



American University Washington College of Law

Washington College of Law Research Paper No. 2011-16

**TARGETED KILLING AND DRONE WARFARE: HOW WE CAME TO
DEBATE WHETHER THERE IS A 'LEGAL GEOGRAPHY OF WAR'**

Kenneth Anderson

This paper can be downloaded without charge from
The Social Science Research Network Electronic Paper Collection

Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War'

KENNETH ANDERSON

I. The Anxieties of Drones and Geography

Targeted killing using armed drones has raised profound anxieties in legal, policy, and advocacy communities in the United States and abroad, including among UN officials and special rapporteurs, high-ranking diplomats and lawyers of foreign and defense ministries of important states and allies, civil liberties and human rights advocacy groups such as the American Civil Liberties Union, and important commentators in academic international law and the press and media. Others are equally adamant

that targeted killing using drone technology is a significant step toward making conflict less harmful to civilians and more discriminating in its objectives. The introduction of armed drones to Libya as this article goes to press has further complicated matters, as some of those who might otherwise be opposed to drone use find that they have irresistible attractions in a war of humanitarian intervention.

The concerns run particularly high given that the Obama administration has made the drones a signature operational tool of US forces, not just in the zones of overt conflict in Afghanistan and Pakistan but

KENNETH ANDERSON is a professor of international law at Washington College of Law, American University, Washington, DC, and a visiting fellow at the Hoover Institution, where he is also a member of Hoover's Koret-Taube Task Force on National Security and Law. He is the author of *Living with the UN: American Responsibilities and International Order* (2011) and specializes in international law, human rights and the laws of war, and international business law.

Copyright (c) 2011 by the Board of Trustees of the Leland Stanford Junior University. All rights reserved. This online publication is an essay in *Future Challenges in National Security and Law*, edited by Peter Berkowitz (Stanford, CA: Hoover Institution Press, 2011).

farther afield, including attacks in Yemen and a possible attack against a Yemeni American radical Islamist cleric with US citizenship. They are also a source of concern for the administration's critics, particularly when carried out by civilian agents of the Central Intelligence Agency (CIA), not only by the uniformed armed forces. The stakes are higher still, given that the US government explicitly holds out the possibility of strikes that extend to other places, such as Somalia, where terrorists might go seeking safe haven and protected locales in which to hide and regroup.

Critics of the practice are naturally most concerned where it appears to involve relatively many civilian casualties. A debate is under way as to what levels of civilian collateral damage ensue from targeted killing. Estimates range from the upper hundreds over the years of targeted killing attacks since 9/11 to insistence by the CIA—in leaks to the press rather than official statements—that total civilian casualties are in the dozens, not in the hundreds. Identifying particular individuals through intelligence methods, followed by an attack on them with deadly force from a remote platform, itself controlled by a still more remote operator, at first blush seem ominous. But these features also raise the genuine possibility, for supporters such as me, that technology *is* making weaponry in conflict genuinely more discriminating. If true, the consequences might well be less collateral damage to civilians. Increasing numbers of observers—I among them—have concluded

that this is so, despite the uncorroborated nature of much of the information.

Even if collateral damage to civilians is significantly less, however, important concerns remain. Emerging technologies of potentially great geographic reach raise the issue of what regime of law regulates these activities as they spread. This is to ask what are the boundaries of that regime of law—if there are any—when the reach of the weapon extends ever farther. The question has special salience when these uses of force are, indeed, highly discrete—but simultaneously far less limited by the physical constraints of geography than before. Having said that, however, we should not overstate how much drones overcome geography; the broadly acknowledged effectiveness of the current programs in Afghanistan and Pakistan is owed in large part to robust on-the-ground human intelligence operations that identify targets in the first place; this is profoundly local, not global, intelligence work, and the ability effectively to target depends on it. Drone technology is not a substitute for on-the-ground local intelligence but rather depends vitally on it.

Moving beyond the issue of civilian collateral damage, the most salient anxiety among the practice's critics comes from a sense that these weapons redefine the geography of war in ways that reveal an apparent lacuna in the laws of war (viz., the law of war's implicit reliance on a bounded geography). The laws of war have inchoate boundaries for where they apply, *lex specialis*, and where the Law of Everyday Life applies.

Redefine those boundaries through changes in war's technologies, and the ordinary law of everyday life, including criminal law, constitutional protections, and more, suddenly might not apply. The laws of war might apply instead.

In earlier times, these boundaries did not need to be specified in a direct legal way, and the law of war did not speak of "geography of war" or the "boundaries" of the laws of war. But then they didn't need to. The technologies of war more or less established these things because they established the places in which hostilities were under way. It was enough to say that war took place, and the law of war governed, where hostilities took place. There were indeed boundary issues—largely created by the development of aircraft—but the nature of the weapons launched from aircraft, and the frequency, still made clear where hostilities were under way and where not for purposes of the laws of war.

The emergence of technologies for targeted killing using drones seems to alter that implicit constraint on war and law of war and still more so in the emergence of global counterterrorism operations. So what might be seen—and certainly is, in my view—an extraordinary and salutary technological revolution in both conventional armed conflict and global counterterrorism is nonetheless a source of profound anxiety to many. It has the possibility of disturbing and undermining a mostly tacit underpinning to the laws of war: an implied geography of war.

This essay examines the evolution of the argument around the proposition that there is a "legal geography of war." Its purpose is not to offer a formal legal argument on the proposition but instead to reflect on how the communities of international law, policy, diplomatic, laws of war, military, intelligence, nongovernmental organizations (NGOs), and international advocacy have debated this since 9/11. It is discursive, structured as a stylized argument between the "US government" and its "critics." The intent is to reconstruct a complicated, high-stakes debate over the legal nature of war and counterterrorism, driven by the emergence of a new technology.

II. Arguing within the Binary

The Use-of-Force Binary: Law Enforcement or Armed Conflict

According to one legal view widely accepted by human rights advocates and other commentators, uses of deadly force in international law must necessarily fall into one of two legal categories. Any lawful use of deadly force must be either law enforcement under the rules of law enforcement, which (with rare exception) seek to detain and arrest rather than to kill in the first instance, on the one hand, or armed conflict under the laws of war, on the other. Under this legal framework, the regulation of how force can lawfully be used is binary in that it is either law enforcement within the international law regime of human rights or armed conflict within the regime of the law

of armed conflict (perhaps incorporating significant materials of human rights law as well).

How does targeted killing fit into this binary framing of international law regulating the use of deadly force? Under narrow circumstances law enforcement condones targeted killing as self-defense or defense of others. Targeted killing in this instance does not mean killing in the course of an otherwise lawful attempt to arrest or detain but instead targeting to kill as such. The most obvious example—there are not many—is shooting to kill a hostage taker where police believe that the hostage is in imminent danger.

The alternative legal regime is armed conflict. The law of armed conflict accepts the targeting and killing of combatants, based solely on their status: as members of the armed forces of a party to a conflict and, under certain circumstances, those, including civilians, who might engage in hostilities so to make themselves lawful targets.

All three branches of the US government have held that the United States is now in an armed conflict, specifically a noninternational armed conflict (NIAC). The armed conflict is with a nonstate actor (and, more broadly, with any actor covered by the post 9/11 Authorization to Use Military Force [AUMF]). Not everyone accepts the United States' characterization that it is in an armed conflict of any kind or that as a consequence persons affiliated (as combatants or in some legally relevant status) with those groups are lawful targets. Whatever the critics' arguments with that conclusion, the result is

that the law of armed conflict would not cover all US counterterrorism operations. Some part is either not armed conflict (and governed by its law) or human rights law applies in important ways even in armed conflict and the law of armed conflict is no longer an exclusive or complete substitute as *lex specialis*.

The stakes in the debates raised by these objections are high for the US government and its critics. Insofar as the critics' objections have bite, the United States loses much, or even all, of its legal ability to shelter its targeted killing operations under the regime of armed conflict law. If one accepts the binary, presumably the legal situation reverts to proceeding under the standards of law enforcement. Targeted killing using drone warfare, or any targeted killing under US national security law, in practical terms could not survive as a lawful practice.

The US Assertion of a More Capacious Conflict in Time and Space

The US response to these objections has mainly been to assert its traditional view that armed conflict is more capacious than the critics allow. It asserts in addition that the binary does not cover all possibilities. The United States has broadly embraced the view that there in fact is an armed conflict (the one named in US domestic law under the AUMF) with transnational nonstate terrorist actors and thus is a NIAC. That being so, in the traditional US legal view, the armed conflict goes where the participants go, as it did in World War II and does today. It goes where the targets

go and goes where hostilities conducted against the targets go. Moreover, once conflict got under way, at least as early as 9/11, it “isn’t over until it’s over.” The conflict has extension in both space and time.

As a consequence, if targetable enemies move from Afghanistan to Pakistan to Yemen to Somalia over a period of years in which they are sometimes actively engaged in attacks and sometimes quiescent, they remain the enemy no less than before and targetable as such until the armed conflict is over. This position raises difficult and highly controversial issues of so-called direct participation in hostilities by civilians and when they can lawfully be targeted; the general position of the United States has been that terrorists hiding in safe havens are not immune from attack. Moreover, new persons or parties that join with them also become connected to the original NIAC and thus become targetable as well.

Armed conflict does not start and stop depending on whether a side wants to fight at that point or not. To permit such a rule would give either party the ability to call “game on” or “game off” as strategic considerations dictated: lawfare par excellence. Apart from contravening the general legal principle of military necessity, such an arrangement would create perverse incentives for one side, such as the United States, to never to let up in the actual fighting and hostilities to ensure that “game off” was never established. Thus, the Obama administration regards those it has targeted in Yemen since 2009 as fully part of the NIAC under the AUMF. Neither time nor distance

nor a possibly looser affiliation of Al Qaeda in the Arabian Peninsula (AQAP) is regarded by the administration as grounds for saying that the NIAC is not the basis for targeted killing operations and thus that the law of armed conflict applies.

The Threshold of Noninternational Armed Conflict

The threshold of armed conflict issue exists independent of the geography issue. Armed conflict comes in two legal varieties, international armed conflict (IAC) and noninternational armed conflict. Each comes into legal existence by meeting certain threshold requirements. For an IAC, the threshold requirement is defined by treaty: Common Article 2 of the four Geneva Conventions of 1949, which brings the regime of IAC into play in any armed conflict between states, declared or undeclared, recognized or unrecognized. *Any* fighting, at *any* level, between the armed forces of states brings the *jus in bello* law of armed conflict into play, irrespective of the fighting’s juridical, *jus ad bellum* classification (declared war, etc.) for any other legal purpose.

NIAC, acknowledged as armed conflict in the law, is given its most universal legal statement in Common Article 3 of the Geneva Conventions. (There is a somewhat different standard in a treaty that to which the United States is not currently a party, Additional Protocol II of 1977, but we leave aside the technical questions of that treaty and the parts regarded as customary.) Common Article 3 refers to “armed conflict not of an international character,” but it does

not further define when such an armed conflict is deemed to be under way for purposes of applying Common Article 3, particularly when internal violence has become, in common parlance, civil war within a state's territory rather than simply riots or internal disturbances not rising to the level of an armed conflict.

States traditionally have been reluctant to lower the customary legal threshold for holding that a NIAC is under way because they fear legitimatizing rebel groups with the tag of internal armed conflict. Common Article 3, for its part, does not articulate the threshold. Although monitors such as the International Committee of the Red Cross (ICRC) have often sought to characterize conflicts as being NIAC to bring minimum humanitarian standards into play, state practice has been far more restrictive, making the ICRC often unable to secure legal acknowledgment. In practice, the ICRC has often been content to obtain purely local agreements that the parties will act as if the conflict were a NIAC without the state acknowledging that it is as a matter of international law.

Although Common Article 3 does not establish the threshold of its own application, customary international law has supplied some standards, albeit fairly flexible ones. Thus, the threshold for finding that a NIAC is under way is customarily thought to require violence that is sustained, intense, systematic, and organized. The United States has not taken the legal position that a NIAC necessarily requires that parties (i.e., the nonstate rebels) control territory, though it

is an evidentiary factor. But NIAC does require something more than merely fleeting, sporadic, relatively minor violence.

Notably, however, any particular instance of targeted killing will most often aim at minimum violence to kill a particular individual. It does so using means, such as drones, that do not satisfy those requirements in any single targeted killing operation. Moreover, each of these operations is planned and executed in ways that, if the operation goes as intended, will *never* reach the level of any of those criteria.

From the standpoint of minimizing collateral damage and the general impact of violence, this is a feature, not a bug, of targeted killing. The critics point to a key legal consequence, however. If you believe that individual instances of targeted killing are not already part of an armed conflict under way, then the failure to engage in enough violence through targeted killing means that this act of violence is not, all things equal, protected under the law of armed conflict and that those engaging in it have no combatant's privilege for their acts of violence under international law. If captured (and even if not), they are liable for crimes under the domestic law of the place where the killing takes place, for example. Importantly, too, the targeted killing itself then turns into an extrajudicial killing under international human rights law, among other adverse legal consequences.

One assumption built into the critics' legal position is that these operations are *not* part of a single armed conflict, under way now for many years, against targets now dispersed

to different safe havens. If that assumption is correct, meaning that individual instances of targeted killing *cannot* be lawfully aggregated and cannot be taken together as a single armed conflict across time and space, then it follows that no single instance of targeted killing rises to the threshold of a NIAC. In that case, the violence is not part of an armed conflict and, according to the critics' binary argument, must be governed instead by the law enforcement and human rights paradigm, not the laws of war.

This assumption has been rejected by the US government, however, for its current targeted killings in Afghanistan, Pakistan, Yemen, and potentially beyond for targets identified under the AUMF. The US government sees these instances of targeted killing as being governed under the laws of war because the hostilities are all part of a single NIAC. Yet the US government and its critics generally share a view that NIAC has a legal threshold that must be met for it to apply as the governing law. That threshold is not merely instances of fighting with nonstate groups that are fleeting and discrete. Instead it must rise to the customary law threshold of being sustained, intense, systematic, and organized.

The touchstone for NIAC is hostilities at a level defined by customary law, not merely the existence of any hostilities whatsoever. But for that threshold to be met, it seems necessary that individual instances of targeted killing be aggregated (perhaps, or perhaps not, along with all the other fighting in conventional operations against Al Qaeda in Afghanistan and elsewhere) into a

single armed conflict across time and space. Otherwise in any individual targeted killing, there is simply not enough violence to call that act a NIAC.

III. Contesting the Binary

Other grounds of argument will not be pursued here: the argument over extra-territorial application of international human rights law, for example. But one further basis on which the US government rejects the critics' conclusions is that the United States rejects the binary itself. The US government position rejects the frame that legal uses of force are necessarily regulated either as law enforcement under human rights law or as the law of armed conflict—and nothing else.

This takes up the brief, but much-noticed, reference by US State Department legal adviser Harold Koh to the customary law of “self-defense” in a speech to the American Society of International Law in March 2010. Not every resort to force in self-defense by a state is necessarily undertaken *through* the conduct of armed conflict. Because the paradigm for self-defense in international law is, of course, interstate conflict rather than noninternational armed conflict, it is natural to assume that self-defense will entail armed conflict and its law—but not necessarily. In particular, the rise of terrorism and groups operating across borders has opened the way to self-defense against nonstate actors operating, with or without consent, from within the territory of another state.

The Law of Self-Defense

The US government addressed the issue of self-defense straightforwardly in the 1980s, notably in an important 1989 speech (later published in the *Military Law Review*) by then State Department legal adviser Abraham Sofaer at the US Army JAG School. Notwithstanding the importance of sovereignty, he said, in those instances in which a state was unable or unwilling to control terrorist groups in its territory, the United States saw itself as lawfully able to strike at them in their safe havens as a matter of self-defense. It was able to do so with its instruments of national security power, including civilian agents of the CIA. This was a prerogative available to states generally, of course, not just the United States.

Koh's 2010 statement was consistent with Sofaer's address from decades before. It held out the possibility that there might be instances in which the United States would engage in uses of force under self-defense that would not necessarily be part of an armed conflict in a technical legal sense (we might call it "naked" self-defense). It can be defined as resorting to force in self-defense, but in ways in which the means and levels of force used are not part of an armed conflict, as a matter of the technical law of war. Those circumstances include self-defense uses of force against nonstate actors, such as individual terrorist targets, which do not (yet) rise to the NIAC threshold.

Koh's address noted that any use of force must have legal standards for its regulation and the *jus in bello* means by which it was carried out; this form of self-defense is no

exception. Such self-defense use of force was therefore required to meet the customary standards of necessity, distinction, and proportionality in carrying it out, even if not formally part of an armed conflict. The invocation of naked self-defense does not lower the standards-of-care conduct in the use of force below what the uniformed military would be required to do in a formal state of armed conflict. Rather, it merely locates them in customary law rather than in the technical law of armed conflict.

This naked self-defense claim has been controversial, even when made by someone as revered in the field of international law as Harold Koh. It is controversial not only among critics of the US position but among many who support the program of targeted killing and believe it lawful, at least as carried out by the US military in an armed conflict. For that matter, despite having enunciated and defended the category of naked self-defense as its paradigm for the use of force, it is not clear that the Obama administration currently finds it necessary actually to invoke it. Actions taken in Yemen and other places (so far as one can tell) are regarded by the administration as against actors fully covered by the NIAC and also fully covered in domestic law by the AUMF.

Is this correct? As a commentator on these matters, I earlier argued that the gradual passage of time and drift of terrorist groups meant that invocation of the NIAC, Al Qaeda, and the AUMF was moving toward a ritual, purely formalistic invocation. In fact targeted killings in Yemen (against AQAP, for example) were really instances of naked

self-defense against new enemies because they increasingly were only notionally connected to the AUMF. The Obama administration, I believed at that time, had ample legal room to make a plausible case either way: to treat the attacks in Yemen in 2009 and 2010 as part of the NIAC or as new instances of naked self-defense. The administration had perfectly good reasons for preferring one over the other; for domestic law reasons, given a choice between two plausible rationales, it preferred the AUMF-based regime but had grounds for either.

In any case, as more information has come out about AQAP and indeed as the group has evolved, its connection to Al Qaeda under the AUMF appears today not just a justifiable and plausible way to think of attacks against it but the best way. Nonetheless, it would be hard to overstate the importance of preserving for future presidents, in circumstances we cannot now foresee, naked self-defense as its own paradigm for the use of force.

IV. Arguing over a Legal Geography of War

Limits to the Sovereign Equality of States?

Thus far the argument has been over the applicable regulatory framework: Is it law enforcement, armed conflict, or perhaps naked self-defense? We turn now to geography and space. Like any other raiding enemy in warfare, terrorist groups require safe havens, which might mean a political geography within a state. It might not mean a

specific sovereign safe haven but instead safety among a broadly sympathetic—or fearful—population that conceals them. But compared to sovereigns, tied by definition to a territory, terrorists are free-floating.

Moreover, individual terrorists on missions easily shift around the world, concealed in airports or foreign cities in many lands, so as to strike at vulnerable targets in extraordinarily diverse settings: New York, Mumbai, London, not to mention Pakistan and Afghanistan. Counterterrorism, obviously, must be similarly mobile. But this mobility means different things in different places in its political and legal senses. In dealing with London or Paris, the United States can rely on the cooperation of local security services and the police, as well as broadly shared aims, values, and methods. This is not the case in Yemen and numerous other places, occasional official protestations to the contrary.

States are not all the same when it comes to terrorism, in other words. No rational US leader is going to take the solemn international law admonition of the “sovereign equality of states” too seriously in these matters—and the United States has never regarded a refusal to do so as contrary to international law but instead as something built into international law as a qualification on the reach of the “sovereign equality” of states. There will not be “Predators over Paris, France,” anymore than there will be “Predators over Paris, Texas,” but Pakistan, Yemen, Somalia, and points beyond are a different story.

Yet give the critics their due. The globally

fluid nature of the struggle makes it impossible *not* to ask where the “kingdom” of ordinary law enforcement leaves off and the laws of war (or some other regime regulating the use of force) takes over. It is not satisfying or reassuring to answer, with a shrug, that some states are more equal than others.

‘The World Is Our Battle Space’—Really?

If it is an armed conflict, the above question has a doctrinal legal answer. The law of armed conflict applies to the “conduct of hostilities,” hostilities being the touchstone for armed conflict and its laws. If hostilities meet the threshold requirements for armed conflict, then the laws of war apply. That is both an authorization to use the privileges of the laws of war—legally permissible collateral damage, for example—and a limitation on the violence of the hostilities. Generally speaking, however, the law of armed conflict allows a wide array of violence in the conduct of hostilities that would be utterly unthinkable in peacetime, under ordinary domestic regimes of law enforcement, and under the norms of international human rights.

If the war is a conventional one, and the hostilities overt, then determining where the laws of war would apply has not been considered a serious legal issue, despite some argument at the edges. It is true that, in the case of NIAC, where a certain level of hostilities must be ongoing, there might be a question as to how one lawfully engages in hostilities *before* the threshold of armed conflict has been met. But once that threshold has been met, the general tendency has

been to ignore its beginnings. (Rebels within a state’s territory must reckon with losing, of course; if they lose and are caught by the regime, the international laws of war do not preclude domestic criminal liability for their acts.)

But the rise of terrorism/counterterrorism in the legal dress of a transnational NIAC creates conceptual tensions that cannot be ignored. On the one hand, looking at the post- 9/11 “war on terror,” one inevitably wonders, with the critics, where it stops. A terrorist might be anywhere. Does that mean that the law of war applies anywhere or everywhere, at anytime and all times? Yet what if the touchstone is “hostilities,” without any further qualification? Terrorists might be located anywhere and are in fact significantly dispersed.

This has been sharply debated since 9/11. But add to that the spread of geography-busting drone technology; in that case, hostilities might well be initiated anywhere, anytime. Does the law of war govern all those encounters and, more exactly, all those *possible* encounters and the places where they might *possibly* take place? “The world is our battle space.” What could that possibly mean for the application of the laws of war, except an assertion that the Law of Ordinary Life, as it were, is now and for the foreseeable future displaced by the Laws of War?

These serious questions must occur to anyone trying to give legal form to this armed conflict on a global basis. In applying the concept of the conduct of hostilities to any possible forcible encounter anywhere in the world against alleged terrorists, it ap-

peared to many critics that the *lex specialis* of armed conflict law would swallow the ordinary law of domestic law enforcement and human rights. This is both frightening for the rule of law and could not possibly be right: hence the gradual elaboration of alternative views by the critics in the years following 9/11 that included both moves to limit the places in which the laws of war would apply at all and moves to force the laws of war to incorporate new criteria, narrowing and restricting criteria, in the extent and ways in which the laws of war would be truly *lex specialis*.

The Traditional US View:

No Safe Havens

On the other hand, US officials charged with war against terrorist groups insist that the armed conflict goes where the participants go and that where the participants go follows the possibility of hostilities. They could be attacked—for reasons of military necessity—where they are found, at least as far as the law of conduct of hostilities is concerned. In that case, the applicable legal regime *had* to be the law of armed conflict, at least once actual hostilities were under way against the target and for at least that long because they were part of an ongoing, preexisting armed conflict.

One could easily rule out such actions in friendly states permitting effective cooperation with authorities: no covert counterterrorism uses of force in London or Paris or Mumbai. But Yemen, Pakistan, Somalia, and so on, well, that is a different story, as is true for straight-up enemy states, such as

Iran. Allowing terrorists a legal license to put themselves beyond attacks that would otherwise unfold as part of an armed conflict could not possibly be the right answer either, for the result would be to invite the creation of safe havens for terrorists, permitting them sanctuary from attack.

Each of these positions addresses something that cannot be given up: freely setting aside ordinary rules of law and human rights on the claim of counterterrorism, on the one hand, versus the irreducible fact of transnational terrorists conducting operations clandestinely across borders from sanctuaries, on the other. The choice between them comes down to whether there is a “legal geography of war” in the age of the drone; if not, what is the proper legal position? But consider first how the argument goes that got us to this point.

Following 9/11, the Bush administration announced a “global war on terror.” It was initially assumed that this merely restated the traditional position, as had been seen in other global conflicts such as the Second World War. It seems likely that is what the Bush administration initially thought it was doing. “Hostilities” were the touchstone; the armed conflict followed the combatants, wherever they went for whatever reasons of strategy and military necessity.

Profound questions of international law under *jus ad bellum*, particularly the rights and duties of neutrals, might be raised. But irrespective of whether neutrals’ rights were respected or their duties met, if hostilities were undertaken (lawfully or not under the rules of sovereignty and *jus ad bellum*), the

laws of war governed the conduct of hostilities. Irrespective of legal status under *jus ad bellum*, it was an armed conflict for purposes of *jus in bello*. It soon became apparent, however, that the Bush administration's "global war on terror" meant something legally more than that traditional understanding, precisely what is somewhat difficult to convey.

The Bush Administration's Global War on Terror

Certainly the Bush administration meant that terrorists could be attacked where they were found, as a matter of the laws of war and absent other considerations such as sovereign concerns or "comity" with allies and friends. War followed the participants in time and space, but this is old news. The Bush administration wanted something more. It needed something whereby the "war" was really a set of "intelligence-driven" operations in globally dispersed counterterrorism. It wanted the "privileges and incidents" of the laws of war, even in circumstances in which it had no intention of initiating hostilities.

The Bush administration's concerns thus went far beyond the traditional US insistence that terrorists enjoyed no legal safe havens. It wanted these "privileges and incidents" of the laws of war with respect to terrorists and terrorist suspects, even when it was not intending to attack them through the *actual* conduct of *actual* hostilities but rather to detain them and interrogate them, subject them to extraordinary rendition, or send them to Guantanamo. True, the at-

tempt to detain someone might result in hostilities insofar as one used force, or the threat of force, to carry it out. But the unvarnished reality was that the Bush administration was far more interested in the law of armed conflict for what it offered as an alternative legal regime to ordinary domestic law enforcement and human rights, rather than as the legal rules for the moments when it planned to engage in "real" hostilities, hostilities as ordinarily understood. The conduct of virtual hostilities, the logical possibility of hostilities in lieu of actual hostilities, was undertaken to obtain real-life law.

One understands the reasons for this. What the Bush administration wanted, in both domestic US law and international law, was a robust and functional law of counterterrorism that would allow it certain national security measures for detention and interrogation, beyond the regime of ordinary domestic law. It sought to improvise one and landed on the laws of armed conflict. But it seized on this body of law in the conduct of counterterrorism (rather than its conventional wars in Afghanistan and, later, Iraq) not primarily to govern and limit the conduct of its hostilities but to govern and empower the conduct of its intelligence gathering.

One can, of course, explain how all this is part of the "armed conflict," and in a sense it is. But in the robust, functional manner in which the law of war has traditionally reflected the facts of hostilities, this is a lawyer's subterfuge, a legal gossamer of war draped over intelligence activities. That is the brute

fact of the matter. The Bush administration chiefly valued the law of war in counterterrorism intelligence activities for its legal regime and asserted that it could be applied globally—not because it intended to conduct hostilities everywhere or anywhere but because it wanted to conduct detentions and interrogations anywhere in the world, not subject to the ordinary strictures of criminal law and human rights. The tail of law wags the dog of war.

*The Critics Respond with a
'Legal Geography of War'*

The perception gradually dawned among the monitors, including and perhaps principally the ICRC, that the United States intended the laws of war as a rubric for something quite different from the conduct of hostilities. It created palpable anxiety and with good reason, to judge from many conversations with the NGO and activist communities of international law in the Bush years. What was supposed to be limited authority to conduct hostilities (but which was mostly language of limitation on their conduct) suddenly turned into license with regard to the conduct of intelligence activities, with no indication of what the limits might be. The laws of war, applied in this way, seemed to be nothing more than lawyerly license. In my estimation, this led the Bush administration's (many) critics, even many who were sympathetic to the idea of focused counterterrorism as a legitimate ground for using force, to begin seriously to consider that war, and hence its law, had a distinct geography.

That “legal geography” could be proposed in different ways. One is found in newspapers and many journalistic sources, academic writings, and NGO statements over the many years since the debate emerged in policy, legal, and advocacy circles: references to “theaters of war” or “zones of conflict” or locales of “active battlefields.” Sometimes the reference is to a whole country—Afghanistan—as the theater of conflict; other times the reference is to the much more limited zone of a battlefield. However framed, these are operational terms, not legal ones. The proper legal referent is not geography as such but, rather, the “conduct of hostilities.”

A few critics focus on national boundaries as the markers of a particular armed conflict and argue that the applicable law for the conduct of hostilities is set by the question of the resort to force as a sovereignty issue: illegal violation of sovereignty, no armed conflict for purposes of *jus in bello*. Many more critics regard the sovereignty question as separate from the *jus in bello* issue. No matter what the spatial scope, however, the implication is that, once out of that zone, wide or narrow, defined by sovereign boundaries or by the existence of large-scale conventional fighting by military forces, the law of war no longer applies (or at least is significantly intermingled with human rights law in some way that, granted, is hard to specify). No matter what geographic constraint is adopted as the legal criterion, the point is that armed conflict against terrorism is not “global” with respect to the application of the laws of war.

Again, one sympathizes with the impulse. Thus by 2006 or so, a commonly held legal view among human rights and humanitarian law NGOs and advocates was that the United States was engaged in *two* actual armed conflicts: one in Iraq and the other in Afghanistan. There was the possibility of cross-border spillover in each case, as well as the possibility that the geographic scope of the armed conflict could widen if hostilities widened. But, in principle, for the critics there was a factually ascertainable and legally binding geography to these conflicts.

Reemergence of the “Conduct of Hostilities” Standard

This spatial limitation posited by the critics existed alongside a separate but also commonly held legal view among the advocacy community: a disinclination to concede that the United States was engaged in a war on terrorism against transnational actors in the legal sense of armed conflict, no matter that it was called a NIAC or anything else. This nonspatial argument had, of course, spatial implications because what took place outside the two conventional conflicts was not governed by the law of armed conflict. Participating in these debates, I became persuaded for a while that the best way to understand attacks on nonstate terrorist groups outside the conventional war zones, whatever legally these terms meant if anything (given that they did not derive from the relevant treaty texts), was to reach to naked self-defense as the legal basis for the use of force.

For a time, then, my legal view was that

there *was* some kind of legal geography of war but that the use of force outside it, including by civilian agents such as those in the CIA, could nonetheless be lawful as the exercise of self-defense. Eventually, however, I became persuaded that, although the naked self-defense argument is a genuine possibility, under today’s circumstances, the groups and actors being targeted in places such as Yemen are part of the preexisting and ongoing NIAC under the traditional standard of “conduct of hostilities,” and thus it is not necessary at this point to reach to naked self-defense.

Speaking generally, however, the Obama administration’s rejection of the global war on terror permits the traditional conduct of hostilities standard to reemerge as the touchstone for applying the laws of war. Likewise, assertions of a formal legal geography of war recede along with the global war on terror in the peculiar, functionally “nonhostilities” way in which the Bush administration conceived it.

Yet the category of naked self-defense does not go away, and even if it is not resorted to today, it might well be the situation facing US presidents in the future: terrorist threats unrelated to the AUMF that have not yet ripened into NIAC but that a future president believes must be met with force. In that case, we should recognize the importance of this articulation of the conduct standards for “intelligence-driven uses of force,” including targeted killing. Asserting that the law of self-defense permits the use of force outside armed conflict has the largely unappreciated virtue of insisting that

a body of regulatory international law does apply to the *conduct* of this seemingly unregulated, because unacknowledged, activity of “intelligence” uses of force by covert actors, often civilian agents.

V. Standards of Conduct When Intelligence Agents Use Force

Legal Adviser Koh noted in his March 2010 statement that self-defense in this context (what has been called here naked self-defense) is not free of regulation or standards for its conduct. It is not a license to employ force with lower standards than those applicable in armed conflict, even if technically an armed conflict is not under way. On the contrary, it must meet the standards of necessity, distinction, and proportionality. This could be seen as an advance in international law by articulating for the United States and also for others that even covert action has standards regulating its use. This appears to be more important than it was even a year or two ago as it appears that the “operational” arm of the CIA and military “special ops” are becoming deeply intertwined, to the point that some suggest that they are in the process of merging.

It must be said, however, that many do not see it that way: not those in the binary camp or, ironically, some in the intelligence community. Perhaps those in the intelligence community prefer to have no articulation of conduct standards for their uses of force because that might imply having to be accountable under customary international law, even under standards as basic as

necessity, distinction, and proportionality. Yet as targeted killing using drones went from more-or-less covert to merely “plausibly deniable” to “implausibly deniable,” the notion that one need not articulate standards for uses of force under these customary standards has become untenable.

This remains an important contribution to the articulation of legal standards for the conduct of “intelligence-driven, covert uses of force,” such as targeted killing employing drone technologies and holding them to more explicit standards. It is not a license to lower standards below what the laws of war permit in armed conflict, nor is it a mere appeal to legalisms to justify such practices as detention or interrogation through the laws of war in the absence of actual hostilities. Naked self-defense remains an important category by which intelligence agents might engage in uses of force where the threshold of NIAC has not (yet) been met—and, indeed, if such special operations are successful, might never need to be met. But self-defense operations are subject to the customary rules of necessity, distinction, and proportionality.

Much of the sharp debate over a putative “legal geography of war” could be left aside were it acknowledged that the tail of law cannot wag the dog of war and that the law of war applies in the conduct of actual hostilities in an armed conflict. This is perhaps the best way of understanding the legal, rather than the simply political, effect of the Obama administration’s rejection of the Bush administration’s “global war on terror.” Many have wondered if it wasn’t merely

changing the form of words, given how much of the Bush war on terror has been substantially continued, defended, and in some matters extended.

This change is real and fundamental, representing a return to an earlier and more correct, legal standard. Accepting that the “privileges and incidents” of the laws of war cannot be claimed merely as a pretext where actual hostilities in armed conflict are not at issue moves the legal argument back to the traditional standard of the conduct of hostilities, which explicitly abandons the Bush administration’s position. Conversely, however, this *also* requires that critics acknowledge that armed conflict follows the participants in the conduct of hostilities.

Insofar as the targets today are covered by the AUMF and the associated NIAC, it is not strictly necessary that one decide that in some instances force might be lawfully used against nonstate actors in ways that do not rise to the level of a NIAC: naked self-defense. It is a position to which the US government is committed as a legal category, however, and for sound reasons. It seems to me that the best way to approach uses of force that governments feel themselves lawfully entitled to undertake is as intelligence-driven uses of force short of war, which is something those governments will do. It is better to regulate the intelligence agencies’ conduct under customary principles than to ignore it—and better to regulate this as its own legal and operational category of the use of force in both *jus ad bellum* and *jus in bello*.

Thus it seems we have swung full circle

in the past decade, arriving back at the traditional view there is no legal geography of war beyond the conduct of hostilities.

Postscript: Drones in Libya

As this essay goes to press, the Obama administration, acting on an urgent request from the North Atlantic Treaty Organization, has deployed armed drones to the conflict under way in Libya. Although it is too early to say what the final consequences will be of this deployment for the debate over drone warfare and targeted killing, it is safe to say that it has caused a shift in the public debate around drones and the idea of a “legal geography of war.”

One hesitates to be so cynical as to say that the deployment of drones into a war launched on humanitarian intervention grounds has shifted the view of how drones should be seen. But as someone who has participated for years in the arguments over drones and targeted killing, it does seem to me that in a mere few weeks, intense skepticism about claims by the Obama administration (most often as leaks to the press by unnamed insiders) that drones are vastly more discriminating in their effects on civilians seems suddenly to have melted away. Skepticism about drones and their effects on civilians that seemed unwavering when it was about Afghanistan and Pakistan seems suddenly to have shifted to a view that, of course drones are more discriminating—who ever thought they weren’t?

As someone who participated in upward of fifty conferences, panel discussions, debates, and so on over drones since 2008, I

can say that up until a few weeks ago, this was a central debating point. Discrimination and civilian collateral damage were key issues. Drone warfare and targeted killing were slated to be the next move in an advocacy and NGO campaign that would treat them the same way they had detention and interrogation. A combined campaign of legal attacks, delegitimation, and questioning in the press and opinion media would undermine them as methods of counterterrorism. That incipient campaign seems to have simply disappeared with the dispatch of drones to Libya.

Drones appear to have acquired strange new respect in Libya that they have not so far enjoyed in Pakistan or Afghanistan; one hopes it does not indicate a human rights pivot on drones on the basis of suddenly seeing their utility in humanitarian intervention but not ordinary conflict or in conflicts one likes versus conflicts one does not. The standard of care for the conduct of hostilities is supposed to be the same no matter what the motive for fighting—national security interest or humanitarian altruism. The speed and timing of this sudden new acceptance of drones in Libya raise questions as to what drove the change of heart.

The argument is far from over, however. Drones in Libya are run by the US Air Force, and not (so far as we know) by the CIA, for example. In Libya, they are part of

an overt conflict, not individual instances of covert targeted killing in distant locales such as Yemen or Somalia. The application of the laws of war to their use in Libya is beyond question; the applicable law in other places and circumstances is contested. Libya might have sanitized drones as a tool of overt, conventional war and might have shifted the debate over their abilities to be discriminating and sparing of civilians. It is too soon to finally judge that debate. But their use by the CIA in circumstances outside conventional conflict remains as contested as ever and, along with it, the debate over what this essay has called the “legal geography of war.”

Copyright © 2011 Board of Trustees of the Leland Stanford Junior University.

This publication is for educational and private, non-commercial use only. No part of this publication may be reprinted, reproduced, or transmitted in electronic, digital, mechanical, photostatic, recording, or other means without the written permission of the copyright holder. For permission to reprint, reproduce, or transmit, contact Ms. Tin Tin Wisniewski (tintinyw@stanford.edu).

The preferred citation for this publication is

Kenneth Anderson, “Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’ (2011),” *Future Challenges in National Security and Law*, edited by Peter Berkowitz, www.futurechallengesessays.com.