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The Long-Term International Law Implications of Targeted Killings Practices

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The Long-Term International Law Implications of Targeted Killing Practices

An article from the symposium, “State Ethics: Controlling the Behavior
of Governments and Their Partners”

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One of the most crucial and enduring questions about “targeted killings” is: How will the currently expanding practices of singling out individuals in advance and eliminating them in other countries without accountability impact the established international legal system?

International law, since at least World War II, has developed various mechanisms to limit killing in general, including targeted killings. These take the form of vigorous

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protections for the right to life under human rights law; safeguards against the interstate use of force while permitting states to protect themselves where necessary; and aiming to strike a balance between the principles of humanity and military necessity during armed conflict through international humanitarian law (IHL).¹

Targeted killings are not a new practice – governments have long sought to prevail over their enemies by engaging in premeditated killings of individual suspects.² What is new now is the rapid development and proliferation,³ and increasing deployment,⁴ of technologies which permit such killings to be carried out with greater ease and with little immediate risk to one side’s citizens, together with concerted efforts by some to

¹ Many efforts have also been directed at banning or regulating specific weapons. For an overview of the major disarmament treaties, see Bonnie Docherty, *Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law*, AUSTL. REV. OF INT’L & EUR. L. (forthcoming 2013).

² See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on Targeted Killings*, Human Rights Council, ¶ 11, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Rep. of the Special Rapporteur: Study on Targeted Killings*] (referring to previous targeted killings, and describing the general practice of states to deny such killings, and of other states to condemn them).

³ See generally P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century* (2009) (describing the development of drone technology for military purposes); U.S. Gov’t Accountability Office, GAO-12-536, *Nonproliferation: Agencies Could Improve Information Sharing and End-Use Monitoring on Unmanned Aerial Vehicle Exports* 9 (July 2012) (describing the “rapid growth globally in UAV [unmanned aerial vehicle] acquisition, development, and military applications.”). New and smaller, faster, and more sophisticated drone technologies are now regularly reported as being developed.

⁴ Drone strikes, generally, have drastically increased, although the proportion of these that would qualify as targeted killings in the various theaters of use is, on publicly available information, unclear. Under President Bush, the U.S. carried out an estimated 52 drone strikes in Pakistan. Under President Obama, there have been some 301 reported strikes. In addition, there have been at least 40 reported strikes in Yemen, and since 2011, there have been some strikes in Somalia. See *Covert War on Terror—The Data*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Dec. 07, 2012) [hereinafter *Covert War on Terror—The Data*]. The number of drone strikes overall appears to be the highest in Afghanistan, where a reported 333 strikes took place in 2012 alone. See Noah Shachtman, *Military Stats Reveal Epicenter of U.S. Drone War*, WIRED (Sept. 11, 2012), <http://www.wired.com/dangerroom/2012/11/drones-afghan-air-war/>. It was recently reported that since 2008, almost 1,200 drone strikes took place (by the U.S. and the U.K.) in Afghanistan, Iraq, and Libya. See Chris Woods & Alice K. Ross, *Revealed: U.S. and Britain Launched 1,200 Drone Strikes in Recent Wars*, BUREAU OF INVESTIGATIVE JOURNALISM (Dec. 4, 2012), <http://www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars/>. U.S. Special Operations kill/capture raids in Afghanistan have also reportedly increased under President Obama. See Jonathan Masters, *Targeted Killings: Backgrounder*, COUNCIL ON FOREIGN REL. (Apr. 30, 2012), www.cfr.org/counterterrorism/targeted-killings/p9627.1

offer general legal justifications for current targeted killings practices, and, in some cases, to attempt to redefine existing legal frameworks to expand the circumstances in which such killings may be carried out “lawfully.”⁵

A small number of states with the necessary capabilities – particularly the United States – clearly find targeted killing attractive today. As unmanned aerial technologies becomes more widely available, many other states may feel the same pull towards the advantages of drone attacks in the future. Some 76 countries now have unmanned aerial systems,⁶ it has recently been reported that the Pentagon has approved the export of drones from U.S. manufacturers to 66 countries,⁷ and reports suggest that an increasing number of countries are developing their own armed drones.⁸

Current targeted killings practices and the attempts to legally justify those strikes present a challenge to the systematic protection of the right to life under international law. We are now witnessing a significant effort by some states to insulate their “targeted” uses of deadly force from international scrutiny and to redefine international law in order to serve narrow and short-term interests. This presents a serious risk of leaving everyone less secure, particularly if other states around the world, as they acquire the new technology, claim for themselves the same expanded rights to target their enemies without meaningful transparency or accountability.

The challenge is to ensure that strong protections of the right to life under international law survive the practices of a few states, technological developments, and outlier attempts to redefine core legal standards.

⁵ It is important not to overly-focus on the technologies themselves. Targeted killings, whether carried out by drone or sniper, raise essentially the same legal issues and are constrained by the same legal frameworks. However, it is also important to recognize that drones are presently perceived by those who deploy them to offer new opportunities and unique advantages for expanded surveillance and targeting, and that in this sense they appear to be facilitating the expanding practice, policy, and legal frontiers of targeted killings.

⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 5, at 15 (providing information that since 2005, the number of countries that have acquired a UAV system jumped from 42 to at least 76).

⁷ Actual sales will need approval by the U.S. State Dep't and Cong. See Doug Palmer & Jim Wolf, *Pentagon OK with Selling U.S. Drones to 66 Countries*, NBCNEWS.COM (Sept. 6, 2012), http://usnews.nbcnews.com/_news/2012/09/06/13695931-pentagon-ok-with-selling-usU.S.-drones-to-66-countries?lite.

⁸ See, e.g., *Sukboi to Build Strike, Recon Unmanned Planes*, RIA NOVOSTI (Nov. 13, 2012 10:58 AM), http://en.ria.ru/military_news/20121113/177420795.html (describing armed UAV developments in Russia); Staff Writers, *Latest China Military Hardware Displayed at Airshow*, SPACE TRAVEL (Nov. 13, 2012), http://www.space-travel.com/reports/Latest_China_military_hardware_displayed_at_airshow_999.html (describing armed UAV developments in China); Jon Boone, *Pakistan Developing Combat Drones*, GUARDIAN (Nov. 13, 2012), <http://www.guardian.co.uk/world/2012/nov/13/drones-pakistan> (reporting efforts by Pakistan to develop its own armed UAV).

For the past decade, successive U.N. Special Rapporteurs on extrajudicial, summary, or arbitrary executions have reported on and sought accountability and transparency for targeted killings of various forms, including those in the context of the so-called “War on Terror.” Since the creation of the U.N. mandate thirty years ago in 1982, the U.N. Special Rapporteur on extrajudicial executions has been the primary international actor with the mandate to investigate, prevent, and promote accountability for all unlawful killings under international human rights and IHL.⁹ The mandate exists to ensure respect for every individual’s right not to be arbitrarily deprived of his or her life, to document and promote redress for violations, and to clarify the applicable international law. The mandate addresses a wide range of killings, including politically motivated killings by state agents, excessive use of force by law enforcement officials, custodial deaths, lack of due diligence by states in dealing with killings by private individuals, and violations of IHL during armed conflict by both government and non-state actors.¹⁰

Over the years, successive mandate holders have addressed targeted killings carried out through drone strikes and kill/capture raids, and have built up a detailed record of individual cases and analysis of the applicable international law. In 2003, for example, then U.N. Special Rapporteur, Asma Jahangir, concluded that a 2002 U.S. strike in Yemen was a “clear” extrajudicial execution.¹¹ Since then, numerous official U.N. communications have been exchanged with the U.S. government about targeted killings, seeking clarification about incidents as well as the U.S. government’s views on

⁹ See, e.g., Comm’n on Human Rights Res. 1982/29, ¶ 2 (Mar. 11, 1982); Econ. & Soc. Council Res. 1982/35, ¶ 2 (May 7, 1982); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Econ. & Soc. Council, U.N. Doc. E/CN.4/1983/16 (Jan. 31, 1983) (by S. Amos Wako); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Summary or Arbitrary Executions: Rep. by the Special Rapporteur*, Econ. & Soc. Council, U.N. Doc. E/CN.4/1992/30 (Jan. 31, 1992) (by S. Amos Wako); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Human Rights Council, U.N. Doc. A/HRC/Res/8/3 (Jun. 18, 2008); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Human Rights Council, U.N. Doc. A/HRC/Res/17/5 (Jul. 6, 2011).

¹⁰ For details on each of the primary forms of extrajudicial executions addressed by the mandate, as well as the relevant international law, see Philip Alston & Sarah Knuckey, *INTERNATIONAL LAW AND POLICY OF EXTRAJUDICIAL EXECUTIONS* (forthcoming 2013). See also Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Comm’n on Human Rights, ¶ 5–12, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston).

¹¹ See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Comm’n on Human Rights, ¶ 39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir).

the applicable law.¹² Country mission reports on Afghanistan and the United States have documented targeted killings, raised concerns about the legality of particular strikes, and called for accountability.¹³ In 2010, then U.N. Special Rapporteur Professor, Philip Alston, reported in detail to the U.N. Human Rights Council on the legal frameworks and rules relevant to targeted killings,¹⁴ as well as to the U.N. General Assembly on accountability failures and of potentially “grave damage” to the

¹² See, e.g., Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Summary of Cases Transmitted to Government and Replies Received*, Human Rights Council, 342–61, U.N. Doc. A/HRC/4/20/Add.1 (Mar. 12, 2007) (by Philip Alston). In response to the Special Rapporteur’s work on this issue, the U.S. initially adopted the novel and untenable position that the U.N. Human Rights Council and the Special Rapporteur have no mandate to address killings which took place (or which the U.S. said took place) in an armed conflict. See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Summary of Cases Transmitted to Government and Replies Received*, Comm’n on Human Rights, 264–65, E/CN.4/2006/53/Add.1 (Mar. 27, 2006) (by Philip Alston) (allegation letter sent to the U.S. government about the killing by drone strike of Haitham al-Yemeni in May 2005). See also *id.*, at 125–36 (concerning alleged targeted killings by Israel); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Observations on Communications Transmitted to Governments and Replies Received*, Human Rights Council, ¶ 82, U.N. Doc. A/HRC/20/22/Add.4 (June 18, 2012) (by Christof Heyns) (concerning killing of Osama bin Laden); *id.*, ¶ 85 (concerning alleged use of drones in targeted killing by U.S. government in Yemen); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Summary of Information, Including Cases, Transmitted to Governments and Replies Received*, Human Rights Council, 394, U.N. Doc. A/HRC/17/28/Add.1 (May 27, 2011) (by Christof Heyns) (concerning alleged targeted killing of Anwar Al-Awlaki by the U.S. government); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Follow-Up to Country Recommendations*, Human Rights Council, U.N. Doc. A/HRC/8/3/Add.3 (May 14, 2008) (by Philip Alston) (concerning alleged targeted killings by Sri Lankan forces and the Liberation Tigers of Tamil Eelam).

¹³ See, e.g., Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Follow-Up to Country Recommendations – United States of America*, Human Rights Council, U.N. Doc. A/HRC/20/22/Add.3 (Mar. 30, 2012) (by Christof Heyns) (following up on country recommendations after visit to the U.S. in 2008); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Mission to the United States of America*, Human Rights Council, ¶ 71–73, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009) (by Philip Alston); *id.*, ¶ 83 (reporting on targeted killings by the U.S.); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Mission to Afghanistan*, Human Rights Council, U.N. Doc. A/HRC/11/2/Add.4 (May 6, 2009) (by Philip Alston) (reporting on alleged targeted killings by U.S. raids in Afghanistan).

¹⁴ See *Rep. of the Special Rapporteur: Study on Targeted Killings*, supra note 4, at ¶¶ 28–36.

“legal framework that the international community has so painstakingly constructed in order to protect the right to life.”¹⁵ The U.N. Special Rapporteurs on extrajudicial executions and on counter-terrorism have also asked the U.S. government for factual and legal clarification after the killing of Osama bin Laden.¹⁶ In October 2012, the Special Rapporteurs announced that they would report to the United Nations in 2013 on the legal and factual issues around targeted killings, and an initiative will be launched to investigate strikes.¹⁷ The U.S. has signaled that it is considering cooperating with this investigative work, a step that would go a significant way towards restoring international accountability.¹⁸

The applicable basic principles of international law relevant to the taking of life are clear and tested by time. International law does not wholesale prohibit targeted killings. Rather, rules have developed to impose principled limits on all uses of lethal force, and to ensure that the limits are respected through meaningful transparency and accountability. (Indeed, in some circumstances, “targeted” killings are precisely what international law prescribes.). However, as evidenced by both government practices and legal pronouncements, some states appear to want to offer only general legal justifications for highly contentious practices, to invent new law, or to stretch existing law beyond long-accepted understandings.

This issue will remain on the international agenda for the foreseeable future, and it is important to consider the outlines of the terrain. What rules bind states and should continue to guide action in the future?

¹⁵ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Interim Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, General Assembly, ¶ 11, U.N. Doc. A/65/321 (Aug. 23, 2010) (by Philip Alston) [hereinafter *Interim Rep. of the Special Rapporteur to the General Assembly*].

¹⁶ See Press Release, U.N. Office of the High Commissioner for Human Rights, *Osama bin Laden: Statement by the U.N. Special Rapporteurs on Summary Executions and on Human Rights and Counter-Terrorism* (May 6, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>; see also Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Observations on Communications Transmitted to Governments and Replies Received*, Human Rights Council, ¶ 82, U.N. Doc. A/HRC/20/22/Add.4 (Jun. 18, 2012) (by Christof Heyns) (calling for factual and legal clarification surrounding the killing of Osama bin Laden).

¹⁷ See Owen Bowcott, *UN to Investigate Civilian Deaths from US Drone Strikes*, GUARDIAN (Oct. 25, 2012), <http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes?newsfeed=true>.

¹⁸ See Julie Pecquet, *U.S. Open to Cooperating with U.N. Probe into Drone Strikes*, HILL (Nov. 12, 2012), <http://thehill.com/blogs/global-affairs/terrorism/267373-obama-administration-doesnt-rule-out-un-probe-into-drone-strikes>.

It is undisputed that the right to life is part of international customary law¹⁹, and as such it imposes legal duties on all states, irrespective of their ratification of specific treaties. Some see the right to life as “the supreme right,” and it has been described as a norm of *jus cogens*.²⁰

Operations in the territory of other countries could potentially violate state sovereignty, and they may be considered acts of aggression in violation of the UN Charter absent consent or legitimate self-defense.²¹ While self-defense has been advanced as a justification for targeted killings,²² it is far from clear that its established legal confines have been satisfied in actual current practice. Self-defense (and the use of force on another state’s territory) is justified in response to an “armed attack” that meets the required threshold, and there must be a direct link between the “armed attack” and the subsequent use of force in self-defense. As a general rule, self-defense may only justify force in response to attacks that have already occurred.²³ It is difficult to see in most cases how targeted killings carried out in 2012 can be justified as a self-defense response to the September 11, 2001 terrorist attacks in the United States. As targeted killings take place in more and more countries and against more groups with,

¹⁹ See Human Rights Comm., *General Comment No. 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶¶ 8, 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994); see also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 122 (2005); NIGEL S. RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 247 (2009).

²⁰ See Human Rights Comm., *supra* note 21, at ¶¶ 8, 10; see also U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.8 (May 8, 2006).

²¹ U.N. Charter arts. 2(4), 51; see also Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Human Rights Council, ¶¶ 35, 45, U.N. Doc. A/HRC/14/24 (May 20, 2010) (by Phillip Alston).

²² Various senior U.S. officials have justified targeted killings practices on the basis that they are carried out in the context of an armed conflict, and/or that they are a manifestation of the state’s inherent right of self-defense. Following significant pressure from civil society calling upon the U.S. government to explain how its targeted killings practices comport with international law, over the last two years, U.S. officials have made a number of public speeches briefly explaining and seeking to legally justify current policies. See, e.g., Eric Holder, Attorney General, Dep’t of Justice, Address at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Harold K. Koh, Legal Advisor, Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/1/releases/remarks/139119.htm>.

²³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 8); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

at best, tenuous links to those responsible for the September 11 attacks, this difficulty only increases.

What about new threats? While states may engage in self-defense against truly “imminent” attacks, there is little available evidence to suggest that all of those individuals targeted by drone attacks would meet this requirement. The premeditated nature of targeted killings means that, in many cases, claims of imminence ring hollow. The reported presence for long periods of time of the names of those on “kill lists,” for example, undermines claims of such an imminent threat. More permissive standards of “pre-emptive strikes,” without a clear basis in the U.N. Charter, are being advanced in support of what would normally be regarded as acts of aggression. Indeed, it appears that the U.S. is attempting to redefine “imminence.”²⁴ As noted above, if one government is allowed to use force whenever it is of the opinion that there is some perceived danger that may be realized at some point in the future, with no transparency or accountability, there is no basis on which to hold others back from doing the same.

Moreover, it is clear that even where consent or a self-defense justification for inter-state force is present, it does not obviate the need for further inquiry into whether the demands of IHL or international human rights law have been met in respect of the particular use of force. The question of the legality of extra-territorial use of force should not be confused with the question of the legality of the use of lethal force against a particular target. These are two *separate* inquiries. Questions of *jus ad bellum* and *jus in bello* should not be conflated. The “self-defense” test pertains to whether the use of inter-state force is or is not a violation of state sovereignty, and to when a state may use force extra-territorially. It does not answer the question of whether the specific type, level, timing, or scope of force used is lawful vis-à-vis the individual targeted person. The legality of this use of force depends on whether it complies with either human rights law or IHL.²⁵

²⁴ See JENNIFER K. ELSEA, CONG. RESEARCH SERV., LEGAL ISSUES RELATED TO THE LETHAL TARGETING OF U.S. CITIZENS SUSPECTED OF TERRORIST ACTIVITIES 14–20 (May 4, 2012), <http://www.fas.org/sgp/crs/natsec/target.pdf>; see also Human Rights First, How to Ensure that the U.S. Drone Program Does Not Undermine Human Rights: Blueprint for the Next Administration 4 (December, 2012), http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Targeted_Killing_blueprint.pdf; Special Rapporteur on extrajudicial, summary or arbitrary executions, *Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, General Assembly, ¶ 42, U.N. Doc. A/66/330 (Aug. 30, 2011) (by Christof Heyns).

²⁵ See *Rep. of the Special Rapporteur: Study on Targeted Killings*, *supra* note 4, ¶ 28–36; see also D. FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1–15 (2008); Kevin Jon Heller, One Hell of a Killing Machine: Signature Strikes and International Law, J. OF INT’L CRIM. JUST. (forthcoming 2013) (manuscript at 3–5) (noting that this position is “widely accepted by scholars” and “explicitly endorsed” by the International Law Commission);

Where there is no armed conflict, international human rights law applies. Human rights law affords a high level of protection to the right to life: the use of force must be strictly *necessary* and *proportionate*. Lethal force may only intentionally be used where necessary to counter an imminent threat to life.²⁶ Unless the requirements of an armed conflict are met, international human rights law applies strictly – and it is far from clear on publicly available evidence that all of the targeted individuals posed an imminent threat to life, and that lethal force was in fact necessary.²⁷ It is also important to note that the obligation under human rights law to respect the right to life binds not only the state employing lethal force against an individual, but also, where lethal force is used extraterritorially, the state on whose territory any attack takes place.²⁸

In the exceptional situation of armed conflict, the *lex specialis* rules of IHL also apply, and any killings must satisfy the foundational principles of proportionality, distinction, necessity, and humanity.²⁹ With respect to the question of whether an armed conflict exists, it is unhelpful to talk about a “hot” or a “cold” battlefield – either the killing is carried out in an armed conflict or it is not. The test for determining whether an armed conflict exists is an objective one, and it is not determined according to the mere subjective will or pronouncements of the parties involved.³⁰ In addition, and importantly, the targeted individual must be a lawful target: in the context of non-international armed conflict, the key legal test is that they must directly participate in hostilities.³¹

Michael Elliot, *Where Precision Is the Aim: Locating the Targeted Killing Policies of the United States and Israel within International Humanitarian Law*, 47 CAN. Y.B. OF INT’L L. 108 (2009).

²⁶ See *Rep. of the Special Rapporteur: Study on Targeted Killings*, *supra* note 4, ¶ 33.

²⁷ The facts reported in the following story, for example, raise general questions about the necessity of lethal force: Adam Baron, *Family, Neighbors of Yemeni Killed by U.S. Drone Wonder Why He Wasn’t Taken Alive*, MCCLATCHY (Nov. 28, 2012), <http://www.mcclatchydc.com/2012/11/28/175794/family-neighbors-of-yemeni-killed.html#storylink=cpy#storylink=cpy?storylink=addthis#storylink=cpy>.

²⁸ Thus, for example, to the extent that a state in fact consents to the use of force by another state on its territory, it cannot in law consent to violations by the attacking state of the right to life of those within its jurisdiction. The state on whose territory attacks take place is under a legal obligation to protect their right to life.

²⁹ See *Rep. of the Special Rapporteur: Study on Targeted Killings*, *supra* note 4, ¶ 29.

³⁰ See *id.* ¶ 46.

³¹ See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (May 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (outlining the civilian direct participation in hostilities, and continuous combat function tests). In this sense, the widespread use of the term “militant” in public discourse is deeply unsatisfactory. “Militant” is not a legal category, and obfuscates attempts to determine the legality of any particular targeting decision and strike.

It is not at all clear that the targeted killings carried out by the U.S. are taking place against individuals directly participating in a recognized armed conflict, and in accordance with the specific rules of IHL. Although U.S. officials have relied on the existence of an armed conflict against al Qaeda and the ill-defined “associated forces” category as the basis for the legality of targeted killings, the U.S. government has presented little to no evidence to indicate that all strikes have in fact taken place against direct participants in hostilities or – if that category is used – against individuals who have a continuous combat function in an armed group which is a party to a recognized armed conflict. Strikes have also taken place in circumstances where it is far from evident that sufficient precautions in attack were taken or that the principles of proportionality and distinction were adequately observed.³²

The Bureau of Investigative Journalism, which tracks drone strikes around the world, has reported that, in Pakistan, drone strikes have killed some 472–885 civilians, including 176 children, out of a total of 2,593–3,387 persons killed.³³ The Bureau also reports the use of secondary drone strikes on apparent “first responders” shortly after a first strike.³⁴ Significant civilian casualty reports raise serious questions about

³² Numerous examples of strikes for which evidence has been brought forward of civilian harm is available on the Bureau’s website, and also in a report published by human rights clinics at Stanford and NYU; STANFORD INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AND GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN, (Sept., 2012), <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf> [hereinafter LIVING UNDER DRONES]. Recently, the Times published a very detailed report of evidence of civilian harm following a U.S. strike in Pakistan on October 24, 2012. According to alleged witnesses and victims interviewed by the Times, a 67-year-old woman was killed, and a number of children injured. See Robin Pagnamenta, *My Dead Mother Wasn’t an Enemy of America. She was Just an Old Lady*, TIMES (London) (Nov. 20, 2012), <http://www.thetimes.co.uk/tto/news/world/asia/article3605267.ece>.

³³ See *Covert War on Terror—The Data*, *supra* note 6. The Bureau’s numbers are primarily based on its compilation and aggregation of media reports of strikes and deaths. This raises important issues about the accuracy of the numbers reported by the Bureau, given the constraints of on-the-ground media reporting in Northwest Pakistan, combined with non-transparent U.S. practices. See LIVING UNDER DRONES, *supra* note 34, at 29–54. Nevertheless, a number of studies have found that, of the current drone strike aggregators, the Bureau’s data is the most transparent and contains the most accurate reflection of available media reporting. See *id.* at 53–54; see also COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC, COUNTING DRONE STRIKE DEATHS (Oct. 2012), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/COLUMBIACountingDronesFinalNotEmbargo.pdf>.

³⁴ See Chris Woods, *Get the Data: Obama’s Terror Drones*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>; Scott Shane, *U.S. Said to Target Rescuers at Drone Strike Sites*, N.Y. TIMES (Feb. 5, 2012), <http://www.nytimes.com/2012/02/06/world/asia/U.S.-drone-strikes-are-said-to-target-rescuers.html>; Chris Woods, *CLA “Revives*

whether the principles of distinction and proportionality have been met. Similarly, concerns have been raised about adequate precautions and distinction following contentious revelations by anonymous government sources to the New York Times that adult males were generally counted as “combatants” if they were killed in a strike zone.³⁵ The so-called “signature strikes,” in which targets are chosen based on patterns of behavior, are also troubling.³⁶ And, if civilian “rescuers” are intentionally being targeted in drone attacks in a situation of armed conflict, there is no doubt about the law: those strikes are war crimes.

The use of the term “targeted killing” can be misleading in the context of some strikes, since it creates the impression that little violence occurs and only the “target” is affected. It is true that a specific drone strike target may be identified with precision, and that immediate collateral damage in a particular case may be reduced. But because drones effectively eliminate the personal risk to the soldiers of the state using it, they enable this form of targeted killing to be used more often, with attendant risks to civilians. Furthermore, and as documented in first-hand testimony of witnesses and victims in a recent report by law clinics at Stanford and New York Universities (co-authored by Sarah Knuckey), there is evidence indicating that targeted killings and drone strike practices have negative impacts on civilian mental health, educational and economic opportunities, and community institutions.³⁷

The requirements of transparency and accountability with respect to the use of force apply under international human rights law as well as under IHL. The “first line of defense” against violations of the right to life is at the level of the national legal system. But if violations are not properly addressed domestically, the position of the state in question becomes a matter of legitimate international concern. This is the kind of accountability that the U.N. Human Rights Council deals with on a regular basis – for example, currently with respect to Syria, and previously with respect to Sri Lanka. Accountability for violations of the right to life is not a matter of choice or policy; it is a duty to be observed under both domestic and international law in all cases.

Consistent with the demands made by successive U.N. Special Rapporteur mandate holders over the last decade, the U.S. public and the international community urgently need clarity from the governments concerned on the general question about the legal

Attacks on Rescuers” in Pakistan, BUREAU OF INVESTIGATIVE JOURNALISM (June 4, 2012), <http://www.thebureauinvestigates.com/2012/06/04/ciarevives-attacks-on-rescuers-in-pakistan/>.

³⁵ See Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

³⁶ For a detailed analysis of the legal concerns raised by signature strikes, see Kevin Jon Heller, *supra* note 27.

³⁷ See LIVING UNDER DRONES, *supra* note 34, at 73–101.

basis upon which they carry out targeted killings, and also transparency about the facts that make a full assessment of legality and accountability possible. Key questions include: Who has been killed? What was the factual basis for targeting them? Were there civilian casualties and what procedures are in place to ensure compliance with international law? Only on this basis can the questions of legality be determined, and can redress be provided where necessary. Continuing failures to provide such basic information undermines democratic accountability, meaningful public debate about crucial policies, and ultimately the supervisory role of international law. Occasional “leaks” and anonymously sourced official accounts provided to journalists have provided some further details about U.S. practices, but have also raised concerns about the targeted killing program’s compliance with international law. And they are no substitute for official statements and formal cooperation with existing domestic and international accountability mechanisms.

Current U.S. practices, together with vague legal justifications or those purporting to expand the circumstances in which states may kill their own or other states’ citizens, threaten to undermine crucial international legal protections and the system of international accountability established after World War II. Other states have also thus far failed to hold the U.S. to account, or to adequately respond to U.S. practices or its novel legal interpretations. Individuals and states have always faced security threats. The existing legal frameworks were developed to balance legitimate security concerns with respect for territorial integrity, state sovereignty, the rule of law, due process, and individual rights.³⁸ Current targeted killing practices risk weakening the rule of law and disrupting settled restraints on the use of force. They could also set dangerous precedents for the future.

The international regulatory framework is often slow in responding to developments, including technological ones, and its response to the use of armed drones is no exception. The rapid proliferation of drones calls for a concerted international response. It is clear how difficult it can be to regulate new technologies once they are already developed and in use. In a number of important areas, however, the international community still has an opportunity to act in advance of new developments. We currently face many new issues – such as the domestic proliferation of police surveillance drones, which, without strong regulation, will pose serious risks to privacy and may undermine, for example, the exercise of protest rights.³⁹ The potential deployment of police drones equipped with less-lethal or lethal

³⁸ See generally ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, INTERNATIONAL COMMISSION OF JURISTS (2009), <http://www.ifj.org/assets/docs/028/207/3e83f1c-fbfc2cf.pdf>.

³⁹ See JAY STANLEY & CATHERINE CRUMP, AM. CIV. LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT (Dec. 15, 2011), <https://www.aclu.org/files/assets/>

weapons also lies on the horizon.⁴⁰ The prospect of domestic police drones needs urgent attention from civil society and governments. Furthermore, the development of lethal autonomous weapons systems is on the horizon.⁴¹ Weapons may in the

protectingprivacyfromaerialsurveillance.pdf (describing U.S. domestic drone surveillance, and privacy implications); Asher Moses, *Privacy Watchdog Urges Debate on Aerial Drones*, Brisbane Times.Com (Sept. 12, 2012), <http://www.brisbanetimes.com.au/technology/technology-news/privacy-watchdog-urges-debate-on-aerial-drones-20120912-25ri4.html> (discussing privacy implications of drones in Australia); Nikolaj Nielsen, *EU Components Used in Belarus Spy Drones, NGO Says*, EU Observer (Sept. 10, 2012, 9:03 PM), <http://euobserver.com/foreign/117489> (citing to concerns expressed by Belarus civil society that the government may use drones to impinge on the rights of protesters); Noel Sharkey & Sarah Knuckey, *Occupy Wall Street's "Occuicopter" – Who's Watching Whom?*, Guardian (Dec. 21, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/dec/21/occupy-wall-street-occuicopter-tim-pool> (discussing citizen and police drones); Citizen and Police Drones, Panel at *LeftForum Conference* (Pace University, New York, March, 2012) (panel organized and moderated by Sarah Knuckey, addressing legal and policy issues in the use of domestic surveillance drones).

⁴⁰ See *Groups Concerned Over Arming of Domestic Drones*, CBS (May 23, 2012 1:18 PM), <http://washington.cbslocal.com/2012/05/23/groups-concerned-over-arming-of-domestic-drones/> (reporting that Chief Deputy Randy McDaniel, Montgomery County Sheriff's Office, Texas, stated that "his department is considering using rubber bullets and tear gas in its drone."). But see Jonathan Kaminsky, *Seattle Police Plan for Helicopter Drones Hits Severe Turbulence*, REUTERS (Nov. 27, 2012), <http://www.reuters.com/article/2012/11/27/us-usa-drones-seattle-idUSBRE8AQ10R20121127>, McDaniel recently said he no longer wanted to equip his drones with weapons. See Jason Gilbert, *ShockerDrone: Hackers Attack Shocking Material to Drone Helicopter, Chase People, Stun Them*, HUFFINGTON POST (Aug. 30, 6:07 PM), http://www.huffingtonpost.com/2012/08/30/shockerdrone-hackers-attach-stun-gun-drone-helicopter_n_1843999.html (describing the arming of the \$299 Parrot AR Drone with a stun gun). Recently, the International Association of Chiefs of Police proposed guidelines for the use of police drones. See RECOMMENDED GUIDELINES FOR THE USE OF UNMANNED AIRCRAFT, AVIATION COMM. OF THE INT'L ASSOC. OF CHIEFS OF POLICE (Aug. 2012), http://www.theiacp.org/portals/0/pdfs/IACP_UAGuidelines.pdf.

⁴¹ See INT'L COMM. OF THE RED CROSS, REPORT ON INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 39–40 (2011) (noting that the deployment of lethal autonomous robotics would represent a "paradigm shift and major qualitative change in the conduct of hostilities," and that "current norms do not sufficiently regulate some of the challenges posed and might need to be elaborated."); *Interim Rep. of the Special Rapporteur to the General Assembly*, *supra* note 17 (outlining legal concerns around the development of autonomy); Sarah Knuckey, *International Law and Lethal Autonomous Robotics*, International Drone Summit, co-hosted by the Center for Constitutional Rights, Reprieve, and CodePink, (Washington, D.C., Apr. 2012) (noting the need to address ethical and legal concerns around autonomy before the technology is deployed); see also HUMAN RIGHTS WATCH & HARVARD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (November 2012), <http://www.hrw.org/reports/2012/11/19/losing-humanity-0>. In his 2013 report to the Human Rights Council, Christof Heyns will deal with the human rights and humanitarian law impacts of lethal robotic technologies.

future be programmed to autonomously locate, select, and “decide” who should be targeted for lethal attacks. The international community needs to confront squarely the dangers posed by these technologies before they are already in use.

Let us fast forward ten, or perhaps just five, years. Should there be an international legal order that permits governments around the world to operate “secret” and unaccountable programs to eliminate their enemies wherever they are with few binding limits and no meaningful international scrutiny? Some officials no doubt hope that they can successfully expand the scope of lawful killings through sheer force of repetition of practice and claims of “legality.” This cannot and should not be accepted. The international community should act to uphold and restore the integrity on the international rule of law, and the protections guaranteed by human rights and international humanitarian law.