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### plan

The United States Federal Government should restrict the President’s war powers authority for targeted killing as a first resort outside zones of active hostilities.

### afghanistan

The plan is key to prevent an escalating public backlash against future drone use

Zenko 13 (Micah Zenko is the Douglas Dillon fellow in the Center for Preventive Action (CPA) at the Council on Foreign Relations (CFR). Previously, he worked for five years at the Harvard Kennedy School and in Washington, DC, at the Brookings Institution, Congressional Research Service, and State Department's Office of Policy Planning, Council Special Report No. 65, January 2013, “U.S. Drone Strike Policies”, i.cfr.org/content/publications/attachments/Drones\_CSR65.pdf‎)

In his Nobel Peace Prize acceptance speech, President Obama declared: “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. Even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war.”63 Under President Obama drone strikes have expanded and intensified, and they will remain a central component of U.S. counterterrorism operations for at least another decade, according to U.S. officials.64 But much as the Bush administration was compelled to reform its controversial coun- terterrorism practices, it is likely that the United States will ultimately be forced by domestic and international pressure to scale back its drone strike policies. The Obama administration can preempt this pressure by clearly articulating that the rules that govern its drone strikes, like all uses of military force, are based in the laws of armed conflict and inter- national humanitarian law; by engaging with emerging drone powers; and, most important, by matching practice with its stated policy by limiting drone strikes to those individuals it claims are being targeted (which would reduce the likelihood of civilian casualties since the total number of strikes would significantly decrease). The choice the United States faces is not between unfettered drone use and sacrificing freedom of action, but between drone policy reforms by design or drone policy reforms by default. Recent history demonstrates that domestic political pressure could severely limit drone strikes in ways that the CIA or JSOC have not anticipated. In support of its counterterrorism strategy, the Bush administration engaged in the extraordinary rendition of terrorist suspects to third countries, the use of enhanced interrogation techniques, and warrantless wiretapping. Although the Bush administration defended its policies as critical to protecting the U.S. homeland against terrorist attacks, unprecedented domestic political pressure led to significant reforms or termination. Compared to Bush-era counterterrorism policies, drone strikes are vulnerable to similar—albeit still largely untapped—moral outrage, and they are even more susceptible to political constraints because they occur in plain sight. Indeed, a negative trend in U.S. public opinion on drones is already apparent. Between February and June 2012, U.S. support for drone strikes against suspected terrorists fell from 83 per- cent to 62 percent—which represents less U.S. support than enhanced interrogation techniques maintained in the mid-2000s.65 Finally, U.S. drone strikes are also widely opposed by the citizens of important allies, emerging powers, and the local populations in states where strikes occur.66 States polled reveal overwhelming opposition to U.S. drone strikes: Greece (90 percent), Egypt (89 percent), Turkey (81 percent), Spain (76 percent), Brazil (76 percent), Japan (75 percent), and Pakistan (83 percent).67 This is significant because the United States cannot conduct drone strikes in the most critical corners of the world by itself. Drone strikes require the tacit or overt support of host states or neighbors. If such states decided not to cooperate—or to actively resist—U.S. drone strikes, their effectiveness would be immediately and sharply reduced, and the likelihood of civilian casualties would increase. This danger is not hypothetical. In 2007, the Ethiopian government terminated its U.S. military presence after public revelations that U.S. AC-130 gun- ships were launching attacks from Ethiopia into Somalia. Similarly, in late 2011, Pakistan evicted all U.S. military and intelligence drones, forc- ing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan. The United States could attempt to lessen the need for tacit host-state support by making signifi- cant investments in armed drones that can be flown off U.S. Navy ships, conducting electronic warfare or missile attacks on air defenses, allow- ing downed drones to not be recovered and potentially transferred to China or Russia, and losing access to the human intelligence networks on the ground that are critical for identifying targets. According to U.S. diplomats and military officials, active resis- tance—such as the Pakistani army shooting down U.S. armed drones— is a legitimate concern. In this case, the United States would need to either end drone sorties or escalate U.S. military involvement by attack- ing Pakistani radar and antiaircraft sites, thus increasing the likelihood of civilian casualties.68 Beyond where drone strikes currently take place, political pressure could severely limit options for new U.S. drone bases. For example, the Obama administration is debating deploying armed drones to attack al-Qaeda in the Islamic Maghreb (AQIM) in North Africa, which would likely require access to a new airbase in the region. To some extent, anger at U.S. sovereignty violations is an inevitable and necessary trade-off when conducting drone strikes. Nevertheless, in each of these cases, domestic anger would partially or fully abate if the United States modified its drone policy in the ways suggested below.

Public backlash culminates in a legal crackdown that hemorrhages the targeted killing program

Jack Goldsmith, Harvard Law School Professor, focus on national security law, presidential power, cybersecurity, and conflict of laws, Former Assistant Attorney General, Office of Legal Counsel, and Special Counsel to the Department of Defense, Hoover Institution Task Force on National Security and Law, March 2012, Power and Constraint, P. 199-201

For the GTMO Bar and its cousin NGOs and activists, however, the al-Aulaqi lawsuit, like other lawsuits on different issues, was merely an early battle in a long war over the legitimacy of U.S. targeting practices—a war that will take place not just in the United States, but in other countries as well. When the CCR failed to achieve what it viewed as adequate accountability for Bush administration officials in the United States in connection with interrogation and detention practices, it started pursuing, and continues to pursue, lawsuits and prosecutions against U.S. officials in Spain, Germany, and other European countries. "You look for every niche you can when you can take on the issues that you think are important," said Michael Ratner, explaining the CCR's strategy for pursuing lawsuits in Europe.

Clive Stafford Smith, a former CCR attorney who was instrumental in its early GTMO victories and who now leads the British advocacy organization Reprieve, is using this strategy in the targeted killing context. "There are endless ways in which the courts in Britain, the courts in America, the international Pakistani courts can get involved" in scrutinizing U.S. targeting killing practices, he argues. "It's going to be the next 'Guantanamo Bay' issue."' Working in a global network of NGO activists, Stafford Smith has begun a process in Pakistan to seek the arrest of former CIA lawyer John Rizzo in connection with drone strikes in Pakistan, and he is planning more lawsuits in the United States and elsewhere against drone operators." "The crucial court here is the court of public opinion," he said, explaining why the lawsuits are important even if he loses. His efforts are backed by a growing web of proclamations in the United Nations, foreign capitals, the press, and the academy that U.S. drone practices are unlawful. What American University law professor Ken Anderson has described as the "international legal-media-academic-NGO-international organization-global opinion complex" is hard at work to stigmatize drones and those who support and operate them."

This strategy is having an impact. The slew of lawsuits in the United States and threatened prosecutions in Europe against Bush administration officials imposes reputational, emotional, and financial costs on them that help to promote the human rights groups' ideological goals, even if courts never actually rule against the officials. By design, these suits also give pause to current officials who are considering controversial actions for fear that the same thing might later happen to them. This effect is starting to be felt with drones. Several Obama administration officials have told me that they worry targeted killings will be seen in the future (as Stafford Smith predicts) as their administration's GTMO. The attempted judicial action against Rizzo, the earlier lawsuits against top CIA officials in Pakistan and elsewhere, and the louder and louder proclamations of illegality around the world all of which have gained momentum after al-Aulaqi's killing—are also having an impact. These actions are rallying cries for protest and political pushback in the countries where the drone strikes take place. And they lead CIA operators to worry about legal exposure before becoming involved in the Agency's drone program." We don't know yet whether these forces have affected actual targeting practices and related tactics. But they induce the officials involved to take more caution. And it is only a matter of time, if it has not happened already, before they lead the U.S. government to forgo lawful targeted killing actions otherwise deemed to be in the interest of U.S. national security.

Only the plan can retain allied cooperation on counter-terrorism

David Kris, Assistant Attorney General for National Security at the U.S. Department of Justice from March 2009 to March 2011, 6/15/2011, Law Enforcement as a Counterterrorism Tool, http://jnslp.com/wp-content/uploads/2011/06/01\_David-Kris.pdf

On the other side of the balance, certainly most of our friends in Europe, and indeed in many countries around the world (as well as many people in this country), accept only a law enforcement response and reject a military response to terrorism, at least outside of theaters of active armed conflict.76 As a result, some of those countries will restrict their cooperation with us unless we are using law enforcement methods. Gaining cooperation from other countries can help us win the war – these countries can share intelligence, provide witnesses and evidence, and transfer terrorists to us. Where a foreign country will not give us a terrorist (or information needed to neutralize a terrorist) for anything but a criminal prosecution, we obviously should pursue the prosecution rather than letting the terrorist go free. This does not subordinate U.S. national interest to some global test of legitimacy; it simply reflects a pragmatic approach to winning the war. If we want the help of our allies, we need to work with them.77

More generally, we need to recognize the practical impact of our treatment of the enemy and the perception of that treatment. This war is not a classic battle over land or resources, but is fundamentally a conflict of values and ways of life.78 Demonstrating that we live up to our values, thus drawing stark contrasts with the adversary, is essential to ensuring victory. When our enemy is seen in its true colors – lawless, ruthless, merciless – it loses support worldwide. For example, in Iraq, al Qaeda’s random and widespread violence against civilians eventually helped mobilize the population against the insurgents.79 On the other hand, when our actions or policies provoke questions about whether we are committed to the rule of law and our other values, we risk losing some of our moral authority. This makes it harder to gain cooperation from our allies and easier for the terrorists to find new recruits.

This is not simply abstract philosophy. It is an important reality in our military’s effort to defeat the enemy in places like Iraq and Afghanistan. As the U.S. military’s counterinsurgency field manual states, “to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support.”80 Adherence to the rule of law is central to this approach: “The presence of the rule of law is a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy. A government’s respect for preexisting and impersonal legal rules can provide the key to gaining widespread enduring societal support. Such respect for rules – ideally ones recorded in a constitution and in laws adopted through a credible, democratic process – is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.”81 Indeed, the U.S. military has been implementing such a transition to civilian law enforcement in Iraq, where detentions and prosecutions of insurgents are now principally processed through the domestic criminal justice system,82 and we are moving in that direction in Afghanistan, where transfer of detention and prosecution responsibilities to Afghan civilian authorities is our goal.83 I think these are principles that are well worth keeping in mind as we think about the impact of employing different tools in the context of our conflict with al Qaeda. It would not only be ironic, but also operationally counterproductive, if our partners in Iraq and Afghanistan rely increasingly on law enforcement tools to detain terrorists, even in areas of active hostilities, while we abandon those tools here in the United States.84

Allied cooperation’s key to effective drone use

Zenko 13

Micah Zenko is the Douglas Dillon fellow with the Center for Preventive Action at the Council on Foreign Relations, Newsday, January 30, 2013, "Zenko: Why we can't just drone Algeria", http://www.newsday.com/opinion/oped/zenko-why-we-can-t-just-drone-algeria-1.4536641

CNN should not have been surprised. Neither the Bush nor Obama administrations received blanket permission to transit Algerian airspace with surveillance planes or drones; instead, they received authorization only on a case-by-case basis and with advance notice.

According to Washington Post journalist Craig Whitlock, the U.S. military relies on a fleet of civilian-looking unarmed aircraft to spy on suspected Islamist groups in North Africa, because they are less conspicuous - and therefore less politically sensitive for host nations - than drones. Moreover, even if the United States received flyover rights for armed drones, it has been unable to secure a base in southern Europe or northern Africa from which it would be permitted to conduct drone strikes; and presently, U.S. armed drones cannot be launched and recovered from naval platforms.

According to Hollywood movies or television dramas, with its immense intelligence collection and military strike capabilities, the United States can locate, track, and kill anyone in the world.

This misperception is continually reinvigorated by the White House's, the CIA's, and the Pentagon's close cooperation with movie and television studios. For example, several years before the CIA even started conducting non-battlefield drone strikes, it was recommending the tactic as a plotline in the short-lived (2001-2003) drama "The Agency." As the show's writer and producer later revealed: "The Hellfire missile thing, they suggested that. I didn't come up with this stuff. I think they were doing a public opinion poll by virtue of giving me some good ideas."

Similarly, as of November there were at least 10 movies about the Navy SEALs in production or in theaters, which included so much support from the Pentagon that one film even starred active-duty SEALs.

The Obama administration's lack of a military response in Algeria reflects how sovereign states routinely constrain U.S. intelligence and military activities. As the U.S. Air Force Judge Advocate General's Air Force Operations and the Law guidebook states: "The unauthorized or improper entry of foreign aircraft into a state's national airspace is a violation of that state's sovereignty. . . . Except for overflight of international straits and archipelagic sea lanes, all nations have complete discretion in regulating or prohibiting flights within their national airspace."

Though not sexy and little reported, deploying CIA drones or special operations forces requires constant behind-the-scenes diplomacy: with very rare exceptions - like the Bin Laden raid - the U.S. military follows the rules of the world's other 194 sovereign, independent states.

These rules come in many forms. For example, basing rights agreements can limit the number of civilian, military and contractor personnel at an airbase or post; what access they have to the electromagnetic spectrum; what types of aircraft they can fly; how many sorties they can conduct per day; when those sorties can occur and how long they can last; whether the aircraft can drop bombs on another country and what sort of bombs; and whether they can use lethal force in self-defense. When the United States led the enforcement of the northern no-fly zone over Iraq from the Incirlik Air Base in southern Turkey from 1991 to 2003, a Turkish military official at the rank of lieutenant colonel or higher was always on board U.S. Air Force AWACS planes, monitoring the airspace to assure that the United States did not violate its highly restrictive basing agreement.

As Algeria is doing presently, the denial or approval of overflight rights is a powerful tool that states can impose on the United States. These include where U.S. air assets can enter and exit another state, what flight path they may take, how high they must fly, what type of planes can be included in the force package, and what sort of missions they can execute. In addition, these constraints include what is called shutter control, or the limits to when and how a transiting aircraft can collect information. For example, U.S. drones that currently fly out of the civilian airfield in Arba Minch, Ethiopia, to Somalia, are restricted in their collection activities over Ethiopia's Ogaden region, where the government has conducted an intermittent counterinsurgency against the Ogaden National Liberation Front.

Drones key to Afghan stability post withdrawal

Bengali & Cloud 13 (Shashank Bengali and David S. Cloud – LA Times writers, “U.S. drone strikes up sharply in Afghanistan” February 21, 2013, Los Angeles Times)

The U.S. military launched 506 strikes from unmanned aircraft in Afghanistan last year, according to Pentagon data, a 72% increase from 2011 and a sign that **American commanders may begin to rely more heavily on remote-controlled air power to kill Taliban insurgents as they reduce the number of troops on the ground.**

Though drone strikes represented a fraction of all U.S. air attacks in Afghanistan last year, their use is on the rise even as American troops have pulled back from ground and air operations and pushed Afghan soldiers and police into the lead. In 2011, drone strikes accounted for 5% of U.S. air attacks in Afghanistan; in 2012, the figure rose to 12%.

Military spokesmen in Kabul and at the Pentagon declined to explain the increase. But officers familiar with the operation said it was due in part to the growing number of armed Reaper and Predator drones in Afghanistan and better availability of live video feeds beamed directly to troops on the ground.

The increase has coincided with a shift by the Obama administration toward a new strategy in Afghanistan that relies on a smaller military footprint to go after the Taliban and remaining Al Qaeda fighters.

The use of armed drones is likely to accelerate as most of the 66,000 U.S. troops in the country are due to withdraw by the end of 2014. The remotely piloted long-range aircraft, which kill targets with virtually no risk to American lives, carry an unmistakable attraction for military commanders.

"With fewer troops, and even with fewer manned aircraft flying overhead, it's harder to get traditional support in combat missions," said Joshua Foust, a Washington-based analyst who has advised the U.S. military in Afghanistan. "**Drones provide a good way to do that without importing a bunch of pilots and the support infrastructure they'd need to remain based there."**

The strategy isn't without risk: Drone strikes can kill civilians, as underscored by the Sept. 23 incident that claimed Bacha Zarina's life.

After Marine Gen. John R. Allen, the former coalition commander, issued an order limiting airstrikes in populated areas last year, U.S. and NATO forces reduced civilian casualties in air attacks by 42% in 2012, according to United Nations figures.

But after an airstrike this month that reportedly killed 10 civilians in addition to four Taliban leaders, Afghan President Hamid Karzai banned his forces from requesting coalition airstrikes in residential areas, a decree that also would apply to drones.

Defenders of **drones** say they **are more accurate and less prone to causing civilian casualties** than manned aircraft, because they can watch a potential target longer and often use smaller munitions.

When civilians are inadvertently killed, it is sometimes because they are close to a location where an airstrike is carried out, one U.S. officer said. But there also are instances when troops on the ground mistakenly call for an airstrike against a target where only civilians are present.

The U.S. military has acknowledged multiple times that it has accidentally killed civilians in drone strikes, including in 2010 when 24 Afghans were killed in Oruzgan province after being mistaken for insurgents, based on drone camera images. They were later determined to be noncombatants.

Last year, five coalition drone strikes killed 16 civilians and injured three, according to the U.N. mission in Afghanistan, which documented just one such incident in 2011. It wasn't immediately clear whether those were strikes from U.S. drones; Britain's Royal Air Force also flies armed Reaper drones in Afghanistan, although the vast majority of the coalition's unmanned aircraft belong to the U.S.

Many of the recent strikes have hit eastern Afghanistan, **where Taliban insurgents retain control of many villages.** In Marawara district of Kunar province, where Bacha Zarina lived, the two Taliban commanders killed in the Sept. 23 strike led a group of hard-line fighters who had banned cigarettes and shaving for men, littered the area with roadside bombs, and threatened to kill Afghans who worked for the U.S. military at an outpost an hour's drive away, villagers said.

Bacha Zarina's older brother Saidaa, who, like many Afghans, has just one name, said in a telephone interview that the U.S. military at first denied that the airstrike had killed a civilian, citing the accuracy of drones. After Afghan officials vouched for the family's story, the Americans paid Bacha Zarina's father about $2,000 in compensation.

"Do mistakes happen? Yes," said the U.S. officer, who spoke on the condition of anonymity because he was not authorized to discuss drone operations. "But they also happen with an F-16, maybe more so."

Cmdr. Bill Speaks, a Pentagon spokesman, said, "We have always made safeguarding civilians a top priority in all operations. These strict guidelines apply to all of our weapons platforms."

The Obama administration has come under increasing pressure this month from Congress to disclose details and **legal underpinnings for drone strikes**, especially a 2011 attack that killed Anwar Awlaki, an American citizen and a leader of the group Al Qaeda in the Arabian Peninsula.

On Tuesday, Sen. Lindsey Graham (R-S.C.) said U.S. drone strikes worldwide had killed 4,700 people, the first public estimate of the death toll by a U.S. official since the attacks began early in the George W. Bush administration.

"Sometimes you hit innocent people, and I hate that, but we're at war, and we've taken out some very senior members of Al Qaeda," Graham told the Easley Rotary Club in South Carolina, according to news reports.

The increase in Afghan drone strikes also has coincided with a greater U.S. military focus in the region on deterring Iran, which has put more demands on the Navy fighters flying off two U.S. aircraft carriers in the Persian Gulf and Arabian Sea. In the past, one of the carriers had focused on air operations over Afghanistan.

The U.S. military drone strikes in Afghanistan are separate from the CIA drone campaigns against suspected Taliban and Al Qaeda targets in Pakistan and Yemen. In Afghanistan, analysts say, drones often are used to back up ground forces or for killing insurgents who are spotted trying to plant roadside bombs.

But another strike last year demonstrated that U.S. forces are also using drones for targeted killings, much as the CIA is in Pakistan and Yemen.

In late July, according to officials in the eastern province of Nuristan, a teacher and another Afghan civilian were traveling in a sport utility vehicle along a rocky road toward the Taliban-held village of Waygal. Three senior Taliban leaders and a junior operative stopped the car and demanded a ride, said Shamsuddin Aselzai, the head of the provincial council, who is from that village.

Minutes later, Aselzai said, a drone strike destroyed the SUV, killing the three Taliban leaders and the teacher, Abdul Qayum, a 48-year-old father of four. The other civilian and the junior Talib were injured but survived.

Since then, Taliban leaders in Waygal have gone almost into hiding, Aselzai said, fearful of the next drone attack**.**

"**They are afraid,** otherwise they wouldn't hide even for a second," Aselzai said by phone. He called Qayum's death a tragedy and a mistake, but said the drone strikes were "very useful."

"The Taliban are destroying our country," he said, "and we need to take some serious steps."

Terrorist resurgence escalates

Sale 13 (Richard, pulitzer prize journalist citing interviews with a wide Afghan exports from DoD, RAND, and Brookings, “Afghanistan: A Dark and Fragile Future” 22 March 2013, Truthout; News & Analysis)

Whatever the result of the coming reforms, the message is still startlingly clear: when the United States draws down its forces next year, the Afghan security forces will not be ready to create a stable Afghan state on their own.

Greed

"Afghan government officials have made billions of dollars and it lies in the hands of a very small number of people," Felb-Brown said. She fears that the officials of the Karzai government will simply consolidate their positions and make the necessary arrangements - personal, financial and logistical - necessary to support a new and more stable system of corruption after the US leaves.

"The amount the US is putting into the country is exacerbating the corruption problem," said Jones of Rand. "You fix problems [in Afghanistan] by finding the right people in the province - the government officials will take bribes - they do that historically." He added, "It doesn't make for good government."

There is a fear of capital flight from the country as the Americans leave, he said, and if that is discouraging, estimates of cash taken out of Afghanistan in a given year by corrupt officials who fly to Dubai to stash their loot are as high as $4.5 billion," according to SIGAR.

"Everybody is casting their eyes on the endgame and plotting to get out with their life and money," said Fuller.

The Bad Puppet

O'Hanlon said that a "legitimate democratic leadership change is crucial for Afghanistan's future," but he strongly cautioned that it probably won't happen because of traditional corruption of the country. He warned that "the next couple of years could be testing and trying."

One of the most persistent American delusions has been the program to develop the Kabul government into the organ of an effective, centralized, modern, liberal and democratic state. The experts and officials pointed out that such an ambition could be realized only after generations of effort, not a handful of years. This goal was effectively rendered impossible after the almost complete collapse of Afghan state institutions in 2001, when the Bush Administration - which fielded only modest forces - gave billions in funds to local warlords who restarted the heroin trade and increased the domestic instability that the US and its allies are still purportedly trying to pacify.

American efforts to reform the Kabul government have a flat fizzle. Critics of the war have said constantly that the Afghans in government and the Americans are making conflicting demands that neither side can satisfy and that both have an entirely different idea of their relationship. US interests in Afghanistan rest on achieving "stability," yet the DOD report of last December makes the startling statement that the Afghan government "remains unable to deliver sufficient basic services to all areas and to sufficiently stimulate economic growth" chiefly because of "widespread corruption that denies the government legitimacy in the eyes of its subjects."

The problem is that the Afghan government is a monopoly with a profit motive. In a functioning state, governments levy taxes to provide public services, but the Karzai government doesn't do this. The Afghan central government is unable to collect enough tax revenue to fund its own operations. Due largely to the lack of tax revenue, public services are not free, and corruption is so common in Afghanistan that every public service has its own price tag.

Some argue Karzai needs more time to consolidate his political forces, but Fuller pointed out that another $100 billion or $200 billion by the end of 2014 won't change the fundamentals of the Karzai government's conduct of operations. Studies, news reports and interviews make clear that Karzai long ago gave up his independence and that his power relies on his manipulating the Americans. He has often worked to sabotage US interests, "trying to prove he isn't a US lackey," said Cannistraro. Many Afghan experts, like Jones and Wilder and Felb-Brown, warn that the Karzai government will stand on its own feet only so long as we are there, and they already see signs that Karazi is walking away from US ties. Three times last year Karzai asked for US troops to withdraw from Afghan villages, telling Kabul-based reporters, "When foreigners leave, Afghanistan will never become unsafe; it will become safer."

In a very carefully staged insult on March 10, Karzai, cancelled a meeting with new US Secretary of Defense Charles Hagel, alleging that the Obama administration was colluding with the Taliban by threatening fresh violence if US forces left the country, an assertion designed to realign Karzai's allegiances with internal forces and groups. Karzai is hastily retreating from the superficial westernization pressed on him in the past by the United States. As it stands, the ability of the Karzai government to provide investment capital is very limited. According to the December DOD report, the Afghan banking system is corrupt. The Ministry of Interior is corrupt to the core. Afghanistan's judicial system, including the attorney general office, is infested with extortion, blackmail, cronyism, crooked justices and criminal operations.

Unfortunately, the Afghans have come to accept the current scheme of corruption as an economic and political reality. Many US analysts are convinced that Karzai has proven that he is not the man to bring equilibrium in **a country full of ethnic tensions**. Kunduz, for example, is a powder keg of internal conflict, and there are growing fears that the US-trained Afghan army is likely to splinter along ethnic or tribal lines.

Cannistraro said, "We repeat the same mistake over and over, constantly."

Wilder said, "We have never been terribly good at political solutions, and we have yet to ask what the political solution in Afghanistan is. The answer is murky and incomplete."

**And there may not be one**.

It is almost overwhelming to list the forces, allies and groups that would need to be taken into account, to even begin determining such a "solution." Thomas Ruttig, author of a new book on the Taliban, gave a short but by no means exhaustive list of some of them. Looking at the anti-Taliban groups, there are the US government and US military (which have different approaches and different claims,) the Karzai presidency and its allies, the 100 tribes, the non-Pashtun warlords and other leaders opposed to the Taliban; Westernized Afghan officials; and NGO figures in Kabul.

Among the armed opposition, Ruttig named the Taliban under Mullah Omar (which also has potentially serious internal divisions); the Haqqani network; the Hizb-e-Islami of Gulbuddin Hekmatyar; the remnants of al-Qaeda in the region; the Pakistani Taliban; and anti-Indian terrorist groups based in Pakistan, as well as nations like India, Iran, China and Russia.

In addition, what the United States faces now is a huge abyss of hostility or indifference from most Afghans, who simply do not want any foreigners, however lofty their motives, to remain in their country. As Fuller observed, "**The real endgame is how all parties will jockey** to fill the vacuum of the US and NATO departure**, and the endgame dynamic will have little to do with structures thrown up during the US occupation.** The real settling of regional ethnic and ideological scores will begin."

Global nuclear war

Morgan 7 (Stephen, Former Member of the British Labour Party Executive committee, “Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!?” <http://www.electricarticles.com/display.aspx?id=639>)

However events may prove him sorely wrong. Indeed, his policy could completely backfire upon him. As the war intensifies, he has no guarantees that the current autonomy may yet burgeon into a separatist movement. Appetite comes with eating, as they say. Moreover, should the Taliban fail to re-conquer al of Afghanistan, as looks likely, but captures at least half of the country, then a Taliban Pashtun caliphate could be established which would act as a magnet to separatist Pashtuns in Pakistan. Then, the likely break up of Afghanistan along ethnic lines, could, indeed, lead the way to the break up of Pakistan, as well. Strong centrifugal forces have always bedevilled the stability and unity of Pakistan, and, in the context of the new world situation, the country could be faced with civil wars and popular fundamentalist uprisings, probably including a military-fundamentalist coup d’état. Fundamentalism is deeply rooted in Pakistan society. The fact that in the year following 9/11, the most popular name given to male children born that year was “Osama” (not a Pakistani name) is a small indication of the mood. Given the weakening base of the traditional, secular opposition parties, conditions would be ripe for a coup d’état by the fundamentalist wing of the Army and ISI, leaning on the radicalised masses to take power. Some form of radical, military Islamic regime, where legal powers would shift to Islamic courts and forms of shira law would be likely. Although, even then, this might not take place outside of a protracted crisis of upheaval and civil war conditions, mixing fundamentalist movements with nationalist uprisings and sectarian violence between the Sunni and minority Shia populations. The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of an arc of civil war over Lebanon, Palestine and Iraq would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly nuclear war, between Pakistan and India could not be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a “Pandora's box” for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with China and Russia pitted against the US.

### norms

Unrestrained drone use outside zones of active hostilities collapses legal norms governing targeted killing – only the plan solves

Rosa Brooks, Professor of Law, Georgetown University Law Center, Bernard L. Schwartz Senior Fellow, New America Foundation, 4/23/13, The Constitutional and Counterterrorism Implications of Targeted Killing, http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.28

But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies enabled and facilitated by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. **It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks**.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,29 and distinction.30

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensible for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained.

Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.31

This is a radical oversimplification of a very complex body of law.32 But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all33 -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity34 -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term “lex specialis” – special law. It is applicable in—and only in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes “ordinary law,” or “lex generalis,” the “general law” that prevails in peacetime. We have one set of laws for “normal” situations, and another, more flexible set of laws for “extraordinary” situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the “special” law, and as long as the “special law” doesn’t end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know who the “enemy” is: Libyan government forces. We know where the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know when the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold accountable in the event of error or abuse (the various governments involved).35

Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps—Mali and the Philippines as well. Defenders of the administration's increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. **As a result, Administration assertions** about who is a combatant and what constitutes a threat **are entirely non-falsifiable, because they're based wholly on undisclosed evidence**. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its "associates" unanswered.36 Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow "travel" with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And **when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US targeted killings**. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly: 37 to be "imminent," a threat cannot be distant or speculative.38 But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word “imminent” that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper39—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the absence of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very absence of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may perpetually be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is any threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is every potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,40, and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.41

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should not depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

5. Setting Troubling International Precedents

**Here is an a**dditional **reason to worry** about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. **We should use this window to advance a robust legal** and normative **framework that will help protect against abuses by those states whose leaders can rarely be trusted**. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

That solves global war – US precedent is key

Kristen Roberts 13, news editor for the National Journal, master in security studies from Georgetown, “When the Whole World Has Drones”, March 22, <http://www.nationaljournal.com/magazine/when-the-whole-world-has-drones-20130321>

The proliferation of drone technology has moved well beyond the control of the United States government and its closest allies. The aircraft are too easy to obtain, with barriers to entry on the production side crumbling too quickly to place limits on the spread of a technology that promises to transform warfare on a global scale. Already, more than 75 countries have remote piloted aircraft. More than 50 nations are building a total of nearly a thousand types. At its last display at a trade show in Beijing, China showed off 25 different unmanned aerial vehicles. Not toys or models, but real flying machines.

It’s a classic and common phase in the life cycle of a military innovation: An advanced country and its weapons developers create a tool, and then others learn how to make their own. But what makes this case rare, and dangerous, is the powerful combination of efficiency and lethality spreading in an environment lacking internationally accepted guidelines on legitimate use. This technology is snowballing through a global arena where the main precedent for its application is the one set by the United States; it’s a precedent Washington does not want anyone following.

America, the world’s leading democracy and a country built on a legal and moral framework unlike any other, has adopted a war-making process that too often bypasses its traditional, regimented, and rigorously overseen military in favor of a secret program never publicly discussed, based on legal advice never properly vetted. The Obama administration has used its executive power to refuse or outright ignore requests by congressional overseers, and it has resisted monitoring by federal courts.

To implement this covert program, the administration has adopted a tool that lowers the threshold for lethal force by reducing the cost and risk of combat. This still-expanding counterterrorism use of drones to kill people, including its own citizens, outside of traditionally defined battlefields and established protocols for warfare, has given friends and foes a green light to employ these aircraft in extraterritorial operations that could not only affect relations between the nation-states involved but also destabilize entire regions and potentially upset geopolitical order.

Hyperbole? Consider this: Iran, with the approval of Damascus, carries out a lethal strike on anti-Syrian forces inside Syria; Russia picks off militants tampering with oil and gas lines in Ukraine or Georgia; Turkey arms a U.S.-provided Predator to kill Kurdish militants in northern Iraq who it believes are planning attacks along the border. Label the targets as terrorists, and in each case, Tehran, Moscow, and Ankara may point toward Washington and say, we learned it by watching you. In Pakistan, Yemen, and Afghanistan.

This is the unintended consequence of American drone warfare. For all of the attention paid to the drone program in recent weeks—about Americans on the target list (there are none at this writing) and the executive branch’s legal authority to kill by drone outside war zones (thin, by officials’ own private admission)—what goes undiscussed is Washington’s deliberate failure to establish clear and demonstrable rules for itself that would at minimum create a globally relevant standard for delineating between legitimate and rogue uses of one of the most awesome military robotics capabilities of this generation.

THE WRONG QUESTION

The United States is the indisputable leader in drone technology and long-range strike. Remote-piloted aircraft have given Washington an extraordinary ability to wage war with far greater precision, improved effect, and fewer unintended casualties than conventional warfare. The drones allow U.S. forces to establish ever greater control over combat areas, and the Pentagon sees the technology as an efficient and judicious force of the future. And it should, given the billions of dollars that have gone into establishing and maintaining such a capability.

That level of superiority leads some national security officials to downplay concerns about other nations’ unmanned systems and to too narrowly define potential threats to the homeland. As proof, they argue that American dominance in drone warfare is due only in part to the aircraft itself, which offers the ability to travel great distances and loiter for long periods, not to mention carry and launch Hellfire missiles. The drone itself, they argue, is just a tool and, yes, one that is being copied aggressively by allies and adversaries alike. The real edge, they say, is in the unparalleled intelligence-collection and data-analysis underpinning the aircraft’s mission.

“There is what I think is just an unconstrained focus on a tool as opposed to the subject of the issue, the tool of remotely piloted aircraft that in fact provide for greater degrees of surety before you employ force than anything else we use,” said retired Lt. Gen. David Deptula, the Air Force’s first deputy chief of staff for intelligence, surveillance, and reconnaissance. “I think people don’t realize that for the medium altitude aircraft—the MQ-1 [Predator] and MQ-9 [Reaper] that are generally written about in the press—there are over 200 people involved in just one orbit of those aircraft.… The majority of those people are analysts who are interpreting the information that’s coming off the sensors on the aircraft.”

The analysts are part of the global architecture that makes precision strikes, and targeted killing, possible. At the front end, obviously, intelligence—military, CIA, and local—inform target decisions. But in as near-real time as technologically possible, intel analysts in Nevada, Texas, Virginia, and other locations watch the data flood in from the aircraft and make calls on what’s happening on target. They monitor the footage, listen to audio, and analyze signals, giving decision-makers time to adjust an operation if the risks (often counted in potential civilian deaths) outweigh the reward (judged by the value of the threat eliminated).

“Is that a shovel or a rifle? Is that a Taliban member or is this a farmer? The way that warfare has advanced is that we are much more exquisite in our ability to discern,” Maj. Gen. Robert Otto, commander of the Air Force Intelligence, Surveillance, and Reconnaissance Agency, told National Journal at Nellis Air Force Base in Nevada. “We’re not overhead for 15 minutes with a fighter that’s about to run out of gas, and we have to make a decision. We can orbit long enough to be pretty sure about our target.”

Other countries, groups, and even individuals can and do fly drones. But no state or group has nearly the sophisticated network of intelligence and data analysis that gives the United States its strategic advantage. Although it would be foolish to dismiss the notion that potential U.S. adversaries aspire to attain that type of war-from-afar, pinpoint-strike capability, they have neither the income nor the perceived need to do so.

That’s true, at least today. It’s also irrelevant. Others who employ drones are likely to carry a different agenda, one more concerned with employing a relatively inexpensive and ruthlessly efficient tool to dispatch an enemy close at hand.

“It would be very difficult for them to create the global-strike architecture we have, to have a control cell in Nevada flying a plane over Afghanistan. The reality is that most nations don’t want or need that,” said Peter Singer, director of the Brookings Institution’s Center for 21st Century Security and Intelligence and one of the foremost experts in advanced military technology. “Turkey’s not looking to conduct strikes into the Philippines.... But Turkey is looking to be able to carry out long-duration surveillance and potentially strike inside and right on its border.”

And that’s a NATO ally seeking the capability to conduct missions that would run afoul of U.S. interests in Iraq and the broader Middle East. Already, Beijing says it considered a strike in Myanmar to kill a drug lord wanted in the deaths of Chinese sailors. What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea? Or if India uses the aircraft to strike Lashkar-e-Taiba militants near Kashmir?

“We don’t like other states using lethal force outside their borders. It’s destabilizing. It can lead to a sort of wider escalation of violence between two states,” said Micah Zenko, a security policy and drone expert at the Council on Foreign Relations. “So the proliferation of drones is not just about the protection of the United States. It’s primarily about the likelihood that other states will increasingly use lethal force outside of their borders.”

LOWERING THE BAR

Governments have covertly killed for ages, whether they maintained an official hit list or not. Before the Obama administration’s “disposition matrix,” Israel was among the best-known examples of a state that engaged, and continues to engage, in strikes to eliminate people identified by its intelligence as plotting attacks against it. But Israel certainly is not alone. Turkey has killed Kurds in Northern Iraq. Some American security experts point to Russia as well, although Moscow disputes this.

In the 1960s, the U.S. government was involved to differing levels in plots to assassinate leaders in Congo and the Dominican Republic, and, famously, Fidel Castro in Cuba. The Church Committee’s investigation and subsequent 1975 report on those and other suspected plots led to the standing U.S. ban on assassination. So, from 1976 until the start of President George W. Bush’s “war on terror,” the United States did not conduct targeted killings, because it was considered anathema to American foreign policy. (In fact, until as late as 2001, Washington’s stated policy was to oppose Israel’s targeted killings.)

When America adopted targeted killing again—first under the Bush administration after the September 11 attacks and then expanded by President Obama—the tools of the trade had changed. No longer was the CIA sending poison, pistols, and toxic cigars to assets overseas to kill enemy leaders. Now it could target people throughout al-Qaida’s hierarchy with accuracy, deliver lethal ordnance literally around the world, and watch the mission’s completion in real time.

The United States is smartly using technology to improve combat efficacy, and to make war-fighting more efficient, both in money and manpower. It has been able to conduct more than 400 lethal strikes, killing more than 3,500 people, in Afghanistan, Pakistan, Yemen, Somalia, and North Africa using drones; reducing risk to U.S. personnel; and giving the Pentagon flexibility to use special-forces units elsewhere. And, no matter what human-rights groups say, it’s clear that drone use has reduced the number of civilians killed in combat relative to earlier conflicts. Washington would be foolish not to exploit unmanned aircraft in its long fight against terrorism. In fact, defense hawks and spendthrifts alike would criticize it if it did not.

“If you believe that these folks are legitimate terrorists who are committing acts of aggressive, potential violent acts against the United States or our allies or our citizens overseas, should it matter how we choose to engage in the self-defense of the United States?” asked Rep. Mike Rogers, R-Mich., chairman of the House Intelligence Committee. “Do we have that debate when a special-forces team goes in? Do we have that debate if a tank round does it? Do we have the debate if an aircraft pilot drops a particular bomb?”

But defense analysts argue—and military officials concede—there is a qualitative difference between dropping a team of men into Yemen and green-lighting a Predator flight from Nevada. Drones lower the threshold for military action. That’s why, according to the Council on Foreign Relations, unmanned aircraft have conducted 95 percent of all U.S. targeted killings. Almost certainly, if drones were unavailable, the United States would not have pursued an equivalent number of manned strikes in Pakistan.

And what’s true for the United States will be true as well for other countries that own and arm remote piloted aircraft.

“The drones—the responsiveness, the persistence, and without putting your personnel at risk—is what makes it a different technology,” Zenko said. “When other states have this technology, if they follow U.S. practice, it will lower the threshold for their uses of lethal force outside their borders. So they will be more likely to conduct targeted killings than they have in the past.”

The Obama administration appears to be aware of and concerned about setting precedents through its targeted-strike program. When the development of a disposition matrix to catalog both targets and resources marshaled against the United States was first reported in 2012, officials spoke about it in part as an effort to create a standardized process that would live beyond the current administration, underscoring the long duration of the counterterrorism challenge.

Indeed, the president’s legal and security advisers have put considerable effort into establishing rules to govern the program. Most members of the House and Senate Intelligence committees say they are confident the defense and intelligence communities have set an adequate evidentiary bar for determining when a member of al-Qaida or an affiliated group may be added to the target list, for example, and say that the rigor of the process gives them comfort in the level of program oversight within the executive branch. “They’re not drawing names out of a hat here,” Rogers said. “It is very specific intel-gathering and other things that would lead somebody to be subject for an engagement by the United States government.”

BEHIND CLOSED DOORS

The argument against public debate is easy enough to understand: Operational secrecy is necessary, and total opacity is easier. “I don’t think there is enough transparency and justification so that we remove not the secrecy, but the mystery of these things,” said Dennis Blair, Obama’s former director of national intelligence. “The reason it’s not been undertaken by the administration is that they just make a cold-blooded calculation that it’s better to hunker down and take the criticism than it is to get into the public debate, which is going to be a hard one to win.”

But by keeping legal and policy positions secret, only partially sharing information even with congressional oversight committees, and declining to open a public discussion about drone use, the president and his team are asking the world to just trust that America is getting this right. While some will, many people, especially outside the United States, will see that approach as hypocritical, coming from a government that calls for transparency and the rule of law elsewhere.

“I know these people, and I know how much they really, really attend to the most important details of the job,” said Barry Pavel, a former defense and security official in the Bush and Obama administrations who is director of the Brent Scowcroft Center on International Security at the Atlantic Council. “If I didn’t have that personal knowledge and because there isn’t that much really in the press, then I would be giving you a different rendering, and much more uncertain rendering.”

That’s only part of the problem with the White House’s trust-us approach. The other resides in the vast distance between the criteria and authorization the administration says it uses in the combat drone program and the reality on the ground. For example, according to administration officials, before a person is added to the targeted strike list, specific criteria should be met. The target should be a 1) senior, 2) operational 3) leader of al-Qaida or an affiliated group who presents 4) an imminent threat of violent attack 5) against the United States.

But that’s not who is being targeted.

Setting aside the administration’s redefining of “imminence” beyond all recognition, the majority of the 3,500-plus people killed by U.S. drones worldwide were not leaders of al-Qaida or the Taliban; they were low- or mid-level foot soldiers. Most were not plotting attacks against the United States. In Yemen and North Africa, the Obama administration is deploying weaponized drones to take out targets who are more of a threat to local governments than to Washington, according to defense and regional security experts who closely track unrest in those areas. In some cases, Washington appears to be in the business of using its drone capabilities mostly to assist other countries, not to deter strikes against the United States (another precedent that might be eagerly seized upon in the future).

U.S. defense and intelligence officials reject any suggestion that the targets are not legitimate. One thing they do not contest, however, is that the administration’s reliance on the post-9/11 Authorization for Use of Military Force as legal cover for a drone-strike program that has extended well beyond al-Qaida in Afghanistan or Pakistan is dodgy. The threat that the United States is trying to deal with today has an ever more tenuous connection to Sept. 11. (None of the intelligence officials reached for this article would speak on the record.) But instead of asking Congress to consider extending its authorization, as some officials have mulled, the administration’s legal counsel has chosen instead to rely on Nixon administration adviser John Stevenson’s 1970 justification of the bombing of Cambodia during the Vietnam War, an action new Secretary of State John Kerry criticized during his confirmation hearing this year.

Human-rights groups might be loudest in their criticism of both the program and the opaque policy surrounding it, but even the few lawmakers who have access to the intelligence the administration shares have a hard time coping with the dearth of information. “We can’t always assume we’re going to have responsible people with whom we agree and trust in these positions,” said Sen. Angus King, I-Maine, who sits on the Senate Intelligence Committee. “The essence of the Constitution is, it shouldn’t matter who is in charge; they’re still constrained by principles and rules of the Constitution and of the Bill of Rights.”

PEER PRESSURE

Obama promised in his 2013 State of the Union to increase the drone program’s transparency. “In the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world,” the president said on Feb. 12. Since then, the administration, under pressure from allies on Senate Intelligence, agreed to release all of the legal memos the Justice Department drafted in support of targeted killing.

But, beyond that, it’s not certain Obama will do anything more to shine light on this program. Except in situations where leaks help it tell a politically expedient story of its skill at killing bad guys, the administration has done little to make a case to the public and the world at large for its use of armed drones.

Already, what’s become apparent is that the White House is not interested in changing much about the way it communicates strike policy. (It took Sen. Rand Paul’s 13-hour filibuster of CIA Director John Brennan’s nomination to force the administration to concede that it doesn’t have the right to use drones to kill noncombatant Americans on U.S. soil.) And government officials, as well as their surrogates on security issues, are actively trying to squash expectations that the administration would agree to bring the judicial branch into the oversight mix. Indeed, judicial review of any piece of the program is largely off the table now, according to intelligence officials and committee members.

Under discussion within the administration and on Capitol Hill is a potential program takeover by the Pentagon, removing the CIA from its post-9/11 role of executing military-like strikes. Ostensibly, that shift could help lift the secret-by-association-with-CIA attribute of the program that some officials say has kept them from more freely talking about the legitimate military use of drones for counterterrorism operations. But such a fix would provide no guarantee of greater transparency for the public, or even Congress.

And if the administration is not willing to share with lawmakers who are security-cleared to know, it certainly is not prepared to engage in a sensitive discussion, even among allies, that might begin to set the rules on use for a technology that could upend stability in already fragile and strategically significant places around the globe. Time is running out to do so.

“The history of technology development like this is, you never maintain your lead very long. Somebody always gets it,” said David Berteau, director of the International Security Program at the Center for Strategic and International Studies. “They’re going to become cheaper. They’re going to become easier. They’re going to become interoperable,” he said. “The destabilizing effects are very, very serious.”

Berteau is not alone. Zenko, of the Council on Foreign Relations, has urged officials to quickly establish norms. Singer, at Brookings, argues that the window of opportunity for the United States to create stability-supporting precedent is quickly closing. The problem is, the administration is not thinking far enough down the line, according to a Senate Intelligence aide. Administration officials “are thinking about the next four years, and we’re thinking about the next 40 years. And those two different angles on this question are why you see them in conflict right now.”

That’s in part a symptom of the “technological optimism” that often plagues the U.S. security community when it establishes a lead over its competitors, noted Georgetown University’s Kai-Henrik Barth. After the 1945 bombing of Hiroshima and Nagasaki, the United States was sure it would be decades before the Soviets developed a nuclear-weapon capability. It took four years.

With drones, the question is how long before the dozens of states with the aircraft can arm and then operate a weaponized version. “Pretty much every nation has gone down the pathway of, ‘This is science fiction; we don’t want this stuff,’ to, ‘OK, we want them, but we’ll just use them for surveillance,’ to, ‘Hmm, they’re really useful when you see the bad guy and can do something about it, so we’ll arm them,’ ” Singer said. He listed the countries that have gone that route: the United States, Britain, Italy, Germany, China. “Consistently, nations have gone down the pathway of first only surveillance and then arming.”

The opportunity to write rules that might at least guide, if not restrain, the world’s view of acceptable drone use remains, not least because this is in essence a conventional arms-control issue. The international Missile Technology Control Regime attempts to restrict exports of unmanned vehicles capable of carrying weapons of mass destruction, but it is voluntary and nonbinding, and it’s under attack by the drone industry as a drag on business. Further, the technology itself, especially when coupled with data and real-time analytics, offers the luxury of time and distance that could allow officials to raise the evidentiary bar for strikes—to be closer to certain that their target is the right one.

But even without raising standards, tightening up drone-specific restrictions in the standing control regime, or creating a new control agreement (which is never easy to pull off absent a bad-state actor threatening attack), just the process of lining up U.S. policy with U.S. practice would go a long way toward establishing the kind of precedent on use of this technology that America—in five, 10, or 15 years—might find helpful in arguing against another’s actions.

A not-insignificant faction of U.S. defense and intelligence experts, Dennis Blair among them, thinks norms play little to no role in global security. And they have evidence in support. The missile-technology regime, for example, might be credited with slowing some program development, but it certainly has not stopped non-signatories—North Korea and Iran—from buying, building, and selling missile systems. But norms established by technology-leading countries, even when not written into legal agreements among nations, have shown success in containing the use and spread of some weapons, including land mines, blinding lasers, and nuclear bombs.

Arguably more significant than spotty legal regimes, however, is the behavior of the United States. “History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past,” Zenko argued. Despite the legal and policy complexity of this issue, it is something the American people have, if slowly, come to care about. Given the attention that Rand Paul’s filibuster garnered, it is not inconceivable that public pressure on drone operations could force the kind of unforeseen change to U.S. policy that it did most recently on “enhanced interrogation” of terrorists.

The case against open, transparent rule-making is that it might only hamstring American options while doing little good elsewhere—as if other countries aren’t closely watching this debate and taking notes for their own future policymaking. But the White House’s refusal to answer questions about its drone use with anything but “no comment” ensures that the rest of the world is free to fill in the blanks where and when it chooses. And the United States will have already surrendered the moment in which it could have provided not just a technical operations manual for other nations but a legal and moral one as well.

Unrestricted drone use causes nuclear war in the Caucuses

Clayton 12 (Nick Clayton, Worked in several publications, including the Washington Times the Asia Times and Washington Diplomat. He is currently the senior editor of Kanal PIK TV's English Service (a Russian-language channel), lived in the Caucuses for several years,10/23/2012, "Drone violence along Armenian-Azerbaijani border could lead to war", www.globalpost.com/dispatch/news/regions/europe/121022/drone-violence-along-armenian-azerbaijani-border-could-lead-war)

Armenia and Azerbaijan could soon be at war if drone proliferation on both sides of the border continues. In a region where a fragile peace holds over three frozen conflicts, the nations of the South Caucasus are buzzing with drones they use to probe one another’s defenses and spy on disputed territories. The region is also host to strategic oil and gas pipelines and a tangled web of alliances and precious resources that observers say threaten to quickly escalate the border skirmishes and airspace violations to a wider regional conflict triggered by Armenia and Azerbaijan that could potentially pull in Israel, Russia and Iran. To some extent, these countries are already being pulled towards conflict. Last September, Armenia shot down an Israeli-made Azerbaijani drone over Nagorno-Karabakh and the government claims that drones have been spotted ahead of recent incursions by Azerbaijani troops into Armenian-held territory. Richard Giragosian, director of the Regional Studies Center in Yerevan, said in a briefing that attacks this summer showed that Azerbaijan is eager to “play with its new toys” and its forces showed “impressive tactical and operational improvement.” The International Crisis Group warned that as the tit-for-tat incidents become more deadly, “there is a growing risk that the increasing frontline tensions could lead to an accidental war.” “Everyone is now saying that the war is coming. We know that it could start at any moment.” ~Grush Agbaryan, mayor of Voskepar With this in mind, the UN and the Organization for Security and Co-operation in Europe (OSCE) have long imposed a non-binding arms embargo on both countries, and both are under a de facto arms ban from the United States. But, according to the Stockholm International Peace Research Institute (SIPRI), this has not stopped Israel and Russia from selling to them. After fighting a bloody war in the early 1990s over the disputed territory of Nagorno-Karabakh, Armenia and Azerbaijan have been locked in a stalemate with an oft-violated ceasefire holding a tenuous peace between them. And drones are the latest addition to the battlefield. In March, Azerbaijan signed a $1.6 billion arms deal with Israel, which consisted largely of advanced drones and an air defense system. Through this and other deals, Azerbaijan is currently amassing a squadron of over 100 drones from all three of Israel’s top defense manufacturers. Armenia, meanwhile, employs only a small number of domestically produced models. Intelligence gathering is just one use for drones, which are also used to spot targets for artillery, and, if armed, strike targets themselves. Armenian and Azerbaijani forces routinely snipe and engage one another along the front, each typically blaming the other for violating the ceasefire. At least 60 people have been killed in ceasefire violations in the last two years, and the Brussels-based International Crisis Group claimed in a report published in February 2011 that the sporadic violence has claimed hundreds of lives. “Each (Armenia and Azerbaijan) is apparently using the clashes and the threat of a new war to pressure its opponent at the negotiations table, while also preparing for the possibility of a full-scale conflict in the event of a complete breakdown in the peace talks,” the report said. Alexander Iskandaryan, director of the Caucasus Institute in the Armenian capital, Yerevan, said that the arms buildup on both sides makes the situation more dangerous but also said that the clashes are calculated actions, with higher death tolls becoming a negotiating tactic. “This isn’t Somalia or Afghanistan. These aren’t independent units. The Armenian, Azerbaijani and Karabakh armed forces have a rigid chain of command so it’s not a question of a sergeant or a lieutenant randomly giving the order to open fire. These are absolutely synchronized political attacks,” Iskandaryan said. The deadliest recent uptick in violence along the Armenian-Azerbaijani border and the line of contact around Karabakh came in early June as US Secretary of State Hillary Clinton was on a visit to the region. While death tolls varied, at least two dozen soldiers were killed or wounded in a series of shootouts along the front. The year before, at least four Armenian soldiers were killed in an alleged border incursion by Azerbaijani troops one day after a peace summit between the Armenian, Azerbaijani and Russian presidents in St. Petersburg, Russia. “No one slept for two or three days [during the June skirmishes],” said Grush Agbaryan, the mayor of the border village of Voskepar for a total of 27 years off and on over the past three decades. “Everyone is now saying that the war is coming. We know that it could start at any moment." Azerbaijan refused to issue accreditation to GlobalPost’s correspondent to enter the country to report on the shootings and Azerbaijan’s military modernization. Flush with cash from energy exports, Azerbaijan has increased its annual defense budget from an estimated $160 million in 2003 to $3.6 billion in 2012. SIPRI said in a report that largely as a result of its blockbuster drone deal with Israel, Azerbaijan’s defense budget jumped 88 percent this year — the biggest military spending increase in the world. Israel has long used arms deals to gain strategic leverage over its rivals in the region. Although difficult to confirm, many security analysts believe Israel’s deals with Russia have played heavily into Moscow’s suspension of a series of contracts with Iran and Syria that would have provided them with more advanced air defense systems and fighter jets. Stephen Blank, a research professor at the United States Army War College, said that preventing arms supplies to Syria and Iran — particularly Russian S-300 air defense systems — has been among Israel’s top goals with the deals. “There’s always a quid pro quo,” Blank said. “Nobody sells arms just for cash.” In Azerbaijan in particular, Israel has traded its highly demanded drone technology for intelligence arrangements and covert footholds against Iran. In a January 2009 US diplomatic cable released by WikiLeaks, a US diplomat reported that in a closed-door conversation, Azerbaijani President Ilham Aliyev compared his country’s relationship with Israel to an iceberg — nine-tenths of it is below the surface. Although the Jewish state and Azerbaijan, a conservative Muslim country, may seem like an odd couple, the cable asserts, “Each country finds it easy to identify with the other’s geopolitical difficulties, and both rank Iran as an existential security threat.” Quarrels between Azerbaijan and Iran run the gamut of territorial, religious and geo-political disputes and Tehran has repeatedly threatened to “destroy” the country over its support for secular governance and NATO integration. In the end, “Israel’s main goal is to preserve Azerbaijan as an ally against Iran, a platform for reconnaissance of that country and as a market for military hardware,” the diplomatic cable reads. But, while these ties had indeed remained below the surface for most of the past decade, a series of leaks this year exposed the extent of their cooperation as Israel ramped up its covert war with the Islamic Republic. In February, the Times of London quoted a source the publication said was an active Mossad agent in Azerbaijan as saying the country was “ground zero for intelligence work.” This came amid accusations from Tehran that Azerbaijan had aided Israeli agents in assassinating an Iranian nuclear scientist in January. Then, just as Baku had begun to cool tensions with the Islamic Republic, Foreign Policy magazine published an article citing Washington intelligence officials who claimed that Israel had signed agreements to use Azerbaijani airfields as a part of a potential bombing campaign against Iran’s nuclear sites. Baku strongly denied the claims, but in September, Azerbaijani officials and military sources told Reuters that the country would figure in Israel’s contingencies for a potential attack against Iran. "Israel has a problem in that if it is going to bomb Iran, its nuclear sites, it lacks refueling," Rasim Musabayov, a member of the Azerbiajani parliamentary foreign relations committee told Reuters. “I think their plan includes some use of Azerbaijan access. We have (bases) fully equipped with modern navigation, anti-aircraft defenses and personnel trained by Americans and if necessary they can be used without any preparations." He went on to say that the drones Israel sold to Azerbaijan allow it to “indirectly watch what's happening in Iran.” According to SIPRI, Azerbaijan had acquired about 30 drones from Israeli firms Aeronautics Ltd. and Elbit Systems by the end of 2011, including at least 25 medium-sized Hermes-450 and Aerostar drones. In October 2011, Azerbaijan signed a deal to license and domestically produce an additional 60 Aerostar and Orbiter 2M drones. Its most recent purchase from Israel Aeronautics Industries (IAI) in March reportedly included 10 high altitude Heron-TP drones — the most advanced Israeli drone in service — according to Oxford Analytica. Collectively, these purchases have netted Azerbaijan 50 or more drones that are similar in class, size and capabilities to American Predator and Reaper-type drones, which are the workhorses of the United States’ campaign of drone strikes in Pakistan and Yemen. Although Israel may have sold the drones to Azerbaijan with Iran in mind, Baku has said publicly that it intends to use its new hardware to retake territory it lost to Armenia. So far, Azerbaijan’s drone fleet is not armed, but industry experts say the models it employs could carry munitions and be programmed to strike targets. Drones are a tempting tool to use in frozen conflicts, because, while their presence raises tensions, international law remains vague at best on the legality of using them. In 2008, several Georgian drones were shot down over its rebel region of Abkhazia. A UN investigation found that at least one of the drones was downed by a fighter jet from Russia, which maintained a peacekeeping presence in the territory. While it was ruled that Russia violated the terms of the ceasefire by entering aircraft into the conflict zone, Georgia also violated the ceasefire for sending the drone on a “military operation” into the conflict zone. The incident spiked tensions between Russia and Georgia, both of which saw it as evidence the other was preparing to attack. Three months later, they fought a brief, but destructive war that killed hundreds. The legality of drones in Nagorno-Karabakh is even less clear because the conflict was stopped in 1994 by a simple ceasefire that halted hostilities but did not stipulate a withdrawal of military forces from the area. Furthermore, analysts believe that all-out war between Armenia and Azerbaijan would be longer and more difficult to contain than the five-day Russian-Georgian conflict. While Russia was able to quickly rout the Georgian army with a much superior force, analysts say that Armenia and Azerbaijan are much more evenly matched and therefore the conflict would be prolonged and costly in lives and resources. Blank said that renewed war would be “a very catastrophic event” with “a recipe for a very quick escalation to the international level.” Armenia is militarily allied with Russia and hosts a base of 5,000 Russian troops on its territory. After the summer’s border clashes, Russia announced it was stepping up its patrols of Armenian airspace by 20 percent. Iran also supports Armenia and has important business ties in the country, which analysts say Tehran uses as a “proxy” to circumvent international sanctions. Blank said Israel has made a risky move by supplying Azerbaijan with drones and other high tech equipment, given the tenuous balance of power between the heavily fortified Armenian positions and the more numerous and technologically superior Azerbaijani forces. If ignited, he said, “[an Armenian-Azerbaijani war] will not be small. That’s the one thing I’m sure of.”

Nuclear war

Blank 2k

(Stephen, Prof. Research at Strategic Studies Inst. @ US Army War College, “U.S. Military Engagement with Transcaucasia and Central Asia”, www.strategicstudiesinstitute.army.mil/pdffiles/pub113.pdf)

Washington’s burgeoning military-political-economic involvement seeks, inter alia, to demonstrate the U.S. ability to project military power even into this region or for that matter, into Ukraine where NATO recently held exercises that clearly originated as an anti-Russian scenario. Secretary of Defense William Cohen has discussed strengthening U.S.-Azerbaijani military cooperation and even training the Azerbaijani army, certainly alarming Armenia and Russia.69 And Washington is also training Georgia’s new Coast Guard. 70 However, Washington’s well-known ambivalence about committing force to Third World ethnopolitical conflicts suggests that U.S. military power will not be easily committed to saving its economic investment. But this ambivalence about committing forces and the dangerous situation, where Turkey is allied to Azerbaijan and Armenia is bound to Russia, create the potential for wider and more protracted regional conflicts among local forces. In that connection, Azerbaijan and Georgia’s growing efforts to secure NATO’s lasting involvement in the region, coupled with Russia’s determination to exclude other rivals, foster a polarization along very traditional lines.71 In 1993 Moscow even threatened World War III to deter Turkish intervention on behalf of Azerbaijan. Yet the new Russo-Armenian Treaty and Azeri-Turkish treaty suggest that Russia and Turkey **could be dragged into a confrontation to rescue their allies** from defeat. 72 Thus many of the conditions for conventional war or protracted ethnic conflict in which third parties intervene are present in the Transcaucasus. For example, many Third World conflicts generated by local structural factors have a great potential for unintended escalation. Big powers often feel obliged to rescue their lesser proteges and proxies. One or another big power may fail to grasp the other side’s stakes since interests here are not as clear as in Europe. Hence commitments involving the use of nuclear weapons to prevent a client’s defeat are not as well established or apparent. Clarity about the nature of the threat could prevent the kind of rapid and almost uncontrolled escalation we saw in 1993 when Turkish noises about intervening on behalf of Azerbaijan led Russian leaders to threaten a nuclear war in that case. 73 Precisely because Turkey is a NATO ally, Russian nuclear threats **could trigger a potential nuclear blow (**not a small possibility given the erratic nature of Russia’s declared nuclear strategies). The real threat of a Russian nuclear strike against Turkey to defend Moscow’s interests and forces in the Transcaucasus makes the danger of major war there higher than almost everywhere else. As Richard Betts has observed, The greatest danger lies in areas where (1) the potential for serious instability is high; (2) both superpowers perceive vital interests; (3) neither recognizes that the other’s perceived interest or commitment is as great as its own; (4) both have the capability to inject conventional forces; and, (5) neither has willing proxies capable of settling the situation.74 that preclude its easy attainment of regional hegemony. And even the perceptions of waning power are difficult to accept and translate into Russian policy. In many cases, Russia still has not truly or fully accepted how limited its capabilities for securing its vital interests are. 76 While this hardly means that Russia can succeed at will regionally, it does mean that for any regional balance, either on energy or other major security issues, to be realized, someone else must lend power to the smaller Caspian littoral states to anchor that balance. Whoever effects that balance must be willing to play a protracted and potentially even military role in the region for a long time and risk the kind of conflict which Betts described. There is little to suggest that the United States can or will play this role, yet that is what we are now attempting to do. This suggests that ultimately its bluff can be called. That is, Russia could sabotage many if not all of the forthcoming energy projects by relatively simple and tested means and there is not much we could do absent a strong and lasting regional commitment.

India will strike militants in Pakistan – US precedent is key

Siddique 13 (Qandeel, researcher and policy advisor based in Oslo. She specialises in international terrorism, political violence and South Asian affairs for the Centre for International and Strategic Analysis, 4/8/2013, "THE UNITED STATES’ DRONE PROGRAM IN PAKISTAN: An Analysis of the Efficacy and the Pakistani Government’s Complicity", strategiskanalyse.no/publikasjoner%202013/2013-04-08\_SISA4\_DroneProgram\_QandeelS.pdf)

While only a small share of countries presently possess armed drones, the demand for it is great, The boom in drone technology signals a shift in the way war is fought and omens a start to a new arms race. In August 2012 Iran marked the founding of its first armed drone; a gesture that threatens Israeli security. In September 2012, China an­nounced that it would send surveillance drones to monitor the disputed islands in the South China Sea. China has also showcased its ability to arm its UAVs. Nuclear rivals like India and Pakistan are known to be working on their individual drone programs; these two countries continue to carry out low intensity warfare over the disputed region of Kashmir **and there is a likelihood that with the US precedent in mind**, India may attempt to strike suspected terrorists in Kashmir in the name of fighting terrorism. Given the challenges India faces concerning counter-terrorism and -insurgency in the region, India (like many other countries) has displayed interest in the tactical benefits of drones. While the intended use is that of intelligence, reconnaissance and surveillance, India has declared its goal of acquiring “mass acquisition of armed UAVs.4

Causes escalation

Keck 13 (Zachary Keck is Associate Editor of The Diplomat. He has previously served as a Deputy Editor for E-IR and as an Editorial Assistant for The Diplomat. Zach has published in various outlets such as Foreign Policy, The National Interest, The Atlantic, Foreign Affairs, and World Politics Review., 8/29/2013, "India Eyes Drone-Launched Smart Bombs", thediplomat.com/flashpoints-blog/2013/08/29/india-eyes-drone-launched-smart-bombs/)

Yogesh Joshi, an expert on India’s strategic and missile capabilities at the School of International Studies at Jawaharlal Nehru University in Delhi, was slightly more optimistic.

“It will take them a lot of time to get where U.S. and Israel are,” Joshi told The Diplomat referring to DRDO. “However, DRDO is also benefiting a lot by collaboration with U.S. and particularly Israel. Given the fact [that the] U.S. is not as critical of India-Israel engagement as it used to be has benefited this relationship. So the progress may be much more speedy than we expect.”

Both experts also agreed that having such a capability would be useful to Delhi in a number of important areas.

Karnad, who helped draft India’s nuclear doctrine in the late 1990s, said that there is a “whole bunch of tactical and strategic military uses,” for drones armed with smart bombs**, including “on the conventional military battlefield versus Pakistan** and China, for deployment against terrorist training camps and staging areas/supply depots **in Pakistan-occupied Kashmir**, and to fight the Naxal insurgents active inside the country.”

Joshi had a similar assessment saying that the drones could be “used for fighting terrorism inside the country in remote areas of Jammu and Kashmir as well as anti-Naxal operations.”

He didn’t believe that the drones would be used to target anti-India militants inside Pakistan proper in the same way that the U.S. has used its drone fleet to carry out targeted strikes against al-Qaeda and Taliban fighters operating in Pakistan’s northwestern regions.

“I think it will be foolish to use them against militants on foreign soil,” Joshi said when asked by The Diplomat if the drones would be used inside Pakistan.

He pointed out that Pakistan has repeatedly said it has the capability to shoot down U.S. drones, and Iran has in fact taken down a U.S. drone that was conducting surveillance operations in Iranian airspace.

“For all obvious reasons, Pakistan certainly can't shoot down U.S. drones. **But in the case of India, it will not restrain itself at all.** We would therefore be staring at… a loss of resources, international embarrassment as well as **an** escalation of conflict.”

#### Indo-pak causes extinction

Greg Chaffin 11, Research Assistant at Foreign Policy in Focus, July 8, 2011, “Reorienting U.S. Security Strategy in South Asia,” online: http://www.fpif.org/articles/reorienting\_us\_security\_strategy\_in\_south\_asia

The greatest threat to regional security (although curiously not at the top of most lists of U.S. regional concerns) is the possibility that increased India-Pakistan tension will erupt into all-out warthat could quickly escalate into a nuclear exchange. Indeed, in just the past two decades, the two neighbors have come perilously close to war on several occasions. India and Pakistan remain the most likely belligerents in the world to engage in nuclear war. Due to an Indian preponderance of conventional forces, Pakistan would have a strong incentive to use its nuclear arsenal very early on before a routing of its military installations and weaker conventional forces. In the event of conflict, Pakistan’s only chance of survival would be the early use of its nuclear arsenal to inflict unacceptable damage to Indian military and (much more likely) civilian targets. By raising the stakes to unacceptable levels, Pakistan would hope that India would step away from the brink. However, it is equally likely that India would respond in kind, with escalation ensuing. Neither state possesses tactical nuclear weapons, but both possess scores of city-sized bombs like those used on Hiroshima and Nagasaki. Furthermore, as more damage was inflicted (or as the result of a decapitating strike), command and control elements would be disabled, leaving individual commanders to respondin an environment increasingly clouded by the fog of war and decreasing the likelihood that either government (what would be left of them) would be able to guarantee that their forces would follow a negotiated settlement or phased reduction in hostilities. As a result any suchconflict would likely continue to escalateuntil one side incurred an unacceptable or wholly debilitating level of injury or exhausted its nuclear arsenal. A nuclear conflict in the subcontinentwould havedisastrous effects on the world as a whole. In a January 2010 paper published in Scientific American, climatology professors Alan Robock and Owen Brian Toon forecast the global repercussionsof a regional nuclear war. Their results are strikingly similar to those of studies conducted in 1980 that conclude that a nuclear war between the United States and the Soviet Union wouldresult in acatastrophic and prolonged nuclear winter,which could very well place the survival of the human race in jeopardy. In their study, Robock and Toon use computer models to simulate the effect of a nuclear exchange between India and Pakistan in which each were to use roughly half their existing arsenals (50 apiece). Since Indian and Pakistani nuclear devices are strategic rather than tactical, the likely targets would be major population centers. Owing to the population densities of urban centers in both nations, the number of direct casualties could climb as high as 20 million. The fallout of such an exchange would not merely be limited to the immediate area. First, the detonation of a large number of nuclear devices would propel as much as seven million metric tons of ash, soot, smoke, and debris as high as the lower stratosphere. Owing to their small size (less than a tenth of a micron) and a lack of precipitation at this altitude, ash particles would remain aloft for as long as a decade, during which time the world would remain perpetually overcast. Furthermore, these particles would soak up heat from the sun, generating intense heat in the upper atmosphere that would severely damage the earth’s ozone layer. The inability of sunlight to penetrate through the smoke and dust would lead toglobal cooling by as much as 2.3 degrees Fahrenheit. This shift in global temperature would lead to more drought, worldwide food shortages, and widespread political upheaval. Although the likelihood of this doomsday scenario remains relatively low, the consequences are dire enough to warrant greater U.S. and international attention. Furthermore, due to the ongoing conflict over Kashmir and the deep animus held between India and Pakistan, it might not take much to set them off. Indeed, following the successful U.S. raid on bin Laden’s compound, several members of India’s security apparatus along with conservative politicians have argued that India should emulate the SEAL Team Six raid and launch their own cross-border incursions to nab or kill anti-Indian terrorists, either preemptively or after the fact. Such provocative action could very well lead to all-out war between the two that could quickly escalate.

#### Deterrence doesn't solve

Grossman 13

Elaine M. Grossman is a special correspondent for National Journal, and executive editor and senior correspondent for Global Security Newswire, Nuclear Threat Initiative, April 3, 2013, "Pakistan's Military Sanguine on Avoiding Wartime Nuclear Calamity", http://www.nti.org/gsn/article/pakistani-military-sanguine-about-avoiding-nuclear-calamity/

After Pakistan first tested nuclear weapons in 1998, India is widely believed to have formulated a so-called “Cold Start” strategy in which it would be prepared to dash across the border and seize key assets -- perhaps even cities, such as Lahore -- within reach. Under the strategy, which Indian officials have at times denied preparing, New Delhi would hope to prevent any use of Pakistani nuclear weapons.

In counter-reaction, Pakistan has expanded its atomic arsenal and devised plans to disperse these arms at the outset of any major war so they could not be captured, according to issue experts.

This dispersal might also make the use of nuclear arms more likely, some observers say.

Specifically, the worry is that spreading nuclear arms throughout Pakistani army units on a chaotic battlefield could make warheads more vulnerable to terrorist theft, unauthorized detonation or approved use based on misunderstanding.

“With dispersal, the loss of control is quite easy and that is one great fear,” said Abdul Hameed Nayyar, a retired scholar at Quaid-i-Azam University in Islamabad.

The Pakistani military has developed “tactical” or shorter-range nuclear arms for possible battlefield use. It has also planned for a “shoot-and-scoot” tactic in its plans for war against India, which would involve moving atomic-tipped missiles on mobile launchers to help evade enemy targeting, Nayyar said.

In such an approach, “you are actually delegating responsibility” to commanders at “very, very low” echelons, he said. “And delegating authority [over] nuclear weapons at that low level is very dangerous and I think that is something we all are very afraid of.”

“Use of tactical weapons is not an element of stability in the whole Indo-Pakistan strategic equation,” agreed retired Pakistani army Lt. Gen. Talat Masood. “There are dangers in delegation of authority as far as use of nuclear weapons are concerned.”

The Pakistani military has said that launch authority would remain at high levels, though some reports suggest otherwise, he told reporters visiting Islamabad.

“But the only problem is if the conditions are unstable, and if you are that close to the border, then you can’t really exercise physical control,” Masood said.

Even if strict high-level control over nuclear use were retained, “we are not going to detonate [once] and remain limited to that,” Nayyar said, calling the use of theater nuclear weapons by Pakistan “an escalatory step” in response to India’s military doctrine.

“Deterrence is an abstract notion that sometimes fails real-world tests,” South Asia expert Michael Krepon observed in a 2011 blog post.

“Every crisis that results in the increased readiness to use nuclear weapons also increases the likelihood of accidents and loss of control over nuclear assets,” he wrote more recently in a December analysis of Pakistan’s nuclear posture. “The probability of first use as a result of accidents and unauthorized use … appears greater than a deliberate command decision to cross the nuclear threshold.”

After a conflict breaks out, “crisis management and escalation control then become paramount,” but “there is no reliable playbook for escalation control once a crisis transitions to hostilities between nuclear-armed states,” Krepon said.

“India and Pakistan still lack the means to manage a crisis, frankly,” said Lodhi, the former ambassador. She added that the United States in the past has acted as a “fire brigade,” returning to the region repeatedly to “put out the fires.”

### solvency

Only congressional action on the scope of hostilities sends a clear signal that the US abides by the laws of armed conflict

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• First, the United States government urgently needs publicly to declare the legal rationale behind its use of drones, and defend that legal rationale in the international community, which is increasingly convinced that parts, if not all, of its use is a violation of international law.

• Second, the legal rationale offered by the United States government needs to take account, not only of the use of drones on traditional battlefields by the US military, but also of the Obama administration’s signature use of drones by the CIA in operations outside of traditionally conceived zones of armed conflict, whether in Pakistan, or further afield, in Somalia or Yemen or beyond. This legal rationale must be certain to protect, in plain and unmistakable language, the lawfulness of the CIA’s participation in drone-related uses of force as it takes place today, and to protect officials and personnel from moves, in the United States or abroad, to treat them as engaged in unlawful activity. It must also be broad enough to encompass the use of drones (under the statutory arrangements long set forth in United States domestic law) by covert civilian agents of the CIA, in operations in the future, involving future presidents, future conflicts, and future reasons for using force that have no relationship to the current situation.

• Third, the proper legal rationale for the use of force in drone operations in special, sometimes covert, operations outside of traditional zones of armed conflict is the customary international law doctrine of self-defense, rather than the narrower law of armed conflict.

• Fourth, Congress has vital roles to play here, mostly in asserting the legality of the use of drones. These include: (i) Plain assertion of the legality of the programs as currently used by the Obama administration, as a signal to courts in the US as well as the international community and other interested actors, that the two political branches are united on an issue of vital national security and foreign policy. (ii) Congressional oversight mechanisms should also be strengthened in ensuring Congress’s meaningful knowledge and ability to make its views known. (iii) Congress also should consider legislation to clarify once and for all that that covert use of force is lawful under US law and international law of self-defense, and undertake legislation to make clear the legal protection of individual officers. (iv) Congress should also strongly encourage the administration to put a public position on the record. In my view, that public justification ought to be something (self-defense, in my view) that will ensure the availability of targeted killing for future administrations outside the context of conflict with Al Qaeda – and protect against its legal erosion by acquiescing or agreeing to interpretations of international law that would accept, even by implication, that targeted killing by the civilian CIA using drones is per se an unlawful act of extrajudicial execution.

The Multiple Strategic Uses of Drones and Their Legal Rationales

4. Seen through the lens of legal policy, drones as a mechanism for using force are evolving in several different strategic and technological directions, with different legal implications for their regulation and lawful use. From my conversations and research with various actors involved in drone warfare, the situation is a little bit like the blind men and the elephant – each sees only the part, including the legal regulation, that pertains to a particular kind of use, and assumes that it covers the whole. The whole, however, is more complicated and heterogeneous. They range from traditional tactical battlefield uses in overt war to covert strikes against non-state terrorist actors hidden in failed states, ungoverned, or hostile states in the world providing safe haven to terrorist groups. They include use by uniformed military in ordinary battle but also use by the covert civilian service.

5. Although well-known, perhaps it bears re-stating the when this discussion refers to drones and unmanned vehicle systems, the system is not “unmanned” in the sense that human beings are not in the decision or control loop. Rather, “unmanned” here refers solely to “remote-piloted,” in which the pilot and weapons controllers are not physically on board the aircraft. (“Autonomous” firing systems, in which machines might make decisions about the firing of weapons, raise entirely separate issues not covered by this discussion because they are not at issue in current debates over UA Vs.)

6. Drones on traditional battlefields. The least legally complicated or controversial use of drones is on traditional battlefields, by the uniformed military, in ordinary and traditional roles of air power and air support. From the standpoint of military officers involved in such traditional operations in Afghanistan, for example, the use of drones is functionally identical to the use of missile fired from a standoff fighter plane that is many miles from the target and frequently over-the-horizon. Controllers of UAVs often have a much better idea of targeting than a pilot with limited input in the cockpit. From a legal standpoint, the use of a missile fired from a drone aircraft versus one fired from some remote platform with a human pilot makes no difference in battle as ordinarily understood. The legal rules for assessing the lawfulness of the target and anticipated collateral damage are identical.

7. Drones used in Pakistan’s border region. Drones used as part of the on-going armed conflict in Afghanistan, in which the fighting has spilled over – by Taliban and Al Qaeda flight to safe havens, particularly – into neighboring areas of Pakistan likewise raise relatively few questions about their use, on the assumption that the armed conflict has spilled, as is often the case of armed conflict, across an international boundary. There are no doubt important international and diplomatic questions raised about the use of force across the border – and that is presumably one of the major reasons why the US and Pakistan have both preferred the use of drones by the CIA with a rather shredded fig leaf, as it were, of deniability, rather than US military presence on the ground in Pakistan. The **legal questions are important**, but (unless one takes the view that the use of force by the CIA is always and per se illegal under international law, even when treated as part of the armed forces of a state in what is unquestionably an armed conflict) there is nothing legally special about UAVs that would distinguish them from other standoff weapons platforms.

8. Drones used in Pakistan outside of the border region. The use of drones to target Al Qaeda and Taliban leadership outside of places in which it is factually plain that hostilities are underway begins to invoke the current legal debates over drone warfare. From a strategic standpoint, of course, the essence of much fighting against a raiding enemy is to deny it safe haven; as safe havens in the border regions are denied, then the enemy moves to deeper cover. The strategic rationale for targeting these leaders (certainly in the view of the Obama administration) is overwhelming. Within the United States, and even more without, arguments are underway as to whether Pakistan beyond the border regions into which overt fighting has spilled can justify reach to the law of armed conflict as a basis and justification for drone strikes.

9. Drones used against Al Qaeda affiliates outside of AfPak – Somalia, Yemen or beyond. The President, in several major addresses, has stressed that the United States will take the fight to the enemy, and pointedly included places that are outside of any traditionally conceived zone of hostilities in Iraq or AfPak – Somalia and Yemen have each been specifically mentioned. And indeed, the US has undertaken uses of force in those places, either by means of drones or else by human agents. The Obama administration has made clear – entirely correctly, in my view – that it will deny safe haven to terrorists. As the president said in an address at West Point in fall 2009, we “cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear.”1 In this, the President follows the long-standing, traditional view of the US government endorsing, as then-State Department Legal Advisor Abraham Sofaer put it in a speech in 1989, the “right of a State to strike terrorists within the territory of another State where terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped.”2

10. The United States might assert in these cases that the armed conflict goes where the combatants go, in the case particularly of an armed conflict (with non-state actors) that is already acknowledged to be underway. In that case, those that it targets are, in its view, combats that can lawfully be targeted, subject to the usual armed conflict rules of collateral damage. One says this without knowing for certain whether this is, in fact, the US view – although the Obama administration is under pressure for failing to articulate a public legal view, this was equally the case for the preceding two administrations. In any case, however, that view is sharply contested as a legal matter. The three main contending legal views at this point are as follows:

• One legal view (the traditional view and that presumably taken by the Obama administration, except that we do not know for certain, given its reticence) is that we are in an armed conflict. Wherever the enemy goes, we are entitled to follow and attack him as a combatant. Geography and location – important for diplomatic reasons and raising questions about the territorial integrity of states, true – are irrelevant to the question of whether it is lawful to target under the laws of war; the war goes where the combatant goes. We must do so consistent with the laws of war and attention to collateral damage, and other legal and diplomatic concerns would of course constrain us if, for example, the targets fled to London or Istanbul. But the fundamental right to attack a combatant, other things being equal, surely cannot be at issue.

• A second legal view directly contradicts the first, and says that the legal rights of armed conflict are limited to a particular theatre of hostilities, not to wherever combatants might flee throughout the world. This creates a peculiar question as to how, lawfully, hostilities against a non-state actor might ever get underway. But the general legal policy response is that if there is no geographic constraint consisting of a “theatre” of hostilities, then the very special legal regime of the laws of armed conflict might suddenly, and without any warning, apply – and overturn – ordinary laws of human rights that prohibit extrajudicial execution, and certainly do not allow attacks subject merely to collateral damage rules, with complete surprise and no order to it. Armed conflict is defined by its theatres of hostilities, on this view, as a mechanism for limiting the scope of war and, importantly, the reach of the laws of armed conflict insofar as the displace (with a lower standard of protection) ordinary human rights law. Again, this leaves a deep concern that this view, in effect, empowers the fleeing side, which can flee to some place where, to some extent, it is protected against attack.

• A third legal view (to which I subscribe) says that armed conflict under the laws of war, both treaty law of the Geneva Conventions and customary law, indeed accepts that non-international armed conflict is defined, and therefore limited by, the presence of persistent, sustained, intense hostilities. In that sense, then, an armed conflict to which the laws of war apply exists only in particular places where those conditions are met. **That is not the end of the legal story, however**. Armed conflict as defined under the Geneva Conventions (common articles 2 and 3) is not the only international law basis for governing the use of force. The international law of self-defense is a broader basis for the use of force in, paradoxically, more limited ways that do not rise to the sustained levels of fighting that legally define hostilities.

• Why is self-defense the appropriate legal doctrine for attacks taking place away from active hostilities? From a strategic perspective, a large reason for ordering a limited, pinprick, covert strike is in order to avoid, if possible, an escalation of the fighting to the level of overt intensity that would invoke the laws of war – the intent of the use of force is to avoid a wider war. Given that application of the laws of war, in other words, requires a certain level of sustained and intense hostilities, that is not always a good thing. It is often bad and precisely what covert action seeks to avoid. The legal basis for such an attack is not armed conflict as a formal legal matter – the fighting with a non-state actor does not rise to the sustained levels required under the law’s threshold definition – but instead the law of self-defense.

• Is self-defense law simply a standardless license wantonly to kill? This invocation of self-defense law should not be construed as meaning that it is without limits or constraining standards. On the contrary, it is not standardless, even though it does not take on all the detailed provisions of the laws of war governing “overt” warfare, including the details of prison camp life and so on. It must conform to the customary law standards of necessity and proportionality – necessity in determining whom to target, and proportionality in considering collateral damage. The standards in those cases should essentially conform to military standards under the law of war, and in some cases the standards should be still higher.

11. The United States government seems, to judge by its lack of public statements, remarkably indifferent to the increasingly vehement and pronounced rejection of the first view, in particular, that the US can simply follow combatants anywhere and attack them. The issue is not simply collateral damage in places where no one had any reason to think there was a war underway; prominent voices in the international legal community question, at a minimum, the lawfulness of even attacking what they regard as merely alleged terrorists. In the view of important voices in international law, the practice outside of a traditional battlefield is a violation of international human rights law guarantees against extrajudicial execution and, at bottom, is just simple murder. On this view, the US has a human rights obligation to seek to arrest and then charge under some law; it cannot simply launch missiles at those it says are its terrorist enemies. It shows increasing impatience with US government silence on this issue, and with the apparent – but quite undeclared – presumption that the armed conflict goes wherever the combatants go.

12. Thus, for example, the UN special rapporteur on extrajudicial execution, NYU law professor Philip Alston, has asked in increasingly strong terms that, at a minimum, the US government explain its legal rationales for targeted killing using drones. The American Civil Liberties Union in February 2010 filed an extensive FOIA request (since re-filed as a lawsuit), seeking information on the legal rationales (but including requests for many operational facts) for all parts of the drones programs, carefully delineating military battlefield programs and CIA programs outside of the ordinary theatres of hostilities. Others have gone much further than simply requests that the US declare its legal views and have condemned them as extrajudicial execution – as Amnesty International did with respect to one of the earliest uses of force by drones, the 2002 Yemen attack on Al Qaeda members. The addition of US citizens to the kill-or-capture list, under the authorization of the President, has raised the stakes still further. The stakes, in this case, are highly unlikely to involve President Obama or Vice-President Biden or senior Obama officials. They are far more likely to involve lower level agency counsel, at the CIA or NSC, who create the target lists and make determinations of lawful engagement in any particular circumstance. It is they who would most likely be investigated, indicted, or prosecuted in a foreign court as, the US should take careful note, has already happened to Israeli officials in connection with operations against Hamas. **The reticence of the US government on this matter is frankly hard to justify**, at this point; this is not a criticism per se of the Obama administration, because the George W. Bush and Clinton administrations were equally unforthcoming. But this is the Obama administration, and **public silence on the legal legitimacy of targeted killings especially in places** and ways **that are not obviously** by the military in obvious **battlespaces is increasingly problematic**.

13. Drones used in future circumstances by future presidents against new non-state terrorists. A government official with whom I once spoke about drones as used by the CIA to launch pinpoint attacks on targets in far-away places described them, in strategic terms, as the “lightest of the light cavalry.” He noted that if terrorism, understood strategically, is a “raiding strategy” launched largely against “logistical” rather than “combat” targets – treating civilian and political will as a “logistical target” in this strategic sense – then how should we see drone attacks conducted in places like Somalia or Yemen or beyond? We should understand them, he said, as a “counter-raiding” strategy, aimed not at logistical targets, but instead at combat targets, the terrorists themselves. Although I do not regard this use of “combat” as a legal term – because, as suggested above, the proper legal frame for these strikes is self-defense rather than “armed conflict” full-on – as a strategic description, this is apt.

14. This blunt description suggests, however, that it is a profound mistake to think that the importance of drones lies principally on the traditional battlefield, as a tactical support weapon, or even in the “spillover” areas of hostilities. In those situations, it is perhaps cheaper than the alternatives of manned systems, but is mostly a substitute for accepted and existing military capabilities. Drone attacks become genuinely special as a form of strategic, yet paradoxically discrete, air power outside of overt, ordinary, traditional hostilities – the farthest project of discrete force by the lightest of the light cavalry. As these capabilities develop in several different technological direction – on the one hand, smaller vehicles, more contained and limited kinetic weaponry, and improved sensors and, on the other hand, large-scale drone aircraft capable of going after infrastructure targets as the Israelis have done with their Heron UAVs – it is highly likely that they will become a weapon of choice for future presidents, future administrations, in future conflicts and circumstances of self- defense and vital national security of the United States. Not all the enemies of the United States, including transnational terrorists and non-state actors, will be Al Qaeda or the authors of 9/11. Future presidents will need these technologies and strategies – and will need to know that they have sound, publicly and firmly asserted legal defenses of their use, including both their use and their limits in law.

Status quo administration policy delineates between geographic zones, but our legal justification for war everywhere remains in place

Anthony Dworkin 13, senior policy fellow at the European Council on Foreign Relations, “Drones And Targeted Killing: Defining A European Position”, July, <http://ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf>

Two further points are worth noting. First, the administration has acknowledged that in the case of American citizens, even when they are involved in the armed conflict, the US Constitution imposes additional requirements of due process that bring the threshold for targeted killing close to that involved in a self-defence analysis. These requirements were listed in a Department of Justice white paper that became public earlier this year.26 Second, **the administration has** at times **suggested** that even in the case of non-Americans **its policy is to concentrate its efforts against individuals who pose a significant and imminent threat to the US**. For example, John Brennan said in his Harvard speech in September 2011 that the administration’s counterterrorism efforts outside Afghanistan and Iraq were “focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qaeda and its associated forces”.27

However, the **details** that have emerged about US targeting practices in the past few years **raise questions about how closely this approach has been followed in practice**. An analysis published by McClatchy Newspapers in April, based on classified intelligence reports, claimed that 265 out of 482 individuals killed in Pakistan in a 12-month period up to September 2011 were not senior al-Qaeda operatives but instead were assessed as Afghan, Pakistani, and unknown extremists.28 It has been widely reported that in both Pakistan and Yemen the US has at times carried out “signature strikes” or “Terrorist Attack Disruption Strikes” in which groups are targeted based not on knowledge of their identity but on a pattern of behaviour that complies with a set of indicators for militant activity. It is widely thought that these attacks have accounted for many of the civilian casualties caused by drone strikes. In both Pakistan and Yemen, there may have been times when some drone strikes – including signature strikes – could perhaps best be understood as counterinsurgency actions in support of government forces in an internal armed conflict or civil war, and in this way lawful under the laws of armed conflict. Some attacks in Pakistan may also have been directly aimed at preventing attacks across the border on US forces in Afghanistan. However, **by presenting its drone programme overall as part of** a global armed conflict. the **Obama** administration **continues to set** an expansive precedent **that is damaging to the international rule of law**.

Obama’s new policy on drones

It is against this background that Obama’s recent counterterrorism speech and the policy directive he announced at the same time should be understood. On the subject of remotely piloted aircraft and targeted killing, there were two key aspects to his intervention. First, he suggested that the military element in US counterterrorism may be scaled back further in the coming months, and that he envisages a time in the not-too-distant future when the fight against the al-Qaeda network will no longer qualify as an armed conflict. He said that “the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat” and that while al-Qaeda franchises and other terrorists continued to plot against the US, “the scale of this threat closely resembles the types of attacks we faced before 9/11”.29 Obama promised that he would not sign legislation that expanded the mandate of the AUMF, and proclaimed that the United States’ “systematic effort to dismantle terrorist organizations must continue […] but this war, like all wars, must end”. The tone of Obama’s speech contrasted strongly with that of US **military officials** who testified before the Senate Committee on Armed Services the week before; Michael Sheehan, the Assistant Secretary of Defence for Special Operations and Low-Intensity Conflict, **said** then that **the end of the armed conflict was “a long way off**” and appeared to say that **it might continue for 10 to 20 years**.30

Second, the day before his speech, **Obama set out regulations** for drone strikes that appeared to restrict them beyond previous commitments (the guidance remains classified but a summary has been released). The guidance set out standards and procedures for drone strikes “that are either already in place or will be transitioned into place over time”.31 **Outside areas of active hostilities, lethal force will only be used “when capture is not feasible and no other reasonable alternatives exist to address the threat effectively”. It will only be used against a target “that poses a continuing, imminent threat to US persons”. And there must be “near certainty that non-combatants will not be injured or killed**”.

In some respects, these standards remain unclear: the president did not specify how quickly they would be implemented, or how “areas of active hostilities” should be understood. Nevertheless, **taken at face value,** they **seem to** represent a meaningful change**, at least on a conceptual level**. Effectively, they bring the criteria for all targeted strikes into line with the standards that the administration had previously determined to apply to US citizens. **Where the administration had previously said on occasions that it focused in practice on those people who pose the greatest threat,** this is **now formalised as** official policy. In this way, the standards are **significantly** more restrictive than the limits that the laws of armed conflict set for killing in wartime, and represent a shift towards a threat-based rather than status-based approach. **In effect, the new policy endorses a self-defence standard as the de facto basis for US drone strikes**, even if the continuing level of attacks would strike most Europeans as far above what a genuine self-defence analysis would permit.32 The new standards would seem to prohibit signature strikes in countries such as Yemen and Somalia and confine them to Pakistan, where militant activity could be seen as posing a cross-border threat to US troops in Afghanistan. According to news reports, signature strikes will continue in the Pakistani tribal areas for the time being.33

However, the impact of the new policy will depend very much on how the concept of a continuing, imminent threat is interpreted. The administration has not given any definition of this phrase, and the leaked Department of Justice white paper contained a strikingly broad interpretation of imminence; among other points, the white paper said that it “does not require the United States to have clear evidence that a specific attack on US persons or interests will take place in the immediate future” and that it “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans”.34 The presidential policy guidance captures the apparent concerns behind the administration’s policy more honestly by including the criterion of continuing threat, but this begs the question of how the notions of a “continuing” and “imminent” threat relate to each other. Even since Obama’s speech, the US is reported to have carried out four drone strikes (two in Pakistan and two in Yemen) killing between 18 and 21 people – suggesting that the level of attacks is hardly diminishing **under the new guidelines**.35

It is also notable that the new standards **announced by Obama** represent a policy decision **by the US** rather than **a** revised **interpretation of its** legal obligations. In his speech, **Obama drew a distinction between legality and morality**, pointing out that “to say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance”. The suggestion was that the US was scaling back its use of drones out of practical or normative considerations, not because of any new conviction that the its previous legal claims went too far. The **background** assertion that the US **is engaged in an armed conflict with al-Qaeda and associated forces, and** might **therefore** lawfully kill any member **of the opposing forces** wherever they were found, remains in place **to serve** as a precedent **for other states that wish to claim it**.

Limiting the use of force as a first resort is critical to sustainable consensus-building on targeted killing standards

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

Legal scholars, policymakers, and state actors are embroiled in a heated debate about whether the conflict with al Qaeda is concentrated within specific geographic boundaries or extends to wherever al Qaeda members and associated forces may go. The United States' expansive view of the conflict, coupled with its broad definition of the enemy, has led to a legitimate concern about the creep of war. Conversely, the European and human rights view, which confines the conflict to a limited geographic region, ignores the potentially global nature of the threat and unduly constrains the state's ability to respond. Neither the law of international armed conflict (governing conflicts between states) nor the law of noninternational armed conflict (traditionally understood to govern intrastate conflicts) provides the answers that are so desperately needed.

The zone approach proposed by this Article fills the international law gap, effectively mediating the multifaceted liberty and security interests at stake. It recognizes the broad sweep of the conflict, but distinguishes between zones of active hostilities and other areas in determining which rules apply. **Specifically, it offers a set of standards that would both limit and legitimize the use of out-of-battlefield targeted killings** and law of war-based detentions, subjecting their use to an individualized threat assessment, a least-harmful-means test, and significant procedural safeguards. **This approach confines the use of out-of-battlefield targeted killings** and detention without charge to extraordinary situations in which the security of the state so demands. It thus limits the use of force as a first resort, protects against the unnecessary erosion of peacetime norms and institutions, and safeguards individual liberty. At the same time, the zone approach ensures that the state can effectively respond to grave threats to its security, wherever those threats are based.

The United States has already adopted a number of policies that distinguish between zones of active hostilities and elsewhere, implicitly recognizing the importance of this distinction. **By adopting the** proposed **framework as a matter of law, the U**nited **S**tates **can begin to set the standards and build an international consensus as to the rules that ought to apply, not only to this conflict, but to future conflicts**. The likely reputational, security, and foreign policy gains make acceptance of this framework a worthy endeavor.

This is current administration policy, it just needs to be formalized

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

One might be skeptical that a nation like the United States would ever accept such constraints on the exercise of its authority. There are, however, several reasons why doing so would be in the United States' best interest.

First, as described in Section II.B, **the** general **framework is** largely **consistent with current U.S. practice since 2006**. The United States has, as a matter of policy, adopted important limits on its use of out-of-battlefield targeting and law-of-war detention suggesting an implicit recognition of the value and benefits of restraint.

Second, while the proposed substantive and procedural safeguards are more stringent than those that are currently being employed, their implementation will lead to increased restraint and enhanced legitimacy, which in turn inure to the state. As the U.S. Counterinsurgency Manual explains, it is impossible and self-defeating to attempt to capture or kill every potential insurgent: "Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by increasing their own legitimacy at the expense of the insurgent's legitimacy. n215 The Counterinsurgency Manual further notes, "Excessive use of force, unlawful detention ... and punishment without trial" comprise "illegitimate actions" that are ultimately "self-defeating." n216 In this vein, the Manual advocates moving "from combat operations to law enforcement as [\*1232] quickly as feasible." n217 **In other words, the high profile and controversial nature of killings outside conflict zones** and detention without charge **can work to the advantage of terrorist groups** and to the detriment of the state. **Self-imposed limits on** the use of detention without charge and **targeted killing** can **yield legitimacy and security benefits**. n218

Third, limiting the exercise of these authorities outside zones of active hostilities better accommodates the demands of European allies, upon whose support the United States relies. As Brennan has emphasized: "**The convergence of our** legal views **with those of our international partners matters**. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies who, in ways public and private, take great risks to aid us in this fight." n219 By placing self-imposed limits on its actions outside the "hot" battlefield, the United States will be in a better position to participate in the development of an international consensus as to the rules that ought to apply.

Fourth, such self-imposed restrictions are more consistent with the United States' long-standing role as a champion of human rights and the rule of law a role that becomes difficult for the United States to play when viewed as supporting broad-based law-of-war authority that gives it wide latitude to employ force as a first resort and bypass otherwise applicable human rights and domestic law enforcement norms.

Fifth, **and critically, while the U**nited **S**tates **might be confident that it will exercise its authorities responsibly, it cannot assure that other states will follow suit**. What is to prevent Russia, for example, from asserting that [\*1233] it is engaged in an armed conflict with Chechen rebels, and can, consistent with the law of war, kill or detain any person anywhere in the world which it deems to be a "functional member" of that rebel group? Or Turkey from doing so with respect to alleged "functional members" of Kurdish rebel groups? If such a theory ultimately resulted in the targeted killing or detaining without charge of an American citizen, the United States would have few principled grounds for objecting.

The best scholarship validates our theory of arms races – unless norms precede formal agreements, they’ll be ineffective

Robert Farley 11, assistant professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Over the Horizon: U.S. Drone Use Sets Global Precedent, October 12, http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities.

So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. Arms races don't just "happen" because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare.

States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. All of these reasons share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries.

Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic precedent can affect state policy. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that they would not have had in absence of the U.S. example.

What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used.

Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war.

However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

## 2ac

### loac da

Unconstrained geographic war destroys LOAC – only the plan solves

Sasha Radin, Visiting Research Scholar at the Naval War College, Newport Rhode Island; PhD candidate, Asia Pacific Centre for Military Law, University of Melbourne Law School, 2013, Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts, www.usnwc.edu/getattachment/311c6f17-ee69-4870-a00d-b7d845e4387c/Global-Armed-Conflict--The-Threshold-of-Extraterri.aspx

State sovereignty was another impetus for creating the requirement that the hostilities reach a certain level of intensity before LOAC could apply. States wanted to limit the involvement of outside States in their domestic affairs. This objective must, therefore, be seen in light of the fact that the types of conflicts envisioned were mainly internal armed conflicts. In an extraterritorial NIAC context, the reluctance of the State party to the conflict to be subject to interference from other States in its internal affairs largely disappears.150 Neither internal disturbances nor the conflict itself takes place in their own territory.

Does it matter in terms of what LOAC requires for its application that it is the State not party to the conflict whose territorial integrity is infringed? In other words, **could this geographic shift in where the hostilities occur affect one of the original underlying reasons for the existence of the threshold?** In contrast to the previous two points (whether the violence undertaken by various armed groups may be conglomerated and whether the distribution of violence over space means that it does not reach the sufficient level of intensity), this point questions whether the level of intensity customarily required for internal armed conflicts is the same for extraterritorial conflicts.

It may be argued that the territorial State (i.e., the State in which an extraterritorial NIAC physically takes place) has an interest in trying to prevent incursions into its sovereignty, even though it may not be a party to that NIAC. An incursion by an outside State in order to fight an armed group would likely have implications for the “uninvolved” territorial State. For instance, such an action could be an indication that the territorial State is not able to maintain its own security—an image that States usually take pains to avoid. Or, the territorial State may be concerned that the outside State might gain control or influence within their State.

The implications this shift might have on establishing the threshold of an extraterritorial armed conflict are not clear. At the very least, the reassignment of which State’s sovereignty is affected indicates that issues arising from the shifted location of the conflict warrant further examination. Therefore, even if one accepts the premise that NIACs may exist extraterritorially, the fact that the law was designed for a different context presents challenges in determining the existence of an armed conflict.

VI. GEOGRAPHIC BOUNDARIES OF EXISTING ARMED CONFLICTS

The removal of territorial boundaries from a system based on these physical limits raises the related question of where LOAC may be applied once the law of armed conflict has been triggered. Limited discussion has arisen previously on this issue in the context of purely internal conflicts. However, the main controversy surfaces today specifically with regard to individuals affiliated with an organized armed group located in a second State (“outside of an active battlefield”151). The **unease** of some commentators **that the world could become a battlefield reappears** here.

Because NIAC law was designed for internal application, its extraterritorial parameters are not clear. Two main options have been discussed for how to deal with this challenge. One proposes that the geographic application of LOAC is limited to the area of hostilities. The other maintains that once an armed conflict exists the law may extend beyond the immediate zone of hostilities. This latter approach has been interpreted by some to suggest that the law applies to the parties to the conflict wherever they may be located.

The first proposal, suggesting that LOAC would not apply at a distance from wherever the hostilities were taking place,152 may seem logical on its face, but lacks a legal basis. Jurisprudence from the ICTY dealing with the geographic scope of Common Article 3 within a State contradicts this interpretation, providing that “international humanitarian law continues to apply . . . in the case of internal conflicts . . . [to] the whole territory under the control of a party, whether or not actual combat takes place there.”153 The ICTY case law has generally been interpreted by other bodies to mean that Common Article 3 applies to the entire country in which a conflict is taking place, regardless of where hostilities occur.154 This language has been repeatedly upheld by subsequent ICTY and ICTR judgments.155 In the absence of explicit treaty law or customary international law, this jurisprudence could be said to have relevance when it comes to interpreting the geographic contours of internal conflicts.

Resort to the object and purpose of the law also supports application of the law beyond areas of hostilities. One of the law’s fundamental purposes is to ensure protection of individuals once in the hands of the enemy. To interpret the law as only applying to areas of combat would reduce the protection afforded to some of the most vulnerable, who may be located at a distance from active hostilities.

Finally, the text of AP II can be turned to for some guidance, even though the types of conflicts under discussion here are those with a lower threshold. AP II explicitly provides that it applies to “to all persons affected by an armed conflict.”156 This indicates that although AP II limits its applicability to the State in which the conflict is taking place,157 its application is not restricted to areas of active hostilities.158

The second approach considers that once an armed conflict exists LOAC applies beyond the area of active hostilities.159 It is argued that this is the more defensible position of the two. Although this view does not find an explicit basis in treaty law, it is difficult to find justification within the existing law for restricting the application of LOAC to a certain region once an armed conflict exists. In addition, the ICTY and ICTR case law just noted could be said to indirectly support this position in that it interprets the application of the law as extending beyond the combat zones. However, too much reliance on this jurisprudence is misguided as it still depends on State boundaries. For example, if one accepts that the armed conflict in Afghanistan has spilled over into Pakistan, does Common Article 3 then apply throughout the country of Pakistan?

**The view that LOAC applies beyond the area of active hostilities leads to the question of whether anything restricts the geographic application of LOAC**. One approach is to interpret the ICTY case law as literally referring to the areas where the parties to the conflict have control.160 Under such a view, NIAC law would only apply to the territory under control of the Pakistani Taliban (and other armed groups) in the North-West Frontier Province. **This construction**, however, **presents hurdles**.161 First, what is meant by control?162 Second, if it is territorial control that is envisioned, the majority of commentators and jurisprudence view the control of territory by an armed group as an indicator for the applicability of Common Article 3, rather than an obligation.163 It would not make sense to require territorial control by an armed group in order to determine the reach of an armed conflict within a country, but not to require territorial control for the existence of an armed conflict.164 Third, taken to its extreme this interpretation illogically suggests that if neither party controls territory, then LOAC does not apply,165 leading to the possibility that LOAC would not apply precisely where the battle rages.

The U.S. government position that LOAC is not geographically constrained with regard to individual members of a party to a conflict166 has engendered criticism.167 However, it is a defensible stance if one has already accepted that the territorial boundaries of States do not limit LOAC’s application. The bigger issue seems to be that the law was not designed for extraterritorial application. As such, should the view that territorial boundaries are not relevant to LOAC’s application gain force, it may be that the law will develop in a clearer and more nuanced manner.168 Notwithstanding the lack of clarity with regard to this issue, significant restrictions on the use of force against an individual located at a distance from hostilities in a second country already exist. Perhaps most importantly, the question only arises in the first place if an armed conflict exists between the State using force and the armed group against which the force is directed (which includes establishing that the group to which the individual belongs is an identifiable party). Second, and crucially, the separate question then arises of whether an individual is targetable (either by virtue of the membership approach or because s/he is directly participating in hostilities).169 This includes determining that the individual in question has a sufficient nexus to the ongoing armed conflict.170

Should those conditions be fulfilled, then the constraints within LOAC still apply (such as all of the rules pertaining to the principles of distinction and proportionality), as would the country’s domestic law and human rights law to the degree that it interacts with LOAC. It is likely that if the occurrence were far from active hostilities the latter two bodies of law would play a greater role. Issues of State sovereignty could, and often do, present one of the greatest limitations on action. Therefore, it is not the case that force may be used anywhere in the world at any time against parties to the conflict once an armed conflict exists.

VII. CONCLUSION

In conclusion, the general trend today is that some extraterritorial conflicts may qualify as NIACs, despite the fact that they are not geographically confined to a single State. This interpretation recognizes that to artificially restrict the law in a way that does not reflect either the realities on the ground or the purpose of the law itself is counterproductive. However, because the existing law was not designed for extraterritorial conflicts, challenges arise in its application.

The issue of links between armed groups in NIACs is an area where the law may need reinterpretation or development. Analogies with other areas of the law do not lead to more clarity. The tenuous suggestion that in order to fulfill the intensity requirement not only should the affiliated armed group be organized and part of an identifiable party, but also that the group’s actions and goals should constitute a threat to the opposing party carries with it practical problems. Specifically, it could be difficult to ascertain both the threat and which members of an armed group are actually participating in actions that are part of the global conflict, as opposed to part of a separate internal conflict.

Determining whether amassing violence that is diffused over distances may fulfill the intensity requirement is another example of how the geographic extension of the law’s application may present difficulties. It has been argued here that taking into account the underlying purpose of the law, the violence must reach a certain level of intensity within a geographic region for an armed conflict to exist. When the violence is spread out geographically, such that in an individual country the law enforcement regimes may function, it is difficult to view the intensity requirement as being met. However, as with links, this issue is far from resolved.

The third principal challenge resulting from the extraterritorial application of NIAC law is that a reassignment of sovereignty occurs. It is unclear if this shift might impact on how States perceive the threshold of the existence of an armed conflict.

Once the existence of an armed conflict has been established, a separate issue arises as to the geographic boundaries of that conflict. This impacts the controversial question of when an individual may be targeted or detained if located in another country away from the main battlefield. Here too, because the law was originally intended to apply within State boundaries, very little guidance exists. It is argued that as the law currently stands, once an armed conflict exists LOAC applies to the parties to the conflict wherever they may be located, but that other restraints within LOAC and jus ad bellum limit its application. In particular, the question of whether an armed conflict exists in the first place is not self-evident. The debate on who can be targeted and when applies both to internal NIACs and extraterritorial NIACs. It may be that **additional stipulations will be** considered **necessary as the law develops given the lack of State boundaries and the distance from an active battlefield**. However, currently the law does not require this. Finally, the restrictions found in jus ad bellum curtail action that may be taken.

Therefore, to erase territorial boundaries from the equation entirely when establishing the existence of an armed conflict raises challenges to the structure of the law and some of its underlying purposes. Certain obstacles may prompt clarification in the law; others may remain as limitations on the law’s application. As a consequence, it is not clear where the bar for the application of Common Article 3, and thus LOAC, lies, particularly when applied to conflicts that spread across multiple countries. Some States want to ensure that they have sufficient flexibility to deal with these circumstances. Other States (as well as organizations and commentators) are concerned that the law may be interpreted too permissively and ultimately be abused. A **balance** **must be found in the solution to these issues**.

We control uq – squo policy renders the entire legal framework obsolete

Charles Garraway, former Stockton Professor, United States Naval War College, Dec 2009, Can the Law of Armed Conflict Survive 9/11?, Yearbook of International Humanitarian Law / Volume 14

The initial response to the attacks was to launch an attack on Afghanistan where Al Qaeda were sheltering under Taliban protection. In principle, this was sup- ported by the international community and should have posed few problems to the existing legal framework. This was an international armed conflict within that framework, though running alongside an existing non-international armed conflict between the Taliban and the Northern Alliance. However, the rhetoric from the United States leadership seemed to go further, indicating that the United States was at war not merely with Afghanistan but with terrorism in general in a Global War on Terror. Supported by legal advice, though not unchallenged, President Bush drew a distinction between ‘‘our present conflict with the Taliban’’ to which the laws of war (‘‘the provisions of Geneva’’) applied and ‘‘our conflict with al Qaeda in Afghanistan or elsewhere throughout the world’’ to which none of the ‘‘provisions of Geneva’’, including Common Article 3 applied.

In so far as Afghanistan was concerned, whilst the legal reasoning might have been faulty, the effects on the legal framework might not have been too bad. There was clearly an armed conflict underway and although it could indeed be argued that Al Qaeda were not entitled to combatant status in that conflict, there were still provisions within the legal framework that covered them. In an armed conflict, nobody is totally outside the protection of the law.

The problem lay with the words ‘‘or **elsewhere throughout the world’**’. The United States was now claiming to be involved in a global conflict—and furthermore one which was outside the traditional legal framework being neither an international armed conflict within the terms of Common Article 2 to the Geneva Conventions nor an ‘‘armed conflict not of an international character’’ governed by Common Article 3. It appeared that the United States was claiming the right to carry out military operations against Al Qaeda throughout the globe. The legal implications of this were huge. It could be argued that, because of the universal condemnation of international terrorism by the United Nations, the laws of neutrality in their classic form did not apply. Indeed, President Bush himself announced, in an address to a joint session of Congress on September 20, 2001, ‘‘Either you are with us, or you are with the terrorists.’’ It was not long before the United States showed that it meant business when, in November 2002, a Hellfire missile attack on a convoy travelling in Yemen killed Abu Ali al-Harithi, supposedly the mastermind behind the bombing of the USS Cole in October 2000. Further strikes in Yemen have followed, as well as numerous attacks in Pakistan, culminating in the death of Osama Bin Laden himself.

**But what law applies to these ‘‘targeted killings’’**? The United States maintains that it is at war and these matters are therefore governed by the laws and customs of war. As a result of the Supreme Court decision in Hamdan v Rumsfeld, the Administration have conceded that this ‘‘war’’ is governed by Common Article 3 of the 1949 Geneva Conventions but that article, in itself, says nothing on the rules governing the conduct of hostilities. It is unclear what rules the United States consider binding in that context although one thing is clear—targeting is based on status, as under the traditional law of war paradigm, and not immediate threat as under human rights law. Al-Harithi was posing no immediate threat to anyone at the time he was killed. Osama Bin Laden was, according to US sources, subject to lethal force because of his position as an enemy commander. The Navy Seals did not have to rely on any actions taken by him at the time of the attack.

In principle, there is no obstacle to the United States, on this reasoning, taking out an Al Qaeda leader on the streets of London or Paris. It is argued that, in practice, this would never happen because it would be left to the authorities in those countries to take action. But because Europe, and indeed much of the rest of the world, has not bought into this ‘‘Global War on Terror’’, the action would need to be taken under a law enforcement paradigm. What if domestic law did not provide the grounds for such action?

We seem to face here a dilemma. Do the laws of war extend down to cover all actions against Al Qaeda and affiliated organisations operating anywhere in the world, or are such actions covered by the law enforcement paradigm except where they take place within the bounds of a recognised armed conflict? If United States Navy Seals killed an unarmed Al Qaeda leader on the streets of London, would they be committing murder or could they claim combatant privilege? **The boundaries between armed conflict and law enforcement now seem to have merged together in a way that there is no longer any clear dividing line**. It can hardly be appropriate to say that the law governing the situation depends on the stability of the country in which the operation takes place.

This confusion is having a double effect. First, there is a fightback by those in the human rights community who argue that the events of the last 10 years have shown that the laws of war are inadequate to address modern day situations. Targeted killings are often accompanied by the deaths of other innocent people and this is seen as unacceptable. The danger here is that such a viewpoint will extend into more traditional armed conflicts. In Afghanistan, the McChrystal doctrine of ‘‘courageous restraint’’ led to a restriction on permitted collateral damage in planned attacks almost to the extent of zero tolerance. This is far more akin to a human rights standard than one emanating from the laws of war where the expected collateral damage must not be excessive to the anticipated military advantage. We have already seen how human rights bodies are becoming increasingly involved in situations of armed conflict. Whereas the United States continues to insist that human rights law and the laws of war are mutually exclusive, this is a position that is becoming increasingly untenable internationally. As has been pointed out above, the European Convention on Human Rights was always envisaged as applying to some extent in time of war and the Court has already considered cases arising from situations of armed conflict, most recently in relation to Chechnya and Iraq. There are a number of cases currently before it in relation to the Russia-Georgia conflict in 2008.

The International Court of Justice also has endorsed the continued application of human rights law in time of armed conflict. In the ‘‘Barrier’’ advisory opinion involving the Israeli security wall, it stated:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of inter- national humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humani- tarian law.

Of course, the Court did not go on to outline where those situations can be found. There is a growing school that argues that human rights law is the foun- dation legal framework and that the law of war as the ‘‘lex specialis’’ should only apply where it is compatible with human rights law and can add to it. This is probably workable in relation to much ‘‘Geneva law’’, relating to the protection of victims of war, but it would play havoc with the traditional law of war relating to the conduct of hostilities, particularly in relation to the use of force where the standards are diametrically opposed.

There is a second and less obvious danger. There has been a tendency to look upon ‘‘terrorists’’ as modern day outlaws, beyond the pale. They should, like pirates, be subject to universal jurisdiction and ‘‘terrorism’’ should be an inter- national crime. Attractive as this argument might be, it falls down on closer analogy. One of the reasons why pirates are subject to universal jurisdiction is because their crimes are committed on the high seas, territory beyond the juris- diction of any one State. Acts which would amount to piracy if committed on the high seas but which are committed within the territorial sea of a State are classified as ‘‘armed robbery’’ and not subject to universal jurisdiction. Most acts of ter- rorism are committed within the territory of a State. Whilst I agree that there is a need for greater international cooperation in the justice sphere in dealing with acts of terrorism, and indeed the various United Nations Conventions were designed to do exactly that, there is a risk in making ‘‘terrorism’’ an international crime.

Apart from the difficulty in defining the term, it has become usual in recent years for Governments to describe all opponents who resort to arms as ‘‘terrorists’’. If such people were in theory committing an international crime **subject to universal jurisdiction,** it would completely undermine the application of the laws of war **to non-international armed conflict**. Already there is difficulty in persuading non-State actors that it is in their interests to apply the laws of war in a non- international armed conflict. Non-State actors remain subject to domestic juris- diction and, if captured, can be tried and sentenced under that domestic law. However, provided that they comply with the laws of war, they will not be committing international crimes, war crimes, and thus, Additional Protocol II can urge the ‘‘authorities in power’’ at the end of hostilities to ‘‘endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict’’. This is not designed to protect those who have committed war crimes but those who have fought in accordance with the laws of war.

If ‘‘terrorism’’ is to become an international crime and all non-State actors in a non-international armed conflict are to be classed as terrorists, and thus interna- tional criminals, this provision of **Additional Protocol II will become obsolete** as it is generally accepted that amnesties should not apply to international crimes. **There would then be no incentive at all for** non-State **actors to comply with the laws of war**. If the laws of war were thus seen to be ineffectual, it would be a further argument for their subordination to human rights law.

It follows that the decision by the Bush Administration in the immediate aftermath of ‘‘9/11’’ to treat the fight against terrorism as a matter governed primarily by the laws of war rather than by a law enforcement paradigm may in fact have serious consequences for the laws of war themselves. The perceived underlying unsuitability of using the use of force provisions from the laws of war in counter-terrorist operations outside situations of armed conflict has given human rights lawyers a platform to attack some of the fundamental principles of the laws of war, such as the balance between humanity and military necessity, even in traditional conflict situations.

In addition, the extension of the definition of ‘‘terrorist’’, at least colloquially, and the wish to ensure that acts of terrorism are universally condemned and subject to the widest possible jurisdiction has cast doubt on the efficacy of the laws of war as they relate to non-international armed conflict and led to calls for a wider application of human rights standards, even where they conflict with the laws of war.

If the long term effect of this is to make it impossible to conduct military operations effectively in a legal manner, it could be disastrous. However much theorists may look forward to the days when war is no more, that utopian dream has never been achieved in past millennia. The laws of war were designed to recognize the sad reality of war but to seek to alleviate as far as possible the calamities of war. Human rights law does not recognize that reality, coming as it does from the law of peace. This clash of philosophies is already being seen in Afghanistan where there is increasing pressure on ISAF European contingents to refrain from handing detainees to the national authorities on human rights grounds. But such contingents have no legal authority themselves to hold the detainees for any length of time. The result is that they may have to be released. A soldier who captures an insurgent who has killed one of his colleagues on Monday only to find him back on the streets on Wednesday will not be impressed. If he captures him again and the same thing happens, he will wonder as to the point of what he is doing. The temptation will be to take the law into his own hands with fatal consequences.

**The laws of war are there for a purpose**, limited though it may be. The United States, in seeking to extend the scope of those laws into areas for which they were not designed have done the laws no service. Indeed, they may, in a worst case scenario, have struck a death knell for those laws. As wars unfortunately, like taxes, are not going to disappear in the foreseeable future, if the laws that regulate them no longer can be applied, then we are back to the law of the jungle. Henry Dunant would be turning in his grave.

Alt cause – disputes over terrorist status (also a reason the CP links more)

Margulies ’12 (Peter, Professor of Law, Roger Williams University, “The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11,” Marquette Law Review Vol. 95 Iss. 4 Summer 2012)

In the last forty years, the rise of non-state actors has prompted new tensions. Drafters of Additional Protocol I to the Geneva Conventions believed that non-state actors “fighting against colonial domination and . . . racist régimes”67 had standing to participate in international armed conflict. That innovation challenged the traditional jus ad bellum norm of “right authority,” which extends to state actors the sole privilege of conducting hostilities while denying this privilege to non-state actors, whom LOAC has traditionally assumed could obtain a remedy from their states of nationality.68 While compelling examples supporting higher status for non-state actors span centuries, from the American colonists at Lexington and Concord to the African National Congress (ANC), the drafters of Additional Protocol I **did not provide any criteria** for deciding which group among rivals would be found the authentic representative. This **definitional vacuum** left inter-group violence as the default selection process, risking harm to members of the community that each group purports to represent. Protocol I yielded additional anomalies. While it codified the principle of distinction that forbids targeting civilians,69 it also made **concessions to irregular forces** that severely complicated implementation of that “basic principle.” Article 44(3) shields such forces until they have “engaged in a military deployment preceding the launching of an attack.”70 Some countries have construed this language as barring targeting of such forces until “‘moments immediately prior to an attack.’”71 Because a state’s uniformed forces can be targeted at any time,72 this reading creates a **marked asymmetry** in the targeting options of non-state and state actors. The drafters felt that this tactical advantage would at least encourage non-state actors to shun the most egregious forms of perfidy, where no arms were displayed until the attack was in progress.73 Although some non-state actors may have considered availing themselves of this opportunity, one cannot imagine Al Qaeda operatives following suit.74 However, a non-state fighting force without the duty to identify itself will **impel states to cut corners on the principle of distinction, shooting first and asking questions about participation in hostilities later.** As with even more blatant forms of perfidy, the result is greater risk to those hors de combat. Because LOAC, like other forms of international law, is increasingly fragmented,75 the increasing role of non-state actors has buttressed arguments for giving states more flexibility in the jus ad bellum. For example, states dealing with ideologically committed terrorist networks have sought to relax the customary requirement of imminent attack as a condition for self-defense. Scholars argued that obliging a state to wait until a terrorist plot approaches consummation was both unrealistic and risky for civilians whom the network plans to target.76

These debates have accelerated since September 11. Two opposing developments each reflected an effort to change LOAC. First, in the eighteen months after September 11, Bush administration officials sought to deprive suspected terrorists of protections against coercive interrogation and also sought to establish indefinite detention without judicial review and military commission trials that lacked fundamental guarantees of fairness.77 Even more recently, the ICRC proposed that civilians be shielded from targeting even if they have participated in hostilities.78 Over the objections of a majority of commentators convened for its study, the ICRC asserted that only civilians with a narrowly defined “continuous combat function” could be targeted at all times. Others could in effect choose the time and place of their vulnerability, even as they planned a return to the fray. Each change **threatened to destabilize LOAC**.

Alt cause – Syria

David Kaye 13, Professor at the University of California, Irvine, School of Law, The Legal Consequences of Illegal Wars, August 29, <http://www.foreignaffairs.com/articles/139886/david-kaye/the-legal-consequences-of-illegal-wars>

The United States, by all indications, will soon become a belligerent in Syria’s civil war. The Syrian government's alleged use of chemical weapons to kill hundreds crossed a redline that U.S. President Barack Obama claimed a year ago would be the game changer, and the game for Washington, London, and Paris has clearly changed. Yet one thing has not: the international law governing when states may use force.

That is not to suggest that government lawyers won’t eventually try to offer some sort of legal benediction. News coverage suggests that administration officials are pushing them to do just that. And the lawyers will want to be helpful, particularly if the policy consensus for force is strong and the evidence for the regime’s responsibility for the attacks is beyond reproach.

But they should also be clear: It is the lawyers’ duty to provide their clients -- senior U.S. officials -- with legal, not moral, advice and counsel. The lawyers’ remit is not to say whether attacking Syria is the right thing to do, but to state what the law is, explain the positions adopted by the United States in similar circumstances in the past, and predict what the legal and institutional consequences of law-breaking might be.

So what is the law? The black-letter law on the use of force is quite simple: Under the United Nations Charter, the central treaty of the modern era and largely the handiwork of the United States and its World War II allies, states are generally prohibited from using force against other states unless they are acting in individual or collective self-defense or pursuant to an authorization of the UN Security Council. Over the post-war history of the charter, self-defense claims have proven most controversial. States -- especially the United States -- have sought to expand the situations that fall under the definition of self-defense.

But a case for self-defense in Syria would break the concept of self-defense beyond recognition. What concerns the administration, according to official statements, is the “moral obscenity” of a chemical attack on one’s own citizen. As awful as it is, there has been no attack (or the threat of attack) on the United States to justify individual self-defense or on allies to justify collective self-defense as a matter of law.

Given that a Security Council resolution seems unlikely, the United States is left without strong legal arguments for force. Some states, non-governmental organizations, and scholars have sought to craft exceptions to the requirement for Council authorization, usually under the rubric of humanitarian intervention or its contemporary form, the Responsibility to Protect (or R2P). Both exceptions spring from a moral position that states owe their citizens a duty of care, and when they violate it by committing grave crimes, force should be an available mechanism to halt or deter them. But neither exception has the force of law. The United States itself rejected humanitarian intervention as legal justification for the Kosovo war in 1999 even as the United Kingdom espoused (and still espouses) it, but the UK has few allies on the matter. R2P was blessed by the United Nations in 2005, but even there the United Nations decided that Security Council authorization was necessary for any intervention to qualify as legal.

Obama has also evoked norms against the use of weapons of mass destruction, such as the 1925 Geneva Protocol prohibiting use of poison weapons (to which Syria is a party). This prohibition may be strongly stated, but the treaty itself provides no basis for using force. Like many instruments of its time, it does not talk about the consequences of violation.

So, unless the Security Council authorizes action, the United States and its participating allies would be in violation of international law in using military force against Syria. Call it what you will: “illegal” if you are frank, “inconsistent with international law” if you are a lawyer, “difficult to defend” if you are a diplomat. They all amount to the same thing: No international law supports a U.S. attack on Syria, even in the face of mass killing by internationally prohibited weapons.

Alt cause – detention

Webber ’13 (Diane Webber, solicitor of the Senior Courts of England and Wales; LL.B. (Hons.), University of London; LL.M.,Preventive, “Detention in the Law of Armed Conflict: Throwing Away the Key?” Journal of National Security Law and Politics, Vol. 6)

We are still no closer to discerning the end point of detention. By continuing to link the duration of detention to the continuation of hostilities, the NDAA has not taken matters much further, other than adding more processes to review continue d detention. The test for review of detainees of “continued threat” is nebulous, although this may be clarified when procedures are issued. It is not clear how the threat evaluation tests work within the cessation of hostilities frame work. Does detention end when hostilities have ceased or when the individual is no longer a “continuing” threat to the security of the United States? Does the “continuing threat” test trump continuation of hostilities, or vice versa? Does the threat evaluation only come into play after the end of hostilities? It is problematic to try to define the duration of detention with abstract concepts, such as continuation of hostilities, continuing threats, indefinite war, war on terror (that is not a war in the true sense of the word), or (the even more open-ended) countering violent extremism, particularly if hostilities are infrequent terrorist attacks or atrocities occurring in different countries. There are claims that military detention without trial for an indefinite period addresses the problems of trying suspected terrorists in either federal courts or military commissions. 303 It does not. It merely avoids the issue of having to decide an appropriate mode of trial. Nor does it alter the fact that indefinite detention for terrorists **does not sit comfortably in the LOAC paradigm**. Over a decade after 9/11, when the “clear legal framework for handling alleged terrorists” promised by President Obama in 2009 is still relatively undeveloped 304 and the country continues to hold suspects indefinitely, it is time that these questions and issues are addressed. The form of preventive detention of suspected terrorists that is deemed necessary by the U.S. government does not fit within the current domestic U.S. criminal law framework or the U .S Constitution; hence the reliance on the LOAC. However, the way forward should not lie in trying to make a framework out of a LOAC that does not provide quite the right model to detain terrorists or violent extremists. Using the LOAC as a framework does not rectify the shortcomings of the LOAC in the terrorism context. It is to be hoped that the enactment of the NDAA will spur Congress to debate and clarify the entire detention issue.

Alt cause – ICC

Charles J. Dunlap, USAF, Duke University Law School, Dec 2011, The Mottled Legacy of 9/11: A Few Reflections on the Evolution of the International Law of Armed Conflict, Yearbook of International Humanitarian Law / Volume 14

Even the UN’s own judicial arm has come under fire. Professor John Norton Moore, the respected international lawyer from the University of Virginia, gave a scathing assessment of the United Nations’ International Court of Justice’s performance in a series of jus ad bellum cases, accusing it of ‘‘shocking failure[s] of legal craftsmanship.’’14 Such failings merit immediate and searching examination if international law related to security matters—to include ILOAC—is to continue to evolve as a legal construct worthy of respect and deference.

### war powers da

Syria outweighs the link

David Rothkoph, CEO and editor at large of Foreign Policy, 8/3/13, The Gamble, www.foreignpolicy.com/articles/2013/08/31/the\_gamble?page=full

Obama has reversed decades of precedent regarding the nature of presidential war powers -and whether you prefer this change in the balance of power or not, **as a matter of quantifiable fact** he is transferring greater responsibility for U.S. foreign policy to a Congress that is more divided, more incapable of reasoned debate or action, and more dysfunctional than any in modern American history. Just wait for the Rand Paul filibuster or similar congressional gamesmanship.

The president's own action in Libya was undertaken without such approval. So, too, was his expansion of America's drone and cyber programs. Will future offensive actions require Congress to weigh in? How will Congress react if the president tries to pick and choose when this precedent should be applied? At best, the door is open to further acrimony. At worst, the paralysis of the U.S. Congress that has given us the current budget crisis and almost no meaningful recent legislation will soon be coming to a foreign policy decision near you. Consider that John Boehner was instantly more clear about setting the timing for any potential action against Syria with his statement that Congress will not reconvene before its scheduled September 9 return to Washington than anyone in the administration has been thus far.

Perhaps more importantly, what will future Congresses expect of future presidents? If Obama abides by this new approach for the next three years, will his successors **lack the ability to act quickly** and on their own? While past presidents have no doubt abused their War Powers authority to take action and ask for congressional approval within 60 days, we live in a volatile world; sometimes security requires swift action. The president still legally has that right, but Obama's decision may have done more -for better or worse -to **dial back the imperial presidency** than anything his predecessors or Congress have done for decades.

5. America's international standing will likely suffer.

As a consequence of all of the above, even if the president "wins" and persuades Congress to support his extremely limited action in Syria, the perception of America as a nimble, forceful actor on the world stage and that its president is a man whose word carries great weight is **likely to be diminished**. Again, like the shift or hate it, **foreign leaders can do the math.** Not only is post-Iraq, post-Afghanistan America less inclined to get involved anywhere, but when it comes to the use of U.S. military force (our one indisputable source of superpower strength) **we just became a whole lot less likely to act** or, in any event, act quickly. Again, good or bad, that is a stance that is likely to **figure into the calculus of those who once feared provoking the United States**.

A final consequence of this is that it seems ever more certain that Obama's foreign policy will be framed as so anti-interventionist and **focused on disengagement from world affairs** that **it will have major political consequences in 2016**. The dialectic has swung from the interventionism of Bush to the leaning away of Obama. Now, the question will be whether a centrist synthesis will emerge that restores the idea that the United States can have a muscular foreign policy that remains prudent, capable of action, and respects international laws and norms. Almost certainly, that is what President Obama would argue he seeks. But I suspect that others, including possibly his former secretary of state may well seek to define a different approach. Indeed, we may well see the divisions within the Democratic Party on national security emerge as key fault lines in the Clinton vs. Biden primary battles of 2016. And just imagine Clinton vs. Rand Paul in the general election.

Zero risk of Korean conflict

Ashley **Rowland**, 12/3/20**10**. Stars and Stripes. “Despite threats, war not likely in Korea, experts say,” http://www.stripes.com/news/despite-threats-war-not-likely-in-korea-experts-say-1.127344?localLinksEnabled=false.

Despite increasingly belligerent threats to respond swiftly and strongly to military attacks, analysts say there is one thing both North Korea and South Korea want to avoid: an escalation into war. The latest promise to retaliate with violence came Friday, when South Korea’s defense minister-to-be said during a confirmation hearing that he supports airstrikes against North Korea in the case of future provocations from the communist country. “In case the enemy attacks our territory and people again, we will thoroughly retaliate to ensure that the enemy cannot provoke again,” Kim Kwan-jin said, according to The Associated Press. The hearing was a formality because South Korea’s National Assembly does not have the power to reject South Korean president Lee Myung-bak’s appointment. Kim’s comments came 10 days after North Korea bombarded South Korea’s Yeonpyeong island near the maritime border, killing two marines and two civilians — the first North Korean attack against civilians since the Korean War. South Korea responded by firing 80 rounds, less than half of the 170 fired by North Korea. It was the second deadly provocation from the North this year. In March, a North Korean torpedo sank the South Korean warship Cheonan, killing 46 sailors, although North Korea has denied involvement in the incident. The South launched a series of military exercises, some with U.S. participation, intended to show its military strength following the attack. John Delury, a professor at Yonsei University in Seoul, said South Korea is using “textbook posturing” to deter another attack by emphasizing that it is tough and firm. But it’s hard to predict how the South would respond to another attack. The country usually errs on the side of restraint, he said. “I think they’re trying to send a very clear signal to North Korea: Don’t push us again,” Delury said. “For all of the criticism of the initial South Korean response that it was too weak, in the end I think people don’t want another hot conflict. I think the strategy is to rattle the sabers a bit to prevent another incident.” Meanwhile, Yonhap News reported Friday that North Korea recently added multiple-launch rockets that are capable of hitting Seoul, located about 31 miles from the border. The report was based on comments from an unnamed South Korean military source who said the North now has 5,200 multiple-launch rockets. A spokesman for South Korea’s Joint Chiefs of Staff would not comment on the accuracy of the report because of the sensitivity of the information. Experts say it is a question of when — not if — North Korea will launch another attack. But those experts doubt the situation will escalate into full-scale war. “I think that it’s certainly possible, but I think that what North Korea wants, as well as South Korea, is to contain this,” said Bruce Bechtol, author of “Defiant Failed State: The North Korean Threat to International Security” and an associate professor of political science at Angelo State University in Texas. He said North Korea typically launches small, surprise attacks that can be contained — not ones that are likely to escalate. Delury said both Koreas want to avoid war, and North Korea’s leaders have a particular interest in avoiding conflict — they know the first people to be hit in a full-scale fight would be the elites.

### safe havens da

That makes all the difference

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

Some likely will object that such an official designation would recreate the same safe havens that this proposal seeks to avoid. But a critical difference exists **between a territorially restricted framework that** effectively **prohibits reliance on law-of-war tools outside of specific zones of active hostilities and a zone approach that merely imposes heightened procedural and substantive standards on the use of such tools**. Under the zone approach, the non-state enemy is not free from attack or capture; rather, the belligerent state simply must take greater care to ensure that the target meets the enhanced criteria described in Section III.B.

Corn agrees—the plan is a mitigation measure that is necessary to resolve international backlash, not the “arbitrary geographic limitation” their offense assumes

Geoffrey Corn, South Texas College of Law, Professor of Law and Presidential Research Professor, J.D., 2013, Geography of Armed Conflict: Why it is a Mistake to Fish for the Red Herring http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2179720

This does not mean that the uncertainties created by the intersection of threat-based scope and TAC are insignificant. To the contrary, extending the concept of armed conflict to a transnational non-State opponent has resulted in significant discomfort related to the assertion of State military power. But attempting to decouple the permissible geography of armed conflict from threat driven strategy by imposing some arbitrary legal limit on the geographic scope of TAC is an unrealistic and ultimately futile endeavor. **Other solution**s to these uncertainties **must be pursued**—solutions **that mitigate** the **perceived over-breadth of authority associated with TAC.** As explained below, these solutions should focus on four considerations:

(1) managing application of the inherent right of self-defense when it results in action within the sovereign territory of a non-consenting State;

(2) adjusting the traditional targeting methodology to account for the increased uncertainties associated with TAC threat identification;

(3) considering the feasibility of a “functional hors de combat” test to account for incapacitating enemy belligerents incapable of offering hostile resistance; and

(4) continuing to enhance the process for ensuring that preventive detention of captured belligerent operatives does not become unjustifiably protracted in duration.

This essay does not seek to develop each of these mitigation measures in depth. Instead, it proposes that focusing on these (and perhaps other innovations in existing legal norms) is a more rational approach to mitigating the impact of TAC than imposing an arbitrary geographic scope limitation. Other scholars have already begun to examine some of these concepts, a process that will undoubtedly continue in the future. Whether these innovations take the form of law or policy is another complex question, which should be the focus of exploration and debate. In short, rejecting the search for geographic limits on the scope of TAC should not be equated with ignorance of the risks attendant with this broad conception of armed conflict. Instead, it must be based on the premise that even if such a limit were proposed, it would ultimately prove ineffective in preventing the conduct of operations against transnational non-State threats where the State concludes such operations will produce a decisive effect. Instead, focusing on the underlying issues themselves and considering how the law might be adjusted to account for actual or perceived authority over-breadth is a more pragmatic response to these concerns.

A. Jus ad Bellum and the Authority to Take the Fight to the Enemy

One example of proposals to mitigate the risk of over-breadth associated with TAC is the “unable or unwilling” test highlighted by the scholarship of Professor Ashley Deeks.53 Deeks proposes a methodology for balancing a State’s inherent right to defend itself against transnational non-State threats and the sovereignty of other States where threat operatives are located. Because the law of neutrality cannot provide the framework for balancing these interests (as it does in the context of international armed conflicts), Deeks acknowledges that some other framework is necessary to limit resort to military force outside “hot zones,” even when justified as a measure of national self-defense. The test she proposes seeks to limit selfhelp uses of military force to situations of absolute necessity by imposing a set of conditions that must be satisfied to provide some objective assurance that the intrusion into another State’s territory is a genuine measure of last resort.54 This is pure lex lata,55 so is Deeks, to an extent. However, Deeks, having served in the Department of State Legal Advisor’s Office, recognizes that if TAC is a reality (which it is for the United States), these innovations are necessary to ensure it does not result in unjustifiably overbroad U.S. military action.

B. Target Identification and Engagement

This is precisely the approach that should be considered in the jus in bello branch of conflict regulation to achieve an analogous balance between necessity and risk during the execution of combat operations. Even assuming the “unable or unwilling” test effectively limits the exercise of national selfdefense in response to transnational terrorism, it in no way mitigates the risks associated with the application of combat power once an operation is authorized.

The in bello targeting framework is an obvious starting point for this type of exploration of the concept and its potential adjustment.56 Indeed, it seems increasingly apparent that while TAC suggests a broad scope of authority to employ combat power in a LOAC framework with no geographic constraint, the consternation generated by this effect is a result of the uncertainty produced by the complexity of threat recognition. This consternation is most acute in relation to three aspects of action to incapacitate terrorist belligerent operatives: the relationship between threat recognition and the authority to kill as a measure of first resort (the difficulty of applying the principle of distinction when confronting irregular enemy belligerent forces); the pragmatic illogic of asserting the right to kill as a measure of first resort to an individual subject to capture with virtually no risk to U.S. forces; and the ability to apply this targeting authority against unconventional enemy operatives located outside of “hot zones”.57

These concerns flow from the intersection of a battlespace that is functionally unrestricted by geography and the unconventional nature of the terrorist belligerent operative. The combined effect of these factors is a target identification paradigm that defies traditional threat recognition methodologies: no uniform, no established doctrine, no consistent locus of operations, and dispersed capabilities.58 It is certainly true that threat identification challenges are in no way unique to TAC; threat identification has always been difficult, especially in the context of “traditional” noninternational armed conflicts involving unconventional belligerent opponents. Yet, when this threat recognition uncertainty was confined to the geography of one State, it was never perceived to be as problematic as it is in the context of TAC. This is perplexing. In both contexts, the unconventional nature of the enemy increases the risk of mistake in the target selection and engagement process.59 Thus, employing the same approach is completely logical.

Two factors appear to provide an explanation for the increased concern over the threat identification uncertainty in the context of TAC. One of these is beyond the scope of “mitigation solutions,” while the other is not. The first is the increased public awareness and interest in both the legal authority to use military force and the legality of the conduct of hostilities, a factor that inevitably increases the scrutiny on military power under the rubric of TAC. **This pervasive and intense interest in and legal critique of military operations** associated with what is euphemistically called the war on terror **is truly unprecedented**. In this “lawfare” environment, it is unsurprising that government action that deprives individuals of life as a measure of first resort or subjects them to preventive detention that may last a lifetime—often impacting individuals located far beyond a “hot zone” of armed hostilities—generates intense legal scrutiny.60 **This factor**, whether a net positive or negative, is a reality that **is unlikely to abate** in the foreseeable future.

In an article published in the Brooklyn Law Review, I proposed a sliding quantum of information related to the assessment of targeting legality based on relative proximity to a “hot zone.”62 In essence, I proposed that when conducting operations against unconventional non-State operatives, the reasonableness of a target legality judgment requires increased informational certainty the more attenuated the nominated target becomes to a zone of traditional combat operations. The concept was proposed as a measure to mitigate the increased risk of targeting error when engaging an unconventional belligerent operative in an area that itself does not indicate belligerent activity. Jennifer **Daskal offers a similar proposal** in her article, The Geography of the Battlefield.63 Daskal presents a more comprehensive approach to adjusting the traditional targeting framework when applied to the TAC context. Both of these articles seek to mitigate the consequence of applying broad LOAC authority against a dispersed and unconventional enemy; both methods that should continue to be explored.

[Note: This clarifies Corn is talking about proposals that seek to legally limit TAC authority (transnational armed conflict) – that is referring to the “armed conflict” legal apparatus that regulates the US armed conflict against AQ, which allows for the use of force and what not. If the US did legally confine the armed conflict, then law enforcement and human rights law would apply outside of the battlefield. Clearly, that is not the plan, as we only add a mitigation measure to a single armed conflict operation.]

### t-restrict

“Restrictions” are on time, place, and manner – this includes geography

Lobel, professor of law at the University of Pittsburgh, 2008

(Jules, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War,” Ohio State Law Journal, http://moritzlaw.osu.edu/students/groups/oslj/files/2012/04/69.3.lobel\_.pdf)

Throughout American history, Congress has placed restrictions on the President’s power as Commander in Chief to conduct warfare. On numerous occasions, **Congress has authorized the President to conduct warfare but placed significant restrictions on the time**, **place and manner of warfare**. Congress has regulated the tactics the President could employ, the armed forces he could deploy, the geographical area in which those forces could be utilized, and the time period and specific purposes for which the President was authorized to use force. Its regulations have both swept broadly and set forth detailed instructions and procedures for the President to follow. This historical practice is consistent with the Constitution’s text and Framers’ intent, which made clear that the President was not to have the broad powers of the British King, but was subject to the control and oversight of Congress in the conduct of warfare.

“On” means there’s no limits disad

Dictionary.com, http://dictionary.reference.com/browse/on

On

preposition

1.so as to be or remain supported by or suspended from: Put your package down on the table; Hang your coat on the hook.

2.so as to be attached to or unified with: Hang the picture on the wall. Paste the label on the package.

### olc cp

No one trusts the CP

Mark David Maxwell, Colonel, Judge Advocate with the U.S. Army, Winter 2012, TARGETED KILLING, THE LAW, AND TERRORISTS, Joint Force Quarterly, http://www.ndu.edu/press/targeted-killing.html

The weakness of this theory is that it is not codified in U.S. law; it is merely the extrapolation of international theorists and organizations. The only entity **under the Constitution that can frame and settle Presidential power** regarding the enforcement of international norms **is Congress**. As the check on executive power, Congress must amend the AUMF to give the executive a statutory roadmap that articulates when force is appropriate and under what circumstances the President can use targeted killing. **This would be the** needed endorsement from Congress, the other political branch of government, **to clarify the U.S. position on its use of force regarding targeted killing**. For example, it would spell out the limits of American lethality once an individual takes the status of being a member of an organized group. Additionally, statutory clarification will give other states a roadmap for the contours of what constitutes anticipatory self-defense and the proper conduct of the military under the law of war.

Congress should also require that the President brief it on the decision matrix of articulated guidelines before a targeted killing mission is ordered. As Kenneth Anderson notes, “[t]he point about briefings to Congress is partly to allow it to exercise its democratic role as the people’s representative.”74

The desire to feel safe is understandable. The consumers who buy SUVs are not buying them to be less safe. Likewise, the champions of targeted killings want the feeling of safety achieved by the elimination of those who would do the United States harm. But allowing the President to order targeted killing without congressional limits means the President can manipulate force in the name of national security without tethering it to the law advanced by international norms. The potential consequence of such unilateral executive action is that it gives other states, such as North Korea and Iran, the customary precedent to do the same. Targeted killing might be required in certain circumstances, but if the guidelines are debated and understood, the decision can be executed with the full faith of the people’s representative, Congress. **When the decision is made without Congress, the result might make the U**nited **S**tates **feel safer, but the process eschews what gives a state its greatest safety: the rule of law**.

Executive transparency fails—not legally binding, no cred, raises expectations

Sarah Knuckey, NYU Law School Project on Extrajudicial Executions Director, Special Advisor to the UN Special Rapporteur on extrajudicial executions, 10/1/13, Transparency on Targeted Killings: Promises Made, but Little Progress, justsecurity.org/2013/10/01/transparency-targeted-killings-promises-made-progress/

Some interpreted these efforts and the President’s speech to mark the beginning of improved transparency. But despite transparency promises and expectations, many of **the same, core concerns regarding undue secrecy remain**. The President’s speech, the Policy Guidance, and Holder’s letter – because of textual ambiguities within each, and combined with events since – have largely failed to address these longstanding concerns, **and in** some **important respects aggravated them.**

Continuing Secrecy on Core Issues

Key areas in which transparency has not yet been forthcoming include:

Who can be killed, where, and on what basis. Demands for legal and policy information on who and when the US believes it can kill have long been at the center of calls for more transparency. Senior US officials, before 2013, delivered important speeches outlining the government’s views on the applicable legal frameworks for targeting. But the speeches lacked detail, and left crucial legal questions unanswered. Legal concepts key to understanding the scope of US targeting – like “imminence,” “associated forces,” and “directly participating in hostilities” – remain unclear (see this and this). The relevant legal memos have still not been published, even in redacted form. In addition, although President Obama’s speech and the published Policy Guidance set out strict rules for the use of force – stricter, in numerous respects, than the laws of war – they are not legally binding, and we do not know when they began to apply, or when the strict policy limits on killing may be relaxed (and if we will ever be told when they are). And, crucially, **we don’t know where the new guidelines actually apply** (original assumptions by many outside government that they applied in Pakistan were later called into question). Since Obama’s May 2013 speech, **confusion** about who can be targeted **has** at times **increased** (e.g. a “senior American official” stated in August that a security threat had “expanded the scope” of who could be targeted in Yemen).

OLC can’t solve and links to politics

Posner 11 Eric Posner is the Kirkland & Ellis Professor, University of Chicago Law School. “DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER 9/11 CONGRESS, THE COURTS AND THE OFFICE OF LEGAL COUNSEL” available at http://www.law.uchicago.edu/academics/publiclaw/index.html.

These two events neatly encapsulate the dilemma for OLC, and indeed all the president’s legal advisers. If OLC tries to block the president from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If OLC gives the president the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public. Can OLC constrain the executive? That is the position taken by many scholars, most notably Jack Goldsmith. 18 The underlying idea here is that even if Congress and the courts cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Bruce Ackerman, is that OLC is a rubber stamp. 19 I advocate a third view: OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that OLC enables than constrains. B. OLC as a Constraint on the Executive A number of scholars have argued that OLC can serve as an important constraint on executive power. I will argue that OLC cannot act as a constraint on executive power. Indeed, its only function is the opposite—as an “enabler” (as I will put it) or extender of executive power. A president must choose a course of action. He goes to OLC for advice. Ideally, OLC will provide him good advice as to the legality of the course of action. It will not provide him political advice and other relevant types of advice. The president wants to maximize his political advantage, 21 and so he will follow OLC’s advice only if the legal costs that OLC identifies are greater than the political benefits. On this theory, OLC will properly always give the president neutral advice, and the president will gratefully accept it although not necessarily follow it. If the story ended here, then it would be hard to see what the controversy over OLC could be about. As an adviser, it possesses no ability to constrain the executive. It merely provides doctrinal analysis, in this way, if it does its job properly, merely supplying predictions as to how other legal actors will react to the president’s proposed action. The executive can choose to ignore OLC’s advice, and so OLC cannot serve as a “constraint” on executive power in any meaningful sense. Instead, it merely conveys to the president information about the constraints on executive power that are imposed from outside the executive branch. However, there is an important twist that complicates the analysis. The president may choose to publicize OLC’s opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress 22 claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office’s reputation. When OLC’s opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OLC’s opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status. But if the president publicizes OLC opinions, he takes a risk. The risk is that OLC will publicly advise him that an action is illegal. If OLC approval helps deflect blame from the president, then OLC disapproval will tend to concentrate blame on the president who ignores its advice. Congress and the public will note that after all the president is ignoring the advice of lawyers that he appointed and thus presumably he trusts, and this can only make the president look bad. To avoid such blame, the president may refrain from engaging in a politically advantageous action. In this way, OLC may be able to prevent the president from taking an action that he would otherwise prefer. At a minimum, OLC raises the political cost of the action. I have simplified greatly, but I believe that this basic logic has led some scholars to believe that OLC serves as a constraint on the president. But this is a mistake. OLC strengthens the president’s hand in some cases and weakens them in others; but overall it extends his power—it serves as enabler, not constraint. To see why, consider an example in which a president must choose an action that lies on a continuum. One might consider electronic surveillance. At one extreme, the president can engage in actions that are clearly lawful—for example, spying on criminal suspects after obtaining warrants from judges. At the other extreme, the president can engage in actions that are clearly unlawful—for example, spying on political opponents. OLC opinions will not affect Congress’s or the public’s reaction to either the obviously lawful or the obviously unlawful actions. But then there are middle cases. Consider a policy L, which is just barely legal, and a policy I, which is just barely illegal. The president would like to pursue policy L but fears that Congress and others will mistakenly believe that L is illegal. As a result, political opposition to L will be greater than it would be otherwise. In such a case, a favorable advisory opinion from a neutral legal body that has credibility with Congress will help the president. OLC’s approval of L would cause political opposition (to the extent that it is based on the mistaken belief that L is unlawful) to melt away. Thus, OLC enables the president to engage in policy L, when without OLC’s participation that might be impossible. True, OLC will not enable the president to engage in I, assuming OLC is neutral. And, indeed, OLC’s negative reaction to I may stiffen Congress’ resistance. However, the president will use OLC only because he believes that OLC will strengthen his hand on net. It might be useful to make this point using a little jargon. In order for OLC to serve its ex ante function of enabling the president to avoid confrontations with Congress in difficult cases, it must be able to say “no” to him ex post for barely illegal actions as well as “yes” to him for barely legal actions. It is wrong to consider an ex post no as a form of constraint because, ex ante, it enables the president to act in half of the difficult cases. OLC does not impose any independent constraint on the president, that is, any constraint that is separate from the constraint imposed by Congress. An analogy to contract law might be useful. People enter contracts because they enable them to do things ex ante by imposing constraints on them ex post. For example, a debtor can borrow money from a creditor only because a court will force the debtor to repay the money ex post. It would be strange to say that contract law imposes “constraints” on people because of ex post enforcement. In fact, contract law enables people to do things that they could not otherwise do—it extends their power. If it did not,people would not enter contracts. A question naturally arises about OLC’s incentives. I have assumed that OLC provides neutral advice—in the sense of trying to make accurate predictions as to how other agents like Congress and the courts would reaction to proposed actions. It is possible that OLC could be biased—either in favor of the president or against him. However, if OLC were biased against the president, he would stop asking it for advice (or would **ask for its advice in private and then** ignore it). This danger surely accounts for the fact that OLC jurisprudence is pro-executive. 23 But it would be just as dangerous for OLC to be excessively biased in favor of the president. If it were, it would mislead the president and lose its credibility with Congress, with the result that it could not help the president engage in L policies. So OLC must be neither excessively pro-president nor anti-president. If it can avoid these extremes, it will be an “enabler”; if it cannot, it will be ignored. In no circumstance could it be a “constraint.” If the OLC cannot constrain the president on net, why have people claimed that OLC can constrain the president? What is the source of this mistake? One possibility, which I have already noted, is that commentators might look only at one side of the problem. Scholars note that OLC may “prevent” the president from engaging in barely illegal actions without also acknowledging that it can do so only if at the same time it enables the president to engage in barely legal actions. This is simply a failure to look at the full picture. For example, in The Terror Presidency, Goldsmith argues that President Bush abandoned a scheme of warrantless wiretapping without authorization from the FISA court because OLC declared the scheme illegal, and top Justice Department officials threatened to resign unless Bush heeded OLC’s advice. 25 This seems like a clear example of constraint. But it is important to look at the whole picture. If OLC had approved the scheme, and subsequently executive branch agents in the NSA had been prosecuted and punished by the courts, then OLC’s credibility as a supplier of legal advice would have been destroyed. For the president, this would have been a bad outcome. As I have argued, a credible OLC helps the president accomplish his agenda in “barely legal” cases. Without taking into account those cases where OLC advice helps the president’s agenda ex post as well as the cases where OLC advice hurts the president’s agenda ex post, one cannot make an overall judgment about OLC’s ex ante effect on executive power. Another possible **source of error** is that scholars imagine that “neutral” advice will almost always prevent the president from engaging in preferred actions, while rarely enabling the president to engage in preferred actions. The implicit picture here is that a president will normally want to break the law, that under the proper interpretation of the Constitution and relevant standards the president can accomplish very little. So if OLC is infact neutral and the president does obey its advice, then it must constrain the president. But this theory cannot be right, either. If OLC constantly told the president that he cannot do what he wants to do, when infact Congress and other agents would not object to the preferred actions, then the president would stop asking OLC for advice. As noted above, for OLC to maintain its relevance, it cannot offer an abstract interpretation of the Constitution that is divorced from political realities; it has to be able to make realistic predictions as to how other legal agents will react to the president’s actions. This has led OLC to develop a pro-executive jurisprudence in line with the long-term evolution of executive power. If OLC tried to impose constraints other than those imposed by Congress and other institutions with political power, then the president would ignore it.

Zero chance of Congressional follow-on AND CP links to politics

Kevin Drum, Mother Jones, 4/22/13, Maureen Dowd and Presidential Leverage, www.motherjones.com/kevin-drum/2013/04/maureen-dowd-and-presidential-leverage

Finally, there's the most obvious change of all: **the decision by Republicans to stonewall every single Obama initiative from day one**. By now, I assume that even conservative apologists have given up pretending that this isn't true. **The evidence is overwhelming**, and **it's applied to** practically **every single thing Obama has done** in the domestic sphere. The only question, ever, is whether Obama will get two or three Republican votes vs. three or four. If the latter, he has a chance to win. But those two or three extra votes don't depend on leverage. In fact, Obama's leverage is negative. The last thing any Republican can afford these days is to be viewed as caving in to Obama. That's a kiss of death with the party's base.

### convention plank

Codifying rules constrains the US while other countries cheat – having the norm is a prerequisite

Ben Lerner 13, Vice President for Government Relations at the Center for Security Policy, Judging ‘Drones’ From Afar, March 25, <http://www.centerforsecuritypolicy.org/2013/03/25/judging-drones-from-afar/>

Whatever the potential motivations for trying to codify international rules for using UAVs, such a move would be ill advised. While in theory, every nation that signs onto a treaty governing UAVs will be bound by its requirements, it is unlikely to play out this way in practice. It strains credulity to assume that China, Russia, Iran, and other non-democratic actors will not selectively apply (at best) such rules to themselves while using them as a cudgel with which to bash their rivals and score political points. The United States and its democratic allies, meanwhile, are more likely to adhere to the commitments for which they signed up. The net result: we are boxed in as far as our own self-defense, while other nations with less regard for the rule of law go use their UAVs to take out whomever, whenever, contorting said “rules” as they see fit. One need only look at China’s manipulation of the Law of the Sea Treaty to justify its vast territorial claims at the expense of its neighbors to see how this often plays out.

And who would enforce the treaty’s rules — a third party tribunal? Would it be an apparatus of the United Nations, the same U.N. that assures us that it is not coming after the United States or its allies specifically, even as its investigation takes on as its “immediate focus” UAV operations recently conducted by those countries?

The United States already conducts warfare under the norms of centuries of practice of customary international law in areas such as military necessity and proportionality, as well as the norms to which we committed ourselves when we became party to the 1949 Geneva Conventions and the United Nations Charter. These same rules can adequately cover the use of UAVs in the international context. But if the United States were to create or agree to a separate international regime for UAVs, we would subject ourselves to new, politicized “rules” that would needlessly hold back countries that already use UAVs responsibly, while empowering those that do not.

### iran

GOP, Dems, Israel lobby, no veto

Weisman 11/12/13

Jonathan, NYT, “Iran Talks Face Resistance in U.S. Congress,” http://www.nytimes.com/2013/11/13/world/middleeast/iran-talks-face-resistance-in-us-congress.html?\_r=0

After having come tantalizingly close over the weekend to an agreement to freeze Iran’s nuclear program, the Obama administration is gingerly weighing a threat to the talks potentially more troublesome than the opaque leadership in Tehran: Congress. Secretary of State John Kerry will meet behind closed doors on Wednesday afternoon with members of the Senate Banking, Housing and Urban Affairs Committee to try to head off a new round of stiff sanctions on Iran that administration officials fear could derail the talks in Geneva. In addition, Vice President Joseph R. Biden Jr.; Mr. Kerry; Wendy R. Sherman, the administration’s chief negotiator; and David S. Cohen, under secretary of the Treasury for terrorism and financial intelligence, are scheduled to brief Senate Democratic leaders that day in a full-court press to win backing of the diplomatic initiative. But the **administration is running headlong into** Prime Minister Benjamin **Netanyahu** of Israel **and pro-Israel lobbyists** pressing their case that the deal taking shape would be a major blunder. Diplomats from the United States and five other countries are pursuing an accord that would cause Iran to freeze its nuclear program in exchange for the loosening of some of the sanctions that have crippled the Iranian economy. Talks broke off this weekend but are scheduled to resume on Nov. 20. But they are facing bipartisan doubt about their course. “I understand what they’re saying about destroying a chance for a peaceful outcome here with new sanctions, but I really do believe if the new sanctions were crafted in the right way, they would be more helpful than harmful,” said Senator Lindsey Graham, Republican of South Carolina. Senator Charles E. Schumer of New York, the third-ranking Democrat, was briefed Monday on the negotiations by Mr. Biden and has met with the White House chief of staff, Denis R. McDonough, as well as with cabinet officials. Yet he still proclaimed himself “dubious” of the possible agreement because of concerns that the administration might be willing to give too much away while getting too little in return. In a letter to the editor in The New York Times last week and an opinion article in USA Today, Senator Robert Menendez of New Jersey, the Democratic chairman of the Foreign Relations Committee, indicated he would press forward against the administration’s wishes on the sanctions legislation. “Iran is on the ropes because of its intransigent policies and our collective will, and it would be imprudent to want an agreement more than the Iranians do,” he wrote in USA Today on Monday. “Tougher sanctions will serve as an incentive for Iran to verifiably dismantle its nuclear weapons program.” A powerful lobbying group, the American Israel Public Affairs Committee, issued its own broadside. “Aipac continues to support congressional action to adopt legislation to further strengthen sanctions, and there will absolutely be no pause, delay or moratorium in our efforts,” the group’s president, Michael Kassen, said in a statement this month. But the group’s officials are taking a wait-and-see stance for now. If the talks collapse on their own, the group can avoid wading into a political donnybrook, but if a diplomatic breakthrough is achieved, Aipac is ready to mount an aggressive campaign to stop it, according to one person familiar with its thinking. Senator Tim Johnson, Democrat of South Dakota, the chairman of the Banking Committee, has said he will not move forward with sanctions legislation until he has consulted with committee members after the Wednesday briefing from Mr. Kerry. But Republicans are threatening to move on their own, possibly by attaching the sanctions to a defense policy bill that will reach the Senate floor **this week**. “I understand the problem that this creates at the negotiating table,” said Senator Bob Corker of Tennessee, the top Republican on the Foreign Relations Committee and a member of the Banking Committee, which has jurisdiction over economic sanctions. But, he added, the administration’s fears are misplaced: “New sanctions wouldn’t kick in for three to six months. The important period of time for this country, candidly for the world community, on this issue is over the next two to three weeks.” Sanctions legislation would require the president’s signature, **but even its introduction** could upset the talks. Administration officials fear that congressional action would raise questions in Tehran about the value of Western promises while potentially angering some negotiating team members, especially China and Russia, whose companies would be hit especially hard by the tightening economic noose.

US won’t strike unless they get the bomb – that won’t happen

Colin H. **Kahl 12**, security studies prof at Georgetown, senior fellow at the Center for a New American Security, was Deputy Assistant Secretary of Defense for the Middle East, “Not Time to Attack Iran”, January 17, <http://www.foreignaffairs.com/articles/137031/colin-h-kahl/not-time-to-attack-iran?page=show>

Kroenig argues that there is an urgent need to attack Iran's nuclear infrastructure soon, since Tehran could "produce its first nuclear weapon within six months of deciding to do so." Yet that last phrase is crucial. The International Atomic Energy Agency (IAEA) has documented Iranian efforts to achieve the capacity to develop nuclear weapons at some point, but there is no hard evidence that Supreme Leader Ayatollah Ali Khamenei has yet made the final decision to develop them. In arguing for a six-month horizon, Kroenig also misleadingly conflates hypothetical timelines to produce weapons-grade uranium with the time actually required to construct a bomb. According to 2010 Senate testimony by James Cartwright, then vice chairman of the U.S. Joint Chiefs of Staff, and recent statements by the former heads of Israel's national intelligence and defense intelligence agencies, even if Iran could produce enough weapons-grade uranium for a bomb in six months, it would take it at least a year to produce a testable nuclear device and considerably longer to make a deliverable weapon. And David Albright, president of the Institute for Science and International Security (and the source of Kroenig's six-month estimate), recently told Agence France-Presse that there is a "low probability" that the Iranians would actually develop a bomb over the next year even if they had the capability to do so. Because there is no evidence that Iran has built additional covert enrichment plants since the Natanz and Qom sites were outed in 2002 and 2009, respectively, any near-term move by Tehran to produce weapons-grade uranium would have to rely on its declared facilities. The IAEA would thus detect such activity with sufficient time for the international community to mount a forceful response. As a result, the Iranians are unlikely to commit to building nuclear weapons until they can do so much more quickly or out of sight, which could be years off.

Obamacare sinks the agenda

Paul Gregory, Forbes, 11/6/13, President Obama's Loss Of Trust Over Obamacare Imperils Immigration Reform, www.forbes.com/sites/paulroderickgregory/2013/11/06/veracity-and-lost-presidencies/

The President’s “misspeaking” on his Obama Care pledges have doomed any chance of immigration reform, **or any other major reform, for that matter**. **Obama may go into campaign mode on immigration** reform to gain Hispanic votes, **but it will be only talk**. There can be no comprehensive reform of anything – immigration, entitlements, or the national debt — if legislators and, more importantly, the voters do not trust the President’s word.

Obama has declared immigration reform his top legislative priority for the rest of his term. In June of 2012, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act, which spends more on border security, provides provisional legal status and eventual pathway to citizenship for people living in the country illegally, and outlines reforms for the existing visa programs for immediate relatives and skilled workers.

House Speaker John Boehner declared the Senate bill a nonstarter and expressed hope that the House would produce its own bill. A House bi-partisan group of four Republicans and four Democrats began drafting such a plan but has subsequently fallen apart with only one Republican remaining. The chances of passage of any comprehensive immigration reform during the Obama years are about zero.

Irrespective of your views, comprehensive immigration reform requires a high degree of trust. Under the Senate bill, the president must enforce border security, decide the disposition of criminal undocumented workers, and set visa regulations, among other things. The Republican s in Congress cannot take the political risk of passing immigration reform to see parts of it enforced, other parts ignored, and yet other parts made unrecognizable by executive order.

One Republican member of the collapsed bi-partisan House team put it this way (House immigration group collapses):

“If past actions are the best indicators of future behavior; we know that any measure depending on the president’s enforcement will not be faithfully executed,…It would be gravely irresponsible to further empower this administration by granting them additional authority or discretion with a new immigration system.”

The Obama administration has made a practice of not enforcing legislation it does not like (DOMA, no child left behind, medical marijuana, gay spousal benefits, to name a few) and by executing other initiatives by executive action (de facto execution of the Dream act). Added to this history of selective enforcement, we have the problem of the President’s veracity. Can we take the President’s solemn pledge to raise border security to legislated levels seriously after he broke an even more solemn promise to the American people on his legacy Obama Care legislation (If you like your policy or your doctor you can keep them).

After George W. Bush was reelected, he declared he would use his political capital to reform social security. He failed because of deep rooted opposition to change but also because his credibility had been damaged by the oft-repeated charge: “Bush lied.”

Unless Obama restores his credibility with the American people, he must forego any major initiatives. Major changes come about only when there is trust in the nation’s chief executive.

No political capital

Jonathan Bernstein, 11/8/13, What matters, and what doesn’t, with Obama’s sliding approval numbers, www.washingtonpost.com/blogs/plum-line/wp/2013/11/08/what-matters-and-what-doesnt-with-obamas-sliding-approval-numbers/

Everyone is talking about Barack Obama’s falling numbers this week, with a new Pew Poll out today showing him at 41 percent approval, and a slide in Gallup to a post-election low earlier this week. Any careful look should go to the aggregators; the latest HuffPollster average has Obama’s approval at 43%, with a steady slide since a post-election peak back in late December.

Of course, Obama is never going to appear on a ballot again. But **his popularity still matters**. In some ways, and not in others.

What’s hurting the president? A week of high-coverage negative publicity on the Obamacare rollout can’t help, and in fact his approval rating from Pew on health care is down to 37 percent. On the other hand, that’s only down eight points since January, compared with an 11 point overall drop.

It’s not likely Obama is getting dragged down just by health care. It’s probably a combination of things — a large part of it likely from the dramatic drop in Gallup’s economic confidence index since May, which is about when sequestration started kicking in and the deficit started shrinking rapidly.

Here’s where Obama’s approval numbers do not matter: The future of the health law.

There will be a lot of talk that Dems are running away from the health law because of his drop. But on health care, Democrats pretty much are all in the same boat: They want the law to work. After all, what other choice is there? Dems are not going to support repeal — they voted for the bill. So they’re stuck hoping the administration can get everything running as painlessly as possible. Democrats probably are open to small fixes to immediate problems, but even there it’s not clear how much can be done legislatively — and no fixes that would help Obamacare run better can pass the GOP-controlled House.

Here’s where Obama’s approval does matter.

Presidential approval has real effects on midterm elections. Right now, what matters is perceptions among elites, and potential candidates, about those elections. There’s some evidence Dems benefited from the shutdown, with a small wave of successful recruitment. If the conventional wisdom shifts to a sense that Obama (and Democrats) are doomed, it’s unlikely Democrats could build on those successes. We might see some Republican recruiting coups. Separate from that is the direct effect of presidential popularity; the better Obama is doing in November 2014, the better Dems can expect to do.

**The other reason presidential approval matters is that it should**, on the margins, help or **hurt his ability to influence people**, whether Members of **Congress** or people in executive branch **agencies** **or** any of those **Washingtonians** (in Richard Neustadt’s language) **a president seeks to influence.**

Low presidential approval now could also matter to Obama’s long term success. If he remains unpopular, he might have more trouble getting judges confirmed, perhaps leading to more court decisions against his programs. Another area: the more popular Obama is, the more pressure there would probably be on states to join the Medicaid expansion.

## 1ar

### 1ar – link uq

The boundary between IHL and IHRL is inevitably mushy

Jens D. Ohlin, Cornell Law School Professor, 11/26/2012, Is Jus in Bello in Crisis?, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1106&context=clsops\_papers

The preceding summary suggests that although the U.S. deployment of drone strikes raises deep and potentially intractable dilemmas for IHL, these are by no means new issues for the field to address. The field has long struggled with how to regard NSAs and how to categorize armed conflicts between them and traditional states. The scholarly dialogue regarding the interplay between IHL and IHRL has undergone substantial evolution in the last decade, though whether this movement was sparked by the drone campaign is doubtful; rather, it is more likely the inevitable collision of competing paradigms or what David Luban has referred to as the ‘Two Cultures Prob- lem’.59

The drone campaign has added urgency to the legal status of targeted terrorists, though the standard of civilians ‘directly participating in hostilities’ long pre-dates the armed conflict against al-Qaeda. Critics of the ‘con- tinuous combat function’ legal standard developed by the ICRC have suggest- ed that it is an unfortunate and misguided attempt to legitimate how the United States and its allies target terrorists. However, regardless of the mo- tivation, the question is whether the definition is legally defensible, not wether it was inspired by a specific factual scenario. As for the status of civil- ian employees in warfare, and whether they violate the laws of war when they operate remotely piloted drones, this is merely the flipside of the status question for terrorists. Once IHL is liberated from the jus ad bellum, legal standards for civilian/combatant status must be determined by virtue of a neutral principle for both sides of the conflict.60 If al-Qaeda operatives do not enjoy combatant immunity for failure to carry arms openly and display a fixed emblem recognizable at a distance, neither do U.S. personnel operating covertly. One thing is certain: legal analysis regarding proportionality remains hamstrung by the lack of impartial factual reporting of civilian casualties – a lacuna that has plagued prior armed conflicts as well. This is one area where the ex post fact-finding machinery of international criminal justice may have some role to play.

### Collapse

Compliance is inevitable and disputes don’t spillover—continued conflation is key.

Lubell ‘7

Noam, Lecturer in International Human Rights Law, Irish Centre for Human Rights, National University of Ireland, Galway, “PARALLEL APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: AN EXAMINATION OF THE DEBATE,” ISR. L. REv. Vol. 40 No.2, 2007

For example, the rules on the use of force are significantly different in IHL and IHRL. IHL allows for lethal force against certain categories of persons, even in the absence of individual self-defense. In the context of a non-international armed conflict, some interpretations view members of armed opposition groups as having lost their IHL civilian protection,35 which in turn could lead the state to adopt a shoot to kill policy. This would not necessarily be in violation of IlHL, but is in clear contrast to the IHRL law enforcement standards which dictate lethal force as a last option, and contain an obligation to attempt to detain individuals before using any force.36 In this context, there may be room to examine the parallel application in such a way that recognises the existence of an armed conflict and the need for IHL rules in certain circumstances, but nevertheless **gives greater predominance to IHRL** **rules** than the traditional lex specialis approach seems to afford. For instance, stressing an obligation in certain circumstances to attempt to detain whenever possible rather than opting directly for lethal force, might be a step in that direction. A number of other obstacles and challenges have been raised in this volume and elsewhere,37 including the particularities of multilateral operations and peacekeeping; the implications of IHRL upon military investigations into deaths during armed conflict; economic, social and cultural rights during armed conflict; remedies for violations, reparations and more. In conclusion, obstacles and inconsistencies are inevitable **when dealing with an ongoing process whose final outcome is not yet determined,** at least not with regard to all the details. The direction is **however clear**, as the majority of opinion nowadays **clearly concludes** that we have some form of parallel application. Hopefully this volume will have contributed to the understanding of this relationship. It is clear that while International Humanitarian Law and International Human Rights Law have been engaged in a relationship for many years, there are still some rocky patches that need to be navigated before we can be assured that the two branches of law **can live together happily ever after.**

Empirics disprove and self-interest always guarantees compliance

Ohlin ‘13

Jens, Associate Professor of Law, Cornell Law School; member, Editorial Committee, “Is Jus in Bello in Crisis?,”

Most of the legal issues raised by the American drone campaign are, predictably, alleged **jus in bello violations**, though a few issues sound in jus ad bellum. For example, human rights critics and other commentators occasionally complain that the asymmetrical nature of the lethal force of drones makes the resort to force too easy.3 Since drones are remotely piloted, attacking forces can neutralize their intended target and risk no loss of life when their drones are deployed. The question becomes whether the asymmetrical nature of the risk offends, on a conceptual level, the basic paradigm of coequal belligerents who meet each other on the battlefield and run the reciprocal risk of killing and dying – a paradigm encapsulated by the chivalric conception of warfare, a conception already placed under pressure by the development, in World War II, of aerial bombardment, but whose pressure has been inflated into pure displacement now that pilots are remotely housed out of harm’s way. The issue of aerial risk received widespread notice when NATO required its pilots to fly above 15,000 feet when bombing Serbian targets during the conflict over Kosovo – a decision that allegedly prioritized force protection over civilian collateral damage. Indeed, not a single pilot died during the conflict, and critics complained that NATO’s obsession with zero casualties impermissibly prioritized the lives of soldiers over the lives of civilians. That being said, there would be something odd about a putative rule of international law that prevented an attacking force from lowering the risk to its own personnel, as it does with drones, when lowering the risk to one’s own personnel does not increase the risk of collateral damage to enemy civilians as it might have in Serbia.4 On a more practical level, the question is whether the asymmetrical use of force, and the low risk of civilian casualties, will erode one of the automatic enforcement mechanisms of the **Article 2** prohibition on the use of force in the UN Charter. In the past, the aggressive use of force in contravention of the Charter was only possible when a country risked its own personnel, thus providing a self-interested reason to comply with the legal prohibition on the use of force, in addition to more principled reasons for compliance. If aggressive force can be deployed without risk, will more nations ignore the Charter (and customary law) prohibition on the use of force? In this vein, it is perhaps sufficient to note that **the problem is not new** and that nuclear weapons may also be used without risk. The solution to the nuclear dilemma was the deterrent rationale expressed in the Mutually Assured Destruction Doctrine, which became a reality once nuclear weapons proliferated. The coming proliferation of drone technology may well solve the same issue again and provide an internal check on over-deployment of drone technology. Turning now to jus in bello problems raised by targeted killings, the issues can be classified into five discrete categories: (1) the existence of a putative armed conflict with al-Qaeda; (2) **the contentious relationship between IHL and IHRL;** (3) whether targeted terrorists are civilians or combatants; (4) whether drone operators enjoy the privilege of combatancy; and (5) **the nature of proportionality calculations when civilians are collateral victims.** Each category will be addressed in order to express the full landscape of legal dispute and evaluate whether jus in bello is truly in crisis. The resulting portrait will reveal that **most of these fissures** **pre-date the development of drone technology** and are simply **emblematic of a pre-existing disunity** **that consistently threatens the underlying reciprocity of IHL.**

### 1ar – alt cause ov

LOAC’s flexibility in spite of repeat violations ensures there’s no impact to the plan either

Charles J. Dunlap, USAF, Duke University Law School, Dec 2011, The Mottled Legacy of 9/11: A Few Reflections on the Evolution of the International Law of Armed Conflict, Yearbook of International Humanitarian Law / Volume 14

Among the concerns are misplaced actions that encourage behaviors that may, over time, prove profoundly inimical to the fundamental purposes of ILOAC. In particular, this article contends that ILOACs efforts to grapple with the challenge of non-state actors engaged in armed conflict and terroristic acts is too often having the perverse effect of seeming to reward noncompliance with ILOAC, and thus—paradoxically—incentivizing further violations of the law.

### Zah

A zone of active hostilities is wherever there is ongoing fighting – that’s the best standard

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

This task is both necessary and inherently difficult. It is an attempt to develop a set of clear standards, or on-off triggers, for a situation in which the gravity, imminence, and likelihood of a threat are dynamic, uncertain, and difficult to categorize. My aim is to propose an **initial set of standards** that will regulate the use of force and detention without charge outside a zone of active hostilities, consistent with the state's legitimate security needs. The expectation is that debate and discussion will help develop and refine the details over time.

A. The Zone of Active Hostilities

Commentary, political discourse, court rulings, and academic literature are rife with references to the distinction between the so-called "hot battlefield" and elsewhere. **Yet despite the salience of this distinction,** there is no commonly understood definition of a "hot battlefield," let alone a common term applied by all. n118 In what follows, I briefly survey the relevant treaty and case law and offer a working definition of what I call the "zone of active hostilities." This definition takes into account such sources of law as well as the normative and practical reasons for this distinction.

1. Treaty and Case Law

While not explicitly articulated, the notion of a distinct zone of active hostilities where fighting is underway is implicit in treaty law. The Geneva Conventions, for example, specify that prisoners of war and internees must be moved away from the "combat zone" in order to keep them out of danger, n119 and that belligerent parties must conduct searches for the dead and wounded left on the "battlefield." n120 While there are no explicit definitions provided, the context suggests that these terms refer to those areas where fighting is currently taking place or very likely to occur. The related term "zones of military operations," which is spelled out in a bit more detail in the Commentaries to the Geneva Conventions, is described as covering those areas where there is actual or planned troop movement, even if no active fighting. n121

In a variety of contexts, U.S. courts also have opined on whether certain activities fall within or outside of a zone of active hostilities, indicating that the existence and quantity of fighting forces are key. In Hamdi v. Rumsfeld, for example, the Supreme Court observed that the large number of troops on the ground in Afghanistan supported the finding that the United States was involved in "active combat" there. n122 A panel of the D.C. Circuit subsequently noted that the ongoing military campaign by U.S. forces, the attacks against U.S. forces by the Taliban and al Qaeda, the casualties U.S. personnel incurred, and the presence of other non-U.S. troops under NATO command supported its finding that Afghanistan was "a theater of active military combat." n123 Previous cases have similarly used the presence of fighting forces, the actual engagement of opposing forces, and casualty counts to identify a theater of active conflict. n124

Conversely, U.S. courts have often assumed that areas in which there is no active fighting between armed entities fall outside of the zone of active hostilities. Thus, the Al-Marri and Padilla litigations were premised on the notion that the two men were outside of the zone of active hostilities when [\*1205] taken into custody in the United States. n125 The central issue in those cases was how much this distinction mattered. n126 The D.C. Circuit in Al Maqaleh similarly distinguished Afghanistan defined as part of "the theater of active military combat" from Guantanamo described as outside of this "theater of war" presumably because of the absence of active fighting there. n127 In the context of the Guantanamo habeas litigation, D.C. District Court judges have at various times also described Saudi Arabia, Gambia, Zambia, Bosnia, Pakistan, and Thailand as outside an active battle zone. n128

In defining what constitutes a conflict in the first place, international courts have similarly looked at the existence, duration, and intensity of the actual fighting. Specifically, in Tadic, the ICTY defined a noninternational armed conflict as involving "protracted armed violence between governmental authorities and organized armed groups." n129 In subsequent cases, the ICTY [\*1206] described the term "protracted armed violence" as turning on the intensity of the violence and encompassing considerations such as "the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of weapons fired; the number of persons and type of forces partaking in the fighting; the number of casualties; [and] the extent of material destruction." n130 Security Council attention is also deemed relevant. n131

The International Committee of the Red Cross (ICRC) has similarly defined noninternational armed conflicts as "protracted armed confrontations" that involve a "minimum level of intensity."

2. Identifying the Zone

Consistent with treaty and case law, overt and sustained fighting are key factors in identifying a zone of active hostilities. Specifically, the fighting must be of sufficient duration and intensity to create the exigent circumstances that justify application of extraordinary war authorities, to put civilians on notice, and to justify permissive evidentiary presumptions regarding the identification of the enemy. n133 The presence of troops on the [\*1207] ground is a significant factor, although neither necessary nor sufficient to constitute a zone of active hostilities. Action by the Security Council or regional security bodies such as NATO, as well as the belligerent parties' express recognition of the existence of a hot conflict zone, are also relevant.

Linking the zone of active hostilities primarily to the duration and intensity of the fighting and to states' own proclamations suffers, however, from an inherent circularity. A state can itself create a zone of active hostilities by ratcheting up violence or issuing a declaration of intent, thereby making previously unlawful actions lawful. n134

It is impossible to fully address this concern. The problem can, however, be significantly reduced by insisting on strict compliance with the law-of-war principles of distinction and proportionality and by vigorously punishing states for acts of aggression. n135 There will, of course, be disagreement as to whether a state's escalation of a certain conflict constitutes aggression, particularly given underlying disagreements about who qualifies as a lawful target. **The zone approach is helpful in this regard as well: it narrows the range of disagreement by demanding heightened substantive standards as to who qualifies as a legitimate target outside the zones of active hostilities.** Under the zone approach, the escalation of force must be aimed at a narrower set of possible military targets until the increased use of force is sufficiently intense and pervasive enough to create a new zone of active hostilities.

3. Geographic Scope of the Zone

A secondary question relates to the geographic scope of the zone of active hostilities. In answering the related question of the scope of the overarching armed conflict, the Tadic court defined the conflict as extending throughout the state in which hostilities were conducted (in the case of international armed conflict) n136 and the area over which a party had territorial control (in the case of a noninternational armed conflict that did not extend [\*1208] throughout an entire state). n137 Neither approach, however, maps well onto the practical realities of a transnational conflict between a state and a non-state actor. In many cases, the non-state actor and related hostilities will be concentrated in a small pocket of the state. It would be contrary to the justifications of exigency and proper notice to define the zone of active hostilities as extending to the entire state. A territorial control test also does not make sense when dealing with a non-state actor, such as al Qaeda, which does not exercise formal control over any territory and is driven more by ideology than territorial ambition.

This Article suggests a more nuanced, albeit still imperfect, approach**: If the fighting is sufficiently widespread throughout the state, then the zone of active hostilities extends to the state's borders**. **If**, however, **hostilities are concentrated only in certain regions within a state, then the zone will be geographically limited to those** administrative **areas** or provinces in which there is actual fighting, a significant possibility of fighting, or preparation for fighting. This test is fact-intensive and will depend on both the conditions on the ground and preexisting state and administrative boundaries.

It remains somewhat arbitrary, of course, to link the zone of hostilities to nation-state boundaries or administrative regions within a state when neither the state itself nor the region is a party to the conflict and when the non-state party lacks explicit ties to the state or region at issue. This proposed framework inevitably will incorporate some areas into the zone of active hostilities in which the key triggering factors sustained, overt hostilities are not present. But **such boundaries, even if overinclusive or artificial, provide the most accurate means available of identifying the zone of active hostilities**, at least over the short term.

### circumvent

The plan is goldilocks – we solve our allies adv regardless of compliance

Byman ’13 [Daniel L. Byman, Research Director, Saban Center for Middle East Policy | Senior Fellow, Foreign Policy, Saban Center for Middle East Policy, He is also a professor at Georgetown University's Security Studies Program. He served as a staff member on the 9/11 Commission and worked for the U.S. government, 10/10/13, Brookings Institute, “Captures vs. Drones,” http://www.brookings.edu/blogs/up-front/posts/2013/10/10-al-libi-capture-byman, accessed 10/10/13]

Arrests and the legal system also offer more legitimacy, particularly with Western allies. **The legality of U.S. drone strikes outside recognized war zones** and against targets only loosely associated with the Al Qaeda core and the 9/11 attacks, **even if they are clearly terrorists, is hotly debated.** The U.S. drone and targeted killing program are widely criticized as counterproductive and barbaric, with allies rejecting the war paradigm the United States uses to justify these attacks. Capture is deemed more civilized, particularly when – as seems the case with al-Libi – it is followed by a trial in a civilian court. In theory at least, such legitimacy makes allies more willing to support U.S. policies in general.

Yet the costs and limits of capture operations are also painfully clear. Most important, capture operations are much harder. To insert U.S. forces into another country, and to be sure they can be supported if they encounter problems or need to be extracted unexpectedly, requires far more military support than just the insert SEAL or Delta Force team. In contrast, a drone strike, like a military capture operation, requires excellent intelligence, but if the drone encounters problems it simply flies away – and even if it is shot down no Americans die.

In addition, capture operations are more likely to fail. No one doubts the bravery or professionalism of the team that tried to capture Ikrimah, but they came up empty-handed, in part because they encountered more civilians than they expected. A drone flying overhead could have provided continuous surveillance and, had there been a moment when civilians were not near Ikrimah, struck with deadly effect.

In some cases, captures are simply not feasible without taking absurd risks. In remote parts of Pakistan’s FATA, inserting and extracting a special operations force team to capture a suspected terrorist would be exceptionally difficult in most cases. The terrorists are on the lookout for enemies, and U.S. forces could not blend in to a supportive population or move quickly before the enemy could respond. A hail of gunfire, not shocked immobility, would be the likely response.

Not only could U.S. forces be killed, they might also be wounded and captured. This would make the raid a political disaster, with the terrorist group demanding the release of other prisoners and otherwise using the captive to extract concessions.

Somewhat surprisingly, the presence of boots on the ground can be perceived as more of a violation of sovereignty than a drone strike. It was the Bin Ladin raid that caused the most outrage in Pakistan – far more than any drone strike. Already Libya’s government condemned the al-Libi capture and threatened to remove the prime minister if he approved it.

Many of those targeted by U.S. intelligence could not be tried in a U.S. court. There is no indictment against them, evidence is confined to intelligence challenges, or the threat they pose is primarily to U.S. allies. In such cases the United States may want to capture the individual and pass him to an ally, but in so doing the United States becomes implicated in the ally’s treatment of the suspect, a troubling association if the ally is a dictatorship like Algeria or Egypt.

Making this problem much worse, U.S. detention policy is a failure. Obama and other liberals roundly reject continuing Guantanamo, but no policy has emerged to take its place. So what is to be done with captured terrorists who cannot neatly be tried in the U.S. legal system?

Emphasizing capture operations more can help U.S. intelligence and it is good PR – but we can’t pretend that targeted killings will become a thing of the past. Capture is often infeasible or too risky, and policymakers will turn to drone strikes or other lethal approaches instead. So rather that see this weekend’s raids as a shift in the U.S. approach, we should consider it a broadening – increasing the role of capture operations, but not abandoning killing operations altogether.

### Syria

Syria destroyed any perception of Obama power—takes out internal links

Anthony Cordesman 9/1/13, holds the Arleigh A. Burke Chair in Strategy at the Center for Strategic and International Studies (CSIS) in Washington, D.C., “President Obama and Syria: The ‘Waiting for Godot’ Strategy,” <http://csis.org/publication/president-obama-and-syria-waiting-godot-strategy>

Instead, **the Administration** first rushed into the kind of rhetoric you only use if you actually intend to act regardless of domestic and international support. It **tied its entire effort to Syrian use of chemical weapons** and the precedent for using such weapons forever. **And only then did it** suddenly spun around and **talked about** then need for **delay**, measured action, and Congressional approval.¶ While Beckett might not appreciate my efforts to define Godot as the Syrian Civil war, the Administration followed the script of Beckett’s play to the extent it never defined the reasons for what the actors were doing, why they were waiting, or what would happen after Godot came. Chemical weapons are a very real issue, but they are only a subset of the real issue: the overall level of suffering and growing regional instability coming out of the Syrian civil war.¶ We now face the inevitable reaction. **The President’s decisions have reinforced** all of the doubts **about American strength, and our willingness to act, of both our friends and foes**. We now have ten days of confusion and uncertainty to deal with, and then Congress will be evidently be asked to act only on a strike tailored to deter the future use of chemical weapons. It will still lack a meaningful plan for dealing with the Syrian civil war and its impact on the region.¶ Israel is threatening to return to hawk mode over Iran. Russia and China are in the “we told you so” mode. Assad has already launched new conventional artillery barrages against Syrian civilian areas and now has time enough to disperse a significant number of key physical assets from fixed target sites. France is left hanging – as is Britain for very different reasons. Our Arab allies and Turkey have no clear lead to follow. Our whole strategy in the Middle East remains unclear, as is our entire national security posture in an era of Sequestration and funding crises.¶ If the Congress does support the President, it will only be after we have openly faltered, and after having rushed forward before deciding on a course of delay. The President will have set a uniquely dangerous precedent by turning to Congress only after he appeared weak, rather than doing from the start, and will have then committed himself to wait at least ten days for the congress to return for its holiday. The message to the world is obvious.

### Asia

#### No war

Shuo 9/12/12 (Wang Shuo, managing editor of Caixin Media: the top English-language magazine covering business and finance in China, "Closer Look: Why War Is Not an Option", english.caixin.com/2012-09-12/100436770.html)

It is highly unlikely that China will fight a hot war with any of its neighbors over territorial disputes, but it should still reexamine who its friends really are

There won't be a war in East Asia.

The United States has five military alliances in the western Pacific: with South Korea, Japan, Thailand, the Philippines and Singapore, and American battleships are busy patrolling the seas. Without a go-ahead from Washington, there is no possibility of a hot war between battleships of sovereign countries here. As to conflicts between fishing boats and patrol boats, that's not really a big deal.

The Chinese have to ponder several questions: If the country has battleship wars with Japan, can it win without using ground-based missiles? Will the war escalate if missiles are deployed? What will happen if the war continues with no victory in sight?

In the last few days, one country bought islands, and the other announced the base points and the baselines of its territorial waters. But look closely, China and Japan have at least two things in common in this hostile exchange: At home they fan up nationalism, and in the international arena no activities have exceeded the scope of previous, respective claims on sovereignty.

This means there is no possibility of a war in East Asia, not even remotely.

From the East Sea to the South Sea, China has reached a new low in relations with Asian neighbors. It's hard to remove the flashpoints in territorial disputes, but the country can surely reduce their impacts. And the key is relations with the United States.

#### No risk of Asia war – Peaceful China and multilateral institutions

Bitzinger and Desker, 9

[Richard, Senior Fellow at the S. Rajaratnam School of International Studies, Barry, Dean of the S. Rajaratnam School of International Studies and Director of the Institute of Defense and Strategic Studies, Nanyang Technological University, Singapore, “ Why East Asian War is Unlikely,” Survival | vol. 50 no. 6 | December 2008–January 2009

The Asia-Pacific region can be regarded as a zone of both relative insecurity and strategic stability. It contains some of the world’s most significant flashpoints – the Korean peninsula, the Taiwan Strait, the Siachen Glacier – where tensions between nations could escalate to the point of major war. It is replete with unresolved border issues; is a breeding ground for transnational terrorism and the site of many terrorist activities (the Bali bombings, the Manila superferry bombing); and contains overlapping claims for maritime territories (the Spratly Islands, the Senkaku/Diaoyu Islands) with considerable actual or potential wealth in resources such as oil, gas and fisheries. Finally, the Asia-Pacific is an area of strategic significance with many key sea lines of communication and important chokepoints. Yet despite all these potential crucibles of conflict, the Asia-Pacific, if not an area of serenity and calm, is certainly more stable than one might expect. To be sure, there are separatist movements and internal struggles, particularly with insurgencies, as in Thailand, the Philippines and Tibet. Since the resolution of the East Timor crisis, however, the region has been relatively free of open armed warfare. Separatism remains a challenge, but the break-up of states is unlikely. Terrorism is a nuisance, but its impact is contained. The North Korean nuclear issue, while not fully resolved, is at least moving toward a conclusion with the likely denuclearisation of the peninsula. Tensions between China and Taiwan, while always just beneath the surface, seem unlikely to erupt in open conflict any time soon, especially given recent Kuomintang Party victories in Taiwan and efforts by Taiwan and China to re-open informal channels of consultation as well as institutional relationships between organisations responsible for cross-strait relations. And while in Asia there is no strong supranational political entity like the European Union, there are many multilateral organisations and international initiatives dedicated to enhancing peace and stability, including the Asia-Pacific Economic Cooperation (APEC) forum, the Proliferation Security Initiative and the Shanghai Co-operation Organisation. In Southeast Asia, countries are united in a common geopolitical and economic organisation – the Association of Southeast Asian Nations (ASEAN) – which is dedicated to peaceful economic, social and cultural development, and to the promotion of regional peace and stability. ASEAN has played a key role in conceiving and establishing broader regional institutions such as the East Asian Summit, ASEAN+3 (China, Japan and South Korea) and the ASEAN Regional Forum. All this suggests that war in Asia – while not inconceivable – is unlikely. This is not to say that the region will not undergo significant changes. The rise of China constitutes perhaps the most significant challenge to regional security and stability – and, from Washington’s vantage point, to American hegemony in the Asia-Pacific. The United States increasingly sees China as its key peer challenger in Asia: China was singled out in the 2006 Quadrennial Defense Review as having, among the ‘major and emerging powers … the greatest potential to compete militarily with the United States’.1 Although the United States has been the hegemon in the Asia-Pacific since the end of the Second World War, it will probably not remain so over the next 25 years. A rising China will present a critical foreign-policy challenge, in some ways more difficult than that posed by the Soviet Union during the Cold War.2 While the Soviet Union was a political and strategic competitor, China will be a formidable political, strategic and economic competitor. This development will lead to profound changes in the strategic environment of the Asia-Pacific. Still, the rise of China does not automatically mean that conflict is more likely; the emergence of a more assertive China does not mean a more aggressive China. While Beijing is increasingly prone to push its own agenda, defend its interests, engage in more nationalistic – even chauvinistic – behaviour (witness the Olympic torch counter-protests), and seek to displace the United States as the regional hegemon, this does not necessarily translate into an expansionist or warlike China. If anything, Beijing appears content to press its claims peacefully (if forcefully) through existing avenues and institutions of international relations, particularly by co-opting these to meet its own purposes. This ‘soft power’ process can be described as an emerging ‘Beijing Consensus’ in regional international affairs. Moreover, when the Chinese military build-up is examined closely, it is clear that the country’s war machine, while certainly worth taking seriously, is not quite as threatening as some might argue.

### 1nc resolve frontline

The “Obama power” thesis is totally wrong---nothing about a President’s relative resolve matters

James Kitfield 11, Senior Correspondent for The National Journal, three-time winner of the Gerald R. Ford Award for Distinguished Reporting on National Defense, November 18, 2011, “Power Down,” The National Journal, online: <http://www.nationaljournal.com/magazine/an-indispensible-nation-no-more--20111117>

**For generations reared on** the mother’s milk of “**American exceptionalism,” each day brings a new affront**. China, on the rise, stubbornly refuses to end its currency manipulation, distorting Beijing’s advantage in an international system of our making. Close allies in Europe and Japan slash defense budgets, further burdening Washington with the role of global police officer. In the face of repeated threats and sanctions, Iran still dares to build nuclear weapons and plot terrorist attacks on U.S. soil. Syria’s despotic president lingers in power. Israelis and Palestinians blithely ignore presidential exhortations to make concessions for peace. A costly war in Afghanistan drags on toward … what, exactly?

**Republicans lay the blame** for those international woes **on** President **Obama’s doorstep**. They object to his squishy multilateralism, his willingness to engage odious adversaries in diplomacy, and his apologies for past American mistakes. They see insufficient fealty to Israel, indecision in Afghanistan, and a refusal to lead—out front, the way they’re accustomed to seeing—on Libya. They doubt Obama’s conviction that America is a “shining city upon a hill” and a beacon to all free peoples. “As president of the United States, I will devote myself to an American Century, and I will never, ever apologize for America,” Republican presidential candidate Mitt Romney said during a recent foreign-policy speech. In it, he advanced the notion of America’s singularity, its role as a bulwark against tyranny, and its leadership of the free (and, by extension, the entire) world. “America’s strength rises from a strong economy, a strong defense, and the enduring strength of our values,” he said. “Unfortunately, under this president, all three of those elements have been weakened.”

Wait just a minute. Only three years ago, Obama and the Democrats blamed President Bush and his administration for failing to check China and deter Iran. They objected to Bush’s swashbuckling unilateralism, his decision to ignore diplomacy with disagreeable countries, and his with-us-or-against-us triumphalism that alienated even close allies. They questioned his one-sided fealty to Israel and blamed him for a war in Iraq that was dragging toward … what, exactly? They charged that he tarnished the American beacon by endorsing torture and conflating the spread of democracy with regime change at the point of a gun.

Why did two presidents with such different foreign-policy instincts run up against—and, in many cases, get foiled by—the same international challenges? In “George W. Bush, Barack Obama, and the Future of U.S. Global Leadership,” a recent article in International Affairs, James Lindsay wrote that **presidents** today, **no matter their styles, must manage friends and foes who feel increasingly empowered to ignore or contest American dominance**. “Americans have this ingrained notion that U.S. leadership and predominance is the natural state of world affairs, with **Democrats** thus concluding that gentle engagement will automatically cause countries to rally to our banner, **and Republicans** believing that firmness and consistency will have the same effect,” Lindsay said in an interview. “They **are both** fundamentally misreading **the geostrategic environment**.” The post-Cold War period was an era of victory that left the United States standing atop the global order—a superpower with unmatched military, economic, social, and diplomatic might. No wonder expectations are so high.

But **things have changed. Brazil, India, Indonesia, Turkey, and especially China are clawing their way to the top of the international system, “insisting on** all the **privileges** that come with their newly elevated status,” as Lindsay puts it. Revolution is sweeping the Middle East, the world’s energy basket. Revisionist powers (Russia) and perennial outliers (Iran, North Korea) sense opportunity and new room to maneuver. “If a unipolar moment ever really existed, it’s not just passed, it’s gone permanently,” says Richard Haass, the former senior official in the first Bush White House who now runs the Council on Foreign Relations. Partly, that follows from two costly wars, a recession, and political dysfunction that blocks a long-term debt solution or a bipartisan foreign-policy consensus. More than that, though, it flows from globalization. “**Power is** simply **too diffuse** now, and the challenges we confront are complex, transnational, and **they defy the efforts of any one nation**,” Haass says.

Credibility is situational---no spillover

Dennis and Shannon 7 – Michael Dennis, Ph.D. Candidate in Government at the University of Texas-Austin, and Vaughn P. Shannon, Assistant Professor of Political Science at the University of Northern Iowa and Director of UNI’s Center for International Peace and Security Studies, April 2007, “Militant Islam and the Futile Fight for Reputation,” Security Studies, Vol. 16, No. 2, p. 287-317

A third critic of rational deterrence is Daryl Press, whose current calculus theory asserts that “credibility does not hinge on establishing a history of resolute actions”—only interests and power matter.24 Press insists that credibility rests with situational power and interests rather than past actions.25 By this view, a withdrawal from Iraq would not affect Islamist perceptions of U.S. resolve in the future. Credibility is case-specific to unique situations, thus making reputations irrelevant. Press suggests that statesmen merely assess interests and power in each specific instance to calculate whether an adversary's threat is credible: if they are strong and have strong interests at stake, the threat is credible regardless of past actions; scant power and interests yield dubious credibility regardless of past actions taken to bolster a reputation for resolve.26

Best studies conclude resolve is meaningless

Tang 5 – Shiping Tang, associate research fellow and deputy director of the Center for Regional Security Studies at the Chinese Academy of Social Sciences in Beijing, January-March 2005, “Reputation, Cult of Reputation, and International Conflict,” Security Studies, Vol. 14, No. 1, p. 34-62

The general validity of reputation, however, has come under assault. Whereas in 1961 Glenn Snyder touted the virtue of drawing the line in places such as Quemoy and Matsu,4 he later all but acknowledged the flaw of his logic.5 Likewise, a decade after claiming that "a state can usually convince others of its willingness to defend its vital interests by frequently fighting for interests others believe it feels are less than vital,"6 Jervis was no longer so sure in 1982: "We cannot predict with great assurance how a given behavior will influence others' expectations of how the state will act in the future."7 This assault on reputation remains anathema for most politicians (and many political scientists). As statesman Henry Kissinger warned his colleagues, "No serious policymaker could allow himself to succumb to the fashionable debunking of 'prestige,' or 'honor\* or 'credibility.'"8 Judging from politicians' rhetoric and behavior, Kissinger's advice has been well taken. There seems to be a gap, therefore, between politicians' persistent obsession with reputation and scholars' increasing doubt about reputation's importance, and that gap is widening. Several more recent studies have taken the case against reputation (and credibility) even further.9 Compared to previous studies, these tend to be more systematic and better grounded empirically. They can be divided into two categories. The first group of work focuses on the impact of politicians' concern for reputation on state behavior and concludes that the concern for reputation has had a profound influence on state behavior in conflicts.10 The second group of work, taking politicians' belief in reputation as a fact, argues that this belief is unjustified because reputation in international conflicts is difficult, if not impossible, to develop. To put it differently, this line of work contends that reputation actually does not matter as much as politicians usually believe, if it matters at all.11