

January 2011

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Recommended Citation

Mary Ellen O'Connell, Remarks: The Resort to Drones under International Law, 39 Denv. J. Int'l L. & Pol'y 585 (2011).

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Remarks: The Resort to Drones under International Law

Keywords

Drones, International Law: History, Military, War and Peace, Strikes, War, Human Rights Law

REMARKS: THE RESORT TO DRONES UNDER INTERNATIONAL LAW

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It is a privilege to be part of the Sutton Colloquium, one of the most important discussions of international law that occurs in the United States. I would like to express sincere thanks to Professors Ved Nanda and David Akerson for inviting me, as well as to their students and staff for organizing the event.

My remarks concern this question: When may a state lawfully resort to drone attacks? The answer lies in the first instance in what we call the *jus ad bellum*, the law governing resort to military force. This is a distinct body of law with important overlaps with *jus in bello*, another body of law also known as international humanitarian law (IHL) or the law of armed conflict (loac), which governs how force is used once an armed conflict is underway.¹ We must begin with the *jus ad bellum*, however, analyzing whether resort to weaponized drones is lawful before turning to the *jus in bello*, to determine whether the way drones are used is lawful.²

Drones are unmanned aerial vehicles that are operated by a pilot who may be thousands of miles away from where the drone is flying.³ The militaries of sovereign states and of non-state actors are quickly acquiring large fleets of drones. Most of these drones are currently used for surveillance only. Increasingly, however, states and non-state actors are acquiring drones equipped with missiles and bombs, the sort of weapons that international law restricts to armed conflict hostilities. The restriction on weaponized drones to use in combat zones means that the distinction between situations of armed conflict and situations that are not armed conflict is critical. What exactly distinguishes these situations is a matter of common sense that is reflected in the definition of armed conflict found in

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1. See MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE, CASES AND MATERIALS 103-13 (2d ed. 2009) (providing an overview of both the *jus ad bellum* and the *jus in bello*).

2. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL, THE LAW GOVERNING LETHAL FORCE IN CONTEXT 13 (Simon Bronitt ed., forthcoming 2011), available at <http://ssrn.com/abstract=1501144> [hereinafter O'Connell, *Pakistan*].

3. See Peter W. Singer, *Robots at War: The New Battlefield*, WILSON Q., Winter 2009, at 30, 33-34 (discussing robotic weapons including drones).

international law. Armed conflict is the exceptional situation, while peace is the normal situation. Thus, whether the United States or any state is lawfully using armed drones depends on whether the initial resort to armed force is lawful or whether the use is within a situation defined by international law as an armed conflict. Outside of armed conflict such use would be unlawful.

Before going into more detail respecting the law on resort to drones, I will first provide a brief history and very brief overview of drone use by the United States from 2001-2010. This history will set the stage for our discussion of the applicable law.

At the time of this writing, the United States has two types of combat drones in its arsenal: the MQ-1 or Predator and the MQ-9 or Reaper.⁴ Predators began as surveillance drones and then were adapted to carry two Hellfire missiles.⁵ The Reaper is similar in design and function to the Predator, but was specially designed as a launch vehicle for weapons. It can carry up to fourteen Hellfire missiles and 500-pound bombs.⁶ The U.S. is rapidly increasing its supply of drones and will soon have more unmanned than manned aerial vehicles in its arsenal.⁷ I understand pilots are not altogether happy with this development.

The United States is not the only country that possesses this technology. Other states and non-state actors have drones, including the United Kingdom, France, Russia, Turkey, India, China, Hezbollah, Israel, and Iran.⁸ An October 2010 report by United Press International (UPI) says that Israel has sold drones to over 42 states.⁹ Iran is also supplying drones to friendly states and non-state actors. In a *New Yorker* magazine article in late 2009, Jane Mayer described the U.S. as having two drone programs: one conducted by the U.S. Air Force and one by the CIA.¹⁰

From my discussions with others, especially with a former commander of drone operation at Nellis Air Force Base in Nevada, it is clear to me that all drone operations are today and probably for some time have been joint operations. None are carried out by the Air Force alone. The commander told me that “a thousand

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

5. *Id.*

6. *MQ-9 Reaper*, OFFICIAL WEBSITE OF THE U.S. AIR FORCE (Aug. 18, 2010), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

7. Singer, *supra* note 3, at 38.

8. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 27, n.51, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].

9. *Iran Muscles into the UAV battlefield*, UPI.COM (Oct. 5, 2010, 2:38 PM), http://www.upi.com/Business_News/Security-Industry/2010/10/05/Iran-muscles-into-the-UAV-battlefield/UPI-47421286303914/.

10. Jane Mayer, *The Predator War, What are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

people see the video feed” from the deployed drones, from the pilots in their trailers in Nevada and New Mexico to intelligence analysts at CENTCOM to personnel in Japan to the President of the United States.

The first known use of a drone to kill a named individual occurred in Afghanistan in November 2001. This was about a month after the United States and the United Kingdom launched the intervention of October 7, 2001, in response to the 9/11 attacks. In the midst of armed conflict hostilities, the U.S. Air Force used a drone to launch a Hellfire missile to kill Mohamed Atef, a reputed al Qaeda leader, in his home near Kabul.¹¹ On November 3, 2002, the U.S. used a drone outside of a combat area to launch Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen. The CIA operated that drone from a base in Djibouti on Africa’s east coast.¹² The United States Air Force at the time had control of drone operations, but did not carry out the strike because of concerns about its legality. The CIA apparently had no such concerns and carried out the strike killing all six persons in the vehicle, including a suspected top operative in al Qaeda and a United States citizen, a young man in his twenties from Buffalo, New York.¹³ According to Dina Temple-Raston of National Public Radio, the CIA quickly arrived at the site, repelled an agent down, and took DNA samples from the bodies to confirm who had been killed.¹⁴

In January 2003, the United Nations Human Rights Commission received a report on the Yemen strike from its special rapporteur on extrajudicial summary or arbitrary killing. She concluded that the strike constituted “a clear case of extrajudicial killing.”¹⁵ Drone attacks by the United States in Pakistan began in 2004.¹⁶ The number of attacks have jumped dramatically to about 30 in 2008 and continued to climb in 2009 to about 50.¹⁷ In 2010, the U.S. attacked in Pakistan about 120 times.¹⁸

11. *Al-Qaida: Dead or Captured*, TODAY NEWS, MSN (June 22, 2005 3:37 PM), <http://today.msnbc.msn.com/id/4686228/42958222>.

12. See Jack Kelly, *U.S. Kills al-Qaeda Suspects in Yemen*, U.S.A. TODAY, Nov. 5, 2002, at A1, available at http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm (providing a detailed account of the attack); Doyle McManus, *A U.S. License to Kill*, L.A. TIMES, Jan. 11, 2003, at A1, available at <http://articles.latimes.com/2003/jan/11/world/fg-predator11>.

13. John J. Lumpkin, *Administration Says That Bush Has, in Effect: A License to Kill*, ST. LOUIS POST-DISPATCH, Dec. 4, 2002, at A12.

14. DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR* 196 (2007).

15. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Comm’n on Human Rights, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶¶ 37-39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir).

16. See David Rohde & Mohammed Khan, *The Reach of War: Militants; Ex-Fighter for Taliban Dies in Strike in Pakistan*, N. Y. TIMES, June 19, 2004, at A6, available at <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html>.

17. *Counterterrorism Strategy Initiative, 2010: The Year of the Drone*, New AmERICA Foundation., <http://counterterrorism.newamerica.net/drones/2010> (last visited May 11, 2011).

18. *Id.*

The U.S. has also been using drones in Somalia, a place that almost never gets mentioned in discussions of U.S. use of military force.¹⁹ I have been unable to pinpoint when U.S. drone use in Somalia first began, but I have found news accounts that the U.S. was using drones in late 2006, perhaps to assist Ethiopia in the invasion that it carried out to attempt to install a new government in Somalia.²⁰

Despite the fact that we refer to drones as “unmanned,” there are people involved in all of these drone operations. There are people associated with drone use in Afghanistan, Djibouti, Pakistan, Yemen, and places where the drones have been housed such as Uzbekistan.

Many of these persons are CIA personnel or individuals under contract with the CIA. John Radsan, a former assistant general counsel at the CIA, has related to me that all decisions to actually fire a missile or drop a bomb from a drone are made by the CIA at its headquarters in Langley, Virginia.²¹ Jane Mayer’s article also confirms that the CIA is using private military contractors to assist with its drone operations.²² While I certainly do have concerns about the CIA and private military contractors being involved in the use of lethal force, I do not think that is the most important issue confronting the United States as a matter of law today with respect to drone use. The U.S. could easily return all drone operations to the military. The most serious issue with respect to drones is the amount of firepower involved—drones are currently configured as military weapons, meaning resort to drones is lawful in only four circumstances.

First, military force may be used as part of a lawful exercise of individual or collective self-defense under the United Nations (UN) Charter Article 51. Second, the United Nations Security Council may authorize military force. Third, military force may be used by a government in effective control of a state to suppress an organized armed uprising within a state where military force is resorted to by rebel armed forces. Fourth, military force may be used by a state asked to join in suppressing an insurrection within another state.²³

A drone is the aerial equivalent of a ground-based missile launcher or bomber aircraft. The police do not deploy this type of force—police do not get to drop

19. See Steve Bloomfield, *Somalia: The World's Forgotten Catastrophe*, INDEPENDENT (Feb. 9, 2008), <http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html>; *A Strike Against Al-Qaeda's Hornet's Nest*, SPIEGEL ONLINE, Sept. 1, 2007, <http://www.spiegel.de/international/0,1518,458597,00.html>; *U.S. Missile Strike Hits Town in Somalia*, CBS NEWS.COM (Mar. 3 2008), <http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml>.

20. See Bloomfield, *supra* note 19.

21. Interview with John Radsan, Professor at Law and Dir. of Nat'l Sec. Forum, William Mitchell Coll. of Law, in Univ. of Notre Dame Law Sch. (Oct. 8, 2009); see also, Richard Murphy & A. John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405, 412-14 (2009).

22. Mayer, *supra* note 10.

23. See Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States*, 38 CAL. W. INT'L L.J. 41, 41-42, 45-46 (2007); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889-90, 893, 899 (2002).

bombs or use Hellfire missiles against criminal suspects. In law enforcement, lethal force is restricted to situations of absolute necessity.²⁴ Civilian casualties are not tolerated. There is no principle of proportionality that applies to the police when they are exercising lethal force.²⁵ Armed drones are therefore lawful only in armed conflict hostilities. The right to resort to them must be found in the law governing resort to military force, the *jus ad bellum*. The way they are used must be based on IHL and human rights.

Article 2(4) of the UN Charter is the most important rule on resort to force.²⁶ It is a treaty rule that is binding on all sovereign states. Treaty rules are not easily changed by contrary state practice, despite what some commentators argue. Rather, such contrary state practice is a treaty violation according to the law of treaties.²⁷ Contrary state practice might be relevant to the formation of a rule of customary international law.²⁸ In the case of Article 2(4), however, not only are we talking about a treaty rule, the United States argued in its memorials in the *Nicaragua* case in 1984 that it is a rule of *jus cogens*.²⁹ In other words, Article 2(4) is a peremptory rule that cannot be overcome by a contrary treaty rule, let alone a new rule of customary law derived from state practice.

In addition to arguing that 2(4) has been changed by state practice, some scholars try to interpret it as allowing more than it does.³⁰ Article 2(4) is properly interpreted as prohibiting all uses of force above a certain *de minimis* level. Minimal uses of force such as firing a bullet across a boundary or across the bow of a ship may perhaps violate the principle of non-intervention, but such examples are too minor to come within the purview of Article 2(4). With this exception, Article 2(4) generally prohibits all uses of force.

Other UN Charter articles provide two express exceptions to this virtual ban on all uses of force. In Chapter VII, the Security Council has been given authority to act in cases of threats to the peace, breaches of the peace, or acts of aggression

24. See, e.g., Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, 8th Sess., Aug. 27-Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, ¶¶ 3, 4, 9, available at <http://www2.ohchr.org/english/law/firearms.htm>.

25. Alston Report, *supra* note 8, ¶¶ 30, 31.

26. See Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 809, 822 (1970).

27. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

28. See *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, 1969 I.C.J. 3, ¶¶ 71, 77 (Feb. 20).

29. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 1000 (2001); Mary Ellen O'Connell, *Drones Under International Law 3-4* (Oct. 8, 2010) (unpublished Washington University of Law Whitney R. Harris World Law Institute International Debate Series), available at <http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf>. *Jus cogens* norms are peremptory norms from which no derogation is permitted. *Id.*

30. See, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM, 346, 389-90 (Benjamin Wittes ed., 2009) (arguing that if the U.S. wants to legitimize its targeted killing policy under the framework of international law requires that the U.S. maintain its self-defense justification for doing so, thereby sufficiently creating state practice for the lawfulness of such killings).

and it may authorize measures to maintain or restore international peace and security. Article 51 also provides an exception, but note how detailed Article 51 is. So often people seem to skip over it. Every word of the Article is binding and has meaning. It reads:

Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.³¹

Measures need to be reported to the Security Council.³² The evident restrictions in this article have come under a lot of pressure from a number of people, especially academics in the United States. For some reason, for a number of years, it has been a common practice by international lawyers in the U.S. to try to find loopholes in Article 51.³³ Louis Henkin in his famous debate with Jeanne Kirkpatrick in the 1980s, later published in the book *Right vs. Might*, pointed out that it is not in America's interest to find loopholes to these clear rules of the Charter.³⁴ This point continues to be absolutely right.

In 2005, all states re-confirmed the United Nations Charter as written at the UN World Summit in New York City.³⁵ The International Court of Justice (ICJ), the chief judicial organ of the United Nations, and the only court of general jurisdiction on matters of international law, has restated in numerous cases that the Charter means what it actually says with respect to self-defense.³⁶ The ICJ has made clear that self-defense is a term of art in international law. The reference in Article 51 to self-defense refers to the right of a victim-state to use significant offensive force in the territory of a state legally responsible for a significant armed attack.

In at least five separate decisions spanning a 60-year period, the ICJ has said that the armed attack must be attributable to a state for the exercise of self-defense

31. U.N. Charter art. 51.

32. *Id.*; see, e.g., Cassese, *supra* note 29, at 999 (explaining that although in his view the U.S. may not be required to obtain Security Council authorization for acts of self-defense against terrorism, at the very least the U.S. needs to report its measures of self-defense to the Security Council).

33. See, e.g., Anderson, *supra* note 30, at 21; Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010) (arguing that a state may act in self-defense against another state even where the other state is not responsible for an armed attack if a non-state actor carried out the attack from the other state's territory; consent is also not required, in his view.)

34. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT VS. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 69 (Louis Henkin et al. eds., 2d ed. 1989).

35. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 2, 79-80, 85, U.N. GAOR, 60th Sess., 8th plen. mtg., U.N. Doc. A/60/L.1 (Sept. 15, 2005), available at <http://www.unep.org/greenroom/documents/outcome.pdf>.

36. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 4) [hereinafter *The Wall*]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 195, 200 (June 26) [hereinafter *Nicaragua*].

on that state's territory to be lawful.³⁷ Even if the ICJ had not said this so frequently, we know from the law on state responsibility that before you can take offensive measures against another state, that state has to be responsible for the first unlawful use of force.³⁸ The ICJ has also ruled that the armed attack giving rise to the right of self-defense must be an attack that involves significant force. It must be more than a mere frontier incident, such as sporadic rocket fire or small groups of persons crossing a border.³⁹

In addition to the Charter, the ICJ has also said in several cases that two general principles of international law impose important conditions on the right to exercise force in self-defense. Those principles are necessity and proportionality.⁴⁰ In distinction to Professor Newton, I understand that proportionality has a core meaning that crosses all areas of law from criminal law sentencing to trade law, to countermeasures to the *jus ad bellum* and the *jus in bello*.⁴¹ This is the core meaning of balance or equivalence between the injury or wrong and the response. In addition to proportionality, the ICJ made clear in the *Nuclear Weapons* case that for any use of force to be lawful in self-defense, it must be necessary to achieve a defensive purpose. If the state can first make that necessity showing, the state must then show that the method of force used will not result in disproportionate loss of human life or destruction of civilian property or the environment. The ICJ said in *Nuclear Weapons*, that we have a specific rule "whereby self-defence

37. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 146-47 (Dec. 19) (deciding that Uganda could not justify the use of force in Congo given that Congo was not responsible for the attacks in Uganda of non-state actor groups.); *The Wall*, 2004 I.C.J. 136, ¶ 139 (stating that for Israel to be able to invoke Article 51 of the UN Charter as a justification for using military force on the territory of another state, a state must be responsible for an unlawful armed attack.); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 51, 61 (Nov. 6) (finding that the U.S. could not justify its acts against Iran as self-defense because it had not discharged its burden of proof to establish Iran's responsibility for attacks against the U.S.); *Nicaragua*, 1986 I.C.J. 14, ¶ 195 (holding that the right to self-defense requires an armed attack by a state or attributable to a state by "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein"); see *Corfu Channel Case (Alb. v. U.K.)*, 1949 I.C.J. 4, 35 (Apr. 9) (finding that the United Kingdom had no right to remove mines from the Strait of Corfu where it was not proven that Albania had placed the mines as an armed attack on the UK).

38. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l L. Comm'n, arts. 21-22, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001), available at <http://www.unhcr.org/refworld/pdfid/3ddb8f804.pdf> [hereinafter Draft Articles].

39. See *Nicaragua*, 1986 I.C.J. 14, ¶ 195.

40. *Id.* ¶ 194; *Oil Platforms*, 2003 I.C.J. 161, ¶ 43; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, ¶ 41 (July 8) [hereinafter *Nuclear Weapons*].

41. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 719-21 (2008) (explaining that proportionality requires constraint with respect to the level of permitted force under both the *jus in bello* and the *jus ad bellum*, and also applies to use of countermeasures).

would warrant only measures which are proportional to the armed attack and necessary to respond to it."⁴²

The U.S. began its use of force in Afghanistan on October 7, 2001, invoking Article 51.⁴³ The use of force and self-defense in Afghanistan, however, ended in 2002 when the Loya Jirga chose Hamid Karzai to replace the Taliban as the government of Afghanistan.⁴⁴ Today, the U.S. and other international forces are in Afghanistan at the invitation of President Karzai in the attempt to suppress a significant armed insurrection. If you need further evidence that the U.S. does not actually view its actions in Afghanistan today as valid acts of self-defense, I recommend Bob Woodward's book *Obama's Wars*.⁴⁵ Woodward recounts in detailed discussion how the U.S. is engaged in suppressing an insurrection in Afghanistan against Karzai. There is little discussion, however, that U.S. involvement in Afghanistan today is a self-defense effort that began in 2001.

Beyond Afghanistan, the U.S. has been invited to join in some military operations in Pakistan, but it is not clear whether those invitations came from the elected leader of Pakistan, President Zardari.⁴⁶ Moreover, following the floods of 2009, Pakistan had suspended its own offensive military operations – troops have plainly been needed to aid in the rescue and rebuilding effort. Similarly, Ethiopia may have asked for U.S. assistance to use drones during its intervention in Somalia, but Ethiopia's operation is over. Ethiopia withdrew from Somalia, failing to replace the government in Somalia.⁴⁷

Nevertheless, despite the absence of any basis to resort to the use of military force anywhere but Afghanistan at the time of writing, the Obama Administration has persisted in using drones in Pakistan, Somalia and Yemen. How has the U.S. justified these attacks? State Department Legal Advisor Harold Koh gave a speech at the American Society of International Law's Annual Meeting in March 2010, and indicated two possible justifications, though I find them mutually contradictory. He said first, that the U.S. is currently in a worldwide, armed

42. *Nuclear Weapons*, 1996 I.C.J. 95, ¶ 41.

43. Permanent Rep. of U.S. to the U.N., Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Chargé d'affaires a.i. of the Permanent Mission of the U.K. of Gr. Brit. and N. Ir. to the U.N., Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001).

44. See *President Hamid Karzai*, EMBASSY OF AFG., WASH. D.C., <http://www.embassyofafghanistan.org/president.html> (last visited Apr. 21, 2011).

45. BOB WOODWARD, *OBAMA'S WARS* 5 (2010).

46. See Jackie Northam, *Airstrikes in Pakistan's Tribal Areas Legally Murky*, NPR (Mar. 17, 2009), <http://www.npr.org/templates/story/story.php?storyId=101953944>.

47. See *Somalia Joy as Ethiopians Withdraw*, BBC NEWS (Jan. 13, 2009), <http://news.bbc.co.uk/2/hi/africa/7825626.stm>; *Ethiopia Completes Withdrawal of Troops from Somalia*, CHINA VIEW (Jan. 26, 2009), http://news.xinhuanet.com/english/2009-01/26/content_10721724.htm.

conflict with al Qaeda, the Taliban, and associated forces.⁴⁸ But then he also said that the United States is responding to threatened attacks by individuals in these organizations, using force to preempt attacks under a theory of self-defense.⁴⁹ So in other words, there is no worldwide, armed conflict but rather preemptive attacks to stop future terrorist plots. If, however, the U.S. is already in an armed conflict, resorted to in self-defense, it does not need to justify each attack as a preemptive attack in self-defense and each attack would be governed by IHL instead of the law of self-defense. Indeed, preemptive force is not a lawful basis for exercising force against a sovereign state, let alone an individual, so this argument is doubly odd. If we leave to one side the credulous arguments that the U.S. is in a worldwide, armed conflict and/or resorting to preemptive attacks, could the U.S. defend drone attacks in Yemen after, for example, the toner cartridge incident?⁵⁰

The British have strongly advocated for decades that terrorist attacks must be treated as criminal acts under international law unless they are part of an armed conflict, separately established from the terrorist attacks.⁵¹ Terrorist attacks generally have the hallmarks of crime; not armed attacks that can give rise to the right of self-defense under Article 51. Terrorist attacks are usually sporadic, and they are rarely the responsibility of the state where the perpetrators are located. However, in some circumstances though rare, terrorist attacks may be carried out so continuously that they rise to the level of armed conflict.

For instance, the Supreme Court of Israel found in 2006 that Israel was engaged in a continuous state of armed conflict with various terrorist organizations due to the “constant, continual, and murderous waves of terroristic attacks,” and they responded in the armed response to these.⁵² The Israeli court described a situation that was more than a crime and would seem to share the important features of the textbook-case of self-defense: the liberation of Kuwait in 1991. After Iraq invaded Kuwait, Kuwait had the right to use force in self-defense.⁵³

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

49. *Id.*

50. Eileen Sullivan, ‘Toner’ Terror Fallout, N.Y. POST (Nov. 9, 2010, 1:15 AM), http://www.nypost.com/p/news/national/toner_terror_fallout_IrPzhCk38E2yVudpSuDkCO (stating that the “toner cartridge” incident was an attempt by terrorists in Yemen to destroy two cargo planes headed to Chicago with bombs hidden inside of printers, but the plan was thwarted when Saudi Arabian officials obtained information of the attack and provided the United States with the FedEx and UPS tracking numbers of the printers).

51. See, e.g., Reservation of United Kingdom (July 2, 2002), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>; U.K. MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT 31 (2004).

52. H.C.J. 769/02 The Public Committee Against Torture in Israel v. Israel (2) PD 459, ¶ 16 [2006] (Isr.), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d14f3f94989b702fc12572d80043927b!OpenDocument>.

53. See Mary Ellen O’Connell, *Enforcing the Prohibition on the Use of Force: The U.N.’s*

Other states could join Kuwait, in collective self-defense.⁵⁴ Self-defense was authorized by the Security Council in order to expel the invader.⁵⁵ The liberation of Kuwait had two aspects not found in connection with most terrorist attacks. No one doubted who had carried out the armed aggression. It was Iraq. Second, the occupation of Kuwait created a continuing wrong that could be righted.⁵⁶ The international law violation could be effectively corrected through the use of major military counter force.

In the case of terrorist attacks, the first task is always evident. The necessity to act in self-defense means the state that has suffered an attack sees the imminent threat of another attack or is facing continuing attacks to which they must respond quickly.⁵⁷ This is a difficult showing to make in the case of terrorist attacks. Terrorist attacks are usually too brief and do not result in ongoing wrongs, such as the unlawful occupation of territory. It usually takes time to find out who the perpetrators are and where they are. But force used long after a terror attack loses its defensive character becomes an unlawful reprisal. States are forbidden from taking reprisals affirmatively in the General Assembly's Definition of Aggression, which elaborates on Article 2(4).⁵⁸ Even when militant groups remain active along a border, and are regularly carrying out small attacks, such incursions are not considered armed attacks that can give rise to the right of self-defense under Article 51, unless the state where the group is present is responsible for their actions.

In the case of *Congo v. Uganda*,⁵⁹ decided by the ICJ in 2005, Uganda had sent troops into Congo after years of cross-border incursions into Uganda by militant groups based in Congo. Numerous Ugandan citizens were killed as a result of these militant attacks, but Congo did little to control the militants. Nevertheless, the ICJ found that Congo's failure or inability to take action against the militants to protect Ugandans did not give rise to any right by Uganda to exercise major military force on the territory of the Congo.⁶⁰ Thus, although this notion is often heard, there is no actual right to use military force triggered by a state unwilling or unable to control such groups. In the *Congo* case, Uganda was found to have violated Article 2(4) for its attacks on Congolese territory.⁶¹ Uganda

Response to Iraq's Invasion of Kuwait, 15 S. ILL. U. L.J. 453, 479-80 (1991).

54. *See id.*

55. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990), available at <http://daccess-ods.un.org/TMP/1070384.53221321.html>.

56. *See* Draft Articles, *supra* note 38, art. 22.

57. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 121 (Malcolm Evans & Phoebe Okowa eds., 2d ed. 2004)

58. Definition of Aggression, G.A. Res. 3314 (XXIX), art. 3, U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

59. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

60. *See id.* ¶¶ 109-110, 112, 129, 146, 152.

61. *Id.* ¶¶ 149, 153, 165.

needed to take defensive measures on its own territory or in co-operation with Congolese authorities instead of unilaterally sending troops into Congo.

Within states, resort to military force is limited by international human rights law, which prohibits a government from using excessive force in responding to acts of violence, even if armed groups seeking to take power or secede perpetrate the violence.⁶² Those armed groups must reach a certain level of organization and a certain level of ability to confront the government authority before armed force beyond police measures may be exercised.⁶³

I disagree with Professor Newton that there is no international law governing how internal armed conflicts are waged. There is a very large body of customary international law that has been gathered by the International Committee of the Red Cross in their customary law study.⁶⁴ There is plenty of law regulating the conduct of internal armed conflict. But the rule I am emphasizing today, that armed force may not be used outside armed conflict situations, is a rule from human rights law.

Officials of the Bush and Obama Administrations have made the argument that because the 9/11 attacks were significant and were preceded and succeeded by terrorist attacks, the U.S. may target and kill al Qaeda members and their associates wherever they are found.⁶⁵ Following the 2002 Yemen strike, the National Security Advisor, Condoleezza Rice, said that the U.S. is allowed to use military force because the U.S. is in “a new kind of war.”⁶⁶ The U.S. argued that the war existed not where fighting was occurring but where certain individuals were found.⁶⁷ The Deputy General Counsel for International Affairs of the Department of Defense also said that the United States could target al Qaeda and other international terrorists around the world and those who support them without warning.⁶⁸

As weak as it was in other ways, at least the Bush Administration had a logically consistent argument. They said we could kill al Qaeda members if they were in the U.S., Germany, Switzerland, and elsewhere based on a suspect’s presence and claimed the combatant’s privilege to kill wherever a suspect was

62. See Alston Report, *supra* note 8, ¶¶ 30-32.

63. Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

64. ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2001), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha.

65. Koh speech, *supra* note 48; O’Connell, *Pakistan*, *supra* note 2, at 16.

66. *Fox News Sunday with Tony Snow* (Fox News Network television broadcast Nov. 10, 2002), available at <http://www.foxnews.com/story/0,2933,69783,00.html>.

67. See, e.g., Katerina Ossenova, *DOJ Official: President May Have Power To Order Terror Suspects Killed in U.S.*, JURIST (Feb. 5, 2006), <http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php>; Anthony Dworkin, *Obama Administration Announces Legal Basis for Drone Attacks*, CRIMES OF WAR <http://www.crimesofwar.org/commentary/obama-administration-announces-legal-basis-for-drone-attacks/> (last visited June 2, 2011).

68. Mary Ellen O’Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 454 (2003) (citing Anthony Dworkin, *Pentagon Official Examines Legal Aspects of Terror War*, available at http://hsm.intelbridge.com/summary?view_id=117201800 (on file with author)).

found. In contrast, the Obama Administration bases its policy on the conditions in which the suspect is found, not just who the suspect is.⁶⁹ Legal Advisor Koh has said that the Obama Administration no longer uses the term “global war on terror.”⁷⁰ Rather, he says 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.”⁷¹ They had to take a different position from the Bush Administration because President Obama campaigned against the global war on terror. Thus, the Obama Administration is attempting to differentiate the current legal position from that of the Bush Administration.

However, with all due respect to Harold Koh, his argument is actually weaker than the Bush Administration's. You cannot justify the right to use force based on who an individual is as opposed to whether there has been an armed attack where the person is. Moreover, if the U.S. is already in a worldwide, armed conflict, we have no need to invoke self-defense for each additional attack. Finally, if there is a worldwide, armed conflict, it must be in the U.S. and Germany as much as Yemen and Pakistan. The Legal Advisor has said that decisions to use force would be based on the conditions and capacities of governments.⁷² This point again reveals the weakness of the argument. The combatant's privilege to kill is based on the exigencies of armed conflict hostilities and not on the strength or weakness of a government.

The International Law Association (ILA) undertook a five-year study to help clarify what the definition of armed conflict was in international law in response to the Bush Administration's view that there could be a global armed conflict based on the existence of certain persons.⁷³ I was asked to chair that committee of 18 persons from 15 countries. Judith Gardam, the prominent Australian professor of international humanitarian law and human rights law, was the rapporteur.⁷⁴ Christine Gray from the University of Cambridge was a member of the committee, as was Sir Michael Wood, former legal advisor to the British Foreign and Commonwealth office, Eric Myjer of the University of Utrecht, George Nolte of the Humboldt University, Berlin, and many others.⁷⁵

The ILA report states that international law defines armed conflict as always involving at least two minimum characteristics: 1) the presence of organized armed

69. Koh Speech, *supra* note 48.

70. Renee Dopplick, *ASIL Keynote Highlight: U.S. Legal Adviser Harold Koh Asserts Drone Warfare is Lawful Self-Defense Under International Law*, INSIDE JUSTICE (Mar. 27, 2010), http://www.insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law.

71. Koh Speech, *supra* note 48.

72. *See id.*

73. INT'L LAW ASS'N, HAGUE CONFERENCE (2010) USE OF FORCE COMM., FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 1 (2010), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (click on “Conference Report The Hague (2010)” hyperlink).

74. *Id.*

75. *Id.*

groups, 2) engaged in intense inter-group fighting.⁷⁶ The fighting or hostilities of an armed group occurs within limited zones, theater of combat, or combat zones. Ask any member of the U.S. or NATO armed forces where the U.S. is engaged in combat operations today and they will correctly tell you in Afghanistan and Libya. Terrorism, as I discuss above, is generally a crime. Although in some circumstances it may be carried out so continuously as to be the equivalent of the fighting of an armed conflict as the Israeli High Court explained. The isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict because armed conflict requires a certain intensity of fighting.

This is certainly not the situation in the United States today. Even where the U.S. is using drones on the basis of consent from the territorial state, that state may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities. The legal restriction on the use of military force in such situations is found in human rights law. The major human rights treaties, for example, permit derogation in situations of emergency. Outside emergency, a state may only take human life when absolutely necessary in the defense of persons from unlawful violence – in the case of immediate need to save a human life.

Even on those occasions in Pakistan where hostilities were occurring and the President may have been asked to engage in those armed conflict hostilities, the question remains whether using military force in the situation of Pakistan through the use of drones meets the principles of necessity and proportionality. Necessity in the *jus ad bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense.

One of the leading counter terrorism experts today, David Kilcullen, says that, in fact, the drone attacks have been counterproductive. He said this in his March 2009 Congressional testimony:

I think one of the things we could do immediately to send a strong message is to call off the drone strikes that have mounted in the western part of Pakistan. . . [T]hey've given rise to a feeling of anger that coalesces the population around the extremists and leads to spikes in extremism well outside the parts of the country where we are mounting those attacks.⁷⁷

The views of Kilcullen and other counter terrorism experts raise questions as to whether drone strikes can ever be defended as accomplishing the military objective. Bob Woodward writes that the President is also aware of the long term disability of drone strikes: “Despite the CIA’s love affair with unmanned aerial

76. *Id.* at 2.

77. *Effective Counterinsurgency: The Future of the U.S. Pakistan Military Partnership: Hearing Before the H. Armed Servs. Comm.*, 111th Cong. 21 (2009) (statement of David Kilcullen, Partner, Crumpton Group, LLC, Senior Fellow, EastWest Institute, Member of the Advisory Board, Center for a New American Security), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52666.pdf.

vehicles, such as Predators, Obama understood with increasing clarity that the United States would not get a lasting durable effect with drone attacks.”⁷⁸ I do not think anybody believes that we will create much more than a temporary disruption of al Qaeda activities.

General Lute, a member of the National Security Council, believes attacking from the air a “high value” target hit list will accomplish little.⁷⁹ This is consistent with what we are hearing from counter terrorism experts. Indeed the Rand Corporation, in a study produced in 2008, provided very definitive evidence that drone attacks or military force against terrorist groups is almost never effective.⁸⁰ The way that terrorist groups come to an end is by bringing them into the political process or through law enforcement efforts.⁸¹ These are not the conclusions of Human Rights Watch; they are the conclusions of the Rand Corporation.

Some commentators have asserted that the U.S., and presumably other forces fighting in Afghanistan, has the right to pursue terrorist suspects in “hot pursuit.”⁸² This assertion was heard frequently in September 2010 after helicopter gunships crossed the border from Afghanistan into Pakistan.⁸³ International lawyers well understand, however, that hot pursuit is a right restricted to maritime policing efforts.⁸⁴ Under the United Nations Convention on the Law of the Sea, the amount of force permissible in hot pursuit is consistent with enforcement measures, not military force.⁸⁵ “Hot pursuit,” as an enforcement measure, is a narrower right under the laws of the sea, confining states to stricter rules than the rules governing the amount of force a state may use against another.⁸⁶

Another highly questionable attempt at justification is something referred to as “unit self-defense.”⁸⁷ As I understand it, it is an argument that, if one naval ship in a unit of ships is attacked by an enemy ship or a plane, then the entire unit to which the victim vessel belonged may strike the entire attacking unit. Outside of

78. WOODWARD, *supra* note 45, at 284.

79. *Id.*

80. See SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA 18-19, 30-31 (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

81. See *id.* at 18-19.

82. Northam, *supra* note 46.

83. Issam Ahmed, *NATO Helicopter Strike on Pakistan Shows New Strategy of “Hot Pursuit,”* CHRISTIAN SCI. MONITOR (Sept. 30, 2010), <http://www.csmonitor.com/World/Asia-South-Central/2010/0930/NATO-helicopter-strike-on-Pakistan-shows-new-strategy-of-hot-pursuit>; but see NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 72-73 (2010) (arguing the doctrine of hot pursuit does not provide a sound basis for military operations contemplated in Pakistan and Afghanistan).

84. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 245-46 (4th ed. 2005); Christian J. Tams, Symposium, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 371 (2009) (summarizing Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 112 (2d ed. 2004)).

85. United Nations Convention on the Law of the Sea art. 111, Dec. 10, 1982, 1833 U.N.T.S. 3.

86. See *id.* (listing the rules of “hot pursuit” for ships at sea); DINSTEIN, *supra* note 84, at 246.

87. Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998) (describing “unit self defense” and the limited assessment of its legal basis).

an armed conflict, there is no legal basis for this asserted right. Even in an armed conflict, the right to attack the enemy is based on the necessity to do so—not on whether a ship or plane belongs to a “unit.” Nor do I see how this argument can lawfully be applied to individual terrorist suspects.

Finally, some arguments are also being made that there is a right of preemptive self-defense to kill a person or group of persons who may be about to engage in future violent action.⁸⁸ As already explained, however, the right of self-defense in international law is based on response to an armed attack occurring, not preempting future attacks. The law of self-defense does not encompass a right to initiate military action against an individual or a small group, especially when the state where such persons are present is not legally responsible for their action.

The strongest conclusion to draw under the *jus ad bellum* is that there is no legal right to resort to drone attacks in Pakistan, Yemen, Somalia, and other places where the U.S. is not involved in armed conflict hostilities. In 2010, that meant Afghanistan only. Drone attacks constitute the use of military force. Resort to them is lawful when a state is a victim of an armed attack and the Security Council has authorized the use of force at the request of a government in effective control who needs assistance in suppressing an organized armed opposition force.

Professor Kenneth Anderson, in a working paper written for a joint project of the Brookings Institute of the Georgetown University Law Center and the Hoover Institute, wrote a statement that I think is absolutely correct and that the United States should carefully heed. He wrote that:

[A] strategic centerpiece of U.S. counter terrorism policy rests upon legal grounds regarded as deeply illegal – extrajudicial killing is one of the most serious violations of international human rights law, after all, as it should be – by large and influential parts of the international community.⁸⁹

Beyond effectiveness against terrorism, the current law on drones should appeal to the West because we are not the only ones who have drones. It is time to start using our legal imagination and to think about these new weapons in the hands of China, Iran, Hezbollah, and others. What are the rules that we should be modeling for all?

In conclusion, commentators are currently debating whether drone technology represents the next revolution in military affairs. Regardless of the correct answer to that question, drones have not created a revolution in legal affairs. The current law governing battlefield launch vehicles is adequate for regulating drones. We do not have a full study of the psychological impact on operators or on our leaders of this new technology—some indicators suggest it is leading to more killing. Our

88. See, e.g., DINSTEIN, *supra* note 84, at 182; W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 530-31 (2006); Franck, *supra* note 26, at 821.

89. Anderson, *supra* note 30, at 16.

leaders may not fully understand that drones are battlefield weapons. The fact that there is not a uniformed member of our armed services in the vehicle may be sending the wrong message that use of drones is somehow not really the use of military force and we can get away with using them away from battlefields. They seem attractive: fast, sleek new technology that we can sneak into countries and get rid of bad guys. Yet, anyone who has seen the destruction caused by drones knows what they are. They are battlefield weapons. They should be regulated under battlefield rules and the United States should be insisting that the entire international community treat them this way. There is no more persuasive argument than pointing out that these are the rules the United States follows.