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Challenging the Legality of the U.S. Targeted Killing Program

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Introduction

“[I]n all of our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban, and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law...[I]t is the considered view of this Administration...that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”

Harold Koh, U.S. Department of State Legal Advisor.¹

In the aftermath of the attacks of September 11, 2001, the United States entered into a conflict with al-Qaeda and the Taliban in Afghanistan.² The Bush administration began using unmanned aerial vehicles, more commonly known as “drones,” in this global war on terror in 2002.³ President Obama has escalated the use of drones in U.S. overseas military operations against al-Qaeda,⁴ reportedly authorizing over five times the amount of strikes than his predecessor.⁵ While some targeted killings are being carried out in the context of the wars in Afghanistan and Iraq, many have also allegedly occurred in

¹ Harold Koh, Legal Advisor, U.S. Dep’t of State, Keynote Address at the American Society for International Law Annual Meeting: The Obama Administration and International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

² Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, 10 J. Int’l Bus. & L. 1, 1 (2011).

³ *Id.* The CIA allegedly conducted its first targeted killing by use of a drone in February 2002 in Afghanistan, where the strike killed three men near a former mujahedeen base. Int’l Human Rights & Conflict Resolution Clinic (Stanford Law School) & Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan* (Sept. 2012), available at <http://livingunderdrones.org> at 10. Other scholars report that the first known use of a drone to kill was earlier, in November 2001, to kill Mohamed Atef, an al-Qaeda leader, near his home in Kabul. Mary Ellen O’Connell, *Remarks: The Resort to Drones Under International Law*, 39 Denv. J. Int’l L. & Pol’y 585, 587.

⁴ In 2009, the Obama administration abandoned use of the term “global war on terror” to describe the United States’ military operations against al-Qaeda and other armed groups, instead preferring “overseas contingency operation.” Scott Wilson & Al Kamen, *‘Global War on Terror’ is Given New Name*, Washington Post (March 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

⁵ According to the New America Foundation, by the time President Bush left office in January 2009, the U.S. had carried out at least 45 drone strikes in Pakistan. *Living Under Drones*, *supra* note 3, at 12.

Yemen, Somalia, Pakistan, Sudan, and the Philippines.⁶ The majority of casualties resulting from U.S. targeted killing have taken place in Pakistan,⁷ where the New America Foundation reports that 337 CIA⁸ drone strikes have killed an estimated 1,932-3,176 people since 2004, of which the average non-militant casualty rate from 2004 to 2012 is 18-23 percent.⁹ The Bureau of Investigative Journalism has reported that between 474 and 881 of the Pakistani victims of drone strikes during this period were civilians, and that 176 were children.¹⁰

The U.S. targeted killing program has particularly strained political relations between the United States and Pakistan, and resulted in heated public debate about the legality of drone strikes under both international and U.S. domestic law. This paper examines the arguments supporting and denouncing the legality of American drone strikes and discusses ongoing litigation to challenge targeted killings in courts. In Part I, I give an overview of the debate surrounding whether the U.S. targeted killing program is legal according to international humanitarian law, international human rights law, and U.S. domestic law. Part II discusses drones litigation in American courts, analyzing

⁶ Complaint at 2, *Al-Aulaqi v. Panetta*, No. 01192 (D.D.C. July 18, 2012), available at http://www.aclu.org/files/assets/tk_complaint_to_file.pdf.

⁷ Following the U.S. invasion of Afghanistan in 2001, Taliban fighters fled across the border into Pakistan and the Federally Administered Tribal Areas (FATA), on the border with Afghanistan. U.S. Predator drones monitored FATA from 2002 to 2004. The U.S. allegedly launched its first drone strike in Pakistan in June 2004 against Nek Muhammad, a Pakistani Taliban commander who reportedly announced his support for al-Qaeda two months prior. *Living Under Drones*, *supra* note 3, at 11.

⁸ The CIA has greater responsibility over drone attacks in Pakistan. *Id.* at vi. The U.S. Air Force also operates a drone program under the direction of the Joint Special Operations Command (JSOC), which targets al-Qaeda militants in various countries, including Afghanistan and Iraq. Andrew Burt & Alex Wagner, *Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program*, Fall 2012, 38 *Yale J. Int. L. Online* 1, 3; Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 *Cornell Int'l L.J.* 729, 730. JSOC and the CIA have their own target lists drawn up by independent processes and with significant overlap. *Living Under Drones*, *supra* note 3, at 14.

⁹ This data is through October 24, 2012. New America Foundation, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, available at <http://counterterrorism.newamerica.net/drones>.

¹⁰ *Living Under Drones*, *supra* note 3, at vi.

Judge Bates' opinion in *Al-Aulaqi v. Obama*, the first case filed in a federal district court challenging the inclusion of a U.S. citizen, Anwar Al-Aulaqi, on the government's drone strike "kill list." This section explains the legal barriers drones victims face in U.S. federal courts, including choosing the proper cause of action, establishing standing, and overcoming government immunities, the political question doctrine, and the states secrets privilege. Part III describes drones litigation taking place outside the United States, including in Pakistan and the United Kingdom, and discusses the possibility of challenging U.S. targeted killing in international fora.

I. Assessing the Legality of the United States Targeted Killing Program

The emerging nature of drone technology in war has left unanswered many questions regarding whether U.S. drone strikes are legal. This section examines the legality of targeted killing according to international law, which is divided into two considerations. The first is *jus ad bellum*, the concept that provides justification for a state to assert its "right to wage war."¹¹ The second is *jus in bello*, the law of war concerning "justice in war,"¹² discussing the application of international humanitarian law (IHL) to drone warfare. This analysis also gives an overview of the international humanitarian law (IHRL) and U.S. domestic legal considerations of targeted killing.

A. International Law: *Jus ad Bellum* and Self-Defense

The United Nations Charter was signed in San Francisco and entered into force on October 24, 1945 with the goal of preventing the atrocities of World War II from reoccurring. Article 2(4) of the Charter states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

¹¹ Larson & Malamud, *supra* note 2, at 2-3.

¹² *Id.* at 3.

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹³ Article 51 of the Charter states an exception to the prohibition of use of force between member states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁴

Accordingly, there are five relevant questions to assessing whether the United States targeted killing program is a legal exercise of force under international law. Is the use of force for the purposes of self-defense and not some other purpose? Is it in response to an armed attack? Is the United States taking action against the responsible party? Does its use of force follow the rules of necessity and proportionality? Has the U.S. satisfied the reporting requirement? I will address four of these questions here, and leave the necessity and proportionality considerations for the section on *jus in bello*. The final part of this section explores whether the U.S. targeted killing is permissible on the basis that host countries have consented to drone strikes on their territory.

i. Are U.S. targeted killings for the purposes of self-defense and not some other purpose?

An armed attack is only justified if it is in self-defense, and this justification cannot merely be a pretext for alternative motivations. In addition to Article 51 of the U.N. Charter, the International Court of Justice (ICJ) has recognized a state’s right to

¹³ U.N. Charter art. 2, para. 4

¹⁴ U.N. Charter, *supra*, art. 51.

self-defense as inherent under customary international law.¹⁵ In the Oil Platforms case,¹⁶ the ICJ looked to whether the United States' attack on an Iranian oil platform could reasonably have had a self-defense justification. The Court held against the United States because its attack was only tenuously related to Iran's "silkworm" missile attack on a U.S. vessel, which took place only three days prior to U.S. bombardment of the oil platform.¹⁷ If the U.S. had attacked a missile launching site, its self-defense justification may have been accepted, but attacking an oil platform suggested a pretext for destroying enemy oil production.¹⁸

Here, in the case of targeted killing, the United States has justified its use of force on al-Qaeda and related terrorist organizations on the basis of their attack on the World Trade Centers and the Pentagon on September 11, 2001. Critics of drone strikes question this justification. Among them is Christof Heyns, the current U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, who has drawn attention to whether "killings carried out in 2012 can be justified as in response to [events] in 2001."¹⁹ Other legal experts, however, press that "self-defence may continue until the [Security Council] has taken effective action rendering armed force by the victim unnecessary," and that because the Security Council has not acted to address al-Qaeda's threat to the United States, the American government can continue its military actions.²⁰

ii. Is the U.S. conducting drone strikes in response to an armed attack?

¹⁵ Orr, *supra* note 8, at 736-37.

¹⁶ The Oil Platforms (Iran v. U.S.) Case, 2003 I.C.J. 189 (Nov. 6).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Living Under Drones*, *supra* note 3, at 107.

²⁰ Orr, *supra* note 8, at 737 (quoting Italian jurist, Antonio Cassese, who was the first President of both the International Criminal Tribunal for the Former Yugoslavia and the Special Tribunal for Lebanon).

A use of force may be legal under international law only if it is in response to an armed attack. This rule has been established by various international decisions. In 1981, the U.N. Security Council passed a resolution condemning Israel's attack on Iraq's Osirak nuclear reactor in anticipation of an armed attack as a violation of the U.N. Charter because there was no "instant and overwhelming" necessity.²¹ In *Nicaragua v. United States*, the ICJ reasoned a distinction between "mere frontier incidents" and "grave forms of the use of force," in that only the latter could trigger a state's right to self-defense.²² Also, in the Oil Platforms case, the court decided an individual act of violence could be an armed attack sufficient to warrant actions in self-defense.²³

Proponents of drone strikes argue that the September 11 terrorist attacks on U.S. soil justified entering into a war against al-Qaeda, which since 1992, has conducted violence in several countries amounting to more than "mere frontier incidents."²⁴ They argue that the prolonged, large-scale hostilities by these non-state actors merit military action,²⁵ as Harold Koh underscored in stating that "as a matter of international law, the United States is in an armed conflict with al-Qaeda as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."²⁶ Critics of U.S. targeted killing argue that the sporadic and loosely-affiliated nature of al-Qaeda's violence does not rise

²¹ S.C. Res. 487, U.N. Doc. S/RES/487 (June 9, 1981). The United States voted to pass this resolution.

²² *Id.* at 737; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 93 (June 27).

²³ *Id.*; The Oil Platforms, *supra* note 16.

²⁴ Orr, *supra* note 8, at 737.

²⁵ *Id.* at 732.

²⁶ Harold Koh, *supra* note 1.

to the level of a military offensive to justify the use of force in self-defense in accordance with the U.N. Charter or the high bar set by *Nicaragua v. United States*.²⁷

Some legal experts contend that the very conception of self-defense necessarily precludes preemptive force, or anticipatory self-defense. The U.N. Special Rapporteur has offered anticipatory self-defense as a narrow exception, only to prevent an attack that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”²⁸ Proponents of targeted killing argue that customary international law has long permitted anticipatory self-defense,²⁹ and that the international community’s support for the American invasion of Afghanistan demonstrates acceptance of this right.³⁰ Publicly available information on drone strikes is scant, but known practices such as signature strikes³¹ and the inclusion of names on kill lists for extended periods of time suggest this narrow self-defense test may not be satisfied.³²

In its National Security Strategy, the United States has adopted a preemptive standard following the attacks of September 11. This standard, or the Bush Doctrine, was justified on the reasoning that traditional notions of the enemy and weaponry have changed in light of groups like al-Qaeda and terrorist threats. The Bush Doctrine is not universally accepted by any means, especially by those who argue the United States is

²⁷ *Id.* at 736.

²⁸ *Living Under Drones*, *supra* note 3, at 108.

²⁹ These scholars argue that the *Caroline* incident involved the use of force against an American ship in anticipation of its military contribution to Canadian rebels’ resistance to British rule, an example of anticipatory self-defense. Orr, *supra* note 8, at 740.

³⁰ *Id.*

³¹ In addition to “personality strikes” against named individuals, the military and the CIA have carried out “signature strikes” against unknown, suspected militants. Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. Times (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>.

³² *Living Under Drones*, *supra* note 3, at 108.

committing the crime of aggression through drone strikes.³³ In answer, targeted killing advocates argue that because U.S. conducts attacks with the intent to defend itself, it is not an aggressor.³⁴

iii. Are drone strikes against the party responsible for the attacks of September 11?

A use of force must be against only those responsible for conducting an aggressive attack against a state. In the *Oil Platforms* case, the ICJ applied a relatively high standard against the United States in holding that it failed to prove that Iran had been the responsible party for the armed attack.³⁵ In the context of targeted killing, both critics and supporters agree that while the United States began its use of force in Afghanistan on October 7, 2001 in self-defense against the attacks of September 11, this justification ended in 2002 when Hamid Karzai replaced the Taliban in governing the country.³⁶ At that point, the conflict shifted from an international armed conflict to a non-international armed conflict as the United States and its allies are fighting alongside the Afghan government to defeat al-Qaeda rebels and remnants of the Taliban regime.³⁷

There is ongoing dispute over whether the inherent right to self-defense only refers to aggression by state actors. In its case addressing the legality of the dividing wall on Palestinian territory, the ICJ limited Article 51 armed attacks to state actions.³⁸

³³ The International Criminal Court has defined aggression as the “use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council.” Int’l Criminal Court, Assembly of States Parties, *The Crime of Aggression*, Annex I, art. 8, ICC Doc. RC/Res.6 (advance version June 28, 2010). This definition is upheld in the U.N. General Assembly’s articulation in Resolution 3314. Orr, *supra* note 8, at 741.

³⁴ Orr, *supra* note 8, at 741.

³⁵ *The Oil Platforms*, *supra* note 16.

³⁶ O’Connell, *supra* note 3, at 592.

³⁷ Susan Breau & Marie Aronsson, *Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict*, 35 *Suffolk Transnat’l L. Rev.* 255, 274.

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 207, para. 139 (July 9).

Opponents of this interpretation argue that reading Article 51 in “good faith in accordance with [its] ordinary meaning” under the Vienna Convention on the Law of Treaties, its omission of a state actor requirement—which is found in Article 2(4)—suggests that the Charter does not limit acts of aggression to states only.³⁹ Furthermore, they argue, the *Caroline* case, which established the modern understanding of self-defense, itself concerned non-state hostilities.⁴⁰

iv. Is the U.S. satisfying the reporting requirement?

When a state uses force, it must report it under Article 51, typically to the U.N. Security Council. There is no evidence that the United States has reported its drone strikes pursuant to this rule.

Have host countries consented to American drone strikes?⁴¹

That a state may consent to the use of force on its territory by another state is not legally controversial.⁴² Due to unavailable public information about diplomatic agreements regarding covert targeted killing operations, it is unclear whether host countries have consented to drone strikes on their territories. Ethiopia may have requested U.S. assistance to use drones in 2006 during its intervention in Somalia, but Ethiopia has since withdrawn, failing to replace the Somali government.⁴³

In Pakistan, former Prime Minister Yusuf Raza Gilani and the Pakistan Army have made statements condemning drone attacks, and the Pakistani Parliament passed a resolution stating “continued drone attacks on the territory of Pakistan...constitute

³⁹ Orr, *supra* note 8, at 739.

⁴⁰ *Id.* at 740.

⁴¹ A related question is whether a host state is itself responsible for a threat. This question is outside the scope of this paper.

⁴² Larson & Malamud, *supra* note 2, at 11. Even if a country has not consented to incursions onto its territory, use of force may be justified under the right to self-defense. *Id.*

⁴³ O’Connell, *supra* note 3, at 588, 592.

violation of the principles of the Charter of the United Nations, international law and humanitarian norms and such drone attacks must be stopped forthwith.”⁴⁴ Supporters of targeted killing tactics in Pakistan, however, cite information released by *Wikileaks* to show the Pakistani government’s tacit support for drone strikes.⁴⁵ In addition, they argue, the ties between the United States and Pakistan are seemingly so close that the states have established “fusion centers” in Pakistan to share intelligence regarding drone strikes.⁴⁶

Considering the lively debate on both sides of the issue, whether the United States is justified under international law to have entered drone strikes on other sovereign territory is still an open question. It is unclear whether the attacks of September 11 and al-Qaeda’s alleged responsibility for the attack are adequate justifications for use of force in self defense, or if other countries have consented to drone strikes on their territory. The following section discusses the international law considerations of drone strikes as they are employed.

B. International Law: *Jus in Bello*

Assuming, arguendo, that the U.S. is justified in using force against alleged al-Qaeda militants and terrorists in sovereign states, its actions and those of its targets must still conform to *jus in bello*, governed by IHL. The relevant questions in a *jus in bello* analysis are whether there is an armed conflict, and if so, whether it falls under the laws

⁴⁴ Complaint at 3-6, *Malik Noor Khan v. Pakistan*, (Peshawar High Court May 9, 2012), *available at* http://www.reprieve.org.uk/static/downloads/2012_04_19_PUB_petition_Noor_Khan_17th_March_drone_attack_Pakistan.pdf.

⁴⁵ One *Wikileaks* cable reports a meeting held on August 21, 2008 between U.S. Ambassador to Pakistan Anne Patterson, Prime Minister Gilani, and Interior Minister Rehman Malik. The cable states, “Malik suggested we hold off alleged Predator attacks until after the Bajaur operation. The PM brushed aside Rehman’s remarks and said ‘I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it.’” *Id.* at 7.

⁴⁶ Larson & Malamud, *supra* note 2, at 13.

governing an international armed conflict (IAC) or a non-international armed conflict (NIAC). It is disputed whether IHRL also applies in the presence of an armed conflict.⁴⁷

i. Is the United States in an armed conflict with al-Qaeda?

International treaty law does not define “armed conflict,” but the International Criminal Tribunal for the Former Yugoslavia (ICTY) articulated a now-widely accepted test in the *Tadic* case examining: a) duration and intensity of the conflict, and b) organization of the armed groups involved in hostilities.⁴⁸ In *Boskoski*, the ICTY further elaborated on the second prong of this standard by considering the armed group’s “ability to carry out military operations” and its “hierarchical command structure.”⁴⁹ Furthermore, the Supreme Court of Israel’s decision on targeted killings in the West Bank and Gaza may be influential in its statement that “there is no doubt today that an armed conflict may take place between a state and groups or organizations that are not states, inter alia because of the military abilities and weapons in the possession of such organization and their willingness to use them.”⁵⁰

It is widely accepted, despite textual difficulties in both Common Article 2 and 3, that if an armed conflict exists between the U.S. and al-Qaeda, it should be classified as a NIAC.⁵¹ Al-Qaeda is not a “high contracting party” within the definition of Article 2 of

⁴⁷ Whether IHRL applies to its conflict with al-Qaeda (on the territory of other states) is contested by the United States, which has supported the view that IHRL applies to subjects only within its territory and jurisdiction, interpreting ICCPR Article 2(1) literally (requiring a state to protect the human rights of persons “within its territory and jurisdiction”) instead of the U.N. Human Rights Committee’s reading the “and” as an “or.”

⁴⁸ Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

⁴⁹ *Id.* at 743. Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, at 78-93 (Int’l Crim. Trib. For the Former Yugoslavia July 10, 2008).

⁵⁰ Robert P. Barnridge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. Int’l L.J. 409, 425. H CJ 769/02 Public Committee Against Torture v. Government of Israel, 11 (2006) [commonly known as the PCATI case].

⁵¹ As stated above, the U.S. war in Afghanistan was initially seen as an IAC while the Taliban was in power, but is now classified as a NIAC. See page 5.

the Fourth Geneva Convention,⁵² so that Convention and Additional Protocol I, concerning IACs, arguably do not apply to its conflict with the United States.⁵³ However, Common Article 3, protecting “persons taking no active part in the hostilities,” would apply “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” i.e., a NIAC.⁵⁴

Whether a NIAC exists between the United States and all the groups it targets with its drone strikes, including Al-Qaeda in the Arabian Peninsula (AQAP), the Haqqani Network, and the Tehrik-i-Taliban, is a hotly debated issue. The United States Supreme Court in *Hamdan v. Rumsfeld* held that a NIAC exists between the United States and al-Qaeda and its associated forces.⁵⁵ However, legal scholars argue that the Supreme Court does not have the authority to unilaterally determine whether the U.S. is in a NIAC with al-Qaeda as a matter of IHL, and that the correct test is under the ICTY’s *Tadic* decision.⁵⁶ These scholars posit that al-Qaeda’s violence is not “sufficiently protracted and intense to qualify as a global NIAC” and that it is “highly unlikely that al-Qaeda qualifies as an organized armed group.”⁵⁷ The conflict could instead be considered as localized NIACs between the U.S. and specific al-Qaeda groups operating in Afghanistan and Pakistan.⁵⁸ This view accepts a status, rather than territorial, definition of a participant in an armed conflict such that, for example, the question is not whether the

⁵² “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

⁵³ The other Geneva Conventions provisions over the conduct of hostilities at land, sea, treatment of prisoners of war are arguably irrelevant to the discussion of legality of drone strikes. Orr, *supra* note 8, at 744.

⁵⁴ Geneva Convention, *supra* note 52, article 3.

⁵⁵ *Hamdan v. Rumsfeld*, 548 U.S. 547 (2006).

⁵⁶ John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. Pa. L. Rev. PENnumbra 175, 196-97 (2011). *Tadic* is the accepted standard of a NIAC in the Rome Statute, which the U.S. is not a party to.

⁵⁷ *Id.* at 197-98.

⁵⁸ *Id.* at 198.

U.S. is in an armed conflict with AQAP in Yemen, or whether AQAP is connected to the NIACs in Afghanistan and Pakistan, but simply whether AQAP is sufficiently associated with al-Qaeda.⁵⁹

Other scholars argue that a NIAC clearly exists, both due to the Supreme Court's decision in *Hamdan* and because al-Qaeda has attacked numerous locations, demonstrating that it can a) carry out military operations, and because it has "bylaws" and a "command council," satisfying that it has a b) hierarchical structure.⁶⁰

ii. International Humanitarian Law

If an armed conflict does exist, the *lex specialis*, or "law governing a specific subject matter," is international humanitarian law. IHL recognizes "the non-culpable homicide of members of an opposing force during armed conflict" in accordance with the principles of distinction, proportionality, and military necessity.⁶¹

Distinction

The law of distinction requires parties to an armed conflict to treat civilians and combatants differently. Additional Protocol II mandates that "[t]he civilian population, as well as individual civilians, shall not be the object of attacks... Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in

⁵⁹ *Id.* at 191. Heller writes that while the doctrine of cobelligerency has been applied to non-state actors allegedly connected to al-Qaeda that are not listed in the Authorization for Use of Military Force (AUMF), this doctrine only applies in IACs. Others argue that Yemen has little connection to the NIACs in Afghanistan and Pakistan, so the U.S. could instead prosecute belligerents there under federal criminal law, including the War Crimes Act. Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 *Denv. J. Int'l L. & Pol'y* 101, 114 (2010).

⁶⁰ Orr, *supra* note 8, at 743. There remains, however, disagreement over whether al-Qaeda, as a non-state actor, controls territory sufficient to receive the NIAC protections of Additional Protocol II. *Id.* at 744.

⁶¹ Colonel Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 *Duke J. Comp. & Int'l L.* 281, 310 (2005).

hostilities.”⁶² Also, the protections of Common Article 3 do not apply to civilians taking part in hostile activities.⁶³

The International Committee of the Red Cross (ICRC) has listed criteria for specific acts that constitute direct participation in hostilities, including those that “adversely affect the military operations or military capacity of a party to an armed conflict” or “inflict death, injury, or destruction on persons or objects protected against direct attack.”⁶⁴ The ICRC has also made a distinction between “*temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function),”⁶⁵ which some argue points to a focus on hostile acts of a certain magnitude rather than membership in an organization.⁶⁶ One’s proximity to an active battlefield is relevant to whether they are in a “continuous combatant function” under which IHL would deprive them of protection, but this proximity is not determinative.⁶⁷ According to the ICRC, parties to a conflict must take “[a]ll feasible precautions...in determining whether a person is a civilian, and if so, whether that civilian is directly participating in hostilities.”⁶⁸

⁶² Additional Protocol II to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Non-International Armed Conflicts, June 8, 1977, art. 13(2),(3).

⁶³ *Supra* note 54.

⁶⁴ Int’l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in the Hostilities under Humanitarian Law 17 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁶⁵ *Id.* at 44-45. [emphasis original]

⁶⁶ *Living Under Drones*, *supra* note 3, at 113.

⁶⁷ Dehn & Heller, *supra* note 56, at 192.

⁶⁸ Int’l Comm. of the Red Cross, *supra* note 64, at 17. The ICRC has also stated that civilians are entitled to a presumption of non-militant status. Orr, *supra* note 8, at 749. In the Nuclear Weapons case, the ICJ forbade “weapons that are incapable of distinguishing between civilian and military targets,” but because it declined to decide that nuclear weapons are incapable of distinction, it is unlikely that drones will fall into this category. Orr, *supra* note 8, at 748.

Both critics and supporters of U.S. targeted killing recognize the difficulty of distinguishing al-Qaeda militants from the civilian populations they live amongst. In Pakistan, FATA fighters intermingle with civilians, conduct routine activities, and do not typically wear distinguishable uniforms. Drone operators often rely on informants to determine the status of a target, and the continual civilian casualties indicate how unreliable this intelligence can be.⁶⁹ Those opposed to targeted killing argue that the U.S. still must distinguish civilians from militants, a duty they say the U.S. is not taking seriously in light of attacks on mosques, funerals, schools, rescue sites, and meetings of elders.⁷⁰ Others state that civilians taking part in hostilities or the militants themselves may be using these sites for training or planning purposes, making them targetable sites.

Proportionality

International law does not forbid all civilian casualties, but requires that military operations avoid civilian deaths that are excessive in relation to military need.⁷¹ Proportionality of military attacks is a fact-based consideration that can include the proximity of weapons to targets, the chronology of events, the professionalism of parties to the conflict, and inaccuracies in intelligence.⁷² Due to the covert nature of U.S. targeted killing, it is difficult to assess whether drone strikes have been a proportional response to the perceived threat from al-Qaeda militants. Some argue that the facts that are available show a relatively low civilian casualty rate.⁷³ However, the Obama

⁶⁹ Orr, *supra*, at 749. Further complicating matters, Al-Qaeda operatives also allegedly use a tactic called “human shielding,” in which they hide among civilian populations. Where civilians who are not directly participating in hostilities refuse to leave the vicinity of al-Qaeda fighters, the question of their status becomes more complex. *Id.*

⁷⁰ *Living Under Drones*, *supra* note 3, at 114. The short time between first and second strikes at rescue sites also raises questions about how a person’s combatant status could be properly determined. *Id.* at 115.

⁷¹ Orr, *supra* note 8, at 748.

⁷² Orr, *supra*, at 747.

⁷³ *Id.*

administration's approach to counting "all military-age males in a strike zone as combatants...unless there is explicit intelligence posthumously proving them innocent"⁷⁴ raises questions about the "exceedingly rare"⁷⁵ civilian casualties as a result of drone strikes.⁷⁶

Military Necessity

The principle of military necessity requires that a state employ only the force necessary to reach an achievable military goal. Targeted killing cannot be used as a reprisal for an earlier strike or to "settle a political score."⁷⁷ Drone strikes must be to prevent genuine al-Qaeda attacks against a military threat that will damage the U.S. war-making capabilities, and these attacks must be likely to occur.⁷⁸ The secrecy of the U.S. drone program has not allowed adequate analysis of whether strikes are a military necessity, or who makes the decision that a strike is necessary, but under current understanding from White House leaks, President Obama "approves the criteria for [kill] lists and signs off on drone strikes outside Pakistan, where decisions on when to fire are made by the director of the CIA."⁷⁹ Some scholars posit that the JAG Corps and military

⁷⁴ 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&_r=0.

⁷⁵ John Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Woodrow Wilson International Center for Scholars (April 30, 2012), transcript available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

⁷⁶ The IHL principle of humanity is stated in Article 22 of the Hague Convention IV, which affirms that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Vogel, *supra* note 59, at 127. Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 art. 22. Article 23 of Hague IV prohibits use of force "calculated to cause unnecessary suffering." *Id.* at art. 23. While there is no evidence that drones cause more suffering than other forms of force, the Obama administration has been criticized for abandoning Bush era detention and torture policies only to expand targeted killing, which takes no prisoners.

⁷⁷ Mike Dreyfuss, *My Fellow Americans, We are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 Vand. L. Rev. 249, 288 (2012).

⁷⁸ *Id.*

⁷⁹ Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intent to Keep Adding Names to Kill Lists*, Washington Post (Oct. 23, 2012), <http://www.washingtonpost.com/world/national-security/plan-for->

commanders should be the primary decision makers to determine the feasibility of attacks, if they are not already in that position.⁸⁰ Decisions instead left more to the commanders' discretion would come under the oversight process of the JAG Corps, who could decide whether a drone strike is necessary and proportionate, which could, supporters of this position argue, be a better solution than the current executive process which is largely without judicial review, as discussed in Part II.⁸¹

iii. International Human Rights Law

If an armed conflict does not exist between the United States and al-Qaeda and IHL does not apply, the United States may still need to comply with IHRL, which some argue applies in all contexts.⁸² IHRL seeks to protect rights that are universal and inalienable in all persons by virtue of their humanity.⁸³ This body of law is based on the “inherent right to life”⁸⁴ and permits a state “to kill a person not in custody only if necessary to prevent him from posing a threat of death or serious injury to others.”⁸⁵ The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary killing, arguably even during an armed conflict, and forbids punitive or deterrent killing of terrorists.⁸⁶ These prohibitions are non-derogable.⁸⁷ Instead of legitimate uses of force under IHL, IHRL allows for a law enforcement model with due process rights in response

hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html

⁸⁰ Dreyfuss, *supra* note 77. See Becker & Shane, *supra* note 74.

⁸¹ *Id.*

⁸² The United States' position is that IHRL does not apply to those outside of its territory and jurisdiction. See *supra* note 47.

⁸³ Carla Crandall, *Ready...Fire...Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 Fla. J. Int'l L. 55, 66 (2012).

⁸⁴ International Covenant on Civil and Political Rights [hereinafter ICCPR] art. 6(1), Dec. 19, 1966, 999 U.N.T.S. 171.

⁸⁵ Crandall, *supra* note 83.

⁸⁶ Orr, *supra* note 8, at 745; ICCPR, *supra* note 84, art. 2(1), 4.

⁸⁷ Orr, *supra* note 8, at 745.

to terrorism⁸⁸ and permits force only when necessary to protect against a threat to life where there are “no other means, such as non-lethal incapacitation, or preventing that threat to life.”⁸⁹

Those who are opposed to U.S. targeted killing argue that while some strikes may qualify as efforts to prevent a serious and imminent threat, many are targeted based on prior conduct.⁹⁰ Unless these individuals pose a serious and imminent threat, attacking them may constitute an arbitrary deprivation of life under IHRL.⁹¹ Also, the nature of drone strikes makes it impossible to capture and prosecute a target, which is the proper mode of action under human rights law. Supporters of strikes argue that targeted drone strikes are far from arbitrary and aim to disrupt future attacks on the U.S., rather than punish or deter military activity, as prohibited under the ICCPR.⁹²

Arguments on both sides demonstrate how the United States may or may not be violating international humanitarian law in targeted killings, depending on whether or not it is legally in an armed conflict with al-Qaeda. The following section discusses the legality of drone strikes outside of international law, within the American legal system.

C. U.S. Domestic Law

In addition to conforming to international laws of armed conflict and human rights, U.S. military action must comply with domestic law. If there is no armed conflict

⁸⁸ *Id.*

⁸⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, Human Rights Council, UN doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), at par. 33.

⁹⁰ Crandall, *supra* note 83, at 67.

⁹¹ *Id.*

⁹² Orr, *supra* note 8, at 745. Critics counter by pointing to other provisions under the ICCPR that targeted killing operations may violate, including “Article 7 (prohibition on cruel, inhumane, and degrading treatment or punishment), Article 9.1 (right to liberty and security), Article 17 (right to freedom from arbitrary or unlawful interference with privacy, family, and home), Article 21 (right to peaceful assembly), and Article 22 (right to freedom of association).” *Living Under Drones*, *supra* note 3, at 118. The high civilian casualties as a result of signature strikes, attacks on first responders and funerals, the Obama administration’s definition of a “militant,” and the practice of surveillance and presence on a list before killing may contravene many of these rights. *Id.* at 117-18.

and IHL does not apply, and the U.S. prevails in its assertion that IHRL only applies to those within its territory *and* jurisdiction,⁹³ U.S. domestic law still applies. There are three areas of domestic law of concern with regard to targeted killing: Congressional authorization, the prohibition on assassination, and the protections of the U.S. Constitution.

i. Authorization for Use of Military Force

Under Article II of the Constitution, the U.S. President has considerable powers as Commander-in-Chief in areas of national security and the use of force. Congress, however, retains authority to declare war under Article I, but when the legislative and executive branches act in concert, the President has the most expansive authority to act.⁹⁴ The primary legislative authority to conduct drone strikes stems from the Authorization for Use of Military Force (AUMF),⁹⁵ in which Congress permitted the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁹⁶ Legal scholars who do not support drone strikes point to the plain language of the AUMF, which appears to authorize the use of force only against those connected with the terrorist attacks of September 11, and “not *any* ‘associated forces’ who may subsequently allegedly join with [al-Qaeda].”⁹⁷ This draws into question groups like the Haqqani Network and

⁹³ See note 87.

⁹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”).

⁹⁵ The National Security Act of 1947 also applies. 50 U.S.C. § 41b. Orr, *supra* note 8, at 732.

⁹⁶ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *Living Under Drones*, *supra* note 3, at 118-19. The National Defense Authorization Act of 2012 affirms the President’s power to detain forces “associated” with al-Qaeda and the Taliban and notes that “nothing in this section is intended to limit or expand...the scope of the Authorization for Use of Military Force.” *Id.*

⁹⁷ *Living Under Drones*, *supra*, at 120. 50 U.S.C. § 413b(a) (2006).

Tehrik-i-Taliban which are currently targeted by drone strikes, but unlike al-Qaeda and the Taliban, are not expressly listed in the AUMF.⁹⁸

ii. Executive Order 11905 Prohibition on Assassination

The U.S. President has the authority under Title 50 to authorize the CIA to conduct operations beyond the limits of Congressional authorization so long as the action does not conflict with other domestic law.⁹⁹ Accepting this authority, many argue that because the U.S. targeted killing program is secret, individual strikes could constitute instances of extrajudicial assassination, which was prohibited in an executive order issued by President Gerald Ford in 1976.¹⁰⁰ It has been presented, however, that targeted killing and assassination are similar but distinct concepts in that the former is a military tactic while the latter is politically motivated subterfuge.¹⁰¹ President Ford's executive ban on assassinations is argued to have defined the term narrowly,¹⁰² which may mean targeted killings fall outside its intended meaning.

iii. U.S. Constitution

If U.S. citizens are targeted in drone strikes, constitutional protections including substantive and procedural due process apply.¹⁰³ In 2002, Ahmed Hijazi, an American

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Exec. Order No. 11905, 41 Fed. Reg. 7703 (Feb. 18, 1976). All U.S. presidents have accepted this order, but at least two presidents may have relied on classified memoranda to decide that the order “does not prevent the president from lawfully singling out a terrorist for death by covert action.” *Living Under Drones*, *supra* note 3, at 120.

¹⁰¹ Dreyfuss, *supra* note 77, at 254.

¹⁰² Orr, *supra* note 8, at 732. Both Presidents Jimmy Carter and Ronald Reagan's executive orders dropped “political” as a modifier to “assassination,” which may mean apolitical assassination was also included in the later iterations of the ban on assassination or that the modifier was redundant. Dreyfuss, *supra*, at 255-56.

¹⁰³ Constitutional process to U.S. citizens that are declared to be enemies of the state may be different from ordinary citizens, regardless of territorial considerations. The New York Times has received access to the Justice Department memorandum that authorized Anwar Al-Aulaqi's targeted killing. The memo “concluded that what was reasonable, and the [constitutional] process that was due, was different for Mr. Awlaki than for an ordinary criminal. It cited court cases allowing American citizens who had joined an

citizen, was killed in a U.S. Predator drone strike aimed at a car in Yemen, which killed six men who were all suspected al-Qaeda militants.¹⁰⁴ Anwar Al-Aulaqi, an individual allegedly affiliated with AQAP who inspired the Fort Hood and 2009 underwear bombings, his 16-year-old son Abdulrahman Al-Aulaqi, and Samir Khan, also allegedly connected to AQAP, are all U.S. citizens who were killed in U.S. drone strikes in Yemen in the past two years.¹⁰⁵ In his dissent in *Hamdi v. Rumsfeld*, Justice Thomas referred to the 2002 drone strike in Yemen and suggested that the plurality's decision that U.S. citizens detained by the government have the right to notice and an opportunity to challenge their status, if taken to the extreme, "would seem to require notice and opportunity to respond" "to potential targets."¹⁰⁶ While Justice Thomas was not advocating for targets of drone strikes to receive this process, some scholars have asserted that due process principles also apply in the context of targeted killing.¹⁰⁷ The constitutional protections that may be asserted in the event of government killing of a U.S. citizen by drone strike include Fourth Amendment seizure of life, Fifth Amendment right not to be deprived of life without due process, Sixth Amendment right to a fair trial, Eighth Amendment protections against cruel and unusual punishment.¹⁰⁸

enemy's forces to be detained or prosecuted in a military court just like noncitizen enemies... The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible." Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>.

¹⁰⁴ Abraham U. Kannon, *Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar Al-Aulaqi*, 25 *Emory Int'l L. Rev.* 1371, 1372 (2011). The targeted individual, however, was Abu Ali Qaed Senyan al-Harithi, an al-Qaeda leader who was allegedly responsible for the USS Cole bombing. *Id.*

¹⁰⁵ The inclusion of Anwar Al-Aulaqi's name on the Obama administration's kill list is the first known time in the U.S. conflict with al-Qaeda that an American citizen has been specifically targeted. *Id.*

¹⁰⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 597 (2004) (Thomas, J. dissenting).

¹⁰⁷ Crandall, *supra* note 83, at 83.

¹⁰⁸ *See generally* Dreyfuss, *supra* note 77, at 274-87.

The legality of the United States' war with al-Qaeda and affiliated groups, as well as its employment of unmanned aerial vehicles to kill suspected militants under international and domestic law is a fiercely debated issue. The newness of drones in warfare and multi-layered nature of the law of war has compounded the complexity on both sides of this issue.

II. Challenging the Legality of Drone Strikes in American Courts

Considering the heated debate over whether U.S. targeted killing is legal, human rights organizations have represented drones victims in U.S. federal courts to challenge the government's drone policy. Two cases have been filed to date, both surrounding Anwar Al-Aulaqi, who was killed in a drone strike on September 30, 2011.¹⁰⁹ The first lawsuit, *Al-Aulaqi v. Obama*, challenged the government's addition of Al-Aulaqi's name to its drone kill list, as reported by the Washington Post in April 2010,¹¹⁰ in violation of the cleric's Fourth and Fifth Amendment rights, as well as international law.¹¹¹ Nasser Al-Aulaqi, Anwar Al-Aulaqi's father, was represented by lawyers from the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) in seeking to enjoin and declare unlawful¹¹² the prospective attack against his son.¹¹³ According to Jameel Jaffer, lead counsel to plaintiffs in the case, "the central proposition of the ACLU's legal challenge was that the courts have a role to play in articulating the

¹⁰⁹ Complaint at 2, *Al-Aulaqi v. Panetta*, *supra* note 6.

¹¹⁰ Greg Miller, *Muslim Cleric Al-Aulaqi is 1st U.S. Citizen on List of Those CIA is Allowed to Kill*, Washington Post (April 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html>.

¹¹¹ Complaint at 9-10, *Al-Aulaqi v. Obama*, No. 01469 (D.D.C. Aug. 30, 2010), *available at* http://www.aclu.org/files/assets/alaulaqui_v_obama_complaint_0.pdf.

¹¹² The Prayer for Relief sought declarations "that, outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son" "except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety" and "in which they present concrete, specific, and imminent threats to life or physical safety," and "there are no means other than lethal force that could reasonably be employed to neutralize the threats." Complaint at 11, *Al-Aulaqi v. Obama*, *supra* note 111.

¹¹³ Richard D. Rosen, *Drones and the U.S. Courts*, 37 Wm. Mitchell L. Rev. 5280, 5281 (2011).

standards under which lethal force is used and in ensuring that the government actually complies with those standards.”¹¹⁴ Judge Bates granted the government’s motion to dismiss primarily over issues of standing and the political question doctrine.¹¹⁵ The second case, *Al-Aulaqi v. Panetta*, filed after Al-Aulaqi’s death, is a wrongful death action for damages on behalf of his and Samir Khan’s estates, and is still ongoing litigation.¹¹⁶

In dismissing the plaintiff’s action on procedural grounds, Judge Bates’ decision in *Al-Aulaqi v. Obama* has been criticized for foreclosing judicial review of executive targeted killing decisions “while claiming it does no such thing.”¹¹⁷ Various legal scholars have argued that the decision allows for “nearly unbounded”¹¹⁸ executive power, and does not take into consideration that federal court jurisdiction has extended to war measures in several cases concerning the war on terror.¹¹⁹ These experts argue that *Hamdan* and *Boumediene* demonstrate how American due process does not necessitate full-scale criminal proceedings when the circumstances of war require less.¹²⁰ However,

¹¹⁴ Jameel Jaffer, *Targeted Killing and the Court: A Response to Alan Dershowitz*, 37 Wm. Mitchell L. Rev. 5315, 5317 (2011).

¹¹⁵ See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (2010).

¹¹⁶ The plaintiffs have filed their complaint and as of this writing, are awaiting the government’s reply. This suit was also filed by ACLU and CCR attorneys on behalf of Nasser Al-Aulaqi, as well as Sarah Khan, Samir Khan’s mother. See <http://www.aclu.org/national-security/al-aulaqi-v-panetta> for the most up-to-date information.

¹¹⁷ Dehn & Heller, *supra* note 56, at 175. The court stated in its opinion that “[c]ontrary to plaintiff’s assertion, in holding that the political question doctrine bars plaintiff’s claims, this Court does not hold that the Executive possesses “unreviewable authority to order the assassination of any American whom he labels an enemy of the state.” Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an “operational” member of AQAP, presents such a threat to national security that the United States may authorize the use of lethal force against him. *Al-Aulaqi v. Obama*, *supra* note 121, at 52 [internal citations omitted].

¹¹⁸ Dehn & Heller, *supra* note 56, at 175.

¹¹⁹ These cases have generally addressed the due process rights of terrorism suspects. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality invoking the Due Process Clause to decide whether an American citizen could be detained as an enemy combatant); *Boumediene v. Bush*, 533 U.S. 723 (2008) (holding that Guantanamo Bay prisoners have a right to habeas corpus in federal courts).

¹²⁰ Crandall, *supra* note 83, at 81. See note 127.

others posit that any form of due process is a judicial obstacle that could hinder national security, especially because courts lack the competence to rule on military decisions.¹²¹

Judge Bates' decision demonstrates the likely obstacles plaintiffs in *Al-Aulaqi v. Panetta* and other targeted killing litigation may face in U.S. federal courts. These obstacles include: choosing the proper cause of action, establishing standing, and overcoming government immunities, the political question doctrine, and the states secrets privilege. The following is an explanation of each of these legal barriers for drones plaintiffs.

Cause of Action

Like their predecessors in *Al-Aulaqi v. Obama* and *Al-Aulaqi v. Panetta*, future drones plaintiffs may sue federal officials in their individual capacities for damages alleging a common law tort, a violation of international law, or a constitutional violation.¹²²

Both *Al-Aulaqi v. Obama* and *Al-Aulaqi v. Panetta* were filed as *Bivens* actions, a judicially created cause of action allowing for those whose constitutional rights¹²³ have been violated to sue a government official acting under the color of federal law for damages.¹²⁴ Two problems arise with *Bivens* actions in targeted killing suits. First, non-citizen victims of overseas attacks do not have constitutional rights.¹²⁵ Second, the Supreme Court has recognized limits on *Bivens* remedies in the form of "special factors"

¹²¹ Richard Murphy & Afsheen John Radsan, *Due Process and the Targeted Killing of Terrorists*, 31 *Cardozo L. Rev.* 405, 438 (2009).

¹²² Richard D. Rosen, *Drones and the U.S. Courts*, 37 *Wm. Mitchell. L. Rev.* 5280, 5288 (2011).

¹²³ Targeted killing may constitute a violation of the Fifth Amendment "shocks the conscience" standard or the Fourth Amendment excessive force protection. Murphy & Radsan, *supra* note 121, at 440.

¹²⁴ Sheldon H. Nahmod, Michael L. Wells, & Thomas A. Eaton, *Constitutional Torts* 22, 3d ed. 2010.

¹²⁵ Rosen, *supra* note 122, at 5289. While *Boumediene* held that the Suspension Clause extends to alien detainees at Guantanamo Bay, out side of the U.S.'s de facto sovereignty, the narrow decision did not state that habeas corpus reaches beyond Guantanamo or affect any other constitutional provisions. *Id.* at 5290.

that give cause for hesitation in providing the remedy without affirmative congressional action.¹²⁶ Among the recognized special factors, lower courts have refused to award *Bivens* remedies against “military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.”¹²⁷

Another possible cause of action for victims of targeted killing is the Federal Employees Liability Reform and Tort Compensation Act of 1988, which provides remedies for tort claims against federal officials acting within the scope of their employment.¹²⁸ This law, also known as the Westfall Act, excepts claims for violations of the Constitution and those brought under a separate statute that allows one to sue the federal official; common law torts and violations of international law—for example, under the Alien Tort Statute—can proceed.¹²⁹

Government Immunities

If a plaintiff chooses a viable cause of action, two government immunities are likely to come into play against their favor in U.S. drones litigation: qualified immunity and sovereign immunity.

Even if a *Bivens* remedy is recognized by the court, victims of drones attacks will need to overcome qualified immunity, the lowest form of immunity that all public officials enjoy from constitutional tort claims.¹³⁰ Qualified immunity protects government officials from liability for civil damages so long as their conduct does not violate “clearly established law” that a reasonable person would have known.¹³¹ Because

¹²⁶ *Id.* at 5291. The Court has also been reluctant to extend *Bivens* remedies to new contexts. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹²⁷ *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

¹²⁸ Rosen, *supra* note 122, at 5288.

¹²⁹ *Id.* at 5288-89.

¹³⁰ *Id.* at 5291.

¹³¹ *Pearson v. Callahan*, 555 U.S. 223 (2009).

most targeted killing victims are foreign nationals who are not entitled to constitutional protections, until their rights are clearly established, federal officials will be immune from most potential *Bivens* suits from drone attacks.¹³² In addition, defendants could reasonably claim that they had authority under established laws of war, and where these military judgments are unclear, the court would likely defer to the executive.¹³³ Judge Bates did not reach the issue of qualified immunity in *Al-Aulaqi v. Obama*.

Also, in the United States, the federal government may not be sued unless it has waived sovereign immunity or consented to suit. If a plaintiff seeks damages for personal injury or property damages from the government, they must show that Congress has waived the government's sovereign immunity for such claims.¹³⁴ The two principal statutes that allow for waivers of sovereign immunity from damages are the Federal Tort Claims Act (FTCA) and the Tucker Act, but neither provides a basis for monetary compensation for drones victims.¹³⁵ Furthermore, it will be difficult for non-citizen drone survivor or next of friend to bring a suit under the Westfall Act even by means of the Alien Tort Statute, in which a plaintiff must be an alien, because the FTCA would bar an ATS suit against American officials, although suits against alien officials can go

¹³² Rosen, *supra* note 122, at 5291-92.

¹³³ Murphy & Radsan, *supra* note 121, at 443.

¹³⁴ *Id.* at 5286.

¹³⁵ *Id.* The FTCA allows a waiver of sovereign immunity for negligent or wrongful acts or omissions of federal employees, allowing for limited tort claims against the government. *Id.* The FTCA expressly excepts some classes of claims, including those that would probably be brought by drones victims. *Id.* It excludes claims "arising out of combat activities of the military or naval forces," in war and those based on injuries in a foreign country. 28 U.S.C. § 2680 (2006).

The Tucker Act waives sovereign immunity for non-tort money claims based on the Constitution. Rosen, *supra* note 122, at 5287. It provides possible relief for property lost by drones victims under the Fifth Amendment Takings Clause. *Id.* However, the Takings Clause is inapplicable to claims for property lost in drone attacks unless the plaintiff is a U.S. citizen or otherwise has a substantial connection to the U.S. *Id.* at 5288. In addition, courts have not recognized Takings Clause claims for property destroyed during combat operations or where they belong to the enemy. *Id.*

forward.¹³⁶ Judge Bates did not find Al-Aulaqi's arguments to overcome sovereign immunity to be persuasive.¹³⁷

Standing

Deciding the proper cause of action and overcoming government immunities are just two of the obstacles facing targeted killing plaintiffs. The principal reason why Nasser Al-Aulaqi's claim against the government failed was due to the judge's decision that he had not established standing to represent his son. To establish standing, a plaintiff must "demonstrate a concrete and particularized injury resulting from a defendant's allegedly illegal conduct."¹³⁸ An interest in a problem is insufficient for standing, so unless an organization has a client who him or herself was a target of a drone strike, those opposed to U.S. targeted killing will probably be unable to challenge this policy in federal court.¹³⁹ Representing such a client is difficult both because the Obama administration's targeted killing list is secret and because al-Qaeda members will be unwilling to turn themselves into U.S. authority in order to seek relief.¹⁴⁰ Furthermore, in the case of an anticipated attack, standing requires the harm suffered by a plaintiff to be actual or imminent, not merely speculative, and again, this information is classified.¹⁴¹

Judge Bates specifically determined that Nasser Al-Aulaqi did not have third party standing to sue on his son's behalf because a) he was unable to show that Anwar Al-Aulaqi was unable to vindicate his own rights by peaceably turning himself in, and b) because of Anwar Al-Aulaqi's apparent disinterest in seeking access to American

¹³⁶ *Id.* at 441.

¹³⁷ *Al-Aulaqi v. Obama*, *supra* note 115, at 41.

¹³⁸ Rosen, *supra* note 122, at 5282.

¹³⁹ *Id.* at 5282-83.

¹⁴⁰ *Id.* at 5283.

¹⁴¹ *Id.*

courts.¹⁴² The district court judge provided two ways Anwar Al-Aulaqi could have established standing: 1) he could have surrendered to American authorities and express a desire to assert his constitutional rights in U.S. courts, or 2) he could have remained and hiding and “[communicated] with attorneys via Internet” or videoconference.¹⁴³ Judge Bates’ solutions have been criticized as “illusory.”¹⁴⁴ First, while turning himself in would likely allow Al-Aulaqi to live, “managing to avoid assassination is not the same as challenging the government’s right to assassinate in the first place.”¹⁴⁵ Second, there is “no evidence in the record that Al-Awlaki had any direct access to videoconferencing equipment or the Internet...in the ‘remote mountains of Yemen.’”¹⁴⁶ These suggestions are thus likely untenable for potential targeted killing plaintiffs to establish standing.

Political Question Doctrine

The second reason that Al-Aulaqi’s case was dismissed was because it invited the Court to address questions reserved for the executive branch. Judge Bates cited the six factors the Supreme Court presented in *Baker v. Carr*, each of which can involve a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment

¹⁴² *Id.* at 5283-84.

¹⁴³ *Al-Aulaqi v. Obama*, *supra* note 115, at n. 4.

¹⁴⁴ Dehn & Heller, *supra* note 56, at 184.

¹⁴⁵ *Id.* at 185.

¹⁴⁶ Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 Utah L. Rev. 1203, 1257 (2011).

from multifarious pronouncements by various departments on one question.¹⁴⁷

The judge also cited to the D.C. Circuit's opinion in *El-Shifa Pharmaceutical Industries Co. v. United States*,¹⁴⁸ in holding that "the courts cannot assess the merits of the President's decision to launch an attack on a foreign target,"¹⁴⁹ even with the target is a U.S. citizen. Judge Bates' analysis has been criticized, however, because *El-Shifa* involved "a one-off use of force against a *wholly* foreign threat identified by the executive branch. It did not involve the review of the executive's prosecution of an armed conflict authorized by Congress," the latter typically not being a political question, but review of executive conduct.¹⁵⁰ Despite the conclusion that this presents "circular logic,"¹⁵¹ it is accepted that the textbook political question case is one in which plaintiffs are challenging a military or foreign policy decision constitutionally committed to Congress and the President, which implicates nearly every *Baker* factor.¹⁵² Because courts lack discoverable standards for deciding these issues, they have refused to review political questions that similar to those that may be implicated in targeted killing.¹⁵³

States Secrets Privilege

If a suit survives all the preceding barriers to challenging targeted killing in a U.S. court, the states secrets doctrine will likely be its "death knell."¹⁵⁴ The common law

¹⁴⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁴⁸ 607 F.3d (D.C. Cir. 2010), *cert denied*.

¹⁴⁹ *Al-Aulaqi v. Obama*, *supra* note 115, at 47.

¹⁵⁰ Dehn & Heller, *supra* note 56, at 180.

¹⁵¹ Judge Bates' political question determination "required the use of circular logic: the court would not adjudicate the question of whether or not the action taken by the executive was constitutional because it had determined that the executive was exercising its constitutional powers." Alford, *supra* note 146, at 1259. See also Benjamin McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 Vand. J. Transnat'l L. 1353 for further discussion on why *Al-Aulaqi v. Obama* did not present a political question.

¹⁵² Rosen, *supra* note 122, at 5284.

¹⁵³ *Id.* For a list of examples from cases implicating a political question, see *id.* at 5285.

¹⁵⁴ Rosen, *supra* note 122, at 5292.

privilege allows the government to prevent disclosure of evidence that may entail a reasonable danger of revealing national security secrets. States secrets may keep plaintiffs not only from introducing vital evidence to their case, e.g. if one has been placed on a kill list or whether a drone attack had sound basis through intelligence sources,¹⁵⁵ but could also result in dismissal of their suit altogether.¹⁵⁶ The Obama administration has remained silent about the existence of a targeted killing list, the names of those on the list, the legal and evidentiary standards by which someone is placed on the list, and any review processes that may exist.¹⁵⁷ In fact, the government has not acknowledged the existence of a drone program or whether it was responsible for the death of Anwar Al-Aulaqi. Various organizations, including the ACLU and the New York *Times*, have filed Freedom of Information Act (FOIA) requests for information on the legal basis for U.S. targeted killing, information pertaining to the training and oversight of drones operators, and data on the number of people killed in strikes.¹⁵⁸ Despite making speeches about targeted killing, selectively leaking information to media outlets, and giving a detailed account of Osama bin Laden's killing, the government has consistently cited the states secrets privilege in refusing to release FOIA documents, a position the ACLU is fighting in courts.¹⁵⁹

In light of these legal barriers, it is unlikely that those placed on targeted killing lists or families of those who have died in drone strikes will find redress for their losses

¹⁵⁵ Murphy & Radsan, *supra* note 121, at 443.

¹⁵⁶ *Id.*

¹⁵⁷ Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 Loy. U. Chi. Int'l L. Rev. 159, 169 (2011).

¹⁵⁸ American Civil Liberties Union, Targeted Killings, ACLU Litigation, <http://www.aclu.org/national-security/targeted-killings>; N.Y. Times FOIA complaint, <http://www.documentcloud.org/documents/278318-foia-targeted-killing-complaint.html>.

¹⁵⁹ *Id.*

in U.S. federal courts. However, judicial fora outside of the United States may provide venues for challenging targeted killing.

III. Challenging the Legality of Drone Strikes Outside the United States

In light of these significant challenges to questioning the legality of U.S. targeted killing in American courts, some victims of drone strikes have sought alternative judicial fora in Pakistani domestic courts and with international bodies.

The Foundation for Fundamental Rights (FFR), a Pakistani non-governmental organization led by attorney Mirza Shahzad Akbar, is representing family members of persons killed in drone strikes in the FATA region in suing the Pakistani government. Akbar has partnered with Noor Behram, a journalist born and raised in North Waziristan, located in the FATA region, where he has witnessed and documented drone strikes.¹⁶⁰ Together, they have gathered evidence for 13 petitions filed in the Islamabad Court of Sessions and the Peshawar High Court.¹⁶¹ Of the three most prominent cases, the first was a First Information Report proceeding filed in July 2011 against the Station House Officer and Superintendent of Police in Islamabad on behalf of Kareem Khan, whose son and brother were killed in a drone attack in December 2009.¹⁶² The complaint calls for the arrest of John Rizzo, former General Counsel to the CIA who would allegedly “approve a list of persons to be killed every month in Pakistan by the CIA using drones.”¹⁶³ The second two cases are constitutional complaints¹⁶⁴ filed in May 2012 on

¹⁶⁰ Amna Nawaz, *For Many Pakistanis, 'USA' Means 'Drones,'* NBC News (June 26, 2012), http://worldnews.nbcnews.com/_news/2012/06/26/12403677-for-many-pakistanis-usa-means-drones?lite.

¹⁶¹ *Id.* See also Foundation for Fundamental Rights, FFR’s Current Litigation, <http://www.rightsadvocacy.org/ffrs-current-litigation>.

¹⁶² Reprieve, *Drone Strikes Investigations*, <http://www.reprieve.org.uk/investigations/drones/>.

¹⁶³ Complaint at 3, *Khan v. Station House Officer*, available at http://www.reprieve.org.uk/static/downloads/2012_04_11_PUB_Kareem_Khan_Drones_JR_Argument.pdf

¹⁶⁴ The alleged Pakistani constitutional provisions in violation include Article 9 security of a person, Article 10A right to due process, Article 14 right to dignity of man and protection from torture, and Article 9 right

behalf of relatives and victims of a March 17, 2011 drone strike in North Waziristan where fifty people were reportedly killed.¹⁶⁵ Among its demands, these two claims call on the Pakistani government to prohibit U.S. drone strikes, provide redress for criminal offenses allegedly committed by Pakistani officials complicit in the March 17 attack, contact the U.N. Security Council for violation of its territorial sovereignty and demand a resolution to condemn targeted killing, and gather data on victims to submit to the U.N. Human Rights Council.¹⁶⁶ FFR is also preparing to represent relatives of drones victims in Britain's High Court against Britain's Foreign Secretary, William Hague, who they accuse of complicity in drones strikes that killed their family members.¹⁶⁷ FFR has written a letter to Hague asserting its claims and requesting information on "whether the UK continues to pass location or other information to the US in circumstances where that information will or might be used in directing drone attacks in Pakistan."¹⁶⁸ As these are the first challenges to U.S. targeted killing in Pakistan, it is not yet clear how successful they will be.

Critics of targeted killing are also pressuring both the United States and Pakistan to abide by the Geneva Conventions and prosecute or extradite persons who have committed "grave breaches," which includes unjustified killing or infliction of great

to life. Complaint at 7-8, *Khan v. Pakistan*, available at http://www.reprieve.org.uk/static/downloads/2012_04_19_PUB_petition_Noor_Khan_17th_March_drone_attack_Pakistan.pdf.

¹⁶⁵ Michele Langevine Leiby, *2 Pakistani Lawsuits Pressure Government to Deal with CIA Drone Strikes*, Washington Post (May 14, 2012), http://www.washingtonpost.com/world/asia_pacific/2-pakistani-lawsuits-pressure-government-to-deal-with-cia-drone-strikes/2012/05/14/gIQA9JrLPU_story.html.

¹⁶⁶ Complaint at 7-8, *Foundation for Fundamental Rights v. Pakistan*, available at http://www.reprieve.org.uk/static/downloads/2012_04_13_PUB_FFR_petition_17th_March_drone_attack_Pakistan.pdf.

¹⁶⁷ Peter Griffiths, *Hague Faces Suit over Pakistan Drone Strikes*, Reuters (March 12, 2012), <http://uk.reuters.com/article/2012/03/12/uk-britain-hague-drones-idUKBRE82A0AL20120312>.

¹⁶⁸ Leigh Day & Co., *Letter to the Foreign Secretary of the U.K (William Hague)*, (Dec. 16, 2011) available at

http://www.reprieve.org.uk/static/downloads/2011_12_16_PUB_Hague_Noor_Khan_LD_drones.pdf.

suffering.¹⁶⁹ Because the political will for such action may be lacking in both states, as well as other countries where drone strikes take place, some assert that drones victims should instead take their cases to the International Court of Justice or the International Criminal Court (ICC). The probability of bringing suit in either court is not high, however, because it is “unlikely that any party would have standing to challenge targeted killing before the International Court of Justice,”¹⁷⁰ and because “the ICC does not have jurisdiction over individual citizens of the United States unless the United States decides to grant it that jurisdiction, or the U.S. citizen is on the territory of a party to the ICC.”¹⁷¹

Conclusion

While drones litigation has not yet resulted in retrospective or prospective relief, it has heightened public debate on targeted killing and encouraged leaks of information by the Obama administration. As the wide range of scholarship and news coverage of targeted killing demonstrates, the debate over the legality of U.S. drone strikes is likely to continue, especially as drone technology advances.

¹⁶⁹ Murphy & Radsan, *supra* note 121, at 439. The U.S. has also codified this mandate in the War Crimes Act. *Id.*

¹⁷⁰ Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 Yale L.J. 1873, 1880 (2007).

¹⁷¹ Dreyfuss, *supra* note 77, at 265. Also, the United States is not party to the Rome Statute.