

Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror

**A Monograph
by
MAJ Matthew J. Machon
U.S. Army**



**School of Advanced Military Studies
United States Army Command and General Staff College
Fort Leavenworth, Kansas**

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MAJ Matthew J. Machon

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Approved by:

Michael Warburton, COL, SF

Monograph Director

Kevin C.M. Benson, COL, AR

Director,
School of Advanced
Military Studies

Robert F. Baumann, Ph.D.

Director,
Graduate Degree
Programs

Abstract

Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror by MAJ Matthew J. Machon, U.S. Army, 64 pages.

On 5 November 2002, an armed Central Intelligence Agency (CIA) operated Predator Unmanned Aerial Vehicle (UAV) launched a lethal missile strike, killing Qaed Salim Sinan al-Harethi, a high ranking al-Qaeda member and suspected architect of the USS Cole bombing, in an isolated and sparsely populated region within Yemen. This missile strike appears to have initiated a new and highly controversial phase in the Global War on Terror; moving “the Bush administration away from the law enforcement-based tactics of arrests and detentions of al-Qaeda suspects that it had employed outside Afghanistan in the months since the fighting there had ended.” Since the 2002 Yemen strike US officials have acknowledged “at least 19 occasions since September 11th on which Predators have successfully fired Hellfire missiles on terrorist suspects overseas.” While it is uncertain how many unacknowledged strikes the US has conducted, “now that al-Qaeda has decentralized its operations around the globe, it's likely that the war against the network will assume an increasingly covert nature, involving intelligence cooperation and targeted strikes against al-Qaeda suspects rather than major conventional military offensives.”

This monograph examines the prohibition on assassination embodied within Executive Order 12333 and its effect on a U.S. policy of targeted killing of transnational terrorist leadership. Next this monograph will examine the numerous interpretations of applicable international law regarding terrorism and the states response. This examination will contrast the law enforcement model proposed by adherents of international humanitarian law, with international humanitarian law and the law of war model advocated by those who see the current “war on terror” as an armed conflict between states and trans-national terrorists.

Given the level of secrecy and lack of transparency involved in this policy and its implementation, how can we judge the moral and legal implications of the Bush administration’s policy of ‘targeted killing’ of al-Qaeda members or other suspected terrorists. Is this policy of ‘targeted killing’ morally justifiable and legal under both US domestic and international law? Can the United States maintain international legitimacy while implementing a policy of targeted killing of suspected trans-national terrorists? This monograph examines Executive Order 12333, International Human Rights Law and International Humanitarian Law to determine the legality of a policy of targeted killing.

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INTRODUCTION

[A]ssassination, poison, perjury...All these were considered legitimate principles in the dark ages which intervened between ancient and modern civilizations, but exploded and held in just horror in the 18th Century.¹

Thomas Jefferson

One hopes each time you get a success like that, not only to have gotten rid of somebody dangerous, but to have imposed changes on their tactics and operations.²

Paul Wolfowicz

The proportionality doctrine of international law supports a conclusion that it is wrong to allow the slaughter of 10,000 relatively innocent soldiers and civilians if the underlying aggression can be brought to an end by the elimination of one guilty individual.³

Thomas C. Wingfield

On 5 November 2002, an armed Central Intelligence Agency (CIA) operated Predator Unmanned Aerial Vehicle (UAV) launched a lethal missile strike, killing Qaed Salim Sinan al-Harethi, a high ranking al-Qaeda member and suspected architect of the USS Cole bombing, in an isolated and sparsely populated region within Yemen. This missile strike appears to have initiated a new and highly controversial phase in the Global War on Terror; moving “the Bush administration away from the law enforcement-based tactics of arrests and detentions of al-Qaeda suspects that it had employed outside Afghanistan in the months since the fighting there had ended.”⁴ Since the 2002 Yemen strike US officials have acknowledged “at least 19 occasions since September 11th on which Predators have successfully fired Hellfire missiles on terrorist suspects overseas.”⁵ While it is uncertain how many unacknowledged strikes the US has conducted, “now that al-Qaeda has decentralized its operations around the globe, it's likely that

¹ Letter from Thomas Jefferson to James Madison (28 August 1789), cited in Ward Thomas, “The New Age of Assassination,” SAIS Review, Vol. XXV, No. 1 (Winter-Spring 2005), 29.

² “US Still Opposes Targeted Killings.” *BBC News*, 6 November 2002. Accessed online at http://news.bbc.co.uk/2/hi/middle_east/2408031.stm 17 February 2006.

³ Thomas C. Wingfield, “Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine,” *The Maryland Journal of International Law and Trade* (Fall 1998/Winter 1999): 312.

⁴ David Johnston and David E. Sanger, “Bush Authorized Targeted Killings,” *The New York Times*, 6 November 2002.

⁵ Josh Meyer, “CIA Expands Use of Drones in Terror War,” *Los Angeles Times*, 29 January 2006.

the war against the network will assume an increasingly covert nature, involving intelligence cooperation and targeted strikes against al-Qaeda suspects rather than major conventional military offensives.”⁶ Given the level of secrecy and lack of transparency involved in this policy and its implementation, how can we judge the efficacy of the Bush administration’s policy of ‘targeted killing’ of al-Qaeda members or other suspected terrorists, or, and perhaps more importantly, is this policy of ‘targeted killing’ morally justifiable and legal under US and international law?

Political and military pundits, journalists, and scholars alike have alternately referred to the Yemen strike and subsequent actions as ‘assassinations,’ ‘targeted killings,’ or ‘extra-judicial executions.’ The manner in which these terms are utilized in describing one single event appears to indicate the terms are synonymous and therefore mutually interchangeable. The truth, however, is each term has a precise and specific definition, the use of which defines the manner in which the individual speaker or author justifies or condemns the US policy. This monograph will explore each of the respective terms, attempt to provide clear definitions of each, and answer the question: is the Bush administration’s policy of targeted killing legally justifiable under US and international law?

The Yemen strike not only eliminated a high-ranking al-Qaeda suspect and ushered in a new policy shift in the US war on terror, it also unleashed a firestorm of controversy surrounding the legality of the ‘targeted killing’ policy. In the immediate aftermath of the strike Amnesty International issued a press release stating "If this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law."⁷ Anna Lindh, the Swedish Foreign Minister referred to the strike as "a summary execution that violates human rights. Even terrorists must be treated according to international law. Otherwise, any country can

⁶ Tony Karon, “Yemen Strike Opens New Chapter in War on Terror,” *Time*, 5 November 2002.

⁷ Anthony Dworkin, “The Yemen Strike: The War on Terrorism Goes Global,” *Crimes of War Project*, 15 November 2002. Accessed online at <http://www.crimesofwar.org/print/onnews/yemen-print.html>

start executing those whom they consider terrorists.”⁸ The most ardent opponents of the policy of ‘targeted killing’ of suspected terrorists, specifically those who categorize it as extra-judicial execution or assassination, are those who view the ongoing struggle against trans-national terrorists as “a pernicious form of criminal activity that should be managed according to the law enforcement model.”⁹ Adherents of the law enforcement model adhere to the international human rights regime under which “the intentional use of lethal force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and due process of law.”¹⁰

Advocates supporting a policy of ‘targeted killing’ directed against terrorist organizations and their leadership often fall into the *realist* school of moral and political philosophy. “Here men and women do what they must to save themselves and their communities, and morality and law have no place. *Inter arma silent leges*: in time of war the law is silent.”¹¹ Unlike critics who believe targeted killing is a violation of international human rights law, advocates contend that the United States is in a state of war with international terrorists and a targeted killing policy is a “legitimate means of fighting the ‘war on terror’ whose legality must be judged on the basis of the laws of armed conflict.”¹² Thus, according to its supporters, ‘targeted killings,’ are justifiable military actions taken against legal combatants, and therefore legal according to the law of war. One legal analyst, immediately following the Yemen strike, asserted the operation should be “viewed as a military action against enemy combatants which would take it out of the realm of assassination. It does seem to me this was characterized as a military operation in the war on

⁸ “Remote Controlled Spy Planes,” *CBS News Online*, 6 November 2002. Accessed online at <http://www.cbsnews.com/stories/2002/11/06/attack/main528396.shtml>

⁹ David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *The European Journal of International Law* Vol. 16 No. 2 (2005): 174.

¹⁰ *Ibid.*, 176.

¹¹ Michael Walzer, *Just and Unjust Wars*, (United States: Basic Books, 1977), 3.

¹² Kretzmer, 174.

terrorism – no rhetorical war – and that these are enemy combatants. You shoot to kill enemy combatants.”¹³

To maintain international legitimacy the United States Government must clarify its policy on the targeted killing of terrorist leaders. Although controversial, a policy of targeting and killing suspected terrorist leaders is not expressly forbidden according to U.S. domestic law nor international law. This monograph will demonstrate that the United States’ policy of targeted killing of al-Qaeda and other terrorist leadership is legal under US domestic law, and, lacking any clear consensus, is subject to interpretation according to international law. The historical context leading to the adoption of a ‘targeted killing’ policy by the United States will briefly be examined. Next, key definitions and terms relevant to and employed throughout the body of this study will be defined and the organization of this study framed. The framing of these terms and the classifying of specific definitions will assist in focusing the analysis of the policy by providing a common frame of reference in order to assess the arguments of both proponents and critics. The body of the study will examine domestic law and international law, their impacts upon a ‘targeted killing’ policy, and the moral implications such a policy entails. Finally, the conclusions and recommendations will suggest changes in international law to clarify and assist nations in the conduct of the war on terror, and recommend clarifications on the US policy of ‘targeted killing.’

¹³ Suzanne Spalding, quoted in “Experts: Yemen Strike Not Assassination,” by Pamela Hess, *United Press International*, 8 November 2002. Accessed online at <http://www.upi.com/inc/view.php?StoryID=20021107-042725-6586r> 15 February 2006.

BACKGROUND AND METHODOLOGY

The events of September 11 were a horrendous atrocity, probably the most devastating instant human toll of any crime in history outside of war.¹⁴

Noam Chomsky

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.¹⁵

Emmanuel Gross

BACKGROUND

The terrorist attacks of 11 September 2001 were perhaps the most pernicious and catastrophic event of American history. In the aftermath of the attacks nearly 3000 American civilians lay dead, the Twin Towers of the World Trade Center lay smoking in ruins, and part of the Pentagon had been severely damaged. That evening, with much of the nation still in a state of shock, congressional leaders, gathered on Capitol Hill, declared the attacks an act of war. Senator John McCain stated “this is obviously an act of war that has been committed on the United States,” while Senator John Kerry called the attacks “a declaration of war that demands a forceful response.”¹⁶ The national consensus in the wake of the attacks was the United States was at war, but with whom?

The Japanese attack on Pearl Harbor, the closest historical parallel to 9/11, offered little in the way of guidance or perspective. Pearl Harbor was an act of war committed by the state of Japan against the United States. Congress immediately responded, declaring war on Japan the next day and entering United States into the Second World War. The 9/11 attacks, however

¹⁴ Noam Chomsky, “*The New War Against Terror*,” transcribed from audio recorded during Chomsky’s talk at the Technology and Culture Forum at MIT 24 October 2001. available online at <http://www.urban75.com/Action/news142.html>

¹⁵ 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* (Fall 2001): 196.

¹⁶ CNN.com, “Congress vows unity, reprisals for attacks,” 12 September 2001, <http://archives.cnn.com/2001/US/09/11/congress.terrorism/>

offered no immediate or clearly defined solution. Almost immediately Osama bin Laden and his al-Qaeda network became the primary focus of the investigation to assess responsibility for the attacks. Within weeks “the clear conclusions reached by the government are: Osama bin Laden and al-Qaeda, the terrorist network which he heads, planned and carried out the atrocities on 11 September 2001; Osama bin Laden and al-Qaeda retain the will and resources to carry out further atrocities.”¹⁷ As one analyst illustrates “had this attack on the World Trade Center and Pentagon been perpetrated by a state, it would constitute an act of aggression.”¹⁸ A clear act of war had been committed against the United States, but the act had not been committed by a sovereign state, but instead by a known terrorist organization, or non-state actor. What policy options, therefore, lay available to the Bush administration in the immediate aftermath of the 9/11 terrorist attacks?

Despite widespread recognition of terrorism as a form of warfare, the United States and the international community, Israel excepted, had largely chosen, prior to 9/11, to regard terrorist acts as individual crimes.¹⁹ This practice continued through the Clinton administration despite the 1998 declaration of the World Islamic Front; within which bin Laden and his al-Qaeda associates clearly state that: “to kill the American and their allies – civilian and military – is an individual duty incumbent upon every Muslim who can do it in any country in which it is possible to do it.”²⁰ Despite this formal declaration of war upon the United States and alleged al-Qaeda complicity in the terrorist bombings of the Tanzanian and Kenyan embassies in 1998, in addition to the USS Cole bombing in 1999, US policy was to treat terrorism “as a legal matter to

¹⁷ PBS.org, “Text of British Document: Responsibility for the Terrorist Atrocities In the United States 11 September 2001,” 4 October 2001, http://www.pbs.org/newshour/terrorism/international/uk_10-4.html

¹⁸ Malvina Halberstam, “Symposium: The Right to use Force in Response to the Attacks on the Pentagon and the World Trade Center,” *Cardozo Journal of International and Comparative Law* (Spring 2004): 854.

¹⁹ *Ibid.*, 860.

²⁰ Bruce Lawrence, *Messages to the World: The Statements of Osama bin Laden* (New York: New Left Books, 2004), 61.

‘depoliticize’ and ‘delegitimize’ it by defining it as criminal activity instead of warfare. Resorting to indictments, extraditions, and trials, it was argued, was the best course.”²¹

Although the Cold War essentially ended with the fall of the Berlin Wall in 1989, United States foreign policy failed to adapt to the new and more challenging international political environment. The end of the Cold War resulted in a dramatic weakening of the Westphalian political model - within which the state is recognized as an autonomous and monolithic political entity, ruled by a government with a monopoly on violence and a mandate to represent its citizens internationally.²² Within this model states are the preeminent actors within the international political environment. Powerful states, such as the United States, are reluctant to acknowledge the erosion of state sovereignty and provide additional strength and legitimacy to these non-state actors. In other words, states attempt to uphold the principle that states deal only with other states. To do otherwise would confer power and legitimacy to non-state actors and organizations such as al-Qaeda. Upholding this principle provides a logical explanation for the maintenance of the terrorism as criminal act policy the United States continued to uphold despite the escalating violence committed against United States interests and its citizens. The challenge posed by trans-national terrorist organizations with global reach such as al-Qaeda:

to this traditional means of categorizing conflict is their ability to project state like violence beyond the borders of a single state. As a result conflict between states and private actors, which is traditionally viewed as an international affair is now being played out on an international scale.²³

The challenge facing the United States and the Bush administration in the wake of 9/11 is determining the nature of the current conflict and the status of al-Qaeda members and other terrorists under international law and/or the law of armed conflict.

²¹ Gary Dempsey, “Crime or Act of War?” *CATO Institute*, 25 September 2001, <http://www.cato.org/current/terrorism/pubs/dempsey-010925.html>

²² Ward Thomas, 30.

²³ Kenneth Watkin, “Warriors Without Rights? Combatants, Unprivileged Belligerents and the Struggle Over Legitimacy,” *Program on Humanitarian Policy and Conflict Research, Occasional Paper Series* (Winter 2005): 18.

In his address to the nation the evening of 9/11 President Bush clearly stated “we will make no distinction between the terrorists who committed these acts and those who harbor them.”²⁴ With a preponderance of evidence implicating Osama bin Laden and al-Qaeda as responsible for the terrorist attacks of 9/11, the refusal of the Taliban, the dominant political regime in control of Afghanistan, to turn bin Laden over to US authorities provided the pretext for the initiation of Operation Enduring Freedom. Invoking Article 51 of the United Nations Charter, a state’s inherent right to self defense, the United States took action against the Taliban and bin Laden applying the interpretation that this right to self defense “includes the right to use force to destroy terrorist bases from which further attacks may be planned organized, supported, or launched, wherever located, if the state in which they are located does not take effective measures to eliminate them as required to do by international law.”²⁵

The removal of the Taliban, the dispersion of al-Qaeda and the loss of Afghanistan as a safe base of operation for terrorists achieved through Operation Enduring Freedom was not the end state sought by the Bush administration. The magnitude of the 9/11 attacks brought about the realization that “there can be no doubt, if there ever was before, that the terrorist threat against the United States is real substantial and ongoing.”²⁶ The recognition of this persistent and credible threat presented by al-Qaeda and other trans-national terrorist organizations capable of projecting violence across international borders, resulted in a broad and dynamic reassessment of US national security policy by the Bush administration. The result of this strategic reassessment was the publication of the National Security Strategy of 2002, a document historian John Lewis Gaddis referred to as:

an historic shift for American foreign policy because it really is the first serious American grand strategy since containment in the early days of the Cold War.

²⁴ George W. Bush, “Statement by the President in his Address to the Nation,” 11 September 2001, accessed at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>

²⁵ Halberstam, 864.

²⁶ Halberstam, 852.

We went through the Cold War, the Cold War ended, and we got into a new situation without a grand strategy. We didn't really devise a grand strategy in the early '90s in the immediate aftermath of the Cold War. And I would argue that the Bush grand strategy is the most fundamental reshaping of American grand strategy that we've seen since containment, which was articulated back in 1947.”²⁷

The primary objectives of the 2002 National Security Strategy rest upon three pillars: defending the peace by combating terrorists and tyrants, preserving the peace through the strengthening of alliances and maintaining solid relations among the great powers, and extending the peace through the promotion of democracy and freedom worldwide. The most provocative and controversial aspect of the Strategy is the expansion of the doctrine of pre-emptive self-defense. As stated within the Strategy:

Given the goals of rogue states and terrorists, the United States can no longer rely solely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first...

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means....

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.²⁸

The paragraphs listed above represent the single most dynamic and controversial aspect of the National Security Strategy and what has since become known as the Bush Doctrine. The United States, to prevent future catastrophes and tragedies will pre-empt emerging threats before they have a chance to develop. The doctrine is clearly predicated upon the concept of American hegemony, and provides a clear warning to Saddam Hussein and Iraq. In fact, many analysts

²⁷ John Lewis Gaddis, PBS Frontline Interview, available at <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/interviews/gaddis.html>

²⁸ United States Government, *The National Security Strategy of the United States of America* (Washington, D.C.: U.S. Government Printing Office, September 2002): 19.

claim the strategy exists as a justification for a pre-emptive war aimed at the removal of Saddam Hussein from power. Iraq aside, the National Security Strategy, or Bush doctrine, establishes the precedent and policy directive for the conduct of a policy of ‘targeted killing’ of al-Qaeda and other terrorist leadership.

The National Strategy for Combating Terrorism, released in February 2003, provides even greater detail about US policy in the conduct of the war on terror. In establishing the 4D strategy (Defeat, Deny, Diminish, and Defend) the document clearly articulates that “the United States and its partners will target individuals, state sponsors, and transnational networks that enable terrorism to flourish.”²⁹ The National Strategy for Combating Terrorism adopts an even more aggressive tone than the National Security Strategy: “the Defeat goal is an aggressive, offensive strategy to eliminate capabilities that allow terrorists to exist and operate – attacking their sanctuaries; leadership; command, control and communications; material support and finances.”³⁰

The language and tone of both the National Security Strategy and the National Strategy for Combating Terrorism indicate the Bush administration’s recognition that the existing and persistent threat posed by international terrorism constitutes a state of war. The Bush administration recognizes the existence of a state of war between the United States and terrorist organizations of global reach that present a credible and persistent threat to the security of the United States and its citizens.

The November 2002 Yemen missile strike outlined in the introduction was the initial transition from the battlefields of Afghanistan to a policy of ‘targeted killing,’ striking terrorist leaders in their safe havens. Commenting on the strike, then National Security Advisor Condoleeza Rice insisted President Bush acted within the accepted practice of past precedent and

²⁹ United States Government, *National Strategy for Combating Terrorism* (Washington, D.C.: U.S. Government Printing Office, February 2003): 15.

³⁰ *Ibid.*, 17.

within his constitutional authority when authorizing such attacks. "The president has given broad authority to a variety of people to do what they have to do to protect this country," she said. "It's a new kind of war. We're fighting on a lot of different fronts."³¹

METHODOLOGY

DEFINING ASSASSINATION

In his article recommending the repeal of Executive Order 12333 MAJ Tyler Harder indicates: "assassination can be defined very broadly or very narrowly...assassination could define any intentional killing, or it could define only murders of state leaders in the narrowest of circumstances."³² Colonel Daniel Reisner, the head of the International Law Section of the Israeli Legal Division purports "assassination is not a legal term, at least not in international law."³³ This assessment appears factual given "the word assassination does not appear in the United Nations Charter, the Geneva Conventions, the Hague Conventions, international case law or the Statute of the International Criminal Court."³⁴ Given a wide and varying range of definitions for assassination, it is necessary to provide a coherent and acceptable definition of assassination. Such a definition will provide a common frame of reference upon which to base moral and legal arguments and to differentiate the current US policy of 'targeted killing' from assassination. In this attempt "defining what is *not* assassination is as important as defining what is assassination."³⁵

The origins of word *assassin* itself are nearly as elusive as the definition of its modern derivative, assassination, is contentious. One valid and logical argument claims the word is

³¹ "US Defends Yemen Strike," *BBC News America*, 10 November 2002. Accessed online at <http://news.bbc.co.uk/2/hi/americas/2439305.stm>

³² MAJ Tyler Harder, "Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law," *Military Law Review* Vol. 172 (June 2002): 3.

³³ Jason D. Soderblom, "Time to Kill? State Sponsored Assassination and International Law," World International Community Experts, 12 February 2004, Accessed online at www.World-ICE.com: 5.

³⁴ Ibid.

³⁵ Harder, 3.

derived from *assassiyun*, Arabic for fundamentalists, from the root *assass*, or foundation.³⁶ The Assassins of the Middle Ages were a radical sect of Ismaili Shia, fundamentalists, who sought to restore true Islam and spread the true faith to the ends of the earth by targeting and killing the rulers and leaders of the existing order –monarchs, generals, ministers, and major religious functionaries.³⁷ Another possible explanation for the source of the word assassin has been attributed to Silvestre de Sacy, who, in the early 19th century, alleges to conclusively show the word is derived from the Arabic *hashish*. De Sacy explains the name as the product of the use of the drug by leaders of the sect to provide their agents with a preconception of the paradise that awaits them.³⁸ Regardless of the root derivative of the Arabic word, this radical sect of Ismaili Muslims in the Middle Ages introduced the word ‘assassin’ into most modern European languages. In general, “it means a murderer, more particularly one who kills by stealth and treachery, whose victim is a public figure and whose motive is fanaticism or greed.”³⁹

The most commonly applied approach to defining assassination is to contemplate two definitions, one having a peacetime application, the other a wartime application. Although all assassinations are illegal, requiring an illegal killing or murder, it is still beneficial to examine the criteria specifying the essential characteristics differentiating peacetime and wartime assassination.

When a state of war does not exist, COL W. Hays Parks contends “peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political purposes.”⁴⁰ Many scholars categorize assassination as a subset of murder where the target is chosen based on his identity, prominence, public position and the killing motivated to

³⁶ Brenda Godfrey, “Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Assessment of Defensive Assassination,” *San Diego International Law Journal* (2003): 492.

³⁷ Bernard Lewis, *The Assassins*, (New York: Basic Books 1968): XI, 24.

³⁸ *Ibid.*, 11-12.

³⁹ *Ibid.*, 2.

⁴⁰ COL. W. Hays Parks, *Memorandum on Executive Order 12333 and Assassination*, accessed online at http://www.ksg.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf

achieve some political objective.⁴¹ Colonel Parks rationalizes that a peacetime killing, in order to constitute assassination, may also require the act to constitute a covert activity.⁴² This monograph adopts the analysis of Major Tyler Harder, in which he summarizes most definitions of peacetime assassination and establishes the requirement for the following three elements to be present: (1) a murder, (2) of a specific individual, (3) for political purposes.⁴³ For a killing in peacetime to qualify as an assassination, all three of these criteria must be met.

Several conclusions can be drawn from an analysis of this definition. A lawful homicide is never an assassination. An unlawful homicide may be an assassination, but if it lacks a political purpose, it would not be an assassination. Finally, a political killing may be a murder, but if it lacks the specific targeting of a select figure it would not be an assassination.⁴⁴

Within a state of war, assassination acquires a different meaning.⁴⁵ The principle of assassination as political activity is also no longer applicable once war begins.

As Carl von Clausewitz suggested: “war is a continuation of political activity by other means”—a theory that leads one to believe that in war, every killing is a political one. A strict application of the peacetime political requirement would then render every wartime death an assassination, a conclusion not reflected either by the laws of war or the common understanding of the word.⁴⁶

Assassination in wartime, according to Professor Michael Schmitt, one of the leading scholars on the legal aspects of targeted killing and assassination, comprises two elements: (1) the specific targeting of a particular individual and (2) the use of treacherous or perfidious means.⁴⁷ Treachery and perfidy are not to be confused with surprise and deception, which are legal in

⁴¹ Nathan Canastaro, “American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo,” *Boston College International and Comparative Law Review* Vol. 26 No. 1 (Winter 2003): 11.

⁴² Parks, 2.

⁴³ Harder, 5.

⁴⁴ *Ibid.*, 5.

⁴⁵ Parks, 2.

⁴⁶ Canastaro, 12.

⁴⁷ Harder, 4.

accordance with the law of war. Treacherous or perfidious acts can be classified as “acts inviting confidence of an adversary to lead them to believe that they are entitled to, or are obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence.”⁴⁸ In order for a wartime killing to constitute an assassination, the act would require the targeting of a specific individual accomplished through treachery (a violation of the law of war). Therefore, if the law of war is not violated, an assassination has not taken place.⁴⁹

Therefore, in order for an assassination to take place there must be a politically motivated murder of a specific individual in peacetime, or a treacherous killing of a specific individual during armed conflict.⁵⁰ In summary, the following definitions distinguishing peacetime and wartime assassination will be utilized throughout this monograph.

Assassination:

Peacetime Assassination: the murder of a specifically targeted individual for a political purpose.

Wartime Assassination: the murder of a specifically targeted individual by treacherous or perfidious means.

Given these definitions it is important to note that other forms of extra-judicial execution, targeted killing, or elimination are not synonymous with assassination. Assassination, whether in peacetime or wartime, constitutes an illegal killing, while other modes of killing may or may not be legal according to international law or the laws of armed conflict. For the purpose of this monograph, other modes of state sponsored killing that do not constitute assassination will be referred to as ‘targeted killings.’ The definition to be utilized throughout this monograph for targeted killing is:

⁴⁸ Geneva Conventions Additional Protocol I Article 37. Available online at <http://www.unhchr.ch/html/menu3/b/93.htm>

⁴⁹ Harder, 4.

⁵⁰ Harder, 19.

Targeted Killing: the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval.⁵¹

STRUCTURE OF THE STUDY

Vocal critics of ‘targeted killing’ generally classify the policy as synonymous with assassination and subscribe to one or more of the following criticisms. First, the policy is criticized as an ineffective means of combating terror since it incites additional violence, creating still more terrorists and continuing the cycle of violence. Second, assassination of terrorist leaders is illegal under both domestic and international law. Finally, it is an immoral policy constituting state sponsored extra-judicial killing without due process of law. Those critics supportive of the final argument tend to support the ‘law-enforcement model’ for combating terrorism. This model requires terrorists to be captured and brought to trial under the criminal justice system rather than subject to the use of state directed force according to the law of war. The first criticism is beyond the scope of this study. While the efficacy of the U.S. policy is certainly a subject worthy of further attention and study, the intent of this monograph is to examine the moral and legal legitimacy of a U.S. policy of ‘targeted killing’ of trans-national terrorists under both U.S. domestic and international law.

The first section of this study will examine the effect of the assassination ban of Executive Order 12333 and its impact upon a policy of ‘targeted killing.’ Many opponents of the policy of ‘targeted killing’ assert the policy is a violation of this executive order and therefore in contravention of domestic law. This section will examine the historical background leading to the creation of Executive Order 12333; the reason for its development, the intent behind it, and its overall impact on U.S. foreign policy. The historical implementation of the executive order will be examined through the use of two case studies; the Libya bombings of 1986, and the cruise

⁵¹ Steven R. David, “Fatal Choices: Israel’s Policy of Targeted Killing.” *The Begin-Sadat Center for Strategic Studies*: Mideast Security and Policy Studies No. 51 (September 2002): 2.

missile strikes against Afghanistan and Sudan in 1998, which will illustrate the application of the executive order and its impact upon presidential policy decisions.

The following section of the study will investigate the legality of assassination and ‘targeted killing’ under international law. First, the positions held by early theorists of international law on the legality and morality of assassination and ‘targeted killing’ will be examined. Next, the question of which legal regime is applicable in dealing with the problem of trans-national terrorism. Trans-national terrorism will be examined according to international human rights law, strongly supported by advocates of the law enforcement model. The applicability of international humanitarian law and the law of war, the model most strongly supported by advocates of the ‘targeted killing’ policy who view the ongoing struggle with trans-national terrorists as an armed conflict, will be examined as well. Can the struggle against trans-national terrorists constitute an armed conflict according to international law, and what is the status of these trans-national terrorists under the law?

I. EXECUTIVE ORDER 12333

Opponents of a policy of ‘targeted killing’ often claim that such a policy is in direct violation of articles 2.11 and 2.12 of Executive Order 12333 (hereafter EO 12333) prohibiting assassination. These arguments, however, fail to accurately examine the context of the executive order, and once again tend to utilize an improper and inaccurate definition for the term assassination. EO 12333 is the most recent in a series of three executive orders to have included presidential bans on assassinations. The first of the series was Executive Order 11905 issued by President Ford in 1976 in response to congressional criticism of alleged abuses committed by US intelligence agencies. “The true effect of the executive order is neither to restrict in any legally meaningful way the President’s ability to direct measures he determines necessary to national security, nor to create a legal impediment to United States action.”⁵² The purpose of EO 12333 was to preempt more restrictive congressional legislation, preclude individual agents or agencies from taking unilateral actions against selected foreign officials, and to unequivocally certify that the United States does not condone assassination as an instrument of national policy.⁵³ This section will examine the historical context behind EO 12333, the presidential motivations behind the issuance of EO 12333, and finally provide historical vignettes analyzing the application of EO 12333.

CHURCH COMMISSION

In November of 1975 the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Commission, issued an interim report on Alleged Assassination Plots Involving Foreign Leaders. The Committee focused its investigation on alleged CIA involvement in five assassinations or attempted

⁵² LCDR Patricia Zengel, “Assassination and the Law of Armed Conflict,” *Military Law Review* Vol. 134 (Fall 1991): 147.

⁵³ Parks, 8.

assassinations against the leaders of foreign governments since 1960. Although the Committee concluded that no foreign leaders had been killed as a result of assassination plots initiated by U.S. government officials, the Committee did determine that the U.S. government had initiated two failed plots and had encouraged other successful ones.⁵⁴

In their report the Church Commission harshly condemned a policy of assassination stating: “we condemn assassination and reject it as an instrument of American policy.”⁵⁵ The Commission further condemned assassination believing that; “short of war, assassination is incompatible with American principles, international order, and legitimacy.”⁵⁶ It also mentioned some of the dangers involved in utilizing assassination to remove a foreign leader. First, citing the removal of Diem in Vietnam as an example, the Committee highlighted the uncertainty and instability likely to ensue following the assassination of a leader, questioning whether the situation might not have been better before than after. Second, they highlight the difficulties in maintaining secrecy within an open and free society where the revelation of U.S. involvement in an assassination of a foreign leader would do tremendous harm to the nation’s image. Thirdly, the problem of reciprocity arises. If the U.S. participates in assassination it might invite reciprocal action from foreign governments, thereby increasing the danger to both U.S. security and international stability.⁵⁷ Finally, the Committee was repeatedly critical of the lack of oversight between the executive branch and the intelligence services:

It believed that efforts to maintain ‘plausible deniability’ within the government itself, the deliberate use of ambiguous and circumlocutious language when discussing highly sensitive subjects, and imprecision in describing precisely what sorts of action were intended to be included in broad authorizations for covert operations, produced a breakdown of accountability by elected government and created a situation in which momentous action might be undertaken by the

⁵⁴ Harder, 12.

⁵⁵ United States Senate, *Report No. 94-465, “Alleged Assassination Plots Involving Foreign Leaders”*, Washington: U.S. Government Printing Office, November 1975: 281.

⁵⁶ *Ibid.*, 1.

⁵⁷ *Ibid.*, 282.

United States without ever having been fully considered and authorized by the president.⁵⁸

In their conclusions the Committee recommended a statute making it a criminal offense for persons subject to the jurisdiction of the United States to conspire to assassinate, attempt to assassinate, or assassinate a foreign official of a country with which the United States is not at war, or against which United States Armed Forces have not been introduced into hostilities.⁵⁹ Despite initiation of three different legislative proposals, congress failed to produce a statute banning assassination as a political tool of US policy. It is important to note, however, that the implied definition of assassination utilized by the Church Committee appears consistent with the peacetime definition of assassination developed earlier. The focus of the Committee and its concerns appear focused on the use of assassination in peacetime against the political leadership of foreign governments.

PRESIDENTIAL MOTIVATIONS

President Ford issued Executive Order 11905 on 18 February 1976, which in Section 5 Subparagraph (g) reads: “Prohibition on Assassination. No employee of the United States Government shall engage in, or conspire to engage in political assassination.”⁶⁰ The order contained no definitions section to clarify what constitutes assassination, as would typically be expected in an act of legislation. Nor was the legitimacy of other types of lethal actions, such as US support for coup attempts or paramilitary operations, discussed.⁶¹ “Despite these deficiencies the executive order was widely interpreted as prohibiting the types of activities revealed by the Church report—specifically, peacetime efforts by U.S. intelligence agency

⁵⁸ Zengel., 143-144.

⁵⁹ Senate Report No. 94-465, 289-290.

⁶⁰ Executive Order 11905 as quoted in “Time to Repeal Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law,” by MAJ Tyler Harder *Military Review* Vol. 172 (June 2002): 13.

⁶¹ Canestaro, 22.

officials to cause the deaths of foreign heads of states whose activities were considered detrimental to the interests of the United States.”⁶²

Numerous analysts and critics suggest the Executive Order was issued primarily to preempt pending congressional legislation banning political assassination. Once the order was issued, Ford administration officials quickly adopted the position that adequate action had been taken to remedy the perceived problems in order to preempt the perceived need for an immediate statutory ban on assassination.⁶³ The order, as one author speculates, “responded to intense political pressure to ‘do something’ while maintaining the flexibility in interpreting what exactly had been done.”⁶⁴

The order, therefore, is the executive office’s attempt to preempt more specific and restrictive congressional legislation that might prove harmful to the military and intelligence capabilities of the United States.⁶⁵ In addition to appeasing Congress and an outraged public, the executive order alleviates the perceived lack of accountability between the intelligence services and the government by ensuring that “authority to direct attacks that might be considered assassination rests with the president alone. It prohibits subordinate officials from engaging on their own initiative in these activities.”⁶⁶

Every presidential administration since the Ford administration has reissued, with some minor modifications, the prohibition against assassination. The current document known as Executive Order 12333, was issued by President Reagan in 1981 and has been reaffirmed by all following presidential administrations. The pertinent sections read:

2.11 Prohibition on Assassination.

No person employed by or acting on behalf of the United States government shall engage in or conspire to engage in, assassination.

⁶² Ibid.

⁶³ Harder, 15-16.

⁶⁴ LCDR Patricia Zengel, “Assassination and the Law of Armed Conflict,” *Military Law Review* Vol. 134 (Fall 1991): 145.

⁶⁵ Canestaro, 22.

⁶⁶ Ibid., 147.

2.12 Indirect Participation.

No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this order.⁶⁷

“The true effect of the executive order is neither to restrict in any meaningful way the President’s ability to direct measures he determines to be necessary to national security.”⁶⁸ The advantage of an executive order over congressional legislation banning assassination is its inherent flexibility. Issuing an executive order can usually be accomplish in far less time than enacting legislation, and if a president wishes to rescind or modify the executive order at any time, he has the authority.⁶⁹ “Additionally, the President may designate any of these changes as classified if he considers them ‘intelligence activities . . . or intelligence sources and methods,’ effectively preventing them from ever reaching public view.”⁷⁰

As revealed in the sections above the executive order banning assassination allows the President a significant amount of flexibility in policy-making given the ambiguity presented by the failure to define assassination. The assassination ban, loose as that ban might be, may also be circumvented through a number of executive actions. The President may request a declaration of war, under which foreign leaders could possibly be classified as combatants and therefore legally targeted. The President might invoke the United States’ rights under Article 51 of the United Nation’s Charter, the right of self-defense, which authorizes the state’s use of force equivalent to a declaration of war.⁷¹ According to Colonel Parks,

acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not

⁶⁷ 46 FR 59941, 3 CFR, 1981, Comp. “Executive Order 12333: United States Intelligence Activities,” accessed online at <http://www.cia.gov/cia/information/eo12333.html>

⁶⁸ Zengel, 147.

⁶⁹ Elizabeth Rindscopf Parker and Timothy E. Naccarato, “Targeting Saddam and Sons: US Policy Against Assassination,” Available online at http://www.mcgeorge.edu/government_law_and_policy/publications/governance_web_journal/TARGETING%20SADDAM-Final%20Draft.pdf, 13-14.

⁷⁰ Canestaro, 23.

⁷¹ Ibid., 23.

constitute assassination if the U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.⁷²

As indicated in the preceding sections, Executive Order 12333 and its predecessors have proven to be largely a symbolic measure with little restrictive impact upon the President's decision to employ force. Critics of Presidential policy decisions tend to condemn any military action in which the U.S. appears to target a specific individual, citing EO 12333 in defense of their arguments. A more effective means of assessing the use of force directed against specific individuals is to examine the actions legality under international law. If an act does not meet one of the two definitions of assassination provided in the first chapter and is not illegal under international law, it is not a violation of EO 12333.

Application of the definition of assassination provided in the opening sections coupled with specific examples of the self-defensive application of military force by the United States may amplify why the assassination ban of EO 12333 is so easily misunderstood. Examining the 1986 Libyan bombing and the 1998 cruise missile strikes in Afghanistan, and the may help provide a measure of insight and understanding of how the EO is often improperly applied, and many of the controversies surrounding it.

VIGNETTES

EL DORADO CANYON

On 15 April 1986 the United States conducted Operation El Dorado Canyon, launching an air attack on Libya with both carrier based aircraft and Air Force aircraft based in England. These attacks simultaneously struck five military installations and facilities in Tripoli and

⁷² Parks, 8.

Benghazi including Colonel Muammar Qaddafi's headquarters in the Al-Azzizya Barracks.⁷³ Colonel Qaddafi was uninjured in the attack, having taken shelter in an underground bunker. Libyan officials alleged 36 civilians and one soldier had been killed in the raid, although other reports suggest the deceased were military personnel.⁷⁴ Other reports estimated the actual casualty total to be somewhere between 50 and one hundred personnel, primarily military.⁷⁵

The use of force was prompted by what President Reagan referred to as irrefutable evidence that now confirms "the terrorist bombing of [the] La Belle discotheque was planned and executed under the direct orders of the Libyan regime."⁷⁶ The bombing resulted in the death of one American soldier, and wounded over 200 people including 50 Americans. In addition, the United States possessed intelligence exposing "an orchestrated, worldwide, centrally directed campaign of terror directed through Libyan diplomatic channels and missions specifically targeting Americans."⁷⁷

Reporting the raid to the United Nations Security Council pursuant to Article 51 of the United Nation's Charter, the United States argued the attack was an act of self-defense in response to "an ongoing pattern of attacks by the government of Libya."⁷⁸ Article 51, which will be covered in greater detail in subsequent chapters, exhibits the United Nations' recognition of a state's inherent right to self-defense. The United States generally recognizes three forms of self-defense: "(a) Against an actual use of force, or hostile act. (b) Preemptive self-defense against an imminent use of force. (c) Self-defense against a continuing threat."⁷⁹

⁷³ "Has United State Foreign Policy Towards Libya, Ira and Serbia Violated Executive Order 12333 Prohibition on Assassination," *New England International and Comparative Law Annual*, Vol. 7 (2001): 168.

⁷⁴ Soderblom, 9.

⁷⁵ Zengel, 149-150.

⁷⁶ President Ronald Reagan, Address to the Nation 15 April 1986, accessed online at <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>

⁷⁷ Bob Woodward and Patrick Tyler, "U.S. Targeted Qaddafi Compound After Tracing Terror Message," *Washington Post*, 16 April 1986, at A 24.

⁷⁸ *New England International and Comparative Law Annual*, Vol. 7 (2001): 168.

⁷⁹ *New England International and Comparative Law Annual*, Vol. 7 (2001): 169.

The United States government cited self-defense, deterrence, and the desire to diminish Libya's terrorist supporting infrastructure as the primary justifications for the strike. President Reagan, in his address to the nation, issued just as U.S. combat aircraft had reentered international airspace, stated:

When our citizens are abused or attacked anywhere in the world on the direct orders of a hostile regime, we will respond so long as I'm in this Oval Office. Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter.

We believe that this preemptive action against his terrorist installations will not only diminish Colonel Qadhafi's capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior. I have no illusion that tonight's action will ring down the curtain on Qadhafi's reign of terror. But this mission, violent though it was, can bring closer a safer and more secure world for decent men and women.⁸⁰

Legal scholars have classified the Libyan strike as a violation of EO 12333. Investigative journalist Seymour Hersh has even alleged that "the primary goal of the attack, however, was Qadhafi's assassination, and the pilots who flew the mission were so briefed."⁸¹ Neither criticism, however, is particularly valid and tends to illustrate the misinterpretation and misrepresentation of the EO by legal scholars and the general public at large.

First, the Libyan air strikes exclusively involved the use of military assets, it was not an operation conducted by the intelligence services. The assassination ban of EO 12333 relates specifically to the activities of the intelligence services and arguably has no direct application restricting the use of military force. The attack on Libya was a direct response to Libya's pattern of behavior which "constituted an ongoing and persistent attack on American citizens, against which the United States was legally entitled to defend itself"⁸² in accordance with Article 51 of the United Nations' Charter.

⁸⁰ President Ronald Reagan, Address to the Nation 15 April 1986, accessed online at <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm>

⁸¹ Harder, 171-172.

⁸² New England International and Comparative Law Annual, Vol. 7 (2001): 169.

Second, even if the United States had specifically targeted Colonel Qaddafi, which has been denied by multiple sources including Colonel Parks who provided legal counsel during the planning phase of the operation,⁸³ the action would not constitute assassination according to the provided definition. By invoking Article 51, the U.S. should be assessed under wartime rather than peacetime conditions under which Colonel Qaddafi clearly qualifies as a legitimate target. As the military commander of the Libyan Armed Forces and intelligence services and therefore;

is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on U.S. citizens, diplomats, troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target.⁸⁴

The air strike conducted against Libya on 15 April 1986 involved overt military force by uniformed members of the United States military, thus the action is neither treacherous nor perfidious.

The Libyan bombings of April 1986 provide an overview of the complexities and misconceptions in the application of EO 12333. Even legal scholars, journalists, and congressmen⁸⁵ easily misconstrue what EO 12333 permits and restricts and its legal applications. Clearly the EO does not even apply in this instance since the incident involves military action as opposed to intelligence activities. In addition, Qaddafi qualifies as a legal combatant and may be targeted regardless if his death was an intended consequence of the strike. Had he been killed in the strike his death would neither constituted assassination, nor been illegal under international law. The above vignette provided an example of the misapplication of EO 12333 in state-to-state relations; the following example involves the complexities and ambiguities involving non-state actors.

⁸³ Colonel W. Hays Parks, "Lessons from the 1986 Libya Airstrike," *New England Law Review* Vol. 36, No. 4 (2003):XX.

⁸⁴ Abraham D. Sofaer, cited in Harder, 22.

⁸⁵ See Harder, 22 reference Senator Pressler's request to broaden EO 12333 in the wake of the Libyan strikes and Senator Cohen's *poison pen* example in arguments against removing the assassination ban of EO 12333.

INFINITE REACH

On 20 August 1998 the United States conducted Operation Infinite Reach, launching more than 70 Tomahawk cruise missiles at the Zawar Kili al-Badr terrorist training camp located in the Paktia Province of Eastern Afghanistan, approximately 90 miles south of Kabul.⁸⁶ Nearly simultaneous to the missile strikes in Afghanistan, six additional cruise missiles struck the El Shifa Pharmaceutical plant, a suspected chemical weapons production facility located in Khartoum, Sudan.⁸⁷ The Afghanistan strikes allegedly killed 24 people, while the Sudanese missiles killed the night watchman at the factory.⁸⁸ Osama bin Laden, however, who was possibly the primary target of the strike, which took place at the time of an expected meeting of key members of his al-Qaeda organization, survived the attack.

These missile strikes were an immediate response to the 7 August 1998 bombings of the U.S. Embassies in Nairobi, Kenya and Dar es Salaam Tanzania. These terrorist bombings left 257 dead and more than 5,000 wounded.⁸⁹ As in the previous vignette, the U.S. government invoked Article 51 of the United Nations' Charter as justification for the use of force. What is especially significant about the Afghanistan missile strike is the fact that the chosen targets were not directly connected to any nation-state, but at terrorist training camps "operated by groups affiliated with Osama bin Laden, a network not sponsored by any state, but as dangerous as any we face."⁹⁰ President Clinton in his address provided four specific reasons for the strike:

First, because we have convincing evidence these groups played the key role in the embassy bombings in Kenya and Tanzania.

Second, because these groups have executed terrorist attacks against Americans in the past.

⁸⁶ Richard J. Newman and Kevin Whitelaw, "America Fights Back," *U.S. News and World Report*, 31 August 1998, Vol. 125, Issue 8: 38.

⁸⁷ Ibid.

⁸⁸ Oriana Zill, "The Controversial U.S. Retaliatory Missile Strikes," *PBS's Frontline*, accessed at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/retaliation.html>

⁸⁹ United States Department of State, U.S. Embassy Bombings, accessed at http://www.usinfo.state.gov/is/international_security/terrorism/embassy_bombings.html

⁹⁰ President William Clinton, "Address to the Nation: Announcing the Strike," transcript accessed at http://www.pbs.org/newshour/bb/military/july-dec98/clinton1_8-20.html

Third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa.

And, fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.⁹¹

Another significant aspect of the August missile strike is the shift in U.S. policy the action indicated. In the past the U.S. tended to adopt a law enforcement position regarding terrorist attacks, relying upon the Federal Bureau of Investigation to uncover whoever was responsible for the attacks and bring them to justice through the U.S. criminal justice system. The terrorist attack on the African embassies, however, was regarded as an act of war against the United States rather than a criminal offense and a military response was deemed the appropriate response. In a second address to the nation President Clinton specified that there would be times when “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.”⁹²

The legality or illegality of specifically targeting a specific individual in an the ambiguous environment within which transnational terrorists operate, an environment to steal a phrase from Roger Spiller can be classified as ‘not war but like war,’⁹³ will be discussed in greater detail in the next chapter. For now the focus is upon the legality of such actions under U.S. domestic law, specifically the assassination ban of EO 12333. On 4 September, two weeks after the strikes in Afghanistan and Sudan, members of the Senate Judiciary Committee asked FBI director Louis Freeh to research the legality of assassinating terrorist leaders. “Specifically, the Senators sought clarification whether the prohibition on assassinations of heads of state

⁹¹ Ibid.

⁹² President William Clinton, “The Presidential Address,” 20 August 1998, accessed at http://www.pbs.org/newshour/bb/military/july-dec98/clinton2_8-20.html

⁹³ Roger J. Spiller, *Not War but Like War*, (Fort Leavenworth, Kansas: Combat Studies Institute, January 1981), title.

embodied in the ban of EO12333 applies to terrorist groups and their leaders.⁹⁴ Once again, however, the raising of these concerns displays a misguided interpretation of EO 12333.

The United States, through the invocation of its Article 51, indicated the attacks were made in self-defense in response to an on-going pattern of attacks by terrorists affiliated with Osama bin Laden and his al-Qaeda organization. Bin Laden and al-Qaeda present a consistent and credible threat to the security of the United States and its citizens. Therefore, the use of force against this organization and its leadership within Afghanistan is justified, virtually the same justification as was used in the Libya air strikes. The issue in this instance is more complex, however, because bin Laden and al-Qaeda do not exercise sovereignty over any state or territory. The strikes, therefore, although directed against bin Laden and al-Qaeda, are a violation of another state's sovereignty, specifically Afghanistan and Sudan in this instance. Operation Infinite Reach serves as an overt statement and warning of a dynamic change in U.S. foreign policy. The Clinton administration has repeatedly warned countries that sponsor terrorism that they are not exempt from punitive measures; the use of military force in Afghanistan and Sudan demonstrate that a country that knowingly gives sanctuary to terrorists, whether or not directly involved in planning or executing terrorist activity could find itself on the receiving end of U.S. military force. This policy is consistent with the writings of Vattel, who in his 1758 work *Law of Nations* appears to imply that states that threaten other states may themselves be targeted:

If, then, there is anywhere a nation of restless and mischievous disposition, ever ready to injure others, to traverse their designs, and to excite domestic disturbances in their dominions . . . it is not doubted that all the others have a *right* to form a coalition in order to repress and chastise that nation, and to put it for ever after out of her power to injure them.⁹⁵

Operation Infinite Reach was once again a military operation, undertaken under the Article 51 invocation and not an intelligence operation. Considerable controversy, however,

⁹⁴ Jami Melissa Jackson, "The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications," *North Carolina Journal of International Law and Commercial Regulation*, Vol. 24 (Spring 1999): 1.

⁹⁵ Canestaro:

surrounds the issue of whether or not terrorist actions meet the “armed attack” requirement required by Article 51. In the case of *Nicaragua v. United States of America* the International Court determined that terrorist attacks do not amount to an ‘armed attack.’”⁹⁶ Advocates of a broader view counter that a limited interpretation of Article 51 does not adequately reflect the nature of modern warfare and the threat posed by international terrorism. They insist this narrow view of Article 51 ignores the pragmatic reality that no state will accept being forced to wait until it is attacked before taking adequate measures to protect itself and its citizens.⁹⁷ Legally, the “purposes of attacks on terrorists may include immediate prevention, long-term prevention, and punishment following past acts.”⁹⁸ The inherent danger of such an interpretation of Article 51 is the risk that aggressor states will claim self-defense for their hostile actions. Any invocation of self-defense, therefore, should be the subject of close scrutiny.

In both of the historical examples provided above the United States justified its actions through the invocation of the right of self defense provided under Article 51 of the U.N. Charter. The missile strikes against Afghanistan and the Sudan, just like the air strikes against Libya constitute directly applied military force rather than intelligence operations. The use of overt military force therefore, negates the vaguely defined prohibition of EO 12333. In addition, because the strike involved the overt application of military force by uniformed members of the United States military the action is considered neither treacherous nor perfidious. The actions taken by the United States in each example constitute a legitimate response to a persistent and credible threat against what the U.S. government contends to be legitimate targets.

Since the attacks on the African embassies both the Clinton and Bush administrations have declared the existence of a state of conflict between the United States and al-Qaeda. This assessment has gained additional momentum in the wake of the 9/11 terrorist attacks. One

⁹⁶ Gross, 214.

⁹⁷ Canestaro, 16.

⁹⁸ Gross, 216.

critical question to be asked, however, is; “can armed conflict exist between a victim state and an international terrorist group?”⁹⁹ The legitimate targeting of terrorists and their leaders requires adoption of one of two concepts: (1) the original armed attack against the victim state has created a state of international armed conflict between the victim state and the state harboring the responsible terrorists. Within the context of this conflict the terrorists and their leadership may be legitimately targeted. (2) Regardless of a state of conflict between the victim state and the harboring state an armed conflict has been established between the victim state and the terrorists responsible for the armed attack. Within this framework the terrorists and their leadership are legitimate targets against whom the victim state may use force.¹⁰⁰ The following chapter will explore the applicability of the law of war to trans-national terrorist organizations, as well as explore the question of the combatant or non-combatant status of Osama bin Laden and other non-uniformed members of terrorist organizations such as al Qaeda. The determination of status is pivotal to determining whether or not the peacetime or wartime definition of assassination is applicable in this instance.

⁹⁹ Kretzmer, 189.

¹⁰⁰ Kretzmer, 188.

II. INTERNATIONAL LAW

ROOTS OF INTERNATIONAL LAW

Mankind has morally and legally justified the taking of human life throughout the course of human history.¹⁰¹ The acceptability of assassination as a tactic of war has persisted for centuries. It wasn't until it became a prominent subject among moral philosophers and legal scholars throughout the seventeenth and eighteenth centuries, however, that the foundations of a body of law began to take form.¹⁰² Within their respective bodies of work none of these scholars considered that the leaders of opposing armies should be afforded absolute protection. Consequently, each perceived these leaders to qualify as a legitimate target of attack within certain requirements and restrictions.¹⁰³ The primary concern of these philosophers and scholars rested upon the means and circumstances by which a person might be targeted and killed. Concerned that the "honor of arms be preserved, and that public order and safety of sovereigns and generals not be unduly threatened,"¹⁰⁴ most authors emphasized a prohibition against the employment of treacherous means.

Alberico Gentili, an early just war theorist, writing in the late sixteenth century, strongly opposed any form of assassination as a valid and acceptable tactic of just war. Gentili clearly objected to the observation "it makes no difference at all whether you kill an enemy on the field of battle or in his camp. An enemy is justly killed anywhere."¹⁰⁵ While he acknowledges the benefit of killing the enemy's leadership on the field of battle, he maintains an aversion to the use of assassination, especially the use of treachery. Gentili describes and denounces three particular forms of assassination: "(1) the incitement of subjects to kill a sovereign; (2) a secret or

¹⁰¹ New England International and Comparative Law Annual, Vol. 7 (2001): 156.

¹⁰² Canestaro, 4.

¹⁰³ Zengel, 125 and New England International and Comparative Law Annual, Vol. 7 (2001): 156.

¹⁰⁴ Zengel, 125.

¹⁰⁵ Alberico Gentili, *De Jure Belli Libri Tres* (1612), reprinted in *The Classics of International Law* (New York: Oceana Publications Inc., 1964), 168.

treacherous attack upon an individual enemy; and (3) an open attack on an unarmed enemy not on the field of battle.¹⁰⁶ Gentili's opposition to assassination of leaders was predicated upon his fear that approval of such methods, whether open or tacit, would lead to the eventual degeneration of civil order and obedience:

Such conduct is a danger to the public and therefore is not to be ignored... since a criminal war is directed not merely against one life but against the safety of all men. For if these corrupt practices should be approved by an authority as great as that of the law of nations, there is no longer anything left to protect our safety. If we wish to confound and confuse all these things we shall make all life dangerous, and expose it to treachery and plots. This is a common evil, a common cause of fear, a common peril.¹⁰⁷

The absence of honor and valor in assassination proved particularly galling to Gentili's notion of justice:

Prudent courage sees victory not in death, but in accomplishment. And this accomplishment consists of the acknowledgement of defeat by the enemy, and the admission that one is conquered by the same honorable means, which give the other the victory.¹⁰⁸

Gentili openly rejected the utilitarian arguments of Sir Thomas More, which approved of assassination as a means to save lives by avoiding death and destruction among the innocent, and placing blame and punishment upon those responsible for war. Gentili criticized this approach for judging actions based upon utility, but disregarding both praise and glory, and justice and honor.¹⁰⁹ Gentili, however, not only criticizes the utilitarian disregard of valor and justice but questions the utility of assassination as well. Like the Church Committee members over three hundred years later, Gentili questioned the net result of a successful assassination. Surely a new leader would emerge and his citizens and soldiers would "throw themselves into war with more energy because of that new wrong...roused to frenzy when their leader is slain by illegitimate

¹⁰⁶ Zengel, 126.

¹⁰⁷ Gentili, 168-169.

¹⁰⁸ Ibid., 171-172.

¹⁰⁹ Ibid., 167.

means.”¹¹⁰ In summary, Gentili staunchly opposed the use of assassination, namely the employment of treacherous means, against an adversary. Although enemy leaders constitute legitimate targets upon the field of battle, covert assassination plots should be condemned.

Hugo Grotius, a contemporary of Gentili, writing in the early seventeenth century and considered the father of international law,¹¹¹ contemplated “whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him.”¹¹² Grotius differentiates between assassins who violate the “their Faith, given expressly or tacitly; as Subjects to their Prince, Vassals to their Lord, Soldiers to their General”¹¹³ and an impersonal attack conducted by those who “owe no Faith to him against whom he is employed.”¹¹⁴ Unlike Gentili, who limited legitimate targeting of leaders to the field of battle, Grotius maintains that “to kill an Enemy any where is allowed, both by the Law of Nature and of Nations.”¹¹⁵ Grotius, however, specifically condemns assassins who act treacherously. Assassination by treacherous means, according to Grotius, is a violation of the Law of Nature and the Law of Nations by both the assassin and those who employ them.¹¹⁶

Grotius’ reasoning against the use of treachery in regard to assassination was that the rule prevented dangers to persons of particular eminence from becoming excessive.”¹¹⁷ Grotius recognized one of the basic principles of sovereignty as the right to declare and wage war, and that the prohibition upon treacherous assassination applied only within a ‘public war’ waged against a sovereign enemy.¹¹⁸ Treacherous means employed against enemies who were not

¹¹⁰ Ibid., 167.

¹¹¹ Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues*, (New Jersey: Prentice Hall, 2004), 66.

¹¹² Grotius, 653 or Zengel, 127

¹¹³ Grotius, 1293-1294.

¹¹⁴ Ibid., 1294.

¹¹⁵ Ibid., 1294.

¹¹⁶ Ibid., 1295.

¹¹⁷ Daniel B. Pickard, “Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law,” *The Georgia Journal of International and Comparative Law*, Vol. 30 No. 1 (Fall 2001): 15.

¹¹⁸ Zengel, 127.

sovereign, such as “robbers and pirates, though it be not altogether blameless, yet is not punished amongst nations, in detestation of those against whom it is committed.”¹¹⁹

Over a century later Cornelius van Bynkershoek, writing in 1737, provides a slightly a more contemporary approach to the determination of what force might be permissible in war:

Every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins... But if we follow reason, who is the teacher of the laws of nations, we must grant that everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our welfare, does it matter what means we employ to accomplish it?¹²⁰

Bynkershoek continues by observing that it is immaterial whether we employ strategy or courage against the enemy. He believes that all forms of deceit and deception are permissible except perfidy. He claims that opposition to the employment of deceit against the enemy is based upon confusion between justice and generosity.¹²¹

Justice is indispensable in war, while generosity is wholly voluntary. The former permits the destruction of the enemy by whatsoever means, the latter grants to the enemy whatever we should like to claim for ourselves in our own misfortune, and it requires wars be waged according to the rules of the duel.¹²²

Unlike the other scholars, Bynkershoek does not find the virtues of courage and honor compelling enough to weaken his position on the use of treacherous means to target the enemy. Perhaps his exposure to modern state warfare allowed him to recognize the necessity of such conduct where the security and survival of the state are at stake.

The general consensus among these early international law theorists and scholars was that an intentional attack to kill an enemy leader was typically permissible, provided the attack did not

¹¹⁹ Grotius, 1300.

¹²⁰ Bynkershoek, 16.

¹²¹ *Ibid.*, 16-17.

¹²² *Ibid.*

employ treacherous or perfidious means.¹²³ Bynkershoek, clearly the most permissive of the three scholars, considered any means of force employed against an enemy to be legitimate. The only obligation owed to an enemy was that of abiding by any agreements made between the two parties. Grotius, on the other hand, considered the enemy to be a legitimate target provided treachery, was not employed. “Treachery was defined as betrayal by one owing an obligation of good faith to the intended target.”¹²⁴ Gentili, on the other hand, was even more restrictive, limiting legitimate attacks on enemy leaders to those upon or near the battlefield itself. Grotius and Gentili, however, were in agreement against the emplacement of bounties upon the heads of enemy leaders, believing such actions would be likely to incite or promote treacherous activity among the enemy’s subjects.

These scholars sought to restrict the methods employed in the conduct of war and the targeting of enemy leaders through both a sense of honor and to protect sovereigns from “unpredictable assaults against which they would find it difficult to defend themselves.”¹²⁵ They considered the possibility of frequent attacks against sovereigns as a destabilizing influence weakening the order and stability provided within the state and reducing life to what Hobbes later referred to as a “state of nature.” Both these theorists operated on the premise that “both the right of a sovereign to wage war, and on the belief that assassination was treacherous and immoral.”¹²⁶

These early scholars focused their efforts upon the legality of targeting a heads of state and other important government officials. Of course the one inherent weakness of these early international law theorists as well as to contemporary forms of international law regarding the use of force is the state centric nature of existing laws and conventions. Historically, the application of international human rights law has applied to the internal domestic situation of a state in both

¹²³ New England International and Comparative Law Annual, Vol. 7 (2001): 158.

¹²⁴ Pickard, 16.

¹²⁵ Zengel, 130.

¹²⁶ Pickard, 18.

times of peace and times of war,¹²⁷ while in times of war, international humanitarian law and the law of war has served as the arbiter of justice and legality for actions among states. This distinction has, in recent years, been somewhat clouded. Some scholars maintain, “the prevailing theory is that even in the conduct of hostilities the international human rights regime applies.”¹²⁸ The increasing complexities provided by trans-national actors and international terrorist organizations such as al-Qaeda have blurred the distinctions even further. The next sections will briefly detail the relevant aspects of international human rights law and international humanitarian law and their ability and inability to address the issue of non-state sponsored terrorism.

HUMAN RIGHTS LAW AND THE LAW ENFORCEMENT MODEL

Human rights activists and advocacy 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. Through adherence to this model “the intentional use of force by state authorities can be justified only in strictly limited conditions. The state is obliged to respect and ensure the rights of every person to life and due process of law.”¹²⁹ Thus, state actions are scrutinized according to international human rights law in order to assess the legality and justification for the action. Amnesty International, in its report criticizing the Israeli policy of targeted killing, defined an extra-judicial execution as:

an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extra judicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and them and bringing them to justice. These killings take place outside of any judicial framework.¹³⁰

¹²⁷ Kretzmer, 185.

¹²⁸ Kretzmer, 185.

¹²⁹ Kretzmer, 176.

¹³⁰ Amnesty International, *Israel and the Occupied Territories: Israel Must End Its Policy of Assassinations*, 4 July 2003: 176.

For the purposes of this monograph, the use of the term extra-judicial killing will be considered as synonymous with assassination, since by the definition provided by Amnesty International in the above paragraph, extra judicial killing is in fact a murder of a specifically targeted individual for political reasons.

The rise of human rights as an important international concern can be traced to the end of World War II and the horrific nature of the Holocaust. More recently, international non-governmental organizations such as Amnesty International and Human Rights Watch among others have sought to pressure state government's policies through the mobilization of civil society worldwide. States themselves have implemented important aspects of the human rights agenda through commitment to a various array of international institutions and conventions.¹³¹

All of the major international human rights conventions are predicated upon the protection of "every human being's inherent right to life."¹³² All human rights conventions recognize the right to life as a non-derogable right, meaning one which cannot be put aside during times of emergency and crisis. Despite this recognition, however, the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights,¹³³ the American Convention on Human Rights (ACHR)¹³⁴ and the African Charter on Human and People's Rights (AFCHPR)¹³⁵ do not frame the right to life in absolute terms.¹³⁶ Instead, each of these conventions prohibits only the *arbitrary*¹³⁷ deprivation of life. Therefore, just as the lack of a specific definition for assassination in EO 12333 leaves considerable flexibility in interpretation,

¹³¹ Ward Thomas, 30.

¹³² ¹³² International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), 999 U.N.T.S. 171, entered into force 23 March 1976, Article 6.

¹³³ Universal Declaration of Human Rights, General Assembly Resolution 217A (III), U.N. Document A/810 (1948), Article 3.

¹³⁴ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force 18 July 1978, Article 4(1).

¹³⁵ African Charter on Human and People's Rights, adopted 27 June 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986, Article 4.

¹³⁶ Ruys, Tom, "License to Kill: State Sponsored Assassination Under International Law," *Institute for International Law Working Paper Number 76* (May 2005): 3.

¹³⁷ *Ibid.*

the “intentional killing of a specific individual will violate the inherent right to life only if arbitrariness can be inferred.”¹³⁸ Lacking a specific and definitive definition of the term arbitrary leaves the evaluation of the legality of a state’s action subject to interpretation and based upon legal precedent.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR) takes a somewhat different and more specific approach, stressing the obligation of the state to protect an individual’s right to life. Article 2 of the ECHR establishes a proportionality test to determine the required conditions necessary to justify the state’s use of lethal force, reading:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.¹³⁹

The use of lethal force by the state, according to the model provided by the ECHR, requires what amounts to an examination of the necessity of the action and the proportionality of the use of force. Kretzmer provides two key questions that succinctly establish the requirements for the state’s employment of lethal force:

1. Is the use of *force* absolutely required, or could other measures be employed to protect the threatened persons?
2. Assuming no other measures are available, is it absolutely necessary to use *lethal* force, or could some other lesser degree of force be employed?¹⁴⁰

Exceptions to the prohibition on states intentionally depriving a person of his fundamental right to life must be “interpreted in light of the fundamental assumption that international human rights

¹³⁸ Ibid.

¹³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 2 (ETS No. 44), enacted on 6 May 1963.

¹⁴⁰ Kretzmer, 178.

law adopts a law-enforcement model based upon the principles of due process.”¹⁴¹ According to Kretzmer, the reliance upon a law enforcement model requires that all measures taken by the state must be compatible with the following principles:

1. every individual benefits from the presumption of innocence
2. persons suspected of perpetrating or planning serious criminal acts should be arrested, detained, and interrogated with due process of law
3. if there is credible evidence that such persons were indeed involved in planning, promoting, aiding and abetting or carrying out terrorist acts they should be afforded a fair trial before a competent and independent court and if convicted, sentenced by the court to a punishment provided by law.¹⁴²

One of the inherent flaws with the law enforcement model in relation to its application to trans-national terror is that one of the fundamental premises is invalid: that the suspected terrorists are within the jurisdiction of the law-enforcement authorities of the victimized state.¹⁴³

The law enforcement model is often resisted by the military based upon the realization that attempting to arrest terrorists can prove prohibitively costly in terms of human life. The 3 October 1993 raid to apprehend Somali warlord Mohammed Farrah Aidid in Mogadishu, chronicled in the book and portrayed in the movie *Black Hawk Down*, illustrates some of the potential dangers inherent with the application of the law enforcement model. The intent of the operation was, in accordance with U.N. Resolution 837, to “use all necessary measures to arrest and detain” Aidid and others responsible for the deadly ambush of Pakistani peacekeepers of 5 June 1993, and present them for “prosecution, trial, and punishment.”¹⁴⁴ In the aftermath of the raid 18 Americans lost their lives while Somali losses numbered 500–1,000 killed, with total casualties probably running over 5,000.¹⁴⁵ Attempting to execute the arrest of a suspect in hostile territory may, as in this instance, lead to tremendous collateral damage and loss of life that might

¹⁴¹ Ibid.

¹⁴² Ibid

¹⁴³ Ibid., 179.

¹⁴⁴ MAJ Clifford Day, “Critical Analysis on the Defeat of Task Force Ranger,” Air Command and Staff College (Montgomery, Alabama, 1997): 4.

¹⁴⁵ COL John Campbell, “Black Hawk Down: A Story of Modern War,” Book Review in *Air and Space Power Journal* (Fall 2002). Accessed online at <http://www.airpower.maxwell.af.mil/airchronicles/bookrev/bowden.html>

have been avoided through the application of a precision strike. The dilemma of course is that while such a strike may potentially spare the lives of others, the target is clearly deprived of his right to life.

Other potential difficulties with the law enforcement model include the “unusual, and at times insurmountable obstacle to indicting them.”¹⁴⁶ The ability to build an overwhelming case against a suspected terrorist capable of proving guilt beyond a reasonable doubt is particularly arduous. Proving a suspects identity, affiliation with a particular organization, and direct responsibility for specific actions in accordance with the strict legal procedures of the criminal justice system remain particularly uncertain. Suspects in custody pose additional problems for the states holding them. Juries and witnesses may be intimidated by the terrorist organization, making trial and conviction still more problematic.¹⁴⁷ The detention of terrorist suspects may also lead to further terrorist attacks or the seizure of hostages as a means to obtain their release.

What recourse is available to victim states when suspected terrorists are in the territory of another sovereign state and that state is either unwilling or incapable of detaining these suspected terrorists? In “Targeted Killing” Daniel Statman claims that the United States is entitled to classify operations against al-Qaeda as war,

with the loosening of various moral prohibitions implied by such a definition, rather than a police-enforcement action aimed at bringing a group of criminals to justice based upon two specific criteria: (a) the gravity of the threat posed by al Qaeda and (b) the impracticality of coping with this threat by conventional law-enforcing institutions and methods.¹⁴⁸

The Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* in 2002 appears to agree with the assessment of Statman. The text of the report accepted the use of lethal force by state agents “in situations where a state’s population is threatened by violence, the

¹⁴⁶ Tamar Meisels, “Targeting Terror,” *Social Theory and Practice*, Vol. 30, No. 3 (July 2004): 304.

¹⁴⁷ *Ibid.*

¹⁴⁸ Daniel Statman, “Targeted Killing,” *Theoretical Inquiries in Law* Vol. 5 (January 2004): 183.

state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.”¹⁴⁹

Once again, the interpretation of the various human rights conventions and examination of case law provides no clear consensus concerning a state’s use of lethal force. Kretzmer acknowledges there are three possible approaches to determining when a state may employ lethal force against suspected terrorists:

1. To thwart an imminent attack. Absent imminency, pre-emptive targeting of suspected a terrorist will be regarded as not being absolutely necessary, or as an arbitrary deprivation of life, no matter how strong the evidence he is planning further terrorist attacks and how high the probability that there may not be another opportunity to prevent such attacks.
2. Allowing the targeting in very narrow circumstances in which apprehending or arresting the suspected terrorist is not feasible, provided there is extremely strong evidence that the suspected terrorist is involved in executing or planning a terrorist attack.
3. Positing that the law-enforcement model...does not provide an adequate answer to the issue of trans-national terror. When the terror is intense, organized and protracted, the appropriate model should be the armed conflict model.¹⁵⁰

One popular argument among scholars is that “when terrorists operate outside the scope of an armed conflict, then they are not combatants that can be killed on sight, but criminals that should be arrested and brought to justice.”¹⁵¹ The United States, however, has generally adhered to the third approach, resorting to the application of proportional military force in response to threats to its citizens and security. Throughout history “the United States has employed military force whenever another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory.”¹⁵² Through the early 1990’s the United States attempted to apply the law enforcement model against terrorists, bringing to trial those accused of perpetrating the 1993 World Trade

¹⁴⁹ OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr.,22 October 2002. Available at <http://www.cidh.org/Terrorism/Eng/part.c.htm>

¹⁵⁰ Kretzmer, 183.

¹⁵¹ Ruys, 11.

¹⁵² Parks, 7.

Center bombing. These measures, however, were met with an increasing frequency and severity of attacks directed upon U.S. citizens and government installations worldwide. These methods have only led to the arrest and conviction of the lowly foot soldiers directly responsible for the attacks. Meanwhile, those principally responsible for motivating, resourcing, and training, bin Laden and other terrorist leaders for example, free to continue planning future attacks.

In the wake of the 9/11 attacks, the Bush administration reassessed the security situation of the United States and determined that more proactive and aggressive measures are warranted to protect the United States and its citizens. The Bush Doctrine, established by the 2002 National Security Strategy, is an attempt to provide a bridge between customary international law, within which it is “possible to adopt the tactic of a pre-emptive war which forestalls the anticipated evil, as an act of self defense permitted in the face of aggression”¹⁵³ and international treaty law which permits self-defense only in instances of armed attack. The next section will examine if the current policy outlined within the National Security Strategy of 2002 is valid within the framework provided by international humanitarian law and the law of war. Does the U.S. declaration of a global war on terror exceed the state’s authority to use of force in self-defense authorized under Article 51 of the U.N. Charter?

THE ARMED CONFLICT MODEL

The fundamental doctrine of international law, the doctrine of positivism “teaches that international law is the sum of the rules by which the states have consented to be bound, and nothing can be law to which they have not consented. In the absence of a legal norm restricting a particular behavior, sovereign states may act as they choose.”¹⁵⁴ Barring an accepted prohibition against a policy of targeted killing of terrorist leaders under international law, states are permitted to pursue such policies according to the widely accepted theory of positivism. Although there is

¹⁵³ Gross, 211.

¹⁵⁴ Pickard, 10-11.

not a single treaty, which explicitly prohibits one state from assassinating the sovereign of another state, there is a significant body of international law regulating the use of force within the sovereign territory of another state.¹⁵⁵

Since its inception in the United Nations Charter has become the dominant international institution for regulating international armed conflict and the use of force. Article 103 of the U.N. Charter explicitly establishes that it supercedes all other international commitments or obligations. It reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹⁵⁶ A state’s use of force against another state, therefore, to remain legitimate and legal must not do so in violation of the U.N. Charter.

Article 2(4) of the Charter provides a general prohibition on a state’s use of force: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁵⁷ The Charter provides two explicit exceptions to the Article 2(4) prohibition on the use of force: (1) military action sanctioned by the Security Council in accordance with Chapter VII of the Charter, and/or (2) when a state utilizes force in self-defense under Article 51 of the Charter.

ARTICLE 51 AND THE INHERENT RIGHT OF SELF DEFENSE

A state’s inherent right to self-defense is established by Article 51 of the U.N. Charter which 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

¹⁵⁵ Ibid.

¹⁵⁶ UN Charter Article 103.

¹⁵⁷ UN Charter Article 2(4).

necessary to maintain international peace and security. 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.¹⁵⁸

The intended scope of the self-defense exception is unclear. Frequently a tremendous amount of controversy surrounds what is considered a legitimate act of self-defense in response to a persistent and credible threat and one that constitutes an illegal retaliation for previous acts of aggression. The inherent right of a state to use force in response to a terrorist attack depends upon the responsibility of the state harboring the terrorists, and possibly on its willingness or capability to apprehend the terrorists to prevent further attacks. The purpose of a state's employment of force, however, must always be preventative rather than punitive. The intention of the force employed is to halt or prevent future aggression directed against the state, not as a form of retaliation or retribution for past attacks.¹⁵⁹ If the use of force "is carried out for reasons other than preventive ones, the operation will not be a preemptive one, but one...which would appear to be prohibited."¹⁶⁰

One common interpretation of the doctrine of self-defense is based upon the necessity and proportionality test established in customary international law by the Caroline Doctrine. This doctrine is based upon a precedent established in 1837 when Daniel Webster, then the U.S. Secretary of State argued that the use of self-defense should be confined to situations in which a government can show the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.¹⁶¹ Proponents claim that under this doctrine states possess a right of anticipatory self-defense and that no armed attack need occur before a

¹⁵⁸ UN Charter, Article 51.

¹⁵⁹ Kretzmer, 187.

¹⁶⁰ Gross, 216.

¹⁶¹ Ibid., 211.

state may resort to force to counter a threat. Of course the threat must remain ‘instant and overwhelming’ and alternative means remain inadequate or unavailable.

Critics of this doctrine, however, contend that Article 51 has superceded the concepts of the Caroline Doctrine and customary international law. Some observers “insist that the Article’s requirement of an “armed attack” should be interpreted to mean that a state could only respond to a threat in the case of an actual physical invasion by one state into the territory of another.”¹⁶² In a recent Advisory Opinion the International Criminal Court pronounced, “only an attack by a state can constitute the type of armed attack contemplated by Article 51 of the U.N. Charter.”¹⁶³ The Court has also endorsed the view that a state may be required to “absorb a severe attack before that state will be permitted, under Article 51, to rise and defend itself.”¹⁶⁴ This interpretation does not allow states to preemptively respond to persistent and credible threats to their security until an actual attack has been committed. Some scholars, such as Professor Louis Beres, however, repudiate this view asserting; “international law cannot reasonably compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself.”¹⁶⁵ An additional stipulation emplaced upon by the self-defense justification by legal scholars and critics of U.S. policy is the requirement for the use of force to “be immediately subsequent to and proportional to the armed attack to which it was in answer. If excessively delayed or excessively severe, it ceases to be self-defense and becomes a reprisal.”¹⁶⁶

The specter of international terrorism poses the most serious challenge to the narrow interpretation of the Article 51. George Schultz, Secretary of State during the Reagan administration, asserted the United States government would need to implement “an ‘active

¹⁶² Canestaro, 15-16.

¹⁶³ Kretzmer, 186.

¹⁶⁴ Gross, 214.

¹⁶⁵ Pickard, 20.

¹⁶⁶ Godfrey, 501.

defense' to counter the rise in terrorism the future would bring."¹⁶⁷ Recognizing the growing trend of terrorism worldwide, Schultz proposed a policy of 'active defense:'

We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, pre-emption, and retaliation. Our goal must be to prevent and deter future terrorist acts, and experience has taught us over the years that one of the best deterrents of terrorism is the certainty that swift and sure measures will be taken against those who engage in it. We should take steps towards carrying out those measures. There should be no moral confusion on the issue. Our aim is not to seek revenge but to put an end to violent attacks against innocent people, to make the world a safer place to live for all of us. Clearly the democracies have a moral right, indeed a duty, to defend themselves.¹⁶⁸

Well before the 9/11 terrorist attacks, the United States adopted a policy position reflective of Schultz's doctrine of 'active defense' and more in agreement with Professor Beres' assessment; rejecting "the notion that the U.N. Charter supersedes customary international law on the right of self-defense"¹⁶⁹ As a result, the U.S. generally recognizes three forms of self-defense permitted within Article 51: (a) against an actual use of force, or hostile act, (b) preemptive self-defense against an imminent use of force, and (c) self-defense against a continuing threat. The United States has employed this broader interpretation of Article 51 to justify the use of force (Libya in 1986 and Afghanistan 1998 for example) and this interpretation provides the primary justification for the policy of targeting killing; to include the lethal strike executed against Qaed Salim Sinan al-Harethi in Yemen in 2002.

Not all members of the United Nations, however, have accepted this broader, more expansive interpretation of Article 51. The Libya bombings in 1986 resulted in a Security Council draft resolution condemning the U.S. action and a subsequent condemnation from the General Assembly. "Nevertheless, despite the unpopularity of its interpretation of self-defense under Article 51, the United States is able to act as it deems appropriate without U.N. censure

¹⁶⁷ Canestaro, 26.

¹⁶⁸ Ibid.

¹⁶⁹ Abraham D. Sofaer, "Terrorism, the Law and the National Defense," *Military Law Review* Vol. 126 (Fall 1989): 94.

since the United States is a permanent member of the Security Council and any resolution requires its approval.”¹⁷⁰ Although still accountable to the General Assembly, their decisions are not binding, and cooperation by member states is purely voluntary.¹⁷¹

If a state can justify the targeted killing of a terrorist under Article 51, then it is legal under both U.S. domestic and international law. Emmanuel Gross provides four factors that are especially appropriate in determining the plausibility of a perceived 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.¹⁷²

Each of these factors can assist a government in assessing conditions and identifying whether preemptive action, to include targeted killing, is justified.

Although the debate surrounding the legitimacy of the use of force against trans-national terrorists under the concept of the inherent right of self-defense authorized within Article 51 of the U.N. Charter may never be completely resolved, the U.S. has, and will continue, to combat al-Qaeda and other trans-national terrorist organizations under the context of the law of war.

Specifically:

when a nation employs Article 51 to justify a use of force in its own defense, or the defense of another state, the laws of war control as they would in any formally declared conflict. Therefore, under an Article 51 action, any state-

¹⁷⁰ Jackson, 5.

¹⁷¹ Ibid.

¹⁷² Gross, 226-227.

sanctioned killing by a victim state would not be an assassination so long as it is not accomplished by treachery or outlawry, as described earlier.¹⁷³

Despite criticism and uncertainty surrounding the invocation of Article 51, the U.S., by acting under its broad interpretation of Article 51, has made the war on terror the equivalent of an armed conflict. The U.S. policy of targeted killing of specific terrorists must therefore be assessed within the jurisdiction of the law of war. Is Osama bin Laden and other terrorist leaders legitimate targets according to the law of war? Does the law of war adequately address the combatant or noncombatant status of terrorists?

TARGETING AND DISTINCTION

International Humanitarian Law recognizes two distinct categories: (a) international armed conflict defined as a conflict between two or more states, and (b) non-international armed conflict defined as a conflict between the authorities of a state and insurgents within its territory.¹⁷⁴ Where do trans-national terrorist organizations fit within the scope of these definitions and what are the principles of distinction and targeting dealing with members of these organizations.

Under the law of international armed conflict the actors must distinguish between combatants and civilians; between legitimate military targets and protected non-military targets. Civilians are defined negatively; individuals that do not meet the definition of combatants are therefore classified as civilians. “Article 50(1) First Additional Protocol (FAP) specifies that civilians are those persons that do not belong to one of the different categories of combatants.”¹⁷⁵

Individuals regarded as combatants must fit into one of two categories:

- (1) they are part of the armed forces of a state participating in the conflict
- (2) they are part of another armed group belonging to a state participating in the conflict and fit one of the following four categories prescribed in Article 4(A)(2) of Geneva Convention III

¹⁷³ Canestaro, 14.

¹⁷⁴ Kretzmer, 189.

¹⁷⁵ Ruys, 17.

- a. being under responsible command;
- b. wearing a fixed distinctive sign
- c. carrying arms openly; and
- d. conducting operations in accordance with the laws and customs of war.¹⁷⁶

Terrorist organizations such as al-Qaeda and other trans-national actors are obviously not operating as members of the armed forces of a state, and even if they meet some of the conditions of Article 4(A)(2) of the Geneva Convention, the nature of their operations indicate they would fail to meet the obligation of category d listed above. Failing to meet the conditions required to qualify as a combatant, they must, by definition be regarded as civilians. As such they are immune from attack “unless and for such time as they take a direct part in hostilities.”¹⁷⁷ Literal interpretation of this article has led to the following determinations: “(1) civilians can be targeted when they carry out military operations; (2) a civilian, who after carrying out military operations, is in his house or going to a private home or to a market may not be the object of an attack.”¹⁷⁸ Concern has long been expressed over this ‘revolving door’ of protection allowing groups to take advantage of the shield provided by Additional Protocol I.¹⁷⁹ This revolving door of protection allows terrorists the ability to “enjoy the best of both worlds—they can remain civilians most of the time and only endanger their protection as civilians while actually in the process of carrying out terrorist attacks.”¹⁸⁰

Many experts argue that the classification of civilian status should be based on their inoffensive nature rather than their failure to satisfy the criteria required to qualify for combatant status. “The argument that civilians are protected unless engaged in overtly aggressive acts like carrying weapons may be particularly difficult to maintain where armed groups are technically

¹⁷⁶ Kretzmer, 191.

¹⁷⁷ Article 51(3) Geneva Conventions Additional Protocol I.

¹⁷⁸ Ruys, 17.

¹⁷⁹ Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” *The American Journal of International Law*, Vol. 98 (2004): 17.

¹⁸⁰ Kretzmer, 193.

afforded civilian status by virtue of not being considered lawful combatants.”¹⁸¹ When the mode of conflict is between a state and a non-state terrorist group such as al-Qaeda, the notion that the terrorists are non-combatants entitled to the full protection afforded to civilians is simply unfathomable. Professor Michael N. Schmitt argues “states should not be prevented from acting in self-defense by targeting terrorists simply because the mode of conflict exists at a different level.”¹⁸² Watkin suggests that an individual’s membership in an armed group directly participating, whether continuously or sporadically, in acts of aggression should be acceptable grounds for loss of non-combatant immunity.¹⁸³

Given the difficulties and controversies surrounding the treatment of a conflict between a state and a trans-national organization as an international armed conflict, it has been argued that such a conflict be classified as a non-international armed conflict. One of the major difficulties in adopting such an approach, of course, is the recognized definition of a non-international armed conflict. Article 3 of the Geneva Conventions defines a non-international armed conflict as one taking place within the territory of a state. Thus, in a conflict between a state and a trans-national terrorist organization operating outside the territory of the state the code of law pertaining to non-international armed conflicts is not inherently applicable.

Historically, the general assumption has always been that violence involving non-state entities is the domain of domestic law. “States were reluctant to internationalize internal conflicts, under the assumption that doing so might lend a degree of legitimacy to insurgents and might also unduly hinder their own freedom of action in dealing with civil strife.”¹⁸⁴ Within a non-international conflict the state is able to deny insurgents and other non-state actors the status

¹⁸¹ Watkin, *Controlling the Use of Force*, 17

¹⁸² Michael N. Schmitt, “State Sponsored Assassination in International and Domestic Law”, *Yale Journal of International Law* Vol. 17 (1992): 648.

¹⁸³ Watkin, “Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy,” *Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series* (Winter 2005): 27.

¹⁸⁴ Kretzmer, 195.

of combatants. This denial prevents these non-state actors from obtaining immunity from criminal liability and denies them prisoner of war status upon capture.

The definition of a non-international armed conflict, therefore, is a conflict between the armed forces of a state and an organized armed group, of whom the member of both parties are combatants. Although these combatants do not enjoy the privileges of combatants afforded by the law of international armed conflict, they may be legitimately targeted and attacked by the other party to the conflict.¹⁸⁵ According to this definition, if an armed conflict exists between the United States and al-Qaeda, as many experts claim, members of al-Qaeda are combatants subject to targeting by the U.S. armed forces. Conversely, within the scope of this conflict, members of the U.S. armed forces are legitimate targets of al-Qaeda members. Of course, the prohibition against treacherous and perfidious means apply to both sides as well.

Recognition of individuals actively participating in the operations and activities of an international terrorist organization as combatants in a non-international armed conflict appears to overcome the ‘revolving door’ protections provided to the same individuals within an international armed conflict. Of course while terrorists seemed to possess unlimited advantages within an international armed conflict, states in a non-international armed conflict appear to reap all the benefits. States are not required to provide prisoner of war status to captured belligerents, nor are captured belligerents immune to prosecution for their actions. In addition, the terrorists and belligerents in a non-international armed conflict are legitimate targets subject to attack by the armed forces of the state at any time and in any location.

“The events of September 11 have focused attention on the potential overlap between international conflict, non-international conflict and law enforcement.”¹⁸⁶ A significant amount of debate has emerged among scholars, academics and diplomats surrounding the status of trans-

¹⁸⁵ Kretzmer, 198.

¹⁸⁶ Watkin, Controlling the Use of Force, 3.

national terrorist organizations and the applicable legal model for the conduct of the war on terror. One of the inherent problems is that each model presents its own inherent strengths and weaknesses in addressing the current situation. The law enforcement model appears insufficient when the disturbing level of violence that non-state actors can inflict has caused significant uncertainty about the suitability of situating criminal acts related to terrorism within the purview of law enforcement and the terrorists operate within the territory of states either unwilling or incapable of cooperating.¹⁸⁷ An armed conflict between a state and a trans-national terrorist organization does not qualify as an international armed conflict since the conflict involves only one state. The conflict, however, exists beyond the borders of the state involved in the conflict and thus fails to fit within the model of a non-international armed conflict.

¹⁸⁷ Ibid.

III. CONCLUSIONS AND RECOMMENDATIONS

Through the examination of both U.S. domestic and international law it becomes evident that little direct evidence exists conclusively supporting the argument that the targeted killing of suspected trans-national terrorists is an illegal act. This examination, however, reveals the overall lack of consensus among academics, scholars, and politicians concerning the proper interpretation of existing international law. In fact, the debate not only focuses on the proper interpretation of the law, but on exactly which aspect of international law is applicable to the current situation regarding states and trans-national terrorists. The analysis in the previous sections indicates that a clear and definitive answer to the question of whether the specific targeting of a suspected terrorist qualifies as an assassination, legitimate act of war, or a breach of international humanitarian law is inconclusive. The answer largely depends upon individual interpretation of vaguely defined terms within the existing law, determination of the applicable legal regime (again subject to interpretation), and the status of the targeted individual or group.

Executive Order 12333 presumably prohibits political assassination, although the order never defines or clarifies what is or is not assassination. The intent of the E.O. is to prevent the peacetime efforts of intelligence officials to assassinate foreign heads of state whose policy or conduct are considered detrimental to the U.S.¹⁸⁸ E.O. 12333 does not apply to the application of military force directed against legitimate targets, whether they constitute individual terrorists or heads of state. The E.O., as a presidential directive, is subject to revocation or modification by the president at any time were the change deemed necessary to justify a particular policy or action. The targeted killing of trans-national terrorists is not a violation of E.O.12333 since the policy constitutes the direct application of military force rather than intelligence activities and because targeted killing itself does not constitute an assassination.

¹⁸⁸ Canestaro, 22 (see note 62).

Given the inadequacies of the international law demonstrated in the second chapter, what recourse is available to nations that are victims of trans-national terrorism? According to Professor Beres:

our world legal order lacks an international criminal court with jurisdiction over individuals. Only the courts of individual countries can provide the judicial context for trials of terrorists. It follows that where nations harbor such criminals and refuse to honor extradition requests, the only decent remedies for justice available to victim societies may lie in unilateral enforcement action. Here, extra-judicial execution may be essential to justice.¹⁸⁹

Because no overarching political authority capable of intervening to resolve issues between states exists, states, acting within this self-help system will continue to take those actions they deem necessary to protect their own citizens and interests. Daniel Pickard goes so far as to claim:

international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented...In the absence of a legal norm restricting a particular state behavior, sovereign states may act as they choose. In other words, unless the existence of a rule prohibiting a specific action can be established, states are permitted to engage in that action. For example, a state's use of armed force against alleged terrorists' bases in response to a prior armed attack would be permissible unless it could be proven that states had earlier consented to a rule prohibiting such a forcible action.¹⁹⁰

Although numerous scholars and critics vehemently disagree with the concept established within the Pickard statement, many states, powerful ones in particular, continue to act in a manner very similar to this description. In the absence of an authority capable of compelling states to refrain from pursuing particular actions, states will continue to pursue those policies perceived to be in their own best interests.

The United States, throughout its history, has frequently resorted to the use of military force beyond the realm of international armed conflict whenever "another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting

¹⁸⁹ Louis Rene Beres, "Assassination of Terrorists May Be Law Enforcing," Available Online at <http://www.professors.org.il/docs/beres3.htm>

¹⁹⁰ Pickard, 10-11.

international criminal activities.”¹⁹¹ These actions have often been conducted against non-state actors and individuals across international boundaries and without a formal declaration of war.

Some of these actions include:

1801-1805: Naval actions and expedition conducted against Barbary Pirates along the North African coast.¹⁹²

1916-1917: General Pershing’s punitive expedition into Mexico in pursuit of Pancho Villa.¹⁹³

1926-1933: U.S. Marines conduct campaign in Nicaragua to kill or capture Augusto Cesar Sandino.¹⁹⁴

1986: U.S. aircraft conduct airstrikes against terrorist related infrastructure within Libya in response to Libya’s support of terrorist operations directed against U.S. interests.

1988-1993: U.S. provides support to Columbian government in the attempt to kill or capture the drug lord Pablo Escobar.¹⁹⁵

1998: U.S. launches cruise missiles against al-Qaeda training facilities in Afghanistan and a suspected chemical/biological weapons factory in Sudan.

Thus, historical precedent exists for the use of military force by the U.S. government to kill or capture individuals whose actions constitute a direct, credible, and ongoing threat to U.S. citizens, interests, or national security.¹⁹⁶ The U.S., regardless of international perception or protestation, has consistently invoked its inherent right to self-defense provided by Article 51 of the U.N. Charter to justify the application of military force as a defensive response to hostile actions taken against U.S. citizens or national security interests.

One of the defensive measures available to states in the war on terror is the specific targeting of suspected terrorists before they can carry out further attacks. According to Statman the policy of targeted killing, therefore:

Emerges as the most natural manifestation of *jus in bello* in wars on terror, for under *jus in bello*, even if a war is unjust, it should be directed only at

¹⁹¹ Parks, 7.

¹⁹² Max Boot, *The Savage Wars of Peace* (New York: Basic Books, 2002), 3-29.

¹⁹³ *Ibid.*, 182-204.

¹⁹⁴ *Ibid.*, 231-252.

¹⁹⁵ Mark Bowden, *Killing Pablo* (New York: Atlantic Monthly Press, 2001).

¹⁹⁶ Parks, 7.

combatants. This implies that wars against terror should be directed only against terrorists....

The moral legitimacy of targeted killing becomes even clearer when compared to the alternative means of fighting terror—that is, the massive invasion of the community that shelters and supports the terrorists in an attempt to catch or kill the terrorists and destroy their infrastructure....Hence, targeted killing is the preferable method not only because, on a utilitarian calculation, it saves lives but also because it is more commensurate with a fundamental condition of justified self defense, namely that those killed are responsible for the threat posed.¹⁹⁷

Current operations within both Afghanistan and Iraq qualify as non-international armed conflict. Both nations have recognized governments combating insurgents and terrorists within their sovereign territory. United States military operations and actions are conducted within their territorial boundaries and in direct support of these governments. The relevant aspects of international law regarding non-international armed conflict recognizes that individuals and organizations targeted within the borders of these states qualify as combatants, legally subject to targeting and the lethal application of force, but are not subject to the ‘privileges’ afforded combatants according to the law of international armed conflict. Insurgents and terrorists within both nations are subject to legitimate targeting in all circumstances and are subject to the criminal prosecution under national law rather than afforded prisoner of war status and protected from prosecution.

The 2002 Yemen strike and the 13 January 2006 strike targeting Ayman al-Zawahiri bring the issue of targeted killing of terrorists beyond the scope of the non-international armed conflicts in Iraq and Afghanistan and into the forefront of U.S. policy for taking the fight to al-Qaeda and other trans-national terrorists. Although extremely controversial, the targeted killing of al-Harethi and the attempt on Zawahiri are not expressly illegal according to U.S. domestic or international law.

¹⁹⁷ Statman, 5.

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.¹⁹⁸

Although there is no clear consensus on the issue, and although numerous scholars would disagree, the United States clearly recognizes the existence of a state of armed conflict between itself and al-Qaeda. The United States, therefore, through this acknowledgement is able to classify al-Qaeda members and other trans-national terrorists as combatants subject to legal and legitimate targeting.

To maintain international legitimacy and retain the moral high ground within the war on terror, the U.S. should clarify its policy regarding the specific targeting of suspected terrorists outside the ongoing conflicts in Afghanistan and Iraq. The current policy remains shrouded underneath a veil of secrecy, its full extent unknown to the general public and mostly a subject of outright speculation. To allay the fears of human rights advocates who fear the policy may constitute an abuse of power and constitute an arbitrary deprivation of an individual's right to life, the policy must be made public, which can be done without revealing classified information.

The U.S. should make it abundantly clear that apprehension of the suspect is the primary objective. The intelligence value of detained terrorist suspects and the potential information they possess makes their capture and detention far preferable to outright elimination. The use of targeted killing should be a policy of last resort intended to eliminate a direct threat to the security of the United States when other means are unavailable or the risk of inaction is too great to await or attempt other methods. A clear review process needs to be established and publicized to provide a sense of transparency, and show these targeted killings are not randomly selected actions. While the details of each case should remain classified to prevent compromise of sources or sensitive information, awareness of a codified procedure for review prior to execution of any targeted killing would mollify some of the disparagement from critics of the policy. The policy

¹⁹⁸ Kretzmer, 204.

should be used sparingly and selectively, which appears to be the case thus far in the war on terror.

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