \textit{supra} note 6.
\textsuperscript{20} O’Connell at 5.
military carries out such strikes from bases in Nevada and Florida\textsuperscript{22}, while the C.I.A. is alleged to carry out many drone strikes from its headquarters in Langley, Virginia.\textsuperscript{23} Allegedly the U.S. has secret airfields in Pakistan which operate for the sole purpose of carrying out drone missions, with drones ready to be deployed at a moment’s notice.\textsuperscript{24} These airfields need not be very large, as Predator drones only require a takeoff-runway of 5,000 by 75 feet.\textsuperscript{25}

The ease with which these attacks can be carried out seemingly comes along with lax rules and regulations for how they can be carried out; reportedly the C.I.A. is not required to even identify their target by name, and can target individuals simply based on surveillance and intelligence-based patterns of behavior.\textsuperscript{26} In part because the C.I.A. is not bound by the Uniform Code of Military Justice, it has been asserted that they simply ignore international standards of the laws of war.\textsuperscript{27} One former C.I.A. agent described the process of selecting targets for “neutralization” as “‘[t]here were individuals we were searching for, and we thought, its better now to neutralize that threat. . . .’”\textsuperscript{28} The U.S. military has standards requiring human confirmation and additional evidence that an individual targeted in Afghanistan is indeed a pre-identified Taliban target, possible constraints of international law, and potential collateral

\begin{itemize}
\item \textsuperscript{22} U.S. Air Force Fact Sheet. Active duty Predator squadrons are based at Creech Air Force Base, Nevada; other bases operating Predator systems are located in Texas, North Dakota, California and Arizona. U.S. Military personnel “pilot” drones from a base in Nevada, while intelligence is directed real-time to Central Command (CENTCOM) in Florida. \textit{See also} O’Connell at 5-6.
\item \textsuperscript{23} Alston Report, \textit{supra} note 4, at 19.
\item \textsuperscript{25} U.S. Air Force Fact Sheet.
\item \textsuperscript{26} Alston Report, \textit{supra} note 4, at 20. However, the C.I.A. review process does involve in-house counsel review of the intelligence and the consent of the director. \textit{See} Kaplan, \textit{supra} note 1.
\item \textsuperscript{27} O’Connell, \textit{supra} note 4, at 7. O’Connell argues that because the C.I.A. only operates off of a list of targets, they judge their success solely upon the number of targets killed.
\end{itemize}
damage;\textsuperscript{29} but apparently there are no specific restrictions about whether the target needs to be captured or killed, nor any specific proscriptions for the appropriate level of force to be used.\textsuperscript{30}

The sophistication of the drone piloting technology only adds to concerns about frequent drone strikes. While the drones surveillance technology simply provides information to the “pilots” and military commanders, the drones have the advanced ability to alert a pilot whether or not a target is holding a weapon and whether the weapon has been recently fired or not.\textsuperscript{31} Over-reliance on such information has led to criticism that “while the computer is not technically ‘autonomous’ in deciding to strike, that is becoming the reality.”\textsuperscript{32} In situations like the U.S. operations in Western Pakistan, where there are few or no credible\textsuperscript{33} human sources of intelligence on the ground, incorrect information may have led to innocent civilian deaths. On President Obama’s third day in office, he ordered C.I.A. drone strikes against al-Qaida targets in Pakistan.\textsuperscript{34} While one strike killed four likely members of al-Qaida, a second drone strike targeted the wrong home, killing a pro-government tribal leader and his entire family.\textsuperscript{35} In 2009 alone, it was believed that 41 sanctioned drone strikes were responsible for the deaths of between three hundred and twenty six and five hundred and thirty eight people in Pakistan alone.\textsuperscript{36}

In the eyes of the international community, these drone strikes have led to serious concerns about the international legality of the strikes. Professor Philip Alston, the Special Rapporteur to the U.N. Human Rights Council, published a report on May 28, 2010, which

\textsuperscript{29} Kaplan, supra note 1.
\textsuperscript{30} Alston Report, supra note 4, at 21.
\textsuperscript{31} O’Connell, supra note 4, at 6.
\textsuperscript{32} Id. (citing Peter W. Singer, Wired for War: The Robotics Revolution and Conflict in the 21st Century (1989)).
\textsuperscript{33} The local informants in Afghanistan, used to confirm the identity of strike targets, have proven unreliable. O’Connell, supra note 4, at 7.
\textsuperscript{34} O’Connell at 7.
\textsuperscript{35} Id.
\textsuperscript{36} Mayer, supra note 24.
directly addressed the U.S.’s use of drones in Afghanistan and Pakistan.\textsuperscript{37} Alston concluded that although the struggle against terrorism and the U.S. response is a legitimate aim, the increased use of drones has impermissibly spread from armed combat to law enforcement of criminals, leading to “the displacement of clear legal standards with a vaguely defined license to kill, and the creation of a major accountability vacuum.”\textsuperscript{38} There has also been a large outcry within the U.S. decrying the legality and propriety of targeted drone strikes.\textsuperscript{39} There have been concerns about the increased combat role taken on by the C.I.A.; the increased dependence upon technology at the alleged expense of facts-on-the-ground human intelligence\textsuperscript{40}; and even due process claims.\textsuperscript{41}

In light of the fact that the Obama Administration appears committed to continuing and expanding the use of drones and targeted killing as a primary counter-terrorism method, addressing both domestic and international concerns about the legality of our drone use is no simple task. Much has been written on the topic, and various definitions and interpretations of international law have been proposed; in order to address all of these concerns simultaneously while balancing the obvious reality that drone strikes will not stop anytime soon, I propose that a domestic judicial mechanism is required. Part I of this paper demonstrated the continuing development and use of drone technology, and the international criticism and debate it has sparked. Part II of this paper examines the history of targeted killings and drone strikes. Part III

\textsuperscript{37} Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alson, Human Rights Council, 14\textsuperscript{th} Sess., U.N. GAOR, A/HRC/14/24/Add.6 (May 28, 2010).

\textsuperscript{38} Alston Report, \textit{supra} note 4, at para. 3.

\textsuperscript{39} Concerning the legality of drone strikes, see Mayer, \textit{supra} note 24; Mckelvey, \textit{supra} note 28; Scott Shane, \textit{C.I.A. to Expand Use of Drones in Pakistan}, NY Times, Dec. 4, 2009, \textit{available at} http://www.nytimes.com/2009/12/04/world/asia/04drones.html (noting that Amnesty International members have said that “[a]nything that dehumanizes the process makes it easier to pull the trigger.”).

\textsuperscript{40} See P.W. Singer, \textit{Robots at War}, \textit{Wilson Quarterly} (Winter 2009), 47.

\textsuperscript{41} The ACLU recently brought a case in the D.C. Circuit on behalf of Anwar al-Aulaqi’s father, Nasser al-Aulaqi, alleging that the Obama Administration’s planned “arbitrary killing” of his son was a due process violation. \textit{See} Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010); \textit{see also} Michael Epstein, \textit{The Curious Case of Anwar al-Aulaqi}, 19 MICH. ST. J. INT’L L. (forthcoming May 2011).
of this paper examines the past and current U.S. policy regarding targeted killings and drone strikes, including justifications under domestic and international law. Part IV analyzes international legal standards, and attempts to grasp “what law applies” in the gray area of counter-terrorism targeted killings. Part V compares Israel’s history and policy of targeted killings and drone use, and analyzes the first prominent judicial opinion regarding the use of targeted killings as a counter-terrorism tool. Part VI proposes a domestic U.S. Court designed to deal with the international and domestic concerns about the questionable legality of targeted killings.

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II. U.S. TARGETED KILLINGS – RECENT HISTORY

A. Pre-War on Terror

Targeted killings using drones did not begin in earnest until the 9/11 attacks. Although drones were invented around the time of World War II and put to use for limited reconnaissance during the Vietnam War, their use by the United States military for reconnaissance became regular practice during the 1991 Gulf War and continued during the 1990s conflicts in the Balkans. However, the C.I.A. carried out a variety of political assassinations in the 1960s and 1970s which are the precursor to today’s policy of targeted killings. A U.S. Senate committee chaired by Senator Frank Church uncovered several C.I.A. attempts to assassinate Fidel Castro

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42 O’Connell, supra note 4, at 3.
of Cuba, Ngo Dinh Diem of South Vietnam and General Rene Schneider of Chile.\textsuperscript{43} In response to the political outrage over the assassination attempts, President Ford issued an Executive Order which barred political assassinations.\textsuperscript{44}

Targeted killings in the 1980s and 1990s were often characterized as air raids or operations intended to disrupt “enemy operational capacity;”\textsuperscript{45} this was done to avoid the violation of President Ford’s Executive Order and not appear to be direct political assassinations.\textsuperscript{46} These attacks used a variety of methods, such as air force bombings, naval gunfire, and cruise missile strikes against targets such as Lebanon in 1984, Somalia in 1993, and Iraq in 1993 and 2003.\textsuperscript{47} However, some attacks were blatantly attempted targeted killings of specific individuals; this was prominently demonstrated when President Ronald Reagan ordered the bombing of Muammar el-Qaddafi’s villa in Libya in retaliation for a Libya-sponsored strike against U.S. troops in Berlin.\textsuperscript{48} In 1989, Special Assistant Judge Advocate General of the Army, W. Hays Parks, advised President George H.W. Bush’s administration that there was a distinctive difference between the targeted killings of individuals or groups who may pose a specific threat to the U.S. and assassinations carried out for primarily political reasons.\textsuperscript{49} Notably, Parks noted that individuals posing such a threat need not be targeted only during wartime, and could be targeted during peacetime if they posed a direct threat to U.S. citizens or national security.\textsuperscript{50}

\textsuperscript{43}Blum & Heymann, supra note 3, at 149.
\textsuperscript{44}Id. The Executive Order was eventually signed by President Reagan in 1981. See Exec. Order. 12333 (1981).
\textsuperscript{45}Kaplan, supra note 1.
\textsuperscript{46}Id.; Exec. Order No. 12,333, 46 C.F.R. 59941 (1981).
\textsuperscript{47}Kaplan, supra note 1.
\textsuperscript{48}Id. Although Qaddafi survived the attack, his infant daughter was killed.
\textsuperscript{49}Blum & Heymann, supra note 3, at 155 (citing Memorandum from W. Hays Parks, Special Assistant to the Judge Advocate Gen. of the Army for Law of War Matters, to The Judge Advocate Gen. of the Army, Executive Order 12333 and Assassination (Dec. 4, 1989)).
\textsuperscript{50}Id.
The Clinton Administration initiated targeted missile strikes against targets abroad as early as 1998, when al-Qaeda was revealed to have been behind attacks against U.S. embassies in Sudan and Tanzania.\(^{51}\) President Clinton, relying upon confidential legal opinions determining that such actions would not violate Executive Order 12333 as “political assassinations,”\(^{52}\) authorized strikes against al-Qaeda camps in Afghanistan and against a factory in Sudan.\(^{53}\) One such attempt to kill Osama Bin Laden involved striking an alleged meeting-site with seventy-five Tomahawk cruise missiles.\(^{54}\)

**B. Policy Established Post- 9/11**

Following the attacks of September 11, 2001, as the U.S. began its global “war on terror,” drone use for targeted killings dramatically increased. Secretary of Defense Rumsfeld formed Special Operations teams to prepare “hunter-killer” teams for the purposes of killing terrorists; this authorization from President Bush allegedly also authorized the potential killing of U.S. citizens if they were found to be involved in planning or carrying out terrorist acts.\(^{55}\) U.S. counter-terrorism operations using drones have since occurred in a variety of settings, both during formal armed conflict by the U.S. Military in Afghanistan and Iraq, as well as other nation-states and territories such as Yemen, Pakistan and Somalia.

1. U.S. Military Use in Afghanistan and Iraq Wars

\(^{51}\) Kaplan, *supra* note 1.  
\(^{52}\) Blum & Heymann, *supra* note 3, at 150.  
\(^{53}\) Kaplan, *supra* note 1. The strike against the factory in Sudan spurred a decade-plus worth of litigation when it was revealed that the factory and its owners had no connection whatsoever to al-Qaeda or Bin Laden. See El Shifa Pharmaceutical v. United States (D.C. Cir. June 8, 2010) (en banc affirmation of dismissal of complaint).  
\(^{54}\) Blum & Heymann, *supra* note 3, at 150.  
Drones were first used in Afghanistan for reconnaissance in attempts to find Osama Bin Laden in October, 2001.\footnote{O’Connell, supra note 4, at 3.} Armed combat drones were used as early as November, 2001, when the U.S. military launched a strike against al-Qaida in the Afghan city of Jalalabad.\footnote{Id.} However, the U.S. military was hesitant to approve targeted killings with Predator drones when the strikes were to be carried out by C.I.A. operatives instead of military personnel; at least one strike against a Taliban leader, Mullah Mohammed Omar, in October, 2001 was aborted when Commander Tommy Franks refused to approve the strike.\footnote{Kaplan, supra note 1. Franks said “[m]y JAG... doesn’t like this, so we’re not going to fire.”} At that time, the C.I.A. did not have independent authority to carry out drone strikes without prior military approval.\footnote{Id.}

The U.S. military also used combat drones for both reconnaissance and attacks during its initial invasion of Iraq in March of 2003.\footnote{O’Connell, supra note 4, at 3.} Saddam Hussein was the target of a U.S. military missile strike in April, 2003.\footnote{Kaplan, supra note 1.} U.S. intelligence sources believed that Hussein and his sons were at a Baghdad restaurant, and blasted the entire area with missiles. Neither Hussein nor his sons were present, and fourteen civilians were killed in the strike.\footnote{Id.}

In 2009, it was confirmed that the U.S. military has a roster of approved terrorist targets called the Joint Integrated Prioritized Target List; the list includes upwards of three hundred names of al-Qaeda terrorists and Taliban drug lords suspected to be in Afghanistan.\footnote{50 Drug Barons on U.S. Target List in Afghanistan, USA TODAY, August 10, 2009, http://www.usatoday.com/news/world/2009-08-10-afghanistan-taliban_N.htm.} The use of drones appears to be expanding beyond simple combat use; in Afghanistan, drones were used to...
track illegal poppy production within Afghanistan’s agricultural areas.\textsuperscript{64} Areas with designated drone patrols are now constantly monitored by rotating drone patrols of two or more Predators or Reapers.\textsuperscript{65} As the U.S. begins to draw down troops in Iraq and Afghanistan, it appears it will increase the use of drones to maintain both a military and intelligence presence.\textsuperscript{66} Reportedly, by the end of 2011, the U.S. Air Force will carry out over 50 independent drone combat patrols to conduct attacks and gather intelligence in Iraq and Afghanistan.\textsuperscript{67}

2. Somalia

In late 2006, the U.S. used combat drones in Somalia to aid the Ethiopian attempt to invade and install a new government.\textsuperscript{68} The U.S. continued to carry out drone strikes against targets in Somalia even after Ethiopia had ceased combat operations and removed its forces from the country.\textsuperscript{69} The Pentagon reportedly provided drones and other intelligence in preparation for strikes on al-Qaeda targets by the Somali government.\textsuperscript{70} The potential use of drones to carry out targeted killings of Somali insurgency leaders to help the newly installed Somali government was heavily critiqued by the press due to the potentially large civilian casualties such strikes could cause.\textsuperscript{71} The U.S. also used drones to help combat Somali pirates in 2009.\textsuperscript{72}

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\textsuperscript{65} Id.
\textsuperscript{66} Iraq Withdrawal to Hike Drone Runs, supra note 17.
\textsuperscript{67} Lubold, supra note 64.
\textsuperscript{68} O’Connell at 3.
\textsuperscript{69} O’Connell supra note 4, at 4.
\textsuperscript{71} Dool, supra note 70.
\end{flushleft}
military confirmed that drones were patrolling the Indian Sea for pirate activity in October, 2009.\textsuperscript{73}

3. Pakistan

The U.S. first carried out drone strikes in Pakistan against Taliban fighters who had fled there in 2004.\textsuperscript{74} As the attacks were ramped up between 2006 and 2009, about 20 terrorists or militants were reportedly killed, along with an estimated 750 to 1000 other persons, including possibly innocent bystanders and children.\textsuperscript{75} A January 13, 2006 strike targeting Ayman al-Zawahiri, at the time al-Qaeda’s second in command, against the village of Damadola killed eighteen civilians (al-Zawahiri was not actually present in the village.)\textsuperscript{76} The failure of the attack and the high civilian casualties were highly criticized by then-President Prevez Musharraf.\textsuperscript{77} One 2009 strike reportedly killed 60 people at a funeral.\textsuperscript{78}

In August of 2009, the U.S. carried out a drone strike against the Taliban leader Baitullah Mehsud.\textsuperscript{79} Mehsud, who was then the leader of the Taliban in all of Pakistan, was hiding at his father-in-law’s house. Mehsud had been wanted for some time in Pakistan, and was wanted for, among other crimes and terrorist attacks, the assassination for former Pakistani-Prime Minister Benazir Bhutto.\textsuperscript{80} C.I.A. officials were able to watch Mehsud for some time to confirm his presence at the house; drone surveillance video was able to gather enough detail to conclude he

\begin{footnotes}
\footnotetext[73]{Baldor & Jelinek, \textit{supra} note 70.}
\footnotetext[74]{O’Connell \textit{supra} note 4, at 4. The 2004 attack killed Nek Muhammad Wazir, near Wana, Pakistan. \textit{See also} N.Y.Times. 6/19/2004 article, The Reach of War: Militants ex fighter for Taliban dies in strike in Pakistan.}
\footnotetext[75]{Mayer, \textit{supra} note 24.}
\footnotetext[76]{Kaplan, \textit{supra} note 1.}
\footnotetext[77]{Blum & Heymann, \textit{supra} note 3, at 150.}
\footnotetext[79]{Mayer, \textit{supra} note 24.}
\end{footnotes}
was receiving an intravenous drip to treat his diabetes and a kidney ailment. The drone collecting the information about Mehsud was approximately two miles above his home when it launched two Hellfire missiles at the home. Mehsud was killed, along with his wife, father-in-law, mother-in-law, a Taliban lieutenant and eight other Taliban members. This was the last of a suspected 16 attempts on Mehsud’s life.

While these attacks appear to have been successful in eliminating specific Taliban and al-Qaeda targets, they appear to be simultaneously exacerbating the situation on the ground. Mehsud’s followers allegedly re-grouped under two new leaders. The citizens of Pakistan do not seem to appreciate the U.S.’s proffered justifications for the attacks; a 2008 Gallup Pakistan poll found that only 9% of Pakistanis approve of U.S. drone strikes within Pakistan and 67% disapprove of the strikes. A majority of those polled also found the U.S. to be a larger threat to Pakistan than India or the Pakistani Taliban. During a visit to Pakistan in October 2009, Secretary of State Clinton was told that the Pakistanis living in the regions where the drone strikes were occurring considered the drone strikes themselves to essentially be terrorist actions against Pakistani citizens.

4. Yemen

As early as 2002, the U.S. carried out strikes aimed against al-Qaida in Yemen. The Yemen strikes were reportedly the first to be carried out by the C.I.A.; these strikes were carried out by the C.I.A. instead of the U.S. military due to concerns about the legality of such

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82 Id.
83 O’Connell *supra* note 4, at 11.
84 Shane, *supra* note 39.
86 O’Connell *supra* note 4, at 3.
strikes.\textsuperscript{88} Allegedly Yemen initially consented to the U.S. presence in exchange for the U.S. providing Yemen’s security forces with equipment and training.\textsuperscript{89} A U.S. drone strike in November, 2002 killed a suspected al-Qaida lieutenant, Abu Ali al-Harithi, along with 5 other passengers in the vehicle he was traveling in (including one American.)\textsuperscript{90} The strike was carried out by a Predator drone firing a Hellfire missile directly into the vehicle.\textsuperscript{91} Al-Harithi was suspected to have been one of the perpetrators of the 2000 U.S.S. Cole bombing. The attack was heavily criticized for, among other things, the likely inspiration of further al-Qaeda martyrs.\textsuperscript{92} The U.N. Commission on Human Rights’ special rapporteur filed a report on the strike, and concluded that this was a “clear case of extrajudicial killing.”\textsuperscript{93} Then-National Security Adviser Condoleeza Rice asserted that the strike was well within the constitutional powers of the President to order, both in light of accepted practice of self-defense and the AUMF.\textsuperscript{94}

The government of Yemen, with suspected help from the U.S. government, carried out targeted strikes against Al Qaeda in the Arabian Peninsula (AQAP) targets Wuhayshi, al-Shihri, and Anwar al-Aulaqi in December, 2009, a week before the attempted bombing of an airliner by Abdulmutallab.\textsuperscript{95} Although it was publicly held out by Yemen that their security forces carried out the attacks, a New York Times report claimed that the C.I.A. was actually behind the strikes.\textsuperscript{96} After al-Aulaqi and AQAP’s involvement with the failed Detroit bombing emerged,

\textsuperscript{88} O’Connell supra note 4, at 3.
\textsuperscript{90} See Kaplan, supra note 1.
\textsuperscript{91} Id.
\textsuperscript{92} Mayer, supra note 24.
\textsuperscript{93} See O’Connell, supra note 4, at 3.
\textsuperscript{94} Kaplan, supra note 1.

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the U.S. government ramped up its actions in Yemen against AQAP through increased bombing and drone strikes. U.S. officials cited both the AUMF and U.N. Article 51 right to self-defense as justifications for the strikes against AQAP. Reportedly U.S. action in Yemen has only continued with the ongoing consent of President Saleh, and he has continued to allow the U.S. to carry out drone operations against AQAP targets.

5. Recent Events

The C.I.A.’s continued presence in Pakistan has led to continued international controversy and criticism. A C.I.A. contractor in Pakistan, Raymond A. Davis, was arrested and held on murder charges after he allegedly shot and killed two men in an attempted robbery in the Pakistani city of Lahore in January of 2011. The U.S. government was able to secure Davis’ release on March 16, 2011 after the payment of 200 million rupees (approx. $1.1 million) to the men’s families under the Shari’ah law principle of compensation, or “blood money.” Just a day later, Predator Drones struck heavily at the tribal region of North Waziristan, killing at least 40 people and wounding scores more. This was just the latest strike in the U.S.’s continuing drone campaign in Pakistan; a week earlier, a U.S. drone strike had allegedly killed an al-Qaeda leader in Pakistan. This attack, however, was loudly condemned by Pakistan’s Foreign Secretary Salman Bashir, who demanded a public apology for the large scale carnage caused by

98 See Section III infra.
101 Id.
the drone strike.\textsuperscript{104} Combined with the frequent protests of Davis’ release and the seemingly constant strikes from the air by U.S. drones, the U.S.’s presence in Pakistan is immensely unpopular. AQAP appears to have taken advantage of this anti-American sentiment in the region, and has begun a practice of giving aid in the form of health care to the poor following drone strikes, and seems focused on garnering local favor to cement anti-American feelings in Yemen.\textsuperscript{105}

Despite this unpopularity, the U.S. government has shown no signs that it intends to minimize or change its current drone campaign. The use of drones in the U.S.’s international activities seems to be increasing exponentially, as the U.S. military has deployed drones to Mexico to help combat the drug war occurring along the U.S.-Mexico border.\textsuperscript{106} So far in Mexico the drones have only been used for surveillance and intelligence gathering, and have been done so with the explicit consent of the Mexican government.\textsuperscript{107}

III. CURRENT US POLICY REGARDING TARGETED KILLINGS AND DOMESTIC JUSTIFICATIONS

A. U.S. Policy Regarding Targeted Killings within the “War on Terror”

Official U.S. Policy regarding international law has not always been an embracing one. Although the Obama Administration has gone to great lengths to attempt to redeem the U.S. in the eyes of the international community\textsuperscript{108}, the general impression of the international community is that the U.S. government only pays lip service to international law and ignores it.

\textsuperscript{107} \textit{Id.}
In the pursuit of al-Qaeda and Osama Bin Laden, U.S. officials seem to find that the ends almost always justify the means when it comes to targeted killings abroad, whether it be in a counter-terrorism setting or military action in the theater of war. However, during the current “war on terror,” the U.S.’s policy of counter-terrorism has relied upon international law as justifying the means it has and will use against al-Qaeda and other terrorists abroad.

The United Nations arguably laid the groundwork for the U.S.’s initial justifications for the “war on terror” when it connected the terrorist attacks of 9/11 to the inherent right of self-defense from armed attack under Article 51 of the UN Charter. On September 12, 2001, the U.N. Security Council passed resolution 1368, which stated that

*The Security Council,*

*Reaffirming* the principles and purposes of the Charter of the United Nations,

*Determined* to combat by all means threats to international peace and security caused by terrorist acts,

*Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security; . . .

Soon after, Congress passed the Authorization of Use of Military Force against Terrorism, which authorized the President to

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109 In a classified memorandum to President Bush regarding the application of the Geneva Convention to prisoners in Afghanistan, former Attorney General Alberto Gonzales referred to the Conventions as “quant” and “obsolete.” See O’Connell, *supra* note 4, at 8.

110 In the wake of the strike against Zawahiri, Sen. John McCain (R-AZ) told CBS News: “It’s terrible when innocent people are killed... [b]ut we have to do what we think is necessary to take out al-Qaeda, particularly the top operatives.” Kaplan, *supra* note 1.

111 Kaplan, *supra* note 1. Regarding the failed strike against Saddam Hussein in April, 2003, despite knowing the risk to civilians in the area, the U.S. officials “clearly believed the military advantage gained by Hussein’s death would outweigh the civilian cost.”


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.114

The Preamble to the AUMF echoed the right of self-defense inherent in the U.N. Charter, and
asserted that the 9/11 attacks “render it both necessary and appropriate that the United States
exercise its rights to self-defense and to protect United States citizens both at home and abroad .
. . ”115 Thus Congress implicitly empowered the President to act not only with its approval, but
under a right guaranteed by the U.N. Charter and thus international customary law. The use of
the AUMF as self-defense against terrorists as part of an armed conflict with such has been
confirmed by the U.S. Supreme Court.116

While the Bush Administration initiated the increase of combat drone use during the
beginning of the war on terror in Afghanistan, President Obama has not shied away from the use
of combat drones in the continuing campaign against terrorists abroad. During his Presidential
campaign, Obama criticized the Bush administration for not acting as aggressively to attack
targets when the means (i.e., combat drone strikes) were readily available.117 President Obama
was not bluffing for campaign purposes about increasing attacks on terrorist targets, as he
ordered drone strikes against targets in Pakistan on his third day in office.118 President Obama
has since ordered a “dramatic increase” in drone strikes against targets in Pakistan.119

114 AUMF (2001).
117 Anderson, supra note 1, at 2. Obama also famously stated, while sparring on the campaign trail with John
McCain, that “John McCain likes to say that he’ll follow Osama Bin Laden to the Gates of Hell, but he won’t even
go to the cave where he lives.” Obama then insinuated he would act on “actionable intelligence.” Id.
118 Anderson, supra note 1, at 2. See also supra Section II.
119 Blum & Heymann, supra note 3, at 151.
The lack of danger to human troops, relative low expense and increased ease with which targeted drone strikes can be carried out makes resorting to such strikes an attractive option to President Obama from a practical perspective.\textsuperscript{120} Compared with the monetary cost, political unpopularity and inherent risk to human life involved with deploying troops to dangerous areas such as Afghanistan, Pakistan or Somalia, relying on targeted drone strikes is a logical policy for Obama to pursue while addressing the dangers of terrorists in said areas.\textsuperscript{121}

In a speech to the American Society of International Law, Harold Koh, the Legal Adviser to the U.S. Department of State, laid out the Obama Administration’s stance on International Law.\textsuperscript{122} Koh stated that the United States, under international law, is engaged in armed combat with the Taliban and al-Qaeda as a response to the 9/11 attacks under the right to self defense inherent in international law.\textsuperscript{123} Domestically, Koh pointed to the AUMF as the Congressional authorization of force against the terrorist actors.\textsuperscript{124} On both fronts, Koh argued that the U.S. was justified as a measure of self-defense in targeting al-Qaeda leaders involved in the planning of future attacks.\textsuperscript{125} Koh stated that the Obama Administration, in response to the inherent difficulty of targeting terrorists who hide among civilian populations, carefully studied and follows the law of war targeting principles of distinction and proportionality.\textsuperscript{126}

In response to the numerous legal objections that have been raised against the Obama Administration’s use of drones in carrying out target combat strikes, Koh stated that the

\textsuperscript{120} Anderson, supra note 1, at 8.
\textsuperscript{121} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. Koh defined distinction as requiring “that attacks should be limited to military objectives and that civilians or civilian objects shall not be the object of the attack;” and defined proportionality as prohibiting “attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.”
Administration did not believe that the acts of targeting or using advanced weapon systems were themselves *per se* violations of international law. In response to criticisms that the attacks were “unlawful extrajudicial killings,” Koh asserted that “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”

**B. Unlawful Enemy Combatants under U.S. Law**

Although the Bush Administration muddied the conception of “unlawful enemy combatant” with its defenses in the Guantanamo Bay cases and subsequent enactment of the Military Commissions Act (“MCA”), the U.S. Supreme Court has recognized that terrorists such as al-Qaeda fighters could be considered enemy combatants engaged in armed conflict against the U.S. It is important to initially note that the Guantanamo Bay cases and MCA were only applied in factually distinguishable cases from targeted killings in that they analyzed the treatment and rights of prisoners once those prisoners were captured on the battlefield. After the AUMF in September, 2001, President Bush issued a Presidential Military Order providing for the detention and treatment of al-Qaeda forces captured in the battlefield; this order defined such detained al-Qaeda forces as “illegal enemy combatants.” The Supreme Court recognized that capturing such forces on the battlefield was included within the means authorized by the AUMF; however, the Court noted that the Bush Administration had not provided clear criteria for what made an individual an “enemy combatant” in the armed conflict against al-Qaeda in Afghanistan,

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128 *Id.* Koh also stated that such justified use in armed combat or self-defense took the attacks out of the realm of assassinations, which have long since been banned by U.S. domestic law.
129 *See* *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, *infra*.
only that they were “an individual who. . . was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’” in Afghanistan.\textsuperscript{131} Although the Court held that, as a U.S. Citizen, Yasser Hamdi was owed notice and a hearing to challenge his status as an enemy combatant, the Court noted that Hamdi could initially be held as an enemy combatant if he was indeed “carrying a weapon against American troops on a foreign battlefield.”\textsuperscript{132}

Importantly, in the next seminal Guantanamo Bay detainee case, \textit{Hamdan v. Rumsfeld}\textsuperscript{133}, the Supreme Court held that detainees who were granted hearings under the military commission set up by the Bush Administration lacked power to properly do so because they violated the Uniform Code of Military Justice and the Geneva Conventions.\textsuperscript{134} In his opinion, Justice Stevens noted that surely the AUMF activated the President’s war powers, but this expansion surely was not intended to repeal or expand the UCMJ\textsuperscript{135}, which in turn incorporates the Geneva Conventions and international laws of armed conflict.\textsuperscript{136} Importantly, the Court’s opinion noted that Hamdan’s alleged crime of conspiracy was not recognized under any of the “major treaties governing the law of war,”\textsuperscript{137} overt acts occurring in the theater of war could be properly considered active hostilities.\textsuperscript{138}

\begin{enumerate}
\item[132] \textit{Id.}, at 522, n.1.
\item[133] 548 U.S. 557 (2006)
\item[134] \textit{Id.} at 567.
\item[136] \textit{Id.} at 603. Stevens implicitly invoked customary international law when he cited \textit{ex parte Quirin}, noting that the violation in \textit{Quirin} was “by ‘universal agreement and practice’ both in this country and internationally, recognized as an offense against the law of war.” \textit{Id.} (citing \textit{Ex parte Quirin}, 317 U.S. 1, 30 (1942)).
\item[137] \textit{Id.} at 610.
\item[138] \textit{Id.} at 612.
\end{enumerate}
Following *Hamdan*, Congress enacted the Military Commissions Act of 2006 ("MCA") to provide military tribunals for violations of laws of war.\(^{139}\) In *Boumedine v. Bush*, the D.C. Circuit held that under the MCA and current U.S. law the definition of “enemy combatant” is

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.\(^{140}\)

Currently, the MCA’s definition section, § 948a, defines a “privileged belligerent” as “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.”\(^{141}\) Section 948a(7) defines “unprivileged enemy belligerent” as an individual who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”\(^{142}\) Finally, the MCA defines “hostilities” as “any conflict subject to the laws of war.”\(^{143}\) Thus, currently, under U.S. law, an “unlawful enemy combatant” in military actions is a current or past supporter or member of the Taliban or al-Qaeda who has committed hostile acts towards the United States. As will be further analyzed in Part IV, *infra*, this definition is at odds with the current international legal standard of “combatant” under armed conflict.

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\(^{141}\) 10 U.S.C.A. § 948a(6).

\(^{142}\) 10 U.S.C.A. § 948a(7).

\(^{143}\) 10 U.S.C.A. § 948a(9).
C. Counter-terrorism as International U.S. Law Enforcement?

It has been asserted that the American model of post-September 11 counter-terrorism legal justifications does not properly fit into international law because it is a hybrid of the international legal principles of law enforcement and armed conflict; or, in other words, a hybrid application of the rules of International Human Rights Law and International Humanitarian Law. Similar conclusions have been made regarding Israel’s counter-terrorism policies. While criminal law enforcement may inevitably lead to violence, such violence is incidental to the effort attempt to prevent or halt the criminal from carrying out a violation of the law. In comparison, the violence against terrorists in an armed conflict may be the aim of the action itself, as opposed as being merely incidental to the law enforcement activity. The ends of armed conflict may be related to military strategies ranging from combat to political ends, and are specifically governed by legal norms assuming that no other state legitimacy exists to meet the necessary ends; in contrast, law enforcement occurs in an ordinary setting where violence is not always necessary to meet such goals.

With counter-terrorism, or “intelligence activities,” as defined by Kenneth Anderson, the lines between law enforcement and armed conflict become blurred. Anderson argues that a full counter-terrorism response to the dangers and threats posed by al Qaeda and other terrorist groups “requires actions across all three of these areas: criminal law, armed conflict, and

144 Anderson, supra note 1, at 5. See also Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 40 CASE W. RES. J. INT’L L. 593 (2009).
146 See, e.g., Anderson, supra note 1, at 5; Paust, supra note 5; Murphy, supra note 5; Lobel, supra note 5.
147 Anderson, supra note 1, at 5.
148 Id.
149 Id. at 6.
“intelligence” functions, including covert deadly force and targeted killing. This reasoning appears to be the prevailing view within the Obama Administration, as the Administration has simultaneously asserted a commitment to international humanitarian law and the laws of war while increasing drone strikes and other counter-terrorism based activities in countries where we are not at war with state actors, such as Pakistan and Afghanistan. While targeted drone strikes have been criticized for civilian collateral damage, the alternative, full scale warfare would likely have far more civilian casualties and is ill-suited for the pursuit of a small number of terrorist actors.

In light of these important questions and the muddied state of the international legal conception of the “war on terror,” the next section of this paper will attempt to answer the basic question of what international legal standards apply to the U.S. government’s current policy of the targeted killing of terrorists and other non-state actors.

IV. APPLICABLE INTERNATIONAL LEGAL STANDARDS

One of the fundamental disagreements regarding targeted killings is what body of law should govern such attacks when questioning their legality. By specific reference to the laws of war and the Geneva conventions, current U.S. law strives to comport with the international law of armed conflict in its ongoing conflict with al-Qaeda and associated forces abroad. Combined with Koh’s reference to self-defense and the international legal concepts of necessity and proportionality, one would think that the laws of war apply. However, al-Qaeda is not a state actor or acting on behalf of a state actor, and is more akin to a rogue criminal organization than a

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150 Id.
151 See Koh Speech, supra note 122.
152 See supra Section II regarding increased Drone use abroad.
153 Anderson, supra note 1, at 7.
traditional armed force. Should the U.S.’s counter-terrorism actions be analyzed as militarized armed conflict, or a specialized form of law enforcement? Or should it be recognized as some sort of hybrid?

In international law and the laws of armed conflict, the two most important bodies of law to address are International Humanitarian Law and International Human Rights Law. International Humanitarian Law applies to situations of armed conflict; Human Rights Law applies to non-combatants and civilians outside of situations of armed conflict. Because, by definition, individuals such as individual terrorist actors or agents of the C.I.A. are not combatants under international legal norms, difficulties arise when attempting to analyze their actions under the laws of armed conflict.\footnote{Anderson, \textit{supra} note 1, at 3.} Difficulties stemming from the respect of other nations borders and limitations of law enforcement to domestic situations also complicates analysis under the laws of peace-time law enforcement and human rights law.\footnote{Blum & Heymann, \textit{supra} note 3, at 146.} Defining past and future U.S. use of drones and targeted killings is complicated by the fact that the Bush Administration frequently defined all of its actions in the “war on terror” as armed conflict.\footnote{Anderson, \textit{supra} note 1, at 3.} It is also important to note that while non-state actors, such as al-Qaeda, are not states and thus cannot be held to requirements of treaties such as the UN Charter and Geneva Conventions, that many of the norms discussed in the following section have been recognized as customary international law, and are thus binding upon party signatories, non-signatories and non-state actors alike.\footnote{NOAM LUBELL, \textsc{Extraterritorial Use of Force Against Non-State Actors} 96 (2010).} This section will set out to define the basic parameters of armed conflict under international law, as well as define each body of applicable norms, and then
determine how targeted drone strikes in the context of war and counter-terrorism should be analyzed.

A. Laws of Armed Conflict

International law constitutes a large body of binding and non-binding sources of international law and custom. Article 38(I) of the Statute of the International Court of Justice states that sources of binding international law can be found in:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\(^\text{158}\)

This conception of the sources of international law has been widely accepted being the authoritative definition of the character of modern international law.\(^\text{159}\) Customary international law reflects widespread state practice which is generally accepted as law.\(^\text{160}\) A state may be bound by customary international law which derives from the language of a treaty even if that state is not bound by the particular treaty.\(^\text{161}\) Specifically, the U.S. Supreme Court has held that customary international law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”\(^\text{162}\)

The United Nations’ Charter, in turn, declared basic conceptions of the use of force and self-defense meant to guide the international community. The U.N. Charter recognizes that the

\(^{158}\) ICJ Statute Art. 38(I).

\(^{159}\) **DAVID WEISSBRODT, ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS, 412 (4th ed. 2009).**

\(^{160}\) *Id.* at 876.

\(^{161}\) *Id.* at 877; see also United States v. Schiffer, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993).

\(^{162}\) The Paquete Habana, 175 U.S. 677, 700 (1900); see also WEISSBRODT, *supra* note 159, at 893.
inevitable use of armed force is an unfortunate reality of today’s world, and thus in Article 51 provides for the right of member-states to self-defense. Article 51 provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.” This right to self-defense must be measured in light of Article 2(4)’s prohibition on the 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.” Thus, in order for armed force to be used in the sovereign territory of another nation, the use must be 1) with the consent of the nation or in a manner that does not otherwise violate their sovereignty under Article 2(4); or 2) justified under Article 51’s principle of self-defense. If actions of armed force are carried out within the territory of a sovereign nation without their consent and not properly justified as self-defense, the actions thus violate Article 2.

The notion of self-defense under the U.N. Charter has been the most prominent international legal justification for use of armed force against non-state actors. For example, the U.S. invoked Article 51’s right to self-defense when it undertook military action against Al-Qaeda in Afghanistan in October, 2001; Israel justified its actions against Islamic Jihad in Syria in 2003 and Hezbollah in Lebanon in the summer of 2006 by invoking Article 51; Ethiopia claimed it felt threatened by Islamic militants in Somalia and had a right under Article

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163 LUBELL, supra note 157, at 26.
164 U.N. Charter, art. 51.
165 Id.
166 U.N. Charter, art. 2, para. 4.
167 LUBELL, supra note 157, at 27.
168 Id.
169 LUBELL, supra note 157, at 29.
170 Koh Speech, supra note 122.
to take action against those actors\textsuperscript{172}; and Turkey claimed it was acting in self-defense when it responded with military force in Iraq against Kurdish forces after the death of 13 Turkish soldiers.\textsuperscript{173}

Article 51’s right to self-defense can only be invoked in light of an “armed attack,”\textsuperscript{174} which raises the question of whether a non-state actor can carry out an armed attack.\textsuperscript{175} In light of recent terrorist attacks, the answer to the question may seem to be an unequivocal affirmative; however, under international law “armed conflict” has a strict definition. The International Court of Justice has posited that self-defense “can only be taken in response to an attack by a state or groups acting on behalf of one.”\textsuperscript{176} However, legal scholars have recognized that attacks by non-state actors independent of state involvement have risen to the level of armed attack held to justify self-defense under Article 51\textsuperscript{177}; most prominently, the U.N. Security Council took specific note of the inherent right to self-defense in the immediate aftermath of the 9/11 attacks carried out by Al-Qaeda, a non-state actor.\textsuperscript{178}

\textsuperscript{174} U.N. Charter, art. 51.
\textsuperscript{175} \textit{LUBELL}, supra note 157, at 31.
\textsuperscript{176} \textit{LUBELL}, supra note 157, at 31 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (“Wall Case”), Advisory Opinion, 2004 I.C.J. 107-13 (July 9)).
\textsuperscript{178} S.C. Res. 1368 (2001); S.C. Res. 1373 (2001). NATO also invoked the right to self-defense in its response to the 9/11 attacks. \textit{See} Press Release, NATO, Statement by the North Atlantic Council, September 12, 2001, \textit{available at} http://www.nato.int/docu/pr/2001/p01-124e.htm (“The commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism.”).
Most notably, Article 51 itself does not define who must be responsible for armed conflict or the specific need for state involvement. The ICJ built its opinion in the *Palestinian Wall* case on its prior holding in *Nicaragua v. USA*, where it analyzed whether or not Nicaraguan support to rebels could impute the actions of the rebels to Nicaragua for purposes of self-defense; arguably the decision did “not necessarily corroborate or negate the contention that non-state actors can be responsible for armed attacks as understood by Article 51.” In the *Nicaragua* case, the ICJ defined an “armed attack” to occur when “regular armed forces cross an international border or when a State sends armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to an actual armed attack by regular forces.” In the 2003 *Congo* case, the ICJ specified that self-defense could only be asserted against such forces when they carried out “large scale attacks.”

Beyond the U.N. Charter and ICJ, the basic norms of self-defense under customary international law find their roots in the historic *Caroline* case. The incident involved British military action against Canadian rebels in 1837. British troops, in an attempt to prevent the Canadian rebels from receiving supplies from private U.S. citizens, boarded the Caroline, a private ship; they then set the ship on fire and sent it crashing over the Niagara Falls. Two U.S. citizens were killed when the ship went over the falls. In the ensuing correspondence between the U.S. and Britain, mostly regarding the British invasion of U.S. territory as the prime offense, Secretary of State recognized that the British troops had the right to act against the Canadian rebels.

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179 Lubell, *supra* note 157, at 32.
180 *Id.* (citing Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)).
183 Lubell, *supra* note 157, at 34. While there was no “case” as we understand them in the legal sense today, the 1837 *Caroline* incident and the ensuing exchange of correspondence between the U.S. and Britain after the incident document each nation’s views on self-defense. See also Paust, *supra* note 174, at 242.
184 Paust, *supra* note 174, at 242. Paust notes that one citizen was confirmed dead, while the other never re-surfaced.
rebels, albeit in a limited manner, under the notion of self-defense.\textsuperscript{185} The fact that the Canadian rebels’ actions could not be imputed to the U.S. or Canada did not seem to detract from the idea that self-defense could be properly invoked by Britain.\textsuperscript{186} However, Secretary of State Webster qualified his comments by stating that self-defense could only be justified by necessity which is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”\textsuperscript{187}

1. Necessity

Two important concepts in international law defining the appropriate limits of armed force grew out of Webster’s stated doctrine of self-defense from the \textit{Caroline} case; the principles of necessity and proportionality.\textsuperscript{188} The ICJ has recognized the principles of necessity and proportionality as the applicable standards of limitation to acts of self-defense.\textsuperscript{189} The ICJ has stated that “there is a ‘specific rule whereby self-[defense] would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law’. . . This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”\textsuperscript{190}

The \textit{Caroline} case is important as being one of the first instances to set out the concept of necessity. In a letter to the British government following the destruction of the Caroline, Secretary of State Daniel Webster noted that “the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”\textsuperscript{191} Webster further explained that “necessity of that self-[defense] is instant, overwhelming, and leaving no choice of means, and

\begin{thebibliography}{9}
\bibitem{185} Id. at 243.
\bibitem{186} LUBELL, \textit{supra} note 157, at 35.
\bibitem{188} LUBELL, \textit{supra} note 157, at 43.
\bibitem{189} \textit{Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons}, 1996 I.C.J. 41 (July 8).
\bibitem{190} Id.
\bibitem{191} LUBELL, \textit{supra} note 157, at 43 (quoting Letter, dated July 27, 1842, from Mr. Webster to Lord Ashburton, Department of State, Washington).
\end{thebibliography}
no moment for deliberation.” While the *Caroline* definition has not been applied literally, necessity has been applied to situations of relative immediacy; necessity has been noted in cases where nation-states wait days or even weeks before responding. However, there does have to be a somewhat “timely connection” between the armed attack and the self-defense measures.

In the case of a response to an attack by a non-state actor, necessity may indeed require the exhaustion of all other diplomatic responses, such as appealing to the nation-state where the non-state actor is hiding. In the case of the U.S. action against al-Qaeda in Afghanistan, the U.S. first requested that the Taliban cooperate in its pursuit of al-Qaeda, a request that had been made of the Taliban previously by the UN Security Council. The failure of the Taliban to cooperate thus properly triggered the concept of necessity under the ICJ’s formulation, as well as the Article 51 conception to self-defense.

An important concept to consider in light of necessity is the concept of pre-emption. A debate has emerged, in light of the U.S. actions against al-Qaeda both in Afghanistan and abroad, regarding “a possible right of states to take action in order to prevent hypothetical future eventualities which cannot easily be described as specific imminent threats.” Arguably the *Caroline* case was a case of pre-emptive self-defense, as the British troops were taking action intended to curtail the Canadian rebels’ future capacity to wage attacks by destroying their supplies. The Article 51 conception of self-defense, however, explicitly allows for self-defense in the context of a *response* to an armed attack, which apparently provides for no

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192 Lubell, *supra* note 157, at 44 (quoting Letter, dated August 6, 1842, from Mr. Webster to Lord Ashburton, Department of State, Washington).
193 Id. (noting that the UK waited several days to deploy troops and several weeks before commencement of force in response to Argentina in the Falklands/Malvinas conflict of 1982, and the U.S. waited several weeks before commencing operations against al-Qaeda in Afghanistan in October, 2001.)
196 Id. at 47.
197 Id. at 55.
198 Id. at 56.
When an attack is imminent, however, there does not appear to have been much debate regarding a nation-state’s ability to defend itself with preemptive attacks. The potentially devastating results of armed attacks by non-state actors, such as the 9/11 attacks or other future terrorist attacks, have led to the U.S. concluding that while “[the] United States will not use force in all cases to preempt emerging threats... in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”

2. Proportionality

The concept of proportionality also finds its roots in Webster’s Caroline doctrine of self-defense. Regarding the Caroline incident, Webster stated that the right to self-defense was limited by the threat at hand; the response to any threat must be “essential and proportional, and all peaceful means of resolving the dispute [must] have been exhausted.”

Within the context for self-defense in situations of warfare, proportionality is concerned with actions that may go beyond the scope of warfare and cause unnecessary collateral damage to civilians. However, in the context of self-defense against non-state actors, proportionality is concerned with balancing the threat posed by the non-state actor with the means necessary to halt that threat. This balancing act can be difficult to achieve when there is inherent

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199 See U.N. Charter, art 51.
200 LUBELL, supra note 157, at 58-59 (citing Israel’s preemptive response to attacks in 1967, as well as U.K. policy laid out the Attorney General of the U.K., Lord Goldsmith, as two primary examples of recognized pre-emptive self-defense under the U.N. Charter.)
202 Guiora, supra note 184, at 323.
204 LUBELL, supra note 157, at 65.
disproportionality between the non-state and state actors’ independent capacity to act. Proportionality also applies with regards to the geographic location of the self-defense actions. The proportionality of the response against a given non-state actor must be measured by the specific threat posed within that territory; hence, actions taken against al-Qaeda operatives in Afghanistan and al-Qaeda operatives in Yemen may have two completely separate levels of accompanying proportionality.

B. International Humanitarian Law

International Humanitarian Law (“IHL”) is the body of international law that defines the applicable legal human rights norms for nation-states involved in an armed conflict. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) recently laid out what has become the definition of “armed conflict” under IHL. The ICTY court stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a state.” The court further stated that “[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or . . . a peaceful settlement is achieved.” There need not be a formal declaration of war or hostilities between nations or between nations and groups of armed forces in order to an armed conflict to exist under IHL. The importance of formal declarations

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205 Say, targeting an al-Qaeda foot soldier armed with an AK-47 via a Predator Drone combat system which uses global satellite tracking, infrared targeting lasers and Hellfire missiles.
206 LUBELL, supra note 157, at 67.
207 LUBELL, supra note 157, at 85.
209 Id. See also Lubell, at 87.
210 See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (August 12, 1949), 75 UNTS 31, entered into force October 21, 1950 (hereinafter “1949 Geneva
of “war” is an important aspect of international legal jurisprudence in terms of conflicts between states and in adjudging internal uses of state “emergency” laws, but the necessary threshold to trigger IHL regarding action against non-state actors is the existence of an armed conflict.211

Armed conflicts need not be between nations or involve several nation states in order to trigger these “international” legal norms. While the initial Geneva Conventions of 1949 recognized a distinction between national and international conflicts212, the International Committee of the Red Cross (“ICRC”) has taken the position that norms of IHL apply to both international and non-international armed conflict.213 Conflicts involving state actors involved in armed conflict against non-state actors in the territory of another nation-state who does not sponsor the non-state actor, such as Israel’s armed conflict with Hezbollah in Lebanon in the summer of 2006, have led to the application of IHL despite not neatly fitting with previous rigid definitions of “international” and “armed conflict.”214 A notable example is the U.S. war in Afghanistan; actions between the U.S. and the Taliban, when it was the de facto government of Afghanistan, would be defined as an international armed conflict between two nation-states, while any actions carried out against al-Qaeda after the Taliban’s ousting within Afghanistan would be defined as non-international armed conflict because only one state actor (the U.S.) is involved in the conflict. Despite these recent difficulties with strict definitions, the ICRC still

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211 Lubell, supra note 157, at 88. Lubell notes that situations like the U.S. actions against Afghanistan early in the 2001 war where Afghanistan’s government was actually backing non-state actors such as al-Qaeda could have been labeled as actual war.


214 Lubell, supra note 157, at 93. Lubell notes that “A conflict between a state and a transnational network operating in and from numerous other states, but not necessarily with their support, is anything but an exact match for the traditional concepts of international and non-international armed conflicts.” Id.
supports a rigid definition of international armed conflict as existing solely where “there is resort to armed force between two or more States.”\textsuperscript{215}

The applicability of IHL in the context of non-international armed conflict between a single state actor and a non-state actor has been recognized as customary international law\textsuperscript{216}, specifically by the ICJ and ICRC.\textsuperscript{217} The 1977 Second Protocol to the Geneva Conventions lays out specific rules for when a non-international armed conflict applies between a state actor and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. . . .”\textsuperscript{218} The U.S. Supreme Court has recognized that the Geneva Conventions apply to U.S. actions against al-Qaeda members in Afghanistan, specifically noting that the conflict is not of an “international character.”\textsuperscript{219}

One of the most crucial aspects of IHL and armed conflict is the principal of distinction. The ICJ has established that distinction is one of the bedrock principles of IHL:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.\textsuperscript{220}

Thus, in the context of IHL, any use of armed conflict is inherently limited by means which are able to distinguish between combatants and non-combatants, and further establishes that non-combatants can never be legally targeted. This means that an individual can be targeted on the

\textsuperscript{215} How is the Term “Armed Conflict” Defined in International Humanitarian Law?, International Committee of the Red Cross (ICRC), Opinion Paper, March 2008.
\textsuperscript{216} Considering the fact that the Geneva Conventions have been recognized and adopted by 194 nation-states, finding a situation where the Conventions did not apply would be difficult. See Lubell, supra note 157, at 102.
\textsuperscript{218} Protocol II, Art. 1.
\textsuperscript{219} Hamdan, 548 U.S. at 566.
\textsuperscript{220} Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 41.
sole basis of their role as a combatant, regardless of the threat posed at any given moment. 221 Consequently, it also means that non-combatants, such as civilians, can never be targeted.222

Within the concept of distinction is the inherent requirement to distinguish between combatants and non-combatants. A combatant is defined as one who can legally partake in an international armed conflict, and thus would be entitled to prisoner of war status if captured.223 A combatant under Protocol I’s definition of combatant limits the definition to actors who are a party to a conflict, and would thus seem to rule out non-state actors.224 However, Geneva Convention III recognizes that combatants can be members of militia or organizations involved in an armed conflict if the group has “a command structure, a fixed distinctive sign, [carry] arms openly and [conducts] their operations in accordance with the laws of war.”225 With non-state actors such as al-Qaeda, arguably their lack of a distinctive sign or uniform, which renders U.S. forces unable to distinguish them from other civilians, means that such non-state actors could never be “combatants” for purposes of international armed conflict and IHL.226

While civilians are generally defined by negation (i.e., not combatants) if civilians take “direct part in hostilities” they can lose their immunity for purposes of IHL.227 Direct participation by citizens need not be direct involvement in actual armed attacks; providing material support or intelligence can qualify as direct participation.228 The ICRC has laid out specific cumulative criteria for actions which qualify as direct participation in hostilities: these

221 LUBELL, supra note 157, at 135.
222 Id.
223 Geneva Convention relative to the Treatment of Prisoners of War (August 12, 1949) 75 UNTS 135, entered in force October 21, 1950 (“Geneva Convention III”), art. 4; Protocol I, arts 43, 44.
224 Protocol I, Art. 1.4.
225 LUBELL, supra note 157, at 138 (citing Hague Regulations, Art. 1; Geneva Convention III, Art 4.)
226 Id. at 138-139.
227 Protocol 1, Art. 51.3 (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”).
requirements include specifics regarding the effect on military operations or likelihood to inflict
death or harm; a direct causal link between a military operation and the intended death or harm;
and “specifically designed to directly cause the required threshold of harm in support of a party
to the conflict and to the detriment of another.”229 The loss of protection is limited to the
duration of the specific act which causes the civilian to lose their immunity.230 The civilian need
not actually carry a weapon to meet this requirement, and need only undertake “hostile” acts.231

Within the IHL conflict, the strict limitation of defining individuals within armed conflict
to either combatants or civilians has led to proposals and recognition of another classification:
unlawful combatants or unprivileged belligerents.232 The Israeli Supreme Court has specifically
recognized that unlawful combatant is not a new category, but a sub-category of ‘civilian’ within
international law.233 The ICRC has also recognized that non-state actors can be treated as non-
civilians, and thus have a “combat function,” within the context of non-international armed
conflict. The ICRC has stated that “members of organized armed groups belonging to a non-
State party to the conflict cease to be civilians for as long as they remain members by virtue of
their continuous combat function.”234

Thus, in order to fall under IHL, non-state actors would have to be civilians who take
“direct part in hostilities,” and terrorist actors, such as al-Qaeda, can never qualify as
“combatants” under IHL rules of armed conflict. This inability to classify al-Qaeda fighters and
terrorists as “combatants” was one of the underlying reasons for the controversial nature of the

229 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian
230 Id. at 70-3.
231 Comment, Kristen E. Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings,
16 YALE L.J. 1873, 1874 (2007).
232 LUBELL, at 143; see also HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2005] (Isr.)
[hereinafter PCATT], available at elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.
233 CrimA 6659/06 Anonymous v. Israel, 12 OD [2008] (Isr.).
234 ICRC Interpretative Guidance, supra note 226, at 71.
Guantanamo Bay cases (alleged human rights violations aside.) However, even though Al-Qaeda members could not be classified as “combatants” under current IHL, they could be civilians who take direct part in hostilities, who then lose the protections normally accorded to civilians due to this illegal participation in armed conflict. Essentially, then, civilians taking direct part in hostilities are in the gray area between civilian and combatant, and defining them as “unlawful combatants” seems necessary to distinguish the fact that they neither are entitled to civilian protections nor can they be considered proper combatants under current IHL. Thus, when weighed with the standards of necessity and proportionality, targeted attacks against such non-privileged civilians or unlawful combatants could satisfy requirements of IHL in a non-international armed conflict.

C. International Human Rights and Law Enforcement

Outside of the context of armed conflict, the laws of International Human Rights (“IHR”) provide a legal framework for the protection of the individual against the use of force by state actors. Some of these bodies of law are binding treaties, such as the International Covenant on Civil and Political Rights (“ICCPR”) and European Convention on Human Rights (“ECHR”). Other IHR norms can be found within various UN human rights mechanisms, such as the Universal Declaration of Human Rights (“UDHR”). While IHR provides for the protection of a wide range of cultural, social, political, and other basic freedoms, the main human right concerned in the context of the targeted killing of non-state actors is the basic right to life.

235 LUBELL, supra note 157, at 168.
The right to life is arguably the most fundamental of all human rights, and is guaranteed by every prominent source of IHR.\textsuperscript{238} The UN High Commissioner on Human Rights explained that, within the ICCPR, “[t]he right to life enunciated in article 6 of the Covenant . . . is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.”\textsuperscript{239} The ICCPR comments specifically provide that in situations of self-defense under the Article 51, war may, however, lead to innocent loss of life.\textsuperscript{240} However, the UN Human Rights Commission also established that in order to protect the fundamental right to life,

States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.\textsuperscript{241}

Indeed, the right to life has been recognized so fundamental that it has the status of customary international law, and is thus “a human rights obligation binding upon all states, regardless of whether they are party to any particular treaty.”\textsuperscript{242}

IHR recognizes that human life may be lost in some justified contexts, such as war or law enforcement; IHR’s main concern with the right to life is when the law is misapplied or not applied at all. Uses of force against individuals can violate IHR norms if they are unnecessary or disproportionate uses of violence\textsuperscript{243}; even if justified within a sovereign nation’s own legal

\textsuperscript{239} UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 6: Article 6 (Right to Life)}, 30 April 1982, \textit{available at} http://www.unhchr.org/refworld/docid/45388400a.html
\textsuperscript{240} Id. at para 2.
\textsuperscript{241} Id. at para 3.
\textsuperscript{242} LUBELL, \textit{supra} note 157, at 170; see also NILS MELZER, \textit{TARGETED KILLING IN INTERNATIONAL LAW}, 184-221 (2008).
framework, unnecessary or disproportionate uses of force or violence will violate IHR.\footnote{See UNCHR, \textit{Husband of Maria Fanny Suarez de Guerrero v Colombia}, Communication No. R.11/45, UN doc. Supp. No. 40 (A/37/40) (1982)} Uses of force against individuals that result in the loss of life that have been recognized as necessary or proportionate are killings that occur in the course of armed conflict (and thus fall under IHL)\footnote{Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 41.} and killings that result from the imposition of lawful death penalties.\footnote{ICCPR, Art. 6.2. “Lawful” in this sense means that the parties are not parties to other treaties or agreements, such as the ICCPR’s Second Optional Protocol, which bar the imposition of the death penalty. See Lubell, at 171.} The U.N. Human Rights Committee, in analyzing Israel’s practice of targeted killing to prevent terrorism, even noted that targeted killing to stop such acts of terror could be justified if all other avenues for prevention, such as attempts at arrest, had been exhausted.\footnote{UN Human Rights Committee (HRC), \textit{UN Human Rights Committee: Concluding Observations: Israel}, 21 August 2003, CCPR/CO/78/ISR, available at: http://www.unhchr.org/refworld/docid/3fdc6bd57.html [accessed 25 March 2011]}

Under the current structure of the UN’s Human Rights Council (“HRC”), special rapporteurs or working groups can be appointed to investigate alleged or potential violations of the UDHR.\footnote{See, e.g., Working Group on Arbitrary Detention, H.R.C. Res. 1991/42, A/HRC/16/47, http://www2.ohchr.org/english/issues/detention/index.htm; Working Group on Enforced or Involuntary Disappearances, H.R.C. Res. 2, A/HRC/7/12, (XXXVI), http://www2.ohchr.org/english/issues/disappear/index.htm; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, H.R.C. Res. 1993/45, http://www2.ohchr.org/english/issues/opinion/index.htm.} The HRC has established a Special Rapporteur on extrajudicial, summary or arbitrary executions in order to, among other duties, “examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason. . . [and] [t]o continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment. . . ”\footnote{See Special Rapporteur on extrajudicial, summary or arbitrary executions, Commission on Human Rights resolution 1982/35, http://www2.ohchr.org/english/issues/executions/index.htm.}
obligations of human rights to only areas under a nation’s territorial control. Most prominently, the UDHR states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind... no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs... or under any other limitation of sovereignty.” The UDHR reinforces basic notions set out in the UN Charter, which provides in Article 55 for “universal respect for, and observance of, human rights and fundamental freedoms for all,” and in Article 56 that all UN members shall set out to enforce these freedoms in “joint and separate... co-operation.”

The ICJ has stated several times that IHR applies to nations who act beyond their own borders. Specifically, in the ICJ’s advisory opinion regarding Israel and the construction of the wall bordering Palestinian territory (“Wall Advisory Opinion”), the ICJ stated that

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory.

The European Court of Human Rights has similarly held that IHR applies to nations who act outside of their own territory or jurisdiction. The prevailing view of the UN’s HRC, as noted by the ICJ, “clearly indicates that they do not view human rights obligations as being limited by

250 LUBELL, supra note 157, at 193.
251 UDHR, art. 2.
252 UN Charter, arts. 55-56.
territorial boundaries.”

Given that IHR applies outside the context of armed conflict and mainly is situations of law enforcement, the necessary burden to meet the standards of necessity or proportionality in a situation involving the killing of an individual is exceedingly high. Under principles of law enforcement, the principle of proportionality requires that the law enforcement action taken must be proportionate to illegal action or crime which necessitates response. In the human rights context, necessity requires that the action taken was only available means to accomplish the legitimate aim. Applying proportionality means that the threat posed or legitimate aim sought to be accomplished has to be proportionate when weighed against the potential violation of fundamental human rights. This is a strict outer limit, and the use of lethal force must be limited to “no more than absolutely necessary to defend persons whose lives are in danger.”

In the context of a targeted killing of an individual, the law enforcement aim would have to be so great to be found to justify the loss of human life; the societal interests in carrying out lawful, judicially imposed death penalties have been found to meet this burden. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, a law enforcement aim which deprives a target of their lives is justified while attempting to protect a victim from

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256 LUBELL, supra note 157, at 232.
259 LUBELL, supra note 157, at 173.
260 Kretzmer, supra note 145, at 177.
261 See ICCPR, Art. 6.
unlawful violence.\textsuperscript{262} Similarly, under the U.S. conception of probable cause, the killing of a suspect by a law enforcement officer is only permissible if the officer has probable cause to believe that the suspect poses a lethal threat or threat of serious bodily harm.\textsuperscript{263}

It has been argued that “intentional killing without attempting to arrest or even use lesser force would amount to an extra-judicial execution” and thus be a \textit{prima facie} violation of IHR.\textsuperscript{264} An intentional use of force without “due process of law” is, by definition, an “extra-judicial execution” and a violation of IHR.\textsuperscript{265} However, actions taken by states which were solely designed to kill individual non-state actors have been found lawful under IHR norms; the act of setting fire to a building with Irish Republican Army (“IRA”) troops inside by British soldiers was found to be necessary and proportionate under IHR.\textsuperscript{266} Specifically in the law enforcement context, the Inter-American Commission on Human Rights recognized that “where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.”\textsuperscript{267}

D. Inter-state Force and Issues of Sovereignty

One landmark international legal norm, sovereignty, is undeniably implicated by the U.S. carrying out acts of armed combat and self-defense against non-state actors within the borders of other legitimate nation states. However, many legal scholars have noted that sovereignty of

\begin{itemize}
  \item \textsuperscript{262} European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2(2). \textit{See} Kretzmer, \textit{supra} note 145, at 177.
  \item \textsuperscript{263} \textit{See} \textit{Tennessee v. Garner}, 471 U.S. 1 (1985).
  \item \textsuperscript{264} \textit{LUBELL, supra} note 157, at 175; \textit{see also} Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/6/17/Add.3, October 25, 2007, para 42.
  \item \textsuperscript{265} Kretzmer, \textit{supra} note 145, at 176.
  \item \textsuperscript{266} McMann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995), at paras. 199-200.
\end{itemize}
other nations is not an issue when they consent, explicitly or implicitly, to the U.S. carrying out targeted killings within their borders.\footnote{Anderson, supra note 1, at 20; Paust, supra note 174, at 249-50.} Arguably, when these nations cooperate through coordination and sharing of intelligence,\footnote{Shane, supra note 39.} or are aware of the strikes but publicly deny such knowledge,\footnote{Kaplan, supra note 1. Despite the fact that NSA sources confirmed that Pakistani President Pervez Musharraf was aware of the January, 2006 strike against Zawahiri, Pakistani Prime Minister Shaukat Aziz publicly denied advance knowledge of the attack or that the U.S. had been granted permission to carry it out.} the nations are ratifying the strikes and thus there is no infringement upon their sovereignty. Further, according to Professor Alston, without specific knowledge of whether the countries actually officially approve the actions or not, it is not possible to conclusively determine whether sovereignty has been violated under international law.\footnote{Shane, supra note 39.}

While carrying out law enforcement actions within another state’s territory without their consent would be a \textit{per se} violation of the UN Charter and potentially be an act of war which could trigger a state of international armed conflict, for the purposes of our analysis it seems prudent to assume the heightened IHR / law enforcement standards apply at a minimum and that the U.S. is only carrying out counter-terrorism actions outside of armed conflict in areas where it has either explicit or implicit consent to do so. In light of the fact that it appears we have had some level of consent to carry out targeted killing operations in Yemen and Pakistan, the two areas where the U.S. has most frequently used counter-terrorism targeted killings, and actions in Afghanistan and Iraq clearly took place in the theater of war, issues of sovereignty applying to targeted killings in the counter-terrorism context invokes a wholly separate discussion beyond the scope of this paper. Thus, any targeted killing discussed will be presumed to be done with at least the implicit consent of the nation-state controlling the relevant territory.
E. What Law Applies?

In the context of counter-terrorism and targeted killings, the lines between armed conflict and law enforcement have blurred substantially. There does not seem to be a current consensus under international law regarding what body of law should be applied to counter-terrorism actions carried out within and among several states against non-state actors. The Obama Administration seems to have implicitly recognized this by attempting to apply the rules of armed conflict and laws of war to the “war on terror” while simultaneously recognizing that the terrorists of al-Qaeda and its affiliates are acting outside of the laws of war and that “enemy unlawful combatants” under U.S. law are arguably “unlawful combatants” under international law. The Israeli Supreme Court has attempted to find an answer to the difficult question of “what law applies” to terrorist non-state actors when they are pursued outside of the victim state’s territory. Their attempt at answering this question, and thus balancing the necessities of armed conflict with the protection of the basic human right to life proves instructive on how a nation like the U.S. could proceed in accordance with both International Humanitarian Law and International Human Rights law.

V. Israeli Targeted Killings and Standard for Post-Targeting Review

Israel is a natural comparative case study in the context of targeted killings; is it essentially the only other democracy in the world to openly carry out targeted killings, as well as drone strikes against non-state actors. Israel has publicly acknowledged carrying out targeted killing, but has never publicly acknowledged carrying out targeted kills using combat drones; despite this, various NGOs and UN organs have reported on Israeli drone strikes against
Palestinians in Gaza and the West Bank. Importantly, Israel has recently announced in a high court ruling a judicial standard regarding government use of targeted killings. Ultimately, Israel found that targeted killings of Palestinian terrorists could be evaluated within the scope of “armed conflict” under International Humanitarian Law, and established a framework for how to evaluate targeted killings within IHL while applying rules of International Human Rights law to the “gaps” not covered by IHL.

A. Israel’s History of Targeted Killings

The Israeli military, the Israeli Defense Force (“IDF”) has taken many preemptive military actions since its declaration of independence in 1948. The IDF carried out preemptive air strikes against the Egyptian military prior to the 1967 Six-Day War, and also launched air attacks against Iraqi nuclear reactors in 1981 and Syrian reactors in 2007. Israel also allegedly carried out assassinations of Egyptian intelligence officers in the 1950s and German scientists developing weapons for Nasser in the 1960s, as well as assassinations of various Palestinian and Lebanese terrorist and militia leaders in the 1990s. To combat the specific threat of Palestinian terrorists who use suicide and other terrorist attacks against Israeli civilians, the Israeli government has continued its policy of targeted killing. These targeted killings are

273 See PCATI, supra note 229.
274 Guiora, supra note 184, at 325.
275 Id.
278 Guiora, supra note 184, at 320.
carried out by both security forces (likely the Israeli Intelligence Branch, the Mossad\textsuperscript{279}) and military forces alike, and are intended to frustrate and prevent future terrorist acts.\textsuperscript{280} Targeted killings have been carried out with various means, such as by helicopter strike\textsuperscript{281}, sniper fire\textsuperscript{282}, and assassinations using military and security personnel\textsuperscript{283}. Accordingly, during times of ceasefire or relative peace, targeted killings are halted.\textsuperscript{284}

The IDF has engaged Palestinian militants and terrorists after it assumed authority over the Palestinian territories of the West Bank and Gaza Strip following the Six-Day War.\textsuperscript{285} Although Palestinian actions against Israel took place in relatively small and isolated incidents between 1967 and 1987, Palestinian militants began to act in a much more organized and militarized manner during the Intifada (a “throwing-off” or “ridding”) from 1987-1993.\textsuperscript{286} While the initial violence of the Intifada included stone-throwing and mass demonstrations, this violence quickly escalated into a series of terror attacks.\textsuperscript{287} These terror attacks began in earnest with the second Intifada in 2000.\textsuperscript{288}

Between 2000 and 2004, over 1000 Israelis were killed in over 20,000 separate terror attacks; these attacks included shootings and suicide bombings aimed at killing innocent civilians.\textsuperscript{289} These attacks took place in both the Palestinian territories and within Israel’s

\textsuperscript{279} Blum & Heymann, \textit{supra} note 3, at 147. Mossad agents have carried out targeted killings since at least the 1970s, as reprisals for the Munich massacre.
\textsuperscript{280} PCATI, at para. 2.
\textsuperscript{284} Blum & Heymann, \textit{supra} note 3, at 152.
\textsuperscript{285} Guiora, \textit{supra} note 185, at 320.
\textsuperscript{286} \textit{Id.}
\textsuperscript{287} \textit{Id.}
\textsuperscript{288} PCATI, \textit{supra} note 229, at para. 1.
\textsuperscript{289} Guiora, \textit{supra} note 185, at 320.
borders; the attacks and bombings struck public targets such as shopping malls, markets, coffee houses and restaurants. These attacks were able to occur despite Israel’s strict and complex security measures aimed at preventing such attacks; thus, it “is crucial to comprehend that a successful suicide bombing is the working of a well-orchestrated, difficult to penetrate, highly disciplined, financially solvent terror organization and not an act of a lone individual.”

One of the security measures adopted by the Israeli government is the policy of targeted killing. Israel’s policy was to target a Palestinian terrorist who poses a serious threat or is in the process of carrying out a terrorist attack if 1) there is “criminal evidence and/or reliable, corroborated intelligence information clearly implicating him,” and 2) there is “no reasonable alternative to the targeted killing,” including the consideration that an attempt at arresting the terrorist will put an Israeli military or security unit in harm’s way.

Israel began its policy of targeted killings of Palestinian terrorists with the killing of Hussein Abayat in the West Bank; the attack was carried out by an IDF helicopter missile launch. Attacks were also carried out against Hamas militants, such as leaders Ahmed Yassin and Abdel Aziz Rantisi in March and April of 2004. These attacks came with civilian casualties: Abayat was killed along with two bystanders; Yassin’s targeting also killed 4 bystanders, two of whom were his sons; and Rantisi’s targeted killed two bystanders and wounded ten civilians. Between 2000 and 2005, Israel carried out targeted strikes against Palestinian terrorists that resulted in the deaths of approximately three hundred members of

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290 PCATI, supra note 229, at para. 1.
291 Guiora, supra note 184, at 321.
292 Id. at 322.
293 Kretzmer, supra note 145, at 172.
294 Id.
295 Id.
terrorist organizations, as well as approximately one hundred and fifty civilians being killed along with hundreds more being wounded.\textsuperscript{296}

One of the most well-known and controversial instances of Israel’s targeted killing policy involved Hamas leader Salah Shehadeh. As the head of Hamas’ military wing, Shehadeh was accused by Israel of being involved and responsible for the deaths of hundreds of Israeli civilians and soldiers, as well as wounding hundreds more.\textsuperscript{297} Once Israel’s demands for his surrender were ignored and it was determined that capturing him within Gaza City would lead to unacceptable levels of civilian casualties, Israel decided to resort to a targeted killing. On July 22, 2002, an Israeli aircraft bombed Shehadeh’s home; Shehadeh, his wife, three of his children, and eleven other civilians were killed, and over one hundred and fifty other civilians were injured.\textsuperscript{298}

Although there was little dispute that Shehadeh was a threat to Israel, the resulting aftermath and civilian casualties drew harsh global condemnation.\textsuperscript{299} Israel’s policy and means of carrying out targeted killings was harshly criticized by both NGOs (such as Amnesty International) and UN Charter Bodies (such as the Commission on Human Rights and UN Secretary General.)\textsuperscript{300} However, in 2003 the Human Rights Committee noted that when the rules of necessity and proportionality were strictly applied and no other alternative was available, targeted killings could be a permissible response to terrorist actions and actors taking “direct part in hostilities.”\textsuperscript{301}

\textsuperscript{296} PCATI, supra note 229, at para. 2.  
\textsuperscript{297} Blum & Heymann, supra note 3, at 152.  
\textsuperscript{298} Id. at 153.  
\textsuperscript{300} Kretzmer, supra note 145, at 173.  
When Israel controlled the Gaza strip between 1967 and 2005, the international community’s prevailing opinion was that Israel’s control and responsibility for the Palestinian civilians brought them under the rules set forth by the Fourth Geneva Convention.\textsuperscript{302} Israel’s control over the territory would thus impose norms of law enforcement and international human rights, imposing a high burden to justify targeted killings. However, when Israel fully withdrew from the Gaza strip in September, 2005 there was great legal uncertainty about which international norms should apply.\textsuperscript{303} While Israel asserted that it no longer had any responsibility for Palestinian civilians in Gaza due to withdrawal, the Palestinians asserted that Israel still had effective control over it rising to the level of occupation due to Israel’s control over the surrounding air space, sea water and international borders.\textsuperscript{304}

B. Public Committee Against Torture v. Israel

As a result of the controversial Shehadeh killing and international condemnation of the Israeli government’s policy of targeted killing, combined with the legal uncertainty surrounding the applicable international law, the Israeli Supreme Court heard what is believed to be the first modern judicial case regarding targeted killing.

In 2006, the Court (High Court of Justice) issued its judgment regarding a legal petition brought by the Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment (“PCATI v. Israel”) which challenged the legality of the Israeli government’s policy of targeted killing.\textsuperscript{305} When the petition was initially submitted in March, 2002, over 300 Palestinians, including 129 civilians, had been killed as the

\textsuperscript{302} Solomon, \textit{supra} note 112, at 514-515.
\textsuperscript{303} Solomon, \textit{supra} note 112, at 514.
\textsuperscript{304} \textit{Id.} at 517.
\textsuperscript{305} PCATI, \textit{supra} note 229.
result of Israel targeted killings since the beginning of the Second Intifada in 2000.  

Specifically, the question before the court concerned the “policy of preventative strikes which cause the death of terrorists... who plan, launch, or commit terrorist attacks in Israel. . . against both civilians and soldiers. These strikes at times also harm innocent civilians.” This was Israel’s (and perhaps the world’s) first judicial opinion regarding targeted killings in the counter-terrorism context, and was the result of close to four years of petitions, hearings, re-hearings, and delayed proceedings.

The petitioners challenged Israel’s policy of targeted killing as violating Israeli and international law, as well as basic human rights standards. The petitioners claimed violations on behalf of both the specific targets and the civilians killed during the implementation of the targeted killings. The petitioners asserted that because the Palestinian actors targeted were not members of another state nor backed by a nation-state, there was no armed conflict and thus the applicable legal standard was that of law enforcement. The court noted that within the law enforcement framework, “suspects are not to be killed without due process, or without arrest or trial. The targeted killings [arguably] violate the basic right to life, and no defense or justification is to be found for that violation.” The petitioners noted that these international legal norms came from both the Fourth Geneva Convention (and its two additional protocols) regarding the duties of occupiers of territory, as well as law enforcement norms established within customary international law.

To demonstrate international custom regarding the application of law enforcement norms to actions against terrorists in occupied territories, the

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306 Blum & Heymann, supra note 3, at 156.
307 PCATI, supra note 229.
308 See Eichensehr, supra note 228.
309 PCATI, supra note 229, at para. 3.
310 Id.
311 Id. at para. 4.
312 Id.
313 Id.
petitioners cited the conflicts between Britain and the IRA; Spain and the Basque underground; Italy and the Red Brigades; and Turkey and the Kurds.\(^{314}\)

The petitioners also argued that even when examined under the laws of armed conflict that the policy of targeted killings violates international law; specifically, they argued that it violated Common Article 3 of the Geneva Conventions. The petitioners rejected the claim that there could be any distinction besides “combatant” and “civilian,” and specifically rejected the idea of an “unlawful combatant.” Thus, under the Geneva Conventions, “terrorist organization members should be seen as having the status of civilians” and thus be accorded all of the rights and protections of civilians during armed conflicts.\(^{315}\) The petitioners recognized that a civilian who directly participated in combat could lose those protections, in accordance with the Geneva Conventions First Additional Protocol, but asserted that the civilian could only lose immunity from an attack “during such time that he is taking a direct and active part in hostilities, and only for such time that direct participation continues.”\(^{316}\) According to the strict interpretation posed by the petitioners, even if a civilian taking direct part in hostilities intended to later participate in hostilities, they would regain immunity as soon as they left the scene of battle or laid down their arms.

The petitioners argued that the lack of due process accorded to civilians who were targeted under the policy combined with the violation of the international customary law of proportionality was in practice a violation of international law.\(^{317}\) The petitioners cited the example of the targeting of alleged terrorist Salah Shehade as an example of the disproportionate nature of the targeted killings; Shehade, his wife, family, and twelve of his neighbors were killed

\(^{314}\) Id.
\(^{315}\) PCATI, supra note 229, at para. 5.
\(^{316}\) Id. at para. 6.
\(^{317}\) Id. at para. 8.
when Israel bombed his home on July 22, 2002.\textsuperscript{318} The petitioners also alleged that other targeted killings had been carried out in secret, and in at least one case, had resulted in innocent deaths due to mistaken identification of targets by the Israeli government.\textsuperscript{319}

The Israeli government responded by first stating that these arguments brought the “Court into the heart of the combat zone, into a discussion of issues which are operational \textit{par excellence}, which are not justiciable.”\textsuperscript{320} Israel asserted that the terrorist actions taken against it were “armed attacks” sufficient to justify the use of self-defense under Article 51 of the U.N. Charter. Israel took the position that the Palestinian terrorists were engaged in a long-standing conflict with Israel, and that as long as the conflict between the terrorists and Israel continued, the terrorists would be considered to be taking direct part in hostilities against Israel.\textsuperscript{321} Israel took the position that civilians who took part in the conflict were “legal targets for attack for as long as the armed conflict continues. . . since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.”\textsuperscript{322}

Essentially, Israel argued that the terrorists were “unlawful combatants” due to their continued participation in an “armed conflict,” and thus under a broad definition of “direct hostilities” would be considered as such until the conflicted ended. Israel argued for this position by asserting that a new category, “unlawful combatant,” should be considered to differentiate innocent civilians and combatants from actors such as the Palestinian terrorists. Israel argued that “unlawful combatants” within the geographic area of the conflict who are “actively

\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Id. at para. 9.
\textsuperscript{321} PCATI, supra note 229, at para. 10.
\textsuperscript{322} Id. at para. 11.
participating in the armed conflict is not that of civilians... [t]hey do not obey the laws of war, and thus they do not benefit from the rights and protections granted to legal combatants.

Israel argued in the alternative that even if the court did not accept its definition of “unlawful combatant,” members of terrorist organizations could still be targeted as civilians who had lost their immunity under the laws of armed conflict. Israel notes that, like many other nations, it is not a signatory to the First Protocol of the Geneva Conventions, but even if it was or the rules of the First Protocol were accepted as binding customary international law, a strict reading of the definition of taking “direct part” is flawed. Israel argued that “‘hostilities‘ is to be interpreted ac including such acts such as the planning of terrorist attacks, launching of terrorists, and command of a terrorist ring. . . [also] a person who plans, launches, or commits a terrorist attack [should be] considered to be taking a direct part in hostilities.” Israel argued that its ability to stop terrorist actions before they occurred would be significantly hampered if limited only to the exact moment where an act of terrorism was “directly” executed.

Regarding proportionality, Israel asserted that the principle of proportionality did not forbid military actions which may result in civilian deaths, and that proportionality should “be examined against the background of the inherent uncertainty which clouds all military activity,” as well as the specific circumstances and context of Israel’s conflict with the Palestinian terrorists. Israel asserted that it only uses targeted killing in exceptional circumstances when it is determined, after strict review, that no alternative is available. To demonstrate this review,

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323 Id. at para. 11.
324 Id. at para. 12.
325 Id.
326 Id.
327 PCATI, supra note 229, at para. 13.
Israel notes that several targeted killing operations were canceled when it was determined that despite the threat posed, too many civilian lives would be endangered.\textsuperscript{328}

The Israeli Supreme Court initially recognized that, in accordance with its past holdings, the conflict between the Palestinians and Israeli government was one of armed conflict.\textsuperscript{329} The Court notes that, relative to the proportion of the U.S. population killed in the 9/11 attacks, the numbers of civilians killed in Israel is significantly higher, and “the events of 9/11 were defined by the states of the world and by international organizations, with no hesitation whatsoever, as an ‘armed conflict’ justifying the use of counterforce.”\textsuperscript{330} Due to the existence of an armed conflict, the Court stated that international humanitarian law applied; this includes both Israeli public law and customary international law which applies to Israel “‘by force of the State of Israel’s existence as a sovereign and independent state.’”\textsuperscript{331} In contrast, noting that some parts of internal Israeli law may conflict with treaties to which Israel is not a party, “International treaty law which has no customary force is not part of our internal law.”\textsuperscript{332}

To confront critics who may state that Israel’s occupation and control of the Palestinian territories renders the conflict “non-international” and strictly one of internal law enforcement, the terrorist organizations they are in conflict with “have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law.”\textsuperscript{333} Thus, the Court applied norms of international humanitarian law from the fourth Hague Convention and the Fourth Geneva Convention (Geneva Convention Relative to the Protection

\begin{footnotes}
\footnotetext[328]{Id.\textsuperscript{328}}
\footnotetext[329]{Id. at para. 16. (‘‘Since late September 2000, severe combat has been taking place. . . It is not police activity. It is an armed conflict.’’) (citing HCJ 7015/02 Ajuri v. The Military Commander of the Judea and Samaria Area.)}
\footnotetext[330]{Id. at para. 17.}
\footnotetext[331]{Id. at para. 19 (internal citations omitted.)}
\footnotetext[332]{PCATI, supra note 229, at para. 19.}
\footnotetext[333]{Id. at para. 21.}
\end{footnotes}
The Court noted that balancing the human rights considerations of customary international law and its own military and security needs is the task of its decision in this case.

The Court analyzed whether the Palestinian terrorists are ‘combatants’ or ‘civilians’ under international humanitarian law. The Court finds that they are not combatants due to their lack of state affiliation and lack of adherence of the laws of war. The Court notes the difficulty with labeling the terrorists as “civilians,” as under international humanitarian law the definition of “civilian” is a negative one; a civilian is an individual who is not a combatant, and, for purposes of international law, a civilian loses civilian protections once they take direct part in hostilities. Thus, although it cannot find support for the position in the Hague or Geneva Conventions to recognize a third category of “unlawful combatant,” it concludes it can only move forward in its analysis by deeming the Palestinian terrorists to be “civilians who constitute unlawful combatants.” The Court stated that an individual unlawful combatant is “a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack.”

The Court next examined the doctrine of proportionality. The Court looked to Protocol I for the customary definition of proportionality within armed conflict; under Protocol I, an attack violated the principle of proportionality if it is “[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage

334 Id. at para. 20.
335 Id. at para. 25-26.
336 Id. at para. 28.
337 Id. at para. 31.
anticipated.”

Again, the Court stated that the determination of the proper standard is a necessary balancing between the need to protect civilians and the necessities of military action. They specifically noted that the killing of an “unlawful combatant” civilian did not require proportionality analysis on its own, and that it was only the innocent civilians who may be killed as a result of the targeted killing who must be taken into account for the proportionality analysis.

The Court noted the importance of protecting both its own civilians through preventative measures as well as protecting innocent civilians during counter-terrorism strikes, and that its duty to do so was dictated by the principle of proportionality. In other words, proportionality would be the needed balance “between security needs and individual rights.” In the end, the Court concluded that, summarized succinctly by Israeli Supreme Court Judge Beinisch, “Ultimately, when an act of ‘targeted killing’ is carried out in accordance with the said qualifications and in the framework of the customary laws of international armed conflict as interpreted by this Court, it is not an arbitrary taking of life, rather a means intended to save human life.”

In reaching its conclusion, the Court laid out a basic framework for determining whether an individual instance of “targeted killing” comported with applicable Israeli and International law. First, a civilian can be targeted if they “directly take part in hostilities”; hostilities being action “which by nature and objective are intended to cause damage to the army.” Second, a civilian must take direct part in said hostilities. While the Court emphasized this must be determined on a case-by-case basis, they held that direct “should not be narrowed merely to the

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338 PCATI, supra note 229, at para. 43 (citing Protocol I, § 51(5)(b)).
339 Id. at para. 46.
340 Id. at para. 63.
341 Id. Beinisch, P., concurring.
342 Id. at para. 33.
person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part.’ The same goes for the person who decided upon the act, and the person who planned it. ’’ 343 As an outer limit, the Court stated that those who supply food or medicine, general strategic analysis, or logistical support such as monetary aid could not be said to be “directly participating.” Third, the direct participation in hostilities could only justify a targeted killing for such time as they take a direct role in said hostilities. Again, the Court held that this must be determined on a case-by-case basis; the Court stated that an individual who has taken part in a single act re-gains his protection once that act is over, but an individual who commits many attacks and lives at a terrorist stronghold would be considered to be taking part in hostilities between individual acts. 344 The definition for “unlawful combatant” according to the Israeli Court is thus:

An unlawful combatant can be targeted if they take 1) direct part in 2) hostilities 3) for such time as they are taking a direct part in hostilities.

In order to determine whether an individual had reached the case-by-case thresholds for targeted killings, the Court laid out a cumulative four-part standard of judicial review. First, government actor carrying out the targeted killing carried the burden of demonstrating that it had a sufficient factual basis for determining the identity and “direct participation” of the target. Second, applying the principle of proportionality, an unlawful combatant could never be targeted “if a less harmful means can be employed.” Third, after every instance of targeted killing, an independent, retroactive investigation must be carried out “regarding the precision of the identification of the target and the circumstances of the attack upon him.” Finally, the retroactive

343 Id. at para. 37.
344 PCATI, supra note 229, at para. 39.
investigation must also analyze any collateral damage resulting in civilian deaths, and such collateral damage must meet the standard of proportionality.\textsuperscript{345}

C. Israel’s Current Use of Targeted Killing and Criticism

In light of the Court’s decision in 2006, Israel has continued to carry out targeted attacks against Palestinian terrorists. Allegedly these attacks have not comported with the Court’s announced standard in the \textit{PCATI} case; nor has Israel released publicly how it now makes factual and legal determinations prior to and during targeted strikes.\textsuperscript{346}

In response to frequent missile launches from Gaza into Israel, Israel launched a full-scale military response against Hamas forces in Gaza in December of 2008.\textsuperscript{347} During “Gaza War” from December 2008 to January 2009, along with military airstrikes against Hamas headquarters and government offices, Israel allegedly carried out targeted killings against Hamas militants using combat drones; these attacks apparently resulted in twenty-nine civilian deaths, according to a Human Rights Watch Report.\textsuperscript{348} However, it appears that the Israeli military attempted to comport with the PCATI standard of last resort, as several targets of attacks were contacted by telephone and SMS text messages prior to the attacks in an apparent attempt to have them surrender without the need to resort to a targeted killing.\textsuperscript{349}

Since the Gaza conflict in 2008-09, the Israeli military has shifted its use of drones and targeted strikes to mainly military operations. In March, 2009, Israeli unmanned drones destroyed a weapons convoy in Sudan that was allegedly operated by Iranian personnel and was

\textsuperscript{345} Id. at para. 40.
\textsuperscript{346} Alston Report, supra note 4, at para. 16-17.
\textsuperscript{347} Solomon, \textit{supra} note 112, at 518.
\textsuperscript{348} Drew, \textit{supra} note 269.
in the process of transporting weapons to Gaza. Approximately forty to fifty militants were killed in the strike.\textsuperscript{350} Then-Prime Minister Ehud Olmert did not deny that drone strikes occurred, and in fact confirmed Israel’s continuing use of drones. He boldly stated that “’[w]e operate in every area where terrorist infrastructures can be struck. . . We are operating in locations near and far, and attack in a way that strengthens and increases deterrence. There is no point in elaborating. Everyone can use their imagination. Whoever needs to know, knows.’”\textsuperscript{351} In February, 2010, Israel revealed a new “super-drone” craft with the capability to fly over 2,000 miles roundtrip without needing to re-fuel, jam electronic signals and launch missiles.\textsuperscript{352}

The Israeli Supreme Court’s decision has been criticized as broadly expanding the understandings of “direct participation” and “for such time” under IHL.\textsuperscript{353} For instance, while the ICRC specifically limited the definition of “direct” to “bearing arms before, during, or after an attack,” the Israeli Court recognized the wider scope of behaviors amounting to “direct” participation, such as providing services, acting as a human shield, and planning or directing an attack.\textsuperscript{354} The Court’s decision also expanded the duration of “for such time” from the hours following an attack to any time during the chain of events that comprised an individual’s participation with a given terrorist group.\textsuperscript{355} Supposedly the Court’s broad interpretation lowers the needed threshold needed to justify targeted killings through its “membership” theory, and if


\textsuperscript{351} Mahnaimi, supra note 347.

\textsuperscript{352} Simon McGregor-Wood, New Israeli Drone Can Fly to Iran, ABC NEWS, Feb. 22, 2010, http://abcnews.go.com/International/israeli-drone-hit-iran/story?id=9908441. The press conference and reveal of the drone was interpreted by some media outlets to be a message to Iran, as opposed to individual terrorists within the Palestinian territories.

\textsuperscript{353} See Eichensehr, supra note 228, at 1875.

\textsuperscript{354} Id.

\textsuperscript{355} Id. at 1876.
the actor carrying out the targeted killing “can prove that the target is an active terrorist organization member, direct participation and an immediate threat are presumed.” 356

However, the opinion’s use of setting extreme examples as the broad range to consider aspects of “direct hostilities” and “for such time” has been lauded as establishing a workable mechanism for evaluating the legal basis for targeted killings. 357 By identifying the outer realms of permissible killings and providing a standard for evaluating behavior within that scope, it has been said that the Court has created a valuable tool for evaluating the legality of targeted killings. 358

VI. PROPOSED NEW U.S. LEGAL MECHANISM

The Obama Administration has not indicated that it will halt or alter its current policy of targeted killings of al-Qaeda terrorists and other dangerous militants abroad using drones. In order to properly comport with international law and mitigate both domestic and world-wide criticism of the current targeted killing policy, the U.S. could adopt the targeted killing standard announced in PCATI. Congress could enact, and President Obama could sign into law, a statute providing for rigorous judicial review of targeted killings as laid out in PCATI; a Targeted Killing Review Court (“TKR Court”). This would simultaneously comport with current IHL and IHR standards, provide limited but assured transparency to the international community that targeted killings are not “arbitrary extra-judicial executions,” and help to assure that U.S. forces acting abroad are being held accountable when they do carry out targeted killings.

356 Id. at 1877.
358 Cassese, supra note 354, at 343.
By incorporating the hybrid armed conflict and law enforcement standard of PCATI through this TKR Court, the Obama Administration could provide for meaningful judicial review under international law and ensure that military and intelligence agents are not acting with carte blanche approval to carry out targeted killings worldwide. While some scholars have proposed systems of public post-killing investigations of C.I.A. actions\textsuperscript{359}, I believe that the complex nature of current drone technology allows for sufficient intelligence gathering justifies requiring a “targeted killing” warrant. Such a warrant could be obtained through \textit{ex parte} application to the TKR Court, and if a targeted killing must be carried out under emergency circumstances, the TKR Court could also provide a uniform mechanism for analyzing whether the proper circumstances existed to carry out a targeted killing. The U.S. already has a classified, Article III court which handles classified intelligence warrants, the Foreign Intelligence Surveillance Court. By basing the TKR Court on this court, I believe that the TKR Court can comport with the necessary requirements of the Fourth and Fifth Amendments, as well as the logical need for classifying such sensitive national security information.

\textbf{A. Military Review and FISA}

It is important to note that this proposed court will only be able to examine targeted killings carried out outside of the scope of recognized war. Federal courts are normally precluded from hearing challenges to discretionary military decisions;\textsuperscript{360} the courts are generally precluded from reviewing issues regarding foreign relations that are exclusively entrusted to the political branches under the doctrine of separation of powers.\textsuperscript{361} However, if the military acts

\textsuperscript{359} See Richard Murphy & Afsheen John Radsan, \textit{Due Process and Targeted Killing of Terrorists}, 31 CARDOZO L. REV. 405 (2009) (proposing “independent, intra-executive investigation of any targeted killing by the CIA. These investigations should be as public as is reasonably consistent with national security.”).


\textsuperscript{361} Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988).
beyond its jurisdiction or recognized scope of discretion, federal courts can hear challenges to
the action.\(^{362}\) Military intelligence actions have been held to be justiciable when the actions are
alleged to violate the rights of both U.S. and foreign citizens\(^ {363}\); thus, if the military acts beyond
its jurisdiction (i.e., the theater of war), it would be required to act through the TKR Court.

Certain controversial intelligence actions require prior judicial review. Surveillance
actions directed at the acquisition of the contents of communications exclusively between or
among foreign powers or from areas under the control of foreign powers must be authorized by
the Foreign Intelligence Surveillance Court (“FISA Court”).\(^ {364}\) The Foreign Intelligence
Surveillance Act (“FISA”), the President, through the Attorney General, can authorize such
electronic surveillance for up to a year.\(^ {365}\) The FISA Court is comprised of seven District Court
judges from seven separate U.S. judicial circuits who are publically appointed by the Chief
Justice of the United States; no judge can hear an application for electronic surveillance which
has been denied by another judge.\(^ {366}\) FISA provides for procedures requiring judges to prepare a
written statement of the reason for the denial.

FISA also provides that the Chief Justice will appoint three judges from the District
Courts or Courts of Appeal who together comprise a FISA court of review (“FISA Court of
Appeals.”) Upon motion of the U.S. government, a denied application can be submitted to the
FISA Court of Appeals.\(^ {367}\) Again, if the FISA Court of Appeals determines that denial was
proper, it must provide a written statement for the record of the reasons for its decision; denial by

organizations, and an Austrian citizen challenging U.S. army intelligence activities, such as warrantless electronic
surveillance; dismissed due to denial of class action certification.)
\(^{364}\) 50 U.S.C.A. § 1802(a).
\(^{365}\) 50 U.S.C.A. §§ 1801 et seq.
\(^{366}\) 50 U.S.C.A. § 1803(a).
\(^{367}\) 50 U.S.C.A. § 1803(b).
the FISA Court of Appeals can be, upon writ of certiorari, appealed to the U.S. Supreme Court. All records of decisions and appeals are transmitted under seal and kept confidential.

Applications made to the FISA Court must be made by a federal officer who is designated to do so by the FISA statute; currently this includes the Secretary of State, Secretary of Defense, Director of National Intelligence, Director of the Federal Bureau of Investigation, Director of the Central Intelligence Agency, and several Deputy Directors of the various branches. Only officials who have been appointed by the President with the advice and consent of the Senate (except for the Deputy Director of the FBI) may certify an application to the FISA Court. Each application to the FISA Court must be approved by the Attorney General, and include the required information specified under FISA. Further, in April of each year the Attorney General must submit a report to the Administrative Office of the United States Court and to Congress regarding the total number of applications and the disposition of each application, as well as keep the House Permanent Select Committee on Intelligence, Senate Select Committee on Intelligence and the Committee on the Judiciary of the Senate informed on a semi-annual basis of all surveillance activity occurring under FISA and the FISA Court.

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368 50 U.S.C.A. § 1803(b).
369 50 U.S.C.A. § 1803(a), (b).
371 Id.
372 50 U.S.C.A. § 1804. Along with the identity of the officer, a FISA Application requires, among other things: the identity of the specific target of the electronic surveillance; a statement of the facts and circumstances justifying the officers belief that the foreign target is indeed a foreign target or agent; a statement of the proposed minimization standards; a description of the information sought and the type of communications or activities which will be tracked; a basis for the certification that the information is of the type of foreign intelligence designated by FISA and that such information cannot be obtained by normal investigation. 50 U.S.C.A. § 1804(a)(1)-(9).
Although the FISA Court and the NSA’s use of surveillance techniques under FISA have been recently challenged by the ACLU\textsuperscript{375}, FISA has generally been upheld as being constitutional.\textsuperscript{376} FISA has been upheld not to violate Article III of the Constitution, the political question doctrine, or the separation of powers doctrine\textsuperscript{377}; the disparate treatment of domestic and foreign targets under FISA has been upheld as rationally related to the purposes of acquiring information necessary to national defense and the conduct of foreign affairs.\textsuperscript{378} Specifically, FISA has been held to meet the warrant requirements under the Fourth Amendment by providing a neutral and detached judicial officer;\textsuperscript{379} and comport with due process when applications are properly made in accordance with the FISA procedures.\textsuperscript{380} While the National Security Agency (“NSA”)’s claim that the AUMF pre-empted the need to follow FISA procedures was held to violate the Constitution\textsuperscript{381}, subsequent use against foreign targets and actors believed to be acting on behalf of foreign targets have been upheld when the government submits detailed and complete submissions comporting with FISA’s requirement.

**B. The Targeted Killing Review Court\textsuperscript{382}**

The FISA Court provides a sound and logical template for another Court requiring prior approval of an “intelligence” action; namely, a court designed to hear applications for targeted killings. The TKR Court would provide a mechanism for C.I.A. agents and military personnel acting outside recognized wars to obtain “targeted killing” warrants to ensure that they meet the


\textsuperscript{382} A full draft of the proposed statute is attached to this article as an addendum.
PCATI standard, and thus conform to standards of applicable international humanitarian law, human rights law and standards of law enforcement. The proposed enacting “TKR Court Statute” (“Statute”) would include the following:

Section 101 – Definitions: This section would include, arguably, the most important legal basis for the TKR Court. First, it would define “targeted killing” as “an action by a nation-state specifically intended to eliminate a specific individual who has been identified as a threat,” and note specifically that this is most frequently carried out by means of Predator Drone strike. Second, it would define “unlawful combatant” as the PCATI standard: “a civilian who takes a) direct part in b) hostilities c) for such time as they are taking a direct part in such hostilities.” It would define “direct” as “being the person who commits the physical act or those who have sent him, decided upon the act, or planned the act. This does not include those who supply food or medicine, general strategic analysis, or logistical support such as monetary aid.” “Hostilities” would be defined as “physical actions threatening the national security of the United States, the armed forces of the United States, or individual citizens of the United States.” Finally, for the unlawful combatant definition, it would define “for such time” as “the amount of time the individual takes direct part in hostilities as a continuing physical action or militant enterprise.” This definition comports with current international humanitarian law standards in a similar fashion to the PCATI standard, and is broader than the current MCA definition of “unlawful enemy combatant.”

Section 101 would also define “customary international law” as it is defined in the ICJ Statute; that is “international custom, as evidence of a general practice accepted by law; and the general principles of law recognized by civilized nations.” By allowing the ICJ definition, and thus the definition embraced by the United Nations, the rules of implicit self-defense and
sovereignty contained within Article 2 and 51 of the UN Charter are implicitly incorporated into
the Statute. Further, the reference to international custom allows the TKR Court to look to other
bodies of international law, such as the Geneva and Hague Conventions, without mandating that
they do so in a rigid manner. Finally, Section 101 would define national security as it is defined
in the MCA – as “the national defense and foreign relations of the United States.”

Section 102 – Targeted Killing Order. This section would provide the process for how to
obtain permission to carry out a targeted killing. If the President, through the Attorney General,
authorizes the targeted killing of an unlawful combatant, a warrant can be obtained if the
Attorney General certifies that: the targeted killing is directed at a civilian, non-combatant who
has lost their civilian protection due to taking direct part in hostilities against the United States;
the targeted killing will take place while the unlawful combatant is still taking direct part in the
hostilities, and can be confirmed to be doing so through verified information; no less harmful
means, such as arrest, interrogation, or trial, can prevent or halt the actions; no less harmful
means can be used to prevent potential collateral damage to civilians or property; and, most
importantly, the proposed targeted killing will meet the definitions of necessity and
proportionality under customary international law.

By providing that the targeted killing is an action meant to protect the national security of
the United States, the armed forces of the United States, or citizens of the United States, and only
when no other means can be used to prevent the harm along with the doctrines of necessity and
proportionality, the standard set here meets all of the requirements of international humanitarian
law, human rights and law enforcement norms. To protect national security and classified
information, the statute provides that all applications will be transmitted under seal, and only
opened in camera during appropriate judicial review.
Section 103 – Designation of Judges. This section will designate judges in a similar manner to FISA. The Chief Justice will publicly appoint 11 district court judges from at least seven districts to comprise the main “TKR Court.” No fewer than three shall reside within 20 miles of the District of Columbia. No judge will hear an application previously denied by another TKR Court judge. The TKR Court may also, on its own initiative, hold en banc hearings for reasons of uniformity or “a question of exceptional importance.” This section also provides for the similar structure of a “TKR Court of Appeals” and petition to the Supreme Court for further review. By not mandating a specific time frame for the granting of such applications, except for noting that “proceedings under this chapter shall be conducted as expeditiously as possible,” the TKR Court allows for the flexibility needed during times of heightened national security and need. Again, all records and proceedings will be kept under seal and classified.

Section 104 – Applications for court orders approving targeted killing. This section lays out the requirements necessary for a proper application for an order approving targeted killing. Applications are made to the Attorney General by a Federal Officer, in writing; a Federal Officer defined as “the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate.” The application must include the underlying facts and circumstances relied upon the applicant to conclude that: the target is an unlawful enemy combatant; the targeted killing will occur during the anticipated span of the hostilities sought to prevent or halt; that minimization procedures will be used to minimize civilian casualties and property damage; the hostilities are a threat to the United States, armed forces, civilians or national security; and

383 That full list includes the Secretary of State, Secretary of Defense, Director of National Intelligence, Director of the Federal Bureau of Investigation, Deputy Secretary of State, Deputy Secretary of Defense, Director of the Central Intelligence Agency, and Principal Deputy Director of National Intelligence.
such a threat cannot be prevented by other law enforcement means. Again, this helps reinforce the application of the *PCATI* standard of direct hostilities, necessity and proportionality in light of considerations of other possible, less harmful means.

The section also provides for a statement certifying permission needed, if any, from sovereign states through the Secretary of State or other diplomatic channels. Thus, importantly, the application must provide the presiding TKR Court judge with the information necessary to determine that the targeted killing will not violate another nation’s sovereignty or unintentionally provoke an international armed conflict. On the other hand, if permission is needed from said third-party nation to enter their sovereign territory and effect the targeted killing, a certification by the TKR Court could help convince the third-party nation that the targeted killing has been seriously debated and thought out, and is not reckless action. This level of analysis could be presented, in redacted form, in order to help make the case to the third-party of the necessity and could help preserve our reputation and standing within and among the international community.

Section 105 - Standard for Applications. This standard re-states the application standard in the form of approved applications. In order to be approved, the application made by the Federal Officer must meet the probable cause standard to believe that the target is an unlawful combatant under the statute. Further, it allows the judges to “consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target,” as well as the means to be used. Thus, if a target is known to have committed terrorist acts in the past which gravely threatened the United States, but no underlying factual basis can confirm that they are doing so at the moment of application, a judge can consider the broad range of circumstances on a case-by-case basis. This case-by-case analysis outlined by the *PCATI*
standard would give TKR Court judges the needed discretion to approve of, as well as
disapprove of, varying cases of application.

Section 106 – Emergency Actions. This section allows the Attorney General to authorize
emergency targeted killings when the application process cannot be completed before the
anticipated hostilities will occur. The Attorney General is still required by this section to follow
all of the standards that normally apply, and mandates full application under the statute, post-
targeted killing, as soon as practicable and no later than 7 days after the targeted killing action.
Whenever an emergency action is carried out, this section provides that a full thorough
investigation will be carried out by a Federal Officer designated by the designated presiding
TKR Court Judge. By allowing individual designation of the investigator after each emergency,
the statute does not hamstring the court by making the Attorney General responsible for
investigating his own improper action. Further, the emergency action provides for important
“exigent standards” and thus does not impinge upon emergency national security situations
which may inevitably arise.

Section 107 – Report of Attorney General to Congressional Committees. Finally, this
section provides that the Attorney General will make semi-annual reports to the House
Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and
the Committee on the Judiciary of the Senate regarding the number and dispositions of every
application under the statute. It further provides for a comprehensive review of all of the
applications every four years. By mandating such a reporting system, Congress will be
frequently updated regarding the U.S. government and Federal Officer’s use of targeted killings.
Congress will then have the ability of having private hearings to further investigate the use of
targeted killings. Under the statute, the Committees can issue reports regarding an analysis of
the killings, and whether the chapter should be amended, appealed, or permitted to continue. Thus, the voting public will know that targeted killings carried out by the U.S. government are being closely scrutinized, and not swept under the rug.

Overall, I believe that the TKR Court provides for a rigid system of Article III judicial review; comports with standards of applicable domestic and international law; and provides a mechanism for both domestic and international accountability.

VII. CONCLUSION

One of the nicknames for U.S. drone strikes that have been adopted by tribesmen in Pakistan is “bangana” – the Pashto word for “thunderclap.”\(^{384}\) The civilians living in Pakistani tribal areas have every reason for equating Predator Drone strikes to thunder; the strikes come out of nowhere, and many of the tribesmen have no idea why they occur. Drone strikes in Pakistan alone have been estimated to have killed over 1,800 people\(^{385}\); while these strikes are likely necessary and proportionate to the grave threat they pose, these attacks cannot continue without some measure of accountability. While military strikes resulting in civilian casualties in the past have been justified due to a lack of knowledge, drone technology has advanced to a point where the U.S. government can gather the exact numbers and identities of possible civilian casualties. When Betullah Mehsud was killed, the C.I.A. agents had been observing him for two hours, and were able to gather information about whose home he was staying at (his father-in-law’s); who was at the home with him (his wife, in-laws, and eight Taliban fighters); and his current state of health (he was receiving an intravenous drip to treat a kidney disease.) Such prior knowledge could surely have been properly scrutinized by a judge to determine whether or


\(^{385}\) Id.
not a strike is proportionate or not within the two hours that that the Predator drone hung over Mehsud and observed him. In the context of all of the known facts and circumstances about Mehsud’s prior acts and threat to national security he likely posed, *some* sort of judicial review could help salvage our reputation abroad and at home.
APPENDIX
PROPOSED Targeted Killing Court Statute

Author: Michael Epstein

§ 101 – Definitions

As used in this subchapter,

(a) “Targeted killing” means –

(1) action by a nation-state specifically intended to eliminate a specific individual who has been identified as a threat, or

(2) “the targeting of a specific individual to be killed, increasingly often by means of high technology, remote-controlled Predator drone aircraft wielding missiles.”

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(b) “unlawful combatant” means a civilian who

(1) can be targeted if they take a) direct part in b) hostilities c) for such time as they are taking a direct part in hostilities;

(A) “direct” being the person who commits the physical act or those who have sent him, decided upon the act, or planned the act. This does not include those who supply food or medicine, general strategic analysis, or logistical support such as monetary aid;

2

(B) “hostilities” being physical actions threatening the national security of the United States, the armed forces of the United States, or individual citizens of the United States; and

(C) “for such time” being the amount of time the individual takes direct part in hostilities as a continuing physical action or militant enterprise.

(c) “customary international law” means

(1) international custom, as evidence of a general practice accepted by law; and

(2) the general principles of law recognized by civilized nations.

3

(d) “National security” – means the national defense and foreign relations of the United States.


2 PCATI, at para. 37.

3 ICJ Statute Art. 38(1).
§ 102 –Targeted Killing order

(a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize the targeted killing of an unlawful combatant taking direct part in hostilities under this subchapter to prevent or halt such hostilities if the Attorney General certifies in writing under oath that--

(A) the targeted killing is solely directed at a civilian, non-combatant, who has lost their protection under customary international law and become an “unlawful combatant”

(i) by “taking direct part in hostilities,” meaning that they have or will carry out an active role in a hostile act towards the national security of the United States, armed forces of the United States, or individual citizens of the United States; and

(ii) continues to take a direct role in the hostilities for such time that the hostile action is planned, intended or previously has been carried out;

(B) the anticipated target of the targeted killing has been identified as an unlawful combatant based upon thoroughly verified information;

(C) no less harmful means can be used, such as arrest, interrogation or trial, to prevent or halt the hostilities;

(D) no less harmful means can be used to prevent any potential collateral damage to civilians or property, and the harm to civilians or property is proportional; that is;

(i) civilians might be harmed due to their presence inside of a hostile target, such as civilians working in an militant base; civilians might be harmed when they live or work in, or pass by, targets; at times, civilians may be forced to serve as “human shields,” and may be unable to protect themselves from a targeted strike;

(E) the proposed actions with respect to such targeted killing meet the definitions of “taking direct part in hostilities,” under section 101 of this title and necessity and proportionality under customary international law.

(2) A targeted killing authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the procedures of proportionality and necessity adopted by him in accordance with customary international law. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 108 of this title.

(3) The Attorney General shall immediately transmit under seal to the court established under section 103 of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless--

(A) an application for a court order with respect to the targeted killing is made under section 104 of this title; or

(B) the certification is necessary to determine the legality of the targeted killing under section 106 of this title.
§ 103. Designation of judges

(a) Court to hear applications and grant orders; record of denial; transmittal to court of review

(1) The Chief Justice of the United States shall publicly designate 11 district court judges from at least seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving targeted killing anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection (except when sitting en banc under paragraph (2)) shall hear the same application for targeted killing under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing targeted killing under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b) of this section.

(2)(A) The court established under this subsection may, on its own initiative, or upon the request of the Government in any proceeding, hold a hearing or rehearing, en banc, when ordered by a majority of the judges that constitute such court upon a determination that--

(i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(ii) the proceeding involves a question of exceptional importance.

(B) Any authority granted by this chapter to a judge of the court established under this subsection may be exercised by the court en banc. When exercising such authority, the court en banc shall comply with any requirements of this chapter on the exercise of such authority.

(C) For purposes of this paragraph, the court en banc shall consist of all judges who constitute the court established under this subsection.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this chapter shall be conducted as expeditiously as possible. The record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.

(d) Tenure

Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the judges first designated under subsection (a) of this section shall
be designated for terms of from one to seven years so that one term expires each year, and that judges first
designated under subsection (b) of this section shall be designated for terms of three, five, and seven
years.

(e)(1) Three judges designated under subsection (a) of this section who reside within 20 miles of the
District of Columbia, or, if all of such judges are unavailable, other judges of the court established under
subsection (a) of this section as may be designated by the presiding judge of such court, shall comprise a
petition review pool which shall have jurisdiction to review petitions filed pursuant to this title.

(2) Not later than 60 days after the enactment of this statute, the court established under subsection (a) of
this section shall adopt and, consistent with the protection of national security, publish procedures for the
review of petitions filed pursuant to this title by the panel established under paragraph (1). Such
procedures shall provide that review of a petition shall be conducted in camera and shall also provide for
the designation of an acting presiding judge.

(f)(1) A judge of the court established under subsection (a), the court established under subsection (b) or a
judge of that court, or the Supreme Court of the United States or a justice of that court, may, in
accordance with the rules of their respective courts, enter a stay of an order or an order modifying an
order of the court established under subsection (a) or the court established under subsection (b) entered
under any title of this chapter, while the court established under subsection (a) conducts a rehearing, while
an appeal is pending to the court established under subsection (b), or while a petition of certiorari is
pending in the Supreme Court of the United States, or during the pendency of any review by that court.

(2) The authority described in paragraph (1) shall apply to an order entered under any provision of this
chapter.

(g)(1) The courts established pursuant to subsections (a) and (b) of this section may establish such rules
and procedures, and take such actions, as are reasonably necessary to administer their responsibilities
under this chapter.

(2) The rules and procedures established under paragraph (1), and any modifications of such rules and
procedures, shall be recorded, and shall be transmitted to the following:

(A) All of the judges on the court established pursuant to subsection (a) of this section.

(B) All of the judges on the court of review established pursuant to subsection (b) of this section.

(C) The Chief Justice of the United States.

(D) The Committee on the Judiciary of the Senate.

(E) The Select Committee on Intelligence of the Senate.

(F) The Committee on the Judiciary of the House of Representatives.

(G) The Permanent Select Committee on Intelligence of the House of Representatives.

(3) The transmissions required by paragraph (2) shall be submitted in unclassified form, but may include
a classified annex.
(h) Nothing in this chapter shall be construed to reduce or contravene the inherent authority of the court established under subsection (a) to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court.
§ 104. Applications for court orders approving targeted killing

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving targeted killing under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include--

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the specific target of the targeted killing;

(3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--

(A) the target of the targeted killing is a civilian unlawful combatant who has, is or will take direct part in hostilities;

(B) the targeted killing will occur while the unlawful combatant continues to take a direct role in the hostilities for such time that the hostile action is planned, intended or previously has been carried out;

(4) a statement of the proposed minimization of collateral damage procedures;

(5) a description of the hostile act sought to be prevented and the means the unlawful combatant has used, is currently using or will use to carry out the hostile act;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, --

(A) that the certifying official deems the hostile act sought to be halted or prevented a threat to the national security of the United States, the armed forces of the United States, or an individual citizen or citizens of the United States;

(B) that a significant purpose of the targeted killing is to protect the national security of the United States;

(C) that such a threat cannot reasonably be prevented by normal law enforcement or investigative techniques;

(D) that such potential or anticipated collateral damage to civilians or property cannot reasonably be prevented by normal law enforcement or investigative techniques; and

(7) a summary statement of the means by which the targeted killing will be effected and a statement whether consultation, through the Secretary of State or other diplomatic officer is required to effect the targeted killing;
(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

(9) a statement of the period of time for when the targeted killing will be effected, and if the nature of the intelligence underlying this application is found to be incorrect or inaccurate the exigency strategy for terminating the targeted killing operation.

(b) Additional affidavits or certifications
The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information
The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 105 of this title.

(d) Personal review by Attorney General
(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) of this section an application under that subsection for a target described in section 102 of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) of this section for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) of this section for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to supervise
the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.
Section 105 – Standard for Applications

(a) Necessary findings
Upon an application made pursuant to section 104 of this title, the judge shall enter an ex parte order as requested or as modified approving the targeted killing if he finds that--

(1) the application has been made by a Federal officer and approved by the Attorney General;

(2) on the basis of the facts submitted by the applicant there is probable cause to believe that--

(A) the target of the targeted killing is an civilian unlawful combatant: Provided, That no United States person may be considered an unlawful combatant solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the targeted killing is directed is being used, or is about to be used, by unlawful combatant;

(3) the proposed minimization of collateral damage procedures meet the definition of necessity and proportionality under customary international law; and

(4) the application which has been filed contains all statements and certifications required by section 104 of this title.

(b) Determination of probable cause
In determining whether or not probable cause exists for purposes of an order under subsection (a)(2) of this section, a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

(c) Specifications and directions of orders
(1) Specifications

An order approving targeted killing under this section shall specify--

(A) the identity, if known, or a description of the specific target of the targeted killing identified or described in the application pursuant to section 104(a)(3) of this title;

(B) the nature and location of each of the facilities or places at which the targeted killing will be directed, if known;

(C) the type of hostile action sought to be halted or prevented;

(D) the means by which the targeted killing will be effected and whether physical entry via military or intelligence personnel will be used to effect the targeted killing; and

(E) the period of time during which the targeted killing is approved.

(2) Directions

An order approving a targeted killing under this section shall direct--
(A) that the minimization of civilian and property collateral damage procedures be followed;

(B) that, upon the finding of the applicant that a less harmful means may be used, those means must be implemented with the minimization of civilian and property collateral damage procedures outlined in the initial application.
§ 1806. Emergency Actions

(a)(1) Notwithstanding any other provision of this subchapter, the Attorney General may authorize the emergency employment of targeted killing if the Attorney General---

(A) reasonably determines that an emergency situation exists with respect to the employment of targeted killing to prevent or halt hostile action before an order authorizing such targeted killing can with due diligence be obtained;

(B) reasonably determines that the factual basis for the issuance of an order under this subchapter to approve such targeted killing exists;

(C) informs, either personally or through a designee, a judge having jurisdiction under section 103 of this title at the time of such authorization that the decision has been made to employ emergency targeted killing; and

(D) makes an application in accordance with this subchapter to a judge having jurisdiction under section 103 of this title as soon as practicable, but not later than 7 days after the Attorney General authorizes such targeted killing.

(2) If the Attorney General authorizes the emergency employment of targeted killing under paragraph (1), the Attorney General shall require that the minimization of collateral civilian and property damage procedures required by this subchapter for the issuance of a judicial order be followed.

(b) Post emergency targeted killing review by district court

Whenever an emergency targeted killing is carried out under section (a) of this title, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed retroactively by a Federal Officer designated by the presiding Judge under section 103 of this title, and will scrutinize the targeted killing in accordance with the standards of sections 102, 104 and 105 of this title.

(c) Consultation with Federal law enforcement officer

(1) Federal officers who conduct targeted killings to prevent direct hostile actions against the United States, the armed forces of the United States or citizens of the United States under this title may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against

(A) actual or potential attack or other grave hostile acts of unlawful combatants;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a unlawful combatant; or

(C) clandestine intelligence activities by an intelligence service or network of an unlawful combatant.
§ 107 – Report of Attorney General to Congressional committees; limitation on authority or responsibility of targeted killings of Congressional committees; report of Congressional committees to Congress

(a)(1) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, and the Committee on the Judiciary of the Senate, concerning all targeted killings under this subchapter. Nothing in this subchapter shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.

(2) Each report under the first sentence of paragraph (1) shall include a description of--

(A) the total number of applications made for orders and extensions of orders approving targeted killing under this subchapter;

(B) a full description of the circumstances and following results of each targeted killing, included known and estimated resultant deaths and property damage; and

(C) the total number of emergency employments of targeted killing under section 105(a) of this title and the total number of subsequent orders approving or denying the validity of such targeted killing.

(b) On or before one year after the enactment of this title, and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this chapter. Said reports shall include but not be limited to an analysis and recommendations concerning whether this chapter should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment.