# 1AC Deterrence Advantage

#### Contention One is the Drones Arms Race:

#### US targeted killing policy has triggered a global drones arms race – this will erode the deterrence norm which makes nuclear conflict and accidental wars inevitable

Boyle, La Salle University Assistant Political Science Professor, 2013

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The race for drones

An important, but overlooked, strategic consequence of the Obama administration’s embrace of drones is that it has generated a new and dangerous arms race for this technology. At present, the use of lethal drones is seen as acceptable to US policy-makers because no other state possesses the ability to make highly sophisticated drones with the range, surveillance capability and lethality of those currently manufactured by the United States. Yet the rest of the world is not far behind. At least 76 countries have acquired UAV technology, including Russia, China, Pakistan and India. China is reported to have at least 25 separate drone systems currently in development. At present, there are 680 drone programmes in the world, an increase of over 400 since 2005. Many states and non-state actors hostile to the United States have begun to dabble in drone technology. Iran has created its own drone, dubbed the ‘Ambassador of Death’, which has a range of up to 600 miles.123 Iran has also allegedly supplied the Assad regime in Syria with drone technology. Hezbollah launched an Iranian-made drone into Israeli territory, where it was shot down by the Israeli air force in October 2012.

A global arms race for drone technology is already under way. According to one estimate, global spending on drones is likely to be more than US$94 billion by 2021. One factor that is facilitating the spread of drones (particularly non-lethal drones) is their cost relative to other military purchases. The top-of-the line Predator or Reaper model costs approximately US$10.5 million each, compared to the US$150 million price tag of a single F-22 fighter jet.127 At that price, drone technology is already within the reach of most developed militaries, many of which will seek to buy drones from the US or another supplier. With demand growing, a number of states, including China and Israel, have begun the aggressive selling of drones, including attack drones, and Russia may also be moving into this market. Because of concerns that export restrictions are harming US competitiveness in the drones market, the Pentagon has granted approval for drone exports to 66 governments and is currently being lobbied to authorize sales to even more. The Obama administration has already authorized the sale of drones to the UK and Italy, but Pakistan, the UAE and Saudi Arabia have been refused drone technology by congressional restrictions.130 It is only a matter of time before another supplier steps in to offer the drone technology to countries prohibited by export controls from buying US drones. According to a study by the Teal Group, the US will account for 62 per cent of research and development spending and 55 per cent of procurement spending on drones by 2022.131 As the market expands, with new buyers and sellers, America’s ability to control the sale of drone technology will be diminished. It is likely that the US will retain a substantial qualitative advantage in drone technology for some time, but even that will fade as more suppliers offer drones that can match US capabilities.

The emergence of this arms race for drones raises at least five long-term strategic consequences, not all of which are favourable to the United States over the long term. First, it is now obvious that other states will use drones in ways that are inconsistent with US interests. One reason why the US has been so keen to use drone technology in Pakistan and Yemen is that at present it retains a substantial advantage in high-quality attack drones. Many of the other states now capable of employing drones of near-equivalent technology—for example, the UK and Israel—are considered allies. But this situation is quickly changing as other leading geopolitical players, such as Russia and China, are beginning rapidly to develop and deploy drones for their own purposes. While its own technology still lags behind that of the US, Russia has spent huge sums on purchasing drones and has recently sought to buy the Israeli-made Eitan drone capable of surveillance and firing air-to-surface missiles.132 China has begun to develop UAVs for reconnaissance and combat and has several new drones capable of long-range surveillance and attack under development.133 China is also planning to use unmanned surveillance drones to allow it to monitor the disputed East China Sea Islands, which are currently under dispute with Japan and Taiwan.134 Both Russia and China will pursue this technology and develop their own drone suppliers which will sell to the highest bidder, presumably with fewer export controls than those imposed by the US Congress. Once both governments have equivalent or near-equivalent levels of drone technology to the United States, they will be similarly tempted to use it for surveillance or attack in the way the US has done. Thus, through its own over-reliance on drones in places such as Pakistan and Yemen, the US may be hastening the arrival of a world where its qualitative advantages in drone technology are eclipsed and where this technology will be used and sold by rival Great Powers whose interests do not mirror its own.

A second consequence of the spread of drones is that many of the traditional concepts which have underwritten stability in the international system will be radically reshaped by drone technology. For example, much of the stability among the Great Powers in the international system is driven by deterrence, specifically nuclear deterrence.135 Deterrence operates with informal rules of the game and tacit bargains that govern what states, particularly those holding nuclear weapons, may and may not do to one another.136 While it is widely understood that nuclear-capable states will conduct aerial surveillance and spy on one another, overt military confrontations between nuclear powers are rare because they are assumed to be costly and prone to escalation. One open question is whether these states will exercise the same level of restraint with drone surveillance, which is unmanned, low cost, and possibly deniable. States may be more willing to engage in drone overflights which test the resolve of their rivals, or engage in ‘salami tactics’ to see what kind of drone-led incursion, if any, will motivate a response.137 This may have been Hezbollah’s logic in sending a drone into Israeli airspace in October 2012, possibly to relay information on Israel’s nuclear capabilities.138 After the incursion, both Hezbollah and Iran boasted that the drone incident demonstrated their military capabilities.139 One could imagine two rival states—for example, India and Pakistan—deploying drones to test each other’s capability and resolve, with untold consequences if such a probe were misinterpreted by the other as an attack. As drones get physically smaller and more precise, and as they develop a greater flying range, the temptation to use them to spy on a rival’s nuclear programme or military installations might prove too strong to resist. If this were to happen, drones might gradually erode the deterrent relationships that exist between nuclear powers, thus magnifying the risks of a spiral of conflict between them.

Another dimension of this problem has to do with the risk of accident. Drones are prone to accidents and crashes. By July 2010, the US Air Force had identified approximately 79 drone accidents.140 Recently released documents have revealed that there have been a number of drone accidents and crashes in the Seychelles and Djibouti, some of which happened in close proximity to civilian airports.141 The rapid proliferation of drones worldwide will involve a risk of accident to civilian aircraft, possibly producing an international incident if such an accident were to involve an aircraft affiliated to a state hostile to the owner of the drone. Most of the drone accidents may be innocuous, but some will carry strategic risks. In December 2011, a CIA drone designed for nuclear surveillance crashed in Iran, revealing the existence of the spying programme and leaving sensitive technology in the hands of the Iranian government.142 The expansion of drone technology raises the possibility that some of these surveillance drones will be interpreted as attack drones, or that an accident or crash will spiral out of control and lead to an armed confrontation.143 An accident would be even more dangerous if the US were to pursue its plans for nuclear-powered drones, which can spread radioactive material like a dirty bomb if they crash.144

Third, lethal drones create the possibility that the norms on the use of force will erode, creating a much more dangerous world and pushing the international system back towards the rule of the jungle. To some extent, this world is already being ushered in by the United States, which has set a dangerous precedent that a state may simply kill foreign citizens considered a threat without a declaration of war. Even John Brennan has recognized that the US is ‘establishing a precedent that other nations may follow’.145 Given this precedent, there is nothing to stop other states from following the American lead and using drone strikes to eliminate potential threats.

#### Collapse of the nuclear deterrence norm guarantees extinction

Freedman, 2013

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Rhetoric that urges elimination on the assumption that the only alternative is Armageddon is not credible, almost seventy years into the nuclear age. It is also impossible to start from the goal of a world without nuclear weapons and work backwards to explain how this can come about. The many intermediate steps are contingent on so many other factors that any one scheme cannot accommodate them. In looking for first steps, the tendency is to pick up on whatever happens to be the most immediate unfinished business on the international agenda at hand/which, after half a century, is still a comprehensive test ban. If survival depends on a goal which middle-/aged politicians routinely say is both essential yet unlikely to be reached in their lifetime, then the inevitable result is fatalism. This might still be a perverse outcome of the recent campaigning, which if nothing else, has provided eloquent reminders of the terrible capacity to self-/destruct found in the international system.

The norms of nuclear nonproliferation, non-/use, and deterrence can be shown empirically to have brought important benefits. Now, they must be applied in cases marked by shifting and fraught political circumstances that make resort to nuclear arms conceivable. These norms are all vulnerable to being rejected by those who see them as cynical instruments of their opponents and the prejudicial morality of patronizing Western elites. If these norms are to have enduring value, they will require more than assertions of their past value/they need constant demonstrations of their relevance to new types of conflict involving new types of actors.

There is an inescapable logic in the assertion that if nuclear weapons did not exist, then the potential for nuclear war could not exist; however, so long as we are stuck in the nuclear age, even at lower levels of armaments, avoiding nuclear war will require intensive diplomacy and careful posturing. The challenge is not to re-/assert an old norm of disarmament, but to prevent the erosion of the old norms of deterrence, as in prudent appreciation of the dangers in taking a risk of nuclear war; of non-/proliferation, as in a grasp of the consequences of adding to the list of potential nuclear conflicts; and of non-/use, as in accepting the responsibility of restraint.

#### The impact is empirical – assumptions of rationality don’t disprove deterrence theory – attempts to understand motivations for war reduce the risk of conflict

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[Keith, "The Fallacies of Cold War Deterrence and a New Direction," <http://www.unm.edu/~gleasong/300/su2006/keith_payne_fallacies.pdf>]

There is no adequate alternative to the hard task of attempting to ascertain the particular opponent’s modes of thought and core beliefs, assessing how they are likely to affect its behavior, and formulating U.S. deterrence policy in light of those findings. In the absence of this, expectations about the behavior of that particular leadership will reflect a dangerous ignorance. Such ignorance clearly cannot be eliminated by even very serious efforts to “know the enemy.” But it may be reduced. Continued reliance on the convenient assumption of a rational and reasonable opponent now risks the type of foreign policy debacles that have followed such an assumption in the past—with the unprecedented additional threats posed by mass destruction weapons.

Accumulating pertinent information about a challenger will never be complete, and the relevant information is likely to change over time. Attempting to become familiar with the decision-making dynamics of foreign leaders, for the purpose of establishing an informed basis for deterring and coercing them, is not a trivial undertaking. And, it must be acknowledged that even extensive efforts at acquiring information concerning the factors underlying a challenger’s decision-making will not preclude surprising, un- predictable behavior based on unfamiliar or wholly obscure motives, goals, and values. Even well-informed policies of deterrence will not be predictably effective. Reducing the level of ignorance concerning the opponent in pertinent areas, however, may be possible in every case. And doing so should serve to increase the likelihood of effectiveness for U.S. deterrence policies by making those policies relatively more informed by the opponents’ various motivations and cost-benefit calculations.

#### Accidental drone wars spark conflicts in every global nuclear hotspot

Dowd, 2013

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Error War

If these geo-political consequences of remote-control war do not get our attention, then the looming geo-strategic consequences should. If we make the argument that UCAV pilots are in the battlespace, then we are effectively saying that the battlespace is the entire earth. If that is the case, the unintended consequences could be dramatic.

First, if the battlespace is the entire earth, the enemy would seem to have the right to wage war on those places where UCAV operators are based. That’s a sobering thought, one few policymakers have contemplated.

Second, power-projecting nations are following America’s lead and developing their own drones to target their distant enemies by remote. An estimated 75 countries have drone programs underway.45 Many of these nations are less discriminating in employing military force than the United States—and less skillful. Indeed, drones may usher in a new age of accidental wars. If the best drones deployed by the best military crash more than any other aircraft in America’s fleet, imagine the accident rate for mediocre drones deployed by mediocre militaries. And then imagine the international incidents this could trigger between, say, India and Pakistan; North and South Korea; Russia and the Baltics or Poland or Georgia; China and any number of its wary neighbors.

China has at least one dozen drones on the drawing board or in production, and has announced plans to dot its coastline with 11 drone bases in the next two years.46 The Pentagon’s recent reports on Chinese military power detail “acquisition and development of longer-range UAVs and UCAVs . . . for long-range reconnaissance and strike”; development of UCAVs to enable “a greater capacity for military preemption”; and interest in “converting retired fighter aircraft into unmanned combat aerial vehicles.”47 At a 2011 air show, Beijing showcased one of its newest drones by playing a video demonstrating a pilotless plane tracking a US aircraft carrier near Taiwan and relaying targeting information.48

Equally worrisome, the proliferation of drones could enable nonpower-projecting nations—and nonnations, for that matter—to join the ranks of power-projecting nations. Drones are a cheap alternative to long-range, long-endurance warplanes. Yet despite their low cost, drones can pack a punch. And owing to their size and range, they can conceal their home address far more effectively than the typical, nonstealthy manned warplane. Recall that the possibility of surprise attack by drones was cited to justify the war against Saddam Hussein’s Iraq.49

Of course, cutting-edge UCAVs have not fallen into undeterrable hands. But if history is any guide, they will. Such is the nature of proliferation. Even if the spread of UCAV technology does not harm the United States in a direct way, it is unlikely that opposing swarms of semiautonomous, pilotless warplanes roaming about the earth, striking at will, veering off course, crashing here and there, and sometimes simply failing to respond to their remote-control pilots will do much to promote a liberal global order.

It would be ironic if the promise of risk-free warpresented by drones spawned a new era of danger for the United States and its allies.

# 1AC International Law

#### Contention Two is International Law:

#### US permissive drone policy is modeled globally - collapses international law

***Alston, 2011***

*[Philip, is the John Norton Pomeroy Professor of Law, New York University School of Law. The author was UN Special Rapporteur on extrajudicial, summary or arbitrary executions from 2004 until 2010. “The CIA and Targeted Killings Beyond Borders,” Accessed: 8-14-13, SpS]*

Because the United States inevitably contributes disproportionately to the shaping of global regime rules, and because it is making more extensive overt use of targeted killings than other states, its approach will heavily influence emerging global norms. This is of particular relevance in relation to the use of drones. There are strong reasons to believe that a permissive policy on drone-fired targeted killings will come back to haunt the United States in a wide range of potential situations in the not too distant future.

In 2011 a senior official noted that while for the past two decades the United States and its allies had enjoyed “relatively exclusive access to sophisticated precision-strike technologies,” that monopoly will soon be ended.574 In fact, in the case of drones, some 40 countries already possess the basic technology. Many of them, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom and France either have or are seeking drones that also have the capability to shoot laser-guided missiles. Overall, the United States accounts for less than one-third of worldwide investment in UAVs.575 On ‘Defense Industry Day’, August 22, 2010, the Iranian President unveiled a new drone with a range of 1,000 kilometers (620 miles) and capable of carrying four cruise missiles.576 He referred to the drones as a ‘messenger of honour and human generosity and a saviour of mankind’, but warned ominously that it can also be ‘a messenger of death for enemies of mankind’.577

To date, the United States has opted to maintain a relatively flexible and open-ended legal regime in relation to drones, in large part to avoid setting precedents and restricting its own freedom of action.578 But this policy seems to assume that other states will not acquire lethal drone technology, will not use it, or will not be able to rely upon the justifications invoked by the United States. These assumptions seem questionable. American commentators favoring a permissive approach to targeted killings abroad are generally very careful to add that such killings would under no circumstances be permitted within the United States.579

Thus when the United States argues that targeted killings are legitimate when used in response to a transnational campaign of terror directed at it, it needs to bear in mind that other states can also claim to be so afflicted, even if the breadth of the respective terrorist threats is not comparable. Take Russia, for example, in relation to terrorists from the Caucasus. It has characterized its military operations in Chechnya since 1999 as a counter-terrorism operation and has deployed ‘seek and destroy’ groups of army commandoes to “hunt down groups of insurgents”.580 It has been argued that the targeted killings that have resulted are justified because they are necessary to Russia’s fight against terrorism.581 Although there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility for, or otherwise justify, such killings. It has also refused to cooperate with any investigation or prosecution.582

In 2006 the Russian Parliament passed a law permitting the Federal Security Service (FSB) to kill alleged terrorists overseas, if authorized to do so by the President.583 The law defines terrorism and terrorist activity extremely broadly, including “practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action,” and also any “ideology of violence.”584

Under the law, there appears to be no restriction on the use of military force “to suppress international terrorist activity outside the Russian Federation.”585 The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law’s passage, “Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals.”586 There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations. In adopting the legislation, Russian parliamentarians claimed that “they were emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country’s borders against external threats.”587

China is another case in point. It has consistently characterized unrest among its Uighur population as being driven by terrorist separatists. But Uighur activists living outside China are not so classified by other states. That means that China could invoke American policies on targeted killing to carry out a lethal attack against a Uighur activist living in Europe or the United States. The Chinese Foreign Ministry welcomed the killing of Osama bin Laden as “a milestone and a positive development for the international antiterrorism efforts,” adding ominously in reference to the Uighur situation that “China has also been a victim of terrorism”.588 When a journalist asked how American practice in Pakistan compared to possible Chinese external action against a Uighur to a senior United States counter-terrorism official the latter distinguished the situations from one another on the unconvincing grounds of Pakistan’s special relationship with the United States.589

A more realistic note was struck by Anne-Marie Slaughter after bin Laden’s killing when she observed that “having a list of leaders that you are going to take out is very troubling morally, legally and in terms of precedent. If other countries decide to apply that principle to us, we’re in trouble.”590 The conclusion to be drawn is that the United States might, in the not too distant future, need to rely on international legal norms to delegitimize the behavior of other states using lethal drone strikes. For that reason alone, it would seem prudent today to be contributing to the construction of a regime which strictly limits the circumstances in which one state can seek to kill an individual in another state without the latter’s consent and without complying with the applicable rules of international law. To the extent that the United States genuinely believes it is currently acting within the scope of those rules it needs to provide the evidence.

F. Conclusion

This Article has not sought to spell out the options open to the United States in order to bring its conduct within the law. The bottom line is that intelligence agencies, and particularly those that are effectively unaccountable, should not be conducting lethal operations abroad. Beyond that proposition, there is a great deal that the CIA could do if it so wished, including making public its commitment to comply with both IHL and IHRL, disclosing the legal basis on which it is operating in different situations involving potential killings, providing information on when, where and against whom drone strikes can be authorized, and publishing its estimates on the number and rate of civilian casualties. Full transparency is neither sought nor expected, but basic compliance with the standards applied by the US military, and both consistently and insistently demanded of other countries by the United States, is indispensable.Examining the CIA’s transparency and accountability in relation to targeted killings also sheds light on a range of other issues that international human rights law needs to tackle in a more systematic and convincing manner. They include the approach adopted by international law to the activities of intelligence agencies, the (in)effectiveness of existing monitoring mechanisms in relation to killings governed by a mixed IHL/IHRL regime, and the techniques needed to monitor effectively human rights violations associated with new technologies such as unmanned drones and robotics. International human rights institutions need to respond more robustly to the growing chorus of proposals that targeted killings be liberated from the hard-fought legal restraints that apply to them. There is a great deal at stake and these crucial issues have been avoided for too long. The principal focus of this Article has been on the question of CIA accountability for targeted killings, under both United States law and international law. As the CIA, often in conjunction with DOD Special Operations forces, becomes ever more deeply involved in carrying out extraterritorial targeted killings both through kill/capture missions and drone-based missile strikes in a range of countries, the question of its compliance with the relevant legal standards becomes even more urgent. Assertions by Obama administration officials, as well as by many scholars, that these operations comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability. The CIA’s internal control mechanisms, including its Inspector-General, have had no discernible impact; executive control mechanisms have either not been activated at all or have ignored the issue; congressional oversight has given a ‘free pass’ to the CIA in this area; judicial review has been effectively precluded; and external oversight has been reduced to media coverage which is all too often dependent on information leaked by the CIA itself. As a result, there is no meaningful domestic accountability for a burgeoning program of international killing. This in turn means that the United States cannot possibly satisfy its obligations under international law to ensure accountability for its use of lethal force, either under IHRL or IHL. The result is the steady undermining of the international rule of law, and the setting of legal precedents which will inevitably come back to haunt the United States before long when invoked by other states with highly problematic agendas.

#### This internal link to international law outweighs alternate causes – the status quo actively prompts other countries to violate I-LAW

*Owen* ***Bowcott - 2012.*** *(Owen Bowcott is legal affairs correspondent. He was formerly the Guardian's* [*Ireland*](http://www.guardian.co.uk/world/ireland) *correspondent and also worked on the foreign newsdesk, The Guardian News Paper, “Drone strikes threaten 50 years of international law, says UN rapporteur,” 6/21/2012,* [*http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un*](http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un)*, Accessed 7/25/2013, WSH)*

**QUOTE:** The US policy of using aerial [drones](http://www.guardian.co.uk/world/drones) to carry out targeted killings presents a major challenge to the system of international law that has endured since the second world war, a [United Nations](http://www.guardian.co.uk/world/unitednations) investigator has said. Christof Heyns, the UN special rapporteur on extrajudicial killings, summary or arbitrary executions, told a conference in Geneva that President Obama's attacks in [Pakistan](http://www.guardian.co.uk/world/pakistan), Yemen and elsewhere, carried out by the CIA, would encourage other states to flout long-established [human rights](http://www.guardian.co.uk/law/human-rights) standards. In his strongest critique so far of drone strikes, Heyns suggested some may even constitute "war crimes". His comments come amid rising international unease over the surge in killings by remotely piloted unmanned aerial vehicles (UAVs). Addressing the conference, which was organised by the American Civil Liberties Union (ACLU), a second UN rapporteur, Ben Emmerson QC, who monitors counter-terrorism, announced he would be prioritising inquiries into drone strikes. The London-based barrister said the issue was moving rapidly up the international agenda after China and Russia this week jointly issued a statement at the UN Human Rights Council, backed by other countries, condemning drone attacks. If the US or any other states responsible for attacks outside recognised war zones did not establish independent investigations into each killing, Emmerson emphasised, then "the UN itself should consider establishing an investigatory body". Also present was Pakistan's ambassador to the UN in Geneva, Zamir Akram, who called for international legal action to halt the "totally counterproductive attacks" by the US in his country. Heyns, a South African law professor, told the meeting**: "Are we to accept major changes to the international legal system which has been in existence since world war two and survived nuclear threats?"** Some states, he added, "find targeted killings immensely attractive. Others may do so in future … Current targeting practices weaken the rule of law. Killings may be lawful in an armed conflict [such as Afghanistan] but many targeted killings take place far from areas where it's recognized as being an armed conflict." If it is true, he said, that "there have been secondary drone strikes on rescuers who are helping (the injured) after an initial drone attack, those further attacks are a war crime". Heyns ridiculed the US suggestion that targeted UAV strikes on al-Qaida or allied groups were a legitimate response to the 9/11 attacks. "It's difficult to see how any killings carried out in 2012 can be justified as in response to [events] in 2001," he said. "Some states seem to want to invent new laws to justify new practices. "The targeting is often operated by intelligence agencies which fall outside the scope of accountability. The term 'targeted killing' is wrong because it suggests little violence has occurred. The collateral damage may be less than aerial bombardment, but because they eliminate the risk to soldiers they can be used more often." Heyns told the Guardian later that his future inquiries are likely to include the question of whether other countries, such as the UK, share intelligence with the US that could be used for selecting individuals as targets. A legal case has already been lodged in London over the UK's alleged role in the deaths of British citizens and others as a consequence of US drone strikes in Pakistan. Emmerson said that protection of the right to life required countries to establish independent inquiries into each drone killing. "That needs to be applied in the context of targeted killings," he said. "It's possible for a state to establish an independent ombudsman to inquire into every attack and there needs to be a report to justify [the killing]." Alternatively, he said, it was "for the UN itself to consider establishing an investigatory body. Drones attacks by the US raise fundamental questions which are a direct consequence of my mandate… If they don't [investigate] themselves, we will do it for them." **It is time, he added, to end the "conspiracy of silence" over drone attacks and "shine the light of independent investigation" into the process.** The attacks, he noted, were not only on those who had been killed but on the system of "international law itself". The Pakistani ambassador declared that more than a thousand civilians had been killed in his country by US drone strikes. "We find the use of drones to be totally counterproductive in terms of succeeding in the war against terror. It leads to greater levels of terror rather than reducing them," he said. Claims made by the US about the accuracy of drone strikes were "totally incorrect", he added. Victims who had tried to bring compensation claims through the Pakistani courts had been blocked by US refusals to respond to legal actions. The US has defended drone attacks as self-defence against al-Qaida and has refused to allow judicial scrutiny of the UAV programme. On Wednesday, the Obama administration issued a fresh rebuff through the US courts to an ACLU request for information about targeting policies. Such details, it insisted, must remain "classified". Hina Shamsi, director of the ACLU's national security project, said: "Something that is being debated in UN hallways and committee rooms cannot apparently be talked about in US courtrooms, according to the government. Whether the CIA is involved in targeted lethal operation is now classified. It's an absurd fiction."The ACLU estimates that as many as 4,000 people have been killed in US drone strikes since 2002 in Pakistan, Yemen and Somalia. Of those, a significant proportion were civilians. The numbers killed have escalated significantly since Obama became president. The USA is not a signatory to the International Criminal Court (ICC) or many other international legal forums where legal action might be started. It is, however, part of the International Court of Justice (ICJ) where cases can be initiated by one state against another. Ian Seiderman, director of the International Commission of Jurists, told the conference that "immense damage was being done to the fabric of international law". One of the latest UAV developments that concerns human rights groups is the way in which attacks, they allege, have moved towards targeting groups based on perceived patterns of behaviour that look suspicious from aerial surveillance, rather than relying on intelligence about specific al-Qaida activists.

#### **Effective international law solves warming and multiple scenarios for nuclear war**

***Institute for Energy and Environmental Research 2***

*and the Lawyers Committee on Nuclear Policy, Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties, May, http://www.ieer.org/reports/treaties/execsumm.pdf*

The evolution of international law since World War II is largely a response to the demands of states and individuals living within a global society with a deeply integrated world economy. In this global society, the repercussions of the actions of states, non-state actors, and individuals are not confined within borders, whether we look to greenhouse gas accumulations, nuclear testing, the danger of accidental nuclear war, or the vast massacres of civilians that have taken place over the course of the last hundred years and still continue. Multilateral agreements increasingly have been a primary instrument employed by states to meet extremely serious challenges of this kind, for several reasons. They clearly and publicly embody a set of universally applicable expectations, including prohibited and required practices and policies. In other words, they articulate global norms, such as the protection of human rights and the prohibitions of genocide and use of weapons of mass destruction. They establish predictability and accountability in addressing a given issue. States are able to accumulate expertise and confidence by participating in the structured system established by a treaty. However, influential U.S. policymakers are resistant to the idea of a treaty-based international legal system because they fear infringement on U.S. sovereignty and they claim to lack confidence in compliance and enforcement mechanisms. This approach has dangerous practical implications for international cooperation and compliance with norms. U.S. treaty partners do not enter into treaties expecting that they are only political commitments that can be overridden based on U.S. interests. When a powerful and influential state like the United States is seen to treat its legal obligations as a matter of convenience or of national interest alone, other states will see this as a justification to relax or withdraw from their own commitments. When the United States wants to require another state to live up to its treaty obligations, it may find that the state has followed the U.S. example and opted out of compliance

#### Warming means extinction if nothing is done

*Graciela* ***Chichilnisky – at least 2010.*** *(Professor of Economics and of Statistics Director, Columbia Consortium for Risk Management (CCRM) Columbia University, 6th Annual Distinguished Lecture Chautauque Series on International StudiesKeynote Address for Women’s History MonthEastern Kentucky University, “Avoiding Extinction,” at least 2010,* [*http://www.chichilnisky.com/wp-content/uploads/2013/01/Avoiding-Extinction-EKU-revised-Jan-23-2013.pdf*](http://www.chichilnisky.com/wp-content/uploads/2013/01/Avoiding-Extinction-EKU-revised-Jan-23-2013.pdf)*, Accessed 8/16/2013, WSH)*

For the first time ever, humans dominate Planet Earth. We are changing the basic metabolism of the planet: the composition of gases in the atmosphere, the integrity of its bodies of water, and the complex web of species that makes life on Earth. What comes next? The changes we are precipitating in the atmosphere are fundamental and can lead to disruptions in climate and global warming. Signals abound: in the Southern hemisphere alpine glaciers and Antartic ice sheets are melting; in the Northern hemisphere Alaska’s permafrost is melting, sinking entire towns whose inhabitants are being relocated at a cost of $140,000 per person. Greenland's ice sheet is gone, creating hostile climate conditions for a number of species that are now close to extinction such as the polar bear. In Patagonia and the Alps we observe mountains without ice or glaciers, reducing the ability of these regions to store water needed for human consumption. In the Caribbean seas 50% of corals are already extinct. Desertification has overtaken 25% of China's land mass. Climatic instability has led to Australia’s longest draught on record, followed by the worst floods in that continent’s history. We observe disappearing summer ice in the Arctic Seas and soil erosion and storm surges in Alaska. Where is all of this coming from? The rapid industrialization of wealthy nations during the last century is responsible for most of the changes and for the risks they entail. Historically the industrialized nations in the Organization of Economic Cooperation and Development (OECD) originated 70% (now still 60%) of all global emissions of carbon, emissions that most scientists in the world, including those in the United Nations Intergovernmental Panel on Climate Change, believe to cause climate change. China’s relentless industrial growth over the last two decades is a sign of things to come: it accelerates the risk of climate change and underscores the fact that in 20 or 30 years into the future most emissions could come from today's poor nations as they assume their turn to industrialize. Water expands when it warms. Since the seas are warming they are rising all over the world. This irrevocable upward trend is well documented: slowly but surely the rising waters will sink the Maldives and most other island states – there are 43 island states in the United Nations representing about 23% of the global vote and most or all could disappear soon under the warming seas. The current shift in climate patterns has led to habitat changes for many insect species and therefore vector illnesses, for example new outbreaks of malaria in Africa. 25 million people are reportedly migrating due to drought and other climate change conditions, and the numbers are increasing rapidly. In the US the consequences are less extreme but they stack up: the mighty Colorado River is drying up, its basin under stress prompts orders to turnoff farm water. Lake Mead’s waters in Nevada exhibit record lows threatening the main supply of water to Las Vegas, and arid areas are spreading quickly as Vegas’ new sites double water use. Wild fires from drought conditions have multiplied and spread rapidly around the region, including California since 2006.The world is aware of the connection that scientists postulate between climate change and the use of fossil energy. The largest segment of carbon emissions, 45% of all global emissions of CO2, originate in the world’s power plant infrastructure, 87% of which are fossil fuel plants that produce the overwhelming majority of the world's electricity. This power plant infrastructure represents $55 trillion according to the International Energy Agency, about the size of the world's economic output. New forms of clean energy are emerging such as wind farms in Scotland and solar farms in Spain in an attempt to forestall carbon emissions. But the process is necessarily slow since the world’s fossil power plant infrastructure is comparable to the world’s entire GDP, and therefore changing this infrastructure will take decades. But this timeframe - several decades - is too slow to avert the potential catastrophes that are anticipated in the next 10 - 20 years. What, then, is the solution? Below we propose a realistic plan that involves market solutions in both industrial and developing nations, simultaneously resolving the problems of economic development and climate change and the global climate negotiations. But the climate change issue is just one of several global environmental areas that are in crisis today. Biodiversity is another: industrialization and climate warming threaten ecosystems. Endangered species include sea- mammals, birds such as cockatoos, polar bears, and marine life such as coral, sawfish, whales, sharks, dogfish, sea-turtles, skates, grouper, seals, rays, and bass; the survival even of primates, our cousins in evolution is at risk. Scientists know that we are in the midst of the 6th largest extinction of biodiversity in the history of Planet Earth, and that the scope of extinction is so large that 75% of all known species are at risk today. The UN Millennium Report documents rates of extinction 1,000 times higher than is found in fossil records. The current 6th largest extinction event follows the dinosaurs’ extinction, which took place 65 million years ago. But today's extinction event is unique in that it is caused, created, by human activity. And it puts our own species at risk. There is a warning signal worth bringing up: all major recorded planetary extinctions were related to changes in climate conditions. Through industrialization we have created environmental conditions that could put our own species’ survival at risk. 99.9% of all species that ever existed are now extinct. Are we to be next? Will humans survive? The issue now is how to avoid extinction**.**

#### Air pollution is rampant worldwide—we’re specifically losing the battle against acid rain:

Joseph Masilamany, 2/15/2013 (staff writer, “Air-pocalypse in the making,” <http://www.freemalaysiatoday.com/category/business/2013/02/15/air-pocalypse-in-the-making/>, Accessed 2/18/2013, rwg)

PETALING JAYA: The world is losing the battle for clean air. In spite of several decades of efforts to combat it, air pollution is taking an increasing toll on human health, the environment and the economy.¶ A recent study by the Washington-based Worldwatch Institute says more than a billion people – or one-fifth of all humanity – live in regions that do not meet World Health Organisation’s air quality standards.¶ According to the institute, air pollution in the US causes as many as 50,000 deaths per year and costs as much as US$40 billion (RM123.62 billion) annually in healthcare and lost productivity.¶ Around the world, Milan, Shenyang, Tehran, Seoul and Rio de Janeiro reported the worst levels of sulphur dioxide – a pollutant directly harmful to humans. Paris and Madrid also made the top 10 in the list.¶ Though concern for human health led to the world’s first control laws, air pollution poses an equally grave threat to the environment. Many water systems around the world are turning toxically rabid because of acid rain, 35% of Europe’s forests are showing signs of air pollution damage and crop losses in the US caused by harmful emissions are estimated to be 5%-10% of total production – more than US$5 billion a year.

#### (--) Effective international law solves acid rain:

Mark L. Glode & Beverly Nelson Glode, 1993 (Master's in Civil Engineering, University of Wisconsin-Milwaukee & J.D., University of Bridgeport School of Law, Boston College Environmental Affairs Law Review, “TRANSBOUNDARY POLLUTION: ACID RAIN AND UNITED STATES-CANADIAN RELATIONS,” Fall 1993, 20 B.C. Envtl. Aff. L. Rev. 1, Lexis, accessed 7/23/2013, rwg)

The Montreal Protocol affirmed the role of traditional international law in bringing about solutions to transboundary pollution problems. n104 Analogously, the North American acid rain problem can be resolved through application of international environmental law. The Montreal protocol provides a model of the type of agreement the United States and Canada must reach to abate the acid rain problem confronting the two nations. While this task is difficult it is not insuperable. The United States and Canada have entered agreements to resolve pollution problems in the past. Most notable are the 1972 and 1978 Great Lakes Water Quality Agreements. n105 On the other hand, many of the issues presented by the acid rain debate [\*13] have sparked strong emotional reaction, in the United States and Canada, which has delayed and complicated resolution of transboundary air pollution between the two countries.

#### (--) Acid rain threatens extinction:

John E. Carroll, 1989 (Environmental Conservation Program at the University of New Hampshire, October 1989, “The Acid Challenge to Security,” Bulletin of the Atomic Scientists, accessed via google books, February 18, 2013, rwg)

The question is how long this will take, and how much damage will be done in the interim. Technology and conventional economic and political decisions may cover over problems temporarily or shift their burdens to other people or ecosystems but will not resolve them. With acid rain and its analogs, there is no national or personal security. Balance will be restored, and whether the restoration is dictated by nature or whether it is guided by humankind and thus provides for human survival is still a matter of human choice. But we cannot stop acid rain or other forms of air pollution while continuing to make the lifestyle and consumption and investment decisions that we make daily. If we do not achieve greater harmony with the natural environment, the future of national security, the nation-state, and the ecosystem as a home for Homo sapiens hangs in the balance.

#### **(--) New satellite date confirms the Earth is facing severe water shortages:**

Daily Mail, 2/13/2013 (“Warnings of severe water shortages in the Middle East after satellites show freshwater reserves the size of the Dead Sea have dried up,” <http://www.dailymail.co.uk/sciencetech/article-2278040/Nasa-warn-freshwater-shortages-Middle-East-study-shows-diminished-reserves.html>, Accessed 2/18/2013, rwg)

Vast freshwater reserves nearly equivalent in size to the Dead Sea have been lost in the Middle East in the last decade, according to a new Nasa study.¶ Scientists warn there could be severe water shortages in decades to come if water resources are not managed better in the region.¶ They say the precious water stocks have gone because of poor water management, increased demands for groundwater, and a major drought in 2007.

#### (--) International law is key to solve water shortages

Christopher L. Kukk & David A. Deese, 1996 (Ph.D. candidate in political science at Boston College & Director of International Studies at Boston College, UCLA Journal of International Law and Foreign Affairs, “AT THE WATER'S EDGE: REGIONAL CONFLICT AND COOPERATION OVER FRESH WATER,” 1 UCLA J. Int'l L. & For. Aff. 21, Lexis, accessed 7/23/2013, rwg)

Although the "difficulties" of severe water shortages may be alleviated by new technologies, better water management, and conservation, the water scarcity-conflict link must still be addressed urgently. Until regional organizations are developed and international law is respected and adopted, water scarcity will continue to be a cause of tension and conflict in the Middle East. Similarly, water scarcity will continue to be a threat to regional and international stability as long as countries define their security in misleading, dangerously narrow terms; refuse to share hydrological information and surpluses of water; and fail to establish regional treaties or agreements concerning the use of international water resources. Still, the solutions discussed herein are meant to show that conflict over water scarcity is not inevitable and that the water scarcity-conflict link can be broken.

#### (--) Impending water shortages threaten human survival:

Miriam C. Nagel, 2013 (“Water Shortages,” <http://www.highbeam.com/topics/water-shortages-t25820>, Accessed 2/18/2013, rwg)

There is no shortage of water on Earth. However, there is a shortage of potable water—water suitable for humans to consume—and also of clean water for washing and crop irrigation in areas where some people live. Fresh, clean water is essential for human survival, but this natural resource is seriously threatened by human activities, such as overuse and mismanagement.¶ Other human activities, such as the burning of fossil fuels, are contributing to climate change, and global supplies of freshwater also are negatively impacted by these changes. Weather patterns are shifting, and unusually strong storms are altering the hydrologic cycle. In addition, the growing human population is placing an ever-increasing burden on the world's water supplies. This growing population presents the challenges of maintaining adequate freshwater resources where they are needed and of handling wastewater, particularly in densely populated regions.

# Plan

#### The federal judiciary should strike down the President’s targeting killing policy involving drones strikes on the grounds that it violates international law.

# 1AC Solvency

#### Contention 3: Solvency

#### Despite international legal precedents, US federal courts have failed to meaningfully rule on targeted killing drone policy – only establishing a judicial legal basis for drones perceptually solves global legitimacy

Ramsden, 2013

[Michael, Assistant Professor, Faculty of Law, The Chinese University of Hong Kong., "Assessing U.S. Targeted Killings Under An International Human Rights Law Framework." Groninger Journal of International Law. Vol. 1, No. 1, www.grojil.org/01-Ramsden%20-%20Assessing%20US%20Targeted%20Killings%20UNder%20an%20International%20HRL%20Framework.pdf, accessed: 8-14-13, SpS]

A further requirement is that any use of lethal force must be subject to review. Article 6 of the ICCPR does not provide explicitly that there must be an investigation. The Human Rights Committee in General Comment No. 6 noted that the law must ‘strictly control and limit the circumstances in which a person may be deprived of their life by the authorities’, and to take ‘measures…to prevent and punish deprivation of life’.76 In subsequent cases, the Committee has noted that the state is subject to a duty to ‘take effective steps to investigate’ the deprivation of life.77 This requires a ‘proper’ and ‘independent’ investigation to be carried out.78 The Committee has not been prescriptive of any particular form of oversight, presumably according discretion to states as to how it investigates deprivations of life.

Similar pronouncements can be found in Strasbourg, where the European Court of Human Rights has frequently observed that protection of the right to life required some form of official investigation when state agents have killed individuals as a result of the use of force. The purpose of this investigatory obligation was to ensure accountability for deaths occurring under their responsibility. In order to meet this investigatory obligation, the state had to initiate a prompt and independent investigation capable of determining whether lethal force was justified. There must also be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.79Some exercises of executive power that interfere with human rights also require judicial oversight. For example in Klass v Germany the court noted in the context of covert surveillance laws that ‘an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.’ 80 The court also noted that ‘in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.’ 81Likewise, the Israeli Supreme Court underscored the importance of judicial review of targeted killings when reviewing the executive’s practice.82

The US executive has resisted calls for the introduction of external checks on its decisions to target suspect terrorists. Recently Brennan has noted, ‘a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force.’ 83 Furthermore, Brennan also noted that adequate process was also unnecessary, as the ‘procedures and practices for identifying lawful targets are extremely robust…They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with applicable law.’ 84 Despite assurance that the US practice of targeted killings accords with applicable law in the planning and execution stages, there are a number of concerns from an IHRL perspective. First, the characterisation of ‘applicable law’ is essentially one that is defined unilaterally by the US executive alone without any judicial challenge. The US District Court in Al-Aulai v Obama did not allay these concerns in finding that the issues raised non-justiciable political questions. Accordingly the US executive may be applying standards that fall short of IHRL, especially given that it primarily characterises the applicable law as IHL. Second, the failure to provide any form of independent mechanism violates basic procedural requirements under IHRL. The reasons presented by US officials to resist independent oversight are unconvincing. In particular, as analysed above, the procedural minimum standard under IHRL does not require audial te rampartem to be respected in the sense that the target has an opportunity of notice and reply prior to the commencement of any drone strike. Rather, the need for an independent investigation requires at a minimum a post-hoc examination of all the circumstances. Such oversight should be capable, it is submitted, of identifying, amongst other matters, whether the individual was a member of a terrorist organization; the evidence that establishes he was engaged in acts of terrorism; whether he was arbitrarily deprived of his life. Third, the suggestion that independent oversight is unjustified or unnecessary reflects a worrying trend by US administrations to insulate counter-terrorism decisions from public accountability. Indeed, the reported human rights abuses at Guantanamo Bay provide a poignant example of the dangers of unchecked power.85

IV. Conclusion

It has been argued in this article that the US justification for targeted killings, resting on self-defence and the existence of an armed conflict with al-Qaeda, is unduly narrow and does not provide an adequate justification for all targeted killings to date. Outside of a defined zone of conflict, the US must justify any targeted killings as consistent with the international law of self-defence and IHRL. The international law of selfdefence serves to preclude the wrongfulness of any use of force on another state’s territory, whereas IHRL provides the appropriate framework to assess the legality of depriving an individual of their life.

Whilst IHRL imposes stringent requirements for the use of lethal force, it is to be noted that some pronouncements from human rights decision-makers recognise that the standards of necessity and proportionality are adaptable, taking into account the gravity of the threat posed to life and the extent to which the authorities are able to assert control over the suspected terrorists. Indeed, if an expanded definition of jurisdiction is given so that the ICCPR enjoys wide extra-territorial effects, it necessarily follows that the standards that qualify the right to life will also take into account a range of factors unique to any extra-territorial use of force. To assert otherwise would be to impose a domestic law enforcement paradigm on the quite different context and challenges arising from the extra-territorial uses of force.

Yet, IHRL is also relevant in another important way; in requiring the US to take measures domestically to provide a legal basis for the killings and an effective means of investigating each killing. In order to enhance the legitimacy of targeted killings and to safeguard from abuse, the US should take steps to provide a legislative standard governing the use of lethal force against suspect terrorists. Effective mechanisms of administrative and judicial review should also be put in place to protect against abuse and ensure that targeted killings only occur in accordance with law.

#### Judicial incorporation of customary international law will be perceived and modeled—this leads to the bolstering of international law:

Douglas Sylvester, 1994 professor of law at the Sandra Day O'Connor College of Law at Arizona State University, Spring, 1994, 42 Buffalo L. Rev. 555, Lexis

#### 3. Countervailing Arguments. The preceding sections have shown that historical and theoretical objections to a modern application of customary international law are not dispositive. Since the judiciary is not precluded from applying customary international law by the Constitution, history, or political theory, the only remaining question to be answered is whether the judiciary should begin applying it. The answer is clearly yes, for a number of reasons. First, there is the fact that much of international law since the Second World War has been created and fostered under the auspices, and to the benefit, of the United States. Judicial applications of international law have the possibility of continuing to solidify and evolve that process. Second, the decisions of domestic tribunals, as evidence of state practice, can have a significant impact on the further development of international law. [n301](http://www.lexisnexis.com.ezproxy.samford.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1283045542529&returnToKey=20_T10006208298&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.794553.2787725402#n301) Increased participation of the domestic judiciary in international law cases will aid in the development of international law in accordance with the interests of the United States.  [\*620]  Third, United States attempts to foster the rule of law in other nations have been **seriously hampered** by this country's refusal to be **bound by** the very proscriptions it espouses. This country's **return to international legitimacy**, even if through judicial imposition, would go far to **strengthening the rule of law** in international relations -- a development that can only support American interests. Finally, the disproportionate effect that this country's actions have upon the development of international law is another factor compelling the judiciary to enforce legitimacy. The incorporation of this law into United States constitutional discourse could have important ramifications. Such an incorporation could simultaneously strengthen the body of customary international law and make it easier for other nations to identify and enforce this law. Once these laws are made explicit it will become more difficult for violations to occur.

After-the-fact judicial review solves best – deters unlawful policy by allowing for judicial competence that balances government secrecy with the defendant’s rights
Vladeck, 2013

[Stephen, Professor of Law and Associate Dean for Scholarship,

American University Washington College of Law, “DRONES AND THE WAR ON TERROR:

WHEN CAN THE U.S. TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?”, accessed: 8-16-13, SpS]

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I believe that virtually all of these concerns could be mitigated.

For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. With respect to adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief, it’s difficult to see any pure Article III problem with such a suit for retrospective relief. As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what the Supreme Court’s 1985 decision in Tennessee v. Garner20 contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances—albeit not always ideally—the government’s interest in secrecy with the detainee’s ability to contest the evidence against him.21 Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures,22 so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. And although the Guantánamo procedures have been developed by courts on an ad hoc basis (a process that has itself been criticized by some jurists),23 Congress might also look to provisions it enacted in 1996 in creating the little-known Alien Terrorist Removal Court, especially 8 U.S.C. § 1534,24 as a model for such proceedings

More to the point, it should also follow that courts would be far more able as a practical matter to review the relevant questions in these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight—removed from the pressures of the moment and with the benefit of the dispassionate distance that judicial review provides. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc.

In addition to the substantive questions, it will also be much easier for courts to review the government’s own internal procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government’s own analysis could, in many cases, go a long way toward proving the lawfulness vel non of an individual strike.

As I mentioned before, there would still be a host of legal doctrines that would likely get in the way of such suits. Just to name a few, there is the present (albeit, in my view, unjustified) hostility to judicially inferred causes of actions under Bivens; the state secrets privilege; and sovereign and official immunity doctrines. But I am a firm believer that, except where the President himself is concerned (where there’s a stronger argument that immunity is constitutionally grounded),25 each of these concerns can be overcome by statute—as at least some of them arguably have been in the context of the express damages actions provided for under FISA.26 So long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and immunity doctrines; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many—if not most—of these cases, these legal issues would be vitiated. Moreover, any concerns about exposing to liability government officers who acted in good faith and within the scope of their employment can be ameliorated by following the model of the Westfall Act, and substituting the United States as the proper defendant in any suit arising out of such an operation.27

Perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn’t raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval does. Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.

Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. Some might also object to this proposal as being unnecessary—that, given existing criminal laws and executive orders, there is already a sufficiently clear prohibition on unlawful strikes to render any such damages regime unnecessarily superfluous.

At least as to this last objection, it bears emphasizing that the existing laws depend entirely upon the beneficence of the Executive Branch, since they assume both that the government will (1) willfully disclose details of unlawful operations rather than cover them up; and (2) prosecute its own in cases in which they cross the line. Given both prior practice and unconfirmed contemporary reports of targeted killing operations that appear to raise serious legality issues, such as “signature strikes,” it doesn’t seem too much of a stretch to doubt that these remedies will prove sufficient.

In addition, there are two enormous upsides to damages actions that, in my mind, make them a least-worst solution—even if they are deeply, fundamentally flawed:

First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent—such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force.

Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution may even compel at least some form of judicial process.28 Compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to balance all of the relevant private, government, and legal interests at stake in such cases.