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## Killing by Drone: Towards Uneasy Reconciliation with the Values of a Liberal State

Tom Farer\* & Frederic Bernard\*\*

Whatever one's philosophical or even theological position, a society is not the temple of value-idols that figure on the front of its monuments or in its constitutional scrolls; the value of a society is the value it places upon man's relation to man.

Maurice Merleau-Ponty<sup>1</sup>

### ABSTRACT

The occurrence of a terrorist act frequently prompts governments to enact a wide array of preventive measures, some of which grate against human

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1. MAURICE MERLEAU-PONTY, HUMANISM AND TERROR: THE COMMUNIST PROBLEM, at xiv (John O'Neill trans. 2000).

rights norms. Among the most problematic is targeted killing. Developments in drone technology have made drones the principal means by which the United States kills suspected terrorists and have allowed a dramatic expansion of this lethal measure's use. Since the killing of suspects outside a structured battlefield or within the context of an interstate war is, by its nature, a form of summary execution, it is not self-evidently reconcilable with the human right to life and therefore with the core values of a liberal state. Nevertheless, we conclude that reconciliation is at least theoretically possible if drone (or any other form of targeted) killing is restrained by a process with certain quasijudicial features in which the totality of the relevant international norms are consistently applied. The relevant norms are embedded in the law determining the legitimacy of recourse to force (what lawyers call the *jus ad bellum*) and in the body of humanitarian law (essentially the Geneva Conventions and the Hague Rules), as well as in human rights law (above all, the International Covenant on Civil and Political Rights (ICCPR) and interpretations thereof by authoritative institutions). Without denying the existence of a number of gray areas, we attempt to illustrate the real-world implications of the normative framework we propose.

## I. INTRODUCTION: EXTRAORDINARY MEASURES AND THE LIBERAL STATE

The threat of a terrorist act inclines governments to initiate preventive measures which grate against human rights. The goal of preventing new terrorist attacks stems partly from the government's responsibility to guarantee its population's safety and partly from the pressure coming from the population to *feel* reassured, a feeling that can at least initially be fostered by violent activity culminating in dead bodies which can plausibly be identified as terrorists.<sup>2</sup> At the same time, governments can exploit understandable, popular anxiety to tighten their grip on power and, if their democratic vocation has always been notional, suppress criticism and political competition.<sup>3</sup>

In this article we address the question of the extent to which it is possible to normalize a particularly problematic special measure, namely targeted killing, without coincidentally subverting the general principles undergirding liberal governance. One of those principles is acceptance of a certain level of societal risk in order to limit the state's capacity to intervene in the quotidian life of the citizenry.<sup>4</sup> Through the accumulation of measures adopted

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2. BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 2 (2006).
  3. DAVID L. ALTHEIDE, *TERRORISM AND THE POLITICS OF FEAR* 15 (2006). To describe this phenomenon, Olivier de Schutter uses the words "windfall effect" ("*effet d'aubaine*"), see Olivier de Schutter, *La Convention Européenne des Droits de l'Homme à l'Épreuve de la Lutte Contre le Terrorisme*, *REVUE UNIVERSELLE DES DROITS DE L'HOMME* 185, 204 (2001).
  4. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 284–85 (2006).

to prevent terrorist acts, a liberal state can undermine itself and over time cease to be liberal;<sup>5</sup> in other words, it can fundamentally alter what Maurice Merleau-Ponty once called “the value it places upon man’s relation to man.”<sup>6</sup>

Targeted killing is only one of the array of measures designed to interrupt as early as possible any process that may—or may not—lead to a terrorist act.<sup>7</sup> States’ ambition to intervene precociously against individuals and organizations perceived to be hostile and potentially violent is mirrored by aggressive extensions of criminal law to the end of “surrounding” the terrorist act itself by criminalizing related behaviors. To use Walter Laqueur’s metaphor, the idea is to “[d]rain the swamp, [so that] the mosquitoes will disappear.”<sup>8</sup> To do so, states have criminalized membership in or financial contributions to nominally philanthropic or social service organizations deemed supportive of terrorism, as well as speech deemed to incite terrorism.<sup>9</sup> In short, the concept of criminal conspiracy is considerably, one might say dangerously, extended.

In addition, governments have increased surveillance of the citizenry as exemplified by several secret programs (such as PRISM) authorized by the Bush administration and maintained by President Obama to monitor communications.<sup>10</sup> Moreover, with respect to persons suspected of involvement in terrorist conspiracies, some states have loosened or been accomplices to a loosening of the prohibition of brutal and degrading interrogation.<sup>11</sup>

Another common preventive measure is the relaxation of rules regarding preventive detention. After 9/11, for instance, the United Kingdom adopted the Anti-Terrorism, Crime and Security Act (2001) and allowed the indefinite detention without charge or trial of immigrants suspected of terrorist

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5. See the words written in 1943 by the English Catholic thinker CHRISTOPHER DAWSON, *THE JUDGMENT OF THE NATIONS* 138 (1942) quoted in TOM BINGHAM, *THE RULE OF LAW* 159 (2010): “As soon as men decide that all means are permitted to fight an evil then their good becomes indistinguishable from the evil that they set out to destroy.”

6. MERLEAU-PONTY, *supra* note 1, at xiv.

7. DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 28 (2007) “[V]irtually all of the Bush administration’s most controversial initiatives in the war on terror have been defended in preventive terms.”

8. WALTER LAQUEUR, *NO END TO WAR: TERRORISM IN THE 21ST CENTURY* 11 (2003).

9. See the UN Convention UN Sec. Council Res. 1373, U.N. Doc. S/RES/1373 (2001). See Terrorism Act, § 1 (2006): “This [section] applies to a Statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.” Compare Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2180 (2006).

10. James Bamford, *They Know Much More Than You Think*, N.Y. Rev. Books, 15 Aug. 2013.

11. David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 *VA. L. REV.* 1425, 1436–40 (2005). See also Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC, (Oct. 2003): “To counter an enemy who relies on stealth and surprise, the most valuable tool is information, and often the only source of that information is the enemy itself.”

connections who could not be sent back to their country of origin because of the non-refoulement principle.<sup>12</sup> Then, after the July 2005 bombings in London, Prime Minister Tony Blair proposed to extend the length of precharge detention from fourteen to ninety days, a proposal ultimately rejected by the House of Commons due to an unusual breaking of ranks by members of the majority party.<sup>13</sup> Still another problematic move illustrated by the British case is the relaxing of constraints on the use of lethal force by members of the security services. This relaxation in the United Kingdom became public knowledge following the killing of a Brazilian citizen mistaken for a terrorist bomber in the London underground.<sup>14</sup>

Popular acceptance of aggressive measures threatening to human rights often stems not only from the trauma inflicted by attacks on civilian targets with their implicit message that no one is safe, but also from the application of exceptional measures primarily against members of an easily identified minority group which shares certain generic characteristics with the perpetrators. A twentieth century instance in the United States is the sweeping measures taken in 1922 by the US authorities against immigrants (mostly from eastern and southern Europe) after a series of anarchist bombings (the so-called *Palmer Raids*).<sup>15</sup> After 9/11, the use of terrorist profiles inevitably had a disproportionate effect on Muslims in various Western countries. Obviously the extensive use of profiles rubs along uneasily with a cardinal value of Western liberal democracies: the principle of nondiscrimination on grounds of national origin, religion, or skin color.

Framing the debate as a struggle between “us” and an ethnically, religiously, or racially defined “them” coincidentally tends to produce a discursive characterization of the problem as one of the rights of the population as a whole balanced against the notional ones of a few dangerous individuals. Predictably, that framing paves the way for the conclusion that, given the disproportion between these two competing values, the interests of the majority should prevail against what has come to be seen as the merely “conditional” rights of individuals or suspect minorities. This reasoning has been used, for instance, to defend the use of torture and other cruel and

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12. Anti-Terrorism, Crime and Security Act, Pt. 4 (2001), available at <http://www.legislation.gov.uk/ukpga/2001/24/contents>; Mark Elliott, *United Kingdom: Detention Without Trial and the “war on Terror,”* 4 INT’L J. CONST. L. 553 (2006). This provision has been struck down by the House of Lords in its judgment: *A (FC) v. Secretary of State for the Home Department* [2004] UKHL 56 (appeal taken from Eng.).
  13. Matthew Tempest, *Blair Defeated on Terror Bill*, GUARDIAN, 9 Nov. 2005. Detention length was, however, extended to twenty-eight days. See Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects* 4 HOMELAND SECURITY AFF. 1, 17 (2008).
  14. CONOR GEARTY, CIVIL LIBERTIES 85–86 (2007); TARIQ ALI, ROUGH MUSIC: BLAIR, BOMBS, BAGHDAD, LONDON, TERROR 1 (2005).
  15. CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 205 (2005).

degrading measures after 9/11.<sup>16</sup> It also underlies the rationale for targeted killing.

The argument generally invoked to justify radical measures is that limits on state power—including human rights and law-of-war norms—cannot be applied or at least must shrink in times of crisis, since in Clinton L. Rossiter's words, they constitute "*luxury products*."<sup>17</sup> Governments explicitly or implicitly take the position that, however regrettable, certain measures are indispensable in practice to protect the population from terrorist attacks.<sup>18</sup>

If one accepts, as we do, Louise Richardson's conclusion that the causes of terrorism lie not in objective conditions of poverty, but in *subjective perceptions of persecution and injustice*,<sup>19</sup> radical preventive measures can function as biographical triggers precisely because those measures bypass norms restraining the unjust exercise of state power. Consequently they can generate an emotional link between the terrorists and the wider community from which the former seek recruits, funds, and at worst, noncooperation with the authorities. The link is a shared sense of victimhood.<sup>20</sup>

## II. TARGETED KILLING

We propose restraints on summary execution, whether by drone or other methods, not only in order to defend human rights for their own sake, but

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16. STEFAN SOTTIAUX, *TERRORISM AND THE LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION* 8 (2008).

17. CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 5 (1948). "[T]he complex system of government of the democratic, constitutional State is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis. Civil liberties, free enterprise, constitutionalism, government by debate and compromise—these are strictly luxury products."

18. A complementary argument holds that terrorist acts are "successes" whose energizing effects are likely to produce new terrorist recruits and funds. See MICHAEL WALZER, *ARGUING ABOUT WAR* 138 (2005). The end, however, is identical.

19. LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* 20 (2006). Compare with the notion of "relative deprivation" developed by TED ROBERT GURR, *WHY MEN REBEL* 24 (1970): "Relative deprivation is defined as actors' perception of discrepancy between their value expectations and their value capabilities. Value expectations are the goods and conditions of life to which people believe they are rightfully entitled. Value capabilities are the goods and conditions they think they are capable of getting and keeping."

20. RICHARDSON, *supra* note 19, at 208 (about pictures showing evidence of prisoners' abuse in American-controlled prisons such as Abu Ghraib):

We will never know just how many young men were moved to join terrorist groups in anger and outrage at these photographs, nor how many others resolved that they would never lift a finger to help the US in its campaign against terrorism. I believe we can safely assume that the numbers are very large. These photographs, and the failure to repudiate them conclusively by holding the most senior people responsible, has made the crucial task of driving a wedge between the terrorists and the communities that produce them immeasurably more difficult.

also in the belief that they could reduce the terrorist threat. It seems likely to us that extraordinary measures may actually aggravate the all-too-real danger. As David Kilcullen, a well-known authority on counterterrorism and a former adviser to General David Petraeus, has warned, there is

a “ladder of extremism” that shows the progress of a jihadist. At the bottom is the vast population of mainstream Muslims, who are potential allies against radical Islamism as well as potential targets of subversion, and whose grievances can be addressed by political reform. The next tier up is a smaller number of “alienated Muslims,” who have given up on reform. Some of these join radical groups, like the young Muslims in North London who spend afternoons at the local community center watching jihadist videos. They require “ideological conversion”—that is, counter-subversion, which Kilcullen compares to helping young men leave gangs [ . . . ]. A small number of these individuals, already steeped in the atmosphere of radical mosques and extremist discussions, end up joining local and regional insurgent cells, usually as the result of a “biographical trigger—they will lose a friend in Iraq, or see something that shocks them on television.” With these insurgents, the full range of counterinsurgency tools has to be used, including violence and persuasion. The very small number of fighters who are recruited to the top tier of Al Qaeda and its affiliated terrorist groups are beyond persuasion or conversion. “They’re so committed you’ve got to destroy them,” Kilcullen said. “But you’ve got to do it in such a way that you don’t create new terrorists.”<sup>21</sup>

## A. On the Realism of International Law

Whatever else it may be, terrorism is violence that transgresses moral limits.<sup>22</sup> Since a governmental response emphasizing the summary application of lethal means risks transgressing moral limits, it correspondingly threatens to blur the distinction between legitimate and illegitimate violence.

That potential for blurring the distinction between authorized and private violence should incentivize governments to bind themselves publicly and in practice to employ lethal means strictly within the normative constraints which apply universally: the human rights and humanitarian law conventions, the principles of customary international law underlying those conventions, and the United Nations Charter. All are relevant because respect for international law extends both to a state’s relationship with other states (the UN Charter) and to a state’s relationship with not only its own nationals but with humanity as a whole, the bearer in our time of indissoluble rights. A

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21. George Packer, *Knowing the Enemy: Can Social Scientists Redefine the “War on Terror”?*, *NEW YORKER*, 18 Dec. 2006.

22. ALEX P. SCHMID, *POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES, AND LITERATURE* 109 (1984).

persuasive declaration of intent to operate within the confines of global law requires demonstrations of respect for interpretations of that law emanating from the courts and other bodies authorized to interpret it, such as the International Court of Justice, the Human Rights Committee established by the ICCPR, and the various regional human rights courts and commissions.

Persons eager to confront transnational terrorism by every means that strikes them as tactically efficient often disparage international law, especially human rights law, humanitarian law, and the UN Charter restraints on the use of force as rigid obstacles to an efficient counter-terror strategy. They portray these restraints as obstacles built on Utopian premises in less dangerous times. Their arguments grossly understate the law's tolerance of exceptional, albeit not unlimited, measures for protecting the security of the citizen.

Take the example of secret surveillance. By its nature, secret surveillance reduces the potential scope of the right to privacy. What a liberal interpreter of the right must do is identify the optimal point for reconciling individual rights and community interests, and then devise or reinforce means for restraining excessive zeal in its use. Restraint requires a balancing test applied by judicial or at least quasijudicial bodies rather than the surveillance bureaucrats who face punishment for failure to detect real conspiracies but not for excessive zeal in interpreting their mandate.<sup>23</sup> By analogy to the assessment process in cases of collateral damage from artillery and aerial bombardment, agents of the state must weigh the degree of proposed encroachment on the right to privacy against the importance of the information sought, the probability that the proposed incursion on privacy rights will produce that information, and the difficulty of obtaining it by less intrusive means. The burden of persuasion must rest on the state since it, after all, has far superior means for meeting it than an appointed or self-appointed representative of the public or the necessarily unknowing target.

Other rights, for instance to association and expression, also are subject to this balancing test.<sup>24</sup> The test is written into the very statement of many rights in that the ICCPR declares them subject to limits required for public health

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23. See European Convention on Human Rights, art. 8, § 2, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter ECHR]:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and *is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.* (emphasis added)

24 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 4, U.N. Doc. A/6316 (16 Dec. 1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

and security.<sup>25</sup> Moreover, most rights are derogable in times of emergency.<sup>26</sup> It is therefore apparent that international law provides states with considerable license to employ measures intended to prevent and deter. Only a few rights—principally, of course, the right to life, the right to protection from torture and cruel, inhuman, and degrading treatment; and the right to due process—are unqualified.<sup>27</sup> Not only the ICCPR, but most regional human rights agreements contain derogation clauses.<sup>28</sup>

Derogation clauses exist precisely in order to prevent emergency conditions from creating legal black holes; they are there, in other words, to inhibit abusive suspension or denial of rights.<sup>29</sup> Pursuant to these emergency clauses, when a state faces a public emergency or a war, it is allowed to suspend rights to the extent strictly necessary under the circumstances. In the context of Northern Ireland in the 1990s, for example, the United Kingdom derogated from the ICCPR and from the European Convention of Human Rights (ECHR) regarding the length of the period between the arrest of “terrorist” suspects and the judicial control of their detention.<sup>30</sup>

Nevertheless, some advocates argue that awful dangers stemming from new technologies make virtually any but the most elastic limits on executive discretion untenable.<sup>31</sup> It is true that individuals can cause far greater damage today than they ever could before. However, technological change is not one-sided, and today’s governments enjoy far more powerful technologies to identify and track dangerous persons, to effect their capture, and, where absolutely necessary, to eliminate them, the use of drones (UCAVS) being a paramount example. Thus, it is not demonstrable that the march of technology requires governments to transcend individual rights in order to protect collective interests.

## B. Needed: A Warrant to Kill

Although there exists no agreed upon definition of targeted killings, they may be usefully described as “the intentional, premeditated and deliberate use of lethal force, by states or their agents acting under color of law, or by

25. See *id.* arts. 19, 22.

26. See *id.* art. 4.

27. Human Rights Committee, General Comment 29, *States of Emergency* (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 Aug. 2001). See also *A (FC) v. Secretary of State for the Home Department* [2004] UKHL 56 (appeal taken from Eng.). (Belmarsh Case).

28. See, for instance, ECHR, *supra* note 23, art. 15; American Convention on Human Rights, art. 27, signed 22 Nov. 1969, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force 18 July 1978).

29. JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* (1994).

30. See *Brannigan and Mc Bride v. UK*, App. Nos. 14553/89, 14554/89, (26 May 1993).

31. See WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* (2000).

an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”<sup>32</sup> To this point, it appears that US and UK-controlled drones have carried out targeted killings in Afghanistan, Libya, Iraq, Pakistan, Yemen, and Somalia, while Israeli drones have conducted similar missions in Palestinian territories.<sup>33</sup> In the view of the current UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the majority of these drone strikes have taken place in the context of armed conflicts as defined by international humanitarian law.<sup>34</sup> We will assess and consider the implications of his conclusion below.

The resort to drones is highly tempting for governments, first, because they allow the killing of potential terrorists without any risk to their armed forces.<sup>35</sup> Second, targeted killing, if highly discriminating, appears less likely than periodic incursions by special forces to generate among the general population in the country where targets are located a feeling of being the objects of foreign aggression.

Whatever their operational virtues, killer drones are a weapon, not a strategy. When employed outside the context of a large-scale and sustained armed conflict, in a literal sense they summarily execute persons believed to be engaged in criminal conspiracies.

Killing other than in large-scale combat between conventional forces or in defense of the self or of innocent third parties from imminent lethal threats is not easily reconciled with legal or, for that matter, moral norms. As defined above, targeted killing obviously negates the target’s presumption of innocence as well as all other guarantees of a fair trial. Additionally, targeted killings often cause the death of bystanders.<sup>36</sup> In doing so, targeted killings cross a crucial moral line, the one that bars the killing of innocent people.<sup>37</sup> Being *prima facie* “transgressive,” as we suggested above, they are probably one of the means—along with torture and limitless confinement without charge and trial—most likely to play the role of David Kilcullen’s biological triggers.

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32. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARVARD NAT’L SEC. J. 283, 298 (2011).

33. Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, European University Institute, RSCAS Policy Papers PP 2013/77 47 (Oct. 2013).

34. *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (Ben Emmerson), Report*, U.N. Doc. A/68/389, 18 (2013), at 17 [hereinafter *Special Rapporteur Emmerson Report*].

35. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, BROOKINGS BRIEF, 11 May 2009, at 8.

36. See *Special Rapporteur Emmerson Report*, *supra* note 34, at 5. See also HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 3 (2013).

37. See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 27–28 (2006).

Sharing our concerns about the legal character of drone killing, Professors Amos Guiora and Jeffrey Brand propose the creation of a US Drone Court “to ensure that any drone policy is conducted in accordance with the rule of law.”<sup>38</sup> To that end, they argue that the procedure for choosing targets and executing strikes must be transparent and assure, to the fullest extent possible, that innocents are not targeted and that collateral damage, if any, is not disproportionate to the imperative of preventing a terrorist attack.<sup>39</sup>

Structurally, the proposed Drone Court’s framework is a creative effort, undertaken in the face of a severe challenge to the security of the citizen and the state, to preserve long-established individual rights by means of new procedures. The Court, which would have primary jurisdiction to authorize the killing of citizens and noncitizens alike, would be independent from the Executive Branch and composed of current Article III sitting judges.<sup>40</sup> Adversarial proceedings would be, if not fully respected, at least roughly approximated by the appointment of security-cleared attorneys representing the targets *in absentia* and having access to the entire intelligence information gathered by the Executive Branch.<sup>41</sup> The Court’s determination would be subject to appeal.<sup>42</sup>

Whatever process of authorization and *post facto* review may evolve at both the national and international levels, even if it is no more than a stream of opinions from what the late Oscar Schachter, referring to the global community of international law scholars, judges and practitioners, called the “invisible college,”<sup>43</sup> it will be in need of a body of substantive law. Our purpose is to illuminate that body as best we can.

### III. THE SUBSTANTIVE TESTS OF LEGALITY: A HOLISTIC APPROACH

A holistic approach demands procedures to contain the use of UCAVs that draw on all the relevant parts of the international legal system. In the words of the previous Special Rapporteur, Philip Alston,

When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force,

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38. Amos N. Guiora & Jeffrey S. Brand, *Establishment of a Drone Court: A Necessary Restraint on Executive Power*, in LEGITIMACY AND DRONES: INVESTIGATING THE LEGALITY, MORALITY AND EFFICACY OF UCAVs 323, 325 (Steven J. Barela ed., 2015).

39. *Id.* at 329–31.

40. *Id.* at 344.

41. *Id.* at 347–48.

42. *Id.* at 356.

43. Oscar Schachter, *The Invisible College of International Lawyers*, 72 Nw. L. REV. 217 (1977).

while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.<sup>44</sup>

The right to life is thus surrounded by a double layer of legal protection. The outer layer consists of restraint on the use of force by states. Human rights norms and, in the event of an armed conflict, humanitarian legal norms constitute the inner layer. It follows that the legitimacy of any case of targeted killing is a function of its compliance with norms in both layers.

Some authors have suggested banning drones completely for they can easily be characterized as intrinsically “cruel” weapons and therefore violate humanitarian law.<sup>45</sup> Not surprisingly, this proposal finds very little support among legal scholars, much less practitioners.<sup>46</sup> Drones, after all, carry the same type of weapons as those found on piloted planes. If “cruel” is construed to include weapons which tend to aggravate the risk and harshness of collateral damage, then drones, because of their susceptibility to precise targeting, are potentially not cruel.<sup>47</sup>

#### A. OUTER LAYER: THE PRESUMPTION AGAINST ARMED INTERVENTION

We join scholars from a variety of jurisprudential schools in treating Articles 2 (4) and 51 of the UN Charter as the point of departure for assessing the legality of any projection of force by a state across national frontiers.<sup>48</sup> Like them, we conclude that there is a presumption against the legality of transnational force projection for purposes other than self-defense against an

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44. *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Philip Alston), Report*, U.N. Doc. A/HRC/14/24 Add.6, (2010), at 11 [hereinafter *Special Rapporteur Alston Report*]. See also Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response*, 42 NYU J. INT'L L. & POL. 829, 897 (2010).

45. In 2009, Former Senior Law Lord Bingham declared in an interview:

From time to time in the history of international law various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think cluster bombs and landmines are the most recent examples. It may be—I'm not expressing a view—that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used.

*Quoted in Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge*, TELEGRAPH, 6 July 2009.

46. Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones* (translation), The Hague (July 2013), at 9.

47. See Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445 (2005).

48. See Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 86, 94–95 (Vaughan Lowe, Adam Roberts, Jennifer Welsh, & Dominik Zaum eds., 2010).

actual or imminent armed attack, or with the permission of the government of the state where crossborder force is employed, or under the authorization of the UN Security Council.

There is abundant disagreement about the elasticity of the Charter language. Disagreement ranges over a number of issues. The first, and probably the most important for our purposes, is what constitutes “imminence,” a word that does not appear in the Charter.<sup>49</sup> In the early years after the Charter’s adoption, it was possible to argue that the right of self-defense could be exercised only after an attack had occurred, the interpretation actually proposed by Hans Kelsen, a leading international legal scholar of that era.<sup>50</sup> Other scholars countered by noting that the Charter referred to self-defense as an “inherent right” and argued that the word “inherent” should be construed in light of the occasions when the right to self-defense had previously been invoked by states. Since the claim of self-defense had not previously been limited to instances of armed attack, much less imminent armed attack, and since waiting could put the defending state at a grave disadvantage, Kelsen’s literal reading almost certainly did not reflect the intentions of the drafters.<sup>51</sup> They were, after all, unlikely to have adopted a suicide pact. The failure of a subsequent Soviet proposal to define aggression as being first to launch force across a border seemed to confirm the evolving view of scholars, reflecting the practice of states, that preemption is not illegitimate.<sup>52</sup>

A second area of disagreement that is also important for assessing compliance with the outer layer of normative restraint on targeted killing is whether episodic armed incursions which stop well short of seriously threatening the political independence and military capabilities of a state, and do relatively little damage to the state’s economic assets before the intruding forces withdraw (or are liquidated), can be aggregated into a continuing armed attack. Only a positive answer may justify a massive response by the targeted state at a time or times of its choosing, designed to destroy the other

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49. See U.N. Charter art. 51, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

50. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 797–98 (1950).

51. Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 546 (1963); Richard Falk, *The Beirut Airport Raid*, 63 AM. J. INT’L L. 415 (1969).

52. Benjamin B. Ferencz, *A Proposed Definition of Aggression: By Compromise and Consensus*, 22 INT’L & COMP. L. Q. 407 (1973).

state's capacity for future incursions.<sup>53</sup> Can even a single incursion, together with threatened future ones, be treated as the trigger of an international armed conflict? If it can, then the victimized state's kinetic responses against the other state's combatants would not be preemptive or preventive but simply tactical moves in an ongoing "war."

Many scholars and, apparently, the majority of Judges of the International Court of Justice insist that legal preemption must satisfy the so-called Caroline principle.<sup>54</sup> Under that principle, as US Secretary of State Daniel Webster wrote in 1842, action can only be justified if there is "a necessity of self-defense, instant, overwhelming and leaving no choice of means, and no moment of deliberation."<sup>55</sup> In addition, the preemptive measures must be no more than necessary to disable the poised attackers; in other words, once the poised force is disabled, the target state cannot, without Security Council authorization, use the occasion to install a more pliant regime or shatter the aggressor state's capacity to renew its threat in the foreseeable future.<sup>56</sup> Webster did not, however, face the issue of periodic attacks that, in their aggregate, can reasonably be deemed to create a state of war. Today the United States apparently embraces the aggregation approach and, in that way, elides the charge that in its counterterrorism moves it has gone beyond preemption to the preventive use of force, a step that would have little support among legal scholars or governments.<sup>57</sup>

A third area of disagreement is whether or not force can be used in self-defense against nonstate actors. Although the International Court of Justice ruled in the *Wall* case that the Charter does not allow the use of force in self-defense against a nonstate actor other than one whose actions are imputable to the host state,<sup>58</sup> most commentators believe that a state should be able, within the meaning of Article 51 of the UN Charter, to defend itself against a nonstate armed attack, at least where there is large-scale transnational violence.<sup>59</sup>

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53. Mary Ellen O'Connell & Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10 J. INT'L CRIM. JUST. 189 (2012).

54. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

55. *Id.* at 89.

56. VAUGHAN LOWE, INTERNATIONAL LAW 277-79 (2007).

57. *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* 7, Office of Legal Counsel, US Department of Justice (DOJ White Paper) (8 Nov 2011). See also *Attorney General Eric Holder Speaks at Northwestern University School of Law* (5 Mar. 2012) available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

58. Int'l Ct. Just., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) ¶ 139.

59. Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245 (2010); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359 (2009).

Despite the important uncertainties we have just described, we favor caution in stretching the elasticity of “imminence” to the point where the line between prevention and preventive war begins to disappear. And we would correspondingly limit the aggregation claim to cases where a state is attacking an organized armed group marked by a hierarchy of command which is conducting or indisputably conspiring to conduct a sustained campaign against the nationals and/or institutions of the state invoking its right to self-defense. We favor caution out of concern for the general good and also concern for the interests of all those states, the great majority, with a stake in a relatively peaceful and stable international system. Liberal capitalist democracies are foremost among them.

Another dangerous blurring of normative lines arises from the fact that some states show signs of beginning to conflate the right to make war—*jus ad bellum*—and the law applicable during a war—*jus in bello*. A state manifests this conflation when it acts as if it enjoyed a broad discretion to employ whatever means it chooses to “defeat” terrorism even to the point where it must employ a strained if not risible interpretation of humanitarian law. Restraints on means are as integral to world order as restraints on recourse to force. Defenders of the main elements of the current order, countries with the most to lose from the collapse of normative constraint on the use of force, must struggle to maintain the *jus in bello*, the accumulated product of carefully negotiated norms reflecting the traumatic experience of mass slaughter.<sup>60</sup>

## B. Inner Layer: Individual Protection

As explained above, the holistic approach holds that every layer of international law must be respected by states engaged in targeted killing. Compliance with restraints on force projection is one obligation. Respect for human rights and humanitarian law is the other.

### 1. Human Rights Law:

As drone attacks usually take place in foreign countries, the first question to address is whether or not human rights norms apply to a state’s conduct beyond its borders. Although human rights instruments were initially conceived as duties states assumed in relation to persons within their respective territories,<sup>61</sup> international monitoring bodies and a significant group of scholars

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60. Jasmin Moussa, *Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963 (2008).

61. See ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 110–11 (2010).

have rejected that limiting interpretation of the relevant instruments.<sup>62</sup> In light of judicial decisions and the commentary of scholars, one can now say with confidence that human rights norms apply beyond national frontiers to all territories effectively controlled by a state. With respect to territory beyond their zones of continuous control, state responsibility is contested.<sup>63</sup> However, there is an emerging body of influential opinion finding responsibility under certain circumstances.<sup>64</sup>

Recently, in the matter of *Mohammad Munaf v. Romania*,<sup>65</sup> the Human Rights Committee (the body responsible for monitoring compliance with the ICCPR) addressed this question. An Iraqi-American national claimed that Romania had violated his rights under the Covenant because its Embassy in Iraq had handed him over to the United States Army, which then submitted him to torture. In order to determine whether the Covenant was applicable, the Committee recalled “its jurisprudence that a State party may be responsible for extra-territorial violations of the Covenant, *if it is a link in the causal chain that would make possible violations in another jurisdiction*. Thus, an extra-territorial violation must be a necessary and for the state concerned foreseeable consequence of its actions.”<sup>66</sup>

The European Court of Human Rights adopted a similar approach in the case of *Issa and others v. Turkey* (2004),<sup>67</sup> which concerned applications made by six women living in northern Iraq, near the Turkish border, against Turkey following the (alleged) forced disappearance of their son and husbands at the hands of the Turkish army. In determining whether the applicants’ relatives came within the jurisdiction of Turkey, the Court held that

a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating—whether lawfully or unlawfully—in the latter State. . . . Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.<sup>68</sup>

62. See Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

63. *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Christof Heyns), Report*, U.N. Doc. A/68/382 (13 Sept. 2013), at 10.

64. See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. INT’L L. 78, 81 (1995).

65. *Mohammad Munaf v. Romania*, U.N. Doc. CCPR/C/96/D/1539/2006, (21 Aug. 2009).

66. *Id.* ¶ 14.2 (emphasis added). Based on that reasoning, the Committee held Mr. Munaf’s claim admissible while holding at the same time that Romania had not breached his rights, since it didn’t know at the time what his future treatment would be.

67. *Issa and others v. Turkey*, App. No. 31821/96, ¶ 81 (16 Nov. 2004).

68. *Id.* ¶ 71 (reference omitted). See also Coard et al. v. the United States, Case No. 10.951, Report No. 109/99 (Inter-Am. Comm’n of Hum. Rts. 29 Sept. 1999) § 37:

Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its

In this context, it should also be noted that, while a territorial state's consent to an attack may "heal" possible problems regarding the outer layer of protection, this consent cannot legitimate violations of human rights on the state's territory.<sup>69</sup>

In cases of targeted killing by drones, the attacking state is obviously "a link in the causal chain" that leads to the death of the targeted individual and is acting in a way it could not replicate legally on its own territory other than in the exceptional case where lethal force is necessary to defend the life of the arresting officers or innocent third parties. There are thus solid grounds in the decisions of the Committee and the European Court for arguing that human rights in general apply extraterritorially. These grounds are even more solid regarding the right to life since Article 6 of the ICCPR calls it "inherent."<sup>70</sup>

The United States disagrees, most recently in a statement before the Human Rights Committee.<sup>71</sup> This claim, if unchallenged, would enable the US to frame the debate in purely national terms of respect for domestic law (particularly the Constitution).<sup>72</sup> Hence, debate in the US about the legal-

jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state - usually through the acts of the latter's agents abroad.

69. See *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (13 Dec. 2012) § 206: "[T]he respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities."
70. Article 6 ICCPR, *supra* note 24 : "Every human being has the inherent right to life"
71. Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. TIMES, 13 Mar. 2014, at A12. We should note, however, that there is no unanimity within the US, since Legal Adviser Harold Koh advocated in a long and detailed memo that the US should change its official position as regards the obligation to respect human rights. See Office of the Legal Adviser, *Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights* (19 Oct. 2010).
72. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 542 (2010). The same debate takes place in the United States about the extraterritorial application of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (*entered into force* 26 June 1987). In its response to the Questions Asked by the Committee Against Torture (the body responsible for overseeing the implementation of the Convention) on 5 May 2006, United States Legal Adviser John B. Bellinger III declared:

In response to *Question 44*, and the Committee's question about the geographic scope of Article 16, as ratified by the United States, I would like to emphasize that by its terms, Article 16 of the Convention obliges States Parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of the "territory under [the] jurisdiction" of the United States. The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention indicating that the two are equivalent.

See US Dept. State, *United States' Response to the Questions Asked by the Committee Against Torture* (5 May 2006), available at <http://www.state.gov/j/drl/rls/68561.htm>. Here

ity of drone killing has been largely conducted in terms of the respective constitutional powers of the Executive and the Congress in matters relating to the use of force and the possible role of the federal courts in protecting individual rights and adjudicating conflicts between the other two branches.<sup>73</sup>

Clearly the right to life operates within national territories to bar any government agency from setting out to kill someone because they are thought to be very dangerous.<sup>74</sup> The police are entitled to use deadly force only in self-defense or in the belief that killing is necessary to stop a suspect from killing or grievously wounding a third party. Deadly force may also be employed as a last resort to prevent the escape of a person convicted of the most serious crimes or a person whom the authorities believe, on the basis of highly persuasive evidence, has committed a crime punishable by the most severe sentences its law allows.<sup>75</sup>

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again, Legal Adviser Harold Koh issued a memorandum supporting the view that the geographic scope of the Convention Against Torture is not limited to the US national territory. See Office of the Legal Adviser, *Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict* (21 Jan. 2013). See also Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014). Very recently, the US adopted the latter position before the UN Committee Against Torture. See Permanent Mission of the United States of America to the United Nations and Other International Organizations, *Acting Legal Adviser McLeod: U.S. Affirms Torture is Prohibited at All Times in All Places* (12–13 Nov.2014), available at <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>. "There should be no doubt, the United States affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times in all places, and we remain resolute in our adherence to these prohibitions." See also Harold Koh, *America's "Unequivocal Yes" to the Torture Ban*, available at <http://justsecurity.org/17551/americas-unequivocal-yes-torture-ban/>: "More important, as noted above, this is the first time in more than two decades that the United States moved away from a strict territorial reading of a human rights treaty."

73. See David Cole, *The Drone Memo: Secrecy Made It Worse*, N.Y. REV. BOOKS BLOG (24 June 2014, 11:20 a.m.), <http://www.nybooks.com/blogs/nyrblog/2014/jun/24/awlaki-secret-drone-memo/>.
74. Inter-Am. Comm'n Hum. Rts, *Report on Terrorism and Human Rights*, OEA/Ser.LV/II.116 22 Oct. 2002, § 87; McCann and others v. UK, App. No 18984/91 (ECHR Grand Chamber (27 Sept. 1995); Human Rights Committee, *Husband of Maria Fanny Suárez de Guerrero v. Columbia*, Comm. No. R.11/45 (20 Jan. 1978).
75. Regarding Osama bin Laden's death, see *Osama bin Laden: Statement by the UN Special Rapporteurs on Summary Executions and on Human Rights and Counter-Terrorism* 6( May 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>:

In respect of the recent use of deadly force against Osama bin Laden, the United States of America should disclose the supporting facts to allow an assessment in terms of international human rights law standards. For instance it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden.

See also UN GA Res. 34/169, *Code of Conduct for Law Enforcement Officials* (17 Dec.1979), as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials *adopted* by the Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders (7 Sept. 1990).

The great weight of legal opinion supports the conclusion that the initiation of armed conflict, even a conflict of an international character, does not automatically suspend the duties a state has assumed by becoming a party to a human rights treaty.<sup>76</sup> As noted above, it simply allows the concerned state or states to declare a state of exception and suspend nonderogable rights to the extent necessary for the effective conduct of hostilities.

Foremost among the nonderogable rights, of course, is the right not to be *arbitrarily* deprived of life. The word “arbitrarily” is the nexus that allows the right to life to be adapted to the exigencies of war. Humanitarian law clarifies the content of the right to life—as well as the detention regime of combatants<sup>77</sup>—as a *lex specialis* defining what constitutes an “arbitrary” deprivation of life in a situation of armed conflict.<sup>78</sup>

As the International Court of Justice put it in its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion,

[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>79</sup>

In these conditions, a lethal attack can be qualified as nonarbitrary under human rights law only if it takes place in a manner consistent with humanitarian law, which is why Philip Alston once stated that while “extrajudicial executions,” “summary executions,” and “assassinations” are by definition illegal, targeted killings may be legal in the circumstance of armed conflict.<sup>80</sup>

76. See *General Comment No. 31*, *supra* note 62.

77. Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT’L REV. RED CROSS 599, 616–27 (2008).

78. *Special Rapporteur Emmerson Report*, *supra* note 34, at 18.

79. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996) § 25. See also Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT’L REV. RED CROSS 373, 391 (2007); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741 (2005).

80. *Special Rapporteur Alston Report*, *supra* note 44, at 5. ECHR, *supra* note 23, art. 2, adopts a slightly different approach, but arrives at the same result. It protects the right to life, goes further linguistically. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 6, U.N. Doc. A/6316 (16 Dec. 1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976). forbids any intentional killing (not only arbitrary ones). ECHR, *supra* art. 15 allows derogation from Article 2 “in respect of deaths resulting from lawful acts of war.” Thus, the main difference between the two instruments is that states need formally to derogate from the ECHR in order to comply with it.

Conversely, human rights law forbids targeted killings outside the framework of an armed conflict unless it can be shown that the killing was the only means to prevent an imminent terrorist attack.<sup>81</sup>

## 2. Humanitarian Law

The place of drones within humanitarian law turns on questions of the law's scope and its substance. On the question of scope, humanitarian law applies to both international and non-international armed conflicts. Although with respect to the latter its substance is more limited, both clearly outlaw summary execution of civilians and both allow the killing of combatants. Legal scholars, practitioners, and the guardian of humanitarian law, the International Committee of the Red Cross, have all agreed in the past that certain cumulative objective conditions must be met before a struggle reaches the threshold of a noninternational armed conflict<sup>82</sup>: they are a certain intensity of violence and a sufficient degree of organization of the parties to the conflict.

The US deems the threshold criteria to have been satisfied in all of the cases to date where it has engaged in targeted killing. Therefore, in all cases, it was entitled to attack the targeted persons anywhere on earth, at least where it had the permission of the government of the territory where it struck or that government was unable or unwilling to arrest the combatant and turn him over to US authorities.<sup>83</sup> Presumably it will deploy this claim in defense of future killings.

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81. Gary D. Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR COLL. REV. 127, 134–35 (2007): “Without an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination—a homicide and a domestic crime.”

82. See International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I, 2 Oct. 1995, § 70; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Alfred Musema*, 27 Jan. 2000, § 248; International Criminal Court (ICC), *Prosecutor v. Thomas Lubanga Dyilo*, 14 Mar. 2012, §§ 536–38. See also Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343 (2010).

83. Harold Hongju Koh, Legal Advisor, US Department of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (25 Mar. 2010), available at <http://www.State.gov/s/l/releases/remarks/139119.htm>:

As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.

See also Vaughan Lowe, *Security Concerns and National Sovereignty in the Age of World-Wide Terrorism*, in *TOWARDS WORLD CONSTITUTIONALISM* 655, 663 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

One problem the US faces in maintaining its legal position is the apparent opposition of the ICRC.<sup>84</sup> The latter has rejected the notion that the violence perpetrated by loosely associated terrorist groups operating within different states can be merged for purposes of reaching the scale-and-intensity threshold. They have rather argued that the situation within each state—e.g. Yemen, Somalia, Algeria, Nigeria, Mali, and Libya—must be considered separately.<sup>85</sup> If and to the extent humanitarian law applies, as it certainly does to the crescendoing conflict with the Islamic Caliphate in the Levant (ISIL), it requires a state to comply with the three core principles of humanitarian law: necessity, distinction, and proportionality. Although we cannot describe them in detail here, we can briefly draw attention to the following points. First, the principle of necessity requires that the killing must advance a tactical or strategic end. Second, the principle of distinction draws a sharp line between fulltime combatants and “civilians” who may episodically participate directly in or consciously facilitate combat operations. The latter can be targeted only when they are participating or taking steps to participate in combat. Thirdly, the principle of proportionality requires that reasonably foreseeable collateral damage must not be disproportionately large in relation to the importance of the military objective and the difficulty of achieving that objective by means less threatening to the civilian population.

Reconciling the practice of drone killing with liberal values requires more than a declaration of intent to comply with the UN Charter and human rights and humanitarian law. Good intentions are a necessary point of departure. Translating good intentions into quotidian reality demands an effective decisionmaking and review process. More specifically, effective translation requires a process which is relatively transparent and which holds practitioners accountable for their actions. It is not by coincidence that transparency and accountability are cornerstones of human rights law.<sup>86</sup>

Transparency requires that the criteria for targeting and the authority approving drone strikes be clearly identified and that, to the extent that disclosure does not compromise key sources, the authorizing authority can publicly justify its decisions and confirm that they were made on the basis of a factually compelling record and through the reasoned application of the relevant law.<sup>87</sup>

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84. INT'L COMM. RED. CROSS, (ICRC), *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS* 10–11 (2011),.

85. See Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65 (2013).

86. See *General Comment No. 31*, *supra* note 62.

87. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 287, 306 (2011). U.N. Charter, *supra* note 49, art. 51 also requires states to report their self-defense measures to the Security Council, which entails a transparency requirement.

The release of the redacted 2010 Justice Department memorandum concerning the targeting of Anwar al-Awlaki in Yemen is a first step in this direction. So may be the indication by President Obama that control of lethal counterterrorism operations conducted outside areas of active hostilities will be transferred from the CIA to the Department of Defense,<sup>88</sup> although it is not absolutely clear that, when it comes to irregular warfare, the Pentagon is less secretive than the CIA.

Transparency, along with accountability, must mark not only the initial authorization of a lethal strike but also its *post facto* evaluation,<sup>89</sup> particularly where there appears to be collateral damage.<sup>90</sup> The drone court proposed by Professors Guiora and Brands, mentioned above, is the most promising instrument for institutionalizing the substantive standards and process requirements we have tried to identify.<sup>91</sup>

However, at its inception, the Drone Court would have to address some difficult questions concerning the applicable law and its substance, for instance: who would determine the applicable law? In particular, would the Drone Court (and the Court of Appeals) be expected to follow the Executive's position or would it be independent in its assessment—thus being allowed to disagree with the government's official position? This question is not merely theoretical, as illustrated by the contemporary discussion on the extraterritorial scope of major UN treaties such as the Covenant on Civil and Political Rights and the Convention Against Torture.

How would the views of human rights bodies such as the Human Rights Committee or the Committee against Torture be received in the Drone Court jurisprudence? Would they help shape the Drone Court's decisions or would they merely be discarded as foreign law?

Would there be a mechanism allowing the Drone Court to synthesize its views with those of other judicial bodies, thereby preventing the creation of a "unilateral" US view on drones?

The initial answers given to these questions by the Drone Court would help to predict how the proposed court would balance legitimate national security concerns with individual rights and the integrity of the international legal system.

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88. Barack Obama, President of The United States of America, Remarks by the President the National Defense University (23 May 2013).

89. See *Special Rapporteur Alston Report*, *supra* note 44, at 6–7, citing *The Public Committee Against Torture et al. v. The Government of Israel*, Case No. HCJ 769/02, ¶¶ 39, 40, 60 (Israel High Court of Justice 14 Dec. 2006). "After each targeted killing, there must be a retroactive and independent investigation of the 'identification of the target and the circumstances of the attack.'"

90. See Michael Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 84 (2011).

91. Guiora & Brand, *supra* note 38.

In the absence of national courts with the requisite independence and will, the evolution of widely accepted norms might ultimately depend on the International Criminal Court, which will have jurisdiction where killings are carried out in the territory of state parties and on the judgment of Professor Schachter's "invisible college."<sup>92</sup> In all events, human rights norms should be construed to require compensation for death and injury to non-combatants.

#### IV. THE CURRENT NORMATIVE STANCE OF THE UNITED STATES

As previously noted, targeted killing by drones or other means must comply with UN Charter law on the use of force and with human rights and humanitarian law, the two levels of legal protection for individual rights. At this point, the US government appears to regard itself as justified in eliminating not only persons playing significant roles in substantial, hierarchically-organized groups like ISIL, Al-Qaeda in the Maghreb, the Haqqani Network and the Shabab in Somalia, but any person associated with such groups even where they pose no immediate threat to US nationals or the nationals of allied states.<sup>93</sup>

We believe this position goes beyond the applicable legal restraints on the use of force which we would summarize as follow.

1. Despite the uncertainties and controversies surrounding the resort to force in international relations (the "outer layer"), drone attacks outside of a state's territory must rely either on the consent of the concerned state or on a plausible claim of self defense against an armed attack. The attacker must, however, be a hierarchically-organized group able to sustain operations over time which has attacked or is manifestly preparing to attack the drone-deploying state.
2. In order to justify a targeted killing under the inner layer of normative restraint, a state has to demonstrate that the conditions of a non-international armed conflict are met. It must establish that there is: (i) a non-state armed group identifiable as such based on criteria that are objective and verifiable (for instance, a minimal level of organization and engagement of the group in collective, armed, anti-government action); (ii) a minimal threshold of intensity and duration. In addition it must demonstrate that it has no viable law-enforcement alternative.<sup>94</sup> Under traditional views the group had to have some territorial base, but given the contemporary ease of moving constantly across borders, many commentators argue that this criterion has become obsolete.

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92. Schachter, *supra* note 43.

93. See HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* 448–49 (2005).

94. Kenneth Roth, *The Law of War in the War on Terror*, 83 *FOREIGN AFF.* 2 (2004), available at <https://www.foreignaffairs.com/articles/2004-01-01/law-war-war-terror>.

3. Persons who apparently are not integral members of an armed group but associate with it informally and episodically can be targeted only where it is established that they are actively engaged in or moving into place in order to participate in an armed attack.
4. Group members who are non-combatants such as fund-raisers and contributors or media advisors and producers cannot be targeted (of course they are subject to arrest and prosecution).
5. In all cases targeted killings must respect the principles of necessity and proportionality. Collateral damage should raise a rebuttable presumption of disrespect for the proportionality principle.
6. Outside the context of an armed conflict within the meaning of the Geneva Conventions as construed by the ICRC, persons suspected of planning or executing terrorist acts can be killed only when state officials can demonstrate by clear and convincing evidence that killing was the only means available to prevent an imminent act of terrorism.

#### **V. HYPOTHETICALS: ISIL IN IRAQ AND SYRIA; THE AFGHANI TALIBAN IN PAKISTAN**

Perhaps for purposes of clarification it would be useful to show how these generalizations would apply to the conflict with ISIL and the Afghan Taliban. The struggle between ISIL and the government of Iraq is an internal armed conflict in which the United States participates at the invitation of the Iraqi government. Because of that invitation, its combat activities in Iraq are consistent with the UN Charter. Under the laws of war, it can target any ISIL combatant anywhere in the country whether they be anonymous grunts or Abu Bakr Al-Baghdadi himself, who appears to be the military as well as the political leader of ISIL.

Admittedly the case would be somewhat more complicated if Al-Baghdadi established a rebel government with a formal division between civilian and military leaders, declared himself the head-of-state and appointed a colleague as general and chief-of-staff. When the United States bombed Muammar Qaddafi's palace in 1994, it claimed it was not targeting the head-of-state as such but rather smashing a center of command-and-control. The "shock-and-awe" bombardment of Baghdad by US-led coalition forces in 2003 targeted several of Saddam Hussein's palaces. And while never conceding that it sought to kill him in this initial onslaught, the extent, severity and targeting of the bombardment at least implied the Coalition governments had confidence in a license to kill the state's operational head. The same could be said of the NATO forces that bombed Qaddafi's home-office complex in Tripoli during the 2011 intervention. It is very doubtful that if such a license,

or what one might call “tolerance,” exists today in the global system of order, it extends to nominal heads-of-state: Presidents and monarchs whose role is essentially ceremonial and where operational power rests in the hands of a prime minister and her cabinet.

As for US sorties in Syrian air space, no doubt in hope of extracting from the US recognition of the Assad regime’s legitimacy, the Syrian government has stated that it has not authorized US cross-border operations. The legality of the use of force in Syria is therefore harder to justify under the Charter, although an argument may be made for collective self-defense against an attacking force which moves at will across the Iraq-Syrian border because of the Syrian government’s inability to control a substantial part of its territory.<sup>95</sup>

The same UN Charter-based argument is available to justify Drone strikes in Pakistan against senior figures in the Afghan Taliban and the Haqqani Network with undifferentiated political/military roles operating out of bases in Pakistan. But according to US government officials, such strikes have not been limited to senior figures. There have also been so-called “signature strikes” against houses or compounds believed to be owned or controlled by the organizations. Designed apparently in the hope of killing senior figures but in any event thinning out the ranks of combatants and deterring recruitment, raid planners are reported to have operated on the premise that civilians of fighting age who are round and about the premises can be deemed to be combatants.

Since the Director of the CIA, the agency which has had operational responsibility for the strikes, concedes that the Agency has not had the capacity to measure the military efficacy of such strikes, in particular whether they foster recruitment of new combatants in numbers exceeding those killed or otherwise contribute positively to Taliban strength, their military utility is uncertain. If military utility is uncertain and all persons of fighting age killed or maimed are presumed to be combatants, the proportionality test imposed by humanitarian law and through it by human rights law is effectively nullified, except in instances where it can be established that women, children, and old men were also among the casualties. And even then, against what is their death or crippling to be balanced? Simply against the number of presumed combatants killed or crippled as a goal in itself? However dubious the moral answer and uncertain the strategic one, the legal answer may be “yes.”

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95. Jack Goldsmith, *Thoughts on the Latest Round of Johnson v. Koh*, LAWFARE, 16 Sept.2011, available at <https://www.lawfareblog.com/thoughts-latest-round-johnson-v-koh>. But this test, often referred to as “Unwilling or Unable,” is hotly contested. See, for instance, Kevin Jon Heller, *The “Unwilling or Unable” Standard for Self-Defense*, OPINIO JURIS, 17 Sept.2011, available at <http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/>.

In an armed conflict, killing enemy combatants has historically been deemed a legitimate military purpose however dubious its strategic consequences. But what is legally and morally intolerable is simply presuming that persons of military age found in the area where Taliban combatants live are themselves combatants. The attacking government must offer much more persuasive evidence than mere proximity, even if it is recurrent, if, for purposes of claiming proportionality, the attacker wants to aggregate proven fighters and those persons merely presumed to have that status. In this connection it is necessary to recall that, in the view of the ICRC, the semi-official steward of humanitarian law, even persons who occasionally join a conflict retain civilian status when they are not actually fighting or moving into position to strike a blow.

## VI. CONCLUSION

Overall, we believe that the enumerated criteria will prevent targeted killing from descending into a system of state-sanctioned murder which would not merely blur, but actually eliminate the line between transgressive and legitimate violence. That being said, we recognize that an exceptional case could conceivably appear, like a black swan, which does not satisfy these criteria, but which on moral grounds demands immediate and decisive measures.

Imagine, for instance, the following scenario. The President of the United States is suddenly presented with information from an utterly credible source that a scientist in a small laboratory in a remote part of Belarus, having succeeded in so manipulating the Ebola virus' genetic structure as to make it as contagious as the common cold, has agreed to sell the new virus to an unknown country or group and the transfer is scheduled to occur within an hour. The US happens to have an East-European-based drone within hellfire missiles which can reach the laboratory in approximately thirty minutes.

If in this hypothetical case the President orders a drone killing, there would be a *prima facie* violation of international law. However, we believe that in such an improbable scenario where preemptive action serves the deep values that lie behind human rights and humanitarian law, the President could properly invoke in her defense the principle of "necessity."<sup>96</sup> As former US State Department Legal Advisor Harold Koh recently wrote:

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96. This reasoning bears some resemblance to Ian Brownlie's analogy of humanitarian intervention with euthanasia, namely an instance in which an action's illegality would remain intact despite the fact that it is justified by higher considerations of public policy and moral choice. See Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John Morton Moore ed., 1974).

[D]o courts tell ambulance-drivers who ran red lights to prevent deaths that their actions are illegal because their actions might encourage ambulance-chasers to do the same thing? . . . Or do we define the contours [of] a narrow “affirmative defense” that would render lawful otherwise illegal behavior?<sup>97</sup>

We believe that the application by independent judicial bodies of the rules we have outlined will enable liberal democratic societies to defend themselves without in the process eroding those constraints on executive power which are essential for the survival of liberal democratic societies. The prospect is considerably bleaker if we must rely for their consistent application only on international public opinion and the President’s concern for sowing what, with the diffusion of technology, will be lethal precedents.

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97. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention, Part II: International Law and the Way Forward*, EJIL: TALK! (4 Oct. 2013), available at <http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward>.