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Richard Murphy

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RESPONSES TO THE TEN QUESTIONS

Richard Murphy[†]

3. IS PRESIDENT OBAMA'S USE OF PREDATOR STRIKES IN AFGHANISTAN AND PAKISTAN CONSISTENT WITH INTERNATIONAL LAW AND INTERNATIONAL STANDARDS?

LEGAL EVOLUTION FOR TARGETED KILLING BY DRONE

"The United States government is very clearly on record as against targeted assassinations. . . . They are extrajudicial killings, and we do not support that." *Martin Indyk, U.S. Ambassador to Israel, commenting in July 2001 on Israeli targeted killing of Palestinian terrorists.*¹

"These CT operations are conducted in strict accordance with American law and are governed by legal guidance provided by the Department of Justice." *Unnamed American official quoted in February 2011 on the legality of the CIA's targeted-killing-by-drone campaign.*²

The *Journal of the National Security Forum* has posed an important and deeply interesting question: Is President Obama's intense drone campaign against the forces of al Qaeda and the Taliban consistent with international law? Certainly, the Obama and Bush administrations have striven mightily to ensure that the drone campaign rests on sound legal foundations. It is impossible

[†] AT&T Professor of Law, Texas Tech University School of Law.

1. Jane Mayer, *The Predator War: What Are the Risks of the CIA's Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, <http://www.newyorker.com/reporting/2009/10/26/091026fa>.

2. Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html>.

to state categorically whether they have succeeded, as many of the relevant facts are contested, unclear, or unknown, and the law is complex, yet in many ways, indeterminate. Thus, the real virtue of the *Journal's* question is not that it can lead to a final, concise, compelling answer to whether the drone campaign is legal. Rather, the difficulty of answering this question highlights the need for more facts and better law.

The legality of American drone strikes must in large part depend on who the drones are killing and why. Clear and certain answers to important and basic factual questions are not available, however, due to factors including government secrecy, geographic inaccessibility, and the lack of disinterested observers.³ Government officials running the drone campaign have much more information than outsiders, of course. They must, for instance, have intelligence to support drone strikes targeted at particular individuals. Also, the drones themselves stream video of all that they see with their amazing cameras to their controllers. Still, intelligence can be faulty, and a drone in the sky cannot absolutely confirm that a particular kill was a hardened member of al Qaeda rather than an innocent farmer. Assessments of accuracy vary wildly from a fifty-to-one ratio of unintended deaths to targeted kills to a one-to-twenty ratio of civilians to militants.⁴ Assessments of the efficacy of the strikes as a means of prosecuting the war also vary. Administration officials claim that the drones are

3. The difficulty of collecting reliable information about the drone campaign has not kept some organizations from trying to carry out this important task, including *The Long War Journal*, an online, neoconservative journal, and the *New America Foundation*, a Washington think tank. See, e.g., Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004–2011*, THE LONG WAR J., (Apr. 27, 2011, 3:07 PM), <http://www.longwarjournal.org/pakistan-strikes.php> (maintaining updated figures on drone strikes in Pakistan and reporting, inter alia, that airstrikes in Pakistan rose from thirty-five during the last year of the Bush administration in 2008 to 117 in 2010, the second year of the Obama administration); *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2011*, NEW AM. FOUND. (last visited Mar. 28, 2011), <http://counterterrorism.newamerica.net/drones> (maintaining updated figures on drone strikes in Pakistan).

4. Mary Ellen O'Connell, *Unlawful Killing With Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (manuscript at 1 n.6) (Simon Bronitt ed., forthcoming) (finding that since January 2008, the ratio was about twenty leaders killed for 750–1000 unintended victims). But see, e.g., NEW AM. FOUND., *supra* note 3. The “true non-militant fatality rate since 2004 according to our analysis is approximately 21 percent[,]” but this figure for 2010 had fallen to “more like six percent”. *Id.*

reducing the chance of attack by wiping out militants.⁵ Other experts contend that the costs, which include outraging local sentiment, outweigh any benefits from killing militants.⁶

In addition to lacking full information about the effects of drone strikes, outsiders also lack information concerning the standards and procedures that the government (and in particular, the CIA) uses to ensure accuracy as well as minimize collateral damage. In this context, it is helpful to draw a distinction between two types of strikes. The first type of strike involves targets of opportunity—for instance, a drone conducting surveillance might happen across a vehicle full of armed men and fire a missile after the drone's controllers conclude the men are Taliban militants. This type of strike is nothing new to the military, which has targeting procedures in place to handle them.⁷ Presumably, when the CIA carries out this type of strike, it draws on the military's long experience.

The second, much more controversial type of strike, involves what has come to be called targeted killing. Used in this way, this phrase is misleading insofar as all strikes are targeted—one does not fire a deadly and expensive Hellfire missile at random. Such strikes, however, involve a special type of targeting in that they are planned in advance as means to kill particular people determined to play influential roles in al Qaeda or the Taliban.

Not much is publicly known about the standards and procedures that the CIA uses to ensure that targeted killings are directed only at legitimate targets. For what it may be worth, according to Harold Koh, leading human rights expert, former dean of Yale Law School, and current Legal Adviser to the State Department, all targeted killings by drone carried out by the United States government use “extremely robust” procedures that are “implemented rigorously” using “advanced technology.”⁸ At

5. McKelvey, *supra* note 2.

6. David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html>.

7. Cf. Kenneth Anderson, *Drone Warfare, the CIA, and Charlie Savage's NYT Article*, THE VOLOKH CONSPIRACY (May 28, 2010, 6:42 PM), <http://volokh.com/2010/05/28/drone-warfare-the-cia-and-charlie-savages-nyt-article/> (“The military . . . sees [drones] in a military sense, as simply another air support weapons system, and target review from a legal standpoint is not different from any other calculus of a similar weapons system.”).

8. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law, The

the CIA, these robust procedures apparently include approval of each strike by Director Leon Panetta.⁹ Agency lawyers play an integral role, preparing detailed cables to justify targeting of particular individuals.¹⁰ These cables include a signature line for the agency's general counsel.¹¹ According to former Acting General Counsel John Rizzo, during his tenure, the agency had about thirty persons targeted at any given time.¹²

Against this backdrop of factual and procedural uncertainty, the drone campaign—and, more particularly, targeted killing by drone—raises many legal issues and complications that have been the subject of a rapidly growing literature.¹³ These legal issues and

Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>.

9. Peter Finn & Joby Warrick, *Under Panetta, A More Aggressive CIA*, WASH. POST, Mar. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032003343.html?nav=emailpage>.

10. See McKelvey, *supra* note 2 (interviewing former Acting General Counsel of the CIA, John Rizzo).

11. *Id.*

12. *Id.*

13. For a sampling of works discussing the legality of the drone campaign or of targeted killing more generally see, e.g., HCJ 769/02, Pub. Comm. Against Torture in *Isr. v. Gov't of Isr.* [2005] (Isr.) [hereinafter *PCATJ*], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf

(Israeli High Court decision concluding that targeted killing of terrorists could be conducted legally if subject to various procedural and substantive controls); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 436–44 (2008) (providing magisterial survey and assessment of targeted killing under international humanitarian law, international human rights law, and the law governing interstate use of force); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346 (Wittes ed., 2009) (contending that the United States's right to self-defense justifies targeted killing of terrorists and that this right exists regardless of whether an armed conflict exists within the meaning of International Humanitarian Law); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003) (“[U.S. law] leave[s] the nasty business of targeted killing where it should lie, as a permissible but tightly managed and fully accountable weapon of national self-defense”); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223 (providing an extremely lucid assessment of the legality of the United States government's targeting of Anwar al-Awlaki, a dual Yemeni-American citizen, under the United Nations Charter, International Humanitarian Law, and International Human Rights Law regimes); Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873 (2007) (contending that the Israeli Supreme Court has imposed improperly lax standards and procedures to govern targeted killing of terrorists); W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J.

complications include, among others:

United Nations Charter provisions governing interstate use of force that bar American drone strikes in Pakistan unless the United States is acting in self-defense or has the effective consent of Pakistan.¹⁴

The United States has targeted an American citizen, Anwar al-Awlaki, now living in Yemen.¹⁵ This targeting implicates al-Awlaki's constitutional rights to be free of unreasonable seizure (i.e., killing) and to due process.¹⁶

Drone strikes are carried out by the United States military in

TRANSNAT'L L. 711, 724 (2007) (discussing evolution of a legal norm permitting targeted killing in some circumstances); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004) ("[T]argeted killing is a legitimate and effective form of active self-defense"); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005) (contending that International Humanitarian Law should borrow elements of International Human Rights Law to provide greater protection against improper targeting of suspected terrorists); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (contending that targeted-killing-by-drone implicates due process); Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT'L LEGAL STUD. 109 (2009), available at <http://apps.americanbar.org/intlaw/spring09/materials/The%20International%20Legality%20of%20US%20Military%20Cross%20Border%20Operations.pdf>; O'Connell, *supra* note 4 (concluding that CIA drone attacks in Pakistan are illegal); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010) (concluding that, as a matter of lawful self-defense, a state may target non-state actors directly involved in armed attacks); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Toward Higher Care for CIA Targeted Killing*, U. ILL. L. REV. (forthcoming 2011) (arguing that International Humanitarian Law principles require the CIA to be certain of its targets beyond a reasonable doubt and that CIA drone strikes be subjected to independent review), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625829; Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 134-36 (2007), available at <http://www.usnwc.edu/getattachment/764f1498-9f87-406c-b8e5-0068336aa9ed/Targeted-Killing-and-the-Law-of-Armed-Conflict-S> (concluding that, for a targeted strike against a civilian to be legal under International Humanitarian Law, the civilian must be directly participating in hostilities and the attack must be authorized by a senior military commander).

14. See, e.g., Chesney, *supra* note 13, at 13-24 (assessing the legality of the United States's targeting of Anwar al-Awlaki in Yemen under the United Nations Charter).

15. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>.

16. Cf. *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.C. Cir. 2010) (dismissing, without reaching the merits, the constitutional arguments against targeting Al-Aulaqi, a Yemeni-American dual citizen).

Afghanistan, and by the CIA in Pakistan and other places, such as Yemen. The legality of the CIA exercising this military function has been questioned.¹⁷

The scope of the United States' legal authority to carry out a drone strike depends on which legal regime applies. Potentially applicable regimes include international humanitarian law (IHL, which governs armed conflicts); a distinct self-defense paradigm that can allow attacks outside an armed conflict;¹⁸ or international human rights law (IHRL), which generally governs civil law enforcement. Of particular note, where IHRL applies, it forbids extrajudicial killing absent an imminent threat.¹⁹

IHL applies at least within Afghanistan where an armed conflict plainly exists, but how far it extends outside Afghanistan has been disputed.²⁰

The armed conflict, whatever its geographic scope, is non-international in character—i.e., it is not among states.²¹ Generally speaking, the law governing international armed conflict makes plain that to further a legitimate military aim, an attacker may target opposing enemy combatants who are not hors de combat, but it may not directly target civilians except when they are directly participating in hostilities.²² Technically speaking, this combatant-

17. See O'Connell, *supra* note 4 ("Members of the CIA are not lawful combatants and their participation in killing persons—even in an armed conflict—is a crime." (quoting the article's Abstract)). *But see, e.g.*, Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. (noting that IHL permits civilians, including intelligence agents, to participate in hostilities, but that they lack combatant immunity from application of local domestic law); MELZER, *supra* note 13, at 317 (observing that police forces, intelligence agents, and border guards may be regarded as armed forces of a state for the purpose of IHL even if they are not recognized as such under domestic law).

18. See generally Anderson, *supra* note 13 (stressing the right to self-defense as a legal justification for targeted killings of terrorists regardless of whether an armed conflict sufficient to trigger application of IHL exists).

19. For discussion of targeted killing under IHL, see, e.g., Chesney, *supra* note 13, at 50–57.

20. See *id.* at 33–38 (discussing debate over whether there are geographic limits to the scope of IHL's application to the United States's conflict with al Qaeda; persuasively concluding that no such limit exists).

21. See MELZER, *supra* note 13, at 248 (observing that international armed conflicts arise "in principle between two States").

22. See *id.* at 303 (noting that active combatants in a conflict, unlike peaceful civilians, do not enjoy immunity from direct attack).

civilian dichotomy does not apply to non-international armed conflicts because, historically, states have been unwilling to extend the rights of combatancy to non-state actors in intrastate, civil conflicts.²³ This gap has hampered analysis of just who, precisely, can be directly targeted in a non-international armed conflict. According to one line of thinking, as there is no such thing as a combatant in such conflicts, all persons must be considered civilians who may be directly targeted only while they are “directly participating in hostilities.”²⁴ Another line of thinking with gathering momentum insists that functional combatants (i.e. persons who have donned a “continuous combat function”) may be directly targeted.²⁵ In practice, neither of these vague characterizations can apply themselves; both present difficult line-drawing problems.

Several interrelated principles of IHL attempt to restrict harm to peaceful civilians, but provide little concrete guidance to those controlling the drone campaign outside obviously extreme cases. These *jus in bello* principles include, inter alia: (a) *distinction*, which requires attackers to discriminate between legal targets and persons and property that may not be directly targeted (e.g., peaceful civilians);²⁶ (b) *proportionality*, which precludes attacks reasonably expected to cause excessive collateral damage in light of the “concrete and direct military advantage” an attack is expected to create;²⁷ and (c) *precaution*, which strengthens the preceding principles by requiring attackers to take all feasible measures to minimize harm to peaceful civilians and property.²⁸

23. See, e.g., Chesney, *supra* note 13, at 40–41 (discussing application of the term “combatancy” in international and non-international armed conflicts).

24. See MELZER, *supra* note 13, at 316 (noting but disposing of this argument as a “misconception of major proportions”).

25. ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed., 2008), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

26. See, e.g., GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 251 (“Distinction, sometimes referred to as discrimination, is the most significant battlefield concept a combatant must observe”).

27. See, e.g., DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE, para. 41 (1956) (“[L]oss of life and damage to property must not be out of proportion to the military advantage to be gained”).

28. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57, Dec. 7, 1978, 1125 U.N.T.S. 3 (requiring planners of attacks to “do everything feasible” to satisfy distinction and minimize incidental harm to

Given this legal backdrop along with factual and procedural uncertainty, the reality is that the drone campaign raises many tough legal, moral, and security issues. The short and true answer to “is it legal?” is “it’s complicated.”

In thinking through these complications, we should recognize from the start that laws limiting and authorizing state violence are designed to protect people from the state but also to allow the state to protect people. In concluding that the tools of regular law enforcement are insufficient, any state subjected to a 9/11-style attack would, if it had the muscle, invoke IHL’s expanded powers to neutralize enemies who remain loudly committed to mass killing. More concretely, it is idle to imagine that law could have blocked the United States from killing Osama bin Laden, or that it could block the United States from killing his lieutenant Ayman al Zawahiri—regardless of which side of the Afghan-Pakistan border he happens to be on and regardless of whether he is, at that moment, an imminent threat within the meaning of IHRL.

Moving past this very practical point, the most immediate problem is to determine how law can best modulate the drone campaign to minimize harm to peaceful civilians without unduly limiting the ability of the United States to protect its legitimate interests. The discussion needs, in short, to focus on adjusting the law of *jus in bello* to new circumstances.

As just noted, IHL seeks to protect peaceful civilians by insisting that attackers obey the principles of distinction, proportionality, and precaution. These principles apply to all armed conflict—whether a tank battle on a well-defined battlefield, bombing of an urban target from a high-altitude bomber, or a missile strike. Given their breadth, these principles are necessarily vague—in practice, they largely reduce to the underlying idea that the application of force should always be reasonable under the circumstances.²⁹ Applying this rule of reason requires commanders to make reasonable efforts to determine who is a legitimate target, to limit attacks to those reasonably expected to create a concrete

civilians); *see also* MELZER, *supra* note 13, at 364 (observing that the requirement of feasible precaution has attained customary status in both international and non-international armed conflicts).

29. *See, e.g.*, SOLIS, *supra* note 26, at 264 (“[W]ould a reasonably prudent commander acting in conformance with LOAC/IHL, knowing what the suspect commander knew, have acted similarly in similar circumstances?”); *id.* at 274 (“Like the meaning of the legal term, ‘reasonable,’ what constitutes ‘excessive’ is left to the interpretation of legal forums.”).

and direct military advantage, and to avoid unreasonable (i.e., disproportionate) collateral damage.

Of course, IHL is not alone in applying a very broad rule of reason to multifarious circumstances. Although it is not a body of law that one expects to come up in a discussion of targeted killing, consider, for instance, the law of antitrust. The Sherman Act, on its face, bars “contract[s] . . . in restraint of trade.”³⁰ Every contract restrains trade in some way, so the courts long ago interpreted this provision as barring only unreasonable restraints of trade.³¹ This vague proscription requires litigants to expend enormous effort to establish whether their behavior was, on balance, pro-competitive (and thus reasonable) or anti-competitive (and thus illegal).³² Antitrust recognizes, however, that certain kinds of frequently recurring, generic conduct are, generally speaking, obviously unreasonable.³³ For instance, it is unreasonable for competitors to agree among themselves to engage in a naked price fix at the expense of their consumers.³⁴ Rather than engage in a free-floating rule-of-reason inquiry to determine the legality of a naked price fix, antitrust instead condemns them as illegal, *per se*. Put another way, the law has developed relatively fixed expectations for what reason demands in particular contexts.

Ideally, the law of targeted killing by drone, currently subject to its own rule of reason, should move in a similar direction by developing more specific standards spelling out what distinction, proportionality, precaution, and related principles demand. Generic circumstances applicable to targeted killing by drone include: (a) the attacker has time to develop and assess intelligence in determining whom to target; (b) the drone streams video to its controllers of its surveillance and its strike; (c) all of this information is available for review after the fact; (d) the drone’s controllers are in no physical danger (unlike, say, a fighter on the ground); (e) the technology of drone strikes is continually

30. 15 U.S.C. § 1 (2006).

31. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

32. *See id.*

33. *See id.* (recognizing that certain types of agreements are “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”).

34. *See, e.g.*, 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2004a (2d ed. 2005) (“[A *per se* bar] applies virtually without exception when the price fix is ‘naked,’ in the sense that it does not accompany any significant integration of research and development, production, or distribution.”).

advancing; (f) drone strikes targeting preselected individuals will likely be relatively limited in number in any given conflict; (g) in a counterinsurgency, strikes that go awry and kill the wrong people, in addition to causing an obvious humanitarian harm, also impede military efforts by alienating the local population; and (h) whatever the legal niceties, targeted killing by drone seems frighteningly close to assassination.

Given the time, resources, and technology available—as well as the extreme importance of correct targeting—surely reason must demand extreme care for targeted killing by drone. The trick is to tease out more specific standards spelling out the requirements of extreme care. To try to move this conversation forward, John Radsan and I have argued in another piece that distinction in this context should require the United States to be sure of its targets beyond a reasonable doubt.³⁵ Also, to satisfy precaution, all CIA strikes should be subjected to review by the CIA's Inspector General, and the results should be made as public as reasonably consonant with national security.³⁶ Some may take issue with these suggestions for being too strong or too weak; some might have other suggestions to make. The most important point for now, however, is that targeted killing by drone demands this sort of conversation to ensure that this dangerous and quickly evolving form of warfare—which the United States initiated in response to a devastating attack by forces that remain committed to mass killing—develops proper bounds and stays within them.

35. Radsan & Murphy, *supra* note 13, at 28.

36. *Id.*