

Mario Einaudi

**Center for
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Studies**

No. 2-12

Working Paper Series

A “War on Terror” by any other name... What did Obama change?

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September 2012

(Updated February 2013)

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Abstract

Barack Obama came into office promising a major departure from the policies of his predecessor regarding the so-called Global War on Terror. This paper compares the policies of the Bush and Obama administrations on four issues: 1) treatment of prisoners, particularly indefinite detention at Guantánamo Bay and trial by military commissions; 2) kidnapping, “extraordinary rendition,” and torture of terrorist suspects; 3) targeted killings by unpiloted aerial vehicles or “drones;” and 4) preventive wars and “humanitarian interventions.” It considers four main indicators of change: 1) whether the Obama administration continued existing policies or stopped them; 2) whether it publicly stigmatized illegal practices or remained silent; 3) whether or not it investigated crimes of Bush officials and punished the perpetrators; and 4) whether the Obama administration expanded the practices of its predecessors. The fourth indicator is most relevant to the topic of drone attacks, where the administration extended the practice of targeting killing by drones in number, frequency, space, and by category of target beyond what the Bush administration did. The paper concludes with brief speculation about the impact of the Obama administration’s policies – and other factors -- on the evolution of legal and ethical norms governing the struggle against terrorism.

About the Author

Matthew Evangelista is the President White Professor of History and Political Science in the Department of Government. Evangelista’s current teaching and research interests focus on the relationship between gender, nationalism, and war; ethical and legal issues in international affairs (particularly, just war theory and international humanitarian law); transnational relations; and separatist movements. He is a prolific author and among his most recent books is *Gender, Nationalism, and War: Conflict on the Movie Screen* (Cambridge, UK: Cambridge University Press, 2011).

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A “War on Terror” by any other name...What did Obama change?¹

Matthew Evangelista, Cornell University

September 2012 (Updated February 2013)

Barack Obama came into office promising a major departure from the policies of his predecessor. With background as a community activist, a Harvard law degree, and experience teaching constitutional law at the University of Chicago, he had criticized the administration of George W. Bush for posing “a false choice between adhering to domestic and international law and providing security to the American people.” Obama vowed instead “to make clear that my administration has faith in the rule of law.”² Supported by a legal team featuring such luminaries as Harold Hongju Koh, former dean of the Yale University Law School, Obama did indeed emphasize the legal basis in international and domestic law for many of his counterterrorism policies. Yet even as they abandoned the Bush administration’s terminology of a “global war on terror,” Obama’s legal advisers deployed arguments founded on an assumption of a conflict that seemingly knew neither temporal nor spatial limits. How much, then, did Obama really change?

In this paper, I compare the policies of the Bush and Obama administrations (through the end of Obama’s first term) on four key issues that emerged in the wake of the terrorist attacks of 11 September 2001: 1) treatment of prisoners, particularly their indefinite detention at Guantánamo Bay and their trial by military commissions; 2) kidnapping, “extraordinary rendition,” and torture of terrorist suspects; 3) targeted killings by unpiloted aerial vehicles or “drones;” and 4) preventive wars and “humanitarian interventions.” I conclude with brief speculation about the impact of the Obama administration’s policies – and other factors -- on the evolution of legal and ethical norms governing the struggle against terrorism.

¹ This paper is a revised version of the epilogue to the Arabic language translation of my book, *Law, Ethics, and the War on Terror* (Cambridge, UK: Polity Press, 2008), and is intended to bring the analysis to cover the first term of the Obama administration. I am grateful to Jonathan Kirshner and Judith Reppy for their comments on an earlier draft.

² Obama’s response to a questionnaire from the American Society of International law during his 2008 campaign, <http://www.asil.org/obamasurvey.cfm>.

Let us remember where things stood at the end of the Bush administration³:

- Officials had violated the Geneva Conventions and other US and international laws, including by engaging in torture and conspiracy to commit torture.
- Hundreds of people were held at Guantánamo and “black sites” elsewhere in indefinite detention, subject at best to military commissions that the US Supreme Court had judged not to afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”
- Congress had legalized those military commissions and endorsed the Bush administration’s narrow definition of torture.
- The CIA continued to carry out extraordinary renditions and targeted killings (as did the military’s Joint Special Operations Command).
- The United States was involved in two major wars. The war in Afghanistan was justified on grounds of self-defense, and endorsed by the United Nations Security Council, whereas the war in Iraq was a preventive war, condemned by most of the international community. The Bush administration invoked humanitarian concerns – overthrowing repressive regimes -- to justify both wars.

My technique is to review the relevant law, summarize how the Bush administration violated that law, and then examine the extent to which the Obama administration changed its predecessor’s policies. This is not simply an exercise in comparative public policy. It also addresses a theoretical debate of growing interest to scholars of international relations, and, in particular, of the evolution of norms. Most of the literature heretofore had focused on the *emergence* and *diffusion* of norms, with concepts such as the “norm cascade” or “norm life cycle” gaining increasing traction in the field.⁴ The policies of the Bush administration made apparent a theoretical gap in the study of norms. The common metaphors were all unidirectional and teleological: water cascades only in one direction and lives progress from birth to death. The topic of “norm death” received only the slightest attention in the literature, yet the practices of the Bush administration appeared to be wounding, if not killing, formerly robust norms – against torture, indefinite detention, assassination, and preventive war.⁵

³ Among the many sources substantiating these points, in addition to my own book, is a particularly well-documented account by Thomas Michael McDonnell, *The United States, International Law, and the Struggle against Terrorism* (London and New York: Routledge, 2011).

⁴ Martha Finnemore and Kathryn Sikkink, “International norm dynamics and political change,” *International Organization*, vol. 52 (Autumn) 1998, pp. 887-917; Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999).

⁵ For important work that seeks to fill the theoretical gap, see Ian Hurd, “Breaking and Making Norms: American Revisionism and Crises of Legitimacy,” *International Politics*, vol. 44 (2007);

To identify such norms as robust does not mean that states always honor them in practice. It means, rather, that when states violate the norms, they try to hide or deny their behavior. The norm against torture, for example, is considered a strong one. In legal terms it is a norm of *ius cogens* that does not even require a specific law to maintain its status, a “peremptory norm” that is “considered binding on all states and no derogation under any circumstances is permitted.”⁶ Nevertheless, many states engage in torture. What is rare is for leaders of states, such as former US vice president Richard Cheney, to acknowledge doing so with arguments that torture (or “enhanced interrogation,” as his administration preferred to call it) “produced phenomenal results for us” in tracking down terrorists and saving lives; it was therefore a necessary, even if illegal, practice.⁷ This view was not limited to the vice president. His claim that “everybody who was a member of the national security council was informed about the essence of the program and signed up to it” has found support in the documentary record.⁸ Such claims go beyond the standard hypocrisy which witnessed the practice of torture along with the acceptance that it was wrong. As Rosemary Foot has pointed out, although “the practice of torture has been widespread, until recently it had come to be understood that no representatives of the state could openly admit that they would use torture for fear of being removed from office and of having their state ostracized by ‘civilized’ nations.”⁹

The US violation of the norm against torture caught the attention of scholars, not least because the stigmatization and punishment of torture was one of the key examples that had come to define the human-rights revolution of the late twentieth century.¹⁰ Yet in the early years of the new millennium, some scholars were already observing “norm regress” or “norm death” and sought to explain it on the basis of “revisionist” policies adopted by Bush administration officials. Contrary to the accepted model that emphasized “internalization” of a norm as the final stage in the norm cascade, one scholar wondered whether “certain members in the Bush administration ever fully internalized the norm against torture,” as they sought to undermine it. Observing that

Ryder McKeown, “Norm Regress: Us Revisionism and the Slow Death of the Torture Norm,” *International Relations*, vol. 23, no. 1; (2009); Diana Panke and Ulrich Petersohn, “Why International Norms Disappear Sometimes,” *European Journal of International Relations* (published online 14 June 2011).

⁶ Rosemary Foot, “Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era,” *International Relations*, vol. 20, no. 2 (June) 2006, p. 132.

⁷ Chris McGreal, “Dick Cheney defends use of torture on al-Qaida leaders,” *The Guardian*, 9 September 2011.

⁸ Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (New York: Doubleday, 2008).

⁹ Foot, “Torture,” p. 132.

¹⁰ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011).

the rhetorical commitment to the normative prohibition against torture remained strong worldwide, despite US policies, he suggested that “US revisionism may have more to do with the character of the Bush administration than the characteristics of the norm itself.”¹¹

If, indeed, the death of norms such as the prohibition on torture can be attributed mainly to the deliberate revisionism of the Bush administration, then one might have anticipated the possibility of “norm resurrection” under his successor, if the policies changed. Whether that happened during Barack Obama’s first term is the focus of this paper.

In undertaking this exercise, I posited that the main indicators of change would be: 1) whether the Obama administration continued the existing policies or stopped them; 2) whether it publicly stigmatized the illegal practices or remained silent; and 3) whether it investigated the crimes of Bush officials and punished the perpetrators, or not. One might think that the first indicator should suffice: If the Obama administration halted the illegal practices of its predecessor, would that not constitute meaningful change? Are we unnecessarily raising the bar by posing two further criteria? The merits of asking about stigmatization, investigation, and punishment stem from the theoretical literature on norms and their close kin, customary international law.¹² A weakened norm would be reinforced not only by restoring practices to the *status quo ante* but by emphasizing the illegality of prior deviation from the norm. A fourth possible indicator of change (or, in this case, lack of change) only occurred to me in the course of carrying out this exercise: 4) whether the Obama administration expanded the practices of its predecessors. The fourth indicator is most relevant to the topic of drone attacks, where the administration extended the practice of targeted killing by drones in number, frequency, space, and by category of target well beyond what the Bush administration did.

Guantánamo and Military Commissions

Candidate Obama had campaigned for the presidency in 2008 with a vow to close the facility at Guantánamo Bay that had become infamous for the abuse of prisoners, violations of the Geneva Conventions, indefinite detention, and denial of due process. He had criticized the military commissions established by the Bush administration as unconstitutional and inferior to civilian trials or military courts martial in their adherence to standards of justice.

¹¹ McKeown, “Norm Regress,” pp. 9 (original emphasis), 20.

¹² For an important interdisciplinary treatment by a legal scholar, see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (New York: Cambridge University Press, 1999). For two examples of applying the analogy of customary law to the Bush administration’s approach to international norms, see Hurd, “Breaking and Making Norms;” and Matthew Evangelista, “The Power of Precedent: Will American Practice Change the Norms of International Humanitarian Law?” *Crossroads*, vol. 6, no. 1 (2006).

Obama was inaugurated as the 44th president of the United States on 20 January 2009. Two days later he issued an executive order to close the Guantánamo prison camp within a year and review the status of the inmates. The next week, in an interview with the Al-Arabiya Arab-language TV Network, Obama explained his decision as a departure from his predecessor's policy – a serious determination to fight particular terrorist organizations (defined in terms of their practice of killing civilians) – notably al Qaeda -- rather than a broad “global war on terrorism,” and a promise to do so by legal means: “I think you've already seen a commitment, in terms of closing Guantánamo, and making clear that even as we are decisive in going after terrorist organizations that would kill innocent civilians, that we're going to do so on our terms, and we're going to do so respecting the rule of law that I think makes America great.”¹³

The administration ultimately was unable to carry out its preferred policies on Guantánamo. Republicans in the US Congress deliberately obstructed Obama's attempt to close the prison there and to put terrorist suspects on trial in the United States. A closer look at the executive order itself indicates, however, that it did not represent a total break with the policies of the Bush administration. In reviewing the status of the detainees, the Obama plan offered three possibilities: 1) release them if there was insufficient evidence that they had committed crimes; 2) put them in detention in the United States awaiting trial in constitutionally authorized courts; or 3) “select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.” Human-rights activists were encouraged by the Obama decision because it reflected very closely what they had argued would be a safe and legal way of dealing with the detainees.¹⁴

The human-rights community had criticized the Bush administration's military commissions – as had the United States Supreme Court – and Obama seemed to heed that criticism when he vowed in his executive order to halt the existing commissions. The steps proposed by nongovernmental organizations coincided with the first two options offered by Obama: either release the detainees or put them on trial in proper courts. The third option was, however, potentially troubling to those committed to the rule of law. Its very wording should have been cause for concern – “select lawful means, consistent with the national security and foreign policy interests of the United States...” To state that the means would be “lawful” without specifying what the means were, and instead to invoke “national security,” sounded rather like the approach of the Bush administration. The concern was warranted: even leaving aside the Republican opposition, the Obama administration chose the ill-defined option 3 as the way to handle the Guantánamo legacy of the Bush era.

¹³ President Obama's interview with Al-Arabiya Arab TV Network, 27 January 2009, <http://www.alarabiya.net/articles/2009/01/27/65087.html>.

¹⁴ Sarah E. Mendelson, *Closing Guantánamo: From Bumper Sticker to Blueprint* (Washington, DC: Center for International and Strategic Studies, 2008).

Instead of abandoning Bush's military commissions, the Obama administration revised the law, providing some additional protections to defendants, but continued to use the commissions as the main means to try terror suspects. In a striking decision, reported exactly one year after Obama issued his executive order regarding Guantánamo, the administration announced that it would "continue to imprison without trials nearly 50 detainees at the Guantánamo Bay military prison in Cuba because a high-level task force has concluded that they are too difficult to prosecute but too dangerous to release."¹⁵ In other words, the Bush administration policy of indefinite detention would continue.

Despite its initial announcements, the administration maintained Guantánamo in operation, relied on somewhat reformed military commissions to try some suspects, but kept many in indefinite detention. Constrained by congressional legislation, it attempted to release prisoners who were found not to have committed crimes (subject to availability of countries – not including the United States -- willing to accept them), but by spring 2012, there were still 169 people imprisoned at Guantánamo.¹⁶

Torture, "Black Sites," and Extraordinary Rendition

The Bush administration pursued a deliberate policy of authorizing the use of torture to obtain information from terrorist suspects, and later from insurgents (or suspected insurgents) in Iraq and Afghanistan.¹⁷ Through the Central Intelligence Agency it actively carried out a program of "extraordinary rendition" -- kidnapping people thought to be associated with terrorism in foreign countries and forcibly sending them to third countries where they were usually tortured to extract information (or, in many cases, tortured and found innocent of any connection to terrorism). To the extent its policy related to the law, the Bush administration had employed lawyers such as John Yoo to craft legal rationales for avoiding prosecution of high-level officials in the event that they were charged under US or international law. With few exceptions, the mainstream US media at the time refrained from exposing the Bush administration's crimes and even seemed unwilling to utter the word "torture," favoring instead the administration's preferred euphemism, "enhanced interrogation techniques."

Barack Obama adopted a principled stand against torture. Even before the administration entered office in January 2009, Eric Holder, Obama's nominee for Attorney General of the United States – the top law-enforcement official – announced his judgment that the practice of "waterboarding," by which a suspect is made to feel as

¹⁵ Charlie Savage, "Detainees Will Still Be Held, but Not Tried, Official Says," *New York Times*, 22 January 2010.

¹⁶ Ben Fox, "Guantanamo Prisoners Released in El Salvador," *Huffington Post*, 19 April 2012, http://www.huffingtonpost.com/2012/04/19/guantanamo-prisoners-el-salvador_n_1438891.html.

¹⁷ For a concise summary, see Peter C. Baker, "For Real: Torture America Style," *The Nation*, 13-20 August 2012, <http://www.thenation.com/article/169064/real-torture-america-style>.

if he or she is drowning, constituted torture.¹⁸ At the same time, the media, led by Fox News, gave former Bush administration officials – particularly ex-vice president Cheney – unprecedented attention as they sought to defend waterboarding as having produced valuable intelligence to prevent terrorist attacks.¹⁹

In April 2009, the Central Intelligence Agency announced, as reported by the *New York Times*, that “it would decommission the secret overseas prisons where it subjected Al Qaeda prisoners to brutal interrogation methods” – the US media were still unwilling to use the word “torture” – “bringing to a symbolic close the most controversial counterterrorism program of the Bush administration.” Yet the same article reported that “the agency’s director, Leon E. Panetta, said agency officers who worked in the program ‘should not be investigated, let alone punished’ because the Justice Department under President George W. Bush had declared their actions legal.”²⁰ In November 2009 the *Times* reported that a US secret prison at the Bagram air base in Afghanistan continued to hold “inmates for sometimes weeks at a time and without access to the International Committee of the Red Cross.”²¹

The wording of Obama’s executive order of January 2009 originally appeared to ban the “black sites” that the CIA used to hold terrorist suspects. The day before Obama issued the order, John Rizzo, the general counsel for the CIA complained to Gregory Craig, the president’s legal adviser, that “the way this is written, you are going to take us out of the rendition business,” because the order prohibited the agency from operating overseas detention facilities to hold kidnapped suspects. According to the *New York Times*, Rizzo explained that “the CIA sometimes held such suspects for a day or two while awaiting a flight. The order appeared to outlaw that. Mr. Craig assured him that the new president had no intention of ending rendition — only its abuse, which could lead to American complicity in torture abroad. So a new definition of ‘detention facility’ was inserted, excluding places used to hold people ‘on a short-term, transitory basis.’ Problem solved — and no messy public explanation” was necessary.²²

Perhaps intimidated by all the pro-torture rhetoric emanating from its political opponents, the Obama administration took a series of measures that undercut its principled objection to the practice. It consistently defended Bush administration

¹⁸ Josh Meyer, “Eric Holder: Waterboarding is torture Attorney general nominee vows review of Bush administration’s practices,” *Chicago Tribune*, 16 January 2009.

¹⁹ BBC News, “Cheney enters ‘torture’ memos row,” 21 April 2009,
<http://news.bbc.co.uk/2/hi/8009571.stm>.

²⁰ Scott Shane, “CIA to Close Secret Prisons, Scenes of Harsh Interrogations,” *New York Times*, 10 April 2009.

²¹ Alissa J. Rubin, “Afghans Detail a Secret Prison Still Operating on a U.S. Base,” *New York Times*, 29 November 2009.

²² Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, 29 May 2012.

officials who were charged in US courts with crimes related to torture and extraordinary rendition. Particularly significant is the example of Maher Arar, a Canadian citizen who made the mistake of traveling via New York's Kennedy Airport in September 2002 as he returned home from a family holiday in Tunisia. The United States kept Arar in solitary confinement for nearly two weeks under interrogation and then "rendered" him to his native Syria, where he was held for a year and tortured until the authorities were satisfied that he was no terrorist. By 2007 the Canadian government had apologized to Arar (its security forces had tipped off the United States to his travel plans and provided incorrect information about his possible terrorist connections), declared him innocent of terrorist activities, and provided monetary compensation. The United States not only refused to apologize, but kept Arar's name on its terrorist watch list in case he should be foolish enough to travel south of the border again. In November 2009, a federal appeals court threw out Arar's suit against US officials responsible for sending him to Syria to be tortured. The court ruled that "victims of extraordinary rendition cannot sue Washington for torture suffered overseas because Congress has not authorized such lawsuits," as one radio report summarized the case.²³ By remaining silent on the Arar case, the Obama administration missed an opportunity to bolster its formal condemnation of torture and help restore the anti-torture norm.

With the end of the Bush administration, many US opponents of torture had hoped that the so-called "torture lawyers" who had invented the legal grounds to justify the practices, would be brought to justice. In addition to the possibility that lawyers such as John Yoo, Jay Bybee, and David Addington might be prosecuted for criminal conspiracy to torture, they also could face charges of professional misconduct: the purpose of government legal advisers is not to keep their bosses out of jail, but to give them the best and most accurate judgment regarding the legality of their proposed actions. In December 2009 the Obama administration intervened on behalf of John Yoo to argue before a federal appeals court that the lawsuit against him should be dropped. The suit was brought by José Padilla, then "serving a 17-year sentence for conspiring to aid Islamic extremist groups." Padilla accused Yoo "of devising legal theories that justified what he claims was his illegal detention and abusive interrogation." The Obama administration effectively defended the Bush administration official by arguing that "federal law does not allow damage claims against lawyers who advise the president on national security issues."²⁴ The White House also argued that the suit would interfere with an ongoing investigation of Yoo by the Justice Department's Office of Professional Responsibility. A month later the office reported that its investigation had cleared Yoo

²³ "Appeals Court Rules in Maher Arar Case: Innocent Victims of Extraordinary Rendition Cannot Sue in US Courts," *Democracy Now* (radio program), 3 November 2009.

²⁴ Bob Egelko, "White House wants suit against Yoo dismissed," *San Francisco Chronicle*, 8 December 2009.

of any charges of professional misconduct.²⁵ A conservative blog described the decision as “a stunning victory that exonerates the Bush Administration’s use of waterboarding.”²⁶

In August 2009, Attorney General Eric Holder had appointed a prosecutor to investigate the Central Intelligence Agency’s role in abusing suspects.²⁷ Evidence that CIA and military interrogators had tortured prisoners to death and allowed others to die in shocking conditions of confinement was already available during the Bush administration. Yet after three years of further investigation, Obama’s attorney general declared that the Justice Department “declined prosecution” on two of the most egregious cases “because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.” Although the department would “not say publicly which cases had been under investigation,” the *New York Times* reported them as those of Gul Rahman, “who died in 2002 after being shackled to a concrete wall in near-freezing temperatures at a secret CIA prison in Afghanistan known as the Salt Pit; and Manadel al-Jamadi, who died in CIA custody in 2003 at Abu Ghraib prison in Iraq, where his corpse was photographed packed in ice and wrapped in plastic.” It reported the reaction of Elisa Massimino, president of Human Rights First, an organization that sought to bring war criminals to justice: “It is hugely disappointing that with ample evidence of torture, and documented cases of some people actually being tortured to death, that the Justice Department has not been able to mount a successful prosecution and hold people responsible for these crimes.”²⁸

By our original three criteria for comparing the Bush and Obama administrations, we believe, but cannot know for sure, given the degree of secrecy in these matters, that 1) the Obama administration stopped the policy of torture; 2) it publicly stigmatized the illegal practices in general terms, but largely remained silent on the numerous specific abuses carried out during the previous administration; and 3) it failed to investigate most of the crimes of Bush officials, announcing that any acts that Bush lawyers had declared legal would not be investigated, let alone prosecuted. It declined to find guilty or punish any of the perpetrators. It allowed the CIA to maintain secret prisons abroad for holding, supposedly for only brief periods, suspected terrorists – but, again because of the secrecy, no one could know who was there or how they were treated. In sum, the international norm against torture and abuse of prisoners – so severely undermined

²⁵ Michael Isikoff and Daniel Klaidman, “Justice Official Clears Bush Lawyers in Torture Memo Probe,” *Newsweek*, 29 January 2010.

²⁶ “Bush Lawyers Cleared in Torture Memo Probe,” Conservative Blogs Central Saturday, 30 January 2010, <http://conservativeblogscentral.blogspot.com/>.

²⁷ Carrie Johnson, “Prosecutor to Probe CIA Interrogations Attorney General Parts With White House In Approving Preliminary Investigation,” *Washington Post*, 25 August 2009.

²⁸ Scott Shane, “No Charges Filed on Harsh Tactics Used by the CIA,” *New York Times*, 31 August 2012.

by the Bush administration – remained in an uncertain state by the end of the Obama's first term as president.

Targeted Killing and Drone Attacks

A central debate emerged in the wake of the 9/11 attacks, whether the effort to combat terrorism should be pursued under a war paradigm or a law-enforcement paradigm.²⁹ Under the war paradigm, if individuals are involved in armed conflict, they can be killed by drones or any other weapon. For those who favor law enforcement, a number of legal issues concerning targeted killing of terrorist suspects arise – starting with whether international or domestic law applies. If the suspects are killed – by drones, let us say – while unarmed and far from a battlefield, it is doubtful that the laws of war apply. If, however, the suspects are engaged in violent attacks in an ongoing armed conflict, they really are not “suspects” anymore, because it is obvious what they are doing. If they are caught in the act of committing violence outside a battle zone – say, setting bombs in order to murder civilians -- they can be killed according to the domestic laws of the countries where they are committing their crimes, including by drones. The gray area – and it is a very large one – concerns people who are suspected of organizing campaigns of terrorist violence, but are not targeted with weapon in hand or apprehended and put on trial, where the evidence against them can be presented. In these cases the drones serve in effect as judge, jury, and executioner. There is no due process – no public presentation of evidence of crimes, no defense lawyers, no court, no trial, no sentencing.

The Bush administration carried out wartime “decapitation” strikes against the Iraqi leadership at the onset of the 2003 war, albeit uniformly unsuccessful ones, and attacks against suspected al Qaeda militants in Pakistan in 2006 and in Somalia in 2007. But although the basic concept of drones is decades old, the advanced-technology versions had not entered into the US arsenal in large numbers during the Bush years.³⁰ The first year of the Obama administration, however, saw a dramatic increase in attacks carried out by Predator drones, and the pace never slowed. In March 2009 the *Chicago Tribune* reported that the CIA had launched 38 drone attacks during the past half year – a number that represented a four-fold increase over the year 2006-2007.³¹ By June 2012, the Obama administration had carried out some 300 strikes in Pakistan alone.³²

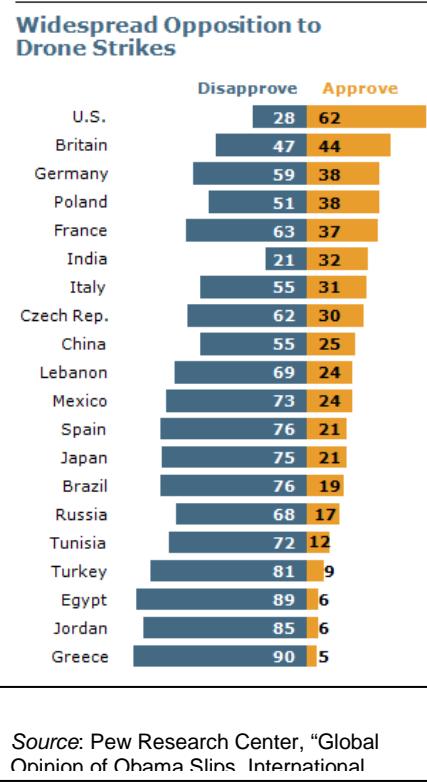
²⁹ This is a major theme of McDonnell, *The United States, International Law, and the Struggle against Terrorism*.

³⁰ For a good overview of the weapon, see John Sifton, “A Brief History of Drones,” *The Nation*, 7 February 2012.

³¹ Greg Miller, “Predator strikes in Pakistan: U.S. says drones ravage Al Qaeda CIA has launched at least 38 Predator attacks since Aug. 31, quadruple the number in all of 2006-07,” *Chicago Tribune*, 22 March 2009.

³² For information about 262 of those strikes, see Chris Kirk, “Obama’s 262 Drone Strikes in Pakistan: A map of all the reported attacks—five times as many under Obama as under Bush,” *Slate*, 8 June 2012,

The practice has been controversial in US legal and human-rights circles, and has angered many people in countries, such as Pakistan, that have seen the most extensive use of drones.³³ It has been largely accepted by the US population – approved by 62 percent in one poll from June 2012, by 83 percent in a poll from a few months earlier – but rejected by people everywhere else in the world (see below).³⁴



The relevant text for assessing the legality under international humanitarian law of targeted killings is the First Geneva Protocol, (1977), Article 51(3): "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities." In 2009, the International Committee of the Red Cross issued an Interpretive Guidance, providing its views on the notion of "direct participation in

http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/06/obama_drone_strikes_the_president_ordered_more_than_george_w_bush.html.

³³ International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (New York University School of Law), *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012).

³⁴ Pew Research Center, "Global Opinion of Obama Slips, International Policies Faulted, 13 June 2012, <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/>; Scott Wilson and Jon Cohen "Poll finds broad support for Obama's counterterrorism policies, *Washington Post*, 8 February 2012.

hostilities," but it failed to resolve the most controversial issues.³⁵ As a former CIA lawyer put it, "What does 'take a direct part in hostilities' mean? You can't target someone just because he visited an Al Qaeda Web site. But you also don't want to wait until they're about to detonate a bomb. It's a sliding scale."³⁶

The strongest critiques of drones claim that their use in Pakistan, Yemen, Somalia, and elsewhere constitutes multiple violations of international humanitarian law. According to some assessments, there was no legally recognized armed conflict on Pakistan's territory, as there was in Afghanistan and Iraq. Killing without warning is legally acceptable only during the hostilities of an armed conflict. The CIA operatives who carry out the drone attacks – not to mention the private security contractors who work with them – are not lawful combatants and are therefore engaging in murder.³⁷ Moreover under the Obama administration the target list of those eligible for long-distance killing was expanded beyond insurgents and terrorist suspects, to include drug traffickers. As the *New York Times* reported in August 2009, "Fifty Afghans believed to be drug traffickers with ties to the Taliban have been placed on a Pentagon target list to be captured or killed."³⁸

In fact, the Obama administration captured very few people on its target list, preferring to kill them by drone attacks instead.³⁹ Leon Panetta, Obama's director of central intelligence, claimed in a public speech referring to the drones in 2009 that "Very frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership."⁴⁰ Ironically, the negative reaction to the Bush administration's illegal policy of extraordinary rendition and indefinite detention at Guantánamo reinforced the impression that targeted killing was "the only game in town." As the *New York Times* reported, "the administration's very success at killing terrorism suspects has been shadowed by a suspicion: that Mr. Obama has avoided the complications of detention

³⁵ International Committee of the Red Cross, "Direct participation in hostilities: questions & answers," 2 June 2009, <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>

³⁶ John Radsan, a former lawyer in the CIA office of general counsel, quoted in Jane Mayer, "The Predator War," *The New Yorker*, 26 October 2009.

³⁷ Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009," Notre Dame Law School, December 2009. On the CIA's use of private contractors from "the company formerly known as Blackwater," see James Risen and Mark Mazzetti, "CIA Said to Use Outsiders to Put Bombs on Drones," *New York Times*, 21 August 2009.

³⁸ James Risen, "US to Hunt Down Afghan Drug Lords Tied to Taliban," *New York Times*, 10 August 2009.

³⁹ Karen DeYoung and Joby Warrick, "Under Obama, more targeted killings than captures in counterterrorism efforts," *Washington Post*, 14 February 2010.

⁴⁰ Cable News Network, "US airstrikes in Pakistan called 'very effective,'" 18 May 2009, http://articles.cnn.com/2009-05-18/politics/cia.pakistan.airstrikes_1_qaeda-pakistani-airstrikes?_s=PM:POLITICS.

by deciding, in effect, to take no prisoners alive. While scores of suspects have been killed under Mr. Obama, only one has been taken into American custody, and the president has balked at adding new prisoners to Guantánamo. ‘Their policy is to take out high-value targets, versus capturing high-value targets,’ said Senator Saxby Chambliss of Georgia, the top Republican on the intelligence committee. ‘They are not going to advertise that, but that’s what they are doing.’”⁴¹

Apart from the legality and morality of targeted killings, whether they become acceptable state practice depends in part on their effectiveness. Much of the US press coverage did indeed – following the Obama administration’s lead – suggest that the strikes were effective. As the *Chicago Tribune*’s report put it, the “intense six-month campaign of Predator strikes in Pakistan has taken such a toll on Al Qaeda that militants have begun turning violently on each other out of confusion and distrust.”⁴² Critics have, however, raised concerns that the attacks are creating a backlash against the United States and are a potent recruiting tool for terrorist organizations.⁴³ A Pew Center poll conducted in Pakistan in June 2012 found “only 17% back American drone strikes against leaders of extremist groups, even if they are conducted in conjunction with the Pakistani government.” Moreover nearly three-quarters of those polled considered the United States an enemy, up from 64 percent three years earlier.⁴⁴

A number of officials of the Obama administration defended its policies on drone attacks in public speeches. They include Harold Hongju Koh, the legal adviser of the US State Department; Eric Holder, the attorney general; Stephen W. Preston, general counsel of the Central Intelligence Agency; and John Brennan, the White House adviser on counterterrorism (and Obama’s nominee for director of Central Intelligence during his second term).⁴⁵ Brennan put the US case most succinctly: “As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban and associated forces, in response to the 9/11 attacks, and we may also use force

⁴¹ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, 29 May 2012; see also Karen DeYoung, “Secrecy defines Obama’s drone war,” *Washington Post*, 19 December 2011.

⁴² Miller, “Predator strikes in Pakistan.”

⁴³ Doyle McManus, “US drone attacks in Pakistan ‘backfiring,’ Congress told,” *Los Angeles Times*, 3 May 2009.

⁴⁴ Pew Research Center, “Pakistani Public Opinion Ever More Critical of US,” 27 June 2012, <http://www.pewglobal.org/2012/06/27/pakistani-public-opinion-ever-more-critical-of-u-s/>

⁴⁵ Harold Hongju Koh, “The Obama Administration and International Law,” address to the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010; “Attorney General Eric Holder Speaks at Northwestern University School of Law, 5 March 2012; <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Stephen W. Preston, “CIA and the Rule of Law,” text of remarks delivered at Harvard Law School, Cambridge, MA, 10 April 2012; National Public Radio, “John Brennan Delivers Speech On Drone Ethics,” 1 May 2012.

consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose, or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.”⁴⁶ Many critics would claim that the level of military activity with which al Qaeda and the United States confronted each other by 2012, when Brennan made his speech, no longer rose to the level of armed conflict. According to legal scholar Kenneth Anderson – a supporter of the Obama administration’s drone policy -- an armed conflict of a non-international character “has a legal threshold that must be met for it to apply as the governing law. That threshold is not merely instances of fighting with nonstate groups that are fleeting and discrete. Instead it must rise to the customary law threshold of being sustained, intense, systematic, and organized.”⁴⁷ He points out that the drone attacks would not seem to qualify – especially if they are as discriminating and precise as their proponents assert.

The Obama administration, as Brennan described, asserted the US right to use lethal force remotely outside a battlefield in countries where there was no ongoing armed conflict. If drone attacks in Pakistan or Yemen are not part of an internationally recognized armed conflict, then what is the US legal rationale for them? The people targeted may have had nothing to do with the 9/11 attacks. Moreover, mentioning the Taliban “and associated forces” left open the possibility for attacks on other groups, such as the so-called Haqqani Network that operates along the border of Afghanistan and Pakistan. The key is the reference that Brennan, and Koh before him, made to a customary law or “inherent right of national self-defense.” Anderson refers to a “law of self-defense” or a claim of “naked self-defense.” He associates it with a 1989 speech by Abraham Sofaer, then legal adviser to the US State Department. “Notwithstanding the importance of sovereignty, he said, in those instances in which a state was unable or unwilling to control terrorist groups in its territory, the United States saw itself as lawfully able to strike at them in their safe havens as a matter of self-defense. It was able to do so with its instruments of national security power, including civilian agents of the CIA.” Anderson adds that “this was a prerogative available to states generally, of course, not just the United States” – although few, if any states, have at their disposal comparable means (advanced technology weapons and a worldwide network of undercover agents).⁴⁸

Anderson offers reassurance that “naked self-defense” does not imply US attacks everywhere: “There will not be ‘Predators over Paris, France,’ any more than there will be ‘Predators over Paris, Texas,’” but, he adds, “Pakistan, Yemen, Somalia, and points

⁴⁶ National Public Radio, “John Brennan Delivers Speech.”

⁴⁷ Kenneth Anderson, “Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’ (April 2011), http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf p. 7.

⁴⁸ Anderson, “Targeted Killing,” p. 8.

beyond are a different story.”⁴⁹ These latter examples are the ones Brennan presumably had in mind when he spoke of countries that are “unable or unwilling” to apprehend the people posing a threat to the United States or to allow US drones to kill them. (In fact, Anderson’s prediction of no drones over Texas was premature: In April 2012, the US Defense Department issued a report proposing 110 sites in the United States to use as drone bases, and a number of municipalities throughout the country have expressed enthusiasm for using the new technology in domestic law enforcement.⁵⁰)

For the Obama administration and supporters such as Anderson the problems that critics raised regarding the indefinite nature of the “war on terror” in terms of time and space did not render US actions illegal. The prerogative of self-defense knows no such boundaries. Other legal scholars agree: “Self-defense can be permissible against non-state actor armed attacks, and measures of self-defense can occur in the territory of another state without special consent of the other state or imputation of the armed attacks to that state as long as the measures of self-defense are directed against the nonstate actors...a self-defense paradigm can be different than a war paradigm, and both are different than a mere law enforcement paradigm.”⁵¹

The Obama administration and its supporters, while disagreeing with criticisms of the drone policy on grounds of *ius ad bellum*, did recognize the legal requirements for *ius in bello*. As Anderson wrote, the United States, in using drones for targeted killings, was “required to meet the customary standards of necessity, distinction, and proportionality.”⁵² Harold Koh, in his speech to the American Society of International Law, claimed that “this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

⁴⁹ Ibid., p. 10.

⁵⁰ Department of Defense, “Report to Congress on Future Unmanned Aircraft Systems Training, Operations, and Sustainability,” April 2012 (pp. 9-12). See also two relevant reports by the US Congressional Research Service: *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses* (6 September 2012); and *Pilotless Drones: Background and Considerations for Congress Regarding Unmanned Aircraft Operations in the National Airspace System* (10 September 2012).

⁵¹ Jordan J. Paust, “Self-Defense Targetings of Non-state Actors and Permissibility of US Use of Drones in Pakistan,” *Journal of Transnational Law*, vo. 19, no. 2 (Spring 2010), pp. 279-280.

⁵² Anderson, “Targeted Killing,” p. 16.

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.”⁵³

The Obama administration faced considerable criticism on its adherence to the principles of distinction and proportionality. One of the earliest and strongest critics was David Kilcullen, chief counter-terrorism adviser to former Secretary of State Condoleezza Rice during the Bush administration. He claimed in May 2009 that "since 2006 we've killed 14 senior al-Qaeda leaders using drone strikes; in the same time period we've killed 700 Pakistani civilians in the same area."⁵⁴ In his view, the administration was clearly not adhering to the norm of proportionality. Even analysts who accepted the *ad bellum* justification for the drone strikes – who considered, for example, that an armed conflict was underway in the areas of Pakistan bordering Afghanistan – nevertheless found that the United States was failing in its obligations regarding treatment of civilians. If the principle of discrimination is taken seriously, attackers must be able to identify which victims were combatants and which were civilians. An important Oxford University study found, among a much longer list, that "there is a legal requirement to record the casualties that result from drone use, regardless of whether these result from an international conflict, a non-international conflict, or a non-conflict situation...every casualty must be properly identified post-attack." Appealing beyond the laws of war to human-rights law, the study also stipulated that "the universal right to life which specifies that no-one be 'arbitrarily' deprived of his or her life cannot be seen to have been upheld unless the identity of the deceased is established – whether a casualty was the intended target or merely a person in the wrong place at the wrong time is critical."⁵⁵

Journalists who have inquired into the process by which the United States determined its targets for drone strikes – the only way to know whether the principles of distinction and proportionality are being honored – have described a highly secretive and centralized system. It was so centralized, in fact, that the ultimate decision for choosing targets – among them, US citizens – rested with President Obama himself. According to a detailed and well-documented account by the *New York Times*, the Obama approach "in effect counts all military-age males in a strike zone as combatants, according to

⁵³ Koh, "The Obama Administration and International Law."

⁵⁴ Doyle McManus, "US drone attacks in Pakistan 'backfiring,' Congress told," *Los Angeles Times*, 3 May 2009.

⁵⁵ Susan Breau, Marie Aronsson, Rachel Joyce, *Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict*, Discussion paper 2, Oxford Research Group, Oxford, UK, June 2011, p. 24.

several administration officials, unless there is explicit intelligence posthumously proving them innocent.”⁵⁶ In other words, the CIA and Pentagon assume that people in a given area are combatants, unless someone convinces them after the attack that they have killed innocents. It is effectively a policy of “dead until proven innocent – and, if innocent, still dead, nevertheless.” It is not surprising, then, that there is such a discrepancy between the Obama administration’s claims of very few civilian casualties and its critics’ protestations that civilians have suffered disproportionately. It is all a matter of definition. As the *Times* reported, “counterterrorism officials insist this approach is one of simple logic: people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good.”⁵⁷ This is a far cry from the Geneva Protocol’s requirement that civilians be protected “unless and for such time as they take a direct part in hostilities.”

Much of the attention in the United States focused on a particular category of persons who make it on to the president’s list for targeted killing: US citizens. Legal scholar David Cole summarized the main take-away point from the speech Attorney General Eric Holder made at Northwestern University in March 2012: “The President of the United States can order the killing of US citizens, far from any battlefield, without charges, a trial, or any form of advance judicial approval.”⁵⁸ Holder’s speech made frequent reference to “a US citizen who is a senior operational leader of al Qaeda or associated forces” as the type of person on the president’s kill list. The person freshest in his audience’s mind was presumably Anwar al-Awlaki, a US citizen killed by drone attack in Yemen in September 2011. He is probably more accurately described as a propagandist for al Qaeda rather than a “senior operational commander.” Two weeks later another drone killed al-Awlaki’s 16-year-old son, Abdul-Rahman, a US citizen born in Denver, Colorado, and two other relatives. As the *New York Times* reported, “it was not known whether any of them were affiliated with Al Qaeda.”⁵⁹

The US Constitution requires “due process” before a citizen can be killed by the government. Most observers believed that meant that the decision to kill a US citizen, rather than arrest him and put him on trial, should at least be reviewed by a judge. In Holder’s speech, he disagreed: “‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.” Holder claimed that a process restricted to the executive branch (but keeping “the appropriate members of Congress” informed) would be adequate: “Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral

⁵⁶ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, 29 May 2012.

⁵⁷ Ibid.

⁵⁸ David Cole, “An Executive Power to Kill?” *New York Review of Books*, 6 March 2012.

⁵⁹ Laura Kasinof, “Strikes Hit Yemen as Violence Escalates in Capital,” *New York Times*, 15 October 2011.

damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.”⁶⁰ Cole disputed the excuse that time pressures made judicial review impractical. He pointed out that al-Awlaki, for example, had been on the kill list since early 2010, but not actually killed until many months later – plenty of time for a judge to consider the case. In any event, compared to its predecessors, the Obama administration expanded the scope of executive power considerably – something that most observers would not have anticipated when he was elected in 2008.

Although not a matter of targeted killing by drone, one of Barack Obama’s actions clearly distinguished his administration from that of George W. Bush and deserves mention and some analysis: The Obama administration located and killed Osama bin Laden, whereas the Bush administration had failed to do so. As the leader of al Qaeda – on behalf of whose terrorist network he declared war on the United States in 1998 and continued to plot mass murder even after 9/11 – bin Laden was certainly a legitimate military target. The controversy concerns whether it was legal for the US forces to enter Pakistan’s territory, without the government’s knowledge or permission, to carry out its mission, and whether that mission was intended to kill bin Laden or capture him alive.

The arguments in favor of not notifying the Pakistani government are mostly practical rather than legal, although Anderson’s “naked self-defense” would serve. Al Qaeda clearly enjoyed support at high levels in Pakistan’s secret services, if not elsewhere in the government – a possible explanation of why bin Laden chose to locate his safe house where he did. The question that many have asked is whether it was possible to take bin Laden alive and put him on trial rather than kill him. Addressing the legality of the operation, Stephen Preston, the CIA’s top lawyer, claimed that “the operation against bin Laden was not only militarily successful and strategically important, but also fully consistent with all applicable law.”⁶¹ In his description, he implied that the first soldier into the room where bin Laden was found was under some threat as he entered – and anticipated that he might face attack by suicide bombers: “there’s the guy first in the room with bin Laden. Charged by two young women. Trained to expect suicide bombers in these circumstances. He grabbed them, shoved them into a corner and threw himself on top of them, shielding them from the shooting and shielding the guys behind him from the blast if they detonated. His quick thinking, and raw bravery, saved two lives that did not have to end that night.” Preston explained that because of the high level of secrecy during the planning,

I cannot say the operation was heavily lawyered, but I can tell you it was thoroughly lawyered...What counsel concentrated on were the law-related issues that the decision-makers would have to decide, legal issues of which the decision-makers needed to be aware, and lesser issues that needed to be resolved. By the time the force was launched, the US

⁶⁰ “Attorney General Eric Holder Speaks at Northwestern University.”

⁶¹ Preston, “CIA and the Rule of Law.”

Government had determined with confidence that there was clear and ample authority for the use of force, including lethal force, under US and international law and that the operation would be conducted in complete accordance with applicable US and international legal restrictions and principles.⁶²

Considering how “thoroughly lawyered” the decision, Preston provided no details on the nature of the discussion or debates, if there were any.

What most observers wonder is whether the mission intended from the start to kill bin Laden or whether the troops were prepared to accept his surrender. At the time, Attorney General Holder suggested the latter: “If the possibility had existed, if there was the possibility of a feasible surrender, that would have occurred,” he said. “But their protection, that is the protection of the force that went into that compound, was I think uppermost in our minds.”⁶³ In August 2012 a member of the Navy SEAL (Sea-Air-Land) team that raided the compound published a book that, according to press reports, “contradicts the Obama administration’s previous descriptions of the mission, raising questions about whether the leader of Al Qaeda posed a clear threat to the commandos who fired on him.”⁶⁴ In fact, the new account does not claim that the SEAL mission was to kill bin Laden. Thus, it is not inconsistent with Holder’s emphasis on the priority of protecting the troops and their expectation that bin Laden might be armed or surrounded by potential suicide bombers. Indeed, the SEALs “found two unloaded weapons — an AK-47 rifle and a Makarov pistol — near the bedroom door.”⁶⁵ What is significant is that the Obama administration chose not to attack the compound with drones – at the risk of considerable collateral damage, and, if the intelligence had been faulty, without finding bin Laden there.

Preventive War and Humanitarian Intervention

Among the policies of the Bush administration that marked a challenge to previous international legal norms were the use of a preventive rationale for the 2003 invasion of Iraq, when there was no clear danger of imminent attack, and the threat to the neutrality and inviolability of humanitarian-aid workers, whom the administration tried to enlist in the service of its wars. Here I briefly review the Obama administration’s positions.

Candidate Obama had opposed the Iraq war with its preventive justification as an unnecessary “war of choice.” He contrasted it to the war in Afghanistan which he understood as a war of necessity, but one the Bush administration had neglected when it turned its attention to Iraq. He campaigned on promises to withdraw US troops from

⁶² Ibid.

⁶³ United Press International, “Holder: Bin Laden raid was legal,” 12 May 2011.

⁶⁴ Eric Schmitt, “Book on Bin Laden Killing Contradicts US Account,” *New York Times*, 29 August 2012.

⁶⁵ Ibid.

Iraq and intensify the military effort in Afghanistan in order to weaken the Taliban and destroy the al Qaeda network. He fulfilled both promises, although it is not clear whether the inevitable US withdrawal from Afghanistan will lead to a revival of the Taliban or how al Qaeda will fare in the absence of bin Laden.

For our purposes, the main point is that Obama did not endorse preventive war as his predecessor had done. A possible exception is the 2011 “humanitarian intervention” into Libya by the military forces of the United States and the North Atlantic Treaty Organization. The mission had a preventive motive, endorsed by the United Nations Security Council under the doctrine of “responsibility to protect” -- to keep the regime of Muammar Gadhafi from murdering citizens who had initially mounted a mass, nonviolent rebellion. As it turns out, once the rebels began resorting to violence, NATO exceeded its mandate to “protect the civilian population through the establishment of a no-fly zone. Instead,” as Stephen Zunes wrote, “NATO became an active participant in a civil war, providing arms, intelligence, advisers and conducting over 7,500 air and missile strikes against military and government facilities.” He worries that “such abuse of the UN system will create even more skepticism regarding the implementation of the responsibility to protect should there really be an incipient genocide somewhere where foreign intervention may indeed be the only realistic option.”⁶⁶

Critics have also pointed out that the Obama administration was rather selective in its support of populations opposing authoritarian regimes in the Middle East. It was remarkably silent about the situation in Bahrain, for example, as the government brutally repressed a genuine mass movement that engaged in mainly nonviolent protest. Some suspected an unwillingness to offend oil-rich Saudi Arabia, the main patron of Bahrain’s regime.

These criticisms aside, the Obama administration’s approach to war for preventive, humanitarian reasons marks a major departure from the Bush legacy. The Bush administration had tacked humanitarian goals onto a long list of reasons to attack Iraq on preventive grounds. It was eager to launch the war and was willing to seize on any pretexts, including, most famously, poor-quality intelligence on Saddam Hussein’s pursuit of weapons of mass destruction and a non-existent link between Iraq and the 9/11 attacks.⁶⁷ Barack Obama, by contrast, evinced no enthusiasm for war in Libya. He established strict criteria in terms of cost, feasibility, international support, and the role of alliance partners – all of which were met. Only in terms of the scope of the conflict did things evidently go beyond what Obama intended. In any event, the experience did not leave the president enthusiastic to continue a pattern of military interventions on humanitarian grounds.

⁶⁶ Stephen Zunes, “Lessons and False Lessons from Libya,” 31 August 2011, http://www.huffingtonpost.com/stephen-zunes/lessons-and-false-lessons_b_942139.html.

⁶⁷ Ryan Goodman, “Humanitarian Intervention and Pretexts for War,” *American Journal of International Law*, vol. 100 (2006).

Thus the Obama administration exhibited caution regarding the situation in Syria, where a nonviolent protest movement devolved into a destructive civil war. The president's restraint was all the more significant given the pressure from both liberal supporters and conservative critics in favor of intervention.⁶⁸ Anne-Marie Slaughter, Obama's director of policy planning at the State Department from 2009 to 2011, was particularly active in advocating the use of force. Her views are worth quoting, because they also reflect a degree of continuity with the Bush administration's position on the relationship between the US armed forces and humanitarian-aid organizations. Bush's secretary of state Colin Powell in 2001 referred to US humanitarian relief groups as "a force multiplier for us, such an important part of our combat team." By disregarding the groups' claims of neutrality and inviolability, he arguably increased their risk of attack by insurgents and terrorists.⁶⁹

Slaughter did something similar when, in an opinion piece for the *New York Times*, she offered a military plan for "the Friends of Syria," a group of some 70 countries, to

establish "no-kill zones" now to protect all Syrians regardless of creed, ethnicity or political allegiance. The Free Syrian Army, a growing force of defectors from the government's army, would set up these no-kill zones near the Turkish, Lebanese and Jordanian borders. Each zone should be established as close to the border as possible to allow the creation of short humanitarian corridors for the Red Cross and other groups to bring food, water and medicine in and take wounded patients out.⁷⁰

Slaughter had been one of the liberal supporters of the Bush administration's invasion of Iraq. She and other like-minded liberal interventionists provided cover for the administration by suggesting that invading without approval of the UN Security council would be "illegal but legitimate." This was her plan:

Soldiers would go into Iraq. They would find irrefutable evidence that Saddam Hussein's regime possesses weapons of mass destruction. Even without such evidence, the United States and its allies can justify their

⁶⁸ Michael Doran and Max Boot, "5 Reasons to Intervene in Syria Now," *New York Times*, 27 September 2012.

⁶⁹ For a debate on whether humanitarian workers should still claim inviolability, see Nicolas de Torrenté, "Humanitarian Action under Attack: Reflections on the Iraq War," *Harvard Human Rights Journal*, vol. 17 (Spring 2004); Kenneth Anderson, "Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts," *Harvard Human Rights Journal*, vol. 17 (Spring 2004).

⁷⁰ Anne-Marie Slaughter, "How to Halt the Butchery in Syria," *New York Times*, 24 February 2012.

intervention if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country.⁷¹

Instead, US forces found no weapons of mass destruction and US authorities botched the occupation of Iraq to such an extent that they fueled a multi-year insurgency, at enormous cost to the Iraqi people.

Slaughter's call for military forces to protect humanitarian-aid workers in Syria in early 2012 raised alarm bells in the aid community. Even if the traditional norms of impartiality, neutrality, and inviolability had come under strain during the Bush administration, it was still surprising to see someone trained in international law apparently unaware of that tradition – and the dangers of undermining it. The head of operations for Near and Middle East of the International Committee of the Red Cross wrote to the Times to express concern:

Anne-Marie Slaughter calls for armed “humanitarian corridors for the Red Cross and other groups.” Her proposal is fundamentally different from the Red Cross’s. By calling a political and military intervention “humanitarian,” Ms. Slaughter blurs the lines and makes it more difficult for humanitarians to do their jobs. Most important, she puts our negotiations for access to Syrian victims at risk.⁷²

This small incident reflects a larger generalization about the legacy of the first Obama administration for preventive war and humanitarian intervention. After seven years of George Bush’s disastrous wars and four of Barack Obama’s, some liberals still had not lost their taste for war. To the extent President Obama resisted their pressure, he distinguished his administration considerably from that of George W. Bush.

Undermining and Bolstering Norms

Under what conditions do long-established norms against particular practices – such as torture and extrajudicial killing – become undermined? Did the Bush administration’s embrace of preventive war and “enhanced interrogation techniques” fatally weaken the international norms against such behavior? Legal scholars and political scientists continue to debate the factors that influence the evolution of international law and practice, and -- inspired by the policies of the Bush administration -- the demise of norms. As this paper suggests, the practices of the Obama administration do not differ a great deal from those of its predecessors in key respects – particularly regarding indefinite detention and targeted killing of suspected terrorists. In other respects there are important differences. The Obama administration formally rejected torture as an instrument of interrogation and has not abused humanitarian motives to justify preventive wars launched for other reasons.

⁷¹ Anne-Marie Slaughter, “Good Reasons for Going around the UN,” *New York Times*, 18 March 2003.

⁷² Béatrice Mégevand-Roggo, letter to the editor, *New York Times*, 27 February 2012.

The mixed record of the Obama administration is unlikely to lead to the resurrection of previously well-established norms in “recess” or moribund. Countries, for example, that took the Bush administration’s embrace of torture and extraordinary rendition as a green light to renew their own practice of torture are unlikely to be dissuaded by Obama’s approach.⁷³ Changing the light from green to red would have meant prosecuting high-level Bush officials who had created the torture policy and making restitution to victims of US torture, such as Maher Arar – actions the Obama administration deliberately rejected.

Clearly the views and practices of the United States, the world’s military superpower, are important influences on the life and death of international norms and laws, but are they determining? What about the practices of other countries, the views of international legal experts, and civil society?

During the Bush administration, people concerned that US criminal activities related to the “war on terror” would undermine international norms sought judicial support from other countries. Working with the US Center for Constitutional Rights, for example, German lawyers filed a lawsuit in November 2006 against former US secretary of defense Donald Rumsfeld and eleven other officials implicated in the torture of detainees. A German prosecutor declined to pursue the case, arguing – correctly -- that primary responsibility to investigate such crimes lay with the US judicial system.⁷⁴ However, with Attorney General Eric Holder’s decision not to pursue any indictments of CIA officials for torture and Barack Obama’s vow to “look forward, not back,” there seems no judicial remedy available in the United States.⁷⁵ Instead we have seen some other countries beginning to take action.

In April 2009 Spanish Judge Baltazar Garzón opened a criminal investigation into allegations of conspiracy to torture by six Bush administration officials: former Attorney General Alberto Gonzales; David Addington, former chief of staff and legal adviser to Vice President Richard Cheney; William Haynes, former general counsel to the Department of Defense; Douglas Feith, former undersecretary of defense; Jay Bybee, former head of the Office of Legal Counsel in the Justice Department; and John Yoo, Bybee’s deputy. As a cable made available by WikiLeaks showed, the Obama administration sought to influence the Spanish judicial authorities on behalf of the Bush officials to drop the case.⁷⁶

⁷³ On the precedent-setting nature of the Bush policies on torture and preventive war, respectively, see Hurd, “Breaking and Making Norms” and Foot, “Torture.”

⁷⁴ Mark Landler, “German Prosecutor Asked to Investigate Rumsfeld,” *New York Times*, 14 November 2006.

⁷⁵ David Cole, “Obama’s Torture Problem,” *New York Review of Books*, 18 November 2010.

⁷⁶ “CCR Applauds Spanish Judge’s Decision to Open New Criminal Investigation into US Torture Program,” Center for Constitutional Rights, 29 April 2009, <https://ccrjustice.org/newsroom/press-releases/ccr-applauds-spanish-judge%E2%80%99s->

In November 2009, the first-ever high-level convictions of US officials for crimes connected to the war on terror were handed down by an Italian judge in the case of the Egyptian cleric Abu Omar (Hassan Mustafa Osama Nasr). The cleric was kidnapped off the streets of Milan in February 2003 and sent to Egypt, where he claims he was tortured. Judge Oscar Magi convicted Robert Seldon Lady, the CIA station chief in Milan, along with 21 other US CIA agents, and a US Air Force colonel – all of whom had already fled the country. Obama’s State Department expressed disappointment in the verdict, which was upheld by Italy’s highest appeals court, revealing yet again its disinterest in upholding fundamental norms against extrajudicial kidnapping and torture.⁷⁷

Because international norms and customary law typically take a long time to change, it is still not possible to give a definitive answer to the theoretical questions posed here and in previous work by other scholars. One can, however, offer a tentative conclusion: It is too early to tell whether the Bush administration’s rejection of norms against torture and extrajudicial killing will undermine those norms in the long term. If, however, the norms do survive the “war on terror” – whose temporal and spatial dimensions show no sign of receding -- it will be despite rather than because of the policies of the first Obama administration.

[decision-open-new-criminal-investigation-u.s.-t](#); the cable is available at
<https://ccrjustice.org/wikileaks-cable-09madrid347>.

⁷⁷ Rachel Donadio, “Italy Convicts 23 Americans for CIA Renditions,” *New York Times*, 5 November 2009; “CIA Extraordinary Rendition Convictions Upheld,” *Review Italy*, vol. 12, no. 10 (October 2012), p. 5.

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