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ADHERING TO LAW AND VALUES AGAINST TERRORISM

Mary Ellen O'Connell*

INTRODUCTION

The thesis of this article was inspired by the remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Harvard Law School on September 16, 2011. Brennan said:

I've developed a profound appreciation for the role that our values, especially the rule of law, play in keeping our country safe. It's an appreciation, of course, understood by President Obama. . . . That is what I want to talk about this evening—how we have strengthened, and continue to strengthen, our national security by adhering to our values and our laws.¹

Brennan's position is backed up by considerable data and analysis from counter-terrorism experts.² If the United States adheres to its values and the rule of law, security can be enhanced. He went on in the remainder of his talk to attempt to defend the U.S. record of compliance with American values and the rule of law. That record is poor; however, with respect to a number of fundamental principles U.S. officials claim to be in compliance with the law

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¹ Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *Strengthening our Security by Adhering to Our Values and Laws*, Program on Law and Security, Harvard Law School, Sept. 16, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

² See generally David Cortright, et al., *Friend, Not Foe: The Role of Civil Society in Preventing Violent Extremism*, 2 NOTRE DAME J. INT'L & COMP. L. 238 (2012); John Mueller, *How Dangerous are the Taliban?* FOREIGN AFF., Apr. 15, 2009 <http://www.foreignaffairs.com/print/64932>; SETH G. JONES & MARTIN C LIBICKI, *HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA* (Rand Corp. 2008) available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf; Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUMBIA J. TRANSNAT'L L. 435 (2005); Dennis C. Blair, *Drones Alone Are Not the Answer*, N.Y. TIMES, Aug. 14, 2011, http://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html?_r=2&ref=opinionv.

are too often referring to compliance with a mistaken, false, or distorted version of the relevant rules.

The remainder of this article aims at demonstrating the claim of poor U.S. compliance with the rule of law and the fundamental values the law seeks to implement in the counterterrorism context. The first evidence of poor compliance to be offered consists of a set of recommendations made to the Obama transition team in 2008. The recommendations were a set of priorities to get the United States into compliance with important international law obligations. To date, only one of the eight has been fully implemented—the principle aimed at ending the use of torture. The arguably more important recommendation, to end the so-called “global war on terrorism” has not been implemented. After reviewing what should have been done by the Obama administration, the article will move on to indicate what has been done, focusing on the use of the “global war” assertion to justify the targeted killing of persons outside armed conflict zones. The final part of the article will consider in some detail why the claim Brennan made at Harvard that the administration is complying with the rule of law in its counter-terrorism policy is inaccurate.

I. RECOMMENDATIONS FOR RETURNING TO THE RULE OF LAW AGAINST TERRORISM

In November 2008, about a week after the presidential election, Dean Thomas J. Romig, a former Advocate General of the U.S. Army, organized a conference called, “The Rule of Law and the Global War on Terrorism.” The final panel was titled, “The Way Forward” and featured David Graham, a long-time Judge Advocate General in the U.S. Army and the Department Chair of International Law at the Judge Advocate General School in Charlottesville, Virginia; Philippe Sands, professor of law at University College, London, a member of Matrix Chambers in the United Kingdom, and a prominent practitioner who has appeared in high profile international law cases, such as the litigation to extradite Augusto Pinochet to Spain; and the third member of the panel, the author of this article, a professor of law at the University of Notre Dame, who specializes in the international law on the use of force, was a professional military educator for the U.S. Department of Defense in Garmisch-Partenkirchen, Germany (1995-1998).

The panel, therefore, represented considerable expertise in international law and the law on the use of force in particular. Its members agreed at the conclusion of their remarks that there had been considerable agreement during the two days of the conference by people of varying perspective from many places around the globe.³ Following the conference the members of the final

³ *The Way Forward—Legal Choices in the Global War on Terror*, The Rules of Law and the Global War on Terror: Detainees, Interrogation and Military Commissions, Washburn University, School of Law, Topeka, Kansas, Nov. 13–14, 2008, available at <http://jurist.law.pitt.edu/forumy/2008/11/way-forward-post-911-principles.php>.

panel drafted a set of eight principles that reflected their understanding of the law and could guide the transition team of President Obama in leading the United States back to compliance with fundamental international law in the aftermath of the Bush administration's handling of the post-9/11 period:

Washburn Consensus on Post-9/11 Principles

1. The phrase "Global War on Terrorism" should no longer be used in the sense of an on-going "war" or "armed conflict" being waged against "terrorism." Nor should it serve as either the legal or security policy basis for the range of counter- and anti-terrorism measures taken by the Administration in addressing the very real and present challenges faced by the United States and other nations in addressing terrorism.
2. The Administration should announce that it is taking immediate steps to close the interrogation and detention facility at Guantanamo Bay, Cuba, with a view to removing all remaining detainees by July 1, 2009.
3. The Military Commissions Act of 2006 should be repealed in its entirety, and all activities currently being conducted under the Military Commission process constituted by the Act should be terminated.
4. Persons accused of committing acts of terrorism, war crimes or other serious human rights violations should be tried, as appropriate, before Article III courts or, as provided for in the Uniform Code of Military Justice, by courts-martial or military commission.
5. The Detainee Treatment Act of 2005 should be amended to ensure the application of one standard of treatment and interrogation to all detainees held in U.S. custody or control.
6. The single standard for the treatment and interrogation of all detainees held in U.S. custody or control should be that reflected in Army Field Manual 2-22.3, Human Intelligence Collector Operations.
7. Any presidential findings, statements, Executive Orders, or other forms of authorization related to detainee treatment and interrogation that sanction or authorize methods inconsistent with Field Manual 2-22.3 should be withdrawn.
8. A comprehensive investigation of alleged post-9/11 U.S.-held detainee abuse should be undertaken by an independent, expert commission with the goal of producing a 2009 report detailing both the findings and recommendations of this commission.

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1. The Panel was chaired by Dean of the Washburn Law School and former Judge Advocate General of the Army, Thomas J. Romig
2. These views are expressed in Mr. Graham's private capacity.⁴

Of the eight principles, only Principle Six has been fully implemented. President Obama issued an executive order two days after he was inaugurated that mandates the use of Army Field Manual 2-22.3.⁵ The executive order has been followed up by law that forbids private contractors from carrying out interrogation of person in United States custody or detention.⁶ It was, apparently, contractors who water boarded Khalid Sheikh Mohammed 183 times and Abu Zubaydah eighty-three times.⁷

Seven of the eight Washburn consensus principles have not been fully implemented, including the first and arguably the most important principle: ending the "global war on terrorism." President Obama himself criticized the assertion that the United States was in a worldwide war against terrorism and his administration does not use the phrase.⁸ While he said the United States could not be at truly be at war with an abstract concept like terrorism, the real problem with the "war on terrorism" is that the president uses the construct to argue he has the legal authority to kill without warning and detain without trial persons who are physically distant from any actual zone of armed conflict hostilities. This position is inconsistent with international law, and, yet,

⁴ *Id.*

⁵ See Executive Order 13491, *Ensuring Lawful Interrogations*, Jan. 22, 2009, 74 FED. REG. 4893 <http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf>

⁶ See National Defense Implements Authorization Act of 2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2190 (2009).

⁷ See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, Apr. 19, 2009, N.Y. TIMES, <http://www.nytimes.com/2009/04/20/world/20detain.html>.

⁸ See Edward Luce & Daniel Dombey, *Obama Junks "Global War on Terror" Label*, FIN. TIMES, June 30, 2009, <http://www.ft.com/intl/cms/s/0/d4bd1bb6-64f7-11de-a13f-00144feabdc0.html#axzz1utGNmkyU>.

President Obama continues to authorize killing and detention of persons far from hostilities. True, the name was changed from the “global war on terrorism” to the “armed conflict against al Qaeda, the Taliban, and associated forces.”⁹ The violations of international law, however, continue. In fact, with respect to targeted killing, the record is worse.

II. The U.S. Practice of Targeted Killing of Terrorism Suspects

On the very day of the Notre Dame International Law Society Symposium, September 30, 2011, just two weeks after Brennan’s Harvard speech, the United States fired missiles launched from drones and jet aircrafts at two vehicles traveling in Yemen. Four persons were killed, including two U.S. citizens, Anwar al-Awlaki and Samir Khan.¹⁰ Two weeks later, the United States fired more missiles in Yemen killing al-Awlaki’s sixteen year old son, seventeen year old nephew, and seven other persons.¹¹ In this time period, the United States also announced that it is building secret drone bases in Africa and on the Arabian Peninsula so that the CIA and the U.S. military may continue to carry out such targeted killing with the use of drones into the future—presumably after the United States has ended its participation in combat in Afghanistan and would be involved in no armed conflict hostilities. These developments should be of grave concern to everyone everywhere of good will.

The plans for continuing targeted killing unrelated to any armed conflict hostilities represent a significant departure from the rule of law. The more immediate issue, however, is the on-going actual killing of persons. The Obama administration has carried out more than twice the number of targeted killings of the Bush administration. For the first years of the Obama administration, little was said about this fact. President Obama had campaigned as an anti-war candidate, criticizing the Iraq War and the war on terrorism. He promised to end the use of torture and promised to close the infamous Guantánamo Bay prison. He went to Cairo and gave an inspiring speech on human rights and democracy. He seemed interested in finally resolving the Israeli-Palestinian impasse. He brought Anne-Marie Slaughter, Samantha Power, Rosa Brooks, and Harold Koh into his administration—all associated with international law or human rights. Brooks and Koh had been

⁹ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, Mar. 25, 2010, Washington, D.C., <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited May 14, 2012) (emphasis in original); *see also* Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NAT’L PUB. RADIO, Mar. 26, 2010, <http://www.npr.org/templates/story/story.php?storyId=125206000>.

¹⁰ *See Al Qaeda’s Anwar al-Awlaki Killed in Yemen*, CBS NEWS, Sept. 30, 2011, http://www.cbsnews.com/2100-202_162-20113732.html.

¹¹ Peter Finn & Greg Miller, *Anwar al-Awlaki’s Family Speaks Out Against His Son’s Death in Airstrike*, WASH. POST, Oct. 17, 2011, http://www.washingtonpost.com/world/national-security/anwar-al-awlakis-family-speaks-out-against-his-sons-deaths/2011/10/17/gIQA8kFssL_story.html.

outspoken critics of the Bush administration's use of torture. All of these factors gained Obama support, and international law experts, human rights advocates, governments, and international organizations around the world were plainly reluctant to acknowledge the grave violations of international law being committed by the administration. There was a good deal of disbelief that Obama was not only following Bush's policy of targeted killing but expanding it. There seems to have been cognitive dissonance by many who protested, criticized, and brought legal action against Bush when it came to targeted killings by Obama.

The statistics, however, starkly reveal Obama's far worse record on targeted killing with drones compared with his predecessor. The United States has used drones for kinetic (lethal) operations in six countries to date: Afghanistan, Iraq, Yemen, Pakistan, Somalia, and Libya, in chronological order of initial drone use for targeted killing.¹² In three of those countries, the United States has used drones as part of armed conflict hostilities: Afghanistan, Iraq, and Libya.¹³ In the three others, the United States has not been involved in hostilities and has had no legal basis for attacking in those countries under the law on resort to force (*jus ad bellum*).

Yemen was the first country where the United States resorted to the use of drones without basis in the *jus ad bellum*. It began in 2002. By early 2012, the United States had killed about 200 people with the attacks, apparently increasing even while Yemen tried to hold elections to replace the long-time dictator, Saleh, who had cooperated with U.S. targeted killing on his territory.¹⁴

The United States has also carried out targeted killing operations in Somalia since at least late 2006 when Ethiopia invaded Somalia in an attempt to depose Somalia's *de facto* government, the Islamic Courts. While that military action was occurring, members of the U.S. military, using helicopter gunships, pursued fleeing terrorism suspects, killing them from the air. The United States has continued to carry out targeted killing operations in Somalia ever since. The operations have for some years also included drone attacks carried out by the CIA. The Bureau of Investigative Journalism published figures in early 2012 of between forty-six and 162 persons killed between 2007 and 2012.¹⁵

¹² For a detailed history of U.S. killing with drones, see Mary Ellen O'Connell, *Seductive Drones, Learning from a Decade of Lethal Operations*, 21 J. L., INFO. & SCI. 1 (2011), available at <http://www.jlisjournal.org/abstracts/oconnell.21.2.html>.

¹³ See Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES, Aug. 6, 2011, at SR5, available at <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?pagewanted=all>.

¹⁴ See *Covert War on Terror—the Data*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drone-data> (last visited May 14, 2012).

¹⁵ See Chris Woods, *Militants and Civilians Killed in Multiple US Somalia Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM, Feb. 22, 2012, <http://www.thebureauinvestigates.com/2012/02/22/militants-and-civilians-killed-in-up-to-20-us-somalia-strikes-new-study-shows/>.

The facts surrounding targeted killing in Pakistan are the best known. The United States has used drones to carry out targeted killing in Pakistan since 2004. Targeted killing operations by the CIA in Pakistan using methods other than drones also appear likely from what was learned during the Raymond Davis affair.¹⁶ However, reliable numbers of persons killed through targeted killing have only been publicly available respecting drone operations. The Bureau of Investigative Journalism reported that as of early May 2012 between 2440 and 3113 persons killed.¹⁷

Is all of this killing in any way warranted? In a word: no. Targeted killing beyond zones of armed conflict hostilities, what U.S. government officials are now calling “hot battlefields,” does not comport with international law, with fundamental morality, or with what works in counterterrorism. Others at the symposium have discussed counterterrorism policy. The remainder of this article will address the relevant international law and, more briefly, the morality of the targeted killing of terrorism suspects.

III. INTERNATIONAL LAW AND TARGETED KILLING OF TERRORISM SUSPECTS

Five separate legal arguments are discernible in the Obama administration’s attempts to justify targeted killing. They are seen in Brennan’s Harvard speech, the speeches of several other officials, comments in the press, and by observing U.S. practice of targeted killing.

1. The United States remains in a global “armed conflict against al Qaida, the Taliban, and associated forces” that began on 9/11.
2. Drone attacks are an exercise of the U.S.’s “inherent right of self-defense” against an imminent threat.
3. Drone attacks are lawful counter-terrorism measures in states that are “unable or unwilling” to counter terrorism.
4. Pakistan and Yemen have consented to attacks.
5. The attacks are precise.

In addition to these five, two other arguments have been made by officials and commentators from time to time:

¹⁶ For the details of the Raymond Davis affair, see Scott Horton, *Spy Games I, What is Really at Stake in the Raymond Davis Case*, FOREIGN AFF., Mar. 11, 2011, available at http://www.foreignpolicy.com/articles/2011/03/11/spy_games?print=yes&hidecomments=yes&page=full.

¹⁷ Bureau of Investigative Journalism, *Covert War on Terror*, <http://www.thebureauinvestigates.com/category/projects/drones-data>. (last visited May 26, 2012); see also, *2011: Drone Attacks Remained Ineffective Against Militant Leaders*, CONFLICT MONITORING CENTER, <http://cmcpk.wordpress.com/2012/01/09/2011-drone-attacks-remained-ineffective-against-militant-leaders/> (last visited May 15, 2012).

6. Targeted killing is lawful when the victim is directly participating in the hostilities in Afghanistan, regardless of where the victim is.
7. In the Afghanistan-Pakistan border region, drone attacks in Pakistan are part of the Afghanistan counter-insurgency war.

These arguments were not included in Brennan's Harvard speech, which may be because they do not apply to Yemen and Somalia. Moreover, once the United States withdraws from participation in combat in Afghanistan, they will not apply anywhere.

As for the remaining arguments, the starting place for analysis is the right to life. The justification for any intentional taking of life is found in exceptions to the basic right. The justifications are narrow. In current international law, the right to life is affirmed in all human rights treaties, including most importantly, the International Covenant on Civil and Political Rights:

Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right to life.¹⁸

The law governing when human life may be intentionally ended, when the limitation on "arbitrary" deprivation is avoided, falls into two categories: peacetime rules and rules within the law of armed conflict. In peace, a state may only take a human life when "absolutely necessary in the defense of persons from unlawful violence."¹⁹ The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), which are widely adopted by police throughout the world, provide in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event,

¹⁸ International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁹ *McCann & Others v. United Kingdom*, 21 Eur. Ct. H.R. 97 (ser. A) (1995); *see also* *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Inter-Am Ct. H.R. (ser. C) No. 150, 69 (July 5, 2006).

intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²⁰

To get away from these restrictions, the Bush administration argued within days of the 9/11 attacks that the country was in a “global war on terror,” that allowed the killing or detention of suspected members of al-Qaeda, the Taliban and other militant non-state actor groups wherever found in the world.

President Obama was highly critical of the “global war” paradigm as asserting a right to limitless war in time and space. Upon taking office, however, his legal and policy advisers have altered the policy in ways that actually weaken their claim of right. State Department Legal Adviser, Dean Harold Koh, argued in 2010, that “*U.S. targeting practices . . . comply with all applicable law, including the laws of war*”²¹ and that “as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”²²

Koh’s statement implicates the first two of the five Obama arguments listed above: global war and inherent self-defense. Koh has insisted to the author that the Obama administration is not using the global war justification of the Bush administration. In his view, the “armed conflict against al Qaeda” and other groups is a distinctive legal argument to justify targeted killing.²³ With all due respect, the difference between the two constructs is imperceptible. While it may seem to be an improvement to wage war against people rather than a concept like terrorism that will never end, terrorist groups will never come to an end either. Moreover, Koh made it clear that it is not really a war against terrorists based on finding war anywhere terrorist suspects are found. Rather, it is a claimed right to use military force in states experiencing instability. The president apparently will not be authorizing drone strikes in the United Kingdom, Germany, or the United States. Thus, the legal justification is not based on persons being fighters in an armed conflict; it is based on persons being present in states with weak governments. Even if this made any sense from a policy perspective, there is no international legal right to exercise military force on this basis.

Moreover, presidents and legal advisers do not have the authority to posit what is and is not an armed conflict. “Armed conflict” is an important term in international law. The exceptions to the human right to life—when a

²⁰ United Nations Basic Principles, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *available at* <http://www2ohchr.org/english/law/firearms.htm>.

²¹ Harold Hongju Koh, Legal Advisor, State. Dept., The Obama Administration and International Law, Annual Meeting the American Society of International Law (Mar. 25, 2010), at 10, *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> (emphasis in the original).

²² *Id.*

²³ *See* Koh, *supra* note 9.

killing is not an arbitrary deprivation of life—differ depending on whether authorized persons are acting during an armed conflict or outside of armed conflict. International humanitarian law is applicable in situations of armed conflict and occupation.²⁴ Certain states have accepted the obligation to grant asylum to persons fleeing “armed conflict.”²⁵ International law defines what an armed conflict is for these and other important areas of international law. The definition was not well known but has now been thoroughly researched in a report of the International Law Association’s Committee on the Use of Force.²⁶ The Committee consisted of eighteen scholars from fifteen countries in five regions of the world.²⁷ The scholars included some of the foremost experts on international law and the use of force, human rights, and international humanitarian law, including Jutta Brunnée, Judith Gardam, James Thuo Gathii, Christine Gray, Georg Nolte, and Sir Michael Wood.²⁸ The Committee looked at a variety of evidence of the definition, including the practice of states with respect to over 300 situations of violence since the Second World War.²⁹ The international community generally recognizes a situation as one of armed conflict if there is, at a minimum, two or more organized armed groups engaged in fighting of some intensity.³⁰ Since 9/11, the United States has been engaged in armed conflict in Afghanistan, Iraq,³¹ and Libya.³² It has carried out targeted killing in Pakistan, Somalia, and Yemen, separate from any armed conflict hostilities.³³

²⁴ Article 2(4) of the UN Charter states that all UN member States must refrain “from the threat or use of force . . . in any other manner *inconsistent* with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4 (emphasis added). One of the purposes of the UN is to “achieve international cooperation in solving international problems of [a] . . . humanitarian character, and in promoting and encouraging respect for human rights . . . for all” *Id.* at art. 1, para. 3. Taken together, these articles of the UN Charter carve out an exception for the use of force in humanitarian interventions.

²⁵ See Council of Europe Directive 2004/83/EC of 29 April 2004, Official Journal of the European Union L 304; *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

²⁶ See USE OF FORCE COMM., INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>. For armed conflict to exist, organized armed groups must engage in fighting of some intensity.

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *See id.*

³⁰ *Id.* at 2.

³¹ *Id.* at 26.

³² *See* Starobin, *supra* note 13.

³³ The United States might have been involved in an armed conflict in Pakistan, when it assisted government forces in the suppression of an armed secessionist struggle in Buner Province. This action lasted for a matter of weeks and is not related to U.S. targeted killing practice. Some might argue that U.S. targeted killing is an unlawful resort to military force comparable to the invasion of Iraq and that, as in Iraq, once the attacks are occurring, there is an armed conflict. Targeted killing involves intermittent attacks, however, not fighting. There has not been, to date, engagement with the United States. The attacks are examples of

The second part of Koh's statement, that the United States is exercising its inherent right of self-defense, is as weak as the first part respecting worldwide armed conflict. Indeed, the second part contradicts the first part in that the first part attempts to justify killing persons as part of an *on-going* armed conflict that began on 9/11. If the United States is already in an armed conflict justified as a lawful exercise of self-defense, then there is no need to reference self-defense every time a military operation in that armed conflict is carried out. The United States does not do this with respect to every operation in Afghanistan, so why do so respecting Yemen, Pakistan, or Somalia in the worldwide armed conflict against al-Qaeda, et al.? It appears, therefore, that self-defense is being invoked as a makeweight for the patently inadequate assertion that the United States is involved in World War III against al-Qaeda and persons alleged to be associated with al-Qaeda.

In fact, the self-defense argument cannot add weight to the fiction of a global war. Self-defense is only another inadequate argument. The legal right of self-defense is codified in Article 51 of the UN Charter.³⁴ Article 51 permits the exercise of individual or collective self-defense, which means carrying out major military force on the territory of another state, if an armed attack occurs.³⁵ The victim state and those states joining it may use military force in collective self-defense until the Security Council takes "measures necessary to maintain international peace and security."³⁶ The International Court of Justice (ICJ) has found that the right of self-defense may only be exercised against a significant attack and must be aimed at a state responsible for the armed attack.³⁷ Attacking non-state actor groups on the territory of a state is attacking the state as much as the group. Every use of force in self-

excessive use of force, which counts of force that violates the *jus ad bellum*. Such force has been condemned in 2011 when carried out by the governments of Syria and Libya.

³⁴ U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.").

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 359 (2010) (citing *Corfu Channel (U.K. v. Albania)*, 1949 I.C.J. 244 (Dec. 15); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter *Nuclear Weapons*]; *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6) 61–64; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 207, 33–34 (July 9) (separate opinion of Judge Higgins); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 222, 268, 146, 301 (Dec. 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, 391 (Feb. 26)).

defense must be necessary for the purpose of defense and proportional in terms of the cost in human lives lost and property (including the environment) destroyed.³⁸ The principles of attribution, necessity, and proportionality are not referred to expressly in Article 51 but are referred to indirectly. The ICJ has explained in a number of cases that the reference to the “inherent right” of self-defense is a reference to the additional customary international law principles that are part of the right of self-defense. The ICJ held in the *Nuclear Weapons* case that “there is a ‘specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’” This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.³⁹

After 9/11, the United Kingdom made a case for the right of self-defense against Afghanistan.⁴⁰ The UK presented in a white paper evidence of Afghanistan’s state responsibility for al-Qaeda’s attacks in the United States on 9/11.⁴¹ Based on this evidence, resorting to the use of major military force against Afghanistan, at least until the Taliban were driven from power, and could be defended as necessary and proportional under international law.⁴² Compare this case for using force under Article 51 of the UN Charter in Afghanistan with the attempts to justify using force under Article 51 in Pakistan, Yemen, and Somalia. The United States has not suffered a significant armed attack from these states, let alone an attack for which any of these states is responsible. The government of Yemen has not invited the United States to be part of its attempt to suppress secessionists in the north and south of the country. Somalia barely has a government,⁴³ and Pakistan has only invited the United States to help with the suppression of a secessionist movement in Buner Province, a request that ended several years ago.⁴⁴ Article 51 provides virtually no support for the targeted killings by the United States.

Further, Article 51 does not permit the use of force in self-defense to pre-empt a future attack. The ICJ has not ruled on anticipatory self-defense, but by requiring a significant attack, the evidence that the attack is significant

³⁸ See *Nicaragua*, 1986 I.C.J. at 94, 176 (noting the requirements of necessity and proportionality when using self-defense).

³⁹ *Nuclear Weapons*, 1996 I.C.J. at 245, 41 (citing *Nicaragua*, 1986 I.C.J. at 94, 176); see also *Oil Platforms* 2003 I.C.J. at 198.

⁴⁰ See Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 901–02 (2002).

⁴¹ See *id.*

⁴² From the time President Karzai assumed governmental authority in Afghanistan, the United States and its allies have been fighting a counterinsurgency war—not a war of self-defense—as is evident by the war aims that consist of building up Afghanistan security forces and institutions to be able to resist attempts at overthrow by the Taliban or other insurgent groups.

⁴³ See *Somalia*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/ei/bgn/2863.htm> (last visited May 20, 2012) (describing the transitional government in Somalia).

⁴⁴ See O’Connell, *supra* note 37, at 363 (citations omitted) (discussing the possibility of U.S. drone attacks on behalf of Pakistan in Buner Province).

must be of an actual attack that is at least underway if not completed. In the case of attacks on Israel from the Occupied Palestinian Territories, the ICJ determined in the *Wall* case that Israel is the responsible state for the territories as the occupying power.⁴⁵ Article 51 is not the relevant rule in a zone of occupation. The ICJ has also found that the attacks by non-state actor militant groups crossing the border from Congo into Uganda did not give rise to Uganda's right to attack Congo.⁴⁶ The ICJ stated expressly in *Congo v. Uganda* that it was not reaching the case of "large-scale attacks" on Uganda.⁴⁷ Such attacks, indeed, would have constituted a different case, one where, presumably, the militant group controlled territory as a *de facto* government or had close ties to the government to be able to launch such attacks and to create a situation where major military counterattacks on the territory met the principles of necessity and proportionality. Such factors would create a situation like the Taliban's control of most of Afghanistan in 2001 or the Kurds' control of northern Iraq.⁴⁸ The United States has not declared that it is attacking groups in control of territory as its basis for its claim of self-defense.

With respect to using force against a state unable or unwilling to use force to control terrorist activity on its territory, international law contains no rule justifying the use of force on this basis. Brennan asserted this argument as a basis for the right to resort to military force; however, he cites no authority.⁴⁹ In this author's research, the phrase "unable or unwilling" appears to have surfaced in connection with justifying resort to military force against foreign sovereign states in the document titled "The Chatham House Principles of International Law on the Use of Force in Self-Defence."⁵⁰ The document was sponsored by the foreign affairs think tank Chatham House (the Royal Institute of International Affairs).⁵¹ The reference to resort to force against states "unable or unwilling" to control terrorism on their territory has no citation to authority in international law. Apparently the Principles include the "unable and unwilling" basis because the drafters of the Principles understood this to be a basis for resort to force that states want, rather than a basis that currently exists in international law.⁵² It is, therefore, a proposal for a future rule but one that contradicts the UN Charter.

⁴⁵ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 197, 201–02, 150, 163 (July 9).

⁴⁶ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 222, 268, 146, 301 (Dec. 19).

⁴⁷ *Id.* at 223, 147.

⁴⁸ See *id.* at 222, 268, 146, 301. See also James Thuo Gathii, *Irregular Forces and Self-Defense Under the UN Charter*, in *WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11*, 91–102 (Mary Ellen O'Connell ed., Leiden: Martinus Nijhof 2012).

⁴⁹ See Brennan, *supra* note 1.

⁵⁰ Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963, 969–70 (2006).

⁵¹ *Id.* at 963. The author also incorporated comments made to her by Wilmshurst into this article.

⁵² See *id.* at 969–70.

Consent of Pakistan or Yemen is the fourth assertion that is often joined to one or more of the others. Because Somalia has not had a government that could give consent, the claim has no bearing for attacks there. Most of the world now knows that authorities in Pakistan or Yemen have given, at best, only erratic consent. Moreover, it is unclear to the author whether Pakistan or Yemen may permissibly give consent for the use of military force against terrorist suspects on their territory. Such consent would be a form of excessive force—the same wrongdoing for which governments across the Arab world have been strongly criticized. It is unlawful to use military force outside the context of armed conflict and self-defense.⁵³

President Obama was asked in January about the wisdom of attacking people with drones during a virtual interview organized by Google and YouTube. Here is a description of what he said:

Obama then said he wanted to make sure people understood drones have not caused a huge number of casualties. The government has only been using “precise” strikes against al Qaeda and their affiliates. He said there’s a “perception” that the US is engaging in a bunch of strikes “willy nilly” when what is happening is a “targeted effort” to get people on a list, who want to hit Americans and American facilities.⁵⁴

It is true that the more precise a weapon is, the closer it will come to meeting the requirement to distinguish between military targets and non-military ones. Most people are aware that this principle of distinction is fundamental to the law of armed conflict. It likely sounds reassuring to audiences when U.S. officials point out that drones allow greater “precision.” The problem is that precision has little to do with the law on resort to force. The way drones are used is governed by international humanitarian law or the law of armed conflict—the law in war—not the law on the right to resort to military force in the first place.

In addition to claims respecting armed conflict, self-defense, rights to attack weak states, and precision munitions, when attacks are made in Pakistan near the Afghanistan border, U.S. officials have also said that the purpose of the attacks is to stop fighters who have crossed into Afghanistan to fight on behalf of the insurgency.⁵⁵ Other commentators will hypothesize that someone

⁵³ See, e.g., Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT’L L. STUD. 109, 118–20 (2009). Murphy discusses consent at length and raises concerns about it as a solid basis for the US use of force in Pakistan. He fails, however, to begin by assessing that to which Pakistan has the legal right to consent.

⁵⁴ Kevin Gosztola, *In YouTube Event, Obama Defends Government’s Use of Drones*, THE DISSENTER, Jan. 30, 2012, <http://dissenter.firedoglake.com/2012/01/30/president-obama-says-us-must-be-judicious-in-drone-use/>

⁵⁵ See, e.g., INT’L SEC. ASSISTANCE FORCE (ISAF), KEY FACTS AND FIGURES (2012), available at <http://www.nato.int/isaf/docu/epub/pdf/placemat.pdf>. ISAF, “as mandated by the

physically distant from the Afghanistan hostilities might, nevertheless, be directly participating in them. These particular claims are not part of the Brennan or Koh analysis perhaps because they will only apply so long as the U.S. is participating in hostilities in Afghanistan. In addition, the first argument is applicable only to the Afghanistan-Pakistan border region. As such, it underscores that no similar fighting involving the United States is occurring in Somalia or Yemen. Yet, the justification is used regularly and merits consideration here. There are several problems with it. Chief among the problems is that the United States and other international forces are fighting a counterinsurgency armed conflict in Afghanistan.⁵⁶ It is being fought to give Hamid Karzai and security forces loyal to him control of Afghanistan.⁵⁷ This means that fighting beyond Afghanistan must be justifiable for this military objective and have the Karzai government's consent. If there are attacks on Afghanistan from Pakistan, it must be for Afghanistan to decide whether to counterattack. Doing so must follow the same rules respecting self-defense discussed above: There must be significant armed attacks, for which the territorial state is responsible, and the response with major military force on the territory of Pakistan must be necessary and proportional to accomplish the military objective. At the time of writing this article, none of these conditions appears to be present. In response to a series of armed incidents by the United States against Pakistan, the Pakistan-Afghanistan border is closed to truck traffic re-supplying international forces in Afghanistan.⁵⁸ The military objective of ending the insurgency in Afghanistan has been harmed rather than helped by targeted killing in the border region.

As for remote participation, the justification would only apply if the United States had highly precise information about the activity of a targeted person at the time of the killing. If the United States ever had such information, it would be in a rare case. Even then, the International Committee of the Red Cross's Interpretive Guidance on Direct Participation makes clear that whether a person could be targeted and killed when far from actual

United Nations Security Council, is working to create the conditions whereby the Government of Afghanistan is able to exercise its authority throughout the country.”

⁵⁶ Tarek El-Tablawy, *Hamid Karzai: Afghanistan Would Back Pakistan in U.S. War*, HUFFINGTON POST (Oct. 23, 2011, 1:39 PM), http://www.huffingtonpost.com/2011/10/23/hamid-karzai-afghanistan-pakistan_n_1027115.html (mentioning a U.S.-led coalition joining with Afghan forces to disrupt insurgent operations in Kabul, Afghanistan).

⁵⁷ ISAF, *supra* note 55 (outlining ISAF's key priorities in Afghanistan, which include “build[ing] the capacity of the Afghan Security Forces so they can take lead responsibility for security in their own country”).

⁵⁸ Tom Wright & Adam Entous, *Coordination Is Questioned in Wake of NATO Airstrike*, WALL ST. J. (Nov. 29, 2011), <http://online.wsj.com/article/SB10001424052970204753404577066120988157782.html>.

fighting would be governed by the appropriate necessity standard.⁵⁹ Far from armed conflict hostilities, the necessity standard would be absolute necessity, which is the law enforcement standard, not the battlefield's reasonable necessity standard.⁶⁰

CONCLUSION

Many Americans, upon learning of these international legal rules restraining resort to military force in the counterterrorism context, express the view that international law is too restrictive. A wide swath of the American public has come to believe that military force is the appropriate or available response to terrorism—at least outside the United States itself. In fact, the ready use of military force is at the root of many of the United States' most serious challenges today, such as the government deficit, which will grow astronomically as the costs of caring for tens of thousands of injured servicemen and servicewomen continues for decades to come. With respect to the topic of this article, U.S. targeted killing, especially with drones, is undermining trust, cooperation, and the rule of law in the very places where those factors are essential. As a major in the U.S. Army JAG Corps described it in April 2012:

The masses of Americans have been persuaded by more than a decade of bellicose, Orwellian propaganda that only the constant use of military force can bring security and peace to America. . . . [A]dvocacy of security through adherence to the law—though reasonable, ethical, and utterly defensible—is at stark contrast to the ends-oriented, insular worldview embraced by an increasingly conservative American populace. . . . As a nation we raced to the bottom after 9/11 and embraced every justification and pretence to exact our revenge. I wonder if we will ever find our way back.⁶¹

The United States has been at such legal and moral dead ends before, most memorably during the Vietnam War. The country did find its way back and could again through a renewed commitment, as Brennan has said, to American values and the rule of law.

⁵⁹ International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009)[hereinafter *Interpretive Guidance*]. The Guidance does not discuss the right to detain.

⁶⁰ *Id.* at 80–81; see also, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/14/24/Add.6, at 3 (28 May 2010).

⁶¹ Private e-mail from a Major in the U.S. Army JAG Corps to Mary Ellen O'Connell (April 10, 2012) (on file with author).