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Seductive Drones: Learning from a Decade of Lethal Operations

COMMENT BY MARY ELLEN O'CONNELL*

Introduction

Late on 1 May 2011, in Washington, DC, President Barack Obama announced that United States Special Forces had killed Osama bin Laden in his home in the quiet Pakistani town of Abbottabad.¹ As details emerged,² human rights experts began to question the legality of the killing, specifically whether Bin Laden could have been captured, rather than killed.³ Just a few days later, the *New York Times* reported that the US had carried out drone strikes in Pakistan and Yemen, killing as many as 15 persons in Pakistan and two in Yemen.⁴ Plainly, no person killed in the drone strikes in the days following events in Abbottabad was as dangerous as bin Laden.⁵ Yet, few questioned those

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¹ See The White House, Office of the Press Secretary, 'Remarks by the President on Osama Bin Laden' (Press Release, 2 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>>.

² National Public Radio (NPR) Staff and Wires, 'Officials: Bin Laden Was Unarmed When He Was Shot' (3 May 2011) NPR <<http://www.npr.org/2011/05/03/135948047/u-s-considers-whether-to-release-bin-laden-photos>>.

³ See Stephanie Nebehay, 'UN Rights Boss Asks US for Facts on bin Laden Killing', *Reuters* (online), 3 May 2011 <<http://www.reuters.com/article/2011/05/03/us-binladen-un-rights-idUSTRE7425PR20110503>>.

⁴ Pir Zubair Shah, 'Drone Strike Said to Kill At Least 8 In Pakistan', *New York Times* (online), 7 May 2011, A9 <<http://www.nytimes.com/2011/05/07/world/asia/07drone.html>>; Mark Mazzetti, 'American Drone Strike in Yemen Was Aimed at Awlaki', *New York Times* (online), 6 May 2011 <<http://www.nytimes.com/2011/05/07/world/middleeast/07yemen.html>>; Tom Finn, 'I Fear for my Son, Says Father of Anwar al-Awlaki, Tipped as New Bin Laden', *The Guardian* (online), 8 May 2011 <<http://www.guardian.co.uk/world/2011/may/08/anwar-awlaki-yemen-al-qaida>>.

⁵ Mazzetti reports that the target of the drone strike in Yemen was Anwar al-Awlaki, above, n 4. Al-Awlaki is generally accepted to be a spiritual leader of the small group of al Qaeda members known as 'Al Qaeda in the Arabian Peninsula' or 'AQAP' and to run a Jihadist website. Yet, he is not considered one of AQAP's '100

killings, in contrast to bin Laden's. Could the targeted persons have been captured rather than killed? A decade after the United States first began using drones for lethal operations complacency about their use may be taking hold. Many Americans, as well as citizens of other countries, may now accept that killing with drones far from armed conflict hostilities is both a legally and morally acceptable practice.

Our growing complacency with respect to drone attacks is the concern of this contribution to the JLS special issue. Most legal experts would conclude today that unmanned combat vehicles (UCVs), including unmanned aerial systems or 'drones', fit the legal regime already in place for manned weapons systems. The United Kingdom Ministry of Defence's Joint Doctrine Note 2/11, *The UK Approach to Unmanned Aircraft Systems* states: 'Most of the legal issues surrounding the use of existing and planned systems are well understood and are simply a variation of those associated with manned systems.'⁶ Yet, is this really the case? Is it true that existing law regulating manned systems is adequate to regulate killing with UCVs? As will be discussed below, after a decade of killing, we have indications that the availability of drones is resulting in resort to military force that would not otherwise occur. Depending on what is behind this phenomenon, legal scholars may need to take a fresh look at the law governing the use of armed UCVs.

This contribution aims only at raising awareness of the issue, to invite more investigation, and to urge caution with respect to killing with UCVs based on the information we currently possess. At least two sets of data indicate a problem: First, we have evidence from psychological studies that killing at a distance using unmanned launch vehicles may lower the inhibition to kill on the part of operators.⁷ Second, we have a decade of evidence of US presidents deploying military force where such force was unlikely to be used prior to the

to 200 hardcore fighters'. See Finn, above n 4. See also, *Al-Aulaqui v Obama et al*, US District Court D.D.C., No 10-cv-01469 (JDB) (2010), especially Expert Declaration of Bernard Haykel.

- 6 United Kingdom Ministry of Defence, *Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems*, (30 March 2011) Ministry of Defence, [502] <http://www.mod.uk/NR/rdonlyres/F9335CB2-73FC-4761-A428-DB7DF4BEC02C/0/20110505JDN_211_UAS_v2U.pdf>, citing Tony Gillespie and Robin West, *Requirements of Autonomous Unmanned Air Systems set by Legal Issues*, (14 December 2010) Defence Science and Technology Laboratories <http://www.dodccrp.org/html4/journal_v4n2.html>; See also, Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings*, (28 May 2010) UN Doc A/HRC/14/24/Add.6, 24 ('Alston Report').
- 7 Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' (Research Paper No 09-43, Notre Dame Law School Legal Studies, (2009)) in Simon Bronitt (ed), *Shooting To Kill: The Law Governing Lethal Force in Context* (forthcoming), 8-9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144>.

development of UCVs.⁸ This evidence indicates that the availability of UCVs lowers political and psychological barriers to killing. At the same time, an increasing number of international law specialists are arguing that it is lawful to kill terrorism suspects wherever they are found or to kill them if they are found in 'weak states.'⁹ These arguments seem intended to support policy decisions already taken, rather than providing rigorous analysis of the relevant international law. International law establishes a high bar to lawful resort to lethal force. That high bar is derived from the Just War Doctrine and so reflects not just a legal norm, but a moral norm as well. Much policy on resort to lethal force, by contrast, appears to be related to Realist power politics ideology rather than international legal authority. Within Realism, resort to lethal force, killing, is acceptable to send a message of strength or to promote the perception of power in the form of military power. Even among policy makers not committed to Realist power projection there may be a belief in the utility of military force to suppress terrorism that is not warranted by the record.

Part 1 below describes the past decade of lethal operations with drones. Part 2 contrasts legal analysis based on solid international legal authority with scholarship taking a permissive view of the right to kill. Part 3 considers the evidence that the availability of UCVs is lowering political and psychological barriers to killing. Given this evidence, the contribution concludes that, at the least, international law experts should be demanding strict compliance by states in the case of killing with UCVs. Indeed, far from relaxing the rules, consideration should be given to raising the standards when it comes to deploying armed UCVs.

1 A Decade of Lethal UCV Operations

Unmanned systems are found in myriad forms today, performing innumerable functions.¹⁰ The focus here is on unmanned weapons systems, especially the systems that began to come online by the year 2000. It was in that year that the United States apparently adapted the Predator, an unmanned aerial surveillance vehicle, for use in lethal operations.¹¹ The

⁸ See below, at EAP 4-9.

⁹ See below, at EAP 15, 17-22.

¹⁰ For an excellent overview of UCVs, especially respecting legal issues, see Brendan Gogarty and Meredith Hagger, 'The Law of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land, and Air' (2008) 19 *Journal of Law, Information and Science* 73. See also, Peter W Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (Penguin, 2009) (provides the standard descriptive work on UCVs).

¹¹ *Eighth Public Hearing of the National Commission on Terrorist Attacks Upon the United States: Counterterrorism Policy* (written statement of George Tenet, 24 March 2004) National Commission on Terrorist Attacks Upon the United States, 16

Predator was re-engineered to carry two Hellfire missiles and subsequently deployed in the Afghanistan War that began 7 October 2001.¹² In 2007, the US began buying the Reaper or MQ9, which is a drone designed from the start to be an attack vehicle.¹³ The Reaper is similar in design and function to the Predator but, among other things, can deploy more firepower.¹⁴ The Reaper can carry up to 14 Hellfire missiles, as well as bombs that can weigh up to 500 pounds. In late 2010, the Air Force announced it would stop buying Predators to focus solely on Reapers.¹⁵ It currently has dozens of Reapers with plans to buy hundreds more during 2011.¹⁶

While there is some evidence that the administration of President Bill Clinton had been prepared to use a Predator to kill Osama bin Laden in 2000,¹⁷ the media reports that Predators were first used to kill during the Afghanistan War. In November 2001, journalists reported that Mohammed Atef had been killed in a targeted killing mission that likely involved CIA and US Air Force personnel. Atef was considered to be the military head of al Qaeda at the time.¹⁸ The US used a drone to launch missiles at his home near Kabul. In addition to Atef, seven other persons were killed in the attack.¹⁹ The US has continued to use drones in combat operations in Afghanistan, where the conflict evolved from a war of self-defense in 2001 to a counter-insurgency or civil war by mid-2002.²⁰

<http://govinfo.library.unt.edu/911/hearings/hearing8/tenet_statement.pdf>
(‘Tenet Statement’).

¹² Ibid 15.

¹³ Spencer Ackerman, *Air Force is Through with Predator Drones* (14 December 2010) Wired <<http://www.wired.com/dangerroom/2010/12/air-force-is-through-with-predator-drones/>>.

¹⁴ Christopher Drew, ‘Drones Are Weapons of Choice in Fighting Qaeda’, *New York Times* (online), 16 March 2009, <http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1&hp>.

¹⁵ Ackerman, above n 13.

¹⁶ Ibid.

¹⁷ *Tenet Statement*, above, n 11, 15-16.

¹⁸ Eric Schmitt, ‘Threats and Responses: The Battlefield; US Would Use Drones to Attack Iraqi Targets’, *New York Times* (online), 6 November 2002, <<http://www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-drones-attack-iraqi-targets.html>>; See also, Peter Bergen and Katherine Tiedemann, *The Drone War, Are Predators our Best Weapon or Worst Enemy?* (3 June 2009) *The New Republic*, 22, <<http://www.tnr.com/article/the-drone-war>>.

¹⁹ *Reports Suggests Al Qaeda Military Chief Killed*, (17 November 2011) CNN, <http://articles.cnn.com/2001-11-17/world/ret.atef.reports_1_qaeda-airstrike-terrorist-network?_s=PM:asiapcf>.

²⁰ See below n 48 and accompanying text.

In November 2002, the CIA, operating from the tiny African country of Djibouti used a drone to kill Abu Ali Al Harithi in Yemen.²¹ The US had evidence tying Harithi to the 2000 attack on the *USS Cole* in the Port of Aden. The drone carried laser-guided Hellfire missiles, which struck a passenger vehicle carrying Harithi and five others. All six passengers in the vehicle were killed, including a 23-year-old American citizen from near Buffalo, New York. The CIA confirmed the identity of the victims by sending agents to the scene by helicopter right after the attack. The agents repelled to the ground to collect DNA samples from the bodies.²² US officials said one of six fatalities was Harithi, the suspect in the *Cole* attack.²³ The US has carried out a number of other military attacks in Yemen since 2002, but it only resorted to drones for a second time in May 2011, during the turmoil of the pro-democracy demonstrations against President Saleh. The target of the May attack was Anwar al-Awlaki, a US citizen and Muslim cleric, considered to be a member of al Qaeda. He is thought to be a propagandist for the group, not a fighter. The drone attack missed Awlaki but killed two other persons.²⁴

The US also used armed drones in the invasion of Iraq that began in March 2003.²⁵ It continued to do so until the end of major combat operations in 2010. In 2004, the US began using drones to attack individuals in Pakistan. During the course of that year the US carried out three attacks. In 2008, the last year of the Bush Administration, there were about 30 drone attacks in Pakistan.²⁶

²¹ Doyle McManus, 'A US License to Kill, a New Policy Permits the CIA to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time,' *Los Angeles Times* (online), 11 January 2003, A1, <<http://articles.latimes.com/2003/jan/11/world/fg-predator11>>.

²² Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror* (Public Affairs, 2007) 196-197.

²³ McManus, above n 21; Jack Kelly, 'US Kills Al-Qaeda Suspects in Yemen; One Planned Attack on USS Cole, Officials Say', *USA Today* (online), 5 November 2002, A1 <http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm>; John J Lumpkin, 'Administration Says That Bush Has, in Effect, a License to Kill; Anyone Designated by the President as an Enemy Combatant, Including US Citizens Can Be Killed Outright, Officials Argue', *St Louis Post-Dispatch* (St Louis) 4 December 2002, A12.

²⁴ Margaret Coker, Adam Entous and Julian E Barnes, 'Drone Targets Yemini Cleric', *The Wall Street Journal* (online), 7 May 2011 <<http://online.wsj.com/article/SB10001424052748703992704576307594129219756.html>>. See also, above n 5 and accompanying text.

²⁵ Brian M Carney, 'Air Combat by Remote Control', *The Wall Street Journal* (online), 12 May 2008 <<http://online.wsj.com/article/SB121055519404984109.html#printMode>>.

²⁶ Phil Stewart and Robert Birsell, 'Under Obama, Drone Attacks on the Rise in Pakistan', *Reuters* (online), 12 October 2009 <<http://www.reuters.com/article/2009/10/12/idUSN11520882>>. ('There have been 39 drone strikes in Pakistan since Obama took office not quite nine months ago, according to a Reuters tally of reports from Pakistani security officials, local

President Obama quickly authorised an escalation. Within three days of his inauguration, he authorised CIA drone strikes that killed an estimated 20 people, including the residents of a house that was hit accidentally: 'The blast killed [a] tribal leader's entire family, including three children, one of them five years old.'²⁷ Despite this tragedy, Obama allowed nearly twice as many attacks in Pakistan in 2009 than there were in 2008. The number doubled again in 2010.²⁸ In 2009, about thirty persons were killed on average in each attack. In 2010, the number killed per attack dropped to 6-7 persons. Nevertheless, of the hundreds of persons killed in 2010, only two were on the CIA's target list.²⁹

The US has used combat drones in Somalia, probably starting in late 2006, during the Ethiopian invasion when the US assisted Ethiopia in its failed attempt to install a new government in that volatile country. The US has also killed fleeing terrorist suspects using helicopter gunships. Following Ethiopia's withdrawal, the US has continued to carry out lethal operations in Somalia, but it is unclear how many of these have involved drones as opposed to those that involved manned aircraft.³⁰ The press reported attacks by Special Forces from helicopters in September 2009 that killed four.³¹ With respect to Somali pirates, the US has used law enforcement methods, even

government officials and residents. That compares with 33 strikes in the 12 months before Obama was sworn in on Jan. 20' [paragraph break omitted]. See also, Bergen and Teidemann, above n 18.

- ²⁷ Jane Mayer, 'The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?', *The New Yorker* (online), 26 October 2009 <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer>.
- ²⁸ Peter Bergen, *An Analysis of US Drone Strikes in Pakistan, 2004-2011* (10 January 2011) New America Foundation: Counterterrorism Strategy Initiative <<http://counterterrorism.newamerica.net/drones>>.
- ²⁹ Greg Miller, 'Increased US Drone Strikes in Pakistan Killing Few High Value Militants', *Washington Post* (online), 21 February 2011 <<http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>>.
- ³⁰ S Bloomfield, *Somalia: The World's Forgotten Catastrophe* (9 February 2008) *The Independent* <<http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html>>; See also, *US Missile Strike Hits Town in Somalia* (3 March 2008) CBS News <<http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml>>; *A Strike Against Al-Qaeda's Hornet's Nest* (1 September 2007) Spiegel Online <<http://www.spiegel.de/international/0,1518,458597,00.html>>.
- ³¹ Karen de Young, 'Special Forces Raid in Somalia Killed Terrorist With Al-Qaeda Links, US Says', *Washington Post* (online) 15 September 2009 <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/14/AR2009091403522.html>>. Apparently the US is planning to escalate drone attacks in Somalia. See Mark Mazzetti and Eric Schmitt, 'U.S. Expands Its Drone War Into Somalia' *New York Times* (New York), 2 July 2011, A1.

sending FBI agents to arrest individuals involved in the killing of American citizens.³² In these operations, drones have been used for surveillance only.

The US has also deployed armed drones in Libya in the civil war that began in mid-February 2011. Almost a month after the United Nations Security Council authorised military intervention to protect civilians, the US decided to deploy combat drones.³³ President Obama was looking for a way to remain engaged with NATO partners in Libya, while appearing not to be part of yet another armed conflict in a Muslim country. The solution was to send armed drones.³⁴

In sum, during the last decade, we know from media reports that the US has used UCVs in lethal operations in the following countries: Afghanistan, Iraq, Libya, Pakistan, Somalia, and Yemen. The killings were part of armed conflict hostilities in Afghanistan, Iraq, and Libya, but generally not in Pakistan, Somalia, or Yemen. The total number of persons killed in these attacks is unknown.

2 Law on UCV Lethal Operations

In international law, the use of lethal force is governed by two separate legal regimes: The law of peace and the law of armed conflict. In peace, international law, especially international human rights law, limits the amount of lethal force national authorities may use in responding to violent crime.³⁵ During armed conflict hostilities, authorised persons face fewer restrictions to engage in lethal force than authorised persons beyond such hostilities. Acts of terrorism do sometimes occur during armed conflict, permitting the use of lethal force against terrorists under armed conflict rules.

³² Carol Cratty, *Sources: FBI agents in Somalia for arrest of alleged pirate* (14 April 2011) CNN

<http://articles.cnn.com/2011-04-14/us/somali.pirate.leader.indicted_1_somali-pirate-macay-and-bob-riggle-pirate-leader?_s=PM:US>; *Pirate who 'wanted to kill Americans' gets 33 years for hijacking US ship* (2 February 2011) msnbc.com
<http://www.msnbc.msn.com/id/41615693/ns/us_news-crime_and_courts/t/pirate-who-wanted-kill-americans-gets-years-hijacking-us-ship/>.

³³ 'US Sends Drones to Libya, Battle Rages for Misrata', *Reuters* (online), 21 April 2011
<<http://www.reuters.com/article/2011/04/21/us-libya-idUSTRE7270JP20110421>>. Between April and mid-June 2011, the US had attacked about 30 times in Libya with drones. See Charlie Savage and Thom Shanker, 'Scores of U.S. Strikes in Libya Followed Handoff to NATO', *New York Times* (online), 20 June 2011,
<<http://www.nytimes.com/2011/06/21/world/africa/21powers.html>>.

³⁴ *Ibid.*

³⁵ Note, for example, the protests over excessive force used by governments against pro-democracy demonstrators in Bahrain, Egypt, Libya, Syria, Tunisia, and Yemen.

In general, however, acts of terrorism are criminal acts, subject to peacetime rules on the use of lethal force.³⁶

Until 9/11, the United States observed this line, still respected by most states, between terrorist crimes and armed conflict hostilities. Indeed, just a few months before 9/11, the US Ambassador to Israel, Martin Indyk, stated on Israeli television in connection with Israeli targeted killing of suspected terrorists: 'The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that.'³⁷ The US position has generally been to treat terrorists as criminals.³⁸ Following attacks by al Qaeda on American targets in 1993, 1998, and 2000, the US used the criminal law and law enforcement measures to investigate, extradite, prosecute and punish persons linked to the attacks.³⁹

³⁶ See, Final Report of the Use of Force Committee, *The Meaning of Armed Conflict in International Law* (August 2010) International Law Association <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>>; *Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6, 3, 54, 85-86 ('Alston Report'); Report of the Eminent Jurists Panel on Terrorism Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (16 February 2009) International Commission of Jurists, 15 <<http://www.icj.org/dwn/database/EJP-Report.pdf>>; European Commission for Democracy Through Law (Venice Commission), *Opinion: On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Persons* (18 March 2006) adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) Op no 363/2005, CDL-AD (2006)009 <<http://www.venice.coe.int/docs/2006/CDL-AD%282006%29009-e.asp>>; *International Summit on Democracy, Terrorism, and Security, Towards a New Consensus* (8-11 March 2005) Club of Madrid, 9-10 <http://www.clubmadrid.org/img/secciones/new_consensus.pdf>.

³⁷ Joel Greenberg, 'Israel Affirms Policy of Assassinating Militants', *New York Times* (online), 5 July 2001, A5, <<http://www.nytimes.com/2001/07/05/world/israel-affirms-policy-of-assassinating-militants.html>>.

³⁸ The US made an exception to this position when it discovered that Libyan agents bombed a Berlin disco where American service personnel often went. The US view was that such attacks and indications of future attacks led to a right to use force in self-defence under Article 51 of the UN Charter. For the facts, see Christopher Greenwood, 'International Law and the United States' Air Operation Against Libya' (1987) 89 *West Virginia Law Review* 933. Such a claim has always been controversial because of the low-level nature of the terrorist attack. Even being sponsored by a state, it is unclear after the decision in the *Nicaragua* case that bombing or other significant military responses are lawful against more minor attacks. The ICJ indicated in *Nicaragua* that countermeasures are the appropriate response. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgement of June 27) [1986] ICJ Rep 14, 103-104 [195], 119 [230] ('*Nicaragua*').

³⁹ After attacks on the US embassies in Kenya and Tanzania in 1998, the US used law enforcement techniques but also bombed sites in Sudan and Afghanistan. These bombings, like the Libya bombing discussed in note 38 above, were controversial. See, eg, Jules Lobel and George Loewenstein, 'Emote Control: The Substitution of

The British, Germans, Italians, Kenyans, Spanish, Indonesians, Indians, and others have all faced terrorist challenges that they dealt with using law enforcement methods.⁴⁰ When becoming a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,⁴¹ the British appended the following understanding to their acceptance:

It is the understanding of the United Kingdom that the term "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.⁴²

France made a similar statement on becoming a party to the Protocol.⁴³ In a dramatic policy shift that has not yet been fully explained, the US responded to the 9/11 terrorist attacks with a war in Afghanistan but also the use of military force and detention without trial of persons with no link to any armed conflict hostilities.⁴⁴

The United States and the UK justified their initial use of force in Afghanistan on the classic international law doctrines of self-defence and state responsibility — the Taliban government of Afghanistan was linked to al

Symbol for Substance in Foreign Policy and International Law' (2005) 80 *Chicago-Kent Law Review* 1045, 1071.

⁴⁰ For a detailed account of the British struggle against the IRA and other counter-terrorism efforts, see Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (Random House, 2006).

⁴¹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979) ('AP I') <<http://www.unhcr.org/refworld/docid/3ae6b36b4.html>>; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609, (entered into force 7 December 1978) ('AP II') <<http://www.unhcr.org/refworld/docid/3ae6b37f40.html>>.

⁴² See AP I, *Reservation/Declaration* (2 July 2002) ICRC <<http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>>.

⁴³ See AP I, *Reservation/Declaration* (11 April 2001) ICRC (in French) <<http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>>.

⁴⁴ For a general discussion of the US position on suppressing terrorism before and after 9/11 and, see, Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4 *Journal of National Security Law & Policy* 343, <<http://ssrn.com/abstract=1654049>>. Many assumed the expansive claims to belligerent rights would end with the presidency of George W Bush. See Christopher Coker, *Ethics and War in the 21st Century* (Routledge, 2008) x. With respect to killing with drones, the Obama administration has gone further than his predecessor. See O'Connell, above n 44, 343-344.

Qaeda and to al Qaeda's attacks in the US on 9/11. Weaknesses in this argument have emerged subsequently but as a matter of the international law governing lethal force, it is generally sound. On the evidence available on October 7, the resort to major military force by the United States and the United Kingdom in Afghanistan was based on the right of self-defence under Article 51 of the United Nations Charter.⁴⁵ Article 51 permits the use of major military force on the territory of another state if that state is responsible for a significant armed attack.⁴⁶ The 9/11 attacks were found to be significant enough to trigger a right to respond under Article 51 by the UN Security Council in its Resolution 1368, but the Security Council did not specify against what state the use of force in self-defense could be carried out. After some days, the US and UK determined that Afghanistan was responsible for the 9/11 attacks because of its support and cooperation with al Qaeda.⁴⁷

The war of self-defence in Afghanistan began on 7 October 2001 and ended in 2002 when Hamid Karzai became Afghanistan's leader following his selection at a *loya jurga* of prominent Afghans.⁴⁸ Today, the US, UK, Australia, and other international forces are in Afghanistan at the invitation of President Karzai in an attempt to repress an insurrection. The fighting in Afghanistan, whether initially as an international armed conflict or today as a civil war, has remained significant enough to justify the use of battlefield weapons by all sides in the parts of Afghanistan where that fighting has taken place.⁴⁹ At least in Afghanistan, therefore, the US use of drones has been justifiable so long as the rules governing battlefield conduct have been observed.⁵⁰

The radical departure from accepted law occurred a year later in Yemen. There, in 2002, the US killed six persons through the use of a drone to launch

⁴⁵ For a detailed discussion of treaties, customary rules, general principles, as well as International Court of Justice decisions relevant to this law, see Mary Ellen O'Connell, 'Preserving the Peace: The Continuing Ban on War Between States' (2007) 38 *California Western International Law Journal* 41; and Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889, 889-904.

⁴⁶ See eg, *Nicaragua*, [1986] ICJ Rep 14, 102 [193].

⁴⁷ O'Connell, 'Lawful Self-Defense to Terrorism', above n 45, 901-902.

⁴⁸ See *President Hamid Karzai* (2006) The Embassy of Afghanistan, Washington DC, <<http://www.embassyofafghanistan.org/president.html>>.

⁴⁹ This has certainly been the case through mid-2011, but the situation may be changing as the media reports of at least preliminary peace talks. See, eg, Quil Lawrence, *Talk of Peace in Afghanistan is a Matter of Trust* (17 April 2011) NPR, <<http://www.npr.org/2011/04/17/135486374/negotiating-afghan-peace-with-the-taliban-quietly>>.

⁵⁰ See the investigation into a drone strike in February 2010 that resulted in the deaths of a number of civilians. Christopher Drew, 'Study Cites Drone Crew in Attack on Afghans', *New York Times* (online), 10 September 2010, <<http://www.nytimes.com/2010/09/11/world/asia/11drone.html>>. (The Pentagon report found the Predator crew exercised 'poor judgment').

Hellfire missiles, despite the fact that the US was not engaged in armed conflict hostilities in that country. Prior to the strike, the FBI had been working with Yemeni authorities to apprehend and prosecute the al Qaeda members in Yemen suspected of attacking the *Cole* in 2000. The US had employed law enforcement techniques cooperatively with Yemeni authorities with considerable success.⁵¹ The drone attack signalled a shift to the use of military force. The US Air Force reportedly had legal concerns with the attack, which was carried out by the CIA.⁵²

In January 2003, the United Nations Commission on Human Rights received a report on the Yemen strike from its special rapporteur on extrajudicial, summary, or arbitrary killing. The rapporteur concluded that the strike constituted 'a clear case of extrajudicial killing.'⁵³ US State Department lawyer, Michael Dennis, published an article in the *American Journal of International Law* taking issue with the UN finding and defending the 'global war on terror.' Dennis wrote: 'The United States' response to the ... Yemen allegations has been that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter.'⁵⁴ Dennis's position was based on his argument that the United States could treat persons far from any battlefield as combatants if they could be tied in some way to al Qaeda. US National Security Adviser Condoleezza Rice explained in a television interview that the Yemen attack was justified because the United States was in a 'new kind of war' to be fought on 'different battlefields.'⁵⁵ The Deputy General Counsel of the Department of Defense for International Affairs at the time, Charles Allen, also explained that the US was in a global war against certain persons, wherever found, and may target 'Al Qaeda and other international terrorists around the world and those who support such terrorists *without warning*.'⁵⁶ He emphasised that the existence of the 'war' depends on the person targeted, not the existence of armed hostilities. Thus, for Allen the US has the legal

⁵¹ Ali H Soufan, 'Scenes from the War on Terrorism in Yemen', *New York Times* (online), 2 January 2010, <<http://www.nytimes.com/2010/01/03/opinion/03soufan.html>>.

⁵² McManus, above n 21; See also, Jeremy Scahill, *The Dangerous US Game in Yemen*, (18 April 2011) *The Nation*, <<http://www.thenation.com/article/159578/dangerous-us-game-yemen>>.

⁵³ Asma Jahangir, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, UN Doc. E/CN.4/2003/3, (13 January 2003) [39].

⁵⁴ Michael J Dennis, 'Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economics and Social Council' (2003) 97 *American Journal of International Law* 364, 367, n 17.

⁵⁵ Fox Broadcasting Company, *Fox News Sunday*, 10 November 2002 (Condoleezza Rice) <<http://www.foxnews.com/story/0,2933,69783,00.html>>.

⁵⁶ Anthony Dworkin, *Official Examines Legal Aspects of Terror War*, (on file with author).

right to target and kill an al Qaeda suspect on the streets of Hamburg, Germany, or in any place where such suspects are located.⁵⁷

Just a few months after the UN report on Yemen, the US, UK, Australia, and Poland invaded Iraq. This was a conventional use of military force. The countries involved did not try to establish a formal link between their perceived right to use force and the 'global war on terror.' US Vice President Cheney did speak frequently of a link between Saddam Hussein and al Qaeda but the US, UK, and Australia all sent letters to the UN Security Council explaining that they were enforcing Security Council resolutions on Iraqi weapons of mass destruction that had been adopted at the end of the Gulf War in 1991.⁵⁸ International law scholars generally agree that the coalition required fresh authority to use force in 2003 to enforce the Council's resolutions. Without that authorisation, the use of force was unlawful. Once in an armed conflict, however, resort to weapons is governed by the *jus in bello*. Even states that have resorted to force unlawfully are bound to fight such conflicts according to *in bello* rules. Because the invading coalition faced a well-armed and organised Iraqi military, it was permitted to resort to battlefield weapons, such as drones carrying Hellfire missiles.

As armed conflict raged in Iraq and Afghanistan during 2004, the Bush administration began a covert program of drone strikes in Pakistan. When President Obama came to office in 2009 and dramatically increased the drone attacks in Pakistan, the pressure to provide a legal justification became intense. People such as counterterrorism expert David Kilcullen were openly discussing the drone campaign in Pakistan and strongly criticising it, pointing to the number of persons being killed who were not on the CIA's target list.

President Obama had campaigned against the war on terrorism, so it remained to be seen throughout 2009 how the new administration would justify the use of military force in a country that had not attacked the US and had only occasionally requested US assistance in military operations against militant groups. The legal justification given by the US for its escalating drone attacks came in March 2010, in a major speech at the American Society of International Law (ASIL) by the Legal Adviser to the State Department, Harold Koh. Koh explained that while the Obama administration had renamed the war on terror, the policy would basically continue as under the Bush administration with respect to detention without trial. Covert targeted killing would increase, however.⁵⁹ The new label for the effort became the

⁵⁷ Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon* (16 December 2002), 6 (on file with author).

⁵⁸ See, eg, Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (21 March 2003).

⁵⁹ Scahill, above n 52; See also, Charlie Savage, 'Obama's War on Terror May Resemble Bush's in Some Areas', *New York Times* (online), 18 February 2009 <<http://www.nytimes.com/2009/02/18/us/politics/18policy.html?r=2&hp=&pagewanted=print>>.

'armed conflict with al-Qaeda, as well as the Taliban and associated forces...' ⁶⁰ Koh cited only one case to defend the killing of named individuals far from armed conflict hostilities: The killing of Japan's Naval General Yamamoto during World War II. ⁶¹ Koh went on to indicate, however, that targeted killing would not be carried out everywhere that the US might find members of these groups. Rather, the US would only carry out attacks in weak states, not places like the United States or Germany where, presumably, law enforcement efforts could be used. ⁶² Koh cited no authority for the right to use military force on the territory of a state because it is 'weak'. ⁶³ The UN Charter does not have an exception to the Article 2(4) prohibition on the use of force for 'weak states.' The International Court of Justice has never found such an exception in its many cases dealing with the use of force. The only support comes from authors, who typically look at a handful of examples that usually lack *opinio juris* — evidence that the practice is undertaken as a matter of legal right. ⁶⁴ By contrast, the ICJ has consistently ruled that force used in self-defence may only be carried out on the territory of a state responsible for a significant armed attack if that state ordered the attack or controls the group that carried it out. This is the clear conclusion from ICJ decisions in the 1949 *Corfu Channel* case, ⁶⁵ the 1986 *Nicaragua* case, ⁶⁶ the 1996 *Nuclear Weapons* case, ⁶⁷ the 2003 *Oil Platforms* case, ⁶⁸ the 2004 *Wall* case, ⁶⁹ the 2005 *Congo* case, ⁷⁰

⁶⁰ Harold Hongju Koh, *The Obama Administration and International Law* (25 March 2010) Annual Meeting of the ASIL, US Department of State <<http://www.state.gov/s/1/releases/remarks/139119.htm>>. At the time of writing, July 2010, the hostilities in Iraq had so subsided that US military were following peacetime rules of engagement.

Dean Koh made clear that new terminology was being used in an answer to a question from the author at the ASIL Annual Meeting on 26 March 2010. It is not clear, however, that the new terms refer to a substantive change. The exchange was recorded and broadcast on NPR. See Ari Shapiro, *US Drone Strikes Are Justified, Legal Adviser Says* (26 March 2010) NPR <www.npr.org/templates/story/story.php?storyId=125206000>.

⁶¹ The Yamamoto case was not uncontroversial at the time. Diane Amann relates that at least one intelligence officer aware of the attack at the time it occurred, former US Supreme Court Justice John Paul Stevens, today has doubts as to whether it was lawful. See Diane Marie Amann, 'John Paul Stevens, Human Rights Judge' (2006) 74 *Fordham Law Review* 1569, 1582-1583. Today it would be in conflict with the basic treaties that form the present law on the use of force, namely the 1945 United Nations *Charter* and the 1949 Geneva Conventions.

⁶² Koh, above n 60.

⁶³ For additional authority against the Koh position, see above n 36 and EAP 18-21.

⁶⁴ See, eg, Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law* 244, 284.

⁶⁵ *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.

⁶⁶ *Nicaragua*, [1986] ICJ Rep 14.

⁶⁷ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245 ('*Nuclear Weapons*').

and the 2007 *Bosnia v Serbia* case.⁷¹ In the *Congo* case the ICJ ruled against Uganda, which had claimed the right to use armed force on the territory of the Congo against non-state actor armed groups after years of cross-border incursions. The ICJ found that the Congo was not legally responsible for the armed groups — it did not control them. Even the Congo's failure to take action against the armed groups did not give rise to any right by Uganda to cross into the Congo to attack.⁷²

The ICJ stated it was not deciding a case of 'large scale attacks' on Uganda. Such attacks would, indeed, have constituted a different case, one where, presumably, the militant group controlled territory as a de facto government or had ties of responsibility to the de facto government. Such factors would create a situation like the Taliban's control of most of Afghanistan in 2001 or the Kurds control of Northern Iraq. In late 2007, both Turkey and Iran justified incursions into Northern Iraq because of attacks by Kurds for which the Kurdish de facto government was responsible.⁷³ In contrast, Pakistan and Yemen are in as much or more control of their territory as Congo at the time of Uganda's attacks. Somalia basically lacks a controlling group meaning that no significant armed attacks are likely to be launched from that country — and none have been. The only type of permissible force that may be waged on the territory of Somalia would be law enforcement measures of the type the US is employing against pirates.⁷⁴

One year after Koh's speech, the *American Journal of International Law* again published an article supportive of the US's targeted killing policy.⁷⁵ Unlike the article by Dennis arguing in support of the 'global war on terror', the new article finds a right to use military force on the territory of 'weak' states. The

⁶⁸ *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 190-191 [61]-[64].

⁶⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 207, 215 [33]-[34] (Separate Opinion of Judge Higgins).

⁷⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 222-223 [146], 268 [301] ('Congo').

⁷¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 204-205 [391] ('Bosnia v Serbia').

⁷² *Congo* [2005] ICJ Rep 168, 222-223 [146], 268 [301]. See also, James Thuo Gathii, 'Irregular Forces and Self-Defense Under the UN Charter' in Mary Ellen O'Connell (ed), *What is War? An Investigation in the Wake of 9/11* (Martinus Nijhof/Brill, forthcoming, 2011).

⁷³ See Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2008) 183-184.

⁷⁴ Cratty, above n 32.

⁷⁵ See Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law* 244, 284.

author, Theresa Reinold, asserts that there is a 'consensus' that the United Nations Charter rules on self-defence are 'inadequate.'⁷⁶ She provides no citation for this consensus but goes on to examine uses of force by the US, Russia, Turkey, Colombia, Israel, and Uganda against weak states. With respect to the *Congo* case, she seeks to minimise its clear holding against attacking states not responsible for low-level armed incursions by emphasising the one sentence of *obiter dictum* discussed above — that the decision does not reach 'large-scale attacks' by irregulars. She also emphasises the separate opinions of Judges Kooijman and Simma for their criticism of the majority's control test for attributing the acts of militant groups to the territorial state.⁷⁷ As a matter of legal authority in international law, however, the separate opinions of judges do not outweigh the majority. This is especially true respecting the control test for attributing acts to sovereign states given that the test was reconfirmed two years later in the ICJ's 2007 *Bosnia v Serbia* case.⁷⁸

In addition to the lack of affirmative authority for her position, Reinold omits consideration of the principles of necessity and proportionality. The general principle of necessity requires some showing that the use of military force is a last resort and can accomplish a defensive purpose. The counterterrorism literature casts considerable doubt on the effectiveness of military force to suppress terrorism.⁷⁹ Even President Obama apparently knows the limits of

⁷⁶ Reinold, *ibid*, 246, 275. Reinold does not consider that in 2005, after the US declared a 'global war on terror', that the international community reiterated that the rules of the UN Charter remain binding as written. The World Summit Outcome document includes these paragraphs never mentioned by Reinold:

77. We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter. ... [W]e are determined to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.

See *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess, Agenda items 46 and 120, UN Doc A/60/L.1 (15 September 2005) 21-22.

⁷⁷ *Ibid*, 260-262. In other words, the ICJ stated clearly that before a state could be held legally responsible for a violation of international law committed by a non-state actor, the state would have to control the actor.

⁷⁸ [2007] ICJ Rep 43, 204-205 [391]-[393].

⁷⁹ See eg, John Mueller, *How Dangerous are the Taliban?* (15 April 2009) Foreign Affairs <<http://www.foreignaffairs.com/print/64932>>; Seth G Jones and Martin C Libicki, *How Terrorist Groups End, Lessons for Countering al Qa'ida* (2008) Rand

drone attacks: 'Despite the CIA's love affair with unmanned aerial vehicles such as Predators, Obama understood with increasing clarity that the United States would not get a lasting, durable effect with drone attacks.'

Reinold's effort raises the question why she and other authors search to find exceptions to the prohibition on force? Why, in the words of Louis Henkin, search for loopholes in the Charter and blurring of its bright lines? Why is it in the interest of the international community to dilute the UN Charter prohibition on the use of force in our violent age? Henkin demanded leaving the Charter as

invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events. Extending the meaning of "armed attack" and of "self-defense," multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war.⁸⁰

The authors who search for exceptions may be motivated to do so by a different philosophical position than the one upon which the Charter was based. The drafters of the Charter inherited an understanding that lawful and moral resort to armed force is restricted to true situations of necessity, where the use of military force will accomplish a lawful military objective.⁸¹

The alternative view asserts a right to use force against non-state actors regardless of the territorial state's responsibility or evidence that military force is necessary. This view may be based on the Realist philosophy of power projection. Realists advocate resorting to force to send a message of strength.⁸² For many Realists, state sponsored killing beyond the nation's

Corporation <http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf>; Richardson, above n 40; Mary Ellen O'Connell, 'Enhancing the Status of Non-State Actors Through a Global War on Terror' (2005) 43 *Columbia Journal of Transnational Law* 435. See also, Dennis C Blair, 'Drones Alone Are Not the Answer', *New York Times* (online), 14 August 2011 <http://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html?_r=2&ref=opinionv>.

⁸⁰ Louis Henkin, 'Use of Force: Law and US Policy' in Louis Henkin et al (eds), *Might v. Right, International Law and the Use of Force* (Council on Foreign Relations Press, 1989) 37, 69.

⁸¹ O'Connell, above n 73, 215-216.

⁸² See, eg, Charles Krauthammer, 'Democratic Realism: An American Foreign Policy for a Unipolar World' (Paper presented at the 2004 Irving Kristol Lecture, Washington, DC, 12 February 2004) <http://www.aei.org/docLib/20040227_book755text.pdf> (Krauthammer asserts his view that American military power is what keeps the 'international system from degenerating into total anarchy,' at 10).

The resilience of the Realist philosophy, can be partially explained — or at least demonstrated — by the fact that two of the most widely read scholars in the field of international relations in the United States are Hans Morgenthau and Kenneth

borders may be justified to signal national power, which is, of course, defined as military power.⁸³ If a terrorist group attacks, proponents of Realism argue that a demonstration of military power must be made to counter any perception of weakness by the victim. In the days after 9/11, before it was confirmed that al Qaeda was indeed responsible for the attacks, Deputy Secretary of Defense Paul Wolfowitz argued for 'ending' states that support terrorism.⁸⁴ Former Secretary of State, Lawrence Eagleburger, said, 'You have to kill some of these people; even if they were not directly involved, they need to be hit.'⁸⁵ American leaders and academics, imbued with this way of thinking have, especially since the end of the Cold War, chafed against international law limits on the use of force.⁸⁶ Realist ideology may be clouding understanding of the limited utility of military force⁸⁷ and the

Waltz. See, generally, Kenneth Waltz, *Man, the State, and War* (Columbia University Press, 1959); and Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 1948). See also, O'Connell, *ibid*, 62-78.

⁸³ But see John Mearsheimer, a leading Realist scholar at the University of Chicago:

Now, the final issue that you raised is the question of what I think of about how the Bush administration is waging the war on terrorism. My basic view, which may sound somewhat odd coming from a Realist, is that the Bush administration's policy is wrong-headed because it places too much emphasis on using military force to deal with the problem, and not enough emphasis on diplomacy. I think that if we hope to win the war on terrorism, or to put it in more modest terms, to ameliorate the problem, what we have to do is win hearts and minds in the Arab and Islamic world.

Harry Kreisler, *Through the Realist Lens: Conversation with John Mearsheimer, Professor of Political Science, University of Chicago* (8 April 2002)

<<http://globetrotter.berkeley.edu/people2/Mearsheimer/mearsheimer-con5.html>>.

⁸⁴ Roy Eccleston, 'Iraq the Next Target for US Hawks – War on Terror', *Australian Financial Review* (Melbourne), 25 September 2001, 9.

⁸⁵ Ziauddin Sardar, 'Where is the Hand of my God in This Horror?' *New Statesmen* (online), 17 September 2001 <<http://www.newstatesman.com/200109170006>>.

⁸⁶ The Israeli scholar David Kretzmer, for example, calls for 'realistic standards of conduct for states involved in armed conflicts with terrorist groups' in David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) *European Journal of International Law* 171, 212. For him 'realistic standards' are the legal right to kill in situations beyond a strict application of the international law rules.

Robert Chesney divides the scholars writing on the use of force in the terrorism context into two groups: 'strict' and 'broad' constructionists of the rules. See Robert Chesney, 'Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (forthcoming, 2011) *Yearbook of International Humanitarian Law* <<http://ssrn.com/abstract=1754223>>. Chesney, like Kretzmer, clearly favours 'broad' or relaxed standards for killing but provides a detailed discussion of the work of those who support a strict reading of the law on killing. See citations to the work of both categories in Chesney.

⁸⁷ See on this topic generally, General Rupert Smith, *The Utility of Military Force: The Art of War in the Modern World* (Penguin, 2007).

wisdom of rules based on the moral principle of necessity. Further, realist power politics has become so robust in foreign policy thinking in the United States that Americans seem to pay little attention to the moral arguments against killing. Indeed, the arguments favouring the right to attack non-state actor groups rarely if ever address the necessity issue. To that extent, the argument for killing with drones is not even put to the test that many demanded for torture:

John Rizzo, who served as the CIA's top lawyer during the Bush administration, said he found it odd that while Bush-era interrogation methods like waterboarding came under sharp scrutiny, "all the while, of course, there were lethal operations going on, and think about it, there was never, as far as I could discern, ever, any debate, discussion, questioning...[of] the United States targeting and killing terrorists."⁸⁸

As just indicated, apparently President Obama knows what counter-terrorism experts have been saying consistently since 9/11: military force such as drone attacks does not suppress terrorism. But the use of drones may not be intended for that exact purpose. They may be intended for retribution or intimidation; not suppression. Regardless, ten years after 9/11 and the constant use of drones, the challenge of terrorism for the US appears to have grown stronger and no one speaks any longer of the US as the 'sole superpower.'

3 The Ease of Killing with Drones

What might explain the growing use of UCVs beyond armed conflict hostilities despite the law and limited results against terrorism? Is the very possession of the technology leading to decisions to kill in situations where, without it, a non-lethal approach would be taken? It was suggested by an audience member at the US Air Force's Air University during a discussion of drones in September 2010 that Presidents Bush and Obama might not consider the use of drones to actually amount to the use of military force. Certainly we have numerous indications after a decade of lethal operations with UCVs that many in the United States do not view killing with drones to be as serious a matter as killing carried out by ground troops, piloted planes, manned naval vessels, or a CIA agent using a knife. One former CIA lawyer has observed: 'People are a lot more comfortable with a Predator strike that kills many people than with a throat-slitting that kills one.'⁸⁹ This section will consider various indications that the possession of UCV technology is lowering the political and psychological barriers to killing, making it easier to overlook the legal, policy and ethical limits as well.

⁸⁸ Adam Entous, 'How the White House Learned to Love the Drone', *Reuters* (online), 18 May 2010 <<http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518>>.

⁸⁹ Mayer, above n 27.

In the UK report on UAVs, mentioned above, the authors raise the concern that UAV technology may be weakening the barriers to killing:

[O]ne of the contributory factors in controlling and limiting aggressive policy is the risk to one's own forces. ... For example, the recent extensive use of unmanned aircraft over Pakistan and Yemen may already herald a new era. That these activities are exclusively carried out by unmanned aircraft, even though very capable manned aircraft are available, and that the use of ground troops in harm's way has been avoided, suggests that the use of force is totally a function of the existence of an unmanned capability—it is unlikely a similar scale of force would be used if this capability were not available.⁹⁰

A national leader knows he can deploy drones without his own citizens coming home in body bags. This fact plainly makes the decision to kill easier for political reasons, especially in the United States where the body bag count that went on for years during the Vietnam War still haunts politicians and citizens alike. One proof of this was the decision in the Bush Administration to ban photographs at Dover Air Force Base where service personnel killed overseas arrive back in the US.

A recent, dramatic example of political leaders seeing drones as different from other forms of military force is the fact that President Obama moved away from manned aircraft to drones in Libya. President Obama had promised that the US would only be using military force in Libya for a few days. As those few days stretched into weeks, he shifted from manned aircraft to drones. With drones he could still assure US Allies that the US was making a major military commitment while at the same time assuring the American people that the US was not really involved in another armed conflict. In a debate about whether Mr Obama was exceeding his legal authority in Libya by not consulting with Congress after 60 days of military involvement, one Congressman asked: "Could one argue that periodic drone strikes do not constitute introducing forces into hostilities since the strikes are infrequent" and "there are no boots on the ground?"⁹¹

This last point, no boots on the ground, has been a significant political factor in the use of drones in Pakistan. Pakistan's government has restricted the US

⁹⁰ United Kingdom Ministry of Defence, above n 6, 5-9.

⁹¹ Charlie Savage, 'Libya Effort is Called a Violation of War Act', *New York Times* (online), 25 May 2011
<http://www.nytimes.com/2011/05/26/world/middleeast/26powers.html?_r=1&emc=eta1>. US State Department Legal Adviser Harold Koh testified before Congress that the US was not involved in 'hostilities' in Libya for purposes of the War Powers Act because the US was not using ground forces but rather primarily unmanned drones in its attacks. See Jennifer Steinhauer, 'Obama Adviser Defends Libya Policy to Senate', *New York Times* (online), 28 June 2011, <http://www.nytimes.com/2011/06/29/us/politics/29powers.html?_r=1>.

military presence on its territory to a small number of military trainers.⁹² To comply with this mandate, the US's drone attacks in Pakistan have been the responsibility of the CIA, operating from CIA headquarters in Langley, Virginia and in Pakistan itself. Until the Obama administration radically increased the number of attacks in 2009, the CIA attempted to keep the attacks quiet, something it could do more effectively than the military. Keeping the drone program covert has also allowed the US to hint that Pakistani officials have secretly given consent to the strikes.⁹³ As relations with Pakistan have deteriorated, the US has seemed less interested in honouring Pakistan's wishes and has conducted strikes in Pakistan with helicopter gunships.⁹⁴ In the Abbottabad operation, President Obama authorised the Navy Seals to fight against any attempt by Pakistan to prevent their helicopters from leaving.⁹⁵

Ironically, in Yemen, the political calculation has been different. In reporting on the 2002 CIA drone strike that killed six persons, the media related that Yemen's President Saleh had acquiesced in the strike. We now know from Wikileaks, Saleh banned further drone attacks but permitted manned vehicle strikes. He would then claim that Yemen itself had carried out the attacks.⁹⁶ The choice of launch vehicle seems tied to the fact that Yemen does not possess armed drones. In early 2011, Saleh faced serious challenges to his presidency from both peaceful demonstrators and armed militants. In the midst of this chaos, the US launched the first drone strike since 2002.⁹⁷ There

⁹² 'Pakistan Trims US Military Training Mission', *Reuters* (online), 26 May 2011 <<http://in.reuters.com/article/2011/05/25/idINIndia-57285220110525>> (the number of US personnel involved with training has ranged between 200 and 300 individuals).

⁹³ The reality is more complicated as Pakistan's military, intelligence services, and elected officials have likely taken different positions at different times. Of the hundreds of strikes, very few, if any, would have had the express permission of Pakistan's elected officials for use in armed conflict hostilities in Pakistan and carried out by uniformed members of the United States' armed forces. Scott Shane, 'C.I.A. to Expand Use of Drones in Pakistan', *New York Times* (online), 3 December 2009 <<http://www.nytimes.com/2009/12/04/world/asia/04drones.html?ref=unmannedaerialvehicles>>.

⁹⁴ Issam Ahmed, 'NATO Helicopter Strike on Pakistan Shows New Strategy of "Hot Pursuit"', *Reuters* (online), 30 September 2010, <<http://www.csmonitor.com/World/Asia-South-Central/2010/0930/NATO-helicopter-strike-on-Pakistan-shows-new-strategy-of-hot-pursuit>>.

⁹⁵ Eric Schmitt, Thom Shanker and David E Sanger, 'US was Braced for Fight with Pakistanis in bin Laden Raid', *New York Times* (online), 9 May 2011 <<http://www.nytimes.com/2011/05/10/world/asia/10intel.html>>.

⁹⁶ Scahill, above n 52.

⁹⁷ Jeb Boone, 'US Drone Strike in Yemen is First Since 2002', *New York Times* (online), 5 May 2011 <http://www.washingtonpost.com/world/middle-east/yemeni-official-us-drone-strike-kills-2-al-qaeda-operatives/2011/05/05/AF7HrzxF_story.html>.

was no point in trying to help Saleh save face any longer, plus, the rapidly changing situation made it safer for US personnel to use a drone. By May 2011, following the killing of bin Laden, US officials may also have come to believe that they have made their political, legal, and moral case for killing terrorism suspects with drone attacks in weak states.

Related to the political reasons for killing with drones are the psychological factors. We know that technological distance from a victim makes the decision to kill easier for the person actually controlling the weapon. It may make the decision to kill easier for those in the operator's chain of command, as well, if they know they are not risking their own nationals' lives along with the enemies'. Proponents of combat drones also argue that drones are far more precise than alternatives such as ship launched cruise missiles or bomber aircraft attacking from high altitude.⁹⁸ John Aquilla, Executive Director of the Information Operations Center at the Naval Post Graduate School, has said, 'I will stand my artificial intelligence against your human any day of the week and tell you that my A.I. will pay more attention to the rules of engagement and create fewer ethical lapses than a human force.'⁹⁹ Kenneth Anderson has also argued that robots will make better, more accurate decisions in life and death matters whether the context is health care or war fighting.¹⁰⁰ The message is that it would be immoral not to use UCVs. In the simple world of politics that message quickly morphs into the idea that UCVs must be used.

CIA Director Leon Panetta demonstrates the slippage in thinking. He has emphasised that using drones is lawful because he asserts they are 'precise'.¹⁰¹ He has not apparently spoken of why it is lawful to resort to them in the first place, but his thinking was revealed in May 2009, when he said drone attacks are 'precise' and cause only 'limited collateral damage.'¹⁰²

⁹⁸ Kenneth Anderson, *Am I Arguing a Strawman about Drones, Civilian Collateral Damage, and Discrimination?* (27 April 2011) Opinion Juris <<http://opiniojuris.org/2011/04/27/am-i-arguing-a-strawman-about-drones-civilian-collateral-damage-and-discrimination/>>. Anderson asserts that the greater precision of drones is now so widely accepted that 'civilian' casualties are not the big issue. However, cf Scott Shane, 'C.I.A. Is Disputed on Civilian Toll in Drone Strikes', *New York Times* (online), 11 August 2011 <<http://www.nytimes.com/2011/08/12/world/asia/12drones.html?ref=unmannedaerialvehicles>>.

⁹⁹ John Markoff, 'War Machines: Recruiting Robots for Combat', *New York Times* (online), 27 November 2010 <<http://www.nytimes.com/2010/11/28/science/28robot.html>>.

¹⁰⁰ Remarks of Kenneth Anderson, *Texas International Law Journal Symposium* (10-11 February 2011, University of Texas School of Law).

¹⁰¹ Mary Louise Kelly, *Officials: Bin Laden Running Out of Space to Hide* (5 June 2009) NPR <<http://www.npr.org/templates/story/story.php?storyId=104938490>>. See also Shane, above n 98.

¹⁰² Ibid; Noah Shachtman, *CIA Chief: Drones 'Only Game in Town' for Stopping Al Qaeda* (19 May 2009) *Wired*

“And very frankly,” he said, “it’s the only game in town in terms of confronting and trying to disrupt the al-Qaida leadership.”¹⁰³ The US administration apparently measures the game’s success by the number of ‘militants’ killed with each drone strike. This feature of the drone wars is reminiscent of America’s experience in Vietnam. Year after year, US officials provided statistics of the number of enemy killed. The war, however, was never won.

The wide acceptance of using drones to kill in far off countries tracks the findings of Lieutenant Colonel Dave Grossman in his 1996 book, *On Killing*, that distance from a victim makes the decision to kill easier or more acceptable.¹⁰⁴ For Grossman, ‘distance from the victim’ includes various concepts of distance, including physical, emotional, social, cultural, moral, and mechanical.¹⁰⁵ These factors seemed to be at play in a tragic incident that occurred in Afghanistan in February 2010, in which 23 Afghan civilians were killed and another 12 injured. The casualties were the result of an attack from a helicopter but the vital information leading to the decision to attack came from drone operators controlling a surveillance drone in Afghanistan from their base in Nevada. A *New York Times* article explained the incident:

A Predator drone pilot played down two warnings about the presence of children before military commanders ordered a helicopter attack that killed 23 Afghan civilians traveling down a road in February [2010], an Air Force investigation has found. ...

The Predator’s video cameras were trained on the vehicles — a pickup truck and two sport-utility vehicles — to try to determine if they were carrying insurgents seeking to outflank the American forces. ... [A]n officer on the ground had told the Predator crew, which was based in Nevada, that his commander intended to attack the vehicles if their passengers were carrying weapons. ...

[I]n his desire to support the ground forces, General Otto wrote, the [drone] pilot “had a strong desire to find weapons,” and this “colored —

<<http://www.wired.com/dangerroom/2009/05/cia-chief-drones-only-game-in-town-for-stopping-al-qaeda/>>.

¹⁰³ Shachtman, above n 102.

¹⁰⁴ Lt Col Dave Grossman, *On Killing, The Psychological Cost of Learning to Kill in War and Society* (Back Bay Books, 1996) 187. See also Noel Sharkey, ‘Automating Warfare: Lessons Learned from the Drones’ (2011) 21(1) *Journal of Law, Information and Science*, EAP 6, DOI: 10.5778/JLIS.2011.21.Sharkey.1.

¹⁰⁵ *Ibid* 188-189. See also, CBS, *60 Minutes*, episode 29, 10 May 2009 <http://www.metacafe.com/watch/cb-z3fr4WgBt40PaRwY6oPAmp6CkZVBINbE/60_minutes_05_10_09_season_41_episode_29/>.

both consciously and unconsciously — his reporting of weapons and children.”¹⁰⁶

Grossman focuses on the person who actually pulls the trigger or uses the joystick to fire the missile. Yet, the distance factor could impact everyone involved in the kill decision, including a whole society that supports such killing. In the United States there are many indications that killing with drones is at a high level of acceptance. Indeed, the acceptance is so high that Americans joke about killing with drones in a way they would not, presumably, about killing with a bayonet or a cruise missile. In May 2010, at an annual dinner for journalists, politicians, and celebrities in which invited guests are expected to tell jokes, President Obama quipped about his two young daughters being fans of a band called The Jonas Brothers. Members of the group were in the audience and the President said, “Boys, don’t get any ideas. I have two words for you – Predator drones... You will never see [them] coming.”¹⁰⁷

The Bush and Obama administrations present killing with drones as precise and imperative, and, therefore, so morally unproblematic we can joke about it. Yet, moral philosophers teach that the taking of human life may only be justified to protect human life.¹⁰⁸ In other words, the exceptional right to resort to lethal force rests squarely on a moral justification of necessity. In armed conflict hostilities, the necessity to kill is presumed. Away from such hostilities the necessity to kill must be related to an immediate threat to life. International law on killing remains closely tied to these fundamental moral insights, as discussed above.¹⁰⁹ Given the political and psychological lures to killing with drones, international law specialists should be alert to whether the current law on lethal operations is adequate. Rather than loosening the rules as appears to be the trend today, the argument here is that the rules should be strictly applied to drone use to counter-balance their seductive attraction.

¹⁰⁶ Drew, above n 50.

¹⁰⁷ Entous, above n 88.

¹⁰⁸ See Germain G Grisez, ‘Toward a Consistent Natural Law Ethics of Killing’ (1970) 15 *American Journal of Jurisprudence* 64, 76 cited in David Hollenbach, S J, *Nuclear Ethics, A Christian Moral Argument* (Paulist Press, 1983) 18-19. Hollenbach describes how the Just War Tradition evolved from Aquinas’s position presuming that war is sinful to one presuming war is just so long as it is waged by legitimate authorities. Hollenbach argues in favour of returning to the presumption that violent warfare is presumed to be morally wrong and that resort to war is justifiable only in exceptional situations, at 14-16. Hollenbach’s position is consistent with current international law on the use of force, as reviewed above.

¹⁰⁹ See O’Connell, above n 73, chapter 1; See also Geoffrey Best, *Law and War Since 1945* (Oxford University Press, 1994): ‘[I]t must never be forgotten that the law of war, wherever it began at all, began mainly as a matter of religion and ethics... It began in ethics and it has kept one foot in ethics ever since.’ At 289.

Returning to close compliance with the rules will likely require a rejection of the Realist motive of killing to project an image.¹¹⁰ Killing to send a message of strength or for retribution is neither moral nor lawful.

Conclusion

The post-9/11 decade has shown general acceptance among American officials when it comes to killing persons with drones far from armed conflict hostilities. Such killing risks no American lives and the price tag is considerably lower than when using manned systems.¹¹¹ The embrace of the drone does not follow simply from cost calculations, however. Since 2002, Americans have heard that it is legal to kill persons far from hostilities. Yet, this conclusion respecting legality may have more to do with the projection of power or campaign politics than with the sources of international law or morality. The restrictive rules on killing derived from the actual sources of international law are related to the moral principle that killing is only justifiable in actual armed conflict hostilities or when necessary to save a human life immediately. And in the case of killing with drones far from battlefields it turns out, just as with the use of torture, that the effective means of dealing with the challenge of non-state actor terrorist or militant groups is also the lawful and moral approach.

¹¹⁰ We have some indications that torture was used after 9/11 for the same reason — to indicate America's willingness to be ruthless toward a brutal foe. Trained interrogators spoke out consistently against the use of torture as a reliable technique for information gathering. The persistent use of torture in the face of such expert views began to seem like something other than information gathering. See, Mary Ellen O'Connell, 'Affirming the Ban on Harsh Interrogation' (2005) 66 *Ohio State Law Journal* 1231.

¹¹¹ P W Singer, *Robots at War: The New Battlefield* (Winter 2009) *The Wilson Quarterly* <http://www.wilsoncenter.org/index.cfm?fuseaction=wq.essay&essay_id=496613>.