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Targeted killing has been heralded as one of the most effective methods for reducing the terrorist threat in the Middle East, yet its legality remains a point of controversy. At issue is the question of whether the United States is, or even can be, at war with al-Qaeda, as a state’s recourse to violence is severely restricted under international law in the absence of such a war. This paper analyzes the three main frameworks under which America’s lethal actions have been evaluated: law enforcement, armed conflict, and self-defense. It concludes that while the United States has a legitimate claim to self-defense against these terrorist networks, targeted killing as currently practiced by the Obama administration cannot be justified under international law.

I. INTRODUCTION

On his inauguration day, President Barack Obama declared, “Our nation is at war against a far-reaching network of violence and hatred” (Obama 2009). Yet this “war” remains a point of controversy. Under international law, a war is recognized only under very specific circumstances, and it must be established that the United States is truly at war with al-Qaeda and associated Islamic jihadist organizations if U.S. military operations
against them are to be declared legal. This is of particular relevance to the United States’ strategy of targeted killing currently being employed in Afghanistan and surrounding regions.

International legal scholar Philip Alston defines targeted killing as “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator” (Alston 2010, 3). If performed outside of the law, targeted killing is considered murder, assassination, or an “extra-judicial execution” (Kretzmer 2005, 174), and various scholars contend that the use of targeted killing by the Obama administration in places like Yemen and Pakistan falls clearly into one of these latter three categories (see O’Connell 2010a).

Relevant laws on this matter, however, are rendered ambiguous by the fact that al-Qaeda and associated groups are not part of a single state. Beyond this, Alston argues that a terrorist organization fails even to meet the legal definition of a “party” to a conflict given that “al-Qaeda and other alleged ‘associated’ groups are often only loosely linked [to each other], if at all” (Alston 2010, 18). As a result, it is somewhat unclear which international rules apply to the United States’ conduct of military operations abroad, as the nation seeks to protect itself against the threat of terrorism.

This article seeks to shed light on how targeted killing, as currently practiced by the Obama administration, might be evaluated under international law. The focus is on targeted killings that have taken place outside of any readily defined war zone, a feature that renders them particularly problematic. The three broad frameworks that have been most commonly used to evaluate U.S. drone strikes are analyzed within this context: law enforcement, armed conflict, and self-defense under Article 51 of the United Nations Charter.

This article examines both the appropriateness of these frameworks for addressing this issue and their implications for the legality of America’s targeted killing strategy outside official theaters of war. It is argued that while self-defense under Article 51 provides some legal justification for targeted killings in countries including Yemen and Pakistan, the United States has overextended its claim to self-defense, thereby operating outside of what is permitted under international law. Such flouting of the international legal regime in this manner may prove harmful for a number of reasons. These are well articulated by University of Oxford Professor Adam Roberts:
First, in all military operations, whether or not against terrorists, a perception that a state or a coalition of states is observing basic international standards may contribute to public support within the state or coalition; support, or at least tacit consent, from other states; and avoidance of disputes within and between coalition member states. Second, if the coalition were to violate *jus in bello* in a major way [...] that would help the cause of the adversary forces and even provide them with a justification for their resort to force under *jus ad bellum*. Third, in anti-terrorist campaigns in particular, a basis for engaging in military operations is often a perception that there is a definite moral distinction between the types of actions engaged in by terrorists and those engaged in by their adversaries. Observance of *jus in bello* can form a part of that moral distinction (Roberts 2002, 9).

In addition, one could argue that the violation of international legal norms encourages other nations to follow suit. For example, when Russian lawmakers in 2006 authorized their “security services to kill alleged terrorists overseas” (Alston 2010, 9), they “insisted that they were emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country’s borders against external threats” (Romero and Warren 2010). For all of these reasons, an understanding of the legal issues serves a very relevant purpose.

**II. BACKGROUND**

Beginning in 2002 with the targeted killing in Yemen of Qaed Senyan al-Harithi, the alleged mastermind of the U.S.S. Cole bombing, both the Bush and Obama administrations have consistently used targeted killings in order to eliminate suspected members and affiliates of al-Qaeda. Yet, while these activities have generated significant attention, the United States is not the only country to utilize such methods. Israeli officials have officially acknowledged a policy of targeted killing against terrorists since 2000, claiming that such acts represent a legitimate means of self-defense under the laws of war, collectively known as international humanitarian law (IHL) (Alston 2010, 6). However, prior to September 11, 2001, the United States “routinely denounced” (Ofek 2010) Israel’s policy. It is, therefore, somewhat ironic that in March of 2010 Harold Koh, the current Legal Advisor of the Department of State, used this very argument of self-defense to justify American targeted killings (Koh 2010).

Whereas such killings have traditionally been carried out by air or
ground military forces, new developments in robotics allow strikes to be performed by unmanned aerial vehicles, more commonly referred to as drones, which are operated remotely from a position of safety. These planes are so advanced that they can transmit a readable image of a license plate from a distance of two miles (Singer 2009, 33), and armed with Hellfire missiles, they can easily demolish the car to which such license plate is attached from the same distance, all while the pilot remains far removed from physical danger.

Drones have proven so invaluable in hunting down and eliminating alleged terrorists that CIA Director Leon Panetta has referred to them as “the only game in town” (Panetta 2009). Furthermore, intelligence reports have “revealed growing examples of Taliban fighters who are fearful of moving into higher-level command positions because of these lethal operations” (Cooper and Landler 2010).

Nevertheless, targeted killings raise serious concerns, especially when executed outside of demarcated war zones in which the international community has recognized the existence of an armed conflict. In this regard, it is important to highlight two distinct targeted killing programs. The first of these is run by the military, openly acknowledged by the U.S. government, and solely “targets enemies of U.S. troops stationed” (Mayer 2009) in Iraq and Afghanistan. The second program is a highly classified CIA operation “aimed at terror suspects around the world, including in countries where U.S. troops are not based” (Mayer 2009).

While the U.S. military’s targeted killings within official war zones are not particularly controversial, the CIA’s operations have been more contentious, as indicated by the sheer bulk of academic literature and media attention dedicated to the matter. No country is allowed to kill individuals at will and, outside of an official armed conflict, any resort to lethal means is strictly prohibited except in extreme cases, such as defense of life. This suggests that, barring the existence of a war, targeted killings transgress the individual right to life, as guaranteed by numerous bodies of international and domestic law, including the International Covenant on Civil and Political Rights (ICCPR).¹

Moreover, the U.S. government’s use of the CIA to execute these missions has been widely decried. Unlike members of the armed forces, CIA officials are not trained in the laws of war and do not bear the uniforms that serve to adequately distinguish them from civilians. In the eyes of many, this makes them unlawful combatants,² subject to attack “whenever and wherever they may be found, including Langley [VA]” (Solis 2010).

Finally, some have questioned the legitimacy of including those who
finance the Taliban on the list of permissible targets (Alston 2010, 19). Since in most cases these individuals are not directly participating in hostilities, they fall into the international legal category of “noncombatants” (Convention IV 1949, Art. 3.1), making their targeting almost certainly unlawful.

Members of the Obama administration nonetheless insist that they are “committed by word and deed to conducting ourselves in accordance with all applicable law” (Koh 2010). Yet an analysis of the competing claims surrounding this issue makes clear that one would be hard pressed to defend certain targeted killings in Pakistan and Yemen under international law. In addition, the use of the CIA to conduct these operations, as well as the inclusion of those not actively engaged in terrorism on targeted killing lists, further undermines claims of legitimacy.

III. Law Enforcement

In his widely cited book on targeted killing, Nils Melzer, the legal advisor for the International Committee of the Red Cross, argues that “the normative paradigm of law enforcement must—‘by default’ and regardless of temporal and territorial considerations—govern the international lawfulness of all State-sponsored targeted killings except those directed against a legitimate military target in a situation of armed conflict” (Melzer 2008, 223). In the case that no such conflict can exist between the United States and the terrorist groups in question, outside the borders of Afghanistan and Iraq targeted killings must be judged by their adherence to international law enforcement standards.

Law enforcement rules stipulate that resort to lethal force is legitimate only within very narrow parameters. Just as most domestic legal systems provide that a policeman may not intentionally kill an individual except in “defense of life” (Alston 2010, 22), law enforcement agents acting internationally are similarly restricted. These agents are also further bound by considerations of state sovereignty and the requirement not to disturb the peace between nations (Blum and Heymann 2010, 146).

The guarantees that ensure an individual cannot be intentionally killed unless he or she poses an immediate threat to another are found not only in most countries’ domestic laws but, more importantly for the purposes of this analysis, in international human rights law. The principle has been incorporated into international law through a number of legal agreements including the ICCPR and the American Convention on Human Rights (ACHR), both of which guarantee “protection from ‘arbitrary’ deprivation of life” (Melzer 2008, 91-2).
Most scholars concur that as a result of these agreements, “[u]nder the international normative paradigm of law enforcement, the lawful use of lethal force may not exceed what is ‘absolutely’ or ‘strictly’ necessary to maintain, restore or otherwise impose law and order in the concrete circumstances” (Melzer 2008, 227-8). It follows from this that “it is never permissible for killing to be the sole objective of an operation” (Alston 2010, 11). Rather, killing can only be used to protect against a present and direct threat to life.

Considering that drones have executed the majority of targeted killings in Pakistan and Yemen, one would be challenged to argue that any such killings could be defended under claims of immediate necessity. Unlike a soldier or a policeman who might confront physical danger in his or her attempt to arrest a suspected terrorist, drones are operated from a “suburban redoubt” (Mayer 2009) far removed from harm’s way, thereby rendering claims of personal self-defense unpersuasive. Should the law enforcement paradigm apply, therefore, these killings are likely “tantamount to extra-judicial execution or murder” (Blum and Heymann 2010, 146).

Furthermore, considering that “[a]s a general principle of international law, a country is strictly prohibited from engaging in law enforcement operations in the territory of another country” (Blum and Heymann 2010, 161), any such killings violate not only the right to life, but also the right to state sovereignty in cases where the nation in question has not given the United States permission to use force. In those cases where permission is granted, such as when the Yemeni government condoned the killing of al-Harithi, the United States would still be guilty of illegal execution. As Notre Dame law professor Mary Ellen O’Connell observed in her testimony before the U.S. Congress, “States cannot…give consent to a right they do not have” (O’Connell 2010a, 2).

However, viewing targeted killings through a law-enforcement lens may be somewhat misleading. Legal scholar David Kretzmer points out that “[t]he problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected” (Kretzmer 2005, 179). In places like Yemen and Pakistan, the state authority clearly lacks the means, and in some cases the will, to locate and arrest the individuals who have been marked for killing. Lacking “an authority stable and strong enough to impose public security, law and order” (Melzer 2008, 88), the law enforcement paradigm seems to be an inadequate model for confronting the terrorist threat. In its 2003 analysis of Israel, The Human
Rights Committee did allow for such a situation in which lethal methods could be employed, under the condition that “[b]efore resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted” (Concluding Observations of the Human Right Committee: Israel 2003). This suggests that in those cases where law enforcement measures fall short, one can look to a different legal framework.

**IV. ARMED CONFLICT**

A second approach is to regard targeted killings not as law enforcement operations but as measures taken within the context of an armed conflict with the transnational terrorists. In this view, al-Qaeda’s attacks against the United States, including but not limited to those carried out on September 11, 2001, are of such gravity as to create a situation of armed conflict. The existence of such a conflict means that all targeted killings against al-Qaeda and its associates should be evaluated under international humanitarian law (IHL).

IHL refers to the body of law that applies during times of armed conflict or war. These are based primarily on the Geneva Conventions of 1949 and the Additional Protocols of 1977, as well as customary international law. Because IHL only applies when a certain threshold of violence has been reached, these laws are far more permissive of force than is international human rights law; under IHL, individuals can be targeted solely on the basis of their status as “combatants” rather than as a result of the immediate threat they pose. It follows then that if a state is legally engaged in an armed conflict with al-Qaeda and its associates, any and all members of those groups are considered legitimate targets under international law.

Based on the above analysis, if it could be shown that the United States were in an armed conflict with the terrorist groups responsible for the September 11 attacks, targeted killings in Yemen and Pakistan might well be justified if they abide by the rules of IHL. Yet just as the law enforcement model is flawed for analyzing the current context, so too is the paradigm of armed conflict, for the reasons iterated below.

International human rights law acknowledges two types of armed conflicts—international and non-international—and applies different legal criteria to each. The three legitimate types of international armed conflict are laid out in Article 2 of the Geneva Conventions and have been widely interpreted as occurring only in conflicts between two states, a reading that was affirmed in *Prosecutor v. Tadić* at the International Criminal Tribunal for the Former Yugoslavia. Based on this understanding, the
conflict between the United States and al-Qaeda and its affiliates is not an international one.

The question then becomes whether it might be a non-international armed conflict. If so, it would trigger the application of Article 3 of the Geneva Conventions, which details the legal rules that apply “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” (Convention (IV) relative to the Protection of Civilian Persons in Time of War). According to University of Texas Law Professor Derek Jinks, Common Article 3 ought to apply to “all ‘armed conflicts’ not covered by Common Article 2” (Jinks 2003, 41). In his view, so long as the September 11 attacks meet the threshold of an “armed conflict,” which he argues they do, these acts fall under the classification of an “armed conflict not of an international character,” thereby bringing into play Article 3 of the Geneva Conventions and the relevant humanitarian laws.

Harold Koh’s remarks at the annual meeting of the American Society of International Law in March of 2010 suggest that the Obama administration is in full agreement with Professor Jinks. During his speech, Koh stated that “as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law” (Koh 2010).

Nevertheless, various scholars disagree with Harold Koh and Derek Jinks’ interpretation of the circumstances under which Common Article 3 applies and whether September 11 triggered an armed conflict under international law. The first question in regard to Article 3 is whether the phrase “not of an international character occurring in the territory of one of the High Contracting Parties” denotes only conflict that occurs within rather than between states. If so, the U.S. war on terror when conducted overseas does not meet this requirement. This matter is addressed in Additional Protocol II, which reads that Article 3 “shall apply to all armed conflicts which are not covered by Article 1…which take place in the territory of a High Contracting Party…” (Protocol II, Art. 1.1). Conventional wisdom on this subject provides that when combined with Additional Protocol II, Common Article 3 does not exclusively apply to conflicts enclosed within state lines (Bassiouni 2002, 99).

A more serious deficiency in applying Article 3 to current U.S. operations is that terrorist groups may not meet the threshold necessary to be considered an official member of an armed conflict at all. Additional Protocol II specifies that the “dissident armed forces or other organized
armed groups” must be “under responsible command” and “exercise such control over a part of [the state’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol” (Protocol II Art. 1.1). It is far from clear that this holds true in the situation under discussion.

Perhaps an even more compelling argument is that the September 11 attacks would not meet the requirements for initiating an armed conflict regardless of whether al-Qaeda and its associates constitute a group in the relevant sense. According to Marco Sassoli, a professor of international law at the University of Geneva, “terrorist acts by private groups…have not customarily been viewed as creating armed conflicts” (Sassoli 2004, 202). Protocol II actually specifies that “[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts” (Protocol II, Art. 1.2). While authorities are divided on whether terrorist attacks against the United States classify as “sporadic,” few contend that terrorism against U.S. interests represents the “sustained, persistent fighting” (Anderson 2010b) required to constitute an armed conflict. As a result, it is helpful to turn to the final framework of self-defense.

V. Self-Defense under Article 51

The self-defense framework for describing the current conflict with the terrorist groups takes the middle road between the law enforcement and armed conflict models. While it acknowledges the inadequacy of the law-enforcement model in accounting for the current situation, it avoids the assertion that the confrontation has reached the level of an armed conflict. Instead, this framework posits that self-defense provides the United States with a justification to which it can legally resort.

Article 51 of the United Nations Charter maintains that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security” (Charter of the UN Art. 51). This statement is not qualified by any threshold requirement of armed conflict. Consequently, a nation can claim this right without touching on the issue of armed conflict at all. Having done so, “a state's actions are subject to the requirements of necessity and proportionality” (Kretzmer 2005, 203).

The appeal of availing oneself of the self-defense argument is quite clear. Through it, the United States can sidestep the fraught debate over
whether a dispersed network of terrorist groups can be party to an armed conflict. Furthermore, the model accounts for a key shortcoming in the law enforcement paradigm by authorizing a more robust response to the September 11 attacks, particularly in the regions of Yemen and Pakistan where the rule of law is weak. Finally, it still falls squarely into a well defined section of international law for which there are clear rules and guidelines.

The UN Security Council has supported this position of self-defense in two separate resolutions passed in the immediate aftermath of the September 11 attacks. On September 12, 2001, under Resolution 1368, the Security Council recognized “the inherent right of individual or collective self-defense in accordance with the Charter” and “expresse[d] its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001” (UN Security Council Resolution 1368 2001). On September 28, 2001, the Security Council reaffirmed this stance, adding that, “States shall…[t]ake the necessary steps to prevent the commission of terrorist acts…” (UN Security Council Resolution 1373 2001), effectively sanctioning the United States’ claim to self-defense. The subsequent North Atlantic Treaty Organization (NATO) endorsement of the Security Council’s position served to further validate U.S. strategy developed in the aftermath of the terrorist attacks (Paust 2010, 248).

Yet, even in the absence of U.N. Security Council and NATO endorsement, historical precedent supports the United States’ right of self-defense. As George Washington University Law Professor Sean Murphy has pointed out, “[T]he destruction wrought [on September 11] was as dramatic as the Japanese attack on Pearl Harbor on December 7, 1941…[and] the death toll from the incidents was worse than Pearl Harbor” (Murphy 2002, 47). Since Pearl Harbor provided adequate provocation to elicit a U.S. declaration of war on Japan, by this standard the September 11 strikes constituted an “armed attack” under Article 51.

Also relevant is the fact that “the United States immediately perceived the incidents as akin to that of a military attack. President Bush declared a national emergency and called to active duty the reserves of the U.S. armed forces” (Murphy 2002, 47). The U.S. Congress, clearly in agreement with the President, authorized him:

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (107th Congress 2001, Section 2).
Professor Mary Ellen O’Connell takes issue with this entire line of reasoning, arguing that “[a]n armed response to a terrorist attack will almost never meet [the] parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as criminal acts because they have all the hallmarks of crimes, not armed attacks that can give rise to the right of self-defense” (O’Connell 2010b, 14). However, as mentioned above, the law enforcement model is not appropriate considering the lack of adequate governance in the areas of Pakistan and Yemen where many of the perpetrators are located. In addition, O’Connell’s arguments seem overly dogmatic given the UN Security Council’s implied endorsement and NATO’s full authorization for the United States to act in self-defense under Article 51.

Nevertheless, O’Connell maintains that “the Security Council has not authorized attacks, and the U.S. has no right on that basis to use drones. In the wake of the 9/11 attacks, the Security Council did find in Resolution 1368 that the attacks triggered Article 51 self-defense. The Council did not, however, authorize the use of force against any particular state” (O’Connell 2010b, 19).

Effectively, O’Connell is equating drone strikes against terrorists residing in a state with strikes against the state itself. However, it is important to note that Article 51 specifically says, “Nothing in the present charter shall impair the inherent right of individual or collective self-defence,” (Charter of the UN Art. 51). This, therefore, overrides the protection of state sovereignty found in Article 2(4) of that same document, thereby refuting any portion of O’Connell’s argument based on principles of state sovereignty.

Nonetheless, while hypothetically it does not violate sovereignty to use force against certain individuals within a state, this does not rule out the possibility that such force could be interpreted as an act against the state itself. Certainly, if the state in question cannot or will not eliminate the threat emanating from it, the United States’ decision to take action into its own hands does not necessarily constitute force against that state (Alston 2010, 11-12). The distinction, however, is fine. Where the use of force produces numerous civilian casualties, it is difficult to argue that this does not constitute, to some degree, an attack on the nation itself. While this matter is revisited in the proceeding section, for now suffice it to acknowledge that as long as the United States avails itself of its right to self-defense in a “selective and proportionate manner merely against non-state actors that are perpetrating, aiding, or directing ongoing armed attacks” (Paust 2010, 258), this need not constitute an attack on the harboring state.
VI. Analysis of U.S. Targeted Killings under Article 51 of the UN Charter

If it is accepted that the United States has a legitimate recourse to force through Article 51 of the UN Charter, what are the legal guidelines under which it must operate? First, all actions must be genuine expressions of “self-defense.” In order for a targeted killing to meet this requirement, it must be both “necessary” and “proportional,” a condition derived from customary IHL.

For a strike to be considered necessary under international law, it must seek to prevent a future attack from occurring. In the current case, this means that “[t]he only acceptable justification for targeting suspected terrorists is protection of potential victims of terrorist acts” (Kretzmer 2005, 202). Judging whether this requirement has been fulfilled is not always simple. For example, one might ask: did the U.S. target al-Harithi because he was actually planning future attacks or simply based on his prior role in the U.S.S. Cole bombing? The answer weighs heavily on the legality of his killing. If al-Harithi was killed solely in reaction to an incident that had occurred two years earlier, “the Predator attack would be considered punitive rather than defensive, an act of reprisal that is judged to be illegal by the vast majority of states” (Downes 2004, 286).

By the same token, even if a particular targeted killing is undertaken for non-punitive reasons, international law still requires the expected threat from that individual to be so imminent that “the necessity of self defence, [is] instant, overwhelming, leaving no choice of means and no moment for deliberation” (Webster 1841). Short of this, the attack falls beyond the purview of legitimate preemptive self-defense and into preventive self-defense, which is not recognized as permissible under international law. While there still may be times that the requisite threshold is reached, it remains imperative that each attack be based on legitimate motives that seek to prevent the otherwise unavoidable loss of life.

Another consideration that must be factored into the necessity analysis is whether lethal action represents the only means of accomplishing the intended good. Nils Melzer describes this requirement as follows: “[T]here must be no non-lethal alternative which would entail a comparable military advantage without unreasonably increasing the risk to the operating forces or the civilian population” (Melzer 2008, 397). It follows from this condition that targeted killing is not legally justified in cases where arrest is possible.

Of course, there are cases in which it is not possible to arrest a suspected
terrorist; in those instances the proposed targeted killing may also be necessary as a true act of self-defense. When this theoretical condition is satisfied, the next question becomes whether the strike is proportionate. Harold Koh has defined the rule of proportionality as “prohibit[ing] attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated” (Koh 2010). Since the direct military advantage of a targeted killing is simply preventing that individual from aiding in, carrying out, or planning a terrorist attack, the elimination of that person must be weighed against the collateral damage.

Compared to many of the lethal means available to the United States for the purpose of combat operations, drones are precision instruments. The popular Predator model is equipped with highly advanced video capabilities and precision lasers to guide its missiles to the correct target. Despite this, targeted killing operations have on various occasions produced substantial collateral damage. For example, a drone strike against Baitullah Meshud, a Taliban leader in Pakistan, resulted in the death of eleven other individuals, including Meshud’s wife and mother-in-law. Even more concerning, in the numerous failed attempts to kill Meshud, “between two hundred and seven and three hundred and twenty-one additional people were killed” (Mayer 2009), some of whom appear to have been children and many of whom were innocent by law of war standards. These numbers raise doubts about whether such an attack was proportionate, even acknowledging that some of the casualties were surely al-Qaeda operatives.

If such a level of collateral damage does not seem unreasonable for a high priority target, it might still be concerning that President Obama has now expanded the target list to include drug lords known to finance the Taliban. Scholars, such as Harvard Law School Professors Gabriella Blum and Philip Heyman, have argued that drug lords, regardless of whom they finance, must be dealt with using law enforcement methods as opposed to lethal force (Blum and Heymann 2010, 148). Certainly, it does seem a stretch to claim that these drug traffickers pose an imminent danger to the United States, or that Hellfire missiles constitute a proportionate response. When one further considers that Predator strikes are usually accompanied by collateral damage, the argument against targeting these individuals is reinforced.

Another issue that arises in the discussion of collateral damage, as briefly discussed previously, is whether extensive civilian death outside of a war zone, even in pursuit of a high level target, constitutes a breach of
state sovereignty. Philip Alston points out that even if a country withholds consent to the use of force on its territory, “[s]tates may invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings…as long as that force is necessary and proportionate” (Alston 2010, 12). This argument potentially provides a legal foundation for using force within a sovereign and non-belligerent state, even if collateral damage occurs, so long as that damage is “proportionate” to the anticipated military advantage. Nonetheless, in the face of countless civilian deaths, countries might increasingly start to see America’s use of force as impinging upon its sovereign rights, regardless of what international law allows.

A further question pertains to where, in a geographical sense, the United States’ right to self-defense ends. Professor Kenneth Anderson of American University provided the following testimony on this issue to the U.S. Congress:

[W]hat is justified in the ungoverned regions of Somalia or Yemen is a different matter applied to places under the rule of law such as our friends and allies. The United States is not going to undertake a targeted killing in London. The diplomatic fiction of the “sovereign equality” of states makes it difficult to say, as a matter of international law that, yes, Yemen is different from France, but of course that is true. (Anderson 2010a, 10)

This formulation is based on a policy that does not hold under international law, meaning that it would be difficult to defend if challenged. While there may be some truth to the logic, failure to provide guidelines as to where the United States will or will not engage in targeted killings opens up the possibility of an ever-expanding notion of self-defense.

Finally, there is the significant question of whether it is appropriate for the CIA to operate the drones used for these lethal operations. President Obama has attempted to move away from the Bush administration’s terminology of a “war on terrorism,” preferring instead to refer to the situation as an “Overseas Contingency Operation” (Kamen 2009). However, if the administration continues to assert that the United States is in an “armed conflict,” should it not use America’s uniformed military to fight that conflict? After all, as Professor of International Law Michael Schmitt has stated, “[t]here are but two categories of individuals in an armed conflict, combatants and civilians. Combatants include members of a belligerent’s armed forces and others who are directly participating in a conflict…the latter [if they participate in hostilities] are labeled unlawful combatants
or unprivileged belligerents” (Schmitt 2004-2005, 522).

In addition to the problem of ambiguous combat status, the CIA is not subject to the same levels of transparency and oversight as the armed forces, nor are CIA officials instructed in the laws of war (O’Connell 2010b, 7). According to O’Connell, these features “may alone account for the high-unintended death rate” (O’Connell 2010b, 7) of CIA targeted killings. This high death rate arguably diminishes the effectiveness of the strategy itself, which raises further questions of proportionality and necessity. An op-ed published by the Council on Foreign Relations asserted that “Pakistani intelligence agencies have reported that refugees from Afghanistan have flocked to the Taliban by the hundreds to avenge the drones’ killings of innocent civilians” (Zenko 2009). If true, this suggests that collateral damage is actually compromising the value of targeted killings. If these strikes are not accomplishing their intended objectives and are also inflicting massive collateral damage, this implies that legally they are neither proportionate nor necessary; they may not even be advisable.

In addition, the lack of transparency inherent in any covert action increases the risk of targeting individuals who may not meet the legal criteria for necessity. After all, “strikes are only as accurate as the intelligence that goes into them” (Mayer 2009); when there is no independent oversight to ensure that intelligence is adequate to justify the killing, mistakes become more likely. According to a disturbing account cited by Jane Mayer in The New Yorker, local informants often “say an enemy of theirs is Al-Qaeda because they just want to get rid of somebody. Or they ma[ke] crap up because they want[] to prove they [are] valuable, so that they [can] make money” (Mayer 2009). With no subsequent review of targeted killing operations, and therefore no real risk of consequences, it becomes far too easy to take these inaccurate tips at face value.

**VII. Conclusion and Recommendations**

As the United States continues to seek ways to protect itself from transnational terrorists, it will be forced to make difficult decisions. At present, the government hovers between operating within international law and setting that law aside in the belief that doing so is necessary to protect U.S. citizens. Ongoing claims that the U.S. is engaged in an “armed conflict” under international law with al-Qaeda and its affiliates remain unconvincing. Even if such claims were credible, the administration continues to undermine them by using the CIA to conduct its targeted killing operations instead of relying upon the military. Consequently, if President Obama wishes to bring American actions into accordance with international legal
standards, he will need to make some major changes.

First, the administration needs to reformulate its legal arguments. There may be a legitimate foundation for self-defense under Article 51, but that does not translate into the existence of an “armed conflict.” The administration should abandon rhetoric assuming such a conflict and embrace the far more convincing claim that targeted killings are justified solely through the United States’ right to defend itself in the face of an armed attack.

Second, the current target list must be brought in line with a stricter definition of “self-defense.” While drug lords who give money to the Taliban may pose a veritable threat, ordering them to be executed by CIA-operated drones using Hellfire missiles stretches the concept of self-defense too far. Furthermore, the collateral damage that inevitably occurs in eliminating these individuals is not proportionate to the advantage accrued by their removal. Therefore, in order to abide by accepted understandings of self-defense and to avoid potential encroachment on state sovereignty, it is necessary to amend the target list. Individuals who do not qualify for targeting under the new guidelines must be dealt with using less lethal methods that more closely resemble law enforcement activities.

Third, there needs to be far more transparency and oversight within the U.S. government’s targeting programs than currently exists. The United States does have a legal right to defend itself from terrorists, and that right does extend to some targeted killing operations outside of official war zones. However, it is vital that the U.S. government treat such operations with equally, if not more, exacting regulations than they would apply in a war zone. This means that under U.S. policy, only the military and not the CIA, should be operating the drones, and there ought to be a standard level of review and oversight. If the government worries that increased transparency of the program could impede the targeting of certain individuals, perhaps this is an indication that the executive has been overstepping his authority.

Finally, the United States ought to work with the global community to develop an international legal framework equipped to address the new political realities of a post-September 11 world. While terrorists and armed groups have existed throughout history, today they play a far more conspicuous role in the international security environment. In order to avoid the legal ambiguity that has engendered so much controversy about what the United States can and cannot do to defend itself against these actors, the United States should lead the effort to develop international laws that directly address this issue.
These laws would seek to answer such pressing questions as: when can a nation use force in another state to target individual terrorists if a war between the two states does not exist? What is the threshold that determines when a country may resort to its right of self-defense? And how closely linked must terrorist groups be in order to be viewed collectively as legitimate targets? Until international law confronts these questions directly, the boundaries of permissible conduct will remain undefined, leaving states free to interpret the law as suits their interests.

NOTES

1 For full text of ICCPR see: http://www2.ohchr.org/english/law/ccpr.htm.

2 Although the term “unlawful combatants” is not actually employed by the Geneva Conventions, it is frequently referenced in academic works. According to a legal advisor at the International Committee of the Red Cross, the phrase is most commonly “understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy” (Dormann 2003, 46).

REFERENCES


