DRAFT AUGUST 31, 2010

Caption

MEMORANDUM IN SUPPORT OF DEFENSES OF NECESSITY AND INTERNATIONAL LAW

"Targeted killing is the most coercive tactic employed in the war on terrorism. Unlike detention or interrogation, it is not designed to capture the terrorist, monitor his or her actions, or extract information; simply put, it is designed to eliminate the terrorist. …A targeted killing entails an entire military operation that is planned and executed against a particular, known person."
Harvard Journal, cited at:
http://www.harvardnsj.com/2010/06/law-and-policy-of-targeted-killing/

INTRODUCTION

The people named as defendants in this action are accused of violating criminal law in their symbolic opposition to the deadly use of drones at Creech Air Force base. This case starts from the fact that no US court has ever ruled on the legality of targeted killings by drones. Defendants seek to put on evidence that targeted killings by drones are criminal acts, even war crimes, and their activities which were taken to highlight and prevent murder by drones are legally allowed under US and International law.

SCOPE OF THIS MOTION

This memorandum of law asks this Court to allow defendants to put on evidence of the illegality of killings by drones, the U.S. doctrine of necessity, and the US incorporation of international law. This evidence may include expert testimony, lay testimony,

documentary evidence, books, videos and other information consistent with the rules of evidence.

A criminal defendant has a basic constitutional right to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' Crane v. Kentucky, 476 U.S. 683, 690 (1986).") This basic constitutional right obviously applies with equal force whether the trial is before a judge or a jury. Arguably, there would even be a lower threshold standard for the introduction of this evidence if the trial is to the Court alone because the potential for the evidence to be prejudicial to the Court would be less than to a jury.

STATEMENT OF FACTS

United States commanders at Creech Air Force base operate drones which target and kill people in Afghanistan and other areas. See David Zucchino, Los Angeles Times, May 29, 2010. "US report faults Air Force drone crew, ground commanders in Afghan civilian deaths," available online at: http://articles.latimes.com/2010/may/29/world/la-fg-afghan-drone-20100531

BASIC FACTS ABOUT DRONES

The United States is the world's number one user of targeted killings by drones and the Obama administration has done more of them than the Bush administration.

Drones kill not only the people who they target but also civilians in the area. Two reputable studies conclude that between 33% and 90% of the deaths from drones are civilians.

In data collected by the New America Foundation over the period of 2004-2010, one of every three people killed by drones is a civilian. See database complied by Peter Bergen and Katherine Tiedmann at: http://counterterrorism.newamerica.net/drones
They report that at least one out of every three deaths by drones is civilian. This is likely a conservative number as it based in part on reports by the military itself which usually reports a number of "militants" killed and unknown other casualties. Even this conservative number ends up with hundreds of civilian deaths – from 300 to 500 in Pakistan alone.

The Brookings Institute estimated that for every militant killed, 10 civilians died in the drone attacks in Pakistan. See Daniel L. Byman, "Do Targeted Killings Work?" Brookings, August 12, 2009 available online at:
http://www.brookings.edu/opinions/2009/0714_targeted_killings_byman.aspx?p=1

A May 2010 report by the United Nations concludes in its first paragraphs that targeted killing by drones has serious legal problems.

"The result of this mix has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major

accountability vacuum.

In terms of the legal framework, many of these practices violate straightforward applicable legal rules. To the extent that customary law is invoked to justify a particular interpretation of an international norm, the starting point must be the policies and practice of the vast majority of States and not those of the handful which have conveniently sought to create their own personalized normative frameworks. It should be added that many of the justifications for targeted killings offered by one or other of the relevant States in particular current contexts would in all likelihood not gain their endorsement if they were to be asserted by other States in the future." Source: Paragraphs 3 and 4 of "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on targeted Killings" Philip Alston, United Nations General Assembly May 28, 2010. Online at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf

INTERNATIONAL LAW IS EXPLICITLY A PART OF THE LAW OF THE US

International law is explicitly included in United States law by reason of two provisions of the United States Constitution.

Article VI, Section 2 says:
This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Article III also explicitly confers on federal courts jurisdiction over cases involving treaties:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

In June of 2004, the United States Supreme Court again affirmed that United States domestic law recognizes international law. In Sosa v Alvarez-Machain, 542 U.S. 692, 730 (2004), the Court ruled:

“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, e.g., Banco Nacional de Cuba v Sabbatino, 376 U.S., at 423, (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); The Paquete Habana, 175 U.S., at 700 ("International law is part of our law, and must be ascertained and administered by the Courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); The Nereide, 9 Cranch 388, 423, (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recognizing that "international disputes implicating ... our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

In the 1900 decision referenced by the United States Supreme Court in Sosa, 542 U.S. at 730, the Supreme Court declared that:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning

what the law ought to be, but for trustworthy evidence of what the law really is. The Paquette Habana, 175 US 677, 700, (1900).

Since 1909, the Court reinforced the power of treaties and the ability and the power to enforce the provisions of those treaties.
"We do not deem it necessary to consider the constitutional limits of treaty-making powers. A treaty, within those limits, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced. Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 273 (1909).

International law is an evolving area of the law, as more recent decisions make clear. For example, "[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Filartiga v Pena-Irala, 630 F2d 876, 881 (2nd Circ. 1980).

In recent years, American jurists have signaled an increased willingness to turn to international law for guidance when addressing key Constitutional questions. See e.g., Thompson v. Oklahoma, 487 U.S. 815, 851 (1988) (O'Connor, J., concurring) (invoking United States' ratification of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950 (ratified by the United States August 2, 1955) and its signature of two other international agreements that had not been ratified, as relevant expressions of international practice to consider when evaluating application of the death penalty to a 15-year-old defendant.)

In 2005, the United States Supreme Court declared the practice of executing juvenile offenders unconstitutional. "[T]he stark reality [is] that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." Roper v Simmons, 543 U.S. 551, 575(2005). In support of its holding, the Court reviewed international human rights treaties and the practices of other countries. It is important to note that the Court, in its reasoning, did not limit itself to treaties to which the United

States was a signatory, but cited treaties that the United States did not sign or ratify as evidence of customary international law in the context of juvenile executions,

Similarly, in Lawrence v Texas, 539 U.S. 558 (2003), the Court cited a 1981 decision of the European Court of Human Rights, authoritative in 45 countries now, as a part of its decision protecting consensual sex between people of the same gender. Id. at 573, citing Dugeon v United Kingdom, 45 Eur. Ct. H. R. (1981).

In the 2003 case upholding academic affirmative action, Justice Ginsburg in a concurrence joined by Justice Breyer, pointed out the importance of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (ratified by the US in 1994), and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, which the United States has not ratified. Grutter v Bollinger, 539 US 306 (2003).

In the 2002 decision invalidating the death penalty for mentally disabled offenders, the Court stated, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Atkins v Virginia, 536 US 304,316 fn. 21 (2002). Both the Atkins Court and the Roper Court approved of the reasoning in Thompson v Oklahoma, 487 US 815, 830 (1988) in which the Court stated that it was worthwhile to consider the views of "respected professional organizations, by other nations that share our Anglo-American heritage and by leading members of the Western European community."

EXTRAJUDICIAL KILLING IS ILLEGAL

There is a binding customary international law norm against extrajudicial killing. Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); Doe v. Saravia, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004); Doe I v. Unocal Corp., 395

F.3d 932, 945 (9th Cir. 2002) (recognizing murder as a jus cogens violation and thus, as a violation of the law of nations); In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Estate II") (describing the "prohibition against summary execution" as a "similarly universal, definable, and obligatory" norm); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995) (finding summary execution to be a violation of international law).

AMERICANS WHO KILL PEOPLE IN OTHER COUNTRIES MAY BE PROSECUTED FOR WAR CRIMES

'After the Second World War, the law of war was codified in the four Geneva Conventions, which have been ratified by more than 180 nations, including the United States.' Kadic [v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995)]. See also Ex parte Quirin, 317 U.S. 1, 27-28, (1942) ('From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.'). In 1996, Congress enacted the War Crimes Act, which defined "war crime" in reference to the Geneva Conventions as well as other international agreements. See 18 U.S.C. § 2441(c). The War Crimes Act provides severe penalties for commission of war crimes, including the death penalty. See § 2441(a).
Based on the Geneva Conventions and their incorporation into the War Crimes Act of 1996, the Court holds that there is a customary international law norm against attacks against civilians as war crimes. See In re Agent Orange, 373 F. Supp. 2d 7, [citations]; See also Kadic, 70 F.3d at 242-43 (recognizing an ATCA claim for war crimes); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1134 n.101 (C.D. Cal. 2002) ('Courts have held that a violation of the law of war may serve as a basis for a claim under the ATCA.'). Mujica, 381 F. Supp. 2d at 1181.

The United States Congress has incorporated international law in the War Crimes Act. Sosa, 542 U.S. at 760-763 (Breyer, J., concurring); Flores v. Southern Peru Copper Corp.,

343 F.3d 140, 150 n.18 (2d Cir. 2003) ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.").

As the Mujica court explained, under the War Crimes Act of 1996, 18 USC section 2441, Americans, including members of the United States Armed Services, who commit specified crimes –including attacks against civilians, rape, torture, cruel or inhuman treatment, sexual assault or abuse, murder, and intentionally causing bodily injury, among others – are subject to prosecution for these crimes. Indeed, a person convicted is subject to the death penalty if his or her actions resulted in death.

The War Crimes Act incorporates in its definition of "war crimes" any grave breach of the Geneva Convention of 1949, a violation of certain articles of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land (October 18, 1907), and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996). 18 USC § 2441(c). In so legislating, Congress has expressly made customary international law prohibitions against particular crimes part of the law of the United States.

UNITED STATES INTERNATIONAL LAW CREATES A RIGHT TO PREVENT CRIME

As noted above, the violation of particular crimes, though committed outside of the territorial jurisdiction of the United States, may be prosecuted, civilly and criminally, in the courts of the United States. If plaintiffs may bring causes of actions for monetary damages in United States courts, and if prosecutors may seek the death penalty against those who commit the crimes listed in the War Crimes Act, so too should a criminal defendant – with whom the Constitution evinces particular concern (see Fourth, Fifth, Sixth, Eighth, Fourteenth Amendments to the United States Constitution) -- be allowed to

present evidence in his or her defense that he or she was acting in order to prevent a violation of international law.

United States courts have long recognized that international law, particularly the Nuremberg principles, create enforceable obligations. Similarly, a common law defense of others may be allowed as a justification for a crime. By parity of reasoning, defendants in the present case should be allowed to present evidence that they were acting to discharge their obligations under Nuremberg, and in defense of others, when they attempted to inform airmen of their responsibilities under principles of international law.

Under General Assembly Resolution 177 (II), paragraph (a), the International Law Commission of the United Nations was directed to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." Principle VI of The Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal declares:

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Furthermore, Principle VII declares:
Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

The Nuremberg Principles are a source of customary international law, and as such, this court may rely upon them. Mujica, et. al. v. Occidental Petroleum, 381 F. Supp. 2d 1164, 1180 (C.D. Ca 2005).

The Nuremberg trials imposed enforceable obligations. See Alperin v. Vatican Bank, 410 F.3d 532, (9th Cir. 2005) ("Following World War II, the Executive Branch exercised its authority in a number of ways, including through the Nuremberg trials, which included prosecution for . . . crimes against humanity, war crimes, and crimes against peace.").

The Charter for the Nuremberg trials authorized prosecution of war crimes and crimes against humanity. Of the twenty-two defendants prosecuted in the "Major War Criminals" trial, twelve were sentenced to death, seven received prison sentences, and three were acquitted. 15 See Steven Fogelson, The Nuremberg Legacy: An Unfulfilled Promise, 63 S. Cal. L. Rev. 833, 858 (March 1990). War crimes and crimes against humanity were two of the charges brought against these defendants. Id. at 852. This type of severe punishment would suggest that the Nuremberg Charter did not merely express an "aspiration". See Sosa, 124 S. Ct. at 2769. Mujica, supra, 381 F. Supp. 2d. at 1180.

The Nuremberg precedent criminalizing conspiracy to commit war crimes not only applied to military leaders, it also established private citizen' responsibilities to uphold international law. See The Flick Case, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1192 (1952).

United States of America v Alstoetter et. al, ("The Justice Case"), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) was the Nuremberg trial of sixteen defendants, members of the Reich Ministry of Justice or People's and Special Courts, which raised the issue of what responsibility judges might have for enforcing grossly unjust--but arguably binding—laws. These defendants were not charged with personally committing war crimes, crimes against humanity, or racial persecution, but rather charged with complicity in these crimes in their roles as jurists. ***Individuals were found to have a duty to disobey domestic orders that cause crimes against humanity.***

The following passage by a legal commentator summarizes the Nuremberg Tribunal principle of the law of complicity in international criminal law:
"[T]his is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime." William Schabas, Enforcing International Humanitarian Law: Catching the Accomplices, 42 International Review of the Red Cross 439 (June 30, 2001).

Therefore, under the precedent set at Nuremberg, individuals have rights based on international law to try to prevent crimes against humanity, crimes of aggression, and war crimes. Francis Boyle, Defending Civil Resistance Under International Law (1988) p. 139. Moreover, the right to prevent crime is one of the recognized General Principles of Law Recognized by Civilized Nations. Francis Boyle, Defending Resistance, 139. The Statute of the International Court of Justice recognizes these principles as a valid source of international law. Article 38.

As noted above, Courts must also look to jurists' interpretations of international law as "trustworthy evidence of what the law really is." The Paquete Habana 175 U.S. 677, 700.

One such jurist and scholar, Supreme Court Justice Robert Jackson, served not only as the chief American prosecutor at the Nuremberg Trial, but was also appointed to help formulate the international legal principles for the trial. In explaining the Charter, Jackson said, "The very essence of the Nuremberg Charter is that individuals have international duties which transcend national obligations of obedience imposed by the individual state." Trial of the Major War Criminals Before the International Military Tribunal, vol. 1, Nurenberg 1947, p. 223, cited in Principles of International Law Recognized In The Charter Of The Nurenberg Tribunal and In The Judgment of the Tribunal, With Commentaries, 1950, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

Tokyo War Crimes Tribunal Judge Röling echoed this articulation of the principles of international law developing from the post-war trials:
The most important principle of Nuremberg was that individuals have international duties which transcend national obligations of obedience imposed by the nation state…This means that in some cases individuals are required to substitute their own interpretation [of international obligations] for the interpretation given by the state. . . [The world] has to rely on individuals to opposed the criminal commands of the government. B.V.A. Roling and Antonio Cassese, The Tokyo Trial and Beyond 107, 108 (1995).

This Nuremberg Privilege would have provided a defense to individuals who blocked trains transporting internees to a German concentration camp or who smuggled Jewish children out of Germany. Matthew Lippman, Civil Resistance: Revitalizing International Law in the Nuclear Age, 13 Whittier L. Rev. 17, (1992). ("The spirit of individual responsibility to humanity that the jurists involved in the prosecution deemed to be the essence of the principles of war crimes trials.")

In the present case, defendants sought to prevent crimes against peace, war crimes, and crimes against humanity. Thus, the evidence sought to be admitted can establish a defense to the crime charged.

If the Nuremberg Charter and the subsequent Principles derived from them create enforceable obligations on all individuals, such that an individual may face the death penalty for a violation, then certainly defendants should be allowed to use these same principles, principles of customary international law, in order to present a defense to a crime charged.

Defendants are entitled to put on evidence there is an international legal right and privilege to prevent violations of international human rights laws and crimes. It would be paradoxical if international law failed to offer protection to those non-violently protesting a state's violation of the law of nations. This would undercut the principle that individuals have international rights and obligations, which transcend those imposed by the nation-state. Therefore, defendants are entitled to introduce evidence of the defense of international law.

KILLING BY DRONES IS A VIOLATION OF INTERNATIONAL LAW

Arbitrary deprivation of life by the state is universally prohibited and condemned under international law, as expressed in both treaty and customary law. See, e.g., Universal Declaration of Human Rights, art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 6, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (Dec. 16, 1966); European Convention on Human Rights, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, art. 4, Nov. 21, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Res. XXX (May 2, 1948); see also Nils Melzer, Targeted Killing in International Law 184-89 (2008) (discussing evidence of the customary nature of the prohibition against arbitrary deprivation of life).

Like the prohibitions against genocide, slavery, and torture, the prohibition against arbitrary killing, including extrajudicial killing, has the rare status of a jus cogens norm—a fundamental rule of international law accepted and recognized by the international community as a whole as permitting no derogation under any circumstances. See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar.v. U.S.), Merits, 1986 I.C.J. 218 (June 27); Human Rights Committee, Gen. Cmt. No. 24, ¶ 10, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994), and Gen. Cmt. No. 29, ¶ 11, 1950th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 21, 2001);

Indeed, "every instrument or agreement that has attempted to define the scope of international human rights has 'recognized a right to life coupled with a right to due process to protect that right.'" Xuncax v.Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) (internal citation omitted).

When it enacted the Torture Victim Protection Act of 1991 ("TVPA"), Congress explicitly included a prohibition against extrajudicial killing which, Congress recognized, had already "assumed the status of customary international law."9 See Wiwa, 626 F. Supp. 2d at 383 (citing the TVPA and finding "unpersuasive Defendants' argument that there is no customary international law norm against summary execution . . . that meets the Sosa standard"); In re Xe Servs. Alien Tort Litig., 665 F. Supp. 2d at 593 (citing the TVPA as "support for the existence of an international norm prohibiting official summary executions"). Indeed, the Supreme Court in Sosa read the TVPA as providing a "clear mandate" for federal courts to recognize claims of extrajudicial killing and torture, including under the ATS. 542 U.S. at 728, 731.

Section 3(a) of the TVPA defines extrajudicial killing as

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note.

A state may intentionally deprive an individual of life only when it is in self-defense. Even then the use of lethal force meets certain stringent criteria—of "proportionality," "necessity" and "precaution." To be lawful, a targeted killing must satisfy all three of these criteria.

As a general rule, the threshold requirement of proportionality ensures that lethal force will be used only to prevent threats to life. It prohibits the use of lethal force except "in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape." Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, princ. 9, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (Aug. 27-Sept. 7, 1990). In the context of counter-terrorism operations, a general threat emanating from an organization as a whole, or a threat based on allegations of past conduct, does not justify an intentional killing.

Even where justified in light of the gravity of a given threat and thus proportionate, the use of lethal force must also be "strictly unavoidable" and thus necessary to prevent the loss of life—a measure of last resort only after non-lethal means to avert the threat have been exhausted.

See Andronicou, App. No. 25052/94, ¶¶ 183-85 (finding that the use of lethal force was "a considered one of last resort" after negotiations had been attempted "right up to the last possible moment" and failed); McCann and Others v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R., ¶¶ 201-13 (1995) (holding that the fatal shooting of terrorist suspects was not "absolutely necessary" because the suspects could have been apprehended at an earlier moment in time); Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586, ¶ 42 (1999) (finding that government agents "made no effort to use means other than lethal force" in

violation of the right to life); see also Basic Principles, princ. 4 (requiring "as far as possible … non-violent means before resorting to the use of force and firearms"), princ. 9 (permitting lethal force "only when less extreme means are insufficient to achieve lawful objectives"); Code of Conduct, art. 3 cmt. (permitting lethal force only when "less extreme measures are not sufficient to restrain or apprehend the suspected offender"); Report of the Special Rapporteur on Extrajudicial Executions, Comm'n H.R., 62nd Sess., ¶ 48, E/CN.4/2006/53 (Mar. 8, 2006) (by Philip Alston) ("[n]on-lethal tactics for capture or prevention must always be attempted if feasible" and "law enforcement officers must … employ a graduated resort to force"). Necessity also has a temporal element, requiring that potential recourse to lethal force be constantly reassessed and necessary at the very moment of application.

Lethal force that is both proportionate and necessary must further satisfy the requirement of precaution, which compels states to plan, organize, and control operations to the greatest extent possible so as to minimize recourse to lethal force. See McCann, App. No. 18984/91, ¶¶ 201-13 (finding that the failure to apprehend terrorist suspects prior to fatally shooting them, the failure to allow for the possibility of erroneous intelligence assessments, and the automatic recourse to lethal force were evidence of a lack of requisite care in the organization and control of the operation); see also Nachova, App. No. 43577/98, ¶ 103 (holding that the authorities had failed to comply with the obligation to minimize the risk to loss of life "since the arresting officers were instructed to use all available means to arrest [the victims], in disregard of the fact that the fugitives were unarmed and posed no danger to life or limb"). To be lawful, the summary use of lethal force by a state must satisfy all three of these criteria.

The danger of creating exceptions to this rule in the face of terrorist threats was articulated by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 2004:

"Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other

alternative has been exhausted. While it is portrayed as a limited "exception" to international norms, it actually creates the potential for endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law. Report of the Special Rapporteur on Extrajudicial Executions, Comm'n H.R., 61st Sess., ¶ 41, E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston).

DEFENDANTS SHOULD BE ALLOWED TO PRESENT EVIDENCE THAT THEY ACTED OUT OF NECESSITY, WHICH DEFENSE WOULD JUSTIFY THEIR TRESPASS IN VIOLATION OF 18 USC SECTION 1382.

A defendant has a due process right to present a complete defense. Holmes v. South Carolina, 547 U.S. at 324. A common law defense of necessity may be asserted as a defense to the trespassing statute at issue here because, "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." United States v. Bailey, 444 U.S. 394, 415 n.11 (1980).

In order to invoke the necessity defense, a defendant must show that he or she (1) was faced with a choice of evils and chose the lesser evil; (2) acted to prevent imminent harm; (3) reasonably anticipated a direct causal relationship between the conduct and the harm to be averted; and (4) had no legal alternatives to violating the law.

The actions taken must be objectively reasonable. United States v. Perdomo-Espana, 522 F.3d 983 (9th Circ. 2008.) The defense can show these actions were necessary.

There are many examples of other jurisdictions which have accepted the defense of necessity in actions aimed at stopping the war in Iraq.

In Ireland, a jury acquitted five people of criminal damage, finding that they had a lawful excuse. Before the invasion and bombing of Iraq, five people entered Shannon Airport and non-violently disarmed a United States Navy war plane on February 3, 2003. (Article available at http://www.rte.ie/news/2005/0308/shannon.html, last viewed August 11, 2008.) The five defendants were charged with two counts of Criminal Damage, with damages assessed at €100 and $2.5 million. If convicted, defendants faced a maximum imprisonment of ten years.

Trial ultimately began on July 10th 2006. Judge Miriam Anderson agreed with defense counsel after extensive submissions and legal argument on the applicability of the statutory 'lawful excuse' defense. After four and a half hours of deliberation the Dublin jury of twelve returned and gave their unanimous verdict that all the accused should be acquitted as they honestly believed they were acting to save lives and property in Iraq and Ireland, and that their disarmament action was reasonable taking into consideration all the circumstances. (Article available at http://www.indymedia.ie/article/77493, last viewed August 11, 2008.)

Although the defense was based on a particular statute, the statutory "lawful excuse," which excuses damage to property in order to protect other people or property, is similar in intent and effect to the common law defense of necessity.

Courts and prosecutors in England have addressed the necessity defense in the context of actions taken by civilians to impede the war in Iraq.

In Regina v. Jones, et. al., 2006 UKHL 16, discussed supra, the court squarely addressed the defendants' right to present a necessity defense. As explicated by the lower court, the elements of necessity are similar to those in the United States: 1) defendant must show that he committed an act to prevent a greater evil, 2) the greater evil must be directed at those for whom the defendant reasonably believes he has a responsibility to protect, 3) the actions must be reasonable and proportionate to the evil avoided, and 4) defendant reasonably believed he must act to prevent the harm. (This opinion is available at

http://www.b52two.org/Judgementonjucticiability.pdf.) The House of Lords affirmed the lower court's ruling that defendants had such a right to present a defense of necessity. Finally, there is the story of Katharine Gun, a translator at the Government Communications Headquarters in Cheltenham, England. Gun received an email request from a United States official, requesting her office's assistance in pressuring, through the use of espionage tactics, officials of other countries to support the then-pending United States-sponsored resolution authorizing the invasion of Iraq. Gun went to the press with this email, it was authenticated, and Gun was arrested and charged with violating the Official Secrets Act. The New Statesman, "The Woman Who Nearly Stopped the War", March 10, 2008, attached as Exhibit 31, available at http://www.newstatesman.com/blogs/martin-bright/2008/03/katharine-gun-iraq-war-gchq, last viewed July 30, 2008. The Crown Prosecution Service eventually dismissed the case in February of 2004, stating that it would be unable to disprove the defense of necessity on the particular facts of Gun's case.

CONCLUSION

For these reasons, defendants ask this court to allow them to put on evidence of international law and the defense of necessity in order to make sure that justice prevails in this matter.

Defendants