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Newport, R.I.**

**TARGETED KILLING: A LEGAL AND EFFECTIVE TOOL FOR THE
COMMANDER IN THE WAR ON TERROR**

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College, the Department of the Navy or the United States Air Force.

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31 October 2008

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ABSTRACT

Al-Qaeda's attacks on the World Trade Center and the Pentagon on September 11, 2001 shattered preexisting notions about terrorism. Historically, the world community has viewed terrorism as a criminal activity to be opposed by law enforcement. Post-9/11, opinion has shifted toward the view that international terrorists are combatants in an ongoing armed conflict between the United States and its allies. This paper asserts targeted killing of terrorists is a legal and effective tool Combatant Commanders (COCOMs) should employ in the war on terror. To provide the legal basis for targeted killing, the author examines existing international legal opinion and the Law of Armed Conflict (LOAC), showing targeted killing is not assassination and that targeted killing of terrorists can be defended—when conducted according to LOAC—as legitimate military action against unlawful enemy combatants. Included is a brief discussion of Israel's targeted killing campaign in order to demonstrate targeted killing is an effective as well as a legal tactic. Finally, this paper contends the authorization of targeted killing operations should rest with COCOMs and makes recommendations to the operational commander for maximizing success without negatively impacting the overall campaign against international terrorism.

INTRODUCTION

*September 11, 2001 will be remembered not only as the cruelest act of terrorism ever launched on US soil but also as the day the free world declared war against terror. The attacks on New York and Washington D.C. were vicious reminders of the danger terrorism poses to mankind.*¹

Emmanuel Gross

The Al-Qaeda attacks on the World Trade Center and the Pentagon on September 11, 2001 shattered preexisting notions about terrorists and their ability to strike abroad anywhere and anytime. The sheer scale and impact of this heinous act of terrorism which killed over 2800 Americans, horribly damaged the Pentagon, and left the Twin Towers smoking ruins, forced Americans to reconsider how to combat terrorism. U.S. policy has historically treated terrorists as criminals who should be apprehended for prosecution in the courts.² A sea change occurred in that policy when President Bush declared a war on terrorism stating “the enemies of freedom committed an act of war against our country.”³ He made it clear the war would be waged “aggressively and methodically to disrupt and destroy terrorist activity” by use of all weapons: diplomatic, financial and military.⁴

The willingness to use all means was demonstrated over the skies of Yemen on November 4, 2002 when a CIA controlled Predator fired a Hellfire missile at a SUV containing Qaed Salim Sinan al-Harethi, a senior Al-Qaeda operative suspected of playing a key role in the 2000 bombing of the *USS Cole*. Al-Harethi, killed in the attack, was on a “list of ‘high-value’ targets whose elimination, by capture or death, had been called for by

¹ Emmanuel Gross, “Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights vs. the State’s Duty to Protect its Citizens,” *Temple International and Comparative Law Journal* 15 (Fall 1980): 196.

² Thomas Geraghty, “The Criminal-Enemy distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Attacks,” *McGeorge Law Review* 33 (Spring 2002): 558.

³ President George W. Bush, “Address to Joint Session of Congress and the American People,” 20 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed 26 October 2008).

⁴ President George W. Bush, “Radio Address to the Nation,” 29 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010929.html> (accessed 26 October 2008).

President Bush.”⁵ This successful attack signaled a shift in the war against terrorism from law enforcement towards a policy of targeted killing of Al-Qaeda leaders and other terrorists.

Almost immediately, reports of the Predator strike generated significant controversy regarding the legality of targeted killing. Some journalists, pundits, and legal scholars have referred to the Yemen attack and subsequent similar actions as assassinations or extra-judicial executions.⁶ This commentary raises serious questions. First, is targeted killing just another name for assassination? If so, then targeted killing is clearly unlawful. Second, even if it is not synonymous with assassination, is there sufficient legal basis in international law to support a policy of targeted killing in the war on terror? Finally, even if targeted killing is legally justified, is it an effective tool for the operational commander and what must a commander consider in authorizing a targeted kill?

This paper asserts targeted killing is legally supported by international law and constitutes an effective tactic that operational commanders should use—albeit wisely—in the Global War on Terror (GWOT). To make the case, this paper is framed in three parts. First, a legal analysis is provided to show targeting terrorists in the context of waging an armed conflict against them is not assassination. Next, this paper analyzes current interpretation of international law to show targeted killing is a legal military option when conducted properly under the Law of Armed Conflict (LOAC). As a counterpoint, the law enforcement model is examined and shown to be inappropriate against international terrorism. Finally, this paper assesses past results to demonstrate targeted killing is effective against terrorism, and it provides recommendations to commanders on who should authorize targeted kills and what

⁵ Seymour M. Hersh, “Manhunt,” *The New Yorker*, 23 December 2002, <http://lexisnexis.com/> (accessed 26 October 2008).

⁶ Matthew Machon, “Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror,” (monograph, Fort Leavenworth, Kansas: School of Advanced Military Studies, Army Command and General Staff College, 25 May 2006), 2.

issues must be weighed, on a case by case basis, when deciding whether or not to conduct a specific targeted killing operation.

TARGETING TERRORISTS IS NOT ASSASSINATION

If targeted killing is just assassination dressed up as a “wolf in sheep’s clothing,” then clearly it is not a legal option for commanders since assassination is a form of murder and therefore illegal. While there is no one universally recognized definition of assassination, it is commonly thought of as having meaning in two contexts: peace and war.⁷ Differentiation of targeted killing from assassination then, requires analysis of both these regimes in turn.

According to COL W. Hays Parks in peacetime assassination can be defined as the “murder of a private individual or public figure for political purposes.”⁸ Consistent with this the United States unambiguously recognizes assassination as murder in Executive Order 12333 which prohibits assassination.⁹ Given this fact, what is the relevance to targeting terrorists? The answer is “none” for two reasons. First, the requirement of singling out a public/political leader does not accurately describe terrorists such as Osama bin Laden. While he is definitely a leader of Al-Qaeda, bin Laden is not a political figure per se. That status is generally reserved for members of defined nation states, for example presidents and members of parliament. Accordingly, targeting bin Laden for death is not political in nature; instead the act is a military one with the aim of legitimately attacking an unlawful enemy combatant. Second, the view that terrorists are combatants springs directly from the United States’ stance that the deadly struggle against Al-Qaeda constitutes armed conflict. By

⁷ Machon, 11-12.

⁸ COL W. Hays Parks, “Memorandum on Executive Order 12333 and Assassination,” *Army Lawyer*, December 1989, 4.

⁹ *Ibid.*, 4.

definition then, the peacetime definition of assassination is inapplicable.

Assuming the U.S effort against Al-Qaeda is in fact an armed conflict, the question remains whether or not targeting key terrorists in war meets the definition of assassination. What in fact is a wartime assassination? The existence of treachery is a common theme. The 17th Century scholar Hugo Grotius believed enemy leaders were legitimate targets of attack so long as the act was not treacherous.¹⁰ According to the Law of Armed Conflict (LOAC) and the Lieber Code of 1863, noted legal expert Professor Michael Schmitt concludes it is the specific targeting of an individual by treacherous or perfidious means.¹¹

Targeted killing meets the first half of this definition as its purpose is precisely to pursue a specific person. Does it also meet the second half? Is targeted killing inherently treacherous? It is not. Treachery implies a breach of confidence—a breaking of one’s word. For example, pretending to be under a flag of truce in order to kill the enemy is clearly treachery. In the war on terror, no such confidence has been given, therefore no treachery exists. Two additional points with respect to treacherous means are crucial to this discussion: surprise and the method of carrying out the attack. First, while some confuse surprise with treachery, the two are not synonymous. Per Schmitt, the employment of stealth or ruses is permitted under LOAC and does not make a lawful killing an assassination.¹² Second, in conducting a targeted killing there is no restriction on use of what are normally considered lawful methods to include missiles, aircraft, snipers, mortars and the like—all are legitimate means of attacking an enemy.¹³ Clearly this makes the CIA Predator attack in Yemen which

¹⁰ Patricia Zengel, “Assassination and the Law of Armed Conflict,” *Military Law Review*, 134 (Fall 1991): 125-6.

¹¹ Michael Schmitt, “State Sponsored Assassination in International and Domestic Law,” *Yale Journal of International Law* 17 (1992): 617.

¹² *Ibid.*, 617.

¹³ Parks, 5.

used a Hellfire missile (and surprise) a legal attack and not an assassination. Similarly, the use of helicopters in Israel's targeted killing campaign against Palestinian terrorists was perfectly legal and not assassination.¹⁴ The bottom line is a combatant participating in an armed conflict is subject to attack by all weapons permitted under international law given there isn't treachery or perfidy involved.¹⁵

Based on this analysis targeted killing of terrorists during war is not assassination. However, this result relies on one important assumption: a state of armed conflict exists between the U.S. and Al-Qaeda. If there is no armed conflict then Al-Qaeda terrorists can't be considered combatants legally subject to attack under the Law of Armed Conflict. The key question is: does international law support the conclusion that transnational terrorist organizations can wage an armed conflict against a state? This question and other legal considerations are examined next.

INTERNATIONAL LAW

The validity of the United States targeted killing policy against terrorists hinges on a number of legal issues. As mentioned already the assertion that the U.S. is engaged in an international armed conflict with terrorists must be proven. Second, given an armed conflict exists, it must be determined terrorists are combatants and not civilians in order for them to be legal targets. Third, all targeted killings must meet the LOAC requirements of necessity, proportionality and imminence. One final issue central to this discussion is whether or not it is more appropriate to use the law enforcement model which treats terrorist acts as crimes and not armed attacks. These four questions are addressed in turn in this section.

¹⁴Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, UK: Cambridge University Press, 2004), 94-5.

¹⁵ Schmitt, "State Sponsored Assassination," 634.

Self Defense, Armed Attack and Armed Conflict

It is a recognized right that sovereign states are allowed to defend themselves from aggression. This is clearly stated in Article 51 of the United Nations charter which authorizes nations to use force in order to defend themselves from armed attack. Specifically Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.¹⁶

However, armed attack is not specifically defined, so the key question is “what constitutes an armed attack?” In particular, can a terrorist act such as the September 11, 2001 World Trade Center and Pentagon strikes be considered an armed attack on the United States’ territorial integrity?

The United States believed it to be the case as shown by President Bush’s declaration of the war on terror. In keeping with that interpretation the U.S. immediately notified the United Nations of our intent to take action against the terrorists as an act of self-defense.

This notification is required by Article 51 which says:

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁷

While America believed an armed attack had occurred, did the rest of the world agree?

In the Westphalian tradition, which sprang from the roots of war among nations on the European continent, the generally accepted view pre-9/11 was that only nation states

¹⁶ Charter of the United Nations, Article 5, 26 June 1945, <http://www.un.org/aboutun/charter/chapter7.htm> (accessed 13 October 2008).

¹⁷ Ibid.

could conduct armed attacks. However, as Helen Duffy, the Legal Director of INTERIGHTs, an international human rights law center writes: “the law is not static. Every legal system needs to be able to develop rules to take into account the evolution and changing exigencies of the society it regulates.”¹⁸ Referring directly to the strike on the World Trade Center she also notes: “there can be little doubt that traditional concepts of armed conflict are increasingly subject to debate post 11 September 2001.”¹⁹ Writing about the 9/11 attacks, Michael Schmitt echoes Duffy saying “It is not that new law emerges or that old law fades away, as much as it is that the understanding of the precise parameters of the law evolves as it responds to fresh challenges...”²⁰

Precisely in response to the fresh challenge of Al-Qaeda’s actions on September 11, 2001, which were mounted from Afghanistan but not controlled by that state government, the understanding of armed attack under Article 51 did change as seen by the United Nations’ response.

In his analysis of United Nations Security Council resolutions 1368 and 1373, Yoram Dinstein, a noted scholar cited by the Israeli High Court in its ruling affirming the legality of Israel’s targeted killing policy, says the fact that Al-Qaeda’s actions “amounted to an armed attack—laying the groundwork for the exercise of self-defense pursuant to Article 51—has been fully corroborated by a number of legal measures taken by international bodies.”²¹ In both Resolution 1368²² and Resolution 1373²³ the Security Council granted its affirmation of

¹⁸ Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge, UK: Cambridge University Press, 2005), 7.

¹⁹ *Ibid.*, 254.

²⁰ Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law, The Marshall Center Papers, No. 5* (The Marshall Center: VIB, 2002), 56.

²¹ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge, UK: Cambridge University Press, 2005), 207.

²² United Nations Security Council, S/RES/1368, 12 September 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf> (accessed 13 October 2008).

the ‘inherent right of individual or collective self-defense in accordance with the Charter.’ Since the concept of self defense only has meaning in the context of reacting to aggression, the UN’s recognition of the United States’ right to self-defense definitively supports the U. S. interpretation that international terrorists—and not just nation states—can commit armed attacks. Schmitt concurs with Dinstein noting: “Security Council resolutions 1368 and 1373 cited the inherent right to self-defense in the specific context of international terrorism.”²⁴

Additionally, there are two other significant points to make about these resolutions. First, this was not a long drawn out decision process. The Security Council approved Resolution 1368 just a day after 9/11. This shows a unanimous and unambiguous recognition of an attack. Second, in both resolutions, no specific mention is made of the terrorists not being a legitimate state. This shows the UN was comfortable deeming Al-Qaeda’s actions an armed attack despite them not being agents of a recognized state. One other item worth noting in reference to the UN’s recognizing an armed attack from a non-state international entity is that this is consistent with the “black and white” wording of Article 51 since nowhere in the Article does it specify only states can commit armed attacks. Schmitt recognizes the validity of this point in his statement: “Article 51 makes no mention of the nature of the entity that must mount the attack that in turn permits a forceful response in self-defense.”²⁵

Since the world community, through resolutions 1368 and 1373, accepts the terrorist acts of 9/11 constitute an international armed *attack*, the key question is whether or not this

²³ United Nations Security Council, S/RES/1373, 28 September 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf> (accessed 13 October 2008).

²⁴ Schmitt, *Counter-Terrorism and the Use of Force*, 17.

²⁵ *Ibid.*, 25.

implies the United States remains locked in an international armed *conflict* with the terrorists. On the surface, there may not appear to be much difference in the terms ‘armed attack’ and ‘armed conflict.’ Indeed they are used interchangeably at times. The distinction this paper makes between the two is that an armed attack is an isolated event whereas an armed conflict is a continuing series of actions.

Why is this important? It is meaningful in justifying targeted killing as a legitimate act of self-defense. If an isolated attack has been thwarted, then there is no continuing need for defense. This is illustrated in the scenario of one man assaulting another. The attackee has every right to defend himself during the course of the fight. However, if a day later the individual who was attacked reinitiates hostilities with the initial attacker, he would be seen as the aggressor. Contrast that with an attack that is part of a continuous campaign. In this case, there is a justifiable need for ongoing self-defense. It is this need for ongoing self-defense that must be shown in order to justify targeted killing of terrorists months after the original Al-Qaeda strikes on 9/11. In David Kretzmer’s words: “In assessing the legality of these operations it is essential to determine whether or not an armed conflict exists between the United States and al-Qaeda at the time of these attacks.”²⁶ Agreeing with this assessment Schmitt contends if there is an armed conflict, then “the individual actions constituting it are no more separate and distinct than tactical engagements in a military campaign.”²⁷

Acts of self defense are permissible under three different circumstances.

Specifically, the United States recognizes self-defense is justified for the following reasons:

“a) Against an actual use of force, or hostile act. (b) Preemptive self-defense against an

²⁶ David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *The European Journal of International Law* 16, No. 2 (2005): 174.

²⁷ Michael Schmitt, “Targeting and Humanitarian Law: Current Issues,” *Israel Yearbook on Human Rights* 34 (2004): 83.

imminent use of force. (c) Self-defense against a continuing threat.”²⁸ It is this last which is particularly pertinent to America’s justification of military action against Al-Qaeda and other terrorists in the GWOT.

To be valid, this third justification must be backed up with a credible belief that international terrorism constitutes an ongoing threat and that in fact the U.S. is locked in a long-term campaign vs. Al-Qaeda. What is the standard for proving there is an ongoing threat? Emmanuel Gross suggests four factors to assess the plausibility of a perceived, persistent threat:

- (1) Past Practices: Past practices of the terrorist organization must be reviewed to determine the extent to which a possible attack is consistent with those practices.
- (2) Motives: Does the group have particular goals? If so, then the extent to which those goals have or have not been fulfilled will bear on the likelihood of future attacks.
- (3) Current Context: Have contemporary events caused tensions between the state and the terrorists to become exacerbated or relaxed? Similarly, what is the current state of relations between the target state and those sponsoring the terrorist group? Further, to what extent is the target state currently vulnerable from either a security or political perspective?
- (4) Preparatory Actions: Even though no intelligence is available indicating a planned attack, are activities underway that suggest that an operation is being planned?...The more consistent the particular activities that the group conducts are with prior operations, the more likely a response is to be deemed necessary.²⁹

Putting these criteria to the test against al-Qaeda undoubtedly show that this terrorist organization is a continuing threat, justifying self-defense actions—such as targeted killing—on the part of the United States. With regard to past practices, Al-Qaeda definitely exhibits a pattern of terrorist behavior. The attack on the *USS Cole* is just one example among many. Al-Qaeda’s motive of ill intent and harm to America is also well established. Osama bin Laden made this apparent when he issued a fatwa in February 1998:

To kill Americans and their allies, both civil and military, is an individual

²⁸ New England International and Comparative Law Annual, 7 (2001), 169, quoted in Machon, 23.

²⁹ Emmanuel Gross, 226-7.

duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque and the Haram Mosque are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.³⁰

Given that fatwa and the involvement of Al-Qaeda operatives in Afghanistan, Iraq, and elsewhere across the globe, the current context shows no relaxation on the part of Al-Qaeda to withdraw from conflict with the U.S. Lastly, there is reason to believe further attacks are being planned—a fact made clear by routine reports in the news that terrorist plots are thwarted on a regular basis.

Before departing the issue of whether or not the U.S. can wage an international armed conflict against an international organization (e.g. Al-Qaeda), it is worth considering one counterpoint offered by David Kretzmer. He contends there can be no international armed conflict against terrorists because they are not combatants. By this he means they are not *lawful* combatants. In his view an international armed conflict must have lawful combatants on both sides. In short: “An armed conflict model of law cannot be applicable if only one party to the conflict has combatants.”³¹ However, this misses the point that past understanding of law changes in light of new events. As discussed already, post-9/11 the UN had no difficulty recognizing that a non-state actor could conduct an armed attack. This paper asserts, in keeping with that change in worldview, a new paradigm must be adopted which recognizes armed conflict can exist between a state with lawful combatants on one side and an enemy composed solely of unlawful combatants on the other.

³⁰ The Aqsa Mosque and the Haram Mosque are located in Jerusalem and Mecca respectively. Ahmed S. Hashim, “The World According to Usama Bin Laden,” *Naval War College Review*, Autumn 2001, 27-8.

³¹ Kretzmer, 194.

Terrorists: Unlawful Combatants—not Civilians

The preceding discussion on self-defense and armed conflict assumed terrorists can be categorized as combatants—specifically unlawful combatants—and not civilians. As part of justifying a targeted killing policy it is incumbent to demonstrate that fact and not simply assume it. This must be accomplished first by showing Al-Qaeda are not lawful combatants and second by demonstrating they don't merit civilian status.

Only military and paramilitary forces who fight openly on the field of battle can be lawful combatants—although depending on their actions they can lose that status and become unlawful combatants. The Law of Armed Conflict (LOAC) requires certain conditions be fulfilled in order to meet the standard of a lawful combatant. LOAC is clear on this point because lawful combatants are entitled to different treatment than unlawful combatants—for example POW status when captured. Citing Article 4(A)(2) of Geneva Convention III, David Kretzmer lists several necessary criteria for recognition as a lawful combatant: 1) wearing a fixed distinctive sign (e.g. a uniform or emblem), 2) carrying arms openly, and 3) conducting operations in accordance with the laws and customs of war.³² By this standard Al-Qaeda members are definitely not lawful combatants since they do not wear distinguishing clothing, they don't carry arms openly and, as was made manifest to the world on September 11th, they do not abide by the laws of war since attacking civilians is universally seen as an illegal act.

If not lawful combatants, then do Al-Qaeda members merit recognition as civilians? They do not. Civilians by definition are noncombatants who do not take up arms or otherwise participate in armed combat. As such they are guaranteed under international law,

³² Kretzmer, 191.

“*life, health, dignity and personal liberty (italics added).*”³³ Per Article 51(3) of Protocol I civilians are entitled to this protection “unless and for such time as they take a direct part in hostilities.”³⁴ If a civilian is participating in hostilities, all protections are immediately lost and that individual is reclassified as an unlawful combatant. As such, he/she becomes a legal target for attack without any of the corresponding rights (e.g. POW status) given lawful combatants under the 1949 Geneva Accords.³⁵ Under the rubric of the war on terror, Al-Qaeda attacks satisfy the “direct part in hostilities” portion of the definition of a civilian as an unlawful combatant: “Though they operate under the guise of civilian noncombatant status, they cross the threshold into the realm of unlawful combatants when they directly participate in armed conflict by attacking U.S. interests.”³⁶

It is important to note Article 51(3) only denies civilian status “for such time” as civilians participate in hostilities—defined as both direct action and active planning of attacks. If a terrorist desists from all terrorist activities then, that individual would be reclassified as a civilian. However, the burden of proof rests with terrorists in demonstrating they are no longer actively engaged hostilities, and unless they unambiguously “lay down arms,” terrorists remain unlawful combatants. This standard is in effect in order to prevent unlawful combatants from continuously going through the “revolving door.”³⁷ Stated simply, one can’t be a terrorist by day and a civilian by night: “a person is not allowed to

³³ Dinstein, *The Conduct of Hostilities*, 29.

³⁴ *Ibid.*, 50.

³⁵ Department of the Navy, *The Commanders Handbook on the Law of Naval Operations*, NWP 1-14M (Norfolk: October 1995), 5-3.

³⁶ Albert Wang, “Surgical Counter-Terrorism: Targeting Individuals as an Operational Tool,” (research paper, Newport, RI: U.S. Naval War College, Joint Military Operations Department, 3 Feb 2003), 5.

³⁷ W. Hays Parks, “Air War and the Laws of War,” 32 *Air Force Law Review* 1 (1990), 118-20, quoted in David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *The European Journal of International Law* 16, No. 2 (2005): 193.

simultaneously wear two caps...”³⁸ Therefore, members of terrorist organizations who actively espouse terrorism are not civilians—they are unlawful combatants subject to attack.

Necessity, Proportionality and Imminence

While international law provides a legal basis for targeted killing of terrorists, there are four specific criteria to be met in deciding whether any *particular* operation is acceptable. First, the strike must be aimed at preventing future attacks in the ongoing campaign. A targeted killing can’t be a form of retaliation or retribution for previous attacks.³⁹ Additionally, targeted killings must satisfy the three principles of necessity, proportionality, and imminence.⁴⁰

The principle of necessity requires lethal force be undertaken only as a last resort. Non-forceful measures must not be sufficient to “deter further attacks making up the terror campaign.”⁴¹ In the context of terrorism, necessity is construed to mean law enforcement is not a reasonable alternative. This does not mean law enforcement must fail. It is enough to show success will not “prove timely enough to head off a continuation of the terrorist campaign.”⁴²

The principle of proportionality requires balancing the value of a military target with the potential loss of life and damage that will occur from the attack. Civilian casualties and damage to civilian objects must not be disproportionate to the target’s importance. In practice this may mean only certain means may be used for a strike (e.g. a sniper vice a bomb), or depending on the locale—for instance a historic mosque—a strike may not be

³⁸ Dinstein, *The Conduct of Hostilities*, 29.

³⁹ Schmitt, “Targeting and Humanitarian Law,” 83.

⁴⁰ Dinstein, *War, Aggression and Self-Defence*, 209.

⁴¹ Schmitt, “Targeting and Humanitarian Law,” 83.

⁴² Schmitt, *Counter-Terrorism and the Use of Force*, 28.

permitted at all. Kretzmer lists three factors to be balanced in determining proportionality: “1. the danger to life posed by the continued activities of the terrorists; 2. the chance of the danger to human life being realized if the activities of the suspected terrorist are not halted immediately; and 3. the danger that civilians will be killed or wounded in the attack on the suspected terrorist.”⁴³

Finally, targeted killings must be conducted against an attack that is imminent or ongoing. According to Schmitt, strikes against terrorists meet the imminent requirement since it is “reasonable to conclude that [the September 11] attack was merely the opening shot in an overall campaign that in itself constitutes a single ongoing armed attack.”⁴⁴

Law Enforcement is Insufficient

Before concluding this discussion of international law, it is valuable to consider law enforcement as a counterargument to the international armed conflict model espoused here. As mentioned earlier, historically terrorism has been viewed as a crime and terrorists as criminals to be prosecuted. In particular, “Human rights activists and ... groups such as Amnesty International and Human Rights Watch, generally promote the law enforcement model as the preferred method of responding to terrorist attacks and mitigating the threat posed by international terrorism.”⁴⁵ These organizations view terrorism as “a pernicious form of criminal activity that should be managed according to the law enforcement model.”⁴⁶

Why shouldn't that continue to be the model for dealing with terrorists?

The simple answer is the law enforcement model isn't effective enough in dealing

⁴³ Kretzmer, 203.

⁴⁴ Schmitt, *Counter-Terrorism and the Use of Force*, 31.

⁴⁵ Machon, 36.

⁴⁶ Kretzmer, 174.

with the grave danger posed by extremist terrorists. President Clinton, years before 9/11, made this point in response to the terrorist attack on U.S. embassies in Africa when he told the nation at times “law enforcement and diplomatic tools would not be enough. When our very national security is challenged and we must take extraordinary action to protect the safety of our citizens.”⁴⁷ In fact, several difficulties exist which prevent law enforcement from being a useful enough tool including jurisdiction, ability to capture, and the problem of indictment.

One problem of the law enforcement model relative to the problem of international terrorism is that the fundamental premise that the suspected perpetrators are in the jurisdiction of the victim state is invalid.⁴⁸ And when the perpetrators are located in a failed or failing state such as Afghanistan, Sudan, or Somalia—states which are either unable or unwilling to apprehend terrorists—the ability to capture is rendered more difficult, if not impossible. Even when capture is possible, if it can’t be accomplished in a timely fashion, it might be too late to prevent an attack. Finally, it is extremely difficult to build a case against a terrorist proving guilt beyond reasonable doubt making this at times an “insurmountable obstacle to indicting them.”⁴⁹

For these reasons even those who can envision scenarios where law enforcement will work recognize that “When the terror is intense, organized and protracted, the appropriate model should be the armed conflict model.”⁵⁰ Daniel Statman in his article, “Targeted Killing,” agrees given 1) the gravity of the Al-Qaeda threat and 2) the impracticality of

⁴⁷ President William J. Clinton, “The Presidential Address,” 20 August 1998, http://www.pbs.org/newshour/bb/military/july-dec98/clinton2_8-20.html (accessed 26 Oct 2008).

⁴⁸ Kretzmer, 39.

⁴⁹ Tamar Meisels, “Targeting Terror,” *Social Theory and Practice* 30, No. 3 (July 2004): 304.

⁵⁰ Kretzmer, 183.

coping with this threat through normal law enforcement institutions and means.⁵¹

OPERATIONAL CONSIDERATIONS AND RECOMMENDATIONS

The first part of this paper has focused on demonstrating the legal basis for conducting targeted killings. However, there exist several operational issues a commander must consider when deciding to employ targeted killing as a tool in the war on terror. Perhaps the most important question to address is whether or not targeted killing is an effective weapon at all. Second, at what level should the decision of targeting a terrorist be made? Last, a commander must determine if a particular targeted killing will be counterproductive to the overall campaign.

The legality of targeted killing is ultimately irrelevant if it is not an effective counter to Al-Qaeda and other terrorists. The United States doesn't discuss its effort to target terrorists much—these efforts tend to be shrouded in secrecy. One source of data that speaks to the effectiveness of targeted killing is the Israeli targeted killing campaign waged against Palestinian terrorists during the second *Intifada* of 2000. This campaign, ongoing now for several years, provides definitive proof that targeting terrorists is indeed effective in three respects: elimination of top leadership, disruption of terrorist command and control (C2), and deterrence.

The terrorists themselves admit this fact. In his article on the Israeli use of targeted killing Steven David notes “Palestinian organizations have acknowledged that the slaying of their leaders and operatives has hurt them and that they are prepared to modify or cease

⁵¹ Daniel Statman, “Targeted Killing,” *Theoretical Inquiries in Law* 5 (January 2004): 183.

attacks against Israeli civilians if Israel would suspend its practice of targeted killings.”⁵²

The above quote speaks to destroying leadership and deterrence. With respect to disrupting C2, David notes targeted killing keeps “would-be bombers on the run...taking precautions against being killed such as sleeping in a different location every night and not letting others know of their whereabouts.”⁵³ These changes in behavior clearly impact a terrorist organization’s ability to conduct operations.

The Israeli experience shows targeting terrorists is operationally effective, but targeted killing remains a very sensitive undertaking. In a world where the media publicly captures on film failures and collateral damage, it is important senior leadership make these decisions. This absolutely includes the President—indeed President Bush has authorized a list of named terrorists who may be targeted if their capture is impractical.⁵⁴ Who else then should have authority to mark a terrorist for killing? Specifically, at what level of military command should this rest? This paper agrees with Gary Solis’ recommendation that given the potential repercussions of targeted killing, such decisions should be delegated to the most senior officers—specifically the four star regional combatant commanders (COCOMs).⁵⁵

Absent this authority, COCOMs must tap into the interagency National Counterterrorism Center (NCTC) to familiarize themselves with the latest intelligence on terrorists operating in their regions⁵⁶ and suggest to the President additions to the authorized list. Since the President’s personal approval is not required for terrorists already designated

⁵² Steven David, “Fatal Choices: Israel’s Policy of Targeted Killing,” in *Democracies and Small Wars*, ed. Efraim Inbar (Portland, OR: Frank Cass & Co., Ltd., 2003), 155.

⁵³ *Ibid.*, 143.

⁵⁴ James Risen and David Johnston, “Bush Has Widened Authority of C.I.A. to Kill Terrorists,” *Los Angeles Times*, 15 December 2002, A1.

⁵⁵ Gary Solis, “Targeted Killing and the Law of Armed Conflict,” *Naval War College Review* 60, No. 2 (Spring 2007): 136.

⁵⁶ Tobe Lunsford, “The National Counterterrorism Center,” (lecture, Naval War College, Newport, RI, 10 September 2008).

as targets,⁵⁷ COCOMs must also deliberately decide to what level of command they will delegate approval for strikes against terrorists on the list. It is recommended, given the sensitivity of these operations, that this approval authority extend no further than Joint Task Force (JTF) commanders.

Finally, for each targeted killing COCOMs must assess several factors to ensure a given strike is not counterproductive to the overall campaign. Two legal considerations are necessity and proportionality. Other concerns include cooperation, both interagency and international, and negative second order effects.

As discussed earlier, in the context of terrorism necessity requires the commander to determine capturing a terrorist is not feasible leaving lethal force the only option. In making this determination COCOMs must consider the location where the terrorist is holed up. Is the state willing or able to apprehend the individual? If the answer is no, the COCOM can legitimately attack the terrorist on foreign soil—as President Clinton did in Afghanistan when he launched tomahawk missiles at bin Laden’s camp. Even if a state has competent law enforcement, capture may be too uncertain making a targeted kill the best choice. This is illustrated in the Yemeni Predator strike against al-Harethi which was only conducted after a previous failed attempt to capture him in the remote area where he was hiding. “Additional attempts to capture him would likely have been just as futile, resulting in...loss of life while potentially allowing the suspected mastermind behind the *USS Cole* bombing to escape arrest indefinitely...”⁵⁸

Factoring in proportionality puts the onus on the commander to determine the

⁵⁷David Johnston and David E. Sanger, “Fatal Strike in Yemen Was Based on Rules Set Out by Bush,” *New York Times*, 6 November 2002, A14.

⁵⁸Maritza Ryan, “Targeted Strikes in the ‘Global War on Terror,’” (research paper, Newport, RI: Naval War College, Joint Military Operations Department, 18 May 2005), 12.

targeted individual's value outweighs the likely casualties and/or damage that may result. Even when this is the case, the COCOM should decide against a strike if expected destruction is likely to inflame the population. For instance targeting a terrorist in a mosque may have the negative effect of creating future terrorists. Collateral damage, however, is never completely avoidable and the farmer's destroyed home or slain son is no less important to him than a mosque. Therefore, this paper recommends COCOMs craft a strategy to counter ill will arising from casualties and damage. Many tribal cultures recognize the concept of compensation for wrongful death, so one possible avenue is providing reparations to civilians affected by a targeted killing.

Whatever the plan, the COCOM must integrate it into his strategic communications. Knowledge of the strategy—be it reparations or something else—should be broadcast widely. Additionally, after every targeted killing, to the extent allowed by national security, the rationale for the attack and the value gained from it needs to be communicated so the public understands the importance in the context of the war on terror. Finally, a clear message must be sent that targeted killings are undertaken only when deemed absolutely necessary and only against high value terrorists—not mid-level operatives. This is consistent with existing COCOM guidance of “defeating the network, not just the attack...[by going] after its leaders.”⁵⁹

Cooperation is another essential element a COCOM must integrate into any targeted killing. Interagency cooperation is critical to make sure the commander possesses all available intelligence in order to maximize the chances of success. Additionally, close consultation with the State Department in the form of the affected ambassador is necessary to

⁵⁹ General David Petraeus, Multi-National Force-Iraq Commander's Counterinsurgency Guidance, 15 July 2008, 1.

ensure the COCOM is aware of any circumstances that may dictate aborting a given attack.

Likewise international cooperation is necessary. While the U.S. possesses a phenomenal intelligence capability, it is not omniscient. Other countries bring outstanding assets to the fight, and working with these states cooperatively maximizes success. A perfect example of this is the Predator attack on al-Harethi. The Yemeni government was fully involved and was “instrumental in providing the necessary intelligence to identify and track al-Harethi.”⁶⁰ Even if certain a strike will be successful without outside help, it is recommended COCOMs cooperate as much as possible. Operating solo in a “cowboy” fashion breeds resentment creating seams in the war on terror. Al-Qaeda’s tentacles stretch across the globe, and the U.S. can’t win the Long War without a strong multinational front.

Finally, the COCOM must consider potential negative second order effects. For instance, in deciding whether to kill a terrorist now or try for capture later, the potential intelligence value that terrorist possesses should be assessed. Intelligence can’t be gained from dead terrorists, so in some instances a commander may defer an attack to preserve the chance of gaining that intelligence in the future. Conversely, the COCOM must also assess the chances of lost future intelligence from key HUMINT sources. This is likely to occur when the information used to plan an attack can be traced back to specific people. This problem surfaced during the Israeli targeted killing campaign when the Palestinians “arrested and executed several alleged collaborators.”⁶¹

⁶⁰Ori Nir, “Bush seeks Israeli Advice on ‘Targeted Killings,’” *The Forward*, 7 February 2003 www.forward.com/issues/2003/03.02.07/news5.html, quoted in Maritza Ryan, “Targeted Strikes in the ‘Global War on Terror,” 12.

⁶¹ Michael Gross, “Fighting by Other Means in the Mideast: a Critical Analysis of Israel’s Assassination Policy,” *Political Studies* 51 (2003): 358.

CONCLUSION

The Al-Qaeda strike on the World Trade Center on September 11, 2001 irrevocably altered how the world views terrorists. No longer are they simply seen as criminals. In this new paradigm terrorists are unlawful enemy combatants planning and conducting attacks in an international armed conflict between the U.S. and those who stand by her. To defeat the persistent, ongoing threat posed by these terrorists, operational commanders must be aware of and be prepared to use all legitimate means—like the tactic of targeted killing—at their disposal. Targeted killing is not assassination “in sheep’s clothing” and is legal under the laws of armed conflict when conducted properly. True, there are risks and uncertainties associated with exercising this option as there are in any military action. But, when used wisely and with due consideration of its overall effect on the campaign, targeted killing is an effective arrow in the commander’s quiver.

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