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Game of Drones

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REVIEW ESSAY

GAME OF DRONES

A Theory of the Drone. By Grégoire Chamayou. Translated by Janet Lloyd. New York, London: The New Press, 2015. Pp. 292. Index. $26.95.

International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects. By Sikander Ahmed Shah. London, New York: Routledge, 2015. Pp. viii, 247. Index. $145.

Sudden Justice: America's Secret Drone Wars. By Chris Woods. Oxford, New York: Oxford University Press, 2015. Pp. xvi, 386. Index. $27.95.

In May 2009, Leon Panetta, the director of the U.S. Central Intelligence Agency (CIA), told the press that drone attacks are "the only game in town in terms of confronting and trying to disrupt the al-Qaida leadership."[1] In September 2015, British Prime Minister David Cameron announced that Britain had carried out drone strikes in Syria on August 21, 2015, which were intended to kill a British national associated with the Islamic State of Iraq and Syria (ISIS).[2] Cameron characterized the strikes, which reportedly killed three, as a lawful exercise of Britain's "inherent right to self-defense"[3] against a "very real threat."[4] Also in September 2015, a spokesman for the Pakistani military sent a tweet saying that Pakistan had killed "3 high profile terrorists" in North Waziristan, Pakistan, on September 7, 2015, by using a drone for the first time.[5]

These statements seemed surprising at the time that they were made. Panetta was publicly acknowledging a secret program that began as part of the Bush administration's "global war on terror." President Barack Obama had heavily criticized the concept of a global war while campaigning for office in 2008 and, within days of his inauguration, ended or attempted to end other controversial practices that Bush administration lawyers claimed were legally justified because they were part of that global war. Yet Obama authorized increased CIA drone attacks, especially in Pakistan, where outrage over drones has been intense. In contrast, based on the ostensible reasons of legality and effectiveness, the British have long championed using law-enforcement measures, not military force, in responding to terrorism.[6] However, these recent statements suggest a change in approach: both Britain and Pak-

[1] Mary Louise Kelly, *Officials: Bin Laden Running Out of Space to Hide*, National Public Radio (June 5, 2009), *at* http://www.npr.org/templates/story/story.php?storyId=104938490.

[2] ISIS is also known by the acronym "ISIL" or the Islamic State in Iraq and the Levant. Increasingly, the group is known as "Daesh," an Arabic form of the name. ISIS broke with Al Qaeda in Iraq and has subsequently been denounced by the main Al Qaeda organization.

[3] Stephen Castle, *Britain Says First Drone Strike in Syria Hit ISIS Suspects*, N.Y. TIMES, Sept. 8, 2015, at A4.

[4] Spencer Ackerman, *Drone Strikes by UK and Pakistan Point to Obama's Counter-terror Legacy*, GUARDIAN, Sept. 9, 2015, *at* http://www.theguardian.com/us-news/2015/sep/09/obama-drone-strikes-counterterror-uk-pakistan.

[5] *Id.*

[6] For example, the British government filed a declaration related to its accession to Additional Protocol I to the Geneva Conventions that noted the following: "It is the understanding of the United Kingdom that the term

istan have now attacked terrorism suspects and bystanders using drones.[7]

The books by Grégoire Chamayou, Chris Woods, and Sikander Ahmed Shah form part of a large body of publications that have appeared since the first use of a drone—a remotely piloted aerial vehicle, equipped with a missile—to locate, target, and kill an individual. Chamayou, a research scholar in philosophy at the Centre National de la Recherche Scientifique in Paris, reveals in his book *A Theory of the Drone* why these uses of drones should not surprise us. As he explains, since airplanes first launched lethal operations beginning in the twentieth century, technology has helped drive legal, ethical, and strategic analysis. Possessing the means to kill with little risk to the one killing creates psychological pressure to use those means, along with legal and policy justifications for doing so. Chamayou's book helps make sense, therefore, of why the United States has persisted in using drones, especially beyond armed conflict zones, despite the facts and the law that counsel against it. Woods, a former BBC journalist, provides a detailed account of drones in his book *Sudden Justice: America's Secret Drone Wars*. He reveals a record of counterproductive results over a dozen-year period. Shah, a professor of law and policy at Lahore University of Management Sciences in Pakistan, makes a persuasive case in *International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects*, the only full-length book to date on the relevant international law, that most U.S. drone attacks have indeed been unlawful. Together, these books support the conclusions that U.S. drone attacks generally violate international law, worsen the problem of terrorism, and transgress fundamental moral principles.

I. THE STORY

The first use of drones to kill occurred in November 2001 in Afghanistan. Since then, numerous books, articles, and reports have appeared, analyzing the technology, law, ethics, and effectiveness of drone use for targeted killing.[8] The books selected for this review provide an in-depth treatment of the story, rules, and incentives related to drone

'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Declaration of United Kingdom of Great Britain and Northern Ireland, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (July 2, 2002), *available at* http://www.wipo.int/wipolex/en/other_treaties/details_notes.jsp?treaty_id=281.

[7] The government of France, too, has declared a "war on terror" following terrorist attacks in Paris on November 13, 2015, believed to have links to ISIS. About 130 people were killed. In April 2001, however, France had made a declaration like that of the United Kingdom, *supra* note 6, upon joining Additional Protocol I in which France distinguished terrorism from armed conflict: "Le Gouvernement de la République Française considère que le terme 'conflits armés' évoqué au paragraphe 4 de l'article 1, de lui-même et dans son context, indique une situation d'un genre qui ne comprend pas la commission de crimes ordinaires, y compris les actes de terrorisme, qu'ils soient collectifs ou isolés." (The Government of the French Republic considers that the term 'armed conflict' mentioned in paragraph 4 of Article 1, on its own and in its context, indicates a situation of a kind that does not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated.) Declaration of the French Republic, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Apr. 11, 2001), *available at* https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2. [Editors' note: The attacks in Paris occurred after the cutoff date for this issue, but, for completeness, this reference has been added during production.]

[8] For example, the following major publications on targeted killing and drones appeared in 2015: LAURIE CALHOUN, WE KILL BECAUSE WE CAN: FROM SOLDIERING TO ASSASSINATION IN THE DRONE AGE (2015); ANTONIA CHAYES, BORDERLESS WARS: CIVIL MILITARY DISORDER AND LEGAL UNCERTAINTY (2015); DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY (Peter L. Bergen & Daniel Rothenberg eds., 2015): KENNETH R. HIMES, OFM, DRONES AND THE ETHICS OF TARGETED KILLING (2015); SCOTT SHANE, OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE (2015); Jeremy Scahill, *The Assassination Complex: Secret Military Documents Expose the Inner Workings of Obama's Drone Wars*, THE INTERCEPT, Oct. 15, 2015, *at* https://theintercept.com/drone-papers/the-assassination-complex (Article No. 1 of 8); and BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES—CONFRONTING A NEW AGE OF THREAT (2015).

use. The conclusions of the three authors are corroborated by numerous other ethicists, journalists, and legal scholars. Where their conclusions are contested, the books invite readers to consider the motivations behind opposing views as well as the standards that should govern all participants.

Sudden Justice is clearly the work of a skilled independent investigative journalist. It is based on multiple overseas reporting trips to locations where drone attacks have originated and where they have had their major impact. Much of the story is familiar by now, but Woods adds greater depth and breadth. His topic is "secret" drone wars in Yemen, Pakistan, Somalia, and Iraq after 2006, places where the CIA, operating covertly, has been largely responsible for attacks that have killed thousands, including hundreds of children.[9]

More typical historic accounts of drones begin with World War II and the development of unmanned reconnaissance air vehicles and move on to discuss drone use for spying by the United States in Vietnam, the Gulf War, and the Balkans.[10] Most explain how the Predator reconnaissance drone was fitted with a missile, the Hellfire, in the 1990s. Rather than dwelling on these well-known details, Woods instead focuses on some overlooked facts relevant to the story, such as the biographical profiles of the men who developed and marketed the weaponization of the drone, including brothers Neal and Linden Blue, owners of U.S. defense contractor General Atomics, and Abe Karem, a former Israeli Air Force aeronautical engineer who invented the Predator reconnaissance drone (Woods, pp. 29–30). Woods also discusses the development of the attack drone in connection with U.S. presidential orders, dating from the 1970s, prohibiting assassination. He reveals that President Bill Clinton, not President George W. Bush, first calculated the need to lift the ban in order to carry out targeted killing with drones:

> The targeted killing of terrorism suspects—and their secret rendition to interrogation and torture facilities in allied nations—were key policies which helped define the presidency of George W. Bush. Yet it was his Democratic predecessor Bill Clinton who had not only begun the rendition program against Al Qaeda-linked suspects— but who also partially lifted a decades-long ban on US assassinations. (P. 37)

By 9/11, the hardware, legal analysis, and strategy of targeted killing were basically in place for the drone campaign to follow. Many members of the Clinton administration took up important posts in the Obama administration, including Panetta. In the meantime, Bush signed a memorandum of notification on September 17, 2001, that, together with other authorizations, provided his permission for the CIA to kill terrorist suspects, including Americans, on a "'high value target list'" (p. 49),[11] which has become known as the "kill list."[12]

When hunting and killing individuals on the kill list first began, the international law community was generally focused on whether going to war in Afghanistan for the 9/11 attacks could be lawful. Arguments supporting the war's legality inevitably drew on UN Security Council Resolution 1368,[13] stating the Council's view that the attacks had triggered UN Charter Article 51 (Article 51)

[9] Following thirteen years of comparative statistical analysis, including early efforts at compiling the data myself with the help of a graduate research assistant from Uzbekistan, I find that the most reliable numbers are provided by the Bureau of Investigative Journalism, where Woods once worked. Its data sets are available online at https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs.

[10] For a more standard history of drones, see, for example, JOHN KAAG & SARAH KREPS, DRONE WARFARE 1–18 (2014).

[11] Citing Charles Duhigg, *The Pilotless Plane That Only Looks Like Child's Play*, N.Y. TIMES, Apr. 15, 2007, *at* http://www.nytimes.come/2007/04/15/business/yourmoney/15atomics.html.

[12] It is widely reported that Britain also has a kill list. *See, e.g.*, Matt Dathan, *David Cameron Draws Up 'Kill List' of Isis Fighters Who Can Be Taken Out at a Moment's Notice*, INDEPENDENT, Sept. 16, 2015, *at* http://www.independent.co.uk/news/uk/politics/david-cameron-draws-up-kill-list-of-isis-fighters-who-can-be-taken-out-at-a-moments-notice-10491191.html.

[13] SC Res. 1368 (Sept. 12, 2001) ("*Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter").

permitting the use of force in self-defense.[14] Less notice was given to a British white paper providing details of the Afghan Taliban's links to Al Qaeda.[15] The British were making a case for a war against Afghanistan, but not beyond. That war began on October 7, 2001. Woods relates that it only took thirty minutes of attacks with cruise missiles, however, to destroy all of the conventional battlefield targets in Afghanistan (p. 41). After that short time, the "'real mission had changed rapidly from fixed targets to a counterterrorism model of going after individuals'" (*id.*).[16] While the world focused on Afghanistan, the United States struck "hard against known and alleged militants in Europe, Africa, Asia, and the Pacific. Some actions were military in nature . . . " (p. 50). Woods does not define "military in nature," but he does explain that the constituency for killing individuals, wherever located, was growing within the CIA, the Pentagon, and other U.S. government agencies. Woods mentions some pushback from the U.S. Department of State, but, by the end of 2002, that opposition seemed to have ended.

Woods would have done well at this point in his book to emphasize not only that the United States has been carrying out targeted killing but also that it has been using Hellfire and cruise missiles to do so. The choice of those weapons marks a significant departure from the assassination and targeted killing that the United States banned in the 1970s. In those days, CIA agents used knives, guns, poison, exploding cigars, and the like to attempt to kill an individual. Weaponized drones have, to date, only deployed Hellfire missiles. The Hellfire was developed by defense contractor Lockheed Martin to have the firepower needed to stop a tank. The United States has also used the even more lethal cruise missile launched from naval vessels and manned aircraft in post-9/11 targeted killing operations. Yet, under international human rights law, missiles can only be justified for carrying out intentional killing of armed opposition fighters within armed conflict zones as defined under international law. Missiles do not meet human rights standards for peacetime policing:[17] missiles represent military force legally restricted to use on actual battlefields or in response to significant armed attacks. Woods does not make this point. Instead, he utilizes analogies and metaphors invoking police weapons in discussing drone attacks as if a Hellfire missile were a bullet (pp. 47, 50, 160). Such characterizations of drone strikes may be playing a role in the public's wide acceptance of drone use. A former CIA lawyer has observed: "'People are a lot more comfortable with a Predator [drone] strike that kills many people than with a throat-slitting that kills one.'"[18] The public needs to be as aware of this paradox of drone killing, as any other.

[14] UN Charter Article 51 provides:

> 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.

[15] *See* Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901–02 (2002) (discussing British white paper).

[16] Quoting David J. Barron, Acting Assistant Attorney General, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) (redacted), *available at* https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/06/6-23-14_Drone_Memo-Alone.pdf. The memo cited above was ordered released to the public by a U.S. federal court. A shorter version of the same memo was also released by the Obama administration and was dated February 2010. The *New York Times* and the American Civil Liberties Union have attempted to get the release of ten more memos on targeted killing, one known to date from 2002, but have not yet been successful in their pursuit.

[17] *See, e.g.*, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, UN Doc. A/CONF. 144/28/Rev. 1 (1990), *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

[18] Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, *at* http://www.newyorker.com/magazine/2009/10/26/the-predator-war (quoting Vicki Divoll, a

Woods devotes a whole chapter to the killing of U.S., British, and other Western citizens by drone strikes. In November 2002, the CIA operating a drone from Djibouti killed six men riding in a sport utility vehicle along a road in Yemen. It was one of the few times of peace in Yemen's short history. The CIA's alleged purpose was to kill an individual linked to the attack on the USS *Cole* in 2000, but Woods indicates that the CIA knew that a twenty-three-year-old American was also in the vehicle. What he does not relate is whether U.S. officials involved in the operation considered that a killing committed with Hellfire missiles distant from any armed conflict would draw attention in a way that other actions of a military nature had not. The Yemen attack did draw some attention, especially in a January 2003 report to the Human Rights Commission by UN special rapporteur Asma Jahangir.[19] Woods reiterates her conclusion that the attack constituted "a clear case of extrajudicial killing" (p. 64).[20] Nevertheless, he also writes that "many of the legal and ethical issues raised by that first strike remained unresolved" (p. 57).

The United States did not attack again in Yemen for some years, but the reasons for this hiatus do not appear related to international law. Because of the publicity over the drone attack, Yemen's President Ali Abdullah Saleh was embarrassed and forbade future drone use (pp. 60–61). The Bush administration moved on to preparing for the Iraq invasion. In 2009, the Obama administration returned to attacking Yemen using cruise missiles launched from planes and ships until Saleh lost power in 2012. Then drone-launched missile strikes resumed. During this period, Obama administration lawyers developed legal advice concluding that killing a U.S. citizen, Anwar al-Awlaki, would not violate international law or U.S. law (pp. 140 n.94, 284). Awlaki was killed in Yemen along with bystanders in September 2011. His teenage son, also a U.S. citizen, and nephew were killed with others a few weeks later.[21]

In addition to Jahangir, Woods cites a number of individuals and organizations with expertise in human rights law and international humanitarian law (IHL) and their commentary on the legality of U.S. drone strikes. In a puzzling omission, he does not mention individuals and organizations known for their work on *jus ad bellum*.[22] For example, he fails to acknowledge the five-year study undertaken by the Use of Force Committee of the International Law Association (ILA) on the definition of armed conflict in international law, despite discussing the precise question of international law's definition over fourteen pages of his book (pp. 55–69). The ILA Use of Force Committee brought together eighteen of the world's leading experts on *jus ad bellum* from fifteen countries on five continents. Critically, its report included perspectives from beyond the half dozen states with major high-tech fighting forces. The ILA Committee assessed hundreds of violent incidents between 1945 and 2010, listing seventy-two specific events. The ILA Committee report's conclusions about the meaning of armed conflict under international law are based on assessment of state practice and *opinio juris*.[23] The report indicates

former CIA lawyer), *excerpted in* DRONES AND TARGETED KILLING: LEGAL, MORAL, AND GEOPOLITICAL ISSUES 63 (Marjorie Cohn ed., 2014).

[19] UN Commission on Human Rights, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, UN Doc. E/CN.4/2003/3 (Jan. 13, 2003) (prepared by Special Rapporteur Asma Jahangir).

[20] Citing *id.*, para. 39.

[21] For detailed accounts of the Awlaki killing, see the books by two journalists, SHANE, *supra* note 8, and JEREMY SCAHILL, DIRTY WARS: THE WORLD IS A BATTLEFIELD (2013).

[22] Woods does not cite, for example, one of the most important articles precisely on his topic, Christine Gray, *Targeted Killings: Recent US Attempts to Create a Legal Framework*, 66 CURRENT LEGAL PROBS. 75 (2013). He equally overlooks these leading titles on *jus ad bellum*: OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (2010); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE (5th ed. 2011); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (3d ed. 2008). These authorities and others were made available to Woods by the present author at a conference in Chicago on drones in 2013.

[23] *See* International Law Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law 5 (2010), *at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022. The present author chaired the committee. Judith Gardam of the University of Adelaide, Australia, was the rapporteur. For a full list of members, documents, and commentary

that, in 2002, the United States was involved in an armed conflict only in Afghanistan. Thus, the United States had no basis for arguing that it was participating in a war in friendly Yemen. The same conclusion was reached by Jahangir.

While the venerable ILA does not promote itself or the work of its committees the way that other organizations do, another factor is worth considering in the omission of the ILA Committee report. *Sudden Justice* is an outsider's view of the international law community. What the author sees is the dominance of human rights law and IHL today, paralleling the rise of human rights courts and the International Criminal Court as well as the UN Human Rights Council and its appointment of high-profile rapporteurs. These developments have led to interest in these areas of international law in a way that may be disconnected from the field in general, including the essential area of law against war.[24] Numerous serious discussions of drone use concern the precision of the weapon, without considering the legality of resorting to military force in the first place.[25] The common conclusion of reports to the UN Human Rights Council on drone attacks calls for holding drone operators accountable when too many "civilian" lives are lost or for having greater "transparency" on how U.S. officials compile the "kill list."[26] A major concern is whether the list is compiled with respect for human rights and humanitarian law. Often overlooked is that it is impossible to justify the use of force in a war that does not legally exist, regardless of the care taken in deciding who will die; everyone killed in such circumstances has died unlawfully.[27]

Sudden Justice moves on from Yemen to Pakistan, where the United States began attacking with drones in the summer of 2004. Woods provides rare details of that first strike. Several people were killed, including two boys aged eight and fourteen (p. 100). The Bush administration continued attacking in Pakistan, reaching a high of some thirty attacks in 2008. Three days after his presidential inauguration in January 2009, Obama authorized his first drone strikes. As noted, he chose Pakistan. Four children were reported among the dead from the drone strikes during the

on the report, see WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11 (Mary Ellen O'Connell ed., 2012).

[24] *See* William A. Schabas, Lex Specialis? *Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of* Jus Ad Bellum, 40 ISR. L. REV. 592 (2007).

[25] *See, e.g.*, Rafia Zakaria, *The Myth of Precision: Human Rights, Drones, and the Case of Pakistan, in* DRONES AND THE FUTURE OF ARMED CONFLICT: ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS 199 (David Cortright, Rachel Fairhurst & Kristen Wall eds., 2015).

[26] *See, e.g.*, UN Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings, paras. 3, 54, 87–92, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010). A brief reference is made to the illegality of killing beyond armed conflict zones with drones. *Id.*, paras. 85–86. Arguably, this point should have been a main subject of the report.

[27] During the Obama administration, the legal justifications shifted from the existence of a global war to self-defense and host-state consent. Shah heavily criticizes these claims, as discussed *infra*. Again, human rights and humanitarian law scholars have focused on aspects of these claims, such as the definition of "imminence" used, without acknowledging that the term "imminence" does not actually appear in UN Charter Article 51 on self-defense or that the law of self-defense simply does not apply to most CIA drone strikes. Another concern relates to the demand that the Obama administration make public "the rules" that it has developed for carrying out drone attacks. On the existence of these rules, see Carol E. Lee & Dion Nissenbaum, *Obama's Drone-Strike Rules to Be Reviewed*, WALL ST. J., Apr. 23, 2015, *at* http://www.wsj.com/articles/obamas-drone-strike-rules-to-be-reviewed-1429832348; *see also* Woods, p. 284. Beyond the contradiction that anything purporting to be "law" can be kept secret from the public, the administration has no authority to create its own code for killing that overrides the readily accessible international legal rules on the use of lethal force. Administration lawyers may have in mind litigation strategy or covert operation methods, which may be kept secret, but the law under which government officials purport to act must be openly acknowledged. Better compliance with international law would plainly benefit from greater general understanding, especially of the *jus ad bellum*, by all—governments, nonstate actors, and individuals. Even with enhanced understanding, however, advocacy for resort to war is likely to continue given the current high confidence in the utility of military force. For a discussion of the limits of military force in the terrorism context as well as the reasons why scholars and government lawyers have nevertheless sought permissive interpretations of the restrictions on military force, see *infra* notes 36–43 and accompanying text.

first week of the new administration. Woods also recounts his own reporting on the intentional targeting of rescuers, people arriving at the scene of drone strikes to attempt to save the wounded and recover the dead, something referred to as a "double-tap" (p. 17). He reveals that "intelligence officials" attempted to discredit him and threatened him if he published his evidence (p. 107). He persisted.

Woods is one of the few authors writing on drones to discuss Somalia. In the early 2000s, various groups in Somalia formed a coalition government, called the Islamic Courts Union, which created relative stability after long years of civil war. The United States became concerned about possible Al Qaeda influence on the coalition and pressed Ethiopia to invade, which it did in late 2006. The United States joined in the fighting, attacking from helicopter gunships. Between 2007 and 2011, as Ethiopia maintained an unstable occupation, the United States attacked on ten occasions. According to Woods, "When the Ethiopians finally retreated having crushed the Islamic Courts Union, they left behind a power vacuum which the more extremist Al Shabaab was well-placed to fill" (p. 213). Again, Woods fails to mention the legality of Ethiopia's intervention or the related U.S. attacks.

His critique is reserved for the problem of "blowback" throughout the region (p. 164). The Somali case is one where Woods believes that the use of force has done more harm than good—a case of "blowback"—the term now used regularly respecting drone attacks. In addition to creating a will for counterviolence among the victims of drones, Woods writes of Iran's news agency Press TV reporting the clearly erroneous claim of almost one hundred U.S. drone strikes in a fifteen-to sixteen-month period in Somalia (pp. 215–16). Some in Iran plainly understand the anger and anti-Western sentiment created by U.S. drone policy. Woods and Shah also link the increasing instability and rampant terrorist violence in Pakistan to U.S. attacks. Both authors completed their research prior to the descent to anarchy and armed conflict now engulfing Yemen. Others link Yemen's plight in part to the destabilizing U.S. attacks.[28]

II. THE RULES

Having criticized the "global war on terror," the Obama administration has floated multiple alternative justifications for "targeted killing."[29] An early proffer recast the global war as still a worldwide armed conflict but one against specific groups and not against the phenomenon of terrorism in general.[30] That argument is rarely heard today. The current common justifications are consent of a government in a state where strikes are carried out and, in the absence of consent, self-defense under Article 51. Similarly, Cameron cited consent to justify Britain's use of force in Iraq and self-defense for drone strikes in neighboring Syria.[31]

Shah discusses both consent and self-defense with respect to drone strikes in Pakistan. Hewing close to the UN Charter, decisions of the International Court of Justice (ICJ), and leading experts in this area of law, such as Christine Gray, Shah finds no basis in the law of self-defense for the U.S. drone strikes in Pakistan. He explains that, for the use of military force in self-defense to be lawful, the state exercising self-defense must be the victim of an armed attack. He acknowledges that the United States was the victim of an attack on 9/11, but, citing ICJ cases, including most importantly the *Congo* and *Genocide* cases,[32] he points out that

[28] Gregory D. Johnsen, *How We Lost Yemen: The United States Used the Pakistan Playbook on Yemen's Terrorists. It Didn't Work*, FOREIGN POL'Y, Aug. 6, 2013, *at* http://foreignpolicy.com/2013/08/06/how-we-lost-yemen.

[29] *See* Mary Ellen O'Connell, *International Law and Drone Attacks Beyond Armed Conflict Zones*, *in* DRONES AND THE FUTURE OF ARMED CONFLICT, *supra* note 25, at 63, 64.

[30] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[31] *See* Castle, *supra* note 3.

[32] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168 (Dec. 19); Application of the Convention on the Prevention and Punishment of the Crime of Genocide

military force in response to an armed attack may be aimed only at the territory of a state responsible for the attack (Shah, pp. 17, 37, 41, 42). Shah demonstrates that Pakistan bears no link of responsibility for 9/11. He further argues that individuals offering assistance to fighters by crossing the border from Pakistan into Afghanistan are not the equivalent of an "armed attack" under Article 51 (p. 42). Shah doubts that the U.S. legal arguments reflect the complicated situation on the Afghanistan-Pakistan border where various groups have different reasons for fighting, yet the United States attacks them all on the claim of protecting the U.S. homeland.

The Afghan Taliban, for example, are fighting a counterinsurgency or civil war challenging the Western-backed government in Kabul. They have shown no real interest in plotting terrorist attacks in the United States. Shah could add that post-2001 foreign forces fighting to keep the Kabul government in control could only attack into Pakistan if Kabul invited a response to an armed attack by Pakistan on Afghanistan.[33] Again, Shah's evidence is compelling that Pakistan does not bear responsibility for any attacks on the United States. Attempted terrorist attacks and military action aimed at Afghanistan do not amount to the armed attack element under Article 51.

Citing the advice developed by the U.S. Department of Justice (DOJ) in 2010 on the legality of the targeted killing of Americans with drones beyond armed conflict zones, Shah sees the United States trying to base its self-defense argument on an assertion that Pakistan is "unwilling or unable" to act against suspected terrorists (p. 157). He rejects that contention both as a factual matter and as a legal matter, having no place in the current law of self-defense. He traces the attempt to base a right of self-defense on a state being unwilling or unable to the 1837 *Caroline* incident.[34] He makes clear that the correspondence between the United States and Britain over that incident contains no basis for a right of self-defense that survived the adoption of the UN Charter. The Charter generally prohibits the use of force in Article 2(4) and, as noted above, creates only a narrow exception in Article 51 for self-defense "if an armed attack occurs."[35] Those who invoke the *Caroline* incident for a right of self-defense beyond the Charter limits wish to evade the armed attack provision of Article 51. In 1837, Britain scuttled a ship called the *Caroline* to prevent its use in bringing weapons across the Great Lakes from the United States to rebels in Canada. The United States pointed out, and Britain agreed, that there was no need for that violent response given the circumstances.

In response to the U.S. drone attacks in Pakistan, Shah writes:

> [T]he test the U.S. Government is relying on arises out of pre-UN Charter customary international law norms that have long since been refined and restrained by the application of the UN regime [that] . . . places a tremendous premium on the maintenance of international peace and stability and, consequently, works to restrain the use of force by states as much as possible. (P. 41)

For use of force in self-defense, the UN Charter requires an armed attack. Beyond the Charter, in the law of state responsibility, the general principles of necessity and proportionality present additional restrictions. As noted, the defending state may not attack the territory of a state bearing no responsibility for triggering the armed attack. Further, Shah explains that the principle of necessity in the *jus ad bellum* restricts the defending state to the use of force as a last resort. He takes the position that the only remaining value of the *Caroline* correspondence is to provide an example of when the use of force in self-defense is necessary, and it was not necessary in that case. Any reliance on the *Caroline* to justify force in the case of an imminent

(Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43 (Feb. 26).

[33] A similar critique has arisen about the possible justification of the UK attack in Syria as related to Iraq's civil war with ISIS. The prime minister did not make this argument, and it is not clear that Iraq wants this sort of attack on friendly Syria as part of its anti-ISIS effort. *See* Robert McCorquodale, *Human Rights and the Targeting by Drone*, EJIL TALK! (Sept. 18, 2015), *at* http://www.ejiltalk.org/human-rights-and-the-targeting-by-drone.

[34] On this case and its relevance to the law of self-defense, see R. Y. Jennings, *The* Caroline *and McLeod Cases*, 32 AJIL 82 (1938).

[35] UN Charter Art. 51.

attack fails to adequately consider the UN Charter.

Shah does not need to discuss the DOJ advice on the legality of killing individual Americans under a claim of self-defense. The scenario has little to do with Article 51. Nevertheless, he does discuss the advice and the DOJ white paper's infamous definition of "imminent" (p. 38).[36] He concludes that the white paper leaves the United States open to attacking "on the basis of 'no specific evidence'" (*id.*).[37] Despite his view of the analysis as "farcical" (*id.*)—a view shared by many—the United Kingdom seems to have adopted this same analysis to justify targeted killings using drone-launched Hellfire missiles to preempt the possibility of a future terrorist attack in the United Kingdom by the individuals killed in Syria in August. In addition to a solid interpretation of the *Caroline* incident, Shah could have expanded his discussion at this point in the book to the issue of targeting a single individual with military force as another aspect of U.S. targeted killing with little connection to Article 51.

Shah's most important discussion concerns the fact that the use of force by the United States against Pakistan has not been a last resort. Drone strikes on Pakistan are "impermissible because they are unnecessary, as other, peaceful means of facing the threat have not been exhausted" (p. 47). Woods confirms this view, adding details of strikes in Pakistan that can only be understood as "revenge" killings or as favors (Woods, pp. 103, 165), as opposed to actions necessary to self-defense.[38]

Shah does not explore the other aspect of necessity: the requirement that the use of military force must have a good likelihood of success in accomplishing the lawful purpose of self-defense. This standard is sometimes analyzed as part of *jus ad bellum* proportionality, which requires an expectation that the cost of exercising self-defense will not outweigh the injury giving rise to the right to use military force. For purposes of predicting success and limiting the counter-injury, the defending state must have a defensive strategy developed in response to an actual armed attack. The principles of necessity and proportionality support the plain terms of Article 51. Proper assessment of necessity and proportionality must be based on the concrete evidence of actual attacks, not future fears.

Even without identifying the likelihood of success or proportionality, Shah points out that the

> use of force is unnecessary in self-defense when, rather than diminishing the dangers involved, the gravity of the threat posed is augmented by the use of force. US drone attacks exacerbate the threat of terrorism, both from a regional and global perspective, and intensely strengthen militancy and insurgency in the troubled Pak-Afghan region. (Shah, p. 48)

Some evidence, discussed below, suggests that drone strikes have had short-term positive results for the United States. When, however, every other

[36] In its analysis of "imminent," the DOJ white paper noted that "the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al Qaeda or an Associated Force*, NBC NEWS, Feb. 4, 2013, *at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (providing link to DOJ white paper). It is uncertain whether the DOJ authors were discussing "imminent" in the context of Article 51 self-defense or the rules governing police use of lethal force. Regardless, the analysis is erroneous. See the discussion of self-defense at notes 32–35 *supra* and accompanying text. Respecting police rules, see UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 17; McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A), para. 145 (1995), *at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943; HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 763 (2d ed. 2015). See also the discussion that missiles cannot be used lawfully under police rules, *supra* notes 17–18 and accompanying text.

[37] Woods also critiques the DOJ white paper. He quotes the *New York Times* description of the white paper as "'a slapdash pastiche of legal theories—some based on obscure interpretations of British and Israeli law—that was clearly tailored to the desired result'" (p. 284).

[38] Scott Shane's article on the killing of Awlaki also leads to the conclusion that he was killed principally to avenge acts of terrorism that the Obama administration believes Awlaki inspired. *See* Scott Shane, *Dead Reckoning*, N.Y. TIMES MAG. Aug. 30, 2015, at 56–62.

element of lawful self-defense is missing, such an equivocal basis for satisfying necessity is virtually irrelevant.

Drawing on his intimate knowledge of Pakistan, its law, and its politics, Shah is in a position to answer the claims that, even if self-defense provides no legal basis for drone attacks, consent of the government does. At most, the Obama administration has indicated that it has received no complaints when notice of impending drone strikes was faxed to Pakistani intelligence or military officials. Shah lays out the internal constitutional organization of Pakistan, which he admits is complex, particularly with respect to the Federally Administered Tribal Areas (FATA). He nevertheless makes a compelling argument that the president of Pakistan has constitutional authority over FATA. Moreover, it is clearly not the military or the intelligence services that may lawfully consent to a foreign state using military force there (Shah, pp. 88–94; Woods, pp. 102–03). Shah also underscores that even the president of Pakistan, who does have such authority, may not consent to the violation of certain *jus cogens* norms. In fact, no government may consent to another government's violation of nonderogable human rights, whether or not *jus cogens*. The right to life and other fundamental human rights at issue in drone strikes turn on whether an armed conflict is occurring on Pakistan's territory and whether Pakistan's government decides to use military force in the justifiable suppression of armed insurrection.

III. THE INCENTIVES

Shah's presentation of the international law on the use of force from a global perspective underscores not only the illegality of drone use but also the importance of the UN Charter rules against the use of force. His discussion emphasizes, in particular, the importance of these rules to the vast majority of sovereign states in the world. What explains, therefore, Pakistan's turn to the use of the drone to summarily kill three suspected terrorists in 2015? Both Shah and Woods present ample evidence to conclude that fourteen years of killing with drones has not just failed but has worsened the problem of terrorism, insurgency, violence, and instability. Why still play the game?

Social scientists have extensive data to assess and compare with the observations of Shah and Woods on whether drones have "succeeded." Daniel Byman is emphatic that they have. He points to the people on the kill list who are now dead, the lack of another major terrorism attack on U.S. soil, and the inadequate available alternatives.[39] Audrey Kurth Cronin draws more carefully on a large body of data for her answer: "Drones are tactically effective in the short term but perilous for American counterterrorism in the long term."[40] Even more insightfully, she explains why U.S. leaders have chosen the short over the long term: "US killer drones are ripe targets for criticism, but we must also acknowledge the role that unrealistic public expectations are playing in their use. The popular demand for perfect security against al-Qaeda terrorist attacks at home without more conventional military engagements abroad is fueling this technology-driven, tactical approach."[41] Her assessment is focused on the United States and preventing attacks there, not on the short-term effects where the attacks occur. Viewed more comprehensively, the immediate loss and anger experienced by victims in Yemen, Pakistan, and Somalia—their "short term"—will

[39] Daniel Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, FOREIGN AFF. MAG., July/Aug. 2013, *at* https://www.foreignaffairs.com/articles/somalia/2013-06-11/why-drones-work, *excerpted in* DRONES AND TARGETED KILLINGS: ETHICS, LAW, POLITICS 46, 46–49 (Sarah Knuckey ed., 2015).

[40] Audrey Kurth Cronin, *The Strategic Implications of Targeted Drone Strikes for US Global Counterterrorism*, *in* DRONES AND THE FUTURE OF ARMED CONFLICT, *supra* note 25, at 99, 119. The counterproductive nature of drone attacks is argued by many experts. Lt. Gen. Michael Flynn, former head of the U.S. Defense Intelligence Agency, has said drone attacks cause more harm than good, calling their use "a failed strategy." *Retired US General: Drones Cause More Damage Than Good*, ALJAZEERA, July 10, 2015, *at* http://www.aljazeera.com/news/2015/07/retired-general-drones-damage-good-150716105352708.html; *see also* SHANE, *supra* note 8, at 62. *But see* Kenneth Anderson, *The Case for Drones*, COMMENTARY, June 2013, at 14, *excerpted in* DRONES AND TARGETED KILLINGS, *supra* note 39, at 57, 60–64 (noting that the author is not persuaded by the evidence of unintended negative consequences).

[41] Cronin, *supra* note 40, at 120.

lead to the longer-term failure of drones to deliver security.

Chamayou argues that the United States and others are killing with drones for reasons largely disconnected from measures of success. He concurs that the use of drones is counterproductive to ending terrorism and explores their continued use despite their failure. He finds that the very possession of the technology leads to the will to use it and induces legal scholars to argue for the right to do so. Chamayou sees the capacity to kill without being killed conflates with a judgment that those possessing the capacity also possess the right to use it.

The right to kill in war is based fundamentally on the premise that it is available to both sides. But drones remove the reciprocity of battlefield killing. Without reciprocity, killing becomes execution. The one that is able to kill confuses this choice with the right to kill.

> The effects of airpower on the juridical and political categorization of the enemy was something that Carl Schmitt, in his day, had accurately pinpointed. His analysis of the effects of "autonomous aerial warfare," in which "the lack of relation between military personnel in the air and the earth below, as well as with inhabitants thereon, is absolute," is still applicable today to the armed drone. . . . The verticalization of armed violence implies a tendency toward the absolute hostilization of the enemy, both politically and juridically. He is no longer positioned, in any sense of the term, on the same ground as oneself. (Chamayou, pp. 165–66)

Chamayou, too, is speaking about the conditions that have led to a certain view of killing as acceptable. If he is right about this progression, it explains why arguments for humanitarian intervention or preemptive self-defense have faded, but arguments for high-tech killing may prove more stubborn.

In the United States today, we see a combination of confidence in American ingenuity, faith in military force, and interest in the legal and moral high ground. It is a contradictory set of perspectives in which the way through has been to reconceive law and morality, not to forgo weapons or the use of force.[42] Even when the vast majority of armed actors possess drones, instead of turning back to the limits on resort to force, Americans seem likely to invest more in new weapons development than law. This prediction is supported by the widespread belief that international law on the use of force either does not exist or is immoral when it restricts the U.S. resort to force. It is further supported by the related belief that the only option is to innovate, given that drone technology is "out there." Work is well underway in U.S. Department of Defense labs towards fully autonomous robotic weapons and cyberweapons. Once the new weapons are invented, the legal and/or moral arguments for their use will follow. For Richard Falk, "[T]he international law of war has consistently accommodated new weapons and tactics that confer significant military advantages on a sovereign state, being rationalized by invoking 'security' and 'military necessity' to move aside whatever legal and moral obstacles stand in the way."[43]

IV. CONCLUSION

Falk's observation is fully in accord with the facts of drone use presented by Woods, the treatment of international law recounted by Shah, and the attitude towards moral imperatives analyzed by Chamayou. Before giving way to despair, however, it is worth considering Falk's word "consistently." In fact, at exceptional times, much of the world has taken a stand in law and morality against resort to war and new weapons. Those inconsistent moments may hold the key to responding constructively to this latest revolution in military-legal affairs. After World War II, two British academics, Julius Stone and Derek Bowett, began the game of challenging the Charter restrictions on resort to force. It was Bowett who first offered the *Caroline* correspondence in an attempt to justify the

[42] For a similar point, see Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle?*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 112, 131 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

[43] Richard Falk, *Why Drones Are More Dangerous Than Nuclear Weapons*, *in* DRONES AND TARGETED KILLING, *supra* note 18, at 31.

United Kingdom's unlawful use of force in the 1956 Suez crisis; the United States and the Soviet Union jointly found the United Kingdom in violation of the Charter. Despite the finding, international lawyers have persisted in looking to the *Caroline* for authority to disregard the Charter's restrictions. Shah's book is a persuasive new argument for rejecting Bowett's interpretation. As ever more seductive means to kill are invented, law and morality applied accurately to the facts by lawyers committed to their professional responsibility to serve the rule of law will be the best means to honor the truly transcendent values, not the security of a few but the flourishing of all.[44]

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BOOK REVIEWS

National Security and Double Government. By Michael J. Glennon. Oxford, New York: Oxford University Press, 2015. Pp. ix, 257. Index. $31.95.

Michael Glennon is deeply pessimistic about the current condition of the United States' national security apparatus. Glennon, a professor of international law at the Fletcher School of Law and Diplomacy at Tufts University, has written an original and thought-provoking book, with a key goal of explaining why national security policies change little across presidential administrations. To this end, he draws from a theory of "double government" developed by British journalist Walter Bagehot in the 1860s to explain the nature of the English Constitution.[1] Bagehot identified two primary constellations of actors in the British system: the monarchy and the House of Lords, which he termed the "'dignified' institutions"; and the prime minister, the House of Commons, and the Cabinet, which he termed the "'efficient' institutions" (p. 5). The real power of government lies in the latter. The dignified institutions largely serve as showpieces, helping to obscure where the actual work of governance occurs. To the extent that the dignified institutions perform *some* governance functions, that is largely to persuade the public that all is well in the world—to avoid revealing the secret of double government.

Glennon brings this concept forward into the contemporary U.S. national security system. He denominates the Bagehotian equivalents of the dignified institutions as "Madisonian" and the efficient institutions as "Trumanite." The Madisonian institutions are the president, the courts, and the elected members of Congress. The Trumanites are the several hundred senior national security officials scattered throughout the executive agencies (including the Departments of Defense, State, and Justice, and the Central Intelligence Agency (CIA)). Glennon argues that the Trumanites—unelected, unaccountable, nontransparent, conformist, and strongly inclined to overstate security threats—exercise almost total control over U.S. national security policy. The Trumanites continue gradually to produce ever-more draconian security policies, and, in Glennon's view, this process is inexorable. While much of his pessimism may be warranted, he overestimates the weakness of the Madisonian institutions, especially the presidency, and underestimates the external and internal constraints on the Trumanite actors who form the core of his story.

Glennon's book begins by describing the Trumanite network that plays a seminal role in U.S. national security. Trumanites offer certain advantages: they are experts in their fields, and they are smart, nonpartisan, and hardworking. But they (or the structures within which they operate) embody serious flaws. In particular, Glennon suggests that Trumanites overemphasize existing threats and invent new ones. This approach ensures continued resources from Congress and the White House and avoids underprotecting the state. In this way, they minimize the criticism that would follow if another terrorist attack occurred. But Glennon may overstate his case here: he admits that "[i]t is unclear the extent to which the specific threats at which the Obama national security policy is directed have been inflated" (p. 21). He also treats the

[44] On the special nature of professional responsibility standards for international lawyers in government, see Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture,* 98 AJIL 689 (2004).

[1] WALTER BAGEHOT, THE ENGLISH CONSTITUTION 61 (Cornell Univ. Press 1966) (1867).