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# Responses to the Ten Questions

Jordan J. Paust

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## RESPONSES TO THE TEN QUESTIONS

Jordan J. Paust<sup>†</sup>

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

#### Editor's Note

In September 2010, the National Security Forum at William Mitchell College of Law held its third annual National Security Retreat. Among the participants were Eric Schmitt (New York Times), Mary Ellen O'Connell (Notre Dame), and Hina Shamsi (NYU/UN). The participants debated several questions posed by Professor A. John Radsan. Professor Paust provided his written answers to those questions as a response to Question #3.

#### ARMED DRONES: RESPONDING TO PROFESSOR RADSAN'S QUESTIONS

Professor John Radsan raised some interesting questions for discussion during the National Security Retreat at William Mitchell College of Law last September. This essay provides brief responses to the questions. Professor Radsan's first question asked what is the best legal foundation for an American targeted-killing program—self-defense, armed conflict, a hybrid model? In my opinion, the best legal foundation either outside the context of war or during war is Article 51 of the United Nations Charter and what I term the self-defense paradigm. During armed conflict, a hybrid approach is also appropriate, using self-defense under the Charter as well as relevant laws of war. Professor Radsan's second question was whether it is legal for any U.S. agency to use armed UAVs in Pakistan without the Pakistani government's public approval. I do not agree that any U.S. agency can or should use UAVs, but I agree that the President, as commander in chief, DOD, U.S. military personnel, and CIA operatives could lawfully use armed UAVs in

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<sup>†</sup> Mike & Teresa Baker Law Center Professor, University of Houston.

Pakistan without Pakistani consent.

My recent article on self-defense targetings of non-State actors and permissibility of use of drones in Pakistan<sup>1</sup> demonstrates that using measures of self-defense against armed attacks by non-state actors is permissible under Article 51 of the United Nations Charter and relevant customary international law, even though the direct effects of responsive force against the non-state actors will most often occur in a foreign country.<sup>2</sup> The article also argues that nothing in Article 51 of the Charter or in general patterns of pre- and post-Charter state practice and *opinio juris* requires special express consent of the state from which non-state actor armed attacks emanate and on whose territory a self-defense action takes place against the non-state actor.<sup>3</sup> Additionally, it would be demonstrably incorrect to claim that a state has no right to defend itself outside its own territory absent (1) express foreign state consent, (2) attribution or imputation of non-state actor attacks to the foreign state when the foreign state is in control of non-state actor attacks, or (3) the existence of a relevant international or non-international armed conflict.<sup>4</sup>

My article also notes that the self-defense paradigm is different from both a mere law-of-war or law-enforcement paradigm,<sup>5</sup> and self-defense targetings and captures can occur with respect to those who are direct participants in armed attacks (DPAA) whether or not an armed conflict exists that would also allow the targeting and capture of persons who are combatants,<sup>6</sup> civilians who are direct participants in hostilities (DPH),<sup>7</sup> or civilians who are unprivileged fighters engaged in a continuous combat function.<sup>8</sup>

With respect to the war in Afghanistan and the targeting and capture of leaders and other members of al Qaeda and the Taliban in parts of Pakistan, few would disagree with the recognition that the *de facto* theater of war has expanded to include parts of Pakistan.<sup>9</sup> As noted in my article, there is a porous border between

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1. 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), available at <http://ssrn.com/abstract=1520717>.

2. *Id.* at 238–49, 279–80.

3. *Id.* at 249–58, 279.

4. *Id.* at 249–58, 279–80.

5. *Id.* at 258–69.

6. *Id.* at 271–73.

7. *Id.* at 275.

8. *Id.* at 279–80.

9. *Id.* at 254–55; see Ved P. Nanda, *International Law Implications of the United*

Afghanistan and Pakistan that neither country effectively controls.<sup>10</sup> For several years, quite deadly, injurious, and continuous “al Qaeda and Taliban armed attacks [have been] planned, initiated, coordinated, or directed from inside Afghanistan and Pakistan on U.S. military personnel in Afghanistan who are engaged in an international armed conflict” and the theater of war has expanded to locations where persons directly participate in hostilities. Lawful measures of self-defense can occur outside of an actual theater of war against those who are directly participating in an ongoing process of armed attacks against the United States and its embassies, military personnel, and other nationals abroad. The right of self-defense allows the targeting of persons wherever such forms of direct participation occur. Yemen is an example, since it is clear that significant armed attacks or attempted armed attacks have emanated from parts of Yemen.<sup>11</sup> My article also demonstrates why human rights law does not protect targeted persons who are not within the jurisdiction or effective control of a country engaged in self-defense or law-of-war targetings.<sup>12</sup>

Professor Radsan’s third question was whether it is legal for the CIA to be involved in targeted killing and whether such is wise. Of course, the CIA should be involved in providing needed intelligence with respect to possible targets, their location, whether civilians who are not taking a direct part in armed attacks or hostilities are nearby, and whether other options are available, such as capture in self-defense or during armed conflict.

Another issue, however, is whether CIA personnel should be flying armed drones and effectuating targetings in self-defense or during armed conflict. With respect to armed conflicts, one problem is that under the laws of war, combatant status and combatant immunity for lawful acts of war are available for members of the regular armed forces of a party to an international

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*States’ “War on Terror,”* 37 DENV. J. INT’L L. & POL’Y 513, 533 (2009) (“One could justify the targeted strikes by the US in Pakistan on the ground that the geographical region of conflict stretches from Afghanistan to Pakistan. . . . It is recommended that the Obama administration review its policy authorizing the killing of suspected terrorists outside the geographical region of armed conflict. . . . [I]f killings are sought outside the area of hostilities the ‘proportionality’ element [should] be strictly adhered to, and . . . if terrorists can be apprehended killings should be a last resort.”).

10. Paust, *supra* note 1, at 254–55.

11. See, e.g., Peter Finn & Gregg Miller, *Package Bombs More Lethal than in December 25 Attempt*, WASH. POST, Nov. 2, 2010, at A03.

12. Paust, *supra* note 1, at 264–65.

armed conflict, but are not available for CIA personnel who are not members of the regular armed forces.<sup>13</sup> This can result in possible criminal liability under relevant domestic law for murder, assault and battery, and other crimes.<sup>14</sup> It would be better for U.S. military personnel to fly the drones during an armed conflict, but an argument can be made that under general patterns of state practice and *opinio juris* it is evident that the international community tolerates killings by non-military persons who are otherwise lawfully carrying out responsive uses of force in self-defense under Article 51 of the United Nations Charter and, therefore, that they have an implied immunity for such targetings.<sup>15</sup> Another problem, however, is whether CIA lawyers are numerous enough and sufficiently well trained in relevant international law to provide rigorous, competent, and immediate legal advice to CIA target selectors and drone operators. JAG officers in the military services are more clearly able to provide such advice and in recent history JAG officers and other military personnel appear to have been more accountable for their violations of international law.<sup>16</sup> Accountability and an end to impunity are important in a democracy committed to the rule of law, and the lack of accountability for serial war crimes can pose threats to our national security.<sup>17</sup>

The fourth question asked how civilian casualties can tilt the targeted-killing program into illegality. This can occur if under the overall self-defense and/or law-of-war targeting program there are violations of the principles of distinction among civilians, reasonable necessity, and proportionality that are applicable under the self-defense paradigm or the law-of-war paradigm.<sup>18</sup> Under

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13. *Id.* at 277–78; Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing* (forthcoming 2011) (manuscript at 7), available at <http://ssrn.com/abstract=1625829>.

14. Paust, *supra* note 1, at 277–78.

15. *See id.* at 278–80.

16. *See* Jordan J. Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TUL. J. INT'L & COMP. L. 151, 151–54, 161 (2010), available at <http://ssrn.com/abstract=1569764>; Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1546 (2009), available at <http://ssrn.com/abstract=1331159>. *Cf.* Radsan & Murphy, *supra* note 13, at 20–23, 28, 32, 36 (noting a six-step U.S. military decisional and review process and suggesting criteria and concerns with respect to lawful CIA roles and decision-making).

17. *See* Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5201–04 (2009).

18. *See* Paust, *supra* note 1, at 270–72, 274–77; Radsan & Murphy, *supra* note

international law, there must not be indiscriminate use of force<sup>19</sup> and there must not be unnecessary death, injury, or suffering.<sup>20</sup> One must also generally distinguish between ordinary civilians who are not targetable and those who are targetable because they are DPAA or DPH, or because they are engaged in a continuous combat function during an armed conflict.<sup>21</sup> If these principles are being followed generally but there are errant violations in particular instances, the overall program would not be tainted with the illegality that attaches to particular targetings that are unlawful. Application of the general principles must be made in connection with actual features of context and by taking into account the value of the target; timing; proximity to and the number of other persons who are not targetable; the precision in targeting that can be obtained; fore-seeable consequences with respect to civilian death, injury, and suffering; and so forth.

The final question asked what the Obama administration should do to improve the program. Two adjustments would improve the legal underpinnings of the program. First, it would be more advisable to use members of the regular armed forces for final target selection and targetings by drone, with real-time advice from JAG officers. Second, there should be constant assurance at all levels that relevant international legal principles guide decisions—as Harold Koh, legal adviser to the Secretary of State, has averred:

Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality . . . are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.<sup>22</sup>

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13, at 7.

19. Paust, *supra* note 1, at 270.

20. *Id.* at 270 n.87.

21. *Id.* at 272 n.90; *see also id.* at 275–77.

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