“Targeted Killings” by the United States
Exploring Strategies for Litigation, Advocacy & Research

Conference Notes
These notes provide a reference point for topics covered in each session of the meeting. They consist of summaries and excerpts of documents: government and industry reports; congressional testimony, commentaries and media reports.

Principally, the notes collect materials which participants are unlikely to have come across previously, either due to their obscurity or recent publication. Accordingly, the notes do not include important reports and analyses that participants themselves authored, or documents which have played so central a role that participants are likely to already be familiar with them. (The exception is documents which themselves are a subject of anticipated discussion, e.g., Legal Adviser Koh’s statements). The notes include several documents which illustrate conservative or mainstream perspectives on factual or legal issues, as reference for our discussion of the current political context.

Organized by session, the summaries provide a quick orientation to the specific issues we will discuss at the meeting. The excerpts will be made available in a printed packet distributed at the meeting; the full documents are available online as a resource for further study.

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Session I: The Emerging Narrative of U.S. Targeted Killings

bin Laden Killing: Reactions & Government Statements

1. “The Lawfulness of the U.S. Operation Against Osama bin Laden”
   Harold Koh, Opinio Juris (May 18, 2011)

   Government statement: Koh, legal adviser at the State Department, emphasizes that “[i]n conducting the bin Laden raid, the United States acted in full compliance with the legal principles” he set forth in a March 2010 address at the American Society of International Law annual meeting. “[B]in Laden continued to pose an imminent threat to the United States that engaged our right to use force…” and “consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept.”

2. “Osama bin Laden: Statement by the UN Special Rapporteurs on Summary Executions and on Human Rights and Counter-terrorism”
   Christof Heyns & Martin Scheinin, UN Special Rapporteurs (May 6, 2011)

   Press release: Current UN experts Christof Heyns (Summary Executions) and Martin Scheinin (Counter-terrorism) urge the U.S. to “disclose the supporting facts to allow for an assessment in terms of international human rights law standards,” particularly, “if the planning of the mission allowed an effort to capture Bin Laden.”

3. “The Administration’s Puzzling Failure to Explain the Legal Basis for Killing bin Laden”
   John Bellinger, Lawfareblog.com (May 7, 2011)

   Blog post: In a post written before Legal Adviser Koh’s statement, Bellinger, a formal Legal Adviser under the Bush administration, argues that the Administration should provide “detailed explanations as to why the Bin Laden killing was lawful under both domestic and international law.” He speculates that the Administration’s silence reflects internal disagreement about whether bin Laden qualified as a “combatant” who could be targeted outside the “hot battlefield” of Afghanistan and contends that the Administration “seem[s] to feel more comfortable relying on a general theory of ‘self-defense’ similar to the theory used by the Clinton Administration.”

4. Amnesty International: “USA: A Reflection on Justice”
   Amnesty International (May 17, 2011)

   Commentary: AI rejects the Administration’s statements that bin Laden’s killing is “justice done.” It queries the White House press secretary’s statement about how U.S. forces would have responded to an offer by bin Laden to surrender, and calls for an investigation.
Reports of Administration Internal Debate & Conservative/Mainstream Commentary

Wall Street Journal (June 4, 2011)

Media report: The article reports that “an increasingly prominent group of State Department and military officials now argue behind closed doors that the intense pace of the strikes aggravates an already troubled alliance with Pakistan and, ultimately, risks destabilizing the nuclear-armed country.” At a recent meeting, CIA director Leon Panetta made the case for “maintaining the current program” and “[t]he result of the meeting—the first high-level debate within the Obama administration over how aggressively to pursue the CIA’s targeted-killing program—was a decision to continue the program as is for now.”

6. “Death From Above, Outrage Down Below”  
David Kilcullen & Andrew McDonald, New York Times (May 16, 2009)

Op-ed: David Kilcullen, former counterinsurgency adviser to Gen. David Petraeus, argues for a moratorium on drone strikes in Pakistan. “The use of drones displays every characteristic of a tactic – or more accurately, a piece of technology – substituting for strategy.” Kilcullen argues that the focus on “high-value” targets “distracts us from larger problems,” while successful capture/kill operations have “only a slight and fleeting effect on levels of violence.” Kilcullen calls for “policies that build local partnerships.” “Drone strikes make this harder, not easier.”

Session II: Evaluating Recent Advocacy for U.S. Government Disclosure & Transparency

7. Interim report of the Special Rapporteur on extrajudicial, summary or arbitrary executions  

UN Expert Report: In his final report as special rapporteur, Philip Alston describes the U.S. government’s “continuing refusal...to provide the international community with the information that would satisfy its obligations in relation to transparency and accountability,” including in response to his May 2010 study on targeted killings. He notes the “vigorous, but largely anonymous, defence of the policy in the media, in which officials have insisted that the targeted killings are highly effective, have involved only a handful of civilian casualties, and are entirely legal.”

Al-Aulaqi v. Obama

8. Complaint for Declaratory and Injunctive Relief  

Litigation filing: Plaintiffs (represented by CCR and the ACLU) set out various claims for relief: 4th amendment unreasonable seizure; 5th amendment right against deprivation of life without due process and due process notice requirement; and under the Alien Tort Statute.

9. Opposition to Plaintiff's Motion for Preliminary Injunction  

Litigation filing: The government, invoking the political question doctrine, articulate the Administration’s position that “[Al Qaeda in the Arabian Peninsula] is a part of al-Qaeda—or at a minimum is an organized,
associated force or co-belligerent of al-Qaeda in the non-international armed conflict between the United States and al-Qaeda.”

10. **District court decision**  

Court decision: D.C. district court judge Bates dismisses the suit on standing and political question grounds, but frames his decision by describing the “[s]tark, and perplexing questions” raised by the case, including whether the Executive “can order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization.”

**Calls for Disclosure & Transparency from Conservative & Mainstream Figures**

11. **“Targeted Killing is Legitimate and Defensible”**  
*Ken Anderson, The Weekly Standard (June 6, 2011)*

Commentary: In the second half of this essay, Anderson lauds Koh’s Opinio Juris blog post on the bin Laden killing and calls for more statements like it. While denigrating the “international law community,” he reiterates his argument that the U.S should proffer more “official articulations” of its rationale, to achieve “public legitimacy.” This is not to be mistaken with a “foolish and misguided call to ‘engage’” and the U.S. should steer clear of “the U.N., its special rapporteurs, [and] the Human Rights Council.”

12. **“Drone Wars”**  
*C. Christine Fair, Foreign Policy (May 28, 2010)*

Commentary: The author, a Georgetown U. professor considered an expert on the region, argues that “fabricated civilian casualties will dominate the drone debate” until the U.S. clarifies its policies. Fair does not oppose strikes: “Drone strikes, however unpopular they may be, are likely to be more popular than the realistic alternatives: the Taliban’s violence or the Pakistani army’s operations.” Nevertheless, the U.S. should make some concessions: abandon the claim that the U.S. does not conduct drone strikes in Pakistan and “provide evidence of what exactly the drone attacks have produced so far: who has been killed, and how important those people were to the enemy’s capabilities.”

**Lunch with Military Scholars: New Technologies & Future Challenges for the Law of Armed Conflict**

13. **“Bloodless Weapons”? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as ‘Weapons’”**  

Journal article: The article, provided by guest participants for this session, describes the legal review that governments must subject new technologies to, if they technologies are classified as a “weapon, means or method of warfare.” The paper calls for legal review of emergent “bloodless capabilities,” such as nanotechnology and “directed energy,” before they are employed.
Session III: Civilian Deaths & Displacement Session Four A: Challenging U.S. Detention and Transfer Decisions Through Transnational Litigation and Advocacy

Studies of Drone Strike Deaths Based on Mainstream Media Reporting

   Peter Bergen & Katherine Tiedemann, New America Foundation (February 2010)

Study: In a frequently cited 2010 study, New America Foundation describes a “civilian fatality rate” of about 32 percent since 2004. (On its website, New America’s research is updated to June 6, 2011: “Our study shows that the 248 reported drone strikes in northwest Pakistan, including 35 in 2011, from 2004 to the present have killed approximately between 1,520 and 2,408 individuals, of whom around 1,227 to 1,937 were described as militants in reliable press accounts. Thus, the true non-militant fatality rate since 2004 according to our analysis is approximately 20 percent. In 2010, it was more like five percent.”)

15. Long War Journal – Charts on US Strikes in Pakistan
   Bill Roggio and Alexander Mayer, Foundation for Defense and Democracies (last updated June 6, 2011)

Online Study: Based on media reports, the authors report that from 2006 to June 6, 2011, “there have been 1,932 leaders and operatives from Taliban, Al Qaeda and allied extremist groups killed and 138 civilians killed.”

Critiques of Drone Strike Studies

16. “Killer Drones: Counting the Human Costs” Interview with Madiha Tahir
   Asia Pacific Forum, WBAI 99.5 FM (Mar. 28, 2011)

Interview: Meeting participant Madiha Tahir describes the methodology of the New America Foundation report on drone strikes and mainstream media reports. Wire services reports often cite anonymous officials, whose credibility cannot be assessed. Foreign press rely on local stringers, who themselves are usually not able to go to the area where an attack occurred. Press accounts reflect “ideology masquerading as information.”

Human Rights NGO Reports on Civilian Deaths & Displacement

17. “ Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan”
Chris Rogers, Campaign for Innocent Victims in Conflict

Report: Based on interviews with more than 160 “Pakistani civilians suffering direct losses from the conflict,” the author describes how civilian deaths are “destabilizing families and entire communities.” There is “no governmental or military mechanism that systematically and publicly investigates or collects data on civilian casualties.”

Kate Clark, Afghanistan Analysts Network (May 2011)
Report: The author describes her investigation of the September 2, 2010 U.S. special forces operation aimed at Muhammad Amin, deputy Taleban governor of Takhar. “The divergent accounts of what happened...seem to come from different worlds. One is the world of the American military whose knowledge is often driven by signals intelligence and reports provided by a limited number of local informants who, generally, focus narrowly on insurgent behavior. The other is the everyday world of Afghan politics. In the case of the Takhar attack, these two worlds simply did not connect.”

Session IV: Litigation & Advocacy in Impacted & Cooperating Countries

19. **Legal Notice for Damages for Wrongful Death**
   *Mirza Shahzad Akbar (Nov. 29, 2010)*

Litigation filing: Legal notice to, inter alia, the CIA Station Chief in Islamabad, for a claim of wrongful death by a drone strike which killed three individuals, including the client’s 18-year-old son. The notice argues that the “placing of drone attack operations by the United States Government under CIA which is a clandestine entity, not traditionally trained in the laws of war has increased the risks of International Humanitarian Laws violations as happened in our case.”

20. **Request for Registration of First Information Report Against Jonathan Banks, CIA Station Chief, Islamabad**
   *Mirza Shahzad Akbar (Nov. 29, 2010)*

Letter: A request that the Islamabad police register a First Information Report, initiating a criminal investigation against Jonathan Banks, the CIA Station Chief in Islamabad. It notes that Banks is residing and operating from the U.S. embassy, “a clear violation of diplomatic norms and laws as a foreign mission cannot be used for any criminal activity within a sovereign State.”

21. **“Germany Limits Information Exchange with US Intelligence”**
   *Holger Stark, Der Spiegel (May 17, 2011)*

Media report: Following an October 2010 drone strike in which German citizen Bunyamin E. was killed, German politicians began to raise questions about cooperation between German and U.S. intelligence agencies, resulting in new restrictions on intelligence-sharing. German prosecutors in Karlsruhe are considering the filing of charges “against those responsible for the death” of Bunyamin.

Session V: Challenges Based on International Law

22. **Hypotheticals for discussion**

23. **“Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’”**
   *Ken Anderson, Hoover Institute Online Volume Essay – Future Challenges (forthcoming, avail. SSRN)*

Commentary: Anderson narrates an idiosyncratic account of how human rights groups came to focus on the need for geographical limits on war: the ICRC and NGO communities responded with “palpable anxiety” to the Bush administration’s invocation of the laws of war as “license with regard to the conduct of intelligence activities.” “[T]his led...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.” Drone technology adds to the anxiety, as it has “the possibility of disturbing and undermining a mostly tacit
underpinning to the laws of war: an implied geography.” The Obama administration’s abandoning of the “global war on terror” formulation is a change “real and fundamental, representing a return to an earlier and more correct, legal standard.”


The author, executive director of the Crimes of War Project and senior policy fellow at ECFR, argues for a “new approach to evaluating the permissibility of drone attacks” that begins with “the radical step of dismissing the technical question of whether there is an armed conflict with al-Qaeda.” Instead “the premeditated taking of life would in all cases have to be justified on an exceptional and individual basis, depending on the gravity of the threat posed by that individual and the possibility of meeting it in other ways.”

Human Rights Institute, Columbia Law School (March 25, 2011)

Background paper: In a paper prepared for the American Society of International Law annual meeting, Legal Adviser’s Koh March 2010 articulation of legal standards and justifications is compared to ongoing debates among observers, scholars and other experts about humanitarian law issues, including the nature and scope of the armed conflict, who may be targeted and the implications of who conducts targeting.

Lunch Discussion: Accountability & the CIA

Afseeh John Radsan, Statement for the House Subcommittee on National Security & Foreign Affairs (May 201)

Congressional testimony/prepared statement: Radsan argues that the CIA’s targeted killings “should be subject to independent review by the CIA’s Inspector General that is as public as national security permits.” Radsan argues that CIA accountability mechanisms will depart from the military model because the drone campaign “differs from traditional armed conflict.” However, “[i]nternational humanitarian law can be developed into specific regulations for the CIA’s targeted killings.”

Session VI: Special Forces, the CIA & Civilian Contractors

27. Targeted Killings: A brief primer on the role of the CIA, contractors and Special Forces, in capture-kill and drone strikes operations  
Pratap Chatterjee, June 8, 2011

In a background paper prepared for this meeting, Chatterjee, a researcher and journalist, describes the U.S. military and CIA personnel involved in capture/kill operations. He describes some CIA legal review procedures, acknowledging that little is known. He describes evidence that the role of contractors in drone use extends beyond maintenance, and into surveillance/intelligence gathering.

U.S. Military – Directives & Reports on Procedures and Standards

Department of Defense, Directive 2311.01E (May 9, 2006; certified as current as of Feb. 22, 2011)
Official directive: Laying out the policy of DoD components to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations” (para. 4.1), the directive requires that the DoD establish an “effective program” to prevent violations of the laws of war and ensure that all “reportable incidents” are “reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”

29. **Customary IHL – Rule 141. Legal Advisers for Armed Forces**
   *ICRC, Customary International Humanitarian Law Database*

Legal commentary: In its guidance on customary law, the ICRC describes a customary norm requiring that States provide legal advisers to commanders to ensure conformity with international humanitarian law. It describes U.S. military manuals that reflect (and help establish) this norm.

30. **“Collateral Damage and the Administrative Process of Targeted Killing”**
   *Gregory S. McNeal (forthcoming, presented at Penn Law Conference “Using Targeted Killing to Fight the War on Terror: Philosophical, Moral and Legal Challenges,” April 16, 2011)*

Journal article: This draft paper by McNeal, a former Justice Department official and current professor at Pepperdine Law School, describes the U.S. military’s process of collateral damage estimation in targeted killings, drawing principally from documents filed by the government in the *Al Aulaqi* litigation.

31. **“US drones: weapons of choice in overseas wars”**
   *Mathieu Rabechault, Agence France Presse (April 22, 2011)*

Media Report: Reporting on use of drones in Libya, the article quotes U.S. military officials’ touting the level of legal review and analysis in military use of UAVs: “[t]here is really nothing unmanned about the system at all” given the number of personnel (“as many as 180”) involved in a drone combat air patrol.

32. **Military Lawyers, Private Contractors, and the Problem of International Law Compliance**
   *Laura A. Dickinson, NYU Journal of International Law and Politics (Winter 2010)*

Journal Article: In the first part of this article, Dickinson describes her interviews with JAG lawyers—lawyers who have “internalized the core values inscribed in international law” and “seek to operationalize those values.” “[T]heir stories strongly indicate that the presence of lawyers on the battlefield can help produce military decisions that are more likely to comply with international legal norms.”

CIA’s Relationship to U.S. Special Forces

33. **“The blurring of CIA and military” & “Rewriting Rumsfeld's Rules”**
   *David Ignatius, Washington Post (June 1 and 3, 2011)*

Commentary: Ignatius, a columnist (and spy novelist), reports “a series of new executive orders (known as ‘EXORDS’),” which are reflected in the cooperation between special forces and the CIA in the bin Laden killing. These orders reportedly require that “if the United States conducts a sensitive intelligence mission outside a war zone, the president should make the decision.” These orders replace or amend Rumsfeld-era orders that permitted military commanders to approve sensitive operations without a White House review.
U.S. Special Forces – Reports & Testimony

34. Senate Hearing on U.S. Special Operations Command, Statement of Adm. Eric T. Olson

Congressional testimony/prepared statement: Colson, Commander of U.S. Special Operations Command, describes the makeup of special operation units and involvement of “at least 5 other agencies within and beyond the [DoD] providing a senior-level counsel and staff-level expertise.” He notes that demand for special operations units is outpacing the supply.

35. “Osama’s Assasins”
Jeremy Scahill, The Nation (May 4, 2011)

Media Report: Scahill, a journalist regularly covering national security issues, describes the Bush administration’s executive order, known as Al Qaeda Network Execute Order (AQN ExOrd), authorizing US Special Forces to “move into denied areas or countries beyond the official battle zones.” “Gen. David Petraeus, now poised to become CIA director, expanded and updated that order in late 2009.”

36. “The Expanding US War in Pakistan”
Jeremy Scahill, The Nation (Feb. 4, 2010)

Media report: Scahill describes “growing concern within the military about what is perceived as the disproportionate and growing influence of JSOC’s lethal ‘direct action’ mentality on the broader Special Forces operations in Afghanistan and Pakistan.”

Session VII: Drone & Lethal Robotics Industry Development

Drones Development & Procurement

37. Unmanned aerial vehicles: emerging lessons and technologies

Think Tank Report: Describing exponential growth in worldwide procurement of drone technology, this report notes that “the value of the global UAV market will grow to $70-80 billion over the coming decade,” with the Pentagon accounting for 58% of UAV procurement. “[T]he [U.S. Air Force] is aiming to use multi-aircraft control technologies by 2012, enabling one pilot to operate several UAVs, thus halving the number of pilots required.” The report includes a chart describing the number and type of UAVs that various governments possess.

Dyke D. Weatherington, Deputy Director, Unmanned Warfare Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) before the House Committee on Oversight and Reform, Subcommittee on National Security and Foreign Affairs (March 23, 2010)

Congressional testimony: Weatherington, a DoD official, describes DoD investments in unmanned aircraft systems (UAS). “The DoD annual budget for development and procurement of UAS has increased from $1.7 billion in FY 2006 to over $4.2 billion in FY 2010. During the same time period DoD UAS operations have grown from 165,000 hours to over 550,000 hours annually...and the unmanned aircraft inventory has increased from less than 3,000 to over 6,500.”
Government planning document: Several short excerpts reflect the Air Force’s commitment to accelerating the integration of unmanned aircraft systems (UAS) technology into “all other assets worldwide” and eventually “leverag[ing] a fully autonomous capability...to put the enemy off balance by being able to almost instantaneously create effects through battlespace.” “Increasingly humans will no longer be ‘in the loop’ but ‘on the loop’ – monitoring the execution of certain decisions...[artificial intelligence] will enable systems to make combat decisions and act within legal and policy constraints without necessarily requiring human input.” The plan also acknowledges weaknesses in training, noting a cumulative “mishap rate” of 14/100,000 flight hours for MQ-1 Predator drones.

Government planning document: A few excerpts from this UK defense planning document reflect a similar commitment to the procurement and integration of UAS technology, but with lengthier discussion of legal requirements. One prescription is the programming of legal compliance: “[A] systems engineering approach will be the best model for developing the [legal] requirement and specification.” “[T]he legal framework for operating the platform would simply form a list of capability requirements that would sit alongside the usual technical and operational requirements.”

Congressional testimony: Wolf describes the Commerce Department’s role in export controls of UAVs. He identifies multilateral export control regimes that have imposed complementary controls on exports of UAVs, like the Wassenaar Arrangement. He describes cases brought by the Commerce Department and Justice Department against companies and individuals accused of illegally exporting UAV components to Iran and China.

UN Expert Report: In his final report as special rapporteur, Alston reports that rapid growth of the lethal robotic technology with autonomous capabilities “raise[s] serious concerns that have been almost entirely unexamined by human rights and humanitarian actors, although some military lawyers, philosophers and roboticists have begun to do so.” He contends that “there is no inherent reason why human rights and humanitarian law considerations cannot be proactively factored into the design and operationalization of the new technologies,” but notes that “this will not happen unless and until the human rights community presses the key public and private actors to make sure it does.”
43. **Statement of the 2010 Expert Workshop on Limiting Armed Tele-Operated and Autonomous Systems, Berlin 22nd of September 2010**

Conference Statement: A statement endorsed by some conference participants identifies “an urgent need to bring into existence an arms control regime to regulate the development, acquisition, deployment and use” of armed and autonomous robotic weapons.” The statement argues that “armed tele-operated and autonomous robotic weapons” should be prohibited, while the range and payload of “armed tele-operated uninhabited vehicles” should be restricted.

44. **“International Governance of Autonomous Military Robots”**


Journal Article: The several authors of this article, who include military scholars and lawyers, describe concerns that development of lethal autonomous robots raise under the law of armed conflict and rules of engagement. They describe existing governance mechanisms, “a patchwork of legislation,” arms control treaties and interpretations of humanitarian law. They also explore the use of professional codes and other “soft law” to manages the risks associated with emerging technology. Although the entire article may be of interest to participants, recommended sections are: Part I, Part II, Part IIIA-IIID, Part V, VI.

45. **“Building a Better WarBot: Ethical issues in the design of unmanned systems for military applications”**


Ethics Journal Article: Sparrow, a bioethicist, describes steps designers of lethal robots should take to increase compliance with law of war principles like discrimination and proportionality, and decrease the incidence of war crimes. “[T]he designers of [unmanned systems] should work to discourage and counteract the alienation between operator and those whose lives they affect.” In particular, these systems “should possess a range of capacities beyond the firing of deadly weapons” and be designed such that “we can identify those responsible for the consequences of the operation of the system” and “ensure that those who are responsible feel responsible—and know precisely what they are responsible for.”

Additional Reading on Lethal Robotic Technology & Compliance with International Law

*Robert Sparrow, “Killer Robots,” Journal of Applied Philosophy, Vol. 24, No. 1, 2007*: Sparrow considers who should be held accountable, as a legal and ethical matter, when an autonomous weapon system is involved in what would normally be described as a war crime.

*Marcus Schulzke, “Robots as Weapons in Just Wars,” Philosophy and Technology (April 28, 2011)*: The author, a PhD candidate in political science, argues that “robotic weapons can be more morally sensitive than human soldiers,” making them more likely to rigorously follow IHL principles of discrimination and proportionality.