1-1-2011

The Legality of Targeted Drone Attacks as U.S. Policy

Cheri Kramer

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

Recommended Citation

Cheri Kramer, Note, *The Legality of Targeted Drone Attacks as U.S. Policy*, 9 SANTA CLARA J. INT'L L. 375 (2011).
Available at: <http://digitalcommons.law.scu.edu/scujil/vol9/iss2/4>

This Note is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Note

The Legality of Targeted Drone Attacks as U.S. Policy

Cheri Kramer*

* Cheri Kramer received a Hackworth Research Grant from the Markkula Center for Applied Ethics for further research on the ethics of targeted killing. She participated in the 2011 Jean Pictet Competition on International Humanitarian Law, and accepted an internship with UNESCO for 2011. She serves as Development Editor for Volume 10 of the Journal of International Law at Santa Clara Law, where she is a J.D. candidate (May 2012).

TABLE OF CONTENTS

I. Introduction

A. Factual History of the Conflict

B. The Parties to the Conflict

1. The ISAF

2. The Taliban

3. Al-Qa'ida

C. The Weapons and the Method: Unmanned Drones Engaging in Targeted Killing

II. Legality of Targeted Killing Generally Under Domestic and International Law

A. Under Domestic Law

B. Under International Law

1. Nature of the Conflict

2. Nature of the Targets

i. Continuous Combat Function (CCF)

ii. Direct Participants in Hostilities (DPH)

a. Threshold of Harm

b. Direct Causal Link

c. Belligerent Nexus

III. Policy: The Need for Systematic Target Selection Procedures Regarding the Use of Targeted Drone Attacks

A. Is the Use of Targeted Killing Good Policy?

1. The Benefits of Targeted Killing as a Military Strategy

2. The Downsides of Targeted Killing as a Military Strategy

B. Is the U.S. Complying with IHL Standards, and Should the U.S. Comply?

- 1. Procedural Guidelines Necessary to Show the U.S. is Complying, Beyond Mere Affirmations by Politicians**
- 2. Public Procedures Safeguard Against Unwarranted Expansion of Executive Power**
- 3. The Strategic Role of Public Procedures to the Rule of Law in International Relations**
- 4. Procedures, Not Fact—*Jeppesen* Distinctions**
- 5. Due Process Considerations**
- 6. Insufficiencies of Current Public Knowledge**
 - i. The COIN Manual*
 - ii. The Joint Doctrine on Targeting*
 - iii. The Insufficiencies of the COIN Manual and the Joint Doctrine*
- 7. Self-Defense is Not the Appropriate Paradigm for Targeted Killing**
 - i. Jus ad Bellum / Jus in Bello Conflation*
 - ii. Fear of Loss of Sovereignty*

IV. Conclusion

I. Introduction

When it comes to war, foreign policy bleeds through the legal structure. As Harold Hungju Koh, Legal Advisor to the U.S. Department of State, recently commented, sometimes a policy proposal is “lawful but awful.”¹ A state action may constitute a legal act, but its negative repercussions may outweigh any potential benefit derived from following that course of action. Prominently, the current controversy over the legality of the U.S. drone attacks employed by military in Afghanistan brings this gritty truth to light. A close examination of international humanitarian law (IHL) reveals that the targeted use of drone attacks is a legal means of warfare in the territory of an armed conflict, when used against legal targets. Level targets include terrorists (both those involved long-term under the continuous combat function paradigm (CCF), as well as those briefly engaged in conflict under the paradigm of direct participation in hostilities (DPH). Yet employing drones as a policy of war may not always be good policy. This odd tension lies primarily in the lack of transparency, safeguards, and accountability in the U.S. targeting process, as highlighted by recent scholarship.²

In the following paragraphs, the legal and military history of the current conflict in Afghanistan is examined at length, followed by an analysis of the current policy regarding use of targeted drone attacks under the Obama administration. The discussion concludes with an overview of specific steps the U.S. can take to clear the legal gap in its current policy. This paper intends to bring together analysis on this issue in a new way which will stimulate a more informed discussion on the U.S. policy of targeted killings in Afghanistan, and to serve as a point of departure on the policy of targeted killing more generally.

A. Factual History of the Conflict

While the U.S. has been fighting al-Qa’ida and its networks for over fifteen years,³ the conflict did not reach the level of full-scale armed conflict until after the attacks on U.S. soil on September 11, 2001.⁴ On September 18, 2001, in a joint resolution, the 107th Congress passed the 2001 Authorization of the Use of Military Force (hereinafter AUMF). The AUMF gave the executive the power “to use all necessary and appropriate force” against those responsible for the terrorists attacks realized in New York, Virginia, and Pennsylvania on September 11, 2001.⁵ Congress passed this resolution consistent with the War Powers Resolution.⁶

-
1. Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Keynote Address at the Annual meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).
 2. See, e.g., U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, *Addendum to the Study on Targeted Killings*, ¶ 22, delivered to the Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston].
 3. Al-Qa’ida’s attacks include those on the U.S. embassies in East Africa and the USS Cole. See PHILIP BOBBITT, *TERROR AND CONSENT* 13 (2008).
 4. *Id.*
 5. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
 6. *Id.*

At the time, al-Qa'ida based its operations in Taliban-controlled Afghanistan. After attempts to work with the Taliban in order to curtail al-Qa'ida's operations failed, the United States allied with the Northern Alliance, an insurgency in northern Afghanistan, and invaded Taliban-controlled Afghanistan on October 7, 2001.⁷ By November 12, Kabul had fallen.⁸ The Taliban were displaced from power, and had retreated to the outlying countryside.⁹

The United States quickly sought to transition power back into Afghan hands, and the Bonn Conference of December 2001, convened in response to the situation in Afghanistan, established the International Security Assistance Force (ISAF) to oversee this transition of power.¹⁰ At that time, leadership in Afghanistan was shared between the Afghanistan Transitional Authority, the United Nations Assistance Mission to Afghanistan, and ISAF.¹¹ Individual States shared leadership of ISAF on six-month rotations until 11 August 2003, when NATO forces assumed command of ISAF.¹²

B. The Parties to the Conflict

1. ISAF

ISAF is a NATO-led military coalition committed to eradicating the remaining insurgency in Afghanistan in order to restore peace.¹³ Currently, it is headed by U.S. General David H. Petraeus. Leadership in ISAF includes nine U.S. American officials, three British officials, one French official, one Turkish official, three German officials, one Canadian official, one Italian official, and one Belgian official.¹⁴ Afghanistan is divided into six regions, each overseen by a different ISAF allied nation: Turkey, the U.S. (with two unconnected regions), Great Britain, Italy, and Germany.¹⁵ Currently, the U.S. alone contributes 90,000 troops to the conflict.¹⁶ ISAF relies primarily on counter-insurgency operations (known as COIN) to slowly wear down the remaining Taliban forces, who have become an insurgency.¹⁷

-
7. Jim Garamone, *American Launches Strike against Al Qaeda, Taliban*, AM. FORCES PRESS SERV. (Oct. 7, 2001), <http://www.defense.gov//News/NewsArticle.aspx?ID=44680>.
 8. See Jim Garamone, *Northern Alliance, U.S. Special Forces at Gates of Kabul*, AM. FORCES PRESS SERV. (Nov. 13, 2001), <http://www.defense.gov//News/NewsArticle.aspx?ID=44461>.
 9. *Id.*
 10. *History of the International Security Assistance Force*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/history.html> (last visited Apr. 7, 2011).
 11. *Id.*
 12. *Id.*
 13. *Mission of the International Security Assistance Force*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/mission.html> (last visited Apr. 7, 2011).
 14. *Leadership of the International Security Assistance Force*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/leadership.html> (last visited Apr. 7, 2011).
 15. *Troop Numbers and Contributions of the International Security Assistance Force*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/troop-numbers-and-contributions/index.php> (last visited Apr. 7, 2011).
 16. *United States Troop Numbers and Contributions of the International Security Assistance Force*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/troop-numbers-and-contributions/united-states/index.php> (last visited Apr. 7, 2011).
 17. LuCelia Ball, *ISAF Operational Update: October 18*, INT'L SEC. ASSISTANCE FORCE, <http://www.isaf.nato.int/article/isaf-releases/isaf-operational-update-oct-18.html> (last visited Apr. 7, 2011).

2. The Taliban

The Taliban is a Sunni Islamist group currently centered in Pashtun and Pakistan.¹⁸ It controlled Afghanistan from 1996 until the U.S. invasion in 2001.¹⁹ Its senior leader is Mullah Mohammed Omar.²⁰ The recently created Council of United Mujahedeen,²¹ initiated by the Mullah, brings together the top Taliban leadership in an avowed fight against the American presence in Afghanistan.²² Currently, it provides part of the base of insurgency in Afghanistan, although in October 2010 its leadership began to warm to the idea of negotiations with the current Afghani government and its supporting allies.²³

3. Al-Qa'ida

Al-Qa'ida is a multinational organization with the capability of "chameleon-like maneuvering."²⁴ This ability is the result of "a vertical leadership structure that provides strategic direction and tactical support to its horizontal network of compartmentalized cells and associate organizations."²⁵ Osama bin Laden operated as Emir General.²⁶ Because of its international nature, pinpointing Al-Qa'ida's location is an absurd task. However, its leadership appears to be concentrated in Waziristan in northern Pakistan.²⁷ This widely accepted rumor is further affirmed by the intensity of recent CIA drone strikes in this area.²⁸

C. The Weapon and the Method: Unmanned Drones Engaged in Targeted Killing

Drones are used for surveillance and for the elimination of targets.²⁹ When used for military force, drones engage in targeted killing. As defined by Philip Alston in his Addendum to the Report on Extrajudicial killing, "[a] targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by

-
18. Archive of stories regarding the Taliban, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/organizations/t/taliban/index.html?inline=nyt-org> (last visited Apr. 7, 2010) [hereinafter *Taliban Archive*].
 19. *Id.*
 20. *Id.*
 21. Also known as the Quetta Shura. See Joby Warrick & Peter Finn, *CIA Director Says Secret Attacks in Pakistan Have Hobbled Al-Qaeda*, WASH. POST, Mar. 18, 2010, at A1.
 22. *Id.*
 23. Dexter Filkins, *In Afghanistan, The Exit Plan Starts With 'If,'* N.Y. TIMES, Oct. 16, 2010, http://www.nytimes.com/2010/10/17/weekinreview/17filkins.html?_r=1&scp=2&sq=afghanistan&st=cse.
 24. ROHAN GUNARATNA, *INSIDE AL-QAEDA* 94 (2002).
 25. *Id.* at 54.
 26. *Id.* at 16.
 27. Archive of stories regarding Al-Qa'ida, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/a/al_qaeda/index.html?scp=1-spot&sq=al%20qaeda&st=cse (last visited Apr. 7, 2011) [hereinafter *Al-Qa'ida Archive*]; see also *Nato Official Claims Osama bin Laden is Living Comfortably in North-West Pakistan*, CLEVELAND LEADER, Oct. 19, 2010, <http://www.clevelandleader.com/node/15049>.
 28. Munir Ahmed, *Pakistan probes reports of Qaida militant's death*, BOSTON GLOBE, Sept. 29, 2010, http://www.boston.com/news/world/asia/articles/2010/09/29/pakistan_probes_reports_of_qaida_militants_death/.
 29. Spencer Ackerman, *High-Tech Army Team Turns From Killers to Airborne Spies*, WIRED, Aug. 16, 2010, <http://www.wired.com/dangerroom/2010/08/high-tech-army-task-force-turns-from-killers-to-airborne-spies> (last visited Apr. 7, 2011).

an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”³⁰

Drones are employed extensively as a weapon for targeted killing by the U.S. military, and “[m]ore than forty countries now have such technology.”³¹ Those opposing the use of drones (particularly unmanned ones) do so on humanitarian grounds, fearing that such drones “make[] violence too easy to undertake.”³² However, the opposite may be more likely: Unmanned drones provide a precise method for discriminating between the civilian population and the lawful target, thus decreasing the overall casualties of an attack.³³ Legally speaking, the difference between employing an unmanned drone in an act of targeted killing instead of a more traditional weapon (such as a gun or helicopter) is negligible.³⁴

II. Legality of Targeted Killing Generally Under Domestic and International Law

A. Under Domestic Law

The United States has a complex and somewhat sordid history of targeted killing. After the Roosevelt Corollary redefined the Monroe Doctrine, the U.S. found itself acting politically and militarily in conflicts to which it was not officially a party.³⁵ For example, the U.S. intervened in Nicaragua in the 1980’s.³⁶ Covert U.S. operations were instrumental in the toppling of the Allende administration in Chile in 1973.³⁷ Assassination attempts occurred on Castro in Cuba,³⁸ and were successful against Pablo Escobar in Colombia.³⁹

A change of heart, or at least of official policy, came about when the Ford administration renounced assassination in an Executive Order (EO).⁴⁰ The Reagan administration’s reiteration of this renunciation, spelled out in EO 12333, has continued in force.⁴¹ EO 12333 prohibits the use of assassination by anyone employed by or working on behalf of the U.S. government. “Assassination” is defined to include three elements: (1) the murder of a private person (2) carried out covertly (3) for political ends.⁴²

However, targeted killing in a time of armed conflict is not an assassination, and is therefore permissible domestic policy.⁴³ The Parks Memo of 1989 made this assertion

30. Alston, *supra* note 2, ¶ 1.

31. *Id.* ¶ 27.

32. KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW 8 (2009).

33. *Id.*

34. Alston, *supra* note 2, ¶ 79.

35. BOBBITT, *supra* note 3, at 43.

36. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.) 1986 I.C.J. 14 (June 27).

37. STAFF OF S. COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., REPORT ON COVERT ACTION IN CHILE 63-372 (U.S. Gov’t Printing Office 1963-73).

38. See, e.g., Duncan Campbell, 638 Ways to Kill Castro, THE GUARDIAN, Aug. 3, 2006, at G2 (14).

39. See, e.g., MARK BOWDEN, KILLING PABLO 1 (2001).

40. Memorandum from Col. W. Hays Parks (Ret.), Special Assistant for Law of War Matters, to the Judge Advocate General of the Army (Nov. 2, 1989), available at http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf.

41. *Id.*

42. *Id.*

43. *Id.*

clear: “The term *assassination* when applied to wartime military activities against enemy combatants or military objectives does not preclude acts of violence involving the element of surprise.”⁴⁴ Instead, surprise attacks are only prohibited if they are “treacherous”—and then only under international law, not a domestic framework.⁴⁵ The Memo also relies on international law to establish that civilians lose their protected status and become legal targets of war when they engage in the hostilities.⁴⁶ In sum, then, the Memo eviscerates EO 12333 of its prohibition when applied to times of armed conflict, making targeting killing via drones (or any other legal weapon) an acceptable legal option for U.S. military forces.⁴⁷

The Parks Memo provides clarity on the issue of the domestic legality of targeted killing in time of war.⁴⁸ When coupled with the 2001 AUMF, which provides the legal basis for stating that the United States is in an armed conflict with al-Qa’ida, this assertion translates into domestic legal permission to employ targeted killing in the armed conflict in Afghanistan. The question now turns on the legality of targeted killing via drones under international law.

B. Under International Law

Under international humanitarian law (IHL), targeted killing is legal during a non-international armed conflict where the target is a combatant, a fighter, or a civilian directly participating in hostilities.⁴⁹ Essentially, this definition involves two main determinations: (1) the nature of the conflict, and (2) the nature of the targets of the killings. As analyzed below, the U.S. military intervention in Afghanistan functions as a non-international armed conflict, and consequently the targeted killing, by any party, of combatants, fighters, or civilians directly participating in hostilities is legal under the IHL paradigm.⁵⁰

1. Nature of the Conflict

The Rome Statute of the International Criminal Court defines non-international armed conflicts as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or

44. *Id.*

45. *Id.* (applying Article 23(b) of the Annex to 1907 Hague Convention IV).

46. Parks, *supra* note 40. See *infra* Part II.B for a further discussion of the legal status of civilians who take part in hostilities during armed conflict.

47. It is also interesting to note that the English word *assassination* derives from the *hashshashin*, a term given to the violent attackers of the Shia sect, the Ismaili fedayeen, in the 11th century, whose tactics mirror closely those of terrorists today. BOBBITT, *supra* note 3, at 24–25.

48. Parks, *supra* note 40.

49. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Common Article 3]. See also Protocol Additional Relating to the Protection of Victims of Non-international Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

50. Note that three other elements apply to the analysis of targeted killing during *international* armed conflicts: (1) the killing is a military necessity; (2) the degree of force used to execute the killing is proportionate considering the potential danger to civilians and property in the area of the killing; and (3) all feasible measures have been taken to ensure minimal harm to civilians and decrease the chance of mistake. Alston, *supra* note 2, ¶ 30 (relying on Common Article 3 and Additional Protocol I).

between such groups.”⁵¹

The conflict continues between the Government of the Islamic Republic of Afghanistan, supported by NATO-led ISAF, and what is called “the insurgency.”⁵² This “insurgency” appears to be comprised primarily of the remains of the Taliban, al-Qa’ida, and al-Qa’ida’s affiliates.⁵³ ISAF and associated troops are considered State parties, but determining the nature of a non-State armed group proves much trickier to delineate.⁵⁴ The Taliban and al-Qa’ida qualify as organized armed groups under the paradigm developed by Philip Alston in his Addendum to the Report, which reflects principles of treaty law.⁵⁵

Alston mentions three criteria for determining whether a non-State group qualifies as an organized armed group: (1) minimal level of organization; (2) adequate command structure; and (3) collective, armed, anti-government action.⁵⁶ He relies heavily on Common Article 3 to the Geneva Conventions and Additional Protocol II in developing this list.⁵⁷

As noted *supra* in Part I.B., both the Taliban and al-Qa’ida maintain a minimal level of organization. Both have identifiable leadership: Muhammed Omar and Osama bin Laden’s closest officials, respectively, along with their underling commanders.⁵⁸ The Taliban’s command structure seems to hinge on its leader and the Council of United Mujahedeen, while al-Qa’ida is run by the structure of vertical leadership established by bin Laden.⁵⁹ Both groups continue to use armed violence to resist the NATO forces in Afghanistan.⁶⁰ At least the Taliban also fights against the Afghani government, as evidenced in the violence it demonstrated around the September 2010 parliamentary elections.⁶¹

Since both the Taliban and al-Qa’ida meet a minimal level of organization, rely on a form of command structure, and are engaged in armed conflict against a State party, they qualify as non-State armed groups. They continue to engage in armed conflict on Afghan territory against the Afghan government and its allies. Given this status, the current situation in Afghanistan satisfies the Rome Statute definition of non-international armed conflict.

2. Nature of the Targets

The situation in Afghanistan is a non-international armed conflict. What, then, is the status of the targets of the killings executed via drones? This question boils down to whether

51. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 3, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

52. *Mission of the International Security Assistance Force*, *supra* note 13.

53. Important to note is that the insurgency of Afghanistan does not qualify as a *levée en masse*, as this characteristic would trigger a different set of rules under international humanitarian law. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13(6), Aug. 12, 1949, 75 U.N.T.S. 135.

54. Alston, *supra* note 2, ¶ 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. See *Taliban Archive*, *supra* note 18.

59. *Id.* See also GUNARATNA, *supra* note 24, at 54.

60. See Filkins, *supra* note 23. See also Warrick & Finn, *supra* note 21.

61. Jon Boone, *Afghanistan election violence fears lead UN to evacuate third of staff*, THE GUARDIAN, Sept. 15, 2010, at 19, available at <http://www.guardian.co.uk/world/2010/sep/15/afghanistan-election-violence-un-evacuation> (“the Taliban have announced they will attack anyone involved in this election”).

the Taliban and al-Qa'ida terrorists qualify as armed forces or civilians directly participating in the hostilities (DPH). Under the following analysis, it is likely that the leaders of both organizations qualify as members of armed groups (CCF), while its operators definitely satisfy the criteria as DPH and may even qualify as members of armed forces (CCF) in certain instances.

"The protection of civilians is one of the main goals of international humanitarian law."⁶² Civilians are never to be targeted for attack.⁶³ Proportionality and distinction are the "meta-issues" of international humanitarian law.⁶⁴ Proportionality is the idea that the force used must not exceed the degree of force necessary to fulfill the military objective, keeping in mind the risk of collateral damage.⁶⁵ Distinction requires military operations to distinguish between combatants, who may be lawfully targeted for attack, and civilians, who may not.⁶⁶

However, the Geneva Conventions and their Additional Protocol spend little time discussing non-international armed conflicts such as the one in Afghanistan, and do not mention these two characteristics where they do.⁶⁷ Proportionality is assumed in armed conflicts generally.⁶⁸ Distinction is as assumed as well, but as Daphné Richemond-Barak has pointed out,

there are no combatants *stricto sensu* in non-international armed conflicts as combatants are defined in the context of the Third Geneva Convention and Additional Protocol I If there are no combatants in non-international armed conflicts, how can there be a duty to distinguish between civilians and combatants?⁶⁹

The ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities sought to clear up this issue. It notes that despite the rhetorical lack of clear delineation between civilians and combatants, "both State and non-State parties to the conflict have armed forces distinct from the civilian population."⁷⁰ As Richemond-Barak concludes in answer to her own question, "[i]n such conflicts [i.e., non-international armed conflicts], the obligation to distinguish between protected and unprotected individuals holds, and for

-
62. NILS MELZER, ICRC, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 4 (2009) [hereinafter ICRC Guidelines].
 63. Common Article 3, *supra* note 49; Additional Protocol II, *supra* note 49, art. 13. The article states "civilians shall enjoy general protection against the dangers arising from military operations." *Id.*
 64. Daphné Richemond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in NEW BATTLEFIELDS/OLD LAWS: FROM THE HAGUE CONVENTION TO ASYMMETRIC WARFARE 109 (William Banks ed., 2010).
 65. Alston, *supra* note 2, ¶ 30.
 66. See Richemond-Barak, *supra* note 64, at 110.
 67. The only applicable treaty law to non-international armed conflicts are Common Article 3 of the Geneva Conventions, and Additional Protocol II (which includes no more than 28 articles, as compared to the 102 articles (excluding the Annexes) of Additional Protocol I, dealing with international armed conflicts).
 68. States may only use the force necessary to achieve legitimate military objectives. See Alston, *supra* note 2, ¶ 75. See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) [hereinafter *Nuclear Weapons Opinion*].
 69. Richemond-Barak, *supra* note 64, at 122. As Alston points out, from a policy perspective, it makes sense for a State to use the least amount of force necessary to achieve its objective, than to use as much force as it can get away with. See Alston, *supra* note 2, ¶¶ 76–77.
 70. ICRC Guidelines, *supra* note 62, at 28 (looking to the wording of Common Article 3 to draw out this understanding).

such limited purposes, unprotected individuals are actually comparable to combatants in international armed conflicts.”⁷¹

Despite the lack of direct language in treaty law, then, three categories of persons exist in situations of non-international armed conflict: State armed forces, organized non-State armed groups, and civilians.⁷² Civilians are always protected under IHL, although they lose their protection and become legal targets of attack via direct participation in hostilities.⁷³

ISAF and Afghani troops, as members of the armed forces of the State parties to the conflict in Afghanistan, qualify as legal targets of attack. Taliban and al-Qa’ida terrorists, however, do not fit nicely into a category without a fact-based analysis. In order for the targeted killings via drones to be legal under IHL, these terrorists must be demonstrated to be either members of organized non-State armed groups (CCF), or civilians directly participating in hostilities (DPH).⁷⁴ The benefit of determining that an enemy is CCF is that the individual can then be legally targeted for attack at any time, while those who satisfy DPH alone can only be attacked during the duration of their participation.⁷⁵

i. Continuous Combat Function (CCF)

Those individuals who qualify as part of the organized non-State armed group lose their protection as civilians, but do not gain the legal benefits of combatant status.⁷⁶ In its Guidelines, the ICRC bases the status of organized non-State armed groups on membership on what it calls “continuous combat function.” The leadership of both the Taliban and al-Qa’ida qualify as legal targets of attack given their status as members of organized non-State armed groups.

The ICRC Guidelines deny civilian protection to those individuals who have assumed continuous combat function (CCF).⁷⁷ “Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.”⁷⁸ Three requirements are derived from this definition:

- (1) lasting integration
- (2) into the part of the armed group that actually uses arms against the State party
- (3) in the violence of an armed conflict.

Identifiable leadership in the Taliban and al-Qa’ida, such as Muhammed Omar, satisfy all three categories. They have been part of their respective organizations for extended amounts of time. While it is unclear if commanding leadership carries and uses arms, they

71. Richmond-Barak, *supra* note 64, at 122.

72. See ICRC Guidelines, *supra* note 62, at 27.

73. *Id.* at 65.

74. *Id.* at 33. Richmond-Barak disagrees and encourages an activity-based approach. Richmond-Barak, *supra* note 64, at 113. However, as her analysis concerns itself primarily with international armed conflicts, it is not addressed in this paper.

75. ICRC Guidelines, *supra* note 62, at 70.

76. *Id.* at 33.

77. *Id.*

78. *Id.* at 34.

certainly command those who do, similar to the role of a general in the U.S. Army. The violence which they command is an integral part of the armed conflict in Afghanistan. Given these characteristics, the leadership of both groups qualifies as members of armed groups under the ICRC guidelines. Additionally, should intelligence on the ground reveal that lesser-level terrorists are engaged to the level specified by the ICRC, these terrorists may be qualified as CCF.

ii. Direct Participation in Hostilities (DPH)⁷⁹

Civilians engaged directly in the hostilities of an armed conflict lose their protected status and become legal targets of attack for the duration of their participation.⁸⁰ Terrorists who carry out the orders of the Taliban and al-Qa'ida leadership satisfy the criteria for DPH and become legal targets of attack.

Even if they do not qualify as CCF, individuals carrying out attacks in the name of al-Qa'ida or the Taliban qualify as legitimate targets under this paradigm. There are three elements in determining whether or not a target qualifies as a legitimate target under the direct participation in hostilities framework. The elements include:

- (a) a threshold of harm,
- (b) direct causation between the harm and the intended act, and
- (c) a belligerent nexus linking the act to the parties of the conflict.⁸¹

a. Threshold of Harm

The threshold of harm element requires that the act be directed at the destruction of either the military property of one of the parties of the armed conflict, or at the infliction of harm on the persons or property of civilians or those otherwise protected from direct attack.⁸² Taliban and al-Qa'ida operatives attacking either NATO or Afghani security forces, or targeting civilians, meet this first element.

b. Direct Causal Link

The second element looks for a direct link between the harm caused by the act, and the act itself.⁸³ That is, the harm must be *intended* to be the direct effect of the act. Economic sanctions or the development of a network that could impose harm on a party to the armed

79. While this paper treats the ICRC Guidelines as hard and fast rules for determining DPH, in reality this is not true. The Guidelines are no more than guidelines, and States are not bound by any customary international law in determining what, exactly, constitutes DPH. See Alston, *supra* note 2, ¶ 58. At the same time, however, Alston's own definition of DPH comes very close to the Guidelines' definition, and he relies substantially on the Guidelines in his own report. *Id.* ¶¶ 60–69.

80. ICRC Guidelines, *supra* note 62, at 44–45; see also *Customary International Humanitarian Law Rule 6*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6 (last visited Apr. 9, 2011).

81. ICRC Guidelines, *supra* note 62, at 46.

82. *Id.* at 47.

83. *Id.* at 51.

conflict do not qualify as “direct” acts.⁸⁴ Acts of Taliban and al-Qa’ida operatives such as armed attacks on NATO troops or civilians qualify as direct attacks, while the mere existence of the Taliban and al-Qa’ida networks does not.

c. Belligerent Nexus

Last, the act must be carried out with a belligerent nexus.⁸⁵ This requirement means that the act must be intended to *benefit* one party to the armed conflict, *to the detriment* of another party.⁸⁶ The act cannot be a demonstration of mere thoughtless violence. The planned attacks of the Taliban and al-Qa’ida meet this requirement, as they usually entail an element of intention. For example, the Taliban intended to discourage support for NATO and the current Afghani government by threatening violence around the recent elections.⁸⁷

Taliban and al-Qa’ida operatives who take part in acts against NATO and Afghani security forces qualify as legitimate targets under DPH, even if they do not qualify as CCF. Consequently, they are legitimate targets of direct attack during the time in which they are preparing for or participating in the qualifying act.⁸⁸

III. Policy: The Need for Systematic Target Selection Procedures Regarding the Use of Targeted Drone Attacks

The heart of the debate over the legality of targeted drone attacks concerns policy considerations. Under both domestic and international law, the use of targeted killing of legal targets is permissible. However, is it good policy?⁸⁹ And, more urgently, do the targeted killings carried out by the U.S. actually qualify as legal killings?

The answer to both questions is a disappointingly vague “maybe.” The definition of good policy is inherently a fact-driven and opinion-based determination. As to the second question, like the notorious three monkeys, the U.S. government seems to have engaged in a “see no evil, hear no evil, speak no evil” policy strategy regarding the use of drones. This is particularly true of its Central Intelligence Agency (CIA), which, until recently, did not officially recognize its drone program, yet employs it extensively to eliminate terrorist targets in northern Pakistan.⁹⁰

It is no secret that the U.S. relies on drones in its war strategy against the insurgency in

84. *Id.* at 53.

85. *Id.* at 58.

86. *Id.*

87. Boone, *supra* note 61.

88. ICRC Guidelines, *supra* note 62, at 65.

89. The question of whether targeted killing is ethical will not be addressed in this paper, as it falls beyond the scope of the research. However, for a fascinating discussion regarding the ethical underpinnings of killing, see Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899 (2010).

90. Siobhan Gorman, *Drones Target Terror Plot*, WALL ST. J., Sept. 27, 2010, <http://online.wsj.com/article/SB10001424052748703694204575518553113206756.html>. Note that since the CIA is not technically a branch of the armed forces, the CIA’s use of targeted killing involves further legal analysis which will not be addressed in this paper. However, its position on the use of targeted killing affects the policy and public debate elements of targeted killing generally.

Afghanistan.⁹¹ Yet the administration repeatedly refuses to produce publicly any guidelines that would set forth the procedures and safeguards used by U.S. forces in determining the legality of a target.⁹² Given the importance of transparency in international rule of law, and its role as a check on executive power, as well as the political legitimacy to be gained by identifying the procedures used in targeting, President Obama's administration has much to gain by being more forthcoming with the procedures engaged to ensure compliance.

A. Is the Use of Targeted Killing Good Policy?

The first issue to be addressed is whether the use of targeted killing via drones is good policy generally. At its best, targeted killing can be justified as good policy insofar as it is a quick, militarily efficient means of eliminating a target with minimal civilian casualties.⁹³ At its worst, targeted killing is a gross violation of right to life by depriving an individual of his or her life without due process of the law, and it aggravates the hostilities instead of alleviating them.⁹⁴

1. The Benefits of Targeted Killing as a Military Strategy

On the positive side, targeted killing—particularly via drones—is an effective military strategy with minimal risk to troops. “The appeal of armed drones is clear: [E]specially in hostile terrain, they permit targeted killings at little to no risk to the State personnel carrying them out, and they can be operated remotely from the home State.”⁹⁵ In fact, the CIA reportedly operates its drones in Afghanistan and Pakistan from its headquarters in Langley, Virginia.⁹⁶ Drone strikes serve the critical function of disrupting terrorist planning.⁹⁷ They are also “more protective of civilian lives than high aerial bombing or long-range artillery”⁹⁸—an incredibly important aspect of the technology, given that IHL strives to minimize casualties to civilians to a level of absolute zero.

91. Evan Perez, *White House Defends Targeted Killing Program*, WALL ST. J., Sept. 25, 2010, <http://online.wsj.com/article/SB10001424052748703793804575512283152390778.html>.

92. The most specific set of guidelines identified to date can be found in the COIN manual, used by commanders in Afghanistan. Noah Shachtman, *Does Petraeus Mean a Return of Afghanistan Air War?*, WIRED, June 23, 2010, <http://www.wired.com/dangerroom/2010/06/does-petraeus-mean-a-return-to-all-out-war>.

93. *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing before the H. Subcomm. on National Sec. and Foreign Affairs*, 111th Cong. (2010) (testimony of Mary Ellen O'Connell, Robert and Marion Short Chair in Law, University of Notre Dame) (examining the legality of unmanned targeting) [hereinafter O'Connell].

94. *Id.*

95. Alston, *supra* note 2, ¶ 27.

96. *Id.* ¶ 20.

97. Gorman, *supra* note 90 (“U.S. officials believe that conducting attacks in an area where militants are present can disrupt planned attacks, even if they do not hit the precise cell plotting the attack.”). According to this article, and in the words of the anonymous U.S. official interviewed, missile strikes in Pakistan are “a product of precise intelligence and precise weapons. We’ve been hitting targets that pose a threat to our troops in Afghanistan and terrorists plotting attacks in South Asia and beyond.” Adam Goldman, *AP Source: Some Drone Strikes Tied to Terror Plot*, BOSTON GLOBE, Sept. 28, 2010, http://www.boston.com/news/nation/washington/articles/2010/09/28/ap_source_some_drone_strikes_tied_to_terror_plot/.

98. O'Connell, *supra* note 93.

2. The Downsides of Targeted Killing as Military Strategy

However, relying on targeted killing as policy has its costs. Most crucial to the discussion of counter-terrorism is the tendency of targeted killing to alienate the civilian population.⁹⁹ Similarly, while in command of the allied forces in Afghanistan, General McChrystal limited the use of airstrikes because “[t]he bombs were causing too many civilian casualties.”¹⁰⁰ As a reminder to those who advocate the use of drones as a troop-casualty-free tactic, under the ICRC Guidelines’ definition of DPH, the drone operators based in Langley are legal targets of attack as DPH.¹⁰¹ There also exists the possibility that long-distance guidance of drones and missiles may decrease the reliability of intelligence on the ground.¹⁰²

The benefits of employing targeted killing via drones are not clear-cut, but they are convincing. While the downsides of drone use urges restraint, it is probably better to use drones than to use heavy artillery or other more intensive military attack strategies. Regardless of the conclusions of analysts in this regard, it is evident that the U.S. executive has relied on drones in the war in Afghanistan, and is likely to continue to rely on drones in its further war on terror generally.¹⁰³

B. Is the U.S. Complying with IHL Standards, and Should the U.S. Comply?

Assuming that targeted killing is good policy, should the U.S. publicly comply with IHL standards in its use of targeted killing? Strong policy considerations urge the Obama administration to seriously consider publicizing the procedures employed by the U.S. in determining its targets and the safeguards in place to minimize the abuse of this tactic.¹⁰⁴

At least from an ideological perspective, the objectives of IHL and counter-terrorism are nearly indistinguishable. Counter-terrorism seeks to suppress gross violations of the principle of distinction: The intentional targeting and killing of civilians. From this perspective, then, adherence to IHL is a natural tool of counter-terrorism. In practice, IHL is treated as a hampering force on counter-terrorism, as evidenced by the Bush administration’s tactics to avoid the application of the Geneva Conventions.¹⁰⁵ While any practical pitfalls of adhering to IHL should be addressed frankly by the Obama administration, President Obama could still benefit from recognizing the closely related aims of IHL and counter-terrorism in his rhetoric.

99. PHILIP HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 64 (2005).

100. Shachtman, *supra* note 93.

101. Alston, *supra* note 2, ¶ 71.

102. *Id.* ¶ 82. *But see* Ackerman, *supra* note 29 (detailing the new role of unmanned drones as intelligence gatherers working closely with ground troops). This possibility highlights the necessity of establishing systematic target selection procedures in order to reinforce the reliability of intelligence used in selection targets.

103. ANDERSON, *supra* note 32, at 2.

104. One need not look far back in history to see that power, when left unchecked by strong legal rules, will be abused. *See, e.g.,* William H. Taft, IV, *A View From the Top: American Perspectives on International Law After the Cold War*, 31 *YALE J. INT’L L.* 503 (2006) (discussing the violations of customary international law committed by U.S. troops when the Bush administration relaxed its rules regarding detainee treatment).

105. *Id.* at 506–09.

1. Procedural Guidelines Necessary to Show the U.S. is Complying, Beyond Mere Affirmations by Politicians

In order to ensure that the United States is complying with its own stated adherence to IHL standards in war, the Obama administration should make public the procedures used in selecting targets of targeted killing. Strong arguments have been made to this effect. As stated scathingly by Philip Alston, “[t]he refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.”¹⁰⁶ His criticism does not stop there: “A lack of disclosure gives States a virtual and impermissible license to kill.”¹⁰⁷ To clarify the U.S. position, Alston recommends disclosing the procedures and safeguards in place to ensure that before each targeted killing is carried out, intelligence is reliable and the intended force is proportionate.¹⁰⁸ He stresses the importance of developing “the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability methods” in the U.S. war strategy.¹⁰⁹

Alston’s recommendations find support elsewhere. Philip Heymann and Juliette Kayyem voice similar opinions, based on years of careful research and consultation with counterterrorism and national security experts in both the U.S. and the United Kingdom.¹¹⁰ They recommend that targeted killing decisions be based on reliable evidence of the necessity of the elimination of the target (including evidence of an absolute lack of alternative methods of elimination), according to procedures developed by the President, submitted to the appropriate subcommittees in Congress, and eventually approved by the Houses.¹¹¹ These procedures “should also be made public. The public would be better served by an open and enunciated policy than by the secret and ambiguous policy that the United States seems to now embrace.”¹¹²

2. Public Procedures Safeguard Against Unwarranted Expansion of Executive Power

In part, the public would be better served by such public procedures because their publication would serve as a check on executive power.¹¹³ Alston echoes this concern, noting that executive power is strengthened in situations of armed conflicts.¹¹⁴ Public discussion on the issue of the legal status of terrorists often conflates means and method analysis with status analysis.¹¹⁵ This means that many well-meaning citizens are suspicious of targeting

106. Alston, *supra* note 2, ¶ 87.

107. *Id.* ¶ 88.

108. *Id.* ¶ 89.

109. *Id.* ¶ 22.

110. HEYMAN & KAYYEM, *supra* note 99, at vii.

111. *Id.* at 67.

112. *Id.* at 67–68.

113. This assertion is supported by the concern behind Heymann and Kayyem’s study, that is, the expansion of executive power in recent years. *Id.* at 3.

114. Alston, *supra* note 2, ¶ 47.

115. See, e.g., “Intelligence Squared” Debate (Bloomberg TV television broadcast Sept. 25, 2010). See also

individuals, even in times of war, based on a fear that such allowances expand the executive's power beyond what is constitutionally valid.¹¹⁶ If Obama wants to win over public sentiment in support of targeted killing, he should delineate how this policy does not violate the rights of terrorists—how targeted killing is legal, not just another expansion of executive power similar to Bush's expanded use of torture. Instead of simply trying to ignore the issue, it makes more sense politically for a state to take measures to ensure that it is not breaking laws to which it is bound.¹¹⁷ No political expediency is served by refusing to publicly identify the steps the military takes to comply with the laws by which it claims to be bound.

3. The Strategic Role of Public Procedures to the Rule of Law in International Relations

The strategic position of the rule of law in international relations brings urgency to this recommendation to publicize the procedures used in target selection. Recent scholarship highlights the intricate relationship between the rule of law in international relations and counter-terrorism.¹¹⁸ The general idea is that terrorism is best countered by rule of law both within and between countries because the global nature of terrorism requires international cooperation.¹¹⁹ As noted by former legal advisor to the State Department William H. Taft, IV, "the world is a dangerous place, perhaps most dangerous for the strongest and most prosperous states because they have the most to lose. For the same reasons we promote the rule of law within states, we need also to promote it among them."¹²⁰

For the purposes of the analysis here, rule of law in international relations means the adherence to a set of rules above domestic law by cooperating with other sovereigns.¹²¹ IHL is one of these sets of rules, and adhering to IHL benefits sovereigns themselves because IHL is inherently apolitical, its aim being to preserve the humane treatment of individuals even in times of armed conflict.¹²²

Rule of law is critical to counter-terrorism, and it applies to all nations involved in counter-terrorism—including the United States. In fact, al-Qaeda reportedly lost support in the Muslim world because of its lawless tactics.¹²³ The U.S. and its allies could capitalize on this

Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2009).

116. *Id.*

117. Also, a lack of systematic procedural standards may expose drone operators to guilt under international and domestic law for following the orders of their commanders. See Alston, *supra* note 2, ¶ 71.

118. Rudolf Dolzer, *Clouds on the Horizon of Humanitarian Law?*, 28 YALE J. INT'L L. 337 (2003); Taft, *supra* note 104, at 503; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003).

119. See, e.g., *id.* at 47 ("As the United States seeks to build a durable and effective transnational coalition against terrorism, humanitarian law (including the laws of war) provides a stable, widely-endorsed normative framework for condemning the attacks."). The global nature of counterterrorism does not suggest that an internationally acceptable definition of "terrorism" has been reached, but rather that nations agree that terrorism is a very real global threat.

120. Taft, *supra* note 104, at 510.

121. See Dolzer, *supra* note 118, at 339 (discussing the importance of "cooperation based on legal rules").

122. See Jinks, *supra* note 118, at 47; see also *Nuclear Weapons Opinion*, *supra* note 68, ¶ 78 (discussing the principle of distinction between civilians and combatants as a "cardinal principle").

123. Dina Temple-Raston, *As Support Fades, Al-Qaida Shows Signs of Decline*, NPR, Apr. 26, 2010,

loss of support “by distinguishing [them]selves through commitment to the rule of law, especially by strict compliance with the rules governing lethal force.”¹²⁴ If the United States wants rule of law elsewhere, it should put rule of law to practice at home. If there is a compelling reason not to comply with IHL, then the U.S. should articulate this reason, without compromising military intelligence, in order to show that any non-adherence to IHL is an aberration from the rule of law norm. The Obama administration can reinforce this rule of law by making public its procedures for selecting targets of targeted killing.

4. Procedures, Not Fact—*Jeppesen* Distinctions

Asking the administration to go public with more details on the procedures used to ensure compliance in targeted killings does not necessarily jeopardize national security. Unlike the petitioner’s complaints in *Muhammed v. Jeppesen Dataplan*, the act of going public with procedures does not require the public revelation of state secrets.¹²⁵ In *Jeppesen*, the plaintiffs sought to bring claims under the Alien Tort Claims Act against Jeppesen Dataplan, a U.S. corporation, for liability in assisting the CIA in its extraordinary rendition program.¹²⁶ The nature of the claims would have required that facts of the extraordinary rendition program be produced as evidence to the court, and publicly discussed at trial.¹²⁷ The United States moved to intervene, claiming the state secrets doctrine; its motion was granted by the district court and the case was dismissed.¹²⁸ On appeal, the Ninth Circuit affirmed the dismissal because “there is no feasible way to litigate Jeppesen’s alleged liability *without creating an unjustifiable risk of divulging state secrets.*”¹²⁹ The court emphasized that, while the state secret doctrine should only be invoked in rare situations, it was appropriate here.¹³⁰ Although much evidence would be available publicly, evidence privileged under the state secret doctrine was intimately linked to unprivileged evidence and therefore the discussion of the unprivileged (i.e., public) information would compromise the privileged information.¹³¹

Unlike *Muhammed v. Jeppesen Dataplan*, when it comes to targeted killing as policy, factual details of targets and attacks are not necessary. However, procedural standards are critical, for the reasons discussed above: clarifying adherence to appropriate international law, limiting executive power, maintaining the moral and political high ground, and increasing the rule of law. The distinction between the disclosure of facts and the disclosure of procedures is essential. By requiring only the disclosure of procedures, the issues which led to the dismissal of *Jeppesen* are avoided. State secrets are not compromised to the extent that the procedures should comply with what is publicly known already—the requirements of

<http://www.npr.org/templates/story/story.php?storyId=126228610>.

124. O’Connell, *supra* note 93.

125. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 3575 (U.S. May 16, 2011) (No. 10-778).

126. *Id.* at 1075.

127. *Id.* at 1088–89.

128. *Id.* at 1093.

129. *Id.* at 1087.

130. *Id.* at 1081.

131. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 3575 (U.S. May 16, 2011) (No. 10-778).

IHL for determining legitimate targets. Of course, if the administration determines that the public dissemination of the procedures would, in fact, compromise an important state secret, then the administration should say so publicly and honestly, as the government asserted in *Jeppesen Dataplan*.¹³² However, since the administration publicly proclaims its adherence to IHL,¹³³ this situation does not seem likely.

5. Due Process Considerations

Some advocates in the field of human rights assert that targeted killing denies individuals due process.¹³⁴ However, due process does not require that each target be given the opportunity to defend him or herself before a legitimate judicial authority before being eliminated: “[A] state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”¹³⁵

Still, in non-international armed conflicts such as the situation in Afghanistan, a target is not lawful until it has qualified as such under either CCF or DPH.¹³⁶ Without public disclosure of the procedures for enforcing compliance with applicable law, it is impossible to determine whether or not the government is adhering to the requirements of law. Making public the procedures for target selection may be the most effective means to confront the human right challenges to targeted killing. In particular, if the U.S. wants to keep the higher moral ground, it should afford the public the process of clear, systematic target selection procedures to minimize the risk of targeting an unlawful target (i.e., a civilian), and thereby invoking guilt for a war crime under the Rome Statute.¹³⁷

6. Insufficiencies of Current Public Knowledge

Currently, publicly available disclosures on the procedures surrounding targeted killing are disappointingly vague, despite the administration’s insistence that the U.S. is in compliance with its obligations under international law. According to Koh, current legal advisor to the State Department, the United States’ “general approach” to determining membership in al-Qa’ida and Taliban “is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).”¹³⁸ He also asserts that the U.S. is entitled to “use force consistent with its inherent right to self-defense under international law.”¹³⁹

132. *Id.* at 1083.

133. *See* Koh, *supra* note 1.

134. *Id.*

135. *Id.*

136. *See* ICRC Guidelines, *supra* note 62, at 12.

137. The Rome Statute criminalizes the intentional attack of civilians who are not categorized as DPH. Rome Statute, *supra* note 51, art. 8(2)(e)(i).

138. Koh, *supra* note 1.

139. *Id.*

i. The COIN Manual

U.S. forces in Afghanistan rely in part on the Counter-Insurgency (COIN) manual for regulations on how to confront the conflict on the ground.¹⁴⁰ The COIN manual, employed by the U.S. Army, addresses the issue of targeted killing via "airstrike," a term that seems to include both manned and unmanned airpower.¹⁴¹ Depending on its interpretation, the manual actually discourages the use of airstrikes, emphasizing the risk of collateral damage. General McChrystal interpreted this narrowly permitting airstrikes only after the ground commanders fulfilled three criteria: (1) demonstrated via multiple intelligences that civilians were not present at the target site; (2) proof that no other alternatives remained to eliminate the target; and (3) a strategy to justify the strike to the locals.¹⁴² General Petraeus, who recently replaced McChrystal as commander in Afghanistan, is more lenient in his use of airstrikes.¹⁴³

Regarding targeting generally, the manual details four procedural steps to carrying out a targeted attack: deciding what to target; detecting the target; delivering (conducting the target attack); and assessing the effects of the attack.¹⁴⁴ Any consideration of the legality of the target appears to take place in the first step, decision, although the manual does not specifically address legality.¹⁴⁵

ii. The Joint Doctrine on Targeting

The Joint Doctrine on Targeting sets the standards and guidelines of targeted attacks taken by joint effort of the respective branches of the armed forces.¹⁴⁶ It emphasizes an effect-oriented approach.¹⁴⁷ Legal considerations are mentioned as part of the second phase of the joint target cycle, as part of target development and prioritization.¹⁴⁸ The legality of the target under both the law of war and the U.S. rules of engagement is examined at this state, on par with the viability of the target and a cost-benefit analysis of the target.¹⁴⁹

iii. The Insufficiencies of the COIN Manual and the Joint Doctrine

Both the COIN manual and the Joint Doctrine indicate the U.S. military's predisposition to defer to the laws of war in conducting targeted attacks. This position coincides with the rhetoric of the Obama administration.¹⁵⁰ Such deference is laudable. However, it is far too

140. As a civilian organization, the CIA approach embraces the President's mandate to "disrupt, dismantle and defeat al-Qaeda," relying heavily on the use of targeted drone attacks. Warrick & Finn, *supra* note 21.

141. U.S. ARMY, U.S. ARMY FIELD MANUAL NO. 3-24 (2006), at E-1 [hereinafter COIN MANUAL].

142. Shachtman, *supra* note 92; see also Memorandum from ISAF Headquarters, Kabul, Afghanistan (July 6, 2009), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

143. Shachtman, *supra* note 92.

144. COIN MANUAL, *supra* note 141, at 5-29.

145. *Id.* ¶¶ 5-106.

146. JOINT CHIEFS OF STAFF, JOINT DOCTRINE FOR TARGETING, JOINT PUBLICATION NO. 3-60 (2002) [hereinafter JOINT DOCTRINE].

147. *Id.* at I-10.

148. *Id.* at II-4.

149. *Id.*

150. Koh, *supra* note 1.

easy for a government to claim to adhere to certain international laws, and much more difficult for a government to actually prove itself in this regard. The Obama administration obviously has benign intentions when it comes to the implementation of international humanitarian law. A public elucidation of the *procedures* used by government actors in deciding whether a target satisfies the requisite standards of international humanitarian law would bolster the administration's legitimacy by matching words with actions.

The current COIN manual and Joint Doctrine are guidelines which encourage adherence to IHL, but they fail to spell out how commanders should apply IHL. In fact, they both lack any explanation of what IHL even requires when it comes to determining whether a target is legitimate. But such explanations of the standards are necessary. Otherwise, the public does not have a measure by which to judge whether the standards the executive claims to abide by are being met.

7. Self-Defense is Not the Appropriate Paradigm for Targeted Killing

Critics of the continued reliance on IHL as the appropriate international law paradigm in the war against terrorism insist that IHL has “the deleterious effect of deforming the laws of war”¹⁵¹ In particular, requiring that targets first meet IHL standards for legitimate targets before lethal force is applied cripples a state's ability to effectively counter real and urgent threats to national security.¹⁵² When it comes to targeted killing, instead of relying on outdated IHL standards, the United States is encouraged to rely on its domestic law and the right to self-defense, as recognized by the Article 51 of the U.N. Charter.¹⁵³ In this way, “as long as a targeted killing legitimately meets the legal criteria of self-defense, it can be lawful to target people who might not be, under the strict law of IHL armed conflict, combatants.”¹⁵⁴

i. Jus ad Bellum / Jus in Bello Conflation

The fundamental flaw of this argument is its inherent conflation of *jus ad bellum* and *jus in bello*.¹⁵⁵ It presupposes that a public adherence to IHL (the codification of *jus in bello*) will compromise a state's flexibility to resort to lethal force under *jus ad bellum*. This presumption is mistaken.¹⁵⁶ Moreover, advocating the reliance on the right to self-defense as the legal basis for targeted killing endangers international relations by removing a crucial component of accountability, since eradicating the *jus in bello* component of the duality erases a state's ability to criticize a use of force apart from the justifications for resorting to force in the first place.¹⁵⁷ Under the duality of *jus ad bellum* and *jus in bello*, criticism of a

151. ANDERSON, *supra* note 32, at 33.

152. *Id.*

153. *Id.* at 18.

154. *Id.* at 33.

155. See Sloane, *supra* note 115, at 50, 76.

156. *Id.* at 50 (“In theory, then, any use of force may be simultaneously lawful and unlawful: unlawful, because its author had no right to force under the *jus ad bellum*; lawful, if and to the extent that its author observes ‘the rules,’ that is, the *jus in bello*.”).

157. That is, without *jus in bello*, there is no IHL and no basis on which a state can criticize, for example, torture of civilians if the civilians are tortured in a war considered legitimate—such as a war to end

state's original resort to force was separated from criticisms of the force it exerted in the resulting armed conflict.¹⁵⁸ Under the right to self-defense, a state's use of force in an armed conflict would be justified by that state's alleged justification in resorting to force in the first place.¹⁵⁹ In other words, forsaking the duality results in a return to the days of just war theory and "might is right."

ii. Fear of Loss of Sovereignty

One of the fears prominent within this analysis insists that the codification of target selection procedures, as currently formulated under IHL, would essentially codify international law in U.S. domestic law.¹⁶⁰ This is a legitimate concern insofar as it addresses the common fear that deference to international law undermines national sovereignty. However, as analyzed by recent scholarship, domestic law and international law have coexisted for the past 200 years without any traceable depreciation in U.S. national sovereignty.¹⁶¹

The United States is a sovereign equal to all other states under international law.¹⁶² It would not kowtow to international pressures by publicly producing the procedures it relies on in adhering to the IHL standards to which it currently claims to be bound.¹⁶³ In fact, by insisting on compliance with IHL, the United States would reap the benefit of increasing international rule of law, a critical component to the global counter-terrorism effort.¹⁶⁴ Abandoning the principles and rules developed within IHL would only prove detrimental to counter-terrorism, as well as to international relations more generally.¹⁶⁵

IV. Conclusion

Targeted drone attacks against individuals qualified under either CCF or DPH in situations of armed conflict are a legal war strategy under both international and U.S. domestic law. The Obama administration knows and insists that appropriate targeted killing is legal under domestic and international law.¹⁶⁶ The military has good intentions of following international humanitarian law when it comes to targeted killing.¹⁶⁷ However, without transparency regarding the procedures used in determining the legality of the targets, it is impossible for the general public to know whether the military is actually implementing IHL in its use of targeted drone attacks.¹⁶⁸ Consequently, the administration is strongly

genocide. *See id.*

158. *Id.*

159. *Id.* at 78.

160. ANDERSON, *supra* note 32, at 28.

161. *See* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge, eds., 2011).

162. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 24 (Thomas Reuters 5th ed. 2009).

163. *See* Koh, *supra* note 1.

164. *See* Taft, *supra* note 104, at 511.

165. *See* Dolzer, *supra* note 118, at 339.

166. Koh, *supra* note 1.

167. *See, e.g.,* JOINT DOCTRINE, *supra* note 146.

168. Barring, of course, another set of "WikiLeaks" such as the one that roused certain attitudes regarding Pakistan's role in the Afghani insurgency. *See* Spencer Ackerman, *WikiLeaks Drops 90,000 War Docs; Fingers Pakistan as Insurgent Ally*, WIRED, July 25, 2010, <http://www.wired.com/dangerroom/2010/07/wikileaks-drops-90000-secret-war-docs-fingers->

urged to consider the immediate public disclosure of all appropriate target selection procedures to demonstrate U.S. compliance with the IHL standards to which it adheres.

pakistan-as-insurgent-ally/.