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Mary Ellen O'Connell

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TO KILL OR CAPTURE SUSPECTS IN THE GLOBAL WAR ON TERROR

Mary Ellen O'Connell[†]

Our topic is the broad one of arresting war criminals. This paper addresses one aspect of that broad topic – arresting suspects in the global war on terror. It presents four cases in which the United States has pursued terror suspects using military action since September 11. Three are actual cases; one is hypothetical. These cases demonstrate when international law permits killing a suspect and when the law requires an attempt to capture or arrest.

The first actual case occurred on February 4, 2002. On that day, CIA agents in Afghanistan used an unmanned Predator drone to fire a missile at three men in the Zuwar Kili cave complex in Southeast Afghanistan.¹ These men were suspected of being senior Al Qaeda lieutenants. The second case involves the Philippines. During the course of 2002, we saw U.S. troops and military advisers in the Philippines assisting the regular Philippine military in the conduct of its war against the Abu Sayyaf terrorist organization.² With that assistance, Abu Sayyaf lost large numbers of its members and abandoned some of its bases of operation. The U.S. has proposed a larger role in fighting Abu Sayyaf. The Philippines has resisted the offer.

The third case involves events of November 3, 2002. Agents of the CIA, again using an unmanned Predator drone, fired a Hellfire missile against a vehicle in remote Yemen, killing six men. One of those men was suspected of being a high-ranking Al Qaeda lieutenant. According to the media, Yemen had knowledge of the operation.³

[†] William B. Saxbe, Designated Professor of Law, The Ohio State University. B.A., Northwestern University; MSc., London School of Economics; LL.B., Cambridge University; J.D., Columbia Law School. Professor O'Connell has taught international law on the faculties of the George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany, the Johns Hopkins University Paul H. Nitze School of Advanced International Studies Bologna Center and Indiana University—Bloomington. She is the co-author of *INTERNATIONAL LAW AND THE USE OF FORCE* (1993).

¹ Periscope-Daily Defense News Capsules, *Predator May Have Killed Top Al-Qaeda Leader*, (Feb. 7, 2002), available at 2002 WL 5970079.

² Ellen Nakashima, *Island in Philippines Poses Counter-terrorism Challenge; After Success on Basilan, U.S. Weighs Action on More Hostile Jobs*, WASH. POST, Dec. 21, 2002, at A16; *U.S. Ponders New Operation in Philippines, Troops Would Aid Search for Guerrillas*, HOUS. CHRON., Dec. 1, 2002, at 36.

³ See, e.g., Doyle McManus, *A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About*

And now, the hypothetical case. Following the Hellfire attack in Yemen, National Security Adviser, Condoleeza Rice, stated, "We're in a new kind of war. And we've made very clear that it is important that this new kind of war be fought on different battlefields."⁴ The Deputy General Counsel of the Department of Defense for International Affairs made even clearer how the Bush Administration viewed the Yemen killings. He said the U.S. can target "Al Qaeda and other international terrorists around the world and those who support such terrorists *without warning*."⁵ So the Administration takes the position that an individual suspected of being an Al Qaeda member may be killed by CIA agents anywhere in the world at anytime using a remotely operated unmanned drone.⁶ That includes Cleveland and the campus of Case Western Reserve University. I do not find any of these cases of pursuing terror suspects easy to defend. I can make an argument for the first three in descending order of persuasiveness. As for the fourth case, international law clearly prohibits the policy of killing suspects any time and anywhere. The Administration's policy, sometimes called "targeted killing," is unlawful.

Let us now look in more detail at each of the cases – the three actual cases and the one hypothetical case.

Afghanistan

Professor Leila Sadat has written persuasively that the United States should have adopted a law enforcement approach with regard to Al Qaeda following September 11.⁷ The U.S. should have treated Al Qaeda members as criminals, rather than as enemy combatants.⁸ If Professor Sadat's

Next Time, L.A. TIMES, Jan. 11, 2003, at A1; Jack Kelly, *U.S. Kills Al-Qaeda Suspects in Yemen; One Planned Attack on USS Cole, Officials Say*, USA TODAY, Nov. 5, 2002, at A01.

⁴ *Fox News Sunday* (Fox News television broadcast, Nov. 10, 2002), available at 2002 WL 7898884, at *9.

⁵ Anthony Dworkin, *Official Examines Legal Aspects of Terror War*, available at http://hsm.intellibridge.com/summary?view_id=117201800 (on file with author); see also Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon* (Dec. 16, 2002), available at <http://www.crimesofwar.org/print/onnews/pentagon-print.html>.

⁶ John J. Lumpkin, *Administration Says That Bush Has, in Effect, a License to Kill; Anyone Designated by the President as an Enemy Combatant, Including U.S. Citizens Can Be Killed Outright, Officials Argue*, ST. LOUIS POST-DISPATCH, Dec. 4, 2002, at A12; see also Anthony Dworkin, *Law and the Campaign against Terrorism*, *supra* note 5 ("...an al-Qaeda member on the streets of a European city like Hamburg could lawfully be targeted.").

⁷ See Leila Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004).

⁸ *Id.* at 146. See also Mark Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 36 N.C. L. REV. 81 (2002).

approach had been adopted, then of course, those individuals discussed in the Afghanistan case would have been criminal suspects. If they resisted arrest, it might have been permissible to kill them under the fleeing felon doctrine.⁹ Under this doctrine, if the CIA had enough evidence to conclude that the three individuals were highly dangerous and could not be allowed to escape, then, after attempting to arrest them, the CIA could justifiably have prevented escape using lethal force.

A law enforcement paradigm such as this would have been a far wiser policy for the United States to pursue considering the several goals that we had following September 11. However, I believe that the U.S. did have the legal right to go further with respect to Afghanistan. Article 51 of the United Nations Charter permits a state to act in self-defense when it is the victim of an armed attack, as the U.S. was on September 11.¹⁰ When acting in self-defense, the victim of an armed attack may take necessary and proportional armed measures against an attacking state. In cases where a state is not the attacker but is unable or unwilling to stop attacks originating from its territory, lesser measures than self-defense may be permissible to stop future attacks. In the case of Afghanistan, the U.S. can make the case that Afghanistan was the attacker because its *de facto* government, the Taliban, shared funding, assisted and cooperated with Al Qaeda. Al Qaeda members fought in Afghanistan's civil war alongside the Taliban. The acts of Al Qaeda could, therefore, be attributed to the Taliban, and, thereby, Afghanistan became legally responsible for Al Qaeda's series of armed attacks committed before and planned after September 11. As Afghanistan's *de facto* government, the Taliban acted for Afghanistan and opened that country to justifiable defensive military action.

The United States began its defense against Afghanistan on October 7, 2001, in Operation Enduring Freedom. All agree, that as of that date, Afghanistan was the scene of an international armed conflict. During an armed conflict, regular members of the armed forces, who respect the law of war, may not be criminally prosecuted for the deaths they cause. We refer to this right as combat immunity. So those killing as part of an armed conflict, taking action against others understood to be enemy combatants, will not generally be prosecuted for the deaths they cause. In these conditions, suspected members of Al Qaeda who do not surrender may be killed without warning.

Whether they may be killed through the use of an unmanned drone is, however, still controversial. One problem with the drone is that it does not register an attempt by the enemy to surrender.

Another problem with using the drone concerns the people operating it in the Afghan and Yemen cases. The CIA is not part of the regular U.S. armed forces. Its members might still qualify as lawful combatants if they

⁹ See *infra* note 17 and accompanying text.

¹⁰ U.N. CHARTER art. 51.

could be characterized as a militia under the Geneva Conventions, in other words, if they have a commander, wear insignia, carry their weapons openly and conduct operations in accordance with the laws and customs of war.¹¹ Sometimes CIA members do, in fact, wear uniforms with insignia. They sometimes operate in an organization under a commander and are understood to be committed to law of war. But operating a drone remotely hardly constitutes carrying weapons openly. This last factor is the most important of all in distinguishing combatants from civilians. Civilians may not be intentionally killed in combat, thus the imperative need for distinguishing them. If the use of the drone does not constitute carrying weapons openly, then the CIA may have committed violations of the law of war, even though killing suspected members of Al Qaeda during the Afghan conflict was arguably lawful at the time of the Predator attack.

The Philippines

An armed conflict was also raging in the Philippines in 2001 and 2002. It was not an international armed conflict, but rather an internal one. Nevertheless, it was the scene of hostilities between two armed groups and thus constituted an armed conflict. In an armed conflict, regular members of the armed forces may kill suspected terrorists who are enemy combatants without warning.

An armed conflict has two important components. We look for two or more armed groups engaged in hostilities. By hostilities we understand fighting that amounts to “more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.”¹² Hostilities are situations where the armed force being used is above a certain minimum threshold. We would tend to refer to fighting below the threshold as “lawlessness” when it occurs within a state. Minimal armed force between states is often referred to as an incident, such as in “border

¹¹ See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, paras. 1, 2, 6 UST 3316, 75 UNTS 135; Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 43, 44, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol II].

¹² Protocol II, *supra* note 11, at art. 1, para. 2. See also Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, I.C.T.Y., No. IT-94-1, ¶ 70 (1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (defining “armed conflict” as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.” In *Hamdi v. Rumsfeld*, 316 F. 3d 450 (4th Cir. 2003), a U.S. circuit court recently decided that the law of war applied – and not U.S. (or presumably Afghan) criminal law – because a suspect was apprehended in a “zone of active military operations” or “active hostilities.” *Id.* at 462, 476.

incident” or “frontier incident.”¹³ Fighting serious enough to be above the threshold between two or more groups is an armed conflict. Once an armed conflict is triggered, whether internal or international, regular members of a government’s military forces are understood to have combat immunity when they take military action against enemy fighters. Mere lawlessness or an incident will not result in combat immunity. The exigencies of the situation do not warrant it.

In the case of an internal armed conflict like that in the Philippines, the military forces of a third state must have the government’s permission to participate in the armed conflict. Some authorities argue that the law restricts *any* outside role in an internal armed conflict.¹⁴ More would tend to agree that with clear permission from the government in effective control of the state, such assistance in an internal armed conflict is permissible. For example, in 2002-2003 France assisted in the Ivory Coast.¹⁵ There was no argument that France was acting unlawfully. It had a request from a government recognized to be the lawful government of the Ivory Coast.

Yet a tension exists between the right of a government to request assistance and impermissible interference by outsiders in the internal political affairs of a state. The Philippines government understands this tension between allowing outside parties to assist, but in doing so, undermining the very claim that it is a government in effective control. The presence of outsiders signals weakness. This is particularly a problem when the outside party is the powerful United States. Very soon it appears to the population as though the government is not really, any longer, a legitimate government but is under the control of that larger, outside party. This concern explains why leaders debate about accepting U.S. assistance. The Philippines has preferred to limit the U.S. role. I fully expect that the U.S. will respect any decision by the Philippines as to what role our military should take in that conflict. If the Philippines government says, “advise only, no active participation,” the United States government will respect that.¹⁶

So, despite the rhetoric that the war on terrorism knows no territorial dimension, the United States is actually respecting sovereign territory and

¹³ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102-03 (June 27) [hereinafter Nicaragua]. See also, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988).

¹⁴ See, e.g., Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation*, 56 BRIT. Y. B. INT’L L. 189, 251 (1985).

¹⁵ U.N. Condemns Coup Attempt in Ivory Coast, Thanks France for Stopping Combat, AGENCE FR.-PRESSE, [A.F.P.], Oct. 31, 2002, available at 2002 WL 23639216 (last visited February 1, 2004).

¹⁶ The U.S., for example, announced it would not send military forces to Indonesia when Indonesia’s government stated it did not want U.S. troops active in their country. There is no question of sending U.S. troops to Malaysia, where Al Qaeda is known to be active.

the wishes of sovereign governments. The U.S. is treating the situation in Afghanistan differently from the Philippines.

Yemen

To some extent the U.S. has also treated the situation in Yemen differently than Afghanistan. This differential treatment shows the Bush Administration does not really believe it is engaged in a global war. In a global armed conflict, no consent would be needed and all terrorists as well as all U.S. military could be targeted anywhere, any time. Yet without that global war, the U.S. strike in Yemen was unlawful. The U.S. might have had Yemen's consent, but the evidence does not support a finding that Yemen was in the midst of an armed conflict at the time of the Predator strike. Absent an armed conflict, those carrying out the strike had no combat immunity.

Yemen was involved in a civil war for years, but Yemen's authorities recognize that war ended in 1994. Following the attack on the *USS Cole* in Yemen in 2000, the United States sent agents of the Federal Bureau of Investigation to work with Yemeni authorities to solve the case. Police techniques were used. Conditions in Yemen at the time of the Predator strike had not changed markedly from the time of the *Cole* attack. Yemen was not the scene of an armed conflict, nor was its government unable or unwilling to deal with suspected terrorists on its territory.

Absent an armed conflict, international human rights law protects criminal suspects when the situation is below the threshold of armed conflict. Individuals may not be killed on suspicion of membership in a group. Rather, authorities must at least make the attempt to arrest a suspect and not simply kill him. It is not, however, possible to attempt to arrest someone using an unmanned drone.¹⁷

¹⁷ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, at 112, U.N. Doc. A/Conf. 144/28/Rev. 1 (1990) [hereinafter *Basic Principles*].

Special provisions of the Basic Principles:

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such as give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to

Even if there was an armed conflict in Yemen, we might ask whether Yemen gave real consent to the United States to carry out military action on its territory? They had knowledge. Was that the real consent that we expect in international law?¹⁸

There was little international outcry after the strike. I have seen no press reports of governments protesting the U.S. action. Amnesty International condemned the strike, labeling it an action an extra-judicial killing in violation of U.S. obligations under the International Civil and Political Rights Covenant.¹⁹ In January 2003, the United Nations Commission on Human Rights received a report on the Yemen strike from its special rapporteur on extrajudicial, summary, or arbitrary killing. The report states the strike constitutes “a clear case of extrajudicial killing.”²⁰ Despite these conclusions by human rights experts, I suspect that many governments gave the U.S. the benefit of the doubt with regard to Yemen. They could have concluded that, given Yemen’s consent and the serious

do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

See also *Tennessee v. Garner*, 471 U.S. 1, 11-13 (1985) (invalidating Tennessee statute permitting the use of deadly force against an apparently unarmed fleeing suspect).

¹⁸ Most authorities indicate that consent to use force on the territory of another state must be express consent. The International Court of Justice stated that intervention is “allowable . . . at the request of the government of a State. . . .” Nicaragua, *supra* note 11, at 126 (emphasis added). And according to Christopher C. Joyner, “States are obligated in their international dealings to refrain from militarily intervening into the internal or external affairs of other states, save . . . in response to a genuine and explicit invitation by the lawful government of a state” Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT’L L. 131, 133 (1984).

¹⁹ Press Release, Amnesty International, Yemen/USA: Government Must Not Sanction Extra-Judicial Executions (Nov. 8, 2002); International Civil and Political Rights Covenant, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174, 6 I.L.M. 360, 370 (permitting the use of the death penalty only “pursuant to a final judgement rendered by a competent court.”).

²⁰ *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur*, U.N. Commission on Human Rights, 59th Sess. Agenda Item 11(b), at ¶¶ 37 – 39, U.N. Doc. E/CN.4/2003/3 (2003). See also Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT’L L. 364, 367 n.17 (2003). (“The United States’ response to the . . . Yemen allegations has been that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter.”). *Id.* See also, Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 376 – 381 (2003). *But see* Natalino Ronzitti, *The Legality of Covert Operations Against Terrorism in Foreign States*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, n.13 (Andrea Bianchi ed., forthcoming April 2004); Jeffrey Addicott, *The Yemen Attack: Illegal Assassination or Lawful Killing?*, JURIST, Nov. 7, 2002, at <http://jurist.law.pitt.edu/forum/forumnew68.php> (last visited Feb. 13, 2004).

lawlessness there, the U.S. and Yemen could kill members of Al Qaeda with Yemen's consent. On the other hand, if the lack of protest is based on the facts of the Yemen case, we cannot conclude that states around the world have acquiesced in the U.S. policy of targeted killing, any time, anywhere.

Any Time, Anywhere

All three actual cases, even the tough case of Yemen, are worlds apart from a policy of killing anywhere any time. For the United States to kill any suspect anywhere, regardless of the situation, regardless of whether there is an armed conflict, regardless of permission to act in the territory, is plainly unlawful. It beggars common sense to treat all the world like Afghanistan.

Killing any time, anywhere is clearly unlawful, but in addition, I do not believe that the United States is going to pursue this policy to its full extent. The U.S. will generally respect the sovereign rights of other countries. It is unlikely to carry out military action in peaceful situations. If targeted killing is carried out anywhere, it will only be on the territory of weak governments that fail to protect the human rights of persons on their territory, countries like Yemen. Thus, the U.S. will reap only negative consequences of having announced that we are going to act in violation of the law. We will not get the benefits of what, I believe, will be our actual conduct – conduct much more consistent with international law. Thus, not only is killing any time, anywhere completely unlawful, it is also wholly flawed as a matter of policy.