

Statement of
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Hearing on
RISE OF THE DRONES II:
EXAMINING THE LEGALITY OF UNMANNED TARGETING

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Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs
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Introduction

I would like to express my sincere appreciation to the Chairman and members of the Committee for the opportunity to address this timely and important subject.

My name is David Glazier and I am a professor of law at Loyola Law School Los Angeles. I spent twenty-one years as a U.S. Navy surface warfare officer, culminating in command of USS George Philip (FFG 12), before retiring to attend law school at the University of Virginia in the summer of 2001. I began detailed research on law of war related topics during the spring of my first year of law school which I have continued to the present date. I remained in Charlottesville as a research fellow at the Center for National Security Law for two years following my law school graduation, publishing law review articles on law of war topics and developing and teaching new Virginia course offerings on the Law of War and American Military Justice. I started work at Loyola in 2006 where I continue to teach and write about the Law of War as well as U.S. Constitutional Law, Foreign Relations Law, and International Law.

Witnesses during last month's hearing before this subcommittee noted that the use of unmanned drones gives rise to a number of potential technological, ethical, and legal issues. Other recent public discussion has questioned the wisdom of their current employment in Afghanistan and Pakistan from a policy perspective, suggesting that attacks perceived as indiscriminate because of "collateral" civilian casualties may do more harm in fueling support for our adversaries than we gain from these strikes. It is my intention to limit my remarks to what I understand to be the focus of this hearing – legal issues implicated by drone use – and I will concentrate on my own area of expertise, the law of war. I would just note upfront that while law of war compliance is not a panacea, past American military and political leaders, dating from George Washington, have perceived policy and public relations advantages from faithful law of war compliance even when not reciprocated by our adversaries. A number of these same officials played a substantial role in developing the current rules.

Although previous government use of the incoherent “war on terror” nomenclature has likely contributed to some of the confusion on this subject, I do not see any credible basis to dispute the idea that the United States is lawfully engaged in an armed conflict against al Qaeda and the resurgent Taliban in which it has the right to draw legal authority from the law of war. The world community has generally recognized the events of “9/11” as constituting an armed attack allowing U.S. invocation of the right of self-defense under Article 51 of the United Nations Charter. 9/11 remains the only event that the liberal western democracies comprising the North Atlantic Treaty Organization have recognized as an armed attack on a member state. Even more importantly from a domestic law perspective, Congress exercised its constitutional authority to permit a military response in the September 2001 Authorization for the Use of Military Force (AUMF). Leading foreign relations scholars, and more importantly, the U.S. Supreme Court in its *Hamdi* and *Hamdan* decisions, have recognized the AUMF as the functional equivalent of a declaration of war, permitting the President to exercise authority granted by the law of war in countering those responsible for perpetrating or aiding and abetting the 9/11 attacks. The fact that al Qaeda is not an actual state does not bar this from being an armed conflict. The United States has fought a number of previous conflicts against groups it refused to recognize as legitimate nations, including the Confederacy, Indian tribes, Philippine Insurgents, and the Viet Cong while applying law of war rules to both sides.

The Law of War and the Lawfulness of Drone Weapons

The necessary starting point in evaluating the legality of any weapons use is identifying the scope and content of the contemporary law of war. The only part of this corpus juris most Americans seem to have heard of is the four Geneva Conventions of 1949, although in my experience few even among educated audiences really know what they say. The irony is that the Conventions are narrowly focused on providing protections for persons who either never were, or no longer are, legitimate objects of attack including the sick, wounded, shipwrecked, prisoners of war, and civilians actually in the hands of a foreign belligerent. They thus have virtually nothing to say about the actual conduct of hostilities. It is necessary to look to the larger, but much less well known, body of other treaties and customary law rules governing armed conflict to find authority relevant to the question before this subcommittee. It is also worth noting that this law includes both specific substantive rules and more general governing principles. The latter, such as the requirement to distinguish between lawful military objects of attack and protected civilian persons and objects, remain fully applicable regardless of changing circumstances and can readily be applied even to technological innovations unforeseeable at the time of the rules’ development. In my opinion most of the frequently heard assertions that the law of war requires urgent updating to address “new” situations or technologies are overstated or outright erroneous.

Evaluating the legality of a weapons system requires a multi-part analysis. First, many types of weapons are the subject of specific prohibitions found either in treaty law, such as bans on chemical and biological weapons, blinding lasers, and anti-personnel land mines, or customary law rules, such as prohibitions on any use of exploding anti-personnel bullets, poisoned weapons, serrated bayonets, etc. Treaty bans are legally applicable only to states actually party to the relevant accord while customary law prohibitions are considered binding on all nations. There are no specific law of war bans which would apply to drone use, however.

Assuming a weapon falls outside these specific prohibitions, it is then necessary to evaluate its conformance with several customary law principles. As previously mentioned, the law of war requires “distinction” between “military objects” which are lawful objects of attack,^{*} and civilian objects which are not. A weapon incapable of discriminate employment, such as the V-1 flying bombs Germany fielded late in World War II, incapable of striking anything more precise than a general sector of a target city, runs afoul of this rule and should be considered unlawful. While a drone launching missiles can be misused as readily as any other weapons system, these weapons capable of discriminate employment rivaling or exceeding virtually any other system in any nation’s inventory. Indeed, it has been suggested that remote drone pilots, freed from the stress factor of being physically at risk while operating these systems, are able to be more careful in distinguishing targets than traditional warrior counterparts within the range of enemy weapons.

A second relevant principle bans the use of any weapon which causes “superfluous injury” or “unnecessary suffering.” While these terms are subject to some interpretation, it is indisputable that the law of war permits the killing or injuring of opposing combatants by means of both kinetic and explosive projectiles and missiles, so a drone launching weapons equivalent to those traditionally employed from other platforms is not at risk of violating this rule.

Some concern has been voiced about the remote nature of drone combat, particularly as currently employed in which operators may be shift-workers located in the United States, literally oceans away from the scene of combat and effectively invulnerable to counterattack. This practice violates historical notions of chivalry which emphasized personal combat—whether between knights of medieval Europe or flying aces over the trenches of World War I battlefields. Although commentators often identify chivalric values as contributing to modern law of war development, there is nothing in the law that requires mutual exposure to risk between opposing forces. Indeed, the history of lawful weapons developments reveals a continuing effort by virtually all states to develop weapons more effective or longer-ranged than those of potential adversaries, allowing the achievement of maximum military advantage at minimum risk to their own forces. The replacement of swords, spears, and bows with firearms, the development of artillery systems of increasing range and accuracy, and the torpedo-equipped submarine are all examples of lawful past efforts to achieve relative (albeit ultimately temporary) invulnerability. Naval and land mines are historic examples of lawful early efforts to use robotic technologies to inflict military damage in remote locations.

Legal Considerations in Drone Employment

Although there is nothing unlawful per se about using drones in combat, it is still necessary that their use conform to traditional rules governing the conduct of armed conflict, commonly known as *jus in bello*. These rules define, inter alia, who and what may be targeted, as well as when and where attacks may be conducted, and who may conduct them. While drones may be employed in a manner fully consistent with the law of war, there are some problematic aspects of

^{*} A military object may be one directly associated with the armed forces, such as a military base, ship, tank, aircraft, etc. or it may be a otherwise civilian object which is being used to achieve a specific military advantage, such as railroad being used to move troops or resupply combat units or a highway being used as a line of advance for an infantry unit.

current U.S. practice, including particularly who is conducting attacks and where they are taking place.

As previously noted, attacks are strictly limited to military objects, defined in Article 52 of Additional Geneva Protocol I of 1977 (AP I) as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”* The law recognizes that in many cases civilian casualties will be unavoidable during strikes against otherwise lawful targets and adopts the principle of proportionality as the standard for judging their legality. AP I article 57 para. 2. (b) (iii) requires refraining from an attack “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The “Rendulic Rule” adopted by post-World War II war crimes trials employs a “reasonable commander” standard for liability in this area – if a reasonable commander would conclude an attack to be lawful based on the information they have or should have access to, then there is no criminal liability if it results in disproportionate civilian casualties. Civilian losses have clearly been a major political issue in U.S. strikes in Afghanistan and Pakistan but without detailed information on the value of the intended targets, facts surrounding the decision process, and accurate information about the resulting “collateral” casualties, it is impossible to remotely judge the lawfulness of individual strikes. Nevertheless publicly available information suggests this is an area requiring significant attention on an ongoing basis for both legal and policy reasons.

A unique aspect of the current drone strikes that seemingly differentiates them from most historic uses of force is the apparent deliberate long range targeting of specific individuals or small groups rather than physical objects of military value. There is nothing inherently problematic about selective targeting provided that the selected individuals are otherwise lawful objects of attack. A fundamental principle of armed conflict is that the adversary’s combatants: members of the armed forces and affiliated groups and units other than medical and religious personnel, are liable to attack at virtually any time or place during the duration of hostilities. Despite discussions of “battlefields” by some commentators as if it was a limitation on the scope of an armed conflict, the term is merely descriptive, not legal. A battlefield is nothing more than a location where a conflict party finds an adversary or military objective and conducts an attack. Once an individual affiliates with the armed forces, they become a lawful object of attack whether engaged in battle, on the playing fields of West Point, or even at home on leave with their family—subject only to the rule of proportionality governing civilian losses. Citizenship is also irrelevant under the law of war – it is the affiliation with the enemy’s forces rather than nationality per se that renders an individual liable to attack. The Supreme Court noted in *Ex parte Quirin* that U.S. citizenship was no bar to detention and trial of an individual as enemy who had violated the law of war, and the inherent logic would have supported engaging them in combat had they not been captured.

A complicating factor in the current conflict is the United States’ failure to clearly classify our adversaries within any recognized law of war categorization. If we consider al Qaeda and

* Although the United States has refused to ratify Additional Protocol I, this provision, along with many other parts of the treaty are recognized as being declaratory of customary international law and accepted as binding on all states.

Taliban fighters as combatants then we can lawfully kill them or detain them for the duration of hostilities based simply on establishing that status. The fundamental privilege that the law of war confers on a combatant in exchange for this vulnerability is immunity from domestic laws, which ordinarily criminalize any act of violence to persons or property. As a result of this immunity, sometimes called “the combatant’s privilege,” their conduct must be judged under the law of war rather than ordinary criminal laws. We have refused, however, to accord members of al Qaeda and the Taliban the basic right to engage in combat against us. We have instead treated any such conduct, such as Omar Khadr’s alleged throwing a grenade at an attacking U.S. soldier, as criminal on the ground that these are not uniformed military personnel legally entitled to engage in hostilities. As a matter of law, this is tantamount to declaring these adversaries to be civilians. Civilians who engage in hostile activity can still be attacked, but only for such time as they are directly participating in hostilities. This classification thus imposes additional limitations on our authority to conduct drone strikes (or any other attacks) against them. There have been suggestions that U.S. targeting may have been expanded, at least for some period of time, to include Afghan drug traffickers who were supporting the Taliban with sale proceeds. This would clearly be unlawful by law of war standards, as would direct attacks on other individuals who are merely performing non-combat support functions, such as financiers, bookkeepers, propagandists, etc.

This issue is equally relevant to who conducts attacks on our behalf. There is no question that uniformed military personnel, whether regular, reserve, or national guard in federal service are lawful combatants entitled to “fly” drone strikes in a recognized armed conflict. But CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities on our behalf. It is my opinion, as well as that of most other law of war scholars I know, that those who participate in hostilities without the combatant’s privilege do not violate the law of war by doing so, they simply gain no immunity from domestic laws. Under this view CIA drone pilots are liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths, or property damage they cause. But under the legal theories adopted by our government in prosecuting Guantánamo detainees, these CIA officers as well as any higher level government officials who have authorized or directed their attacks are committing war crimes.

The final issue is one of geography. While lawful attacks are limited by specific concepts of “battlefields,” they are nevertheless geographically limited by traditional international law rules to the territory of states party to the conflict as well as international waters and airstrikes. Armed attacks may only be carried out in the territory of a “neutral” state either with that state’s permission or if the neutral fails to prevent opposing forces from using its territory to the detriment of another belligerent. The 1970 Cambodia “incursion” is perhaps the paradigmatic example of this principle. Although it provoked a huge domestic outcry, including the protest which resulted in the Kent State killings, and may therefore have been a political mistake, there is little real doubt that it was legal. International rules, which the United States government played the leading role in developing in the wake of the 1837 Caroline incident involving a British military incursion into New York, make it clear that the use of military force on the territory of a neutral without its consent are limited to situations of “the most urgent and extreme necessity” and can only be justified upon showing “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

It is entirely plausible that the governments of countries where U.S. strikes have taken place, such as Pakistan and Yemen, have in fact given their confidential approval and must simply maintain a public posture of denial for domestic political consumption. But if they have not given their permission, it is hard to believe that many of the strikes conducted realistically satisfy the imminency requirements established by international law. This law is intended, by design, to limit cross-border attacks to only the most extraordinary circumstances.

While some commentators have suggested that the United States can conduct drone attacks in self-defense beyond the scope of the congressionally-authorized armed conflict against al Qaeda and the Taliban, it is important to note that the same stringent legal criteria established for the violation of neutral territory apply to anticipatory self-defense as well. The 2004 report of the United Nations Secretary General's High-level Panel on Threats, Challenges and Change rejected the validity of the Bush Administration's expansive preemptive war doctrine while acknowledging that customary international law established a narrow right of anticipatory self-defense even under the U.N. Charter but that it was limited to situations where "the threatened attack is imminent, no other means would deflect it, and the action is proportionate." A sustained, even if sporadic, campaign of drone strikes beyond the scope of hostilities approved by Congress would also raise domestic constitutional issues.

Conclusion

Drone capabilities are progressing rapidly as the United States leads the way in developing and fielding these weapons systems. While the technology is new, it is a mistake to assume that old law is therefore inapplicable. Congress has authorized the President to conduct an armed conflict against al Qaeda and the Taliban, and the law of war includes governing rules and principles broad enough to provide meaningful legal regulation of drone employment. This law authorizes much of what the United States seeks to accomplish with these systems, at least when operated by actual military personnel. But some matters, such as the use of CIA personnel to conduct armed attacks clearly fall outside the scope of permissible conduct and ought to be reconsidered, particularly as the United States seeks to prosecute members of its adversaries for generally similar conduct.