

Clashing over drones: the legal and normative gap between the United States and the human rights community

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The use of lethal drones by the United States (US) marks a paradox insofar as the US government claims that these strikes respect human rights, while the human rights community – including Human Rights Watch and Amnesty International – raise serious concerns that challenge this claim. Would reconciling these seemingly mutually exclusive human rights narratives regarding drone use lead to the formation of a more robust regime that would provide greater respect for human rights than in the current state of legal and moral ambiguity? In order to explore this question, we examine the evolution of these conflicting discourses through three key frames of legitimation – strategic, legal and normative. We argue that the US government has moved from a strategic-legal framework characterised by a focus on strategic objectives and a permissive view of international humanitarian law to a legal-normative discourse that, by incorporating the principles of just war theory, has restrained the strategic scope of the drone programme while reinforcing the legitimacy of international humanitarian law as the paradigm of choice. Comparatively, we assert that the human rights community has pursued a human rights-centric approach that rejects the more permissive standards of an international humanitarian law-centric legal paradigm, while pushing a normative agenda that seeks to enhance respect for human rights under both international humanitarian law and international human rights law. This includes rejecting the US interpretation of just war principles and appealing to a broader understanding of the right to life norm. Taking these ‘right to life’ considerations seriously raises concerns about whether drones can ever satisfy human rights. In the conclusion, we explore how combining certain elements of these narratives may contribute to an emerging norm on drone use.

Keywords: drones; targeted killing; international norms; just war; international law; human rights

Introduction

The enhanced ability of drones to enable the US to kill at a distance without serious risk to its soldiers – what some have called the ‘silver bullet of democracy’ – has accentuated the ambiguous space between law enforcement (where attempting to apprehend suspected criminals is the legal obligation) and war (where killing of the enemy is legal) that characterises the struggle against non-state terrorist actors in the post 9/11 era.¹ The use of drones to combat Al-Qaeda and its affiliates impacts the respect of human rights of perceived enemies and the civilian population in the areas in which they operate and reside. The

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former have de facto become subject to lethal force outside the traditional battlefield, which marks a major shift – problematic for some – in international humanitarian law (IHL). The latter are, by consequence, forced to live under the ubiquitous threat of drone strikes which, while legally permissible in a state of war (assuming civilians are not directly targeted), places these civilians under significant duress that some argue raises serious challenges for respecting human rights under international human rights law (IHRL).² While both IHL and IHRL aim at respecting some level of human rights, they form the basis of two very different narratives – that of the US government and that of the human rights community (HRC) – regarding the legitimacy of drone use.

On the one hand, the US claims to be a defender and promoter of human rights across the globe. As stated in the 2010 National Security Strategy, ‘America’s commitment to democracy, human rights, and the rule of law are essential sources of our strength and influence in the world’.³ At the same time, the US claims that strategic concerns in the post 9/11 era require a more permissive view of international law that allows for preventive self-defence – including drone strikes outside the recognised battlefield. Rather than a violation of human rights, the use of lethal drones in the struggle against al-Qaeda and affiliates has been characterised as part of a war in which the killing of militants is claimed to be in conformity with US domestic law and IHL, two legal regimes that place a premium on the rights of individuals. While drone strikes have caused civilian casualties, US officials claim that respect for human rights has been enhanced by drone use because they are better than other weapons at respecting the *jus in bello* criteria of proportionality and distinction.⁴ Moreover, proponents also claim that the US drone campaign has a far better track record compared to the militaries of other nations, such as Pakistan, when it comes to respecting civilian immunity during military operations.⁵

On the other hand, the HRC – broadly defined to include inter-governmental organisations (IGOs; such as the United Nations Human Rights Office of the High Commissioner), non-governmental organisations (NGOs; including Amnesty International, Human Rights Watch, and the International Committee of the Red Cross), and academic institutes (including New York University’s Global Justice Clinic, Stanford University’s International Human Rights and Conflict Resolution Clinic, and the Columbia Law School’s Human Rights Clinic) – have converged on a broad consensus that directly challenges the US legal and moral claims on the use of lethal drones. While the HRC as we define it consists of a wide variety of institutions with disparate influence in the realm of international relations, we group them together for this study in order to reveal the basis of a common front against US drone use. The HRC, first and foremost, disagrees with the IHL-centric approach, insisting that the more restrictive legal framework of IHRL applies. In addition, even when they concur that IHL could apply, the HRC challenges what they deem a robust security rationale advocated by the US that expands the *jus in bello* principles of distinction, military necessity and proportionality. Finally, while they agree with the US that there are conflicting laws, legal ambiguities and a lacuna in the legal structure, they present a normative frame that pushes the law in a human rights direction, emphasising the greater protection of civilians.⁶

These conflicting discourses elicit a host of important questions: What impact has the concept of human rights had on the way drones are used? Has the use of drones altered the way human rights are understood? Would reconciling these seemingly mutually exclusive human rights narratives regarding drone use lead to the formation of a norm that would provide greater respect for human rights than in the current state of legal and moral ambiguity?

In order to explore these questions, we trace the rhetoric used by US government officials and the HRC to address the human rights challenges of drone use. To tease out the significance of human rights concerns within these discourses, we examine their evolution through three key frames of legitimation – strategic, legal and normative. The strategic lens captures the notion that the fight against terrorist groups obliges states to think differently about traditional norms of sovereignty and human rights, the legal framework contrasts the saliences of two competing discourses of international law (IHL and IHRL), and the normative framework incorporates ‘universalist’ notions of just war to provide moral gloss to fill the gaps in legal discourse. We argue that the US government has moved from a strategic-legal framework to a legal-normative discourse. The former is characterised by a focus on strategic objectives and a permissive view of IHL, with respect of human rights subject to strategic necessity (and thus minimal). The latter incorporates the principles of just war theory, thus restraining the strategic scope of the drone programme while reinforcing the legitimacy of IHL as the paradigm of choice. This provides enhanced respect of human rights, albeit that of IHL (which is far more permissive than IHRL). Comparatively, we assert that the HRC has pursued a human rights-centric approach that rejects the more permissive standards of IHL, while pushing a normative agenda that seeks to enhance respect for human rights under both IHL and IHRL. This includes rejecting the US interpretation of just war principles and appealing to a broader understanding of the right to life norm. Taking right to life considerations seriously raises concerns about whether lethal drones can ever satisfy human rights. In the conclusion, we explore how combining certain elements of these narratives may be contributing to an emerging norm on drone use, and explore the human rights tradeoffs of alternatives to drones in order to push the debate on their use in new directions.

Three frames of legitimation

For the past decade, the US government and the human rights community have presented quite disparate understandings of the legal and moral norms governing drone use outside the traditional battlefield, and in doing so they have used different frames to legitimise their positions. We build on Krebs and Jackson’s ‘rhetorical coercion’ model, in which the authors contend that ‘rhetorical coercion is a political strategy that seeks to twist arms by twisting tongues’.⁷ Here, speech acts, broadly defined to include public speeches, white papers, legal memorandums, reports, declarations and recommendations, represent an exercise of power with two aims: persuading the public at large of the legitimacy of certain preferences, while leaving one’s ‘opponents without access to the rhetorical materials needed to craft a socially sustainable rebuttal ... [because] the claimant’s opponents have been talked into a corner, compelled to endorse a stance they would otherwise reject’.⁸ Successful rhetorical coercion is achieved through skillful framing. In the case of drone use, human rights have been a key part of this framing strategy. The US government and the HRC have employed three overlapping frames of reference to legitimise their preferences, while also discounting those of their critics: a strategic frame, a legalistic frame and a normative frame.

As an ideal type, the strategic frame is guided by utility-maximisation. An actor rationalises his or her actions based on what is perceived to yield the highest probability of success – i.e. maximising security – regardless of legal or moral considerations. In the international realm, this frame is often associated with the realist paradigm, whereby a state will take whatever actions necessary to ensure its security. States usually have to frame their actions at least in part on strategic grounds because a government needs to signal to its

population that it is doing everything in its power to guarantee the security of its citizens and ensure maximum protection of its soldiers.⁹ The HRC, on the other hand, minimises the salience of the strategic frame because its cardinal preference – maximising human rights for everyone – is undermined if the security concerns of one party are allowed to dominate. To quote a UN report on drones:

Although drones are not illegal weapons, they can make it easier for States to deploy deadly and targeted force on the territories of other States. As such, they risk undermining the protection of life in the immediate and longer terms. If the right to life is to be secured, it is imperative that the limitations posed by international law on the use of force are not weakened by broad justifications of drone strikes.¹⁰

On the ground, however, states sometimes find that security concerns conflict with their international legal obligations, including respect of human rights. Reliance on a purely strategic frame tends to suppress human rights because if states can do whatever they need to preserve their security, then they can violate the sovereignty of other states and kill the civilians residing there whenever this is deemed necessary. However, in a world where international law imposes some checks on state behaviour (even if ultimately unenforceable), states suffer costs – in reputation and perhaps security – if they openly and frequently transgress international law. As we will explore in depth below, the US has taken a permissive view of self-defence to use drones to kill suspected militants and/or deny safe havens for terrorist groups outside of defined warzones. This has been perceived as a violation of state sovereignty and has led to civilian casualties. In light of this, the US, left with a choice between either abandoning a controversial military tactic, or trying to legitimise its actions using legal and/or normative frames, opted for the latter.

The legalistic frame attempts to legitimise an actor's preferences and actions based on a supposedly objective assessment of the facts interpreted through the lens of applicable international laws, regardless of strategic or normative concerns. International law is designed to protect the human rights of all people in the world, both in times of peace and in times of war. As with any legal structure, the applicability and interpretation of the law is contestable – especially concerning customary international law – though actors rarely admit this. Instead, when actors justify their preferences in a legalistic frame, they present it as an objective reflection of agreed upon norms. Both the US and the HRC turn to international law to justify preferences. Citing international law provides a sense of global legitimacy – either by affirming that state actions are in conformity with recognised behavioural norms (i.e. non-aggressive behaviour) or in exerting pressure on states to conform to such norms.¹¹

Regarding drones, the challenge lies in discerning which paradigm of international law is most appropriate to targeted killings. The US government has claimed, since the first drone strike in 2002 outside of the Afghanistan warzone, that it is at war with al-Qaeda, meaning IHL should be the legal regime governing the conflict. The key IHL documents in this context include the 1899 and 1907 Hague Conventions; the 1949 Geneva Conventions; and the 1977 Additional Protocols I and II to the Geneva Conventions, which the US has not ratified, although several of its provisions have become part of customary law. The HRC, on the other hand, emphasises that US targeted killings are taking place outside a declared zone of war, meaning that IHRL should be the governing framework. The key international human rights legal documents here include the 1947 Universal Declaration of Human Rights, where several of its provisions have attained a customary character; the 1966 International Covenant on Civil and Political Rights; the 1966 International Covenant on Economic, Social and Cultural Rights; and the 1989 Convention on the Rights of

the Child. Depending on which framework is used, the required level of respect for human rights is different. During war, IHL applies against combatants of the adversary's forces, while in a state of conflict short of war or not reaching a high level of violence, the constraints of law enforcement and IHRL shape the extent to which a state can use lethal force against a suspected criminal. The distinction is important because the level of respect of human rights required in a situation of law enforcement is much greater than what is required in the context of war. By claiming the US is at war, the government can suppress, to a certain extent, the human rights of suspected terrorists and the civilians living around them, in so far as operations that increase the risk of civilian harm become more permissive. This means that the enemy can be killed without being afforded the chance to surrender or being brought to trial. Furthermore, civilian death can, under certain circumstances, be permissible. Contrast this with the law enforcement paradigm where the right to life and trial by jury are paramount, and the justification for the use of force is severely curtailed in order to limit civilian casualties, including those who are presumed suspects.

In the normative frame, actors seek to justify their preferences based on their identity as members of a larger community organised under an agreed understanding of what is true, reasonable, natural, just, and good.¹² While the law provides strong guidance, often there are legal ambiguities, conflicting laws or a genuine lacuna in the legal structure. In addition, actors may disagree with the law or find it obsolete given changing conditions in the international arena. To justify a preference or action that is legally disputed, a normative frame can be used that emphasises a larger set of meta-norms with the hope that controversial actions will be perceived as morally right despite legal ambiguities.¹³ Concerning targeted killings, for example, the US has begun to justify its policy by using principles of just war theory as its normative frame to respond to critics who say drones are wantonly killing civilians.

The principles of just war have consistently influenced the way statesmen think about the relationship between war and ethics in the post-Cold War era. For example, all US presidents since the end of the Cold War have referenced the language of just war in some form or another, albeit in different ways.¹⁴ The principles can be divided into the *jus ad bellum* (how one determines the justice of *going to war*) and *jus in bello* (how one determines what one can do *in war*). The *jus ad bellum* includes the criteria of just cause, right authority, right intention, proportionality, last resort and reasonable hope of success, while the *jus in bello* is defined by the criteria of necessity, distinction and proportionality of means. President Obama's reference to the concept of just war as a means 'to regulate the destructive power of war' in his Nobel Peace prize acceptance speech in 2009 points to the salience of this moral framework, spanning several thousand years of philosophical reflection, as a guide to assist statesman in adjudicating the challenges linked to the use of force in the world today.¹⁵

Obama's interpretation of just war ethics marks a stark rejection of Bush's ethics of war in that it revalorises the notion of last resort (whose significance had been diluted in Bush's thinking); however, Obama actually continued the drone policies implemented by the Bush administration.¹⁶ In particular, he has adopted the same diluted notion of imminence, which led him to expand the drone programme significantly in the first two years of his presidency, while largely remaining silent on the morality of drone strikes. We raise this point to show that the shift towards applying just war principles to drones occurred not simply because Obama was interested in just war thinking.¹⁷ Rather, the turn to the just war framework in early 2012 coincides with the increased pressure from the HRC to define the moral principles by which the drone programmes were being governed.¹⁸

The turn to just war rhetoric has important human rights implications. On the one hand, incorporating just war principles restricts targeting practices (thus protecting human rights compared to the strategic paradigm). This bows to the criticisms of the HRC, who have vehemently criticised the targeting practices of the US government. On the other hand, just war rhetoric provides moral gloss that portrays drone strikes as being governed by universal principles, implicitly reinforcing the legal paradigm of war as the legitimate framework (thus diminishing human rights compared to the law enforcement paradigm). As we will argue below, appealing to just war principles as part of a rhetorical strategy paints human rights groups into a corner by using the goal of maximising protection of human rights in a time of war as a rhetorical frame to disarm criticism.

Taking advantage of the legal ambiguities, the US can claim it is doing everything morally required to assure civilians are not harmed, while affirming the right to use such lethal force to achieve strategic goals.¹⁹ The HRC's response has been to challenge the US understanding of both the *jus ad bellum* and especially, the *jus in bello* principles, and focus on the negative impact constant drone use has on the right to life norm.

US drone discourse: from the strategic-legal to legal-normative frame

It is important to acknowledge that drone use by the US government is circumscribed by the real-world challenges of statecraft. While the US accepts human rights in the abstract, as evidenced by key government documents and policy speeches, the ideal of human rights compliance is limited by difficult decisions political leaders have to make. This is done in a context of legal ambiguity as the legitimate regime of international law to combat non-state actors – the prime target of US Special Operations Forces and CIA drone strikes – remains a matter of debate. As Obama articulated in a 2013 speech: ‘This new technology raises profound questions – about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality’.²⁰ Drone use is thus defined by the tension between upholding the ideal of human rights and providing for national security, that is to say, between ensuring strategic goals and normative preferences while maintaining some level of adherence to legal norms. The Obama administration in particular has used a strategy of rhetorical coercion to navigate this tension in the public sphere.

Drones and the US government's strategic-legal frame

The first reported US drone strike outside an official warzone came in 2002. Abu Ali al-Harethi, a senior al-Qaeda leader and suspect in the bombing of the *U.S.S. Cole*, was killed by a predator drone in Yemen, along with five other purported militants. Deputy Secretary of Defense Paul Wolfowitz described the strike in purely strategic terms. As part of a larger war, the drone operation was

[A] very successful tactical operation, and one hopes each time you get a success like that, not only to have gotten rid of somebody dangerous, but to have imposed changes in their tactics and operations and procedures. And sometimes when people are changing, they expose themselves in new ways.²¹

Despite the mission's success, backlash from the HRC was immediate. Amnesty International wrote in a communication to President Bush: ‘If this was the deliberate killing

of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extrajudicial executions in violation of international human-rights law'.²² While the criticism employed a legalistic frame, the US responded using a counter-legal frame, arguing that the strike was permitted under the international laws of war because the target was an enemy combatant. The Senate Intelligence Committee, which is responsible for overseeing CIA covert operations, defended the strike in such legal terms as well. The committee chairman, Senator Robert Graham, asserted that 'having defined this as an act against a military adversary and applying the standards of international law, this was within the legal rights of a nation at war'.²³ National Security Advisor Condoleezza Rice added that the strategic outlook had changed, implying that the legal understanding of self-defence had changed as well: 'We're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields'.²⁴

The exchange between Amnesty International and the Bush administration captures the legal contest over the ambiguity that came to characterise the drone debate: human rights groups argued that targeted killings violate IHRL, including the most important human right of all, the right to life, while US officials argued that such killings were legitimate under IHL, and thus not a violation of human rights because killing combatants in war is permitted. In each legal frame, human rights has a place, but with very different repercussions for those being targeted and the civilians around them. While the HRC position placed a premium on the right to life (even of suspected militants), and a fair trial, the US government's position was driven by a strong strategic element.

The strategic frame was expressed by deed, as rhetorical rationales were not articulated. Following the 2002 strike, the US began operating under the cloak of plausible deniability by refraining from publicly acknowledging suspected drone operations so that Washington, and potentially its allies, could deny US involvement. This stance persisted through the rest of the Bush administration's tenure in the White House and through most of Obama's first term. Because the US did not acknowledge alleged strikes, it therefore did not need to publically offer legal or normative justifications. This allowed the administration to pursue strategic directives, such as targeting terrorist threats and denying safe havens, and ignore the concerns and critiques of the HRC.

By insulating the administration from public responsibility, a clear precedent regarding targeted killing came to be solidified within the US government and the main bodies that operate drones outside declared warzones (the CIA and Joint Special Operations Command (JSOC)). This marked a clear shift in the political mindset of the key parties involved. Prior to 9/11, CIA Director George Tenet was 'skeptical about whether a military weapon should be fired outside of the military chain of command', insisting that during peacetime, no one at the CIA, including the director, had the legal authority to fire a missile.²⁵ After 9/11, the situation changed as the CIA was granted wide-sweeping authorities to target members of al-Qaeda under the Authorized Use of Military Force (AUMF). Following the approval of the AUMF, the senior leadership at the CIA and in the US government believed that the more permissive IHL regime governed all operations against al-Qaeda, meaning its members were considered militants who could be justly targeted with lethal force. Al-Harethi's death thus marked the culmination of a protracted debate about the legality of targeted killing outside a hot battlefield. As one former CIA official noted, 'There was discussion about this for years in the CIA. The discussion is now over, and the operations have begun'.²⁶ This precedent was extended to JSOC who now also employ drones for targeted killings outside traditional warzones.

The choice of legal frames – that of IHL – conformed to the strategic concerns of the US. The problem, however, was that in pursuing the use of force under the more permissive rules of IHL (compared to IHRL), the US expanded the drone programme in such a way that made the strategic-legal frame unsustainable. Between 2002 and 2007, drones were a small part of the ‘global war on terror’, never exceeding more than four lethal strikes per year outside of Iraq and Afghanistan. However, beginning in 2008, their use skyrocketed. According to the New America Foundation, there were 36 strikes in Pakistan in 2008, 54 strikes in 2009 and 122 strikes in 2010.²⁷ Had drones remained a very limited tool with only a few strikes per year, the human rights impact would have been much smaller. But with more frequent strikes, the stance of plausible deniability became untenable because reports of significant civilian casualties mobilised the HRC to put pressure on the US. Given that the US was silent on drones, the HRC was able to control the discourse. Through its campaign criticising US lethal drone strikes and its emphasis on the need to take IHRL seriously, the HRC backed the US into a rhetorical corner, as it were, and began to delegitimise its actions. This, in turn, forced the US to begin a public campaign to counter the HRC narrative on drones.

The initial period of plausible deniability served to create the space for new norms regarding the use of force to emerge, which impacted the way in which human rights came to be understood. As Kegley and Raymond argue, when a set of new norms is endorsed by a powerful state, this can set the foundation for a more permissive normative world order with regard to the use of force because custom is key in international law.²⁸ The strategic-legal frame reflects the emergence of an expanded concept of anticipatory self-defence that included what would be termed, ‘preventive self-defence’, or the right to attack an adversary even when there is no clear evidence of an imminent attack.²⁹

The norm of preventive self-defence has its roots in the Bush Doctrine. Under the Bush administration, the US used a legal-strategic frame that argued that international law was inadequate for combating transnational terrorist groups, and that an expanded notion of anticipatory self-defence was required.³⁰ One of the clearest articulations of this perspective is found in the 2002 National Security Strategy:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. *We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.*³¹

While the administration used the language of preemption, which has historical legal precedents dating back to the *Caroline affair* in the nineteenth century, the thrust of the argument pressed for a different kind of force. The distinction between preemption and prevention is that the former is self-defence against an imminent threat, while the latter is against a potential future or emerging threat.³² While George W. Bush spoke the language of preemptive war, his doctrine was considered by many as one of preventive war. Although preemptive war is widely considered just, the Bush doctrine, as Matthew Flynn explains, ‘expanded US power to the point where it had moved the country away from self-preservation. Preemption in this broader sense suddenly becomes much more frequent. It also becomes a justification for aggression’.³³ Neta Crawford argued that the bar for anticipatory war was set ‘too low in the Bush administration’s National Security Strategy’. She thus warned that ‘the consequences of lowering the threshold may be increased instability

and the premature use of force', and that such a doctrine 'short-circuits nonmilitary means of solving problems'.³⁴

Even though the Bush Doctrine was largely repudiated because it was seen as enabling the use of force in dangerous ways, this expanded interpretation of anticipatory self-defence would form the basis of the US targeted killing policy enabled by drones.³⁵ Despite significant differences between Bush and Obama with regard to the use of force, the US drone programme fit into the scope of an emerging norm, what Fisk and Ramos describe as the norm of preventive self-defence that emerged in the post 9/11 era: 'states' cost-benefit calculations regarding the options available for this purpose certainly lean toward drones as the weapon of choice, as they offer a trifecta of capabilities: precision, reconnaissance, and surveillance'.³⁶ While the first strike in 2002 was an isolated incident in taking the fight to al-Qaeda wherever its members resided, it was part of a larger strategy that had significant human rights implications as it expanded the geographic scope of the war to a global battlefield. As Wolfowitz explained: 'So we have just got to keep the pressure on everywhere we're able to, and we've got to deny the sanctuaries everywhere we're able to, and we've got to put pressure on every government that is giving these people support to get out of that business'.³⁷ Drones would come to fill this role in a much wider sense as they became the weapon of choice towards the end of Bush's second term and throughout Obama's first term, especially in the region along the Afghanistan-Pakistan border.

There are significant human rights implications that emerge as a consequence of accepting preventive self-defence as a strategic and legal norm for both those deemed combatants as well as non-combatants. In claiming the legal right to wage preventive war against terrorists groups, the US assumes a wider latitude to use lethal force compared to criminal law enforcement. And while the laws of war specify minimum human rights, these are, as David Luban notes, 'far less robust than rights in peacetime'. Luban goes on to argue that such a view 'depresses human rights from their peacetime standard to the war-time standard'.³⁸

Regarding perceived combatants, applying IHL allows for a very wide target list, one that might include top leaders, low-level militants, and perhaps civilians aiding combatants in various ways. The initial use of drones focused on key leaders to decapitate the chain of command; as the fight progressed, the strategy evolved to deny safe havens, which increased the target list to include potentially anyone associated with or inspired by al-Qaeda. At the peak of the strategic-legal phase of the drone campaign in Pakistan in 2010, there was a drone strike every three days on average, pursuing a wide range of targets. Even within the IHL paradigm, this vision of the global battlefield posed multiple human rights concerns. A major concern, of course, is that of identifying who is an actual member of al-Qaeda. Killing people whose identity is uncertain can be a violation even under IHL. Several reputable news agencies published stories on the convoluted 'Kill List' protocol employed by the Obama administration, and the way it identified non-combatants as any man of military age.³⁹

Regarding non-combatants, an increased number of strikes and a wider range of targets augments the probability of greater civilian deaths due to error or over-aggressive targeting. But more generally, the application of IHL places civilian populations where terrorists reside under the legal regimes governing war. The protection of human rights in such a context permits more collateral damage compared to a zone of peace where law-enforcement is used, thus subjecting civilians' human rights to the strategic calculations of the US. This shift has led to what some scholars have called 'risk transfer', or relying on technology to decrease the risk to US soldiers and transferring that risk to non-combatants during conflict.⁴⁰ By prioritising the lives of its soldiers, the US effectively increased the

potential harm to non-combatants who might be in the vicinity of drone strikes (although sending in a team to capture a suspected individual may also pose risks).

If the suppression of human rights that Luban describes had been temporary and for a limited duration during an exceptional crisis (something akin to Walzer's notion of supreme emergency) the impact on human rights may have been circumscribed.⁴¹ However, as Luban argues, the war on terror appears as though it will go on perpetually, which means 'the suspension of human rights ... is not temporary but permanent'.⁴² The use of drones as the tool of choice in the US fight against terrorism has led to a perpetual war and with it a permanent re-interpretation and devaluing of what human rights mean in the contemporary world. As we argue below, this has even deeper implications when the nefarious consequences of drones, detailed by the HRC, are taken into account.

Although the strategic-legal frame did not provide enough moral clout to fill the space of legal ambiguity, when the Obama administration chose to publicly justify its drone use, the foundation for a more permissive world order was already in place. To publically legitimise its drone programme, government officials employed the language of just war.

Drones and the US government's legal-normative frame

The US publicly defended its lethal drones programme through a shift towards a legal-normative frame. Beginning with President Obama's first public acknowledgment of drone operations in January 2012, and followed by a series of speeches by government officials – including General Counsel for the Department of Defense Jeh Johnson, State Department Legal Adviser Harold Koh, Attorney General Eric Holder, and CIA General Counsel Stephen Preston – the US reaffirmed the legitimacy of the IHL framework, but buttressed this defence by turning to the principles of just war. In so far as just war principles are inscribed into IHL, their use clearly overlaps with the legal frame. However, these principles also serve a powerful rhetorical purpose. By appealing to universalist principles, or meta norms that have emerged from the authority of history, the use of just war principles distanced the US from the strategic-centric approach of the period of plausible deniability, appearing to fill the gaps in legal ambiguity by showing the US was waging not just a legal war, but also a *moral* one, indeed the most 'moral' war in human history as some proponents argued.⁴³

The use of just war language by the Obama administration should come as no surprise. Obama referenced the principles of just war in his 2009 Nobel Prize acceptance speech as a means 'to regulate the destructive power of war', and its principles are integrated into the 2010 National Security Strategy. While the principles were applied initially to describe interstate war, they have now become standard for framing the use of drones against al-Qaeda. As Obama stated in his 2013 speech at the National Defense University, in which he outlines the legal and moral reasoning behind drone use: 'We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort, and in self-defense'.⁴⁴

The speech that set the tone for the legal-normative frame was given by John Brennan, who was deputy National Security Adviser and Obama's primary counsellor on counterterrorism, on April 2012 at the Wilson Center. The context for the speech was a discussion of the Obama administration's counter-terrorism strategy, and in particular, its 'ethics and efficacy' which had been the subject of both domestic and international concern given the ever-increasing controversy surrounding drone use. Brennan's speech sought to define drone use as legal (the IHL frame), ethical (the just war frame) and wise (the strategic frame). While the

legal and strategic frames remained the same, the major novelty in his speech was the incorporation of just war language into the government's rhetoric. Departing from the strategic-legal view that the US does not have to try to capture terrorists because they can simply be targeted as enemy combatants in a war, Brennan argues that 'our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible... It is our preference to capture suspected terrorists whenever and wherever feasible'.⁴⁵ This claim sought to counter accusations that the US was killing anyone at will by suggesting drone strikes must adhere to the *jus ad bellum* principle of last resort. This means every reasonable alternative must be explored before resorting to a lethal strike. Following such a view preserves, in theory, two principles key to upholding human rights, the right to life and to a fair and public trial. Adhering to last resort would thus mark a more restrained view of the use of lethal force compared to the strategic-legal framing discussed above.

Yet, Brennan admitted that opportunities for capture are rare, and that at times, drone strikes become a military necessity in the war against al-Qaeda. As he explains in the question and answer session: 'But if it's not feasible, either because it's too risky from the standpoint of forces or the government doesn't have the will or the ability to do it, then we make a determination whether or not the significance of the threat that the person poses requires us to take action, so that we're able to mitigate the threat that they pose'.⁴⁶ In such instances, Brennan claimed that the US is adhering to the *jus in bello* principles, which are incorporated into IHL, to protect the human rights of civilians. Brennan makes explicit reference to the *jus in bello*

principle of necessity, the requirement that the target have definite military value ... the principle of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted ... [and] the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage.⁴⁷

In essence, Brennan explained that the US was taking core IHL principles and imbuing them with greater moral restraint somehow implicit in just war theory.⁴⁸ The new rhetoric marked a stark shift from a strategic-legal to a legal-normative frame to legitimise drone strikes. Under the former, the administration was able to strike widely, without having to publically take responsibility. The legal constraints contained in IHL – such as distinction and proportionality – were interpreted in such a way to ensure mission success, leaving respect for human rights prey to the strategic necessities of the war on terror. Thus, one could err on the side of uncertainty when pursuing suspected militants by targeting them even if there was doubt about their identity or whether civilians might be unduly harmed.

Turning to just war principles, however, reintroduces the notion of public responsibility to uphold certain norms. As a deep moral discourse, just war standards emphasised a re-interpretation of core IHL concepts including, distinction, proportionality, military necessity and imminence. This is reflected in Obama's 2013 speech at the National Defense University:

As our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. *To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance.* For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power – or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists – insisting upon clear guidelines, oversight and accountability.⁴⁹

Infusing IHL with the deep moral discourse of just war has led the US to take greater pains before approving a drone strike than what is required under IHL. Under IHL, it is legally permissible for civilians to be killed when targeting the enemy, but as the US has learned, even the unintentional killing of one civilian can create considerable backlash from the affected civilian population, the HRC and world opinion at large. Consequently, the US has shifted from viewing its lethal operations from an IHL centric strategic-legal context to a more moral legal-normative one that prioritises just war principles. This shift is reflected in the Obama administration's attempts to persuade the public that it is waging a moral war, which in turn has led to greater restraint as a matter of policy. As Obama explained in 2014, 'Before any strike is taken, there must be near-certainty that no civilians will be killed or injured – the highest standard we can set'.⁵⁰ The introduction of this 'near certainty standard', where lethal strikes will only be carried out when the probability that civilians will not be harmed is very, very low, goes well beyond what is required under IHL.

While calls for greater public transparency have fallen largely on deaf ears, the empirically available data on drone strikes suggests that the US turn to just war principles parallels two trends related to drone use. According to the New America Foundation, the number of drone strikes in Pakistan has plummeted since 2012, when there were 48 strikes. In 2013, there were 27 strikes, and at the time of writing (October 2014), there have been 17 strikes (Compared to 122 strikes in 2010, the peak of the strategic-legal frame).⁵¹

The number of civilian casualties has also decreased, both in absolute numbers and in proportion to the total number of strikes. In a study on drone strikes in Pakistan from 2007–2012, Braun and Brunstetter demonstrate that 23% of CIA strikes (80 out of 343) during that period caused civilian deaths (estimated between 462 and 676 civilians and unknowns), which is a far higher percentage than what the US military tolerates as a permissible ratio of combatant kills/collateral damage. They argue that the data raise serious concerns about the CIA's targeting protocol concerning the principles of distinction and proportionality, and the concern for human rights.⁵² The end of their study, however, coincides with the beginning of the shift in rhetorical framing by the US government and the use of just war discourse to defend drone strikes. Presumably, the government has partially reformed its targeting policy to reflect its rhetoric. The numbers suggest such a shift as they have accordingly decreased in 2013 and 2014; in a total of 44 strikes through October 2014, only two strikes (4.5% of total strikes) have killed between three and five civilians and three and four unknowns, while all others have killed only militants.⁵³

We are not suggesting that there is a monocausal relationship between the HRC, the US just war turn and the decrease in US drone strikes. Clearly other factors have also contributed to the decreased use of strikes and the more restrictive rules of engagement. For example, the escalating political costs of the signature strikes campaign led to strained relations between Washington and Islamabad, which may have limited US military options and helped the US to realise drones are not the only option available for dealing with suspected militants in Pakistan. Furthermore, the US has encouraged Islamabad to take a greater role in diminishing threats emanating from the region. The Pakistani government has done so by asking for a lull in strikes to negotiate with the Taliban, while also taking a greater role in pursuing militants through military means, though it is unclear how effective this has been.⁵⁴ This shift in policy represents a new US security, political and economic strategy called the 'New Silk Road', a plan that US government officials see as the long-term alternative to a perpetual drone war, the ethical implications of which we discuss in the conclusion.

However, what we are suggesting is that regardless of whether just war thinking is the most important cause of this trend, the turn to just war principles has created an ethical structure that arguably reduces the temptation to use drones; and when they are used, such strikes are also governed by a more restrictive legal-moral frame. While strikes have increased in Yemen during the same period (albeit with open consent of that government), an optimistic interpretation of this trend would suggest that the legal-normative frame imposes an inherent restraining mechanism by limiting the individuals who can be targeted to those who pose a clear threat, thus reducing the range of permissible targets. Despite persisting ambiguity regarding who is a clear threat and what imminence means, adherence to just war principles appears to have delegitimised signature strikes – drone strikes carried out based on merely suspicious patterns of behavior – which were considered legitimate under the strategic-legal frame. This shift in policy and discourse was a reaction to the challenge posed by the HRC's consensual condemnation of US signature strikes.⁵⁵ Moreover, such a framework makes other alternatives – those encouraged by New Silk Road strategy for example – look more attractive.⁵⁶

It is important to highlight that while the constraints of just war principles on US drone strikes have had a positive effect on human rights (when compared to the strategic-legal frame) in so far as fewer strikes are permissible and greater care must be taken regarding who is targeted and whether civilians are at risk, this legal-normative turn has also introduced a normative gloss that reinforces the IHL-centric legal paradigm that the US prefers, as opposed to the IHRL regime that the HRC advocates. Therefore, the new legal-normative discourse still preserves a key element of its strategic-legal precursor, namely the controversial view that the US claims the right to use lethal force against suspected terrorists residing anywhere in the world. Here, the discourse of just war contributes to the further solidification of the norm of preventive self-defence that perpetually diminishes the human rights of suspected terrorists and those civilians living under drones. We now turn to the HRC challenge of the US legal-normative justification of lethal drones to shed light on an important counter-narrative about the relationship between drones and human rights.

Drones and the human rights community: defending IHRL and expanding human rights protections

The HRC position on drones challenges the underpinnings of both the strategic-legal and legal-normative frames employed by the US. Since Amnesty International's initial criticism of the 2002 drone strike in Yemen, a series of important official reports from the UN, Amnesty International, Human Rights Watch and other NGOs and academic clinics have consistently challenged the evolving US position. In reading these documents, three overarching lines of critique relevant to our argument regarding how the US understands the relation between drone use and human rights emerge.

First, the HRC rejects the IHL-centric framework guiding US drone strikes. The HRC emphasises that context (whether the strike is carried out within an armed conflict, or outside of an armed conflict) is key for assessing which legal structure (IHL or IHRL) applies.⁵⁷ As Philip Alston explains in a 2010 report commissioned by the Office of the United Nations High Commission for Human Rights: 'In the legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict'.⁵⁸ According to the HRC, the US has failed to provide enough evidence to clearly indicate that, outside of the warzones in Iraq and Afghanistan, drone strikes against al-Qaeda, the Taliban, and 'affiliated forces'

such as Yemen's al-Qaeda in the Arabian Peninsula, and Somalia's al-Shabab, should be governed by IHL.⁵⁹ A 2013 Amnesty International report describes this challenge when reporting the death of an elderly woman in Pakistan:

If the drone attack took place as part of an armed conflict, then international humanitarian law would apply alongside international human rights law. Under international humanitarian law, not all civilian deaths that occur as a result of armed attacks are unlawful ... If the attack took place outside an actual situation of armed conflict, then only international human rights law would apply to this case, rather than the more permissive rules of international humanitarian law. The law enforcement standards that uphold the right to life prohibit the use of intentional lethal force except when strictly unavoidable to protect life.⁶⁰

Ultimately however, for the HRC, the default legal paradigm is that of IHRL:

The most immediate protection for the right to life is provided by the international human rights law framework. This is the default legal regime from which deviations are permissible only when, and for as long as, those who justify the more permissive use of force under international humanitarian law can show that the requisite conditions have been fulfilled.⁶¹

The main problem with the US position is that it has failed to show that al-Qaeda, the Taliban and 'affiliated forces' constitute a centralised and organised 'party' under the laws of war, or that their violent acts reach the quantity and severity thresholds to be declared an armed conflict.⁶² Although the HRC acknowledges that the 9/11 terrorist attacks carried out by al-Qaeda did meet the severity threshold, they question, as the current UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, has suggested, whether, 'killings carried out in 2012 can be justified as in response to [events] in 2001'.⁶³ Consequently, the HRC views targeted killings outside of a clear warzone as illegal, claiming they should be characterised as extra-judicial executions, given that human rights law prohibits the premeditated and intentional use of lethal force.⁶⁴ As Fernando Tesón argues in his critical analysis of targeted killing, 'during peacetime, the state can use lethal force only in very limited circumstances, mostly in self-defense or to protect persons from deadly threats. Beyond that, a suspected criminal is entitled to due process and may not be killed except in execution of a lawful sentence pronounced by a court of law after a finding of guilt'.⁶⁵ In other words, for a drone strike to be legitimate according to the HRC, the US would need to provide, in a transparent fashion and under some court's supervision, clear and incontrovertible proof that the suspected individual is directly involved in hostilities, cannot be apprehended, and represents a serious and imminent threat.

Second, even when the HRC agrees that IHL could apply to US targeted killings (in Iraq and Afghanistan, or in the event that more evidence is put forth by the US showing that IHL indeed applies to strikes in Pakistan, Yemen and Somalia), they nonetheless challenge what they see as inadequate attention paid to the *jus ad bellum* principle of last resort as it might apply to a particular drone strike (i.e. serious attempt to capture), as well as the 'robust', 'expanded' and overly permissive interpretations of the *jus in bello* principles of distinction, military necessity and proportionality.

Regarding last resort, the HRC challenges the US view, explained in a leaked Department of Justice (DoJ) White Paper, that imminence in the context of terrorism often comes before all reasonable non-violent options can be tried. As argued in a 2013 joint letter to President Obama on drones and targeted killings written by the American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice, NYU School of Law, Human Rights First, Human Rights Watch and other members of the HRC:

Administration officials have in the past defined an ‘imminent threat’ in ways that emphasize the opportunity to attack a target rather than the immediacy of the threat posed. Justifying the use of lethal force against a ‘continuing’ threat seems to similarly endorse the use of lethal force in response to fear of an unspecified adverse action at an undefined point in the future. These interpretations of imminence are inconsistent with international law.⁶⁶

Rather, the HRC falls back on the level of force permitted in IHRL, purporting the view that ‘outside of actual armed conflict, lethal force may only be used when strictly unavoidable to protect against an imminent threat to life’.⁶⁷

In terms of the principles of distinction and military necessity, the HRC defers to the position outlined in the ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, adopted by the International Committee of the Red Cross (ICRC).⁶⁸ Claiming the US is in a conflict with organised non-state armed groups, the HRC asserts that the laws of a non-international armed conflict should apply. Under such a legal framework, there are no ‘combatants’, only civilians who ‘directly participate in hostilities’. Drone strikes are thus legal when carried out against these individuals, but who these legitimate targets are is contested.

This position contrasts directly with the IHL-centric legal paradigm espoused by the US in that it challenges what constitutes ‘membership’ in an organised armed group, what establishes ‘direct participation’ in hostilities, and how long direct participation – i.e. continuing threat – lasts.⁶⁹ In contrast to the broad targeting principles that could be justified under IHL, the HRC offers a more restrictive rendering of who constitutes a legitimate target by claiming that individuals who indirectly assist a non-state armed group’s war effort through financing, recruitment, training, propaganda, political advocacy, capacity building (including the production of weapons), or by providing food and shelter, are not legitimate targets for attack.⁷⁰ Targeting these individuals cannot be considered an act of military necessity. Rather, in a zone outside the traditional battlefield, for a civilian to be considered as directly participating in hostilities he or she needs to be either carrying out an attack, directly helping in the planning of an imminent attack, loading a weapon, or spotting for artillery.⁷¹

With regard to proportionality, the main challenge in satisfying this principle is that it is difficult to measure. To further complicate matters, while one can count civilian casualties and the numbers of buildings or weapons destroyed, the psychological impact of living under drones does not neatly fit into the standard legal definitions or normative ideals. One human rights report describes the difficulties of living in a state of perpetual fear of a drone strike, the repercussions to family and social structures caused by the killing of innocent community members, and the threat of reprisals from local militants.⁷² These outcomes clearly impact the way civilians go about their daily lives, diminishing their quality of life. The US government views such consequences as an inevitable part of even a ‘moral’ war. Drone proponents thus argue that as long as drones satisfy the proportionality requirement, then the US is acting within its legal and moral obligations.

However, as Braun and Brunstetter illustrate, the US government’s claim that drones are proportionate suffers from what they call ‘proportionality relativism – the use of impertinent comparisons to argue that drones are proportionate because they cause less collateral damage than other uses of force’. Such comparisons not only misrepresent the true meaning of proportionality ‘as an independent assessment of the balance between the anticipated civilian harm and military gain associated with each act of force’ but also ignore human rights concerns of civilians not technically considered in the proportionality calculus, including ‘post-traumatic stress disorder and social disruption caused by the persistent threat of drones’.⁷³ In their study of US drone strikes in Pakistan from 2007–2012, they

show that nearly one in four CIA drone strikes in Pakistan led to civilian deaths, while also causing harms that are overlooked if one only focuses on the numbers. They conclude that ‘the anticipated military advantage of the average strike is found more in denying safe haven to suspected militants than in targeting the leadership. A proportionality balancing calculus that permits civilian deaths for such goals raises serious concerns about the effects of such a long-term campaign on civilian human rights, the U.S. global image, and on the probability of success in the struggle against al Qaeda’.⁷⁴ Their conclusion, reflecting the harrowing stories from HRC reports, points to the need to move beyond the IHL-centric paradigm of proportionality the US applies to drone strikes. The notion of harm, which is key to determining proportionality, they argue, needs to be considered not just in terms of death and destruction, but also by considering the ‘human rights concerns that deeply and negatively affect civilian lives’.⁷⁵

Third, by emplating psychological trauma into the discourse, the HRC employs a legal-normative frame that highlights human rights concerns that are currently not protected by IHL, and possibly not even IHRL. The criticisms emanating from the HRC point to where legal and normative conventions fall short and where existing treaties do not cover certain conceptions of human rights, particularly the right to life. While the US government has arguably been able to exploit such lacunae in the law through its legal-normative just war justifications, the HRC has countered with its own legal-normative discourse emphasising the meta-norm of the ‘right to life’. Several qualitative studies that illustrate the impact of drones on individual lives attempt to raise awareness of the deeper impact drones have beyond ambiguous legal precedents and *jus in bello* ideals. The implication is that sustained drone presence, even if a particular strike might be justified under the rare conditions of IHRL, nevertheless has a vast and negative human rights impact on civilians. The stories communicate a vision of the right to life that includes not only freedom from arbitrary killing by drones, but also a life without the psychological duress that civilians face when living constantly under drones. Ben Emmerson’s recent report to the UN made the following conclusion:

If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict by significantly improving the situational awareness of military commanders.⁷⁶

However, given the trauma that comes from the constant threat of a strike ‘out of the blue’ made possible by drones’ constant presence in the skies, the question becomes whether drones can ever adequately satisfy human rights requirements outside a warzone. Although none of the reports go as far as to say that drones could never satisfy human rights requirements under IHRL, pushing such an expanded view of the right to life might lead to such a conclusion. Because the precedent set by overly permissive US drone use during the period of strategic-legal framing has instilled a fear that ‘I might be next even if I am innocent’, drone use even under the restrictive conditions of IHRL becomes suspect. If drones under even the most restrictive applications of international law become unconvincing, then morally (and perhaps legally) speaking, one of the main strategic advantages of drones – to provide omnipresent strike capability that denies terrorist safe havens – is effectively denied. This is because their mere presence would violate the expanded view of the right to life. The HRC does not go this far, resting instead on the restrictions imposed by IHRL and calls for greater transparency. However, the concerns caused by drones raise important questions about what the right to life, and thus the very notion of human rights will come to mean, as drone technology and legal and moral norms evolve.

Conclusion: towards an imperfect norm regarding lethal drone use

In this article we have argued that the US government has shifted from a strategic-legal frame for legitimising drones to a legal-normative one. This shift both restricts the types of drone strikes that can be legitimated by incorporating just war principles, and maintains the strategic advantages of drones by validating the IHL paradigm that perpetually suspends the human rights of those caught in the crosshairs of the ‘forever war’. The HRC, on the other hand, has rejected the IHL frame while employing a legal-normative frame grounded in IHRL that expands what is meant by the right to life, thus potentially denying some of the strategic advantages of drones. In so far as these shifting and contrasting discourses set the contours for the debate about what norms should govern lethal drones in the future, we conclude with a few observations that might help us understand what a plausible norm might look like that emphasises greater respect for human rights.

First, at the time of writing, the US appears to be moving in the direction of the HRC – that of greater respect of human rights. However, greater respect of human rights does not mean the same thing for the US government as it does for the HRC. For the US, this means following a less strategic and more normative version of IHL, in lieu of IHRL. In so far as the US sees the need to take advantage of the tactical advantages afforded by drones to pursue strategic ends, then the IHL paradigm will be favoured by presidents because it is more permissive than IHRL. While the incorporation of just war principles curtails drone use and leads to greater respect of human rights than under the strategic-legal paradigm, US actions and discourses nevertheless contribute to a permissive legal and normative regime legitimising targeted killings that could set a problematic global precedent. For the HRC, greater respect of human rights means a continued rejection of the IHL paradigm in cases of lethal strikes outside a warzone, and a greater focus on respect for the right to life to include the duress caused by living under drones.

Second, despite agreement that the strategic-legal framework of the early years of the US drone programme is morally problematic, there continues to be a gap between how human rights are understood in a world of drones. The HRC seems unlikely to accept IHL as applicable to ubiquitous drone strikes outside the battlefield because this would acquiesce to the strategic demands of powerful states and depress the human rights of suspected terrorists as well as civilians living under the spectre of drones. On the other hand, the US seems unwilling to accept IHRL as the sole means in the fight against al-Qaeda and like-minded groups across the globe. The result is that the human rights of populations living under drones will continue to be suppressed under wartime standards. Given this gridlock, perhaps one could surmise that in a world of lethal drones and growing terrorist threats, the norm that will come to govern drones lies somewhere within this space.

If this were the case, two further observations merit our attention as we think about the future. Drones have, in some ways, altered how human rights are understood. Drones have enabled the US to de facto extend in unprecedented ways the wartime human rights standard to non-war zones. As several HRC reports reveal, what is unique to drones is that they bring the ‘death from out of the blue’ element to everyday life because of their ability to loiter on an almost permanent basis. Human rights are not only diminished because civilians are killed, but because there is a ubiquitous threat of death from the skies that severely disrupts the social fabric of local communities. As norms regarding drone use evolve this impact should come to be reflected in future targeting policies. If this were the case, the US (and other states) would not necessarily have to abandon the IHL-centric approach, but they would have to recognise the nefarious consequences that IHRL highlights when populations live under an aerial drone occupation. A deeper understanding of just war

principles would restrict drone use to isolated cases, perhaps contributing to a norm that would permit a few strikes per year against identified individuals with the explicit consent of other states who cannot employ law enforcement mechanisms with the same accuracy that drones can provide.

There are obvious issues with such a norm that further research would need to explore. For one, it does not fully satisfy the main HRC concerns, namely that even limited drone use circumvents the right to life. Second, it makes drones a projection of the power of (strong) states that diminishes human rights of peoples residing in weak states. Third, it is open to abuse unless it is transparent and connected to clear legal precedents. Nonetheless, such a norm would significantly limit drone use, especially when compared to the strategic-legal phase which some feared would become the norm, as well as the current legal-normative phase. The result would be greater respect for human rights than the current IHL framework, albeit falling short of an IHRL-centric regime.

If such a norm were to emerge, one final observation that puts the relationship between drones and human rights into a broader context deserves attention. As norms governing drone use evolve it is important to recognise the tension between pursuing security and respecting human rights. This means resisting the temptation to view omnipresent drones as the only solution to the problem of al-Qaeda and like-minded threats, but also recognising that restricting (or eliminating) drone strikes will lead to significant human rights trade-offs as alternative coercive actions inevitably replace drones.

Indeed, we can catch a glimpse of some of these moral tradeoffs already. The US has begun to realise that drones cannot be the solution to ending the struggle against al-Qaeda and affiliates. As a result, it has begun exploring other solutions that have less blowback than the perpetual drone campaign. As Harold Koh acknowledged in a 2013 speech on 'How to End the Forever War?', he explained that, 'We need a security transition, a political transition, and an economic transition, particularly implementation of an economic plan now known as "The New Silk Road."⁷⁷

We highlight the 'New Silk Road' because doing so illustrates the potential human rights tradeoffs that the norm we described above – and perhaps any norm that restricts drone use – will engender. Understanding the moral tradeoffs of such alternatives is key to grasping the full scope of solidifying drone norms. It allows us to anticipate the need to theorise about how to incentivise states – both strong states who have armed drones and weak states whose territorial integrity is compromised by terrorist groups within their borders – to pursue alternatives aimed at eliminating terrorist safe havens through alternative means while also upholding human rights standards that would meet the HRC's view of IHRL.

The idea of a 'New Silk Road' as the vision for a region where drones have frequently been used (Afghanistan and Pakistan) is deeply rooted in history, namely the 'sprawling trading network that crisscrossed Asia – connecting East to West, and North to South' – spanning several millennia and connecting diverse peoples and economies.⁷⁸ It is an idea that is quietly being implemented as a non-interventionist way to deal, long-term, with the threat from terrorist groups. To the extent that this effort can succeed in ending the 'forever war' by helping to reestablish the rule of law in these ungoverned spaces and eliminate the need for drone strikes, then the geographic sphere where drones can be justifiably used under IHL will be greatly diminished. In principle, this is a good thing for human rights. However, it does not necessarily mean that human rights under IHRL will be adequately protected or enforced. Rather, it is important to realise that each of the transitions referenced in Koh's speech will have human rights tradeoffs that could lead to serious human rights violations.

For example, the security transition called for by Koh involves reducing the US military footprint by placing the burden on local governments to provide security and uphold the law. Given the records of these local regimes (including Pakistan and Yemen) it is likely that they will not place a premium on respecting the human rights of their populations to the extent expected by the HRC under IHRL. In other words, fewer drone strikes (or eliminating them altogether) will not necessarily improve the human rights of those populations currently living under drones, since the security burden, and hence control over operations, will be transferred to regimes that might also disregard IHRL.⁷⁹

Furthermore, pushing for democratic reforms in countries where US drone strikes currently occur should also be met with some scepticism, given the results of past attempts by the US to do so (including Iraq and Afghanistan). Unfortunately, although not acknowledged publicly, the most likely scenario is that the US will continue to support regimes that are willing and able to take on the threat of terrorist groups by whatever means necessary, regardless of idealistic democratic reforms and respect for human rights.

Finally, calls for economic reform are founded on the belief that lasting stability and security go hand in hand with increased economic opportunity. By increasing the free-flow of goods in the region, the belief is that the insurgency-driven economic isolationism that has enabled pockets of terrorist safe havens will be greatly diminished. However, it is unclear how US-led economic integration in Central Asia would address regional and local economic inequalities (especially given past US campaigns of economic-restructuring elsewhere). Moreover, to be successful, it would have to invite regional powers such as China and Russia, who have dubious human rights records, to hold more soft power over the region in the future. This brings us full circle back to the issue of drones because China has lethal drones, and Russia is close to acquiring them.

One worries that these states will follow the initial precedent of US drone use, namely that of the strategic-legal framework. However, were a norm that solidifies the shift towards a legal-normative frame in addition to include the HRC's expanded view of the right to life to encompass living free from the fear of a drone 'strike out of the blue' to emerge, this would provide customary precedent to condemn such behaviour. In addition, it may even be the catalyst for a shift in international law that would allay some, albeit not all, of the unique dangers drones pose to respecting human rights in a time of terror.

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Notes

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5. Avery Plaw, 'Counting the Dead: The Proportionality of Predation in Pakistan', in *Killing by Remote Control: The Ethics of an Unmanned Military*, ed. Bradley J. Strawser (New York: Oxford University Press, 2013), 126–53.
6. For the purposes of our analysis, we focused mainly on the following reports: Philip Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', *Human Rights Council* (New York: United Nations General Assembly, 2010). <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>; Christopher Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' *Human Rights Council* (New York: United Nations, 2013). <http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf>; Ben Emmerson, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', *General Assembly* (New York: United Nations, 2013). <http://justsecurity.org/wp-content/uploads/2013/10/2013EmmersonSpecialRapporteurReportDrones.pdf>; Human Rights Watch, 'Between a Drone and Al-Qaeda' (New York: HRW, 2013). <http://www.hrw.org/node/119909/section/7>; Amnesty International, 'Will I be Next? US Drone Strikes in Pakistan' (London: Amnesty International, 2013). <http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>; Human Rights Watch, 'A Wedding that Became a Funeral: Us Drone Attack on Marriage Procession in Yemen' (New York: HRW, 2014). <http://www.hrw.org/reports/2014/02/19/wedding-became-funeral>; Amnesty International, 'USA: The Devil in the (Still Undisclosed) Detail. Department of Justice "White Paper" on Use of Lethal Force against US Citizens Made Public' (Amnesty International, 2013). http://www.amnestyusa.org/sites/default/files/the_devil_in_the_still_undisclosed_detail.pdf; International Human Rights and Conflict Resolution Clinic (Stanford Law School), and Global Justice Clinic (NYU School of Law), 'Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan'. <http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf>. All reports accessed on 4 November 2014. The HRC documents also highlighted many other issues related to human rights that are beyond the scope of this article. These include the lack of: transparency of the US drone programme, a formal process for victims of drone strikes to seek justice, and access to reparations for survivors.
7. Ronald R. Krebs and Patrick Thaddeus Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric', *European Journal of International Relations* 13, no. 1 (2007): 35–66.
8. *Ibid.*, 36.

9. Neta C. Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (Oxford: Oxford University Press, 2013).
10. Heynes, 'Report', 2.
11. Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).
12. James G. March and Johan P. Olsen, 'The Logic of Appropriateness', in *The Oxford Handbook of Public Policy*, ed. Michael Moran, Martin Rein, and Robert E. Goodin (New York: Oxford University Press, 2008), 689–90.
13. Anthea Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal but Justified?', in *Human Rights, Intervention, and the Use of Force*, ed. Philip Alston and Euan Macdonald (New York: Oxford University Press, 2008), 179–213.
14. Presidents were aware of a moral framework – sometimes called just war theory, other times referred to as the concept of just war. For a discussion, see Daniel R. Brunstetter, 'Trends in Just War Thinking During the U.S. Presidential Debates 2000–12: Genocide Prevention and the Renewed Salience of Last Resort', *Review of International Studies* 40, no. 1 (2014): 77–99.
15. Barack Obama, 'Obama's Nobel Remarks', *The New York Times*, 11 December 2009.
16. For a discussion, see Megan Braun, 'Predator Effect: A Phenomenon Unique to the War on Terror', in *Drone Wars: Transforming Conflict, Law and Policy*, ed. Peter Bergen and Daniel Rothenberg (Cambridge: Cambridge University Press, 2014), 253–84.
17. For a discussion of Obama's use of just war principles, see Brunstetter, 'Trends in Just War Thinking', 11–16.
18. BBC Staff, 'Obama Defends US Drone Strikes in Pakistan', *BBC*, 31 January 2012. <http://www.bbc.co.uk/news/world-us-canada-16804247?print=true> (accessed 15 March 2012).
19. Braun and Brunstetter, 'Rethinking the Criterion', 306–10.
20. Barack Obama, 'Remarks by the President at National Defense University', 23 May 2013. <http://www.whitehouse.gov/the-pressoffice/2013/05/23/remarks-president-national-defense-university> (accessed 7 May 2014).
21. CNN, *Live Today*, interview with Paul Wolfowitz, 5 November 2002. <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3264> (accessed 5 July 2014).
22. Howard Witt, 'U.S.: Killing of Al Qaeda Suspects Was Lawful'. http://articles.chicagotribune.com/2002-11-24/news/0211240446_1_al-qaeda-killings-terrorist (accessed 5 July 2014).
23. Doyle McManus, 'A U.S. License to Kill', *The LA Times*, 11 January 2003. <http://articles.latimes.com/2003/jan/11/world/fg-predator11> (accessed 5 July 2014).
24. McManus, 'A U.S. License to Kill'.
25. George Tenet and Bill Harlow, *At the Center of the Storm: My Years at the CIA* (New York: Harper Collins, 2007), 160.
26. Greg Miller, 'Despite Apparent Success in Yemen, Risks Remain', *The LA Times*, 6 November 2002. <http://articles.latimes.com/2002/nov/06/world/fg-yemen6> (accessed 5 July 2014).
27. New America Foundation, 'Drone Wars Pakistan: Analysis'. <http://securitydata.newamerica.net/drones/pakistan/analysis> (accessed 30 June 2014). For a discussion of the pros and cons of alternative sources for data on drone strikes, see Plaw, 'Counting the Dead', 136–7.
28. Charles W. Kegley Jr, and Gregory A. Raymond, 'Preventive War and Permissive Normative Order', *International Studies Perspectives* 4, no. 4 (2003): 390–1.
29. Michael P. Scharf, *Customary International Law in Times of Fundamental Change* (New York: Cambridge University Press, 2013), 200.
30. *Ibid.*, 199.
31. Emphasis added, George W. Bush, 'The National Security Strategy of the United States of America' (Washington, DC: The White House, September 2002), 15.
32. Whitley Kaufman, 'What's Wrong With Preventive War? The Moral and Legal Basis for the Preventive Use of Force,' *Ethics & International Affairs* 19, no. 3 (2005): 23–38.
33. Matthew J. Flynn, *First Strike: Preemptive War in Modern History* (New York: Routledge, 2008), 3.
34. Neta C. Crawford, 'The Slippery Slope of Preventive War', *Ethics & International Affairs* 17, no. 1 (2003).
35. Not all states reject the preventive force doctrine. Other states, including Russia and Israel, have their own versions. See, for example, Ariel Colonomos, *The Gamble of War: Is it Possible to Justify Preventive War?* (New York: Palgrave Macmillan, 2013).

36. Kerstin Fisk and Jennifer M. Ramos, 'Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm', *International Studies Perspectives* 15, no. 2 (2014): 163–85.
37. McManus, 'A U.S. License to Kill'.
38. David Luban, 'The War on Terrorism and the End of Human Rights', *Philosophy and Public Policy Quarterly* 22, no. 3 (2002): 9–14.
39. Scott Shane, 'Secret "Kill List" Tests Obama's Principles', *The New York Times*, 29 May 2012.
40. For example, see Martin Shaw, 'Risk-Transfer Militarism, Small Massacres and the Historical Legitimacy of War', *International Relations* 16, no. 3 (2002): 343–59.
41. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), 251–68.
42. Luban, 'War on Terrorism', 13–14.
43. Kenneth Anderson, 'Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?', in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012), 283–4.
44. Obama, 'Remarks by the President at National Defense University'.
45. John O. Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', *Wilson Center*, 30 April 2012. <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (accessed 15 July 2012).
46. Brennan, 'Ethics and Efficacy'; Brunstetter and Braun warn that such an argument may nullify the last resort criterion if 'the targeted killing of (alleged) terrorists becomes the default tactic', see Brunstetter and Braun, 'The Implications of Drones', 345–6; Brooks takes issue with the way the US defines 'feasibility' and 'imminence', arguing that the US understanding of these terms is very problematic. For a thorough discussion, see 'Drones and the International Rule of Law', 94–5.
47. Brennan, 'Ethics and Efficacy'.
48. There are, of course, intense scholarly debates about what the principles mean and the level of restraint they should imply. See for example the various viewpoints in Davi Rodin and Henry Shue, eds, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008).
49. Emphasis added, Obama, 'Remarks by the President at National Defense University'.
50. Obama, 'Remarks by the President at National Defense University'; this is different from early – and patently false – claims that there had been zero civilian casualties because it speaks to future strikes, not to past strikes for which dubious counting methods were used; See Scott Shane, 'CIA is Disputed in Civilian Toll on Drone Strikes'. <http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all> (accessed 2 November 2014).
51. New America Foundation, 'Drone Wars Pakistan: Analysis'.
52. Braun and Brunstetter, 'Rethinking the Criteria', 315–19.
53. New America Foundation, 'Drone Wars Pakistan: Analysis'.
54. Eric Schmitt, 'Lull in Strikes by U.S. Drones Aids Militants in Pakistan'. http://www.nytimes.com/2012/01/08/world/asia/lull-in-us-drone-strikes-aids-pakistan-militants.html?pagewanted=all&_r=0 (accessed 2 November 2014).
55. See, for example, Amnesty International, 'Will I Be Next?', 28; International Human Rights and Conflict Resolution Clinic, 'Living under Drones', 114; Alston, 'Report', 24–5.
56. The real test that such changes will be solidified lies in seeing whether unmitigated drone strikes would resume should another 9/11-type attack occur, what would happen if al-Qaeda resurge in Pakistan and Islamabad balk at taking the responsibility of dealing with the threat, or if the next US president has a completely different view of just war. We thank an anonymous review for bringing these concerns to our attention. The risk of a return to the period of signature strikes could be diminished if norms restricting drone use – whether within US institutions and/or internationally – are solidified, a point that we address later in the article.
57. International Human Rights and Conflict Resolution Clinic, 'Living under Drones', 110; See also, Alston, 'Report', 55.
58. Alston, 'Report', 3.
59. Emmerson, 'Interim Report', 19; Alston, 'Report', 107–8; International Human Rights and Conflict Resolution Clinic, 'Living under Drones', 111; Amnesty International, 'Will I Be Next', 44–6; Human Rights Watch, 'A Wedding That Became a Funeral', 22.
60. Amnesty International, 'Will I be Next?', 23.

61. Heyns, 'Report', 6.
62. Ibid.
63. Quoted in: International Human Rights and Conflict Resolution Clinic, 'Living under Drones', 107–8.
64. Alston, 'Report', 21–2; Amnesty International, 'Will I Be Next?', 43–4.
65. Fernando R. Tesón, 'Targeted Killing in War and Peace: A Philosophical Analysis', in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012), 403–33.
66. 'Joint Letter to President Obama on Drones and Targeted Killings', 5 December 2013. <http://www.hrw.org/news/2013/12/05/joint-letter-president-obama-drone-strikes-and-targeted-killings> (accessed 15 July 2014).
67. 'Joint Letter'; for a detailed discussion of the DoJ White Paper in question, see Brooks, 'Drones and the International Rule of Law'.
68. International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', ed. Nils Melzer (Geneva, Switzerland: International Committee of the Red Cross, 2009).
69. Alston, 'Report', 19.
70. Ibid., 20.
71. Human Rights Watch, 'A Wedding That Became a Funeral', 24.
72. See also the descriptions in: International Human Rights and Conflict Resolution Clinic 'Living Under Drones', and the congressional testimonies from the various Pakistani families, <http://chrgj.org/transcripts-of-testimonies-from-may-8-congressional-hearing-on-u-s-drone-policy-now-available/> (accessed 22 July 2014).
73. Braun and Brunstetter, 'Rethinking the Criteria', 319.
74. Ibid., 315.
75. Ibid., 318.
76. Emmerson, 'Report', 23.
77. Harold Koh, 'How to End the Forever War?' <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf> (accessed 20 July 2014).
78. Robert M. Hormats, 'The United States' "New Silk Road" Strategy: What is it? Where is it Headed?', U.S. Department of State. <http://www.state.gov/e/rls/rmk/2011/174800.htm> (accessed 1 July 2014).
79. Plaw, 'Counting the Dead', 144–50; for a counter-argument, namely that certain populations in Pakistan view drones as having had a positive effect on the quality of life, see Christine C. Fair, 'Drones over Pakistan: Menace or Best Option?', *The Huffington Post*, 2 August 2010. http://www.huffingtonpost.com/c-christine-fair/drones-over-pakistan---m_b_666721.html.