

2015 LEARNED FRIENDS CONFERENCE
IS IT MURDER? THE ETHICS AND LEGALITY OF DRONE STRIKES

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NUREMBERG

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- 1 Good afternoon and thank you for having me. At the commencement of law term I joined a number of judges from various Australian courts for an informal ceremony and gathering at the Gallipoli Mosque at Auburn in South West Sydney. As I was listening to the beautiful singing of the relevant reading from the Koran, people came and went to pray. My mind wandered. I am not very devout and my Arabic was letting me down badly. The places where my mind wandered were very bleak.

- 2 I wondered: what if the United States had military intelligence (long regarded as a contradiction in terms) that one of their high priority targets was present at the Sydney Mosque that afternoon? Somebody who had planned the September 11 attack on the World Trade Centre or was an active insurgent for IS(IS) or Al Qaida?
 - What if the US decided to take the guy out then are there? Pressed a button in Virginia or Washington or sent a message to the Station Chief in Canberra to press a button?
 - What if 20-30 people, including the Chief Justice of New South Wales and Judge Yehia SC [who was the next speaker at the conference] were killed?

¹ This is a proof read, and slightly revised, version of the notes for a speech delivered by Justice Peter Hamill at the Learned Friends Conference in Nuremberg, Germany on Wednesday 16 September 2015. The power point display which accompanied the talk cannot be displayed at this time.

3 Apart from opening a large number of spots on the Supreme and District Courts, what would the legal ramifications be?

- Would it be murder?
- Would it be an act of terrorism under the Commonwealth Criminal Code?
- Would it be a war crime under international law?
- Would the button pusher in Langley be guilty of a crime under Australian Law?
- Would they be amenable to justice in the International Criminal Court?
- What if the orders came from higher in the administration, say from POTUS himself?
- Could the President of those United States be extradited and prosecuted in Sydney or in The Hague?
- Could the State Coroner of New South Wales call him to give evidence about how on earth he got bail in the first place?

4 As I didn't know the answer to any of those questions, I thought it would make an excellent topic upon which to speak at an international conference, especially one to be held in a place synonymous with the prosecution of war crimes under international law and from which one of the least successful legal defences ever invented - apart perhaps from alibi - got its name.

5 So here I am. Can I invite you to thank Paige, Peter and Bella, the organisers at Learned Friends, for organizing this conference and bringing us to such an interesting place. As always, they have done a great job.

- 6 The last time I spoke for Learned Friends, we met in Boston during the baseball season. Accordingly, I was able artfully to avoid speaking much about my chosen topic (informed consent, and my failures in defending the Butcher of Bega as I recall it) and spoke instead, and extensively, about the history of the Boston Red Sox, why Fenway Park is the most significant religious space in the Americas and the prospects of the Olde Town Team in the 2011 Major League Baseball season.
- 7 A large number of the audience attended a game or two that week and, delightfully enough, the 'Sox pummelled the hideous New York Yankees in a three game set. Those lucky few could honestly lay claim to having watched the 2011 World Champions play ball, because - as I am sure you all know - the Red Sox went on to win the American League Pennant and then the World Series in October of that year.
- 8 It has been a tragic downhill spiral – plummet really – ever since.
- 9 Anyway, that's about as much juice as I can squeeze from that lemon (and word lemon very much applies to the 2015 Red Sox). So let me return to drone strikes and whether they constitute murder.
- 10 My first thought was: of course they do.

DOMESTIC LAWS AGAINST UNLAWFUL KILLING

- 11 In my hypothetical strike on the Sydney Mosque, an act was committed which caused death and the act was done with intent to cause death and with utter disregard (reckless indifference) to human life.²

² See section 18 Crimes Act NSW 1900.

12 When it comes to homicide, the law of Pakistan and Afghanistan where many of the drone strikes are carried out – and for that matter, most states of the United States of America where the buttons are pressed or the orders given - is not that much different to our own.

13 In Pakistan, murder is called *Qatl-e-Amd*. Section 300 of the *Pakistan Penal Code* defines *Qatl-e-Amd*

300. Qatl-e-Amd:

Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with-the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e-amd*.

14 Under s 302 of the *Pakistan Penal Code*, the punishment is death.

15 Article 394 of the *Afghanistan Penal Code* defines murder in a similar way and the punishment is death or long imprisonment depending on the particular circumstances in which the killing occurred.

16 Moving to the United States itself, all states and the District of Columbia have laws criminalizing acts causing death committed with murderous intention. The state where the relevant button is most likely to be pushed or order given is Virginia, home of the Central Intelligence Agency.

17 The *Virginia Code* of 2006 has a very long definition of, and demarcation between, classes of murder. It has three classes of murder: capital murder, murder in the first degree and murder in the second degree. The word “capital” in this context comes from the Latin “caput” which means - appropriately enough in the age of the Islamic State - to lose one’s head. Thus, capital murders are punishable by death and, relevantly, include cases where there are multiple victims and contract murders.

- 18 Murder in the first degree is defined as “any wilful, deliberate and premeditated killing”.
- 19 Now, if the strike occurred in Sydney, but the button was pushed, or the order given, outside of New South Wales, the Criminal Courts of NSW would have jurisdiction because of the geographical nexus between the crime and the state: see Part 1A (sections 10A-10F) Crimes Act. The central provision is s 10C³.
- 20 The kinds of action we are considering, if the killing occurred in NSW, would be amenable to the NSW criminal law. Indeed, it is arguable that if a NSW citizen was killed in a drone strike where **all** of the elements occurred overseas, the offence would have “an effect in the State” and thus the necessary geographical nexus could be established.

THE INTERNATIONAL COVENANT AND GENEVA CONVENTIONS

- 21 Apart from these pesky domestic laws of relevant individual countries, there is also the altogether inconvenient statement of principles in the *International Covenant on Civil and Political Rights*. Article 6.1 says:

"Every human being has the inherent right to life. This right shall be protected by law. No man shall be deprived of his life arbitrarily."

³ 10C Extension of offences if there is a geographical nexus

(1) If:

(a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and

(b) a geographical nexus exists between the State and the offence, the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if:

(a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or

(b) the offence is committed wholly outside the State, but the offence has an effect in the State.

22 If that sounds familiar it should because it is in almost the same terms as the *European Convention* which Justice Garling took us to yesterday.

23 Article 6.2 of the International Covenant says:

"[The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."

24 Article 6.4 provides:

"Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

25 All of this law, considered in the rudimentary and superficial manner of an old criminal lawyer, seems to make the idea that you pick a target, send a device with some artificial intelligence across the world and blow up the building in which the target is located, pretty iffy from a legal point of view.

26 So, how do they get away with this? How is it justified? It seems that seldom a week goes by when we don't hear news of some highly dangerous target being killed in a drone strike. They even make Hollywood movies about the more successful and dramatic operations. There was a time when these things were called "Black Ops" and were scarcely spoken of and, when spoken of, denied.

27 Now, it seems, there is an acceptance that this is a legitimate method of conducting international diplomacy? How did this happen? Has the law changed?

28 The first thing to consider is that the laws to which I have thus far referred are the laws that apply during peace time. Perhaps, the law is different during times of emergency or during war-time? Perhaps it is legitimate summarily to execute an enemy combatant without a trial

during war-time. Presumably, the Geneva Convention covered this sort of thing?

- 29 Well, in 1977, the Geneva Code was modified by what became known as the *Second Additional Protocol*. Article 6 of the Second Protocol “applies to the prosecution and punishment of criminal offences related to the armed conflict.” It says many noble things. At its cornerstone is article 6.2:

"No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality."

- 30 Article 6.2 goes on to provide, amongst other protections, a presumption of innocence and a right to be present during the trial. Article 6.3 provides that a convicted person is entitled to be advised of their rights of appeal and the time limits within which those rights need to be exercised.

- 31 None of this seems to fit very well with the idea that it was lawful to execute your suspected enemies without trial.

LEAKED D.O.J. WHITE PAPER

- 32 There is a glaring problem in the analysis that I have provided to this point. The problem is that it ignores the changed face of armed conflict. As it was put in a US Department of Justice White Paper which was made public by NBC News on 4 February 2013:

“A terrorist war does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and then is past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur”.

- 33 Since NBC published the leaked opinion, the White Paper has been subject to considerable academic, journalistic and political debate. It was, if I can borrow a phrase used by a first year law student at Harvard University, “technology neutral”⁴. In other words, it was not directed specifically to the use of drones. However, most of these “lethal force operations” are now, in practice, carried out by drone strikes. And indeed, one of the cornerstones of the justification or rationale behind the legal opinion provided by the DOJ is that option of capture (and trial) is not feasible (or as it is put in the White Paper, infeasible).⁵
- 34 The White Paper was directed specifically towards the activities of Al-Qa’ida and to the situation where a US citizen, who joined and became a leader in Al-Qa’ida, was the target of the attack. It was also concerned with the lawfulness of strikes directed to areas outside any area of active conflict.
- 35 However, the rationale and legal principles at the core of the DOJ advice are the same regardless of the nationality of the target. It might be thought that the protections afforded to a US citizen who is the target of such an operation are likely to be greater than those afforded to a foreign national. It can, I think, safely be assumed that it is the same basic legal argument that the US would advance to explain its “lethal operations” concerning Bin Ladin and, more recently, the Taliban and, I suspect leaders of the Islamic State.
- 36 In view of the DOJ’s conclusions as to the lawfulness of striking outside of the area of the active hostilities, the opinion is directly relevant to my hypothetical drone strike on the Sydney Mosque. [And, while we are back at the Gallipoli Mosque in Auburn, is there any doubt that if a

⁴ Mary Grinman, ‘Department of Justice White Paper Reveals United States Position on Lethal Force Operations Targeting US Citizens,’ Harvard Journal of Law and Technology, 2013.

⁵ According to the Oxford Dictionary, “infeasible” is a word.

Pakistani ISI agent⁶ took out an American Judge or General or Ambassador who attended the opening of our law term and took a couple of Australian judges with him or her, that the agent would be guilty of a grave criminal offence against Australian law. There can be little doubt of this, even assuming he was acting on orders and in the best interests of his country?]

37 The White Paper concluded that a “lethal operation” (which is to say, executing somebody without trial) is lawful, even where there was collateral damage (which is to say, innocent civilians are killed). However, the DOJ stressed that a number of critical pre-conditions must exist before such an operation could legally be undertaken.

38 I turn then to consider in a little detail the legal framework articulated by the DOJ, its reasoning and those pre-conditions essential to the lawfulness of such lethal operations.

39 The starting point is the President’s paramount duty and authority to respond to imminent threats posed to the United States by groups such as Al-Qa’ida. The White Paper is predicated on the uncontroversial proposition that, under international law, the United States has an inherent right to national self-defence. The conclusion was that:

“Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self-defence.”

40 To get to that conclusion, the DOJ had to tip-toe through some tricky territory, legal and executive; domestic and international. For example, at least three US Presidents over the previous 40 years have issued Executive Orders against the United States’ involvement in assassinations. Further, there was a question about conducting such operations in breach of the sovereignty of those countries in which the operation was to be conducted.

⁶ The ISI is the Inter-Services Intelligence Service, the highest Pakistani security service.

41 The DOJ referred to Article 51 of the United Nations Charter which provides:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

42 Domestically, the US Constitution gives the President authority to conduct warfare but the power to declare war resides with the congress⁷. In the case of Al-Qa’ida, Congress has authorized the President to use necessary and appropriate force against Al-Qa’ida and associated forces who pose an imminent threat of violent attack. This occurred on 18 September 2001, a week after “9/11”, in a joint resolution of the 107th Congress. It is Public Law 107 and it remains in force although, as some commentators have observed, it is a little old in the tooth. It remains at the core of the US justification for its use of drones and its war on terror.

43 As to the targeting of a US Citizen, the DOJ referred to the cases of *Hamdi v Rumsfeld*, 542 US 507 at 518 and *Ex Parte Quirin*, 317 US at 37-38 where the Supreme Court held that the military may constitutionally use force against a US Citizen who is part of enemy forces. This approach is consistent with the laws of armed conflict under the Geneva Code which provides that “those who belong to armed forces or armed groups may be attacked at any time”⁸.

PROHIBITION OF ASSASSINATION AND MURDERS ABROAD

44 However, the United States has publicly had a policy against assassination for many decades. For example, in 1981, President Ronald Reagan published Executive Order 12333. This order was seen by the intelligence services, especially the Central Intelligence

⁷ *US Constitution* Article I, Section 8, Clause 11.

⁸ Second Protocol of the Geneva Conventions (1977).

Agency, to provide it with far wider powers. However, in Part 2.11 it provided;

“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”

45 Previously, EO 11905 (Gerald Ford) had banned political assassinations and EO 12036 (Jimmy Carter) had banned indirect U.S. involvement in assassinations.

46 Furthermore, section 1119 Title 18 of the *United States Code*, prohibits the killing of one American by another when the victim is outside of the United States. That section makes the overseas killing punishable in accordance with section 1111, 1112 and 1113. In essence, those sections criminalise the crime of homicide. Section 1111 defines murder and 1112 defines manslaughter. Section 1113 is concerned with attempts.

UNLAWFULNESS, NECESSITY AND JUSTIFICATION

47 However, each of those sections requires the killing to be unlawful and it is the proper construction of that word – “unlawful” – that the authors of the White Paper relied upon in concluding that neither Title 18 nor the Executive Orders against assassination prohibits the lethal operations that it was considering.

48 The White Paper concluded that there were at least two bases upon which the contemplated operation was not unlawful.

49 The first required a consideration of the common law concepts of murder and manslaughter. In each instance the word “unlawful” connotes a homicide with the absence of excuse or justification.

50 It has been held that “congress did not intend s 1119 to criminalise justifiable or excusable killings”.⁹

51 There is nothing extraordinary about this reasoning. It is the same exception to criminal responsibility that allows an accused charged with murder to plead self-defence. Self-defence generally excuses an action that would otherwise be a crime. If the accused person believes that it is necessary to defend themselves and that their response is a reasonable one in the face of the threat confronting them, their action – even the action of killing – is not unlawful.

UNLAWFULNESS: PUBLIC AUTHORITY EXCEPTION

52 The second basis upon the White Paper asserts that lethal action is not unlawful is a little more obscure. It is known as the “public authority exception”. The public authority exception is that:

“Deeds that otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life are not crimes if done with proper public authority.”¹⁰

53 It is the public authority exception that allows prison officers to lock up their prisoners and allows soldiers to kill.

54 This part of the White Paper holds that because the killing would be carried out in accordance with Law of War principles, the action are subject to the public authority exception and not unlawful. The paper concludes:

‘In some instances, therefore, the best interpretation of a criminal prohibition is that Congress intended to distinguish persons who are

⁹ *US v White* 51 F Supp 2nd 1008 (CA) (1997).

¹⁰ US Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force.

acting pursuant to public authority from those who are not, even if the statute does not make that distinction express”

Nardone v US, 302 US 379, 384 (1937).

55 The White Paper provided a compelling, if prosaic, example of this principle in operation. The prohibition on speeding in various traffic acts and regulations does not apply to a police officer pursuing a criminal or the driver of a fire engine responding to an alarm. The relevant statute or regulation might not specifically allow for an exception for police and fire-fighters but that exception is read into the statute or assumed.

56 So to recap, the White Paper contends that neither the Executive Orders prohibiting assassination, nor any relevant statute outlawing homicide, applies to the drone strikes because the action is not “unlawful”. It is not unlawful because

- It is an act done with excuse or justification – that is, it is a necessary and reasonable act of self defence.
- Further, the prohibitions do not apply because the actions are covered by the public authority exception. Put simply, this is a contention that the action is justified by the fact that it is an act done in war-time. Provided it is done in accordance with the “applicable law of war principles”, it is done with public authority and is not unlawful.

THE LAW OF WAR

57 The DOJ explains that the law of war is not infringed where the lethal operation “is authorized by an informed, high level official”. The United States is engaged in a congressionally authorized armed conflict with

Al-Q'aida and is under continual threat from Al-Q'aida operatives planning operations against it.

58 The law of war allows that:

“If a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder”.¹¹

59 The White Paper cites *State v Gut*, 13 Minn. 341, 357 where it was held:

“That it is legal to kill an alien enemy in the heat and exercise of war is undeniable; but to kill such an enemy after he has laid down his arms and especially when he is confined in prison is murder”.

60 Apart from the prohibition against summarily executing your prisoners, the Law of War also requires that an enemy combatant be provided with the opportunity to surrender.

61 For example under the Hague Convention IV, Annex, art 23 (Oct. 18, 1907) and in addition to the prohibitions specified in other conventions, it is specifically prohibited:

“(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”

62 “At discretion” is an old term used in warfare to mean an unconditional surrender whereby no guarantees are given to the surrendering party. In modern times, unconditional surrenders most often include guarantees provided by international law.

63 The rules of the International Committee of the Red Cross (Rule 47), reflecting customary law and Article 3 of the Geneva Conventions, dictate that attacking persons who are recognized as “*hors de combat*” is prohibited. A person *hors de combat* is:

¹¹ LaFave, *Substantive Criminal Laws*, 10(2)c) at 136.

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender.

64 The United States has taken the position that an offer of surrender has to be made at a time when it can be received and properly acted upon. Thus, a last-minute surrender to an onrushing force may be difficult (or not feasible) to accept.

65 In the context of drone strikes, a question arises as to how a person might surrender when physical distance and blissful ignorance of the impending attack makes it impossible to indicate an intention to surrender or, even putting aside the practical problems, may subject the person surrendering to charges of desertion. Hypothetically, if a drone is hovering over a Pakistani village and people come out with their hands up looking to the sky, would the United States accept this as surrender? And how would such surrender be enforced?

66 The United States has taken the position that retreating combatants, if they do not communicate an offer of surrender, and whether armed or not, are still subject to attack and that there is no obligation to offer an opportunity to surrender before an attack.¹²

67 The Department of Justice White Paper acknowledges the requirement that, for the act to be lawful, the aforementioned (not to say nameless and faceless) “high level official” must determine that a “capture operation is infeasible”. Further, there must be monitoring before the operation is executed to see whether capture becomes feasible.

¹² United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Rule of Law of War, 10 April 1992, ILM, Vol 31, pg 642-643.

- 68 Another pre-condition of lawfulness is that the informed, high level official must determine that the risk of an attack on the United States is “imminent”. The White Paper concludes that the threat posed by al-Qai'da demands “a broader concept of imminence in judging when a person is continually planning a terrorist attack presents an imminent threat.” The DOJ says that the pre-condition of imminence does **not** require the US to have clear evidence that specific attack on US persons and interests will take place in the immediate future. While that tells the reader what “imminent” does not mean, it seems that it is left to the high ranking official to determine what imminent does mean.
- 69 There is, of course, an element of Humpty Dumpty in all of this. You will recall the passage from *Through the Looking Glass and what Alice Found There*:

“And only **one** for birthday presents, you know. There's glory for you!”

‘I don't know what you mean by "glory",’ Alice said.

Humpty Dumpty smiled contemptuously. ‘Of course you don't — till I tell you. I meant "there's a nice knock-down argument for you!”’

‘But "glory" doesn't mean "a nice knock-down argument”,’ Alice objected.

‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

‘The question is,’ said Alice, ‘whether you **can** make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master — that's all.’”

FOURTH AND FIFTH AMENDMENTS

- 70 Because the DOJ's advice related to targeted operations on US citizens, the White Paper also deals with the rights enjoyed by US citizens under the 4th and 5th (and, implicitly, the 16th) Amendment to the US Constitution.
- 71 The fourth amendment outlaws unlawful seizures while the fifth and 16th amendment gives citizens a right to due process. The White Paper acknowledges that these rights attach to US citizens even when they are abroad, but advises that those constitutional immunities would cease to exist if the target was held to be in the leadership group of al-Qa'ida or its associate forces.
- 72 The due process clause would not prohibit the kind of lethal operations discussed in the paper. The majority in the case of *Hamdi v Rumsfeld* explained that there is a process of weighing "the private interest that will be affected by the official action" against the public or Government interest in waging war and protecting its citizens.
- 73 The DOJ acknowledges that the private interest (that is, the right not to be killed) is "weighty" and notes that the Supreme Court held in *Ake v Oklahoma*, 470 US 68, 178 (1985) that the private interest in an individual's life or liberty is almost uniquely compelling. However, the paper notes that the government interest in protecting its citizens and removing the threat posed by members of the enemy is also compelling.
- 74 It concludes that the balance ultimately falls with the government. It relies on the decision in *Hamdi v Rumsfeld* where it was held (at 531):

- “On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States”
- “The realities of combat” render certain uses of force “necessary and appropriate” including force against US citizens who have joined enemy forces and whose activities pose an imminent threat of violent attack against the United States.
- “Due process analysis need not blink at those realities.”¹³
- Those same realities must also be considered in assessing “the burdens the Government would face in providing greater process” to a member of enemy forces.

75 *Hamdi* was an action for *habeas corpus* brought by the father of a young American who was captured in Afghanistan and determined to be an “enemy competent”. He was held in detention. The father said that he went to Afghanistan to do “relief work”. As the case made its way through the courts, the arguments centred around the requirement for the government to produce documentation justifying its position. The Government argued that the congress’ authorization for the President to use “necessary and appropriate force” justified the detention without more and that Hamdi was entitled to limited judicial inquiry into his detention’s legality under the war powers and not to a searching review of the factual determinations underlying his seizure. The intermediate appellate courts upheld the Government’s argument.

76 However, a Supreme Court majority held that Hamdi was entitled to “a meaningful opportunity to contest the factual basis for his detention

¹³ John Carey, William V. Dunlap, Robert John Pritchard, *International Humanitarian Law* (2006) Transnational Publishers, 32.

before a neutral decision maker”. In other words, he was entitled to due process.¹⁴

77 While relying on the Court upholding the right of the Government to detain the US Citizen, the White Paper did not grapple with the fact it also concluded that the citizen was entitled to at least a limited form of due process. As I read it, this is a major omission and potential flaw in the reasoning within the White Paper. It is a kind of jurisprudential, Humpty Dumpty-esque, side-step of the majority opinion.

LOCATION OF ATTACK AND THE THEATRE OF WAR PRINCIPLE

78 A particularly difficult area for the DOJ concerned the location of the operation. Generally, the Law of War limits the legality of the use of force and requires it to be confined to the area of the armed conflict.

79 The United Nations Charter limits the right to use force to self-defence or with Security Council authorization. Lawful force in either case must be limited to what is **necessary and proportional** to achieve the lawful purpose. A state acts in lawful self-defence when it responds to an armed attack using only necessary and proportional force. This restriction on permissible force extends to both the quantity of force used and the geographic scope of its use.

80 The DOJ argues that the United States’ intrinsic right to self-defence extends beyond any geographical barriers. It justifies this position by redefining the scope of proportionality and necessity. The White Paper says that US retains its authority to use force outside of an area of active hostilities where the criteria is met that there is a suspicion that someone is planning an attack on its people. The “theatre of war”

¹⁴ Justice O’Connor announced the judgment of the Court and delivered an opinion, in which the Chief Justice, Justice Kennedy, and Justice Breyer join. Justice Scalia and Thomas dissented and Justice Souter dissented in part.

concept, hitherto central to a consideration of what is necessary or proportional, is thereby either greatly expanded or abolished.

81 This aspect of the use of drones is central to the hypothetical case that I commenced with – the taking out of an ISIS or Al-Q’aida enemy target at the Sydney Mosque.

82 On 3 November 2002, agents of the CIA, using an unmanned Predator drone, fired a Hellfire missile against a vehicle in remote Yemen. Six men were killed. One of those men was suspected of being a high-ranking al-Qaeda lieutenant. The rest were civilians. Following the strike, then 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.”

83 The Deputy General Counsel of the Department of Defense for International Affairs, Charles Allen, made even clearer how the US administration viewed the Yemen killings. He said the U.S. could target “al-Qaeda and other international terrorists around the world, and those who support such terrorists.” He said that suspects could be targeted and killed on the streets of Hamburg [or, presumably, the streets of Nuremberg or the streets of Auburn].

84 The DOJ says in the White Paper that there is no authority to support the contention that it is unlawful to engage the enemy when it plans and executes operations outside of the original area of armed conflict. It relies on the precedent and advice given by a Department of State Legal Advisor during the Vietnam War. That advice justified bombings of the Viet Cong who were in Cambodia – even though Cambodia was not at war and very much did not want to be at war. The advice and justification during the Cambodian campaign was:

“If a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state”.¹⁵

85 This concept of anticipatory self-defence by action that appears to infringe the sovereignty of a neutral power actually has its roots in North American history and in an incident that came to be known as the *Caroline Affair*. In this incident in 1837, Canadian rebels seeking an independent Republic took refuge on the US side of the Niagara River. Americans were aiding them with supplies using a ship called the *Caroline*. The British Navy and a loyal Canadian soldier attacked the rebels, seized the ship, set it ablaze and cast it adrift over the Niagara Falls. The US was in uproar but its protests were ignored. Ultimately, in settling a number of border disputes, the US accepted the employment of such force may be justified in such circumstances.¹⁶

86 Apart from circumstances such as those, the DOJ also says that

“an operation outside of any area of armed conflict would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nations government”

87 So, my hypothetical targeting of the Mosque at Auburn would be lawful if the Prime Minister was persuaded to consent to the US remotely targeting terrorist threats against US citizens or targets that are being planned within Australia.

88 But it is critical to emphasise that the US does not accept that consent is a necessary pre-condition of using drone strikes in neutral (or even friendly) countries. The full quote from the White Paper is this:

“An operation outside of any area of armed conflict would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nations government or

¹⁵ Richard A. Falk, *The Vietnam War and International Law: The Widening Context*, (1972) 23.

¹⁶ Webster-Ashburton Treaty 1842

after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted.”

89 In other words, if the Australian Government did not consent, but the “a determination was made” that its police and security forces were dropping the ball, the US would be justified in executing a targeted killing in Australia.

SUMMARY OF THE WHITE PAPER’S CONCLUSIONS

90 To summarise then, the white Paper’s position, the lethal operation will be lawful if the following conditions apply:¹⁷

1. A high level official determines that an individual poses an imminent threat of violent attack against the United States
2. A capture operation is not feasible.
3. Those conducting the operation continue to monitor whether capture becomes feasible
4. The operation is consistent with applicable law of war principles.

91 It will be justified outside of the area of conflict if either:

5. The neutral or friendly nation consents to the operation OR
6. A determination is made that the neutral nation is incapable or unwilling to suppress the threat.

92 So, turning to the question posed in the subject matter of these remarks – do these targeted killings or drone strikes amount to

¹⁷ Note that this is the author’s summary and not an official DOJ synopsis.

murder? – The United States Department of Justice concludes emphatically that the answer is no.

QUESTIONS ARISING

93 Parts of the DOJ's analysis are compelling and convincing. But it raised many more questions in my mind than it answered. For example:

1. Who, and what, is the putative high level official? According to my viewing of *Homeland* the decision is made by a crazy blonde woman who can't really act in the US Embassy in Islamabad. But seriously, how far up the chain of command does somebody have to be before they qualify as a "high level official" qualified to make the solemn determinations as to "imminence", "proportionality" and the risk of the slaughter of innocent bystanders?

94 After the first Pakistan drone strike under President Obama resulted in a large number of civilian casualties, it was widely reported that the President insisted that he be the final decision maker in all cases where the CIA did not have a "near certainty" of "zero civilian deaths". And the reports of the number of civilian deaths – to which I will return - suggests that the targeting has been much more discriminating in later years.

2. Is the expansive definition of "imminent" justifiable in international law?

3. When is capture “infeasible” and what checks and balances are there on the requirement for monitoring that capture does not become feasible before the button is pressed?
4. How, and by whom, is a “determination made” that a neutral country is unwilling or unable to prevent the activities of the terrorists?
5. Finally, is any of this subject to an open and judicial review or subject to the international criminal courts and if it is?
 - If it were held that the risk or threat of attack was not imminent, is it murder or manslaughter?
 - If it is discovered that nobody, including the putative high level official, monitored the feasibility of capture – is the action unlawful?

RESPONSES TO THE WHITE PAPER AND TO THE US POLICY OF TARGETED KILLINGS

- 95 Since NBC published the leaked White Paper, there have been many academic and journalistic responses. Further, there has been a diplomatic war of words raging in relation to the US policy of targeted killings and the use of drones.
- 96 Not surprisingly, the major issue taken with the drone programme is the extent of collateral damage, which is a nice way of saying the number of innocent people killed to take out one target. How does one ever do the maths to determine whether this can be justified? It is reasonable, I think, to suspect that our putative “high level official” might not value to

the lives of Afghani, Pakistani and Yemeni civilians quite as highly as the lives of Americans.

97 I will return to the question of the numbers of civilian casualties but they are, to say the least, controversial.

Corn and Jensen

98 In the Temple Law Review two experienced servicemen and academics, Geoffrey Corn and Eric Jensen, considered the applicability of the laws of war in the age of America's "war on terror". In their 44 page article bearing the catchy title "*Untying the Gordian Knot*,"¹⁸ the writers examined and explained the difficulties of applying traditional principles of war to a completely different and new kind of war, being the "fight against terrorism."

99 The authors believe that trying to characterize the "war on terror" as within the scope of articles 2 and 3 of the Geneva Conventions is like putting the proverbial square peg into a round hole.

100 Other commentators maintain that it is this difficulty in categorizing terrorist actions within the scope of traditional laws that allows countries like America to justify its apparent subversion or sidestepping of international covenants and recognized principles of warfare.¹⁹

Masters (quoting Alston)

101 A good article by Jonathan Masters was published by the Council on Foreign Relations (a self-described "independent, non-partisan think tank" largely out of Washington and New York). Masters notes that the

¹⁸ Geoffrey S. Corn & Eric Talbot Jensen, 'Untying The Gordian Knot: A Proposal For Determining Applicability of The Laws Of War to The War on Terror' *The Temple Law Review*, Vol. 81.

¹⁹ See, for example, Mary O'Connell, Notre Dame University, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*.

challenge for the US government is the balance of “several opposing imperatives” –

- Asserting broad war powers while assuring critics that there are some limitations
- Justifying actions that remain covert
- Promoting government transparency while protecting sensitive intelligence programs.

102 Masters quotes Philip Alston. Alston is an international lawyer, academic and head of the New York University’s Centre of Human Rights and Global Justice. He held a number of senior positions at the United Nations over two decades including that of United Nations Special Rapporteur²⁰ on Extrajudicial, Summary, or arbitrary executions. He puts the position plainly:

“If other states were to claim the broad-based authority that the United States does - to kill people anywhere, anytime - the result would be chaos.”

Three articles in support

103 Three academic articles all support the general lawfulness of drone strikes but leave open the question of specific strikes.

Orr

104 Andrew Orr published an article in Cornell International Law Journal in 2011. His article focused on the drone programme in Pakistan and on

²⁰ A special rapporteur is an investigator within the UN’s special procedure mechanism which examines, monitors, advises, and publicly reports on human rights issues.

both US domestic law and international law, specifically the Law of War. Orr has a penchant for Latin and so he calls the law of war *Jus in Bello*.²¹ Orr says that the use of drone strikes does NOT constitute an act of aggression under international law because it is “lawfully self defensive”. He argues that the conflict between the US and Al-Q’aida is an “armed conflict” and relies on decisions of the International Criminal Court in two cases that came out of the Yugoslavia conflict.²² The two prongs of the test for armed conflict are

- (i) The intensity of the conflict and
- (ii) The organization of the parties.

105 Based on those criteria, Orr argues that there is an armed conflict. Accordingly, it is lawful – under the customary laws of armed conflict - to target high level leaders of the enemy provided that the principles of “proportionality” and “distinction” are followed. I will return to those principles.

106 As to the fact that the attacks are taking place in a (theoretically) friendly nation, Orr’s article anticipated the approach taken in the White Paper noting FIRST, that Pakistan consents to the strikes and SECOND, that Pakistan is either unable or unwilling to control the activities of Al-Quaida and the Taliban in the tribal areas.

²¹ *Jus in bello* are the laws that govern the actions of the belligerents within an armed conflict. *Jus ad bellum* are the protocols governing when the use of force is justified in the first place.

²² Prosecutor v. Boskoski and Tarculovski (Trial Judgment), IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 July 2008.

Blank

- 107 Laurie Blank reasons in a very similar way in his article with a very punchy name: *After “Top Gun”: How Drone Strikes Impact on the Law of War.*²³
- 108 Blank carefully analysed the four guiding principles of the Law of War:
- *Distinction* – that is, the operation must distinguish between the enemy combatants and civilians.
 - *Proportionality* – that is, the military advantage gained by the action must be proportional to the damage it does.
 - *Necessity* – that is, the action must be necessary in the defence of the perpetrator and its populace.
 - *Humanity* – the action must not cause unnecessary suffering.
- 109 Blank argues that the surveillance capacity of drones – their ability to monitor the movements of the target and the presence of civilians in the area of the proposed strike – increases the likelihood that their use will be lawful under international law. That is, they have a greater capacity than traditional methods to distinguish. However, he raises a concern that the capacity of unmanned aircraft to strike with no risk to its own military, will lead powers with the technological capacity to avoid traditional military operations altogether.
- 110 That is, (and these are my words, not Blank’s) - the prerequisite that capture must be infeasible will simply be ignored.
- 111 A detailed *New York Times* article in May 2012 (Becker and Shane) made the same point, and asserted it went to the very top (ie POTUS).

²³ Laurie R. Blank, ‘After “Top Gun”: How Drone Strikes Impact the Law of War’ 33 *U. Pa. J. Int’l L.* 675 (2012).

It said that President Obama “avoided the complications of the [legality of] detentions by deciding in effect to take no prisoner’s alive”. You will recall that the increase of the drone programme coincided with the massive adverse publicity surrounding the rendition and detention of enemy combatants in places like Guantanamo Bay (Cuba) and Abu Ghraib (Iraq). Becker and Shane quoted Saxby Chambliss, Republican Senator of Georgia:

“Their policy is to take out high-value targets, versus capturing high-value targets. They are not going to advertise that, but that’s what they are doing”.

Vogel

112 In *Drone Warfare and the Law of Armed Conflict*²⁴, Ryan J Vogel, a Foreign Affairs Specialist with the US Department of Defence, adopts much the same reasoning as both Orr and Blank. In other words, in principle and generally speaking, the drone programme is not inconsistent with International Law or with the Law of Armed Conflict.

113 The consistent themes in these articles are as follows:

1. There is an armed conflict between the US and Al-Qaida
2. The US is entitled to act in anticipatory self-defence.
3. Such actions can be carried out in areas outside any recognized area of the armed conflict without breaching sovereignty provided either (i) there is consent from the target country or (ii) the target country is unwilling or unable to control the insurgents (or enemy combatants).

²⁴ Ryan J Vogel, ‘Drone Warfare and the Law of Armed Conflict’ (2010).

4. Provided the particular action is targeted and proportionate, there will be no breach of the International Covenant or the Law of War.

114 However, each of the articles acknowledge (at least implicitly) that the lawfulness of any particular action will turn on the facts and circumstances of that case.

115 Vogel accepts that the use of drones provides new complexities in the application of international law and came up with ten guiding principles to determine or ensure compliance with international law:

1. Any drone strike must be necessary for the accomplishment of an actual military objective.
2. A drone strike must be directed only at lawful targets—i.e., combatants, civilians who have forfeited their protections by directly participating in hostilities, and military objectives.
3. Commanders and operators must not authorize a drone strike when they know or reasonably should know that the strike will cause excessive collateral effects to civilians or civilian property.
4. Commanders and operators must strike a proportional balance between the risk to civilians or civilian objects and the military advantage expected when using drones to conduct attacks.
5. Commanders and operators must exercise constant care and reasonable precaution to spare the civilian population from death and destruction.
6. Commanders and operators must not conduct drone strikes where there is a high likelihood that the strike will cause unnecessary suffering or superfluous injury.
7. A drone strike must be conducted within the framework of an actual armed conflict.
8. A drone strike should be conducted only by lawful combatants.
9. Commanders and operators should receive prior consent (even if blanket approval) from the state in whose territory the strike will occur, unless that state is unwilling or unable to control the threatening activities within its own territory.

10. Although not required by law, commanders and operators may benefit in certain circumstances from pursuing a non-lethal course of action if a target might just as easily be captured and detained, within reason and subject to force protection concerns.

116 Having been through Vogel's proposed laws or governing principles, I have to share with you what may be my favourite quotation arising from the research I have done for today. It comes from Michael Leiter, the former head of the US National Counterterrorism Centre. Leiter was asked about the possibilities of laws or rules to govern the use of targeted killings and responded:

"You can pass a lot of laws. Those laws are not going to get Bin Ladin dead."

117 Another pertinent quote comes from General William Tecumseh Sherman as he marched his Union troops through Georgia destroying everything in his path. Sherman said

"War is all hell. There is no reforming it."

An article against: Mary O'Connell

118 At the other end of the academic debate is an article by Mary O'Connell published through the University of Notre Dame Law School. The article's title provides an overview of its contents: *Unlawful Killing with Combat Drones*.²⁵

119 The article is specifically concerned with the use of drones in Pakistan between 2004-2009. O'Connell's view is that on no view of international law, are the strikes lawful. She argues that the US is exposing itself both to allegations of breach of international and

²⁵ Mary O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan', 2004-2009, (2010) University of Notre Dame Law School.

domestic criminal law and to actions for damages. It is a lengthy and well-reasoned piece of work and it is impossible to do it justice in the time available but some of O'Connell's points are these.

1. Contrary to the view expressed by Blank, the drones' capacity for surveillance is limited and increases, rather than decreases, the risk of civilian casualties. This is because the operators of the drones become overly reliant on the drones' capacity and artificial intelligence and not reliant on what is often more reliable intelligence gathered on the ground.
2. She draws a distinction between two types of drone strikes; those carried out by the military and those carried out by the CIA. O'Connell says that the military is far more reliant on intelligence gathered 'on the ground' whereas the CIA, which is largely responsible for the strikes in Western Pakistan, have very little if any reliable intelligence on the ground.
3. Legally, she notes that the CIA agents are civilians – not military personnel – and therefore have no right to take direct part in hostilities. The Geneva Conventions²⁶ only authorize the **armed forces** of a party to a conflict to engage in hostilities. She argues that:

“CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants. They may be charged with a crime.”

²⁶ Article 43(2) Additional Protocol 1 of 1977 to The Geneva Conventions.

4. She argues that a response to a terrorist attack will “almost never” meet the criteria justifying the use of force under Article 51 of the UN Charter. Terrorist acts are generally regarded as criminal offences, rather than an armed attack under the international law of armed conflict. She refers to the **Nicaragua Case**²⁷ where the International Court of Justice held:

“Low level shipments of arms did not amount to an armed attack and could not be invoked as the basis for self defence”

She also relies on the **Oil Platforms case (Iran v US)**²⁸ where the IJC held that an armed attack giving rise to a right of self defence under the law of armed conflict must involve a “significant amount of force” – for example, it must be more than a frontier incident or sporadic rocket fire across a border.

5. She also says that the circumstances in Pakistan cannot justify the breach of Pakistan sovereignty. She says that while there may have been consent to US aid for particular operations, Pakistan has NOT generally consented to the US carrying out the drone program. Nor (according to the author) has Pakistan shown itself to be unwilling or incapable of dealing the insurgents. She argues:

"There simply is no right to use military force against a terrorist suspect far from any battlefield."

6. She quotes the 1996 book “*On Killing*” by Lieutenant Colonel Dave Grossman which identifies factors that overcome the average

²⁷ Nicaragua v US 1986 ICJ 14, 195.

²⁸ Oil Platforms case (Iran v US) 2003 ICJ 161, 191 (Nov 6).

individual's resistance to killing. Many of those factors come together in the use of drones. In particular, both the physical and emotional distance between the victim and the operator are potent forces. She puts it thus:

“A 20-something Christian Air Force pilot living with her two children in suburban Las Vegas who views a monitor to locate her targets would seem to be as distant as one can be from targets in rural Muslim Pakistan. Television and YouTube video of drone pilots on the job reveal a set up that looks very much like a video game.”

120 Putting to one side the legality and morality of the strikes, O'Connell also argues strongly that the strikes are strategically counterproductive. For every high level target that is taken out, another ten or a hundred militants are born. The drones create terror in the population. She quotes other academics²⁹ for the proposition:

“While violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar and often kills more civilians than militants.”

121 Many of the opponents to the programme, both domestically and internationally, make this point. The US drone strike program is now the most popular propaganda and recruiting tool used by the Taliban, Al-Qaida and the Islamic State.

²⁹ Kilcullen and Exum, 'Death From Above, Outrage Down *Below*,' *New York Times*, March 17, 2009.

COLLATERAL DAMAGE

122 What all of this leads to is this: there are value judgments and moral imperatives surrounding the principles guiding the Law of Armed Conflict and in particular the questions of proportionality and humanity. These questions centre around the killing of civilians.

123 International law does not prohibit civilian casualties, but requires that targeting decisions must avoid civilian casualties that are excessive in relation to military advantage to be gained. Article 51 of the Geneva Conventions first protocol, outlaws indiscriminate attacks but goes on to provide:

“An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁰

124 So, assuming all other boxes are ticked, the real question in any particular case, is whether the ends (the military advantage) justifies the means (the collateral civilian casualties). Here we encounter an almost impenetrable problem of proof. Official (and non-official) estimates of civilian casualties vary wildly each time a drone strike is carried out.

125 In a speech in 2011, the President’s senior advisor (John O Brennan) asserted that in a year of drone strikes in Pakistan, there was not a single non-combatant killed. Another official said that the number of civilians killed in drone strikes in Pakistan was in “single digits”.

126 One reason for this extraordinary low estimate arises from the controversial method by which the administration defines “civilian” or

³⁰ Geneva Convention, Article 51, 5(b)

“non-combatant”. In effect, it counts all military age males in the strike zone as being combatants unless there is explicit intelligence posthumously proving them innocent.³¹

127 On the other hand, organisations such as the Bureau of Investigative Journalism (based in the City University in London) publish estimates each time a drone strike occurs. They also publish tables for each year and a cumulative running count.

128 In 2011, when the US administration were claiming zero and “single digit” civilian casualties, the Bureau published a table asserting that of the 363-666 people killed in 75 strikes, 52-152 were civilians including between 6-11 children.

<i>CIA strikes – Obama 2011</i>	
Total CIA drone strikes	75
Total reported killed:	363-666
Civilians reported killed:	52-152
Children reported killed:	6-11
Total reported injured:	158-236

129 The table published for 2015 shows the impressive decrease since the President asserted ultimate responsibility for attacks where “zero civilian casualties could not be guaranteed by the CIA:

<i>CIA strikes – Obama 2015</i>	
Total CIA drone strikes	12
Total reported killed:	57-79
Civilians reported killed:	2-5
Children reported killed:	0
Total reported injured:	21-28

130 The Bureau’s Cumulative total since the programme began is:

³¹ Becker and Shane, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, New York Times, 29 June 2012.

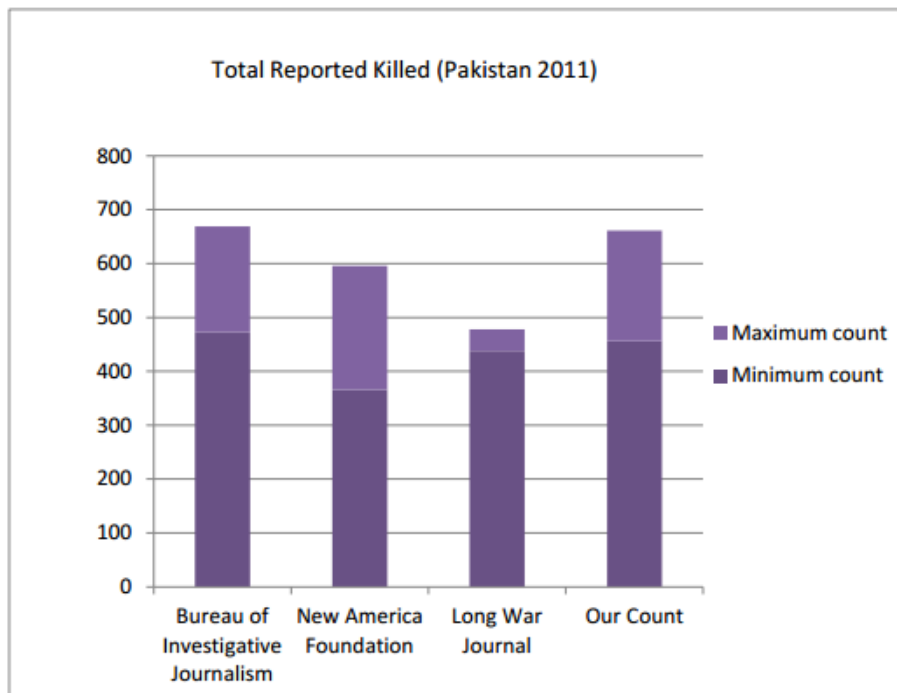
Total strikes: **420**

Total killed: **2,471-3,983**

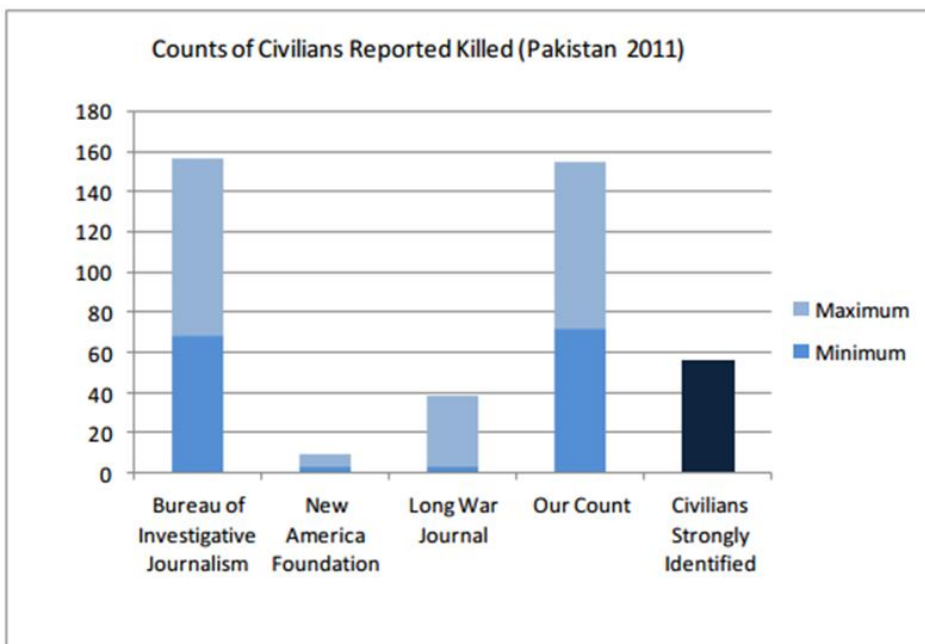
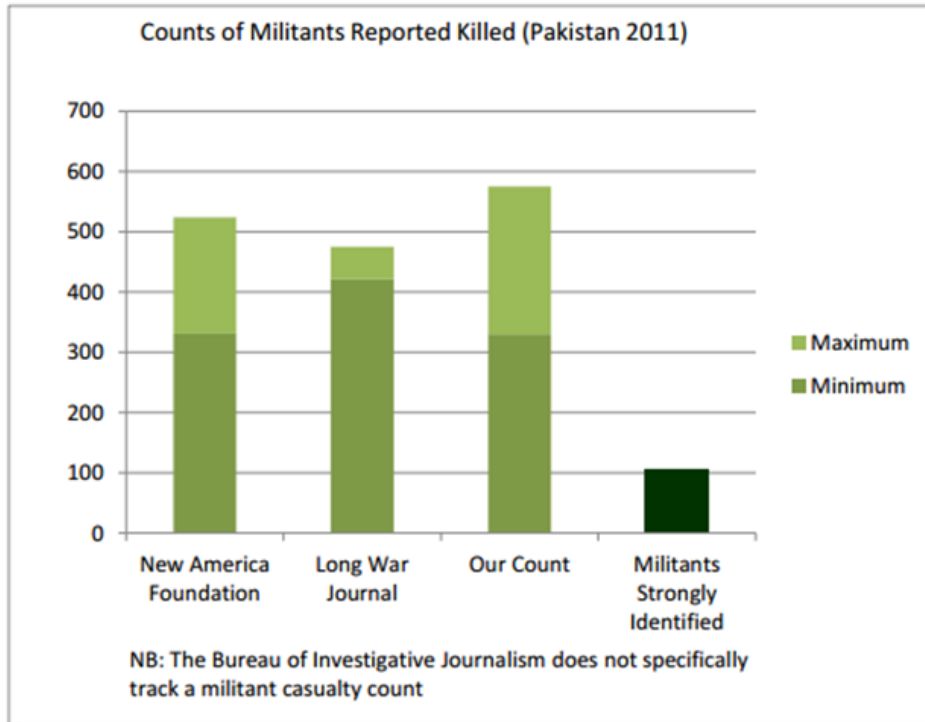
Civilians killed: **423-965**

Children killed: **172-207**

- 131 The Columbia Law School, Human Rights Clinic published a detailed analysis of casualties in a paper published in October 2012.³² It noted the wild fluctuations in estimates of civilian casualties and rejected reliance on media reports as being utterly unreliable. It carried out a 'strike by strike' analysis. The numbers ultimately published were roughly in line with those published by the Bureau of Investigative Journalism.



³² Columbia Law School, *Counting Drone Strike Deaths*, The Human Rights Clinic, October 2012



132 You can see from these tables the wild variations in the numbers reported by apparently reputable sources.

133 The *New America Foundation* is described as an independent, non-partisan think-tank. Its website says that it is “dedicated to the renewal

of American politics, prosperity, and purpose in the Digital Age.” Its website says nothing about its ability to count.

134 The *Long War Journal* describes itself as being dedicated to providing original and accurate reporting and analysis of the Long War (also known as the Global War on Terror).

135 Whether the killing of around 100 civilians to take out 500 militants is proportionate is a matter upon which minds might differ. It may depend on the intelligence regarding the militants, an evaluation of the threats that they posed and precisely what military advantage is to be obtained.

136 Yet another complication arises when the combatants deliberately take refuge in areas of civilian populations including schools and in the vicinity of hospitals.

US APPROACH TO THE INTERNATIONAL CRIMINAL COURT

137 It is well known that the US takes a rather jaundiced view of the International Criminal Court and has made various attempts to prevent US nationals from being tried by the court. It has been the most open and vocal state in opposing the Court and its jurisdiction. [The second most vocal opponent is Israel which also has its own programme of targeted assassinations.]

138 The United States has not signed the Rome Statute (1998) which created the International Criminal Court and the jurisdiction of the ICC over its citizens is not acknowledged.

139 Nevertheless, the Chief Prosecutor of the ICC, Luis Mereno Ocampo, has asserted jurisdiction over all NATO and US forces in Afghanistan and is quoted as saying there is a preliminary investigation in war

crimes in that theatre³³. In its November 2013 Report on Preliminary Examination Activities, the ICC prosecutor's office found that "war crimes and crimes against humanity were and continue to be committed in Afghanistan."

140 In the 2014 report the ICC found that "members of the US military in Afghanistan used so-called 'enhanced interrogation techniques' against conflict-related detainees," which could amount to the war crimes of "cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence." The Court is now at the stage of weighing the gravity of the alleged U.S. war crimes, and whether America's own system of investigations and willingness to prosecute ("national proceedings") are genuine.³⁴

THE NUREMBERG DEFENCE?³⁵

141 Some of the Nazi defendants in the trials conducted here after the Second World War asserted that they were only following orders. The German is "*befehl ist befehl*" – an order is an order. It is sometimes called the "Nuremberg defence" or, perhaps more correctly, the defence of superior orders. The operator or "pilot" of a drone could no doubt make a similar argument. It is surely not his or her decision to undertake the operation.

142 The fourth principle established after the Nuremberg trials was to the effect that the fact that a person acted under order of its government or a superior officer does NOT relieve a person of responsibility under international law provided that a moral choice was in fact possible.

³³ Shane Harris, 'Are Drone Strikes Murder' (2010) *National Journal* 14.

³⁴ Human Rights Watch, *Afghanistan: ICC Prosecutor Finds Grave Crimes, Finding Should Trigger Full Analysis, Fact-Finding Mission*, December 2013. The 2014 report says The Office will continue to analyse allegations of crimes committed in Afghanistan, and to assess the admissibility of the potential cases identified above in order to reach a decision on whether to seek authorization from the Pre-Trial Chamber to open an investigation of the situation in Afghanistan pursuant to article 15(3) of the Statute.

³⁵ Ironically, time did not permit this part of the paper to be presented at the conference in Nuremberg.

143 Article 33 of the *Rome Statute* (1998) provides that the fact that a defendant acts under orders of its government or a superior shall not relieve them of criminal responsibility unless:

(a) There is a legal obligation to obey the order.

(b) The person did not know that the order was unlawful, AND

(c) The order was not manifestly unlawful.

144 There is a view that this defence might run for some war crimes but would never relieve responsibility or provide a defence for acts of genocide.

145 Given the different legal opinions concerning the lawfulness of the drone strike programme, it seems likely that the defence may have some applicability to those at the bottom of the chain of command if a particular strike was held to constitute a violation of international law.

CONCLUSION

146 The history of war is written by the winners.

147 There is little doubt, as has been acknowledged by senior US officials, that the relevant CIA agents would be convicted if tried in the Yemeni courts of justice. Indeed, it is unlikely that the case would get to trial. The Yemeni people would be far more likely to dispense a summary form of a justice.

148 If the ICC ever investigates individual drone strikes or the programme generally, it will be confronted with a distinct lack of evidence as to the intelligence upon which the US acts. It will then be confronted with an overabundance of evidence of the civilian casualties, most of it unreliable, all of it contradictory.

- 149 A real question for the international law is whether the Law of War as it currently exists is sufficient to deal with these kinds of new technologies and this kind of warfare. Academics are divided on this issue.
- 150 When I concluded my first draft of this paper, my personal view was that further laws were not necessary. My feeling was that the law of Armed Conflict as presently understood, encompasses both the prosecution of offences under international law and also the defences of necessity and proportionality that have historically been acknowledged to justify acts that, outside of times of war, would clearly constitute murder. However, I have to say that the more I read of academic article on either side of the debate, and given the changing nature of international conflict, the more I consider that this initial view may be wrong.
- 151 So, is it murder? I will leave that for you to judge.

-oOo-