

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013  
CORRESPONDENTS' REPORTS

*Contents*

Official Directive — Autonomous Weapons Systems .....	1
Government Policy — Targeting of Individual Hostile Belligerents with Drones .....	2
Weapons — Nuclear weapons employment policy .....	4
Court Martial Sentence — Murder of civilians in Afghanistan.....	5
Extradition — War crimes in Bosnian armed conflict.....	5
Criminal Indictment — Concealing participation in war crimes in Bosnia — Naturalization proceedings .....	6
Treaty actions — Signature of Arms Trade Treaty .....	6

UNITED STATES<sup>1</sup>

*Official Directive — Autonomous Weapons Systems*

- Department of Defense Directive 3000.9, 21 November 2012, Subject: Autonomy in Weapons Systems,  
<<http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf>>

One of the most controversial developments in recent weapons technology has been the advent of ‘autonomous weapons systems’, sometimes referred to as robot weapons, which can carry out combat functions independent of human supervision. The US Department of Defense (‘DOD’) has issued a directive governing the development and use of these systems by the armed services and other DOD components. The directive applies to both ‘autonomous weapons systems’ and ‘semi-autonomous weapons systems’. The former are defined as weapons systems that, ‘once activated, can select and engage targets without further intervention by a human operator.’ ‘Semi-autonomous weapons systems’, on the other hand, are those ‘intended to only engage individual targets or specific target groups that have been selected by a human operator.’

Both types of systems must go through ‘rigorous’ testing to ensure, inter alia, that they will ‘minimize failures that could lead to unintended engagements or to loss of control of the system to unauthorized parties.’ Unintended engagements include attacks ‘resulting in damage to persons or objects that the human operators did not intend to be the targets of U.S. military operation, including unacceptable levels of collateral damage beyond those consistent with the law of war.’ Those who ‘authorize the use of, direct the use of, or operate autonomous and semi-autonomous weapons systems must do so ... in accordance with the law of war, applicable treaties ... and applicable rules of engagement.’ Semi-autonomous weapons systems may be used to apply lethal and nonlethal force in general combat operations. Human supervised autonomous weapons systems are authorized ‘to select and engage targets, with the exception of selecting humans as targets, for local defense’ of manned installations and platforms. Plans for other uses of autonomous weapons systems require a high level policy decision within the DOD.

---

<sup>1</sup> Burrus M. Carnahan, Professorial Lecturer in Law, George Washington University, Washington, DC, USA. 

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013**  
**CORRESPONDENTS' REPORTS**

*Government Policy — Targeting of Individual Hostile Belligerents with Drones*

- Remarks by the President at the National Defense University, 23 May 2013, Fort McNair, Washington D.C.  
<<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>

The use of unmanned armed aircraft (drones) to target hostile individuals is one of the most controversial practices of the United States government. The government has repeatedly defended the legality of this practice in public, most notably in State Department Legal Adviser Harold Koh's speech to the American Society of International Law in 2012, and speeches by Attorney General Eric Holder and presidential counter-terrorism adviser John Brennan in 2012. Building on these statements, in May 2013 President Barack Obama, in a speech at the National Defense University in Washington, offered a further defense of drone attacks, along with some policy refinements to reflect the expected end of US combat operation in Afghanistan in 2014.

In his speech, the President stated that, in the 'Afghan war theater,' the United States would continue to use drone strikes not only against 'against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces.' By the end of 2014, however, the President expected that all US combat forces would be withdrawn, so 'we will no longer have the same need: ... [to use drones] ... for force protection.'

'Beyond the Afghan theater,' the President declared, 'we only target al Qaeda and its associated forces.' Despite a 'strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed,' especially where the local government had only limited control over areas where al Qaeda was operating. Depending on the situation, sending Special Forces teams to capture or kill hostile persons might not only endanger American military personnel but create a greater risk of collateral civilian casualties than a drone strike. The Special Forces operation leading to the death of Osama bin Laden 'cannot be the norm' for future action against al Qaeda members.

'America does not take strikes to punish individuals,' the President concluded, 'we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured – the highest standard we can set.'

A Fact Sheet issued after the President's speech summarized the new policy restraints. In counter-terrorism operations, lethal force 'will be used outside areas of active hostilities' only when the following preconditions are met:

*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

*Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to US persons. It is simply not the case that all terrorists pose a continuing, imminent threat to US persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

*Third*, the following criteria must be met before lethal action may be taken:

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013  
CORRESPONDENTS' REPORTS

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants will not be injured or killed;
3. An assessment that capture is not feasible at the time of the operation;
4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons; and
5. An assessment that no other reasonable alternatives exist to effectively address the threat to US persons.

A footnote to the fact sheet clarifies the term 'noncombatant' as follows:

Non-combatants are individuals who may not be made the object of attack under applicable international law. The term 'non-combatant' does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is *not* the case that all military-aged males in the vicinity of a target are deemed to be combatants. (Emphasis in original document.)

The phrase 'part of a belligerent party to an armed conflict' does not have an accepted meaning in international law. It appears similar to the concept of members of 'organized armed groups belonging to a non-State party' to a conflict who, according to an International Committee of the Red Cross ('ICRC') study, lose their immunity from attack as civilians because they engage in a 'continuous combat function.'<sup>2</sup> In practice the United States has taken a very broad view of continuous combat functions to include those who help recruit potential members through media propaganda and personal persuasion. Such was the case of Anwar Awlaki, whose killing in a drone strike President Obama defended in his speech.

President Obama's distinction between use of drone strikes in the Afghan theater and the rest of the world suggests that the government expected a sharp decrease in the use of drone strikes once American and NATO forces ended their combat role in that theater. By calling for 'near-certainty that no civilians will be killed or injured' the President appears to have significantly tightened limitations on collateral civilian injuries. The generally accepted standard for permissible collateral damage is codified in Articles 51.5 and 57 of Additional Protocol I,<sup>3</sup> which prohibits attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' This was the formulation adopted by Legal Adviser Koh in his 2010 speech, and accepted as customary law in the 2005 study of customary international humanitarian law by the ICRC.<sup>4</sup> Similarly, the requirement of 'near certainty' that a terrorist target is present appears to go beyond the accepted rule in Article 57 of Additional Protocol I to 'do everything *feasible* to verify that the objectives to be attacked' are legitimate military targets, another rule the ICRC

---

<sup>2</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, International Committee of the Red Cross, 2009) pp. 71-73, <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>.

<sup>3</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

<sup>4</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge, Cambridge University Press 2005) p. 46, Rule 14.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013**  
**CORRESPONDENTS' REPORTS**

study regards as customary law.<sup>5</sup> It remains to be seen whether the President's stricter rules for collateral damage and target identification can be carried out in practice.

*Weapons — Nuclear weapons employment policy*

- White House Fact Sheet: Nuclear Weapons Employment Strategy of the United States, 19 June 2013,  
<<http://www.whitehouse.gov/the-press-office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states>>

In 2010, the DOD issued a Nuclear Posture Review that recommended measures to significantly curtail reliance on nuclear weapons. After further review within the executive branch of government, on 13 June 2013, the President issued new guidance to DOD on nuclear weapons use. While much of the actual guidance is of necessity classified, the White House offered the following summary:

The President's new guidance:

- affirms that the United States will maintain a credible deterrent, capable of convincing any potential adversary that the adverse consequences of attacking the United States or our allies and partners far outweigh any potential benefit they may seek to gain through an attack.
- directs DOD to align U.S. defense guidance and military plans with the policies of the [Nuclear Posture Review], including that the United States will only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners. ... In so doing, the guidance takes further steps toward reducing the role of nuclear weapons in our security strategy.
- directs DOD to strengthen non-nuclear capabilities and reduce the role of nuclear weapons in deterring non-nuclear attacks.
- directs DOD to examine and reduce the role of launch under attack in contingency planning, recognizing that the potential for a surprise, disarming nuclear attack is exceedingly remote. While the United States will retain a launch under attack capability, DOD will focus planning on the more likely 21<sup>st</sup> century contingencies.  
....
- reaffirms that as long as nuclear weapons exist, the United States will maintain a safe, secure and effective arsenal that guarantees the defense of the U.S. and our allies and partners. ...

Not all of the 2010 Nuclear Posture Review policies are reflected in the White House Fact Sheet. Significantly missing is the Review's statement that conventional deterrent capabilities will be strengthened with 'the objective of making deterrence of nuclear attack on the United States or our allies and partners the sole purpose of US nuclear weapons.'<sup>6</sup> This would have reversed the policy of previous administrations to use the possibility of a nuclear response to deter chemical or biological attacks. While calling for strengthening conventional deterrence, and declaring that nuclear weapons would be used only 'in extreme circumstances to defend the vital interests of the United States or its allies and partners,' the new guidance does not

---

<sup>5</sup> Ibid, Rule 15.

<sup>6</sup> US Department of Defense, 2010 Nuclear Posture Review (NPR) Fact Sheet, 6 April 2010.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013**  
**CORRESPONDENTS' REPORTS**

absolutely preclude a nuclear response to attacks or threatened attacks with chemical or biological weapons.

The guidance also excludes NATO from the new policies. The Fact Sheet notes that the role of nuclear weapons in NATO was examined as part of the last year's Deterrence and Defense Posture Review, which affirmed Allies' support for further US-Russian nuclear reductions, and underscored that any changes in NATO's nuclear posture must be an Alliance decision.

*Court Martial Sentence — Murder of civilians in Afghanistan*

- Greg Botelho, 'Army's Robert Bales gets life, no parole for Afghan rampage -- but was it justice?' 23 August 2013, Cable News Network (US edition), <<http://www.cnn.com/2013/08/23/justice/robert-bales-afghan-killings/index.html>>
- 'Robert Bales sentenced to life in prison for Afghanistan massacre,' The Guardian, 23 August 2013 (Manchester, UK), <<http://www.theguardian.com/world/2013/aug/23/afghanistan-massacre-robert-bales-trial>>

In 2012, US Army Staff Sergeant Robert Bales was charged with the premeditated murder of 17 civilians and assault and attempted murder of six other civilians in Afghanistan's Kandahar Province. According to media reports, in June 2013 Bales pleaded guilty to sixteen counts of murder and fourteen other offenses. After hearing evidence from the prosecution and defense in aggravation and mitigation of the offenses, on 23 August 2013, an Army court martial panel of four officers and two enlisted personnel sentenced him to life imprisonment without the possibility of parole. In accordance with a pretrial agreement between the parties, Bales avoided a possible death penalty by pleading guilty. Such agreements are permitted under US military law, subject to supervision by the Military Judge of the court martial through questioning of the accused in open court to ensure that the accused is actually guilty.

*Extradition — War crimes in Bosnian armed conflict*

- Department of Justice Press Release 13-633, Criminal Division, 'Bosnian National Extradited to Stand Trial for Murder and Torture,' 3 June 3 2013, <<http://www.justice.gov/opa/pr/2013/June/13-crm-633.html>>

Sulejman Mujagic, a citizen of Bosnia and Herzegovina, was extradited to stand trial in Bosnia for charges relating to the torture and murder of one prisoner of war and the torture of another during the armed conflict in Bosnia. On 2 April 2013, the US District Court for the Northern District of New York ruled that Mujagic was subject to extradition, and on 31 May 2013, he was delivered to Bosnian authorities and removed from the United States. The offenses were allegedly committed on or about 6 March 1995, while Mujagic was a platoon commander in the Army of the Autonomous Province of Western Bosnia. The victims had been captured by his unit and were unarmed at the time of the alleged offenses. Mujagic had been a permanent resident of the United States since 2001.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013  
CORRESPONDENTS' REPORTS

*Criminal Indictment — Concealing participation in war crimes in Bosnia — Naturalization proceedings*

- Department of Justice Press Release 13-854, Criminal Division, 'Vermont Man Charged with Obtaining US Citizenship by Failing to Disclose Violent Crimes Committed During the Bosnian Conflict,' 26 July 26 2013, <<http://www.justice.gov/opa/pr/2013/July/13-crm-854.html>>

On 25 July 2013, the US government filed an indictment in the US District Court for the District of Vermont, charging Edin Sakoc with fraudulently obtaining US citizenship by providing false information about his commission of crimes and his participation in the persecution of Bosnian Serbs. Specifically, he is accused of failing to disclose to US immigration authorities that in July 1992 he kidnapped and raped a Bosnian Serb woman and aided and abetted the murder of her elderly mother and aunt, as well as the burning of the victims' house. If convicted, the penalty could include up to ten years imprisonment and loss of US citizenship.

United States criminal law does not provide for universal jurisdiction over war crimes. The applicable statute, the *War Crimes Act of 1996*,<sup>7</sup> grants federal civilian courts jurisdiction over war crimes only if either the accused or the victim is a member of the US armed forces or a US national at the time the crime was committed. When alleged war criminals who do not meet these conditions are found in US territory, federal prosecutors must rely on indirect offenses, such as failing to reveal participation in war crimes when the suspect seeks permanent residence or citizenship.

*Treaty actions — Signature of Arms Trade Treaty*

- Secretary of State John Kerry, 'Historic Outcome of the Arms Trade Treaty Conference', 2 April 2013, <<http://www.state.gov/secretary/remarks/2013/04/206982.htm>>
- Secretary of State John Kerry, 'Remarks at the Arms Trade Treaty Signing Ceremony', 25 September 2013, <<http://www.state.gov/secretary/remarks/2013/09/214717.htm>>

On 25 September 2013, the United States signed the UN *Arms Trade Treaty*.<sup>8</sup> At the time he welcomed successful conclusion of the diplomatic conference that negotiated the Treaty, Secretary Kerry noted its potential role in reducing 'the risk that international transfers of conventional arms will be used to carry out the world's worst crimes, including terrorism, genocide, crimes against humanity, and war crimes.' This was an apparent reference to Article 6.3 of the Treaty, which prohibits a state party from authorizing a conventional arms transfer 'if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements.' Both at that time and at the time of signature Secretary Kerry also emphasized that if the United States became a party to the

---

<sup>7</sup> 18 USC § 2441 (2006).

<sup>8</sup> *Arms Trade Treaty*, opened for signature 3 June 2013, <<http://www.un.org/disarmament/ATT/>>.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 16, 2013**  
**CORRESPONDENTS' REPORTS**

Treaty, it would not impinge on the right of US citizens to possess small arms under the US Constitution.<sup>9</sup>

BURRUS CARNAHAN

---

<sup>9</sup> *United States Constitution*, Amendment II: 'A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.' In spite of the phrase referring to the militia, the US Supreme Court has held that this Amendment creates an individual right to possess firearms, *McDonald v Chicago*, 561 US 742 (2010).