

Justice and Society Program Explores Law of War in Two February Programs

The relationship of human rights and humanitarian law to the “new warfare” of drone strikes and targeted killings; the use of international tribunals to try wartime atrocities in the years since Nuremberg, and whether existing paradigms fit emerging, frightening realities—these were the topics of back-to-back events recently sponsored by the Justice and Society Program (JSP) in Washington, DC.

On February 1, JSP brought together current and former Obama and Bush Administration officials and other experts for a lunchtime roundtable moderated by Atlantic Media Chairman David Bradley, to discuss the legal and policy implications of targeted killings, through drone strikes and other means.

Drone strikes have reportedly been carried out in six countries: Afghanistan, Pakistan, Iraq,



Somalia, Yemen, and Libya. According to the [New America Foundation’s drones database](#), which analyzes U.S. drone strikes in Pakistan, “the 283 reported drone strikes in northwest Pakistan, including 70 in 2011, from 2004 to the present have killed approximately between 1,717 and 2,680 individuals, of whom around 1,424 to 2,209 were described as militants in reliable press accounts.”

Both national and international law provide guidelines as to the legality of this new form of warfare.

For the purposes of U.S. law, lethal force in wartime can be applied as long as there is statutory authorization, or if there is an imminent threat to the lives of American citizens. That the force is applied by drones, or by more conventional means, is not a relevant factor in this analysis. For purposes of international law and norms, as set forth principally in the Hague and Geneva Conventions, lethal force can be used for self-defense in the face of an armed attack. Panelists at the JSP roundtable cited in particular two factors that were articulated by State Department Legal Adviser Harold Koh in a 2010 [speech to the American Society of International Law](#):

- 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.

A third factor concerns the sovereignty of the nation where the target is located—since targeting is prohibited under international law norms if the host nation is capable of disabling the target and willing to do so. By the same token, if U.S. forces are invited in by the host nation, the sovereignty objection is inapplicable.

Whether recent drone strikes by the United States in Pakistan and Yemen comport with these norms is, of course, highly fact specific, and many of these facts are currently classified. As noted by the moderator and commentators at the JSP roundtable, the very opacity of the program makes oversight by either Congress or the judiciary almost impossible. President Obama on January 30 tacitly acknowledged the drone program, claiming in essence that targeting decisions have been mindful of these principles. Yet those who are skeptical of unilateral executive decision making, even in wartime, expressed concern over the lack of accountability for the program as it is currently conducted.

The issues become even more complex when the target is an American citizen. While law and practice in past wars make clear that a citizen who enlists with an enemy army is a legitimate target of lethal force, the fact that Al Qaeda is not a sovereign nation means that the actions of its operatives are a tough fit within either the framework of U.S. criminal procedure.



The ACLU's Jameel Jaffer, a panelist, has been one of the attorneys for the family of Anwar Al-Awlaki, who allegedly counseled the Fort Hood shooter, the Christmas day bomber, and others. In a suit to compel the release of classified documents relating to the drone strike that killed him along with American citizen and Al-Qaeda affiliate Samir Khan, the ACLU contends that Al-Awlaki did not pose an imminent threat, and that as a U.S. citizen, he was entitled to some measure of due process. Will the process rights to be accorded U.S. citizens killed by drone strikes follow in the path of the Guantanamo litigation, with the courts being asked to delineate the parameters of due process in a novel wartime landscape? The story is unfolding daily.

Criticism of the drone strike program is not confined to the United States. As one panelist noted, despite its store of good will on foreign policy matters, the Obama Administration has not yet enlisted our allies in Europe and elsewhere to support the drone strike program (although the silence of these allies at reports of the death Al-Awlaki and others may indicate tacit approval of administration policy). As with U.S. criminal law, the status of these Al-Qaeda loyalists is problematic under the Hague and Geneva Conventions. The status of "unlawful combatant," which provided the justification for detention of purported Al-Qaeda operatives after 9-11, was codified by Congress in 2006. Yet because much of the world does not accept the legitimacy of the declaration of war by Congress on Al-Qaeda, a non-state actor (which nonetheless has a substantial territorial foothold in Waziristan, among other locations), even our allies are reluctant to accept the logic of drone targeting decisions in Afghanistan and Pakistan.



To this day, critics around the world reject the very foundational principle of American targeting policy: that the U.S. is engaged in an armed conflict with Al-Qaeda. These critics contend that the conflict should be governed by criminal law norms, and this difference of opinion does not seem to be likely to be resolved any time soon.

Nor are the thorny questions posed by drone warfare likely to be restricted to the American conflict with Al-Qaeda. In 2011, at least fifty nations acknowledged

possessing drone equipment (which is not itself a weapon, but easily weaponized). Industry pressure has actually resulted in the loosening of export controls, even as worries grow about the potential for lethal attacks by rogue state and non-state actors. While the Obama Administration claims that the U.S. drone program comports with humanitarian war theory, there are only voluntary international compacts that regulate the use of drones in warfare. What, wondered one roundtable questioner, will happen when less responsible actors employ drone technology? Under the norms of reciprocity, who will be deemed a legitimate target? Is it time for a convention on the use of drones, and if one were concluded, would bad actors even honor it?

A final, philosophically intriguing set of problems is posed by the very ability to wage war by remote control. Does this development make war [too neat and too easy to wage](#), detaching it from our natural revulsion at the inevitable deaths of innocents—the euphemistically termed “collateral damage”? NGOs like the [Making Amends Campaign](#) have begun a useful discussion about the civilian costs of drone use. The JSP roundtable concluded with these and related questions still unresolved, and in the words of David Bradley, ones that “we still will be discussing in 2022.”



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The need to adapt to new legal challenges in international conflict was the subject of a second convening that JSP co-sponsored, held on February 2. In a first-time partnership with the U.S. Holocaust Memorial Museum’s Committee on Conscience and the United States Institute of Peace, “In Search of Accountability: Justice after Nuremberg” examined the evolution of war crimes tribunals from Nuremberg to the present. Using as its jumping-off point books by two of the evening’s panelists—*All the Missing Souls* by David Scheffer, former Ambassador-at-Large for War Crimes Issues during the Clinton Administration, and

Justice and the Enemy by William Shawcross, son of Hartley Shawcross, the British Ambassador at Nuremberg—the panel looked at the legal structures created to administer some measure of retributive justice in the aftermath of some of the most horrifying genocides and wartime atrocities since the Second World War. State Department Legal Advisor Harold Koh, a longtime moderator of the Justice and Society Program’s seminar on human rights and humanitarian law when he was Dean of Yale Law School, served as commentator.



United States Holocaust Memorial Museum

Under questioning by Michael Abramowitz, Executive Director of the Museum's Committee on Conscience, panelists explored the measure of retributive justice and prevention that trials for war crimes may provide. As Ambassador Scheffer pointed out, it is the very outrageousness of wartime atrocities that makes it difficult for the international community to respond with the urgency needed to stem them. The conventional language and tools of diplomacy fail at the task. Scheffer praised the recent creation of an [Atrocities Prevention Board](#) by President Obama but noted that in the past, the best the international community had been able to do was to retroactively punish perpetrators. At Nuremberg, this was victors' justice, imposed on Nazi leaders with the force only of international disapprobation. In Bosnia and Rwanda, trials of war crimes have become part of the transitional process to the rule of law itself. And, as Harold Koh pointed out, now we are in "global justice 3.0," with a more vigorous system of monitoring and response.

Despite the reluctance of the U.S. to submit itself to jurisdiction of the International Criminal Court, Koh added, it in most respects complies with relevant protocols. And as William Shawcross pointed out, as a result of the combination of pressures of the legal process and actions of Congress, the military commissions at Guantanamo now provide the highest level of procedural protections of their kind in history.

Panelists agreed that the new world of war will require robust international legal structures, vigilance, and flexibility of response. Old mechanisms of enforcing humanitarian law, and even the humanitarian conventions signed in the last century, will require a fresh look. The same may be true in the context of drone warfare, where the new battlefield may be anywhere from ungoverned territories to heavily populated urban landscapes—across the globe, and even close to home.



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