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TARGETED KILLING AND THE LAW OF ARMED CONFLICT

Gary Solis

There is no consensus definition of “targeted killing” in the law of armed conflict or in case law.¹ A reasonable definition is: the intentional killing of a specific civilian who cannot reasonably be apprehended, and who is taking a direct part in hostilities, the targeting done at the direction and authorization of the state in the context of an international or noninternational armed conflict.

In the second year of the Redland-Blueland war, an armed conflict between two states, a Redland sniper squeezed the trigger of his rifle, the crosshairs of the

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scope unmoving on his target: a uniformed Blueland soldier. The weapon fired, and five hundred meters away the enemy combatant fell to the ground, dead.

Was this a “targeted killing”?

The Redland-Blueland war continued. After months of planning and the training of a team of disaffected Redland nationals, Blueland was ready to implement an operation against the enemy. Days later, two clandestinely inserted Redland nationals, trained in Blueland and wearing Blueland army uniforms, planted an explosive charge under a bridge located inside Redland. Later, as the limousine of the president of Redland passed over the bridge, the charge was detonated and the target killed. The president, elected to office when he was a college professor, had been a thorn in the side of the Blueland government, with his

anti-Blueland rhetoric and verbal attacks on Blueland policies. Now, Blueland's most hated critic was dead, silenced by Blueland agents.

Was this a "targeted killing"?

During World War II, in April 1943, Admiral Isoroku Yamamoto, commander in chief of the Japanese Combined Fleet, was on an inspection tour hundreds of miles behind the front lines. Having broken the Imperial Japanese Navy's message code, U.S. forces knew his flight itinerary and sent sixteen Army Air Forces P-38 Lightning fighter aircraft to intercept him. Near Bougainville, in the northern Solomons, the American pilots shot down their target, a Betty bomber, killing all on board, including Admiral Yamamoto.

Was this a "targeted killing"?

First, consider the Redland sniper. On the battlefield the killing of combatants—uniformed members of the army of one of the parties to the conflict—by opposing combatants is lawful. The sniper, a lawful combatant, killed a lawful enemy combatant in the course of armed conflict between two high contracting parties to the Geneva Conventions. To kill the enemy in a lawful manner was the sniper's mission; it was expected and required of him. A combatant taking aim at a human target and then killing him is not what is meant by the term "targeted killing." "The [1907] Hague Regulations expressed it more clearly in attributing the 'rights and duties of war.' . . . [A]ll members of the armed forces . . . can participate directly in hostilities, i.e., attack and be attacked."² 1977 Additional Protocol I, which supplements the 1949 Geneva Conventions, repeats that formulation.³ The status of "combatant" is crucial, because of the consequences attached to it. It is the mission of every state's armed forces—its combatants—to close with and destroy the enemy. Soldiers who do so are subject to no penalty for their acts.⁴ This was not a targeted killing.

The killing of Redland's president is another matter. He was a civilian and presumably a noncombatant, not subject to combatant targeting. The leaders of some states may be considered combatants, however—World War II's Adolf Hitler, for example. Saddam Hussein of Iraq, another example, was a combatant and lawful target, since he customarily wore a military uniform and went armed, often in the vanguard of Iraqi military units. He decided the tactical and strategic movements of his nation's military forces. These factors combined to make him a combatant and a lawful target in time of war.

How about the president of the United States? He is denominated by the Constitution as the "commander in chief" of the nation's armed forces. He is the person whom the chairman of the Joint Chiefs of Staff advises. The president is the final authority for the strategic disposition of U.S. armed forces—"the decider."⁵ In time of international armed conflict the president of the United States is a lawful target for an opposing state's combatants.

The United Kingdom's monarch? The monarch is the honorary colonel in chief or captain general of many Commonwealth regiments—seventy-one, in the case of Queen Elizabeth II—and is sometimes in military uniform for ceremonial occasions. But determining if a chief of state is a lawful target is not simply a question of whether he or she wears a uniform. In this instance, the king or queen exercises no command of armed forces and has no say in the tactical or strategic disposition of British forces; those decisions reside in the prime minister and Parliament. The United Kingdom's monarch, in uniform or not, is probably not a lawful target.

What little we know of Redland's president—a noncombatant with no apparent role in directing Redland's armed forces—suggests that he was not a lawful target. His killing, even in time of war, even by opposing combatants, was assassination.

There are many definitions of “assassination,” none universally accepted. The term does not appear in the 1907 Hague Conventions, 1949 Geneva Conventions, United Nations Charter, or the Statutes of the International Criminal Courts for Yugoslavia and Rwanda. Confusingly, the term is used differently in peace and in armed conflict.⁶ Assassination in time of armed conflict is “the specific targeting of a particular individual by treacherous or perfidious means.”⁷ This wartime definition tracks with that in the law of armed conflict (LOAC): “It is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army.”⁸ In U.S. practice, that language is “construed as prohibiting assassination. . . . It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”⁹ One simplistic but adequate definition of peacetime assassination is the “murder of a targeted individual for political purposes [or] for political reasons.”¹⁰ Former Department of State legal adviser Abraham D. Sofaer has described it similarly: “Any unlawful killing of particular individuals for political purposes.”¹¹

In the domestic law of most states, assassination is considered murder. Michael Walzer writes, “Political assassins are simply murderers, exactly like the killers of ordinary citizens. The case is not the same with soldiers, who are not judged politically at all and who are called murderers only when they kill noncombatants.”¹² In any event, the armed forces of most states are not customarily involved in assassination, that being left to other government organizations.* The killing of Redland's president was assassination and murder, but it was not a targeted killing.

* An example similar to that described here was the May 1942 assassination of SS Obergruppenführer Reinhard Heydrich, the SS chief of security police, deputy chief of the Gestapo, and the person largely responsible for “the final solution.” He was killed in Prague by two British-trained Czech soldiers disguised as civilians. Although Heydrich was a lawful combatant target, his combatant killers engaged in perfidy by disguising themselves as civilians. His killing was an assassination.

Nor was Admiral Yamamoto's death a targeted killing. Like the Blueland sniper's victim, Yamamoto was a lawful combatant in an international armed conflict, killed by opposing lawful combatants. "There is nothing treacherous in singling out an individual enemy combatant (usually, a senior officer) as a target for a lethal attack conducted by combatants distinguishing themselves as such . . . even in an air strike."¹³ The fact that Yamamoto was targeted away from the front lines is immaterial. Combatants may be targeted wherever found, armed or un-

What little we know of Redland's president suggests that he was not a lawful target. His killing was assassination.

armed, awake or asleep, on a front line or a mile or a hundred miles behind the lines, "whether in the zone of hostilities, occupied territory, or elsewhere."¹⁴ Combatants

can withdraw from hostilities only by retiring and becoming civilians, by becoming hors de combat, or by laying down their arms.¹⁵ The shooting down of Admiral Yamamoto was not a targeted killing.

These exclusionary examples indicate that targeted killing is *not* the battlefield killing of combatants by opposing combatants. Targeted killing is *not* the assassination of an individual, military or civilian, combatant or noncombatant, for political purposes. What *is* an example of targeted killing, then?

On 3 November 2002, over the desert near Sanaa, Yemen, a Central Intelligence Agency-controlled Predator drone aircraft tracked an SUV containing six men. One of the six, Qaed Salim Sinan al-Harethi, was known to be a senior al-Qa'ida lieutenant suspected of having played a major role in the 2000 bombing of the destroyer USS *Cole*. He "was on a list of 'high-value' targets whose elimination, by capture or death, had been called for by President Bush."¹⁶ The United States and Yemen had tracked al-Harethi's movements for months. Now, away from any inhabited area, the Predator fired a Hellfire missile at the vehicle. The six occupants, including al-Harethi, were killed.¹⁷

That was a targeted killing. In today's new age of nonstate actors engaging in transnational terrorist violence, targeting parameters must change. Laws of armed conflict agreed upon in another era should be interpreted to recognize the new reality. While some will disagree, the killing of al-Harethi should be considered as being in accord with the law of armed conflict.

SELF-DEFENSE

The justification for targeted killing rests in the assertion of self-defense. Israel argues that "it is the prime duty of a democratic state to effectively defend its citizens against any danger posed to their lives and well-being by acts or activities of terror."¹⁸ In the United States, the preamble of the Constitution includes the words, "in order to . . . provide for the common defense." A prominent Israeli

scholar argues, “It may be contended that the right of self-defence is inherent not in *jus naturale*, but in the sovereignty of States.”¹⁹ In 2004, the United States initiated an aggressive military-based strategy against suspected terrorists, no longer taking a law enforcement approach to their capture and trial.²⁰

An argument against a state’s assertion of self-defense as legal justification is that “this type of practice [targeted killing] is incompatible with international law, which categorically prohibits extra-judicial executions.”²¹ Indeed, 1907 Hague Regulation IV notes, “It is especially forbidden . . . to declare that no quarter will be given.”²² Human rights organizations say that “suspected terrorists should be detained and put on trial before they can lawfully be punished for their actions. . . . To kill under these circumstances is simply execution—but carried out without any trial or proof of guilt.”²³ The International Committee of the Red Cross says, “Any order of liquidation is prohibited, whether it concerns commandos . . . irregular troops or so-called irregular troops . . . or other cases. It is not only the order to put them to death that is prohibited, but also the threat and the execution, with or without orders.”²⁴ The prohibition on targeting non-combatant civilians is considered customary law.²⁵ Some of these objections presume the employment of a law enforcement model in combating terrorists. But that model is irrelevant to targeted killing, which employs military means to target enemy civilian combatants, albeit unlawful combatants,* during an armed conflict. “The 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.”²⁶

Even in the law enforcement model an individual—or in this case, a state—may defend itself from attack, a state’s right to defend itself being embedded in the Charter of the United Nations. Nor are terrorists, particularly those in leadership roles, easily detained for trial.

THE ISRAELI VIEW

Israel has openly engaged in targeted killing since September 2000 and the second intifada.²⁷ Even before then, Gerald V. Bull, a Canadian civilian artillery expert, was in the pay of Iraq and well along in building an artillery “supergun” capable of firing a 1,300-pound projectile six hundred miles. From the gun’s location in Iraq, Israel would be an easy target. In March 1990, individuals

* An unlawful combatant is one who takes an active and continuous part in armed conflict who therefore should be treated as a combatant in that he/she is a lawful target of attack, not enjoying the protections granted civilians. Because unlawful combatants do not differentiate themselves from civilians and do not obey the laws of armed conflict they are not entitled to the privileges of combatants, for example, prisoner-of-war status.

believed but never proven to be Israeli agents murdered Bull as he entered his Paris apartment.

In 1996, a notorious Hamas bomb maker known as “The Engineer,” Yehiya Ayash, was killed when he answered a cell phone booby-trapped by the Israelis.²⁸ His targeted killing was celebrated throughout Israel, but it also initiated a series of retaliatory suicide bombings that killed more than sixty Israelis. In 2000, helicopter-fired missiles killed a Palestinian Fatah leader and deputy of Yasir Arafat; an Israeli general said, “He’s not shooting at us yet, but he’s on his way.”²⁹ In 2001, Israeli helicopters fired missiles into the West Bank offices of Hamas, killing eight.³⁰ Later, in 2002, in Gaza, Salah Shehade, the civilian founder and leader of Hamas’s military wing and an individual said by the Israelis to be responsible for hundreds of noncombatant deaths, was targeted. In predawn hours an Israeli F-16 fighter jet dropped a one-ton bomb on the three-story apartment building where Shehade was sleeping. He was killed, along with fourteen others asleep in the building, including nine children. One hundred and seventy were reportedly wounded.³¹

Among the most notable of Israel’s targeted killings was that of the wheelchair-bound Sheik Ahmed Yassin, the cofounder of Hamas and its spiritual leader. He was reputedly involved in authorizing terrorist actions against Jews. In March 2004, he was killed by helicopter-fired Hellfire missiles, along with two bodyguards and eight bystanders. Another fifteen were wounded. “The Bush administration felt constrained . . . to say it was ‘deeply troubled’ by Israel’s action, though later it vetoed a UN Security Council resolution condemning the action.”³²

These Israeli actions were not taken in a vacuum, of course. Israeli noncombatants have been victims of countless terrorist attacks; Israel has been involved in numerous international armed conflicts with states employing terrorism, as well as with individual civilians whom Israel later targeted.

The LOAC problem with the Israeli view is summed up in the general’s phrase, “He’s not shooting at us yet, but he’s on his way.” The civilian target is *presumed* to intend direct participation in hostilities. Professor Yoram Dinstein, an Israeli and a foremost LOAC scholar, writes, “attack[s] (which may cause death, injury and suffering) are banned only on condition that the persons concerned do not abuse their exempt status. When persons belonging to one of the categories selected for special protection—for instance, women and children—take an active part in hostilities, no immunity from an ordinary attack can be invoked.”³³

Early in the U.S. conflict against Iraq, *Forward*, a Jewish daily newspaper, mixing assassination and targeted killing, reported:

The Bush administration has been seeking Israel’s counsel on creating a legal justification for the assassination of terrorism suspects. . . . American representatives were

anxious to learn details of the legal work that Israeli government jurists have done . . . to tackle possible challenges—both domestic and international—to its policy of “targeted killings” of terrorist suspects. . . . Unlike Israel, which went public in November 2000 with its assassination policy, the Bush administration . . . officially is opposed to such assassinations and does not acknowledge that it engages in such actions.³⁴

With the widely reported November 2002 targeted killing of al-Harethi, American deniability of the tactic’s use faded, along with American criticism of Israel’s tactic. The question is whether the United States shares Israel’s broad view of when a terrorist is a lawful target.

THE AMERICAN VIEW

Although there were dissenters, the United States and much of the Western press was initially critical of the Israeli practice.³⁵ As early as 1991, however, former president Richard Nixon said that were he still in the White House he would order the assassination of Saddam Hussein.³⁶ In 2001, the American ambassador to Israel, Martin Indyk, scolded, “The United States government is very clearly on record as against targeted assassinations. . . . They are extra-judicial killings and we do not support that.”³⁷ Yet, in 1989, Abraham Sofaer, State Department legal adviser, equivocated: “While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State’s ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender’s unlawful activities from occurring.”³⁸ In August 1998, still viewing lethal attacks on individual targets as assassination, a U.S. presidential finding allowed the targeting of Osama Bin Laden, seen as the force behind the bombing of American embassies in Kenya and Tanzania.³⁹ The United States fired a volley of cruise missiles at an Afghan training compound linked to Bin Laden, saying, “That prerogative arises from a fundamental right of national self-defense.”⁴⁰

The 2002 killing of al-Harethi in Yemen attracted dissenters, but by then the United States had found targeted killing a useful weapon in the “war on terrorism.”⁴¹ The killing of al-Harethi had “shift[ed] the war on terrorism into a new gear.”⁴² The U.S. change of stance was described as reflecting a broader definition of the battlefield upon which the war on terrorism was being fought. Later, the right of national self-defense was also proffered as justification for targeting individuals associated with terrorist groups, as well as self-defense under article 51 of the United Nations Charter.⁴³ Under a series of classified presidential findings, President Bush broadened the number of specifically named terrorists who

may be killed if their capture is impractical.⁴⁴ In June 2006, the targeted killing of Abu Musab al-Zarqawi, leader of al-Qa'ida in Iraq, was celebrated as a strategic and political victory.

In early 2006, it was reported that since 9/11 the United States had successfully carried out at least nineteen targeted killings via Predator-fired Hellfire missiles. "The Predator strikes have killed at least four senior al-Qa'ida leaders, but also many civilians, and it is not known how many times they missed their targets."⁴⁵ The question of whether America shares Israel's broad view of when a civilian terrorist is a lawful target has not yet been clearly answered. Further U.S. attacks will reveal America's policy.

DOMESTIC LAW

A killing in the name of the state must be based upon, or at least not in contravention of, the state's domestic law. Targeted killing is not contrary to U.S. law.

The Constitution's Fifth Amendment, which protects any person from deprivation of life without due process, is not in play. Recent federal case law holds that the Fifth Amendment does not prohibit American agents from torturing foreign nationals abroad. The same reasoning would appear to apply to targeted killing, the court hypothesizes.⁴⁶ More to the point, federal law authorizes the use of U.S. military force to "defend the national security of the United States against the continuing threat posed by Iraq."⁴⁷ Additionally, Congress has authorized the use of "all necessary and appropriate force" against those who carried out the September 11th attacks and all who aided them and "to prevent future acts of international terrorism against the United States."⁴⁸

As long as the targeted killing is related to the continuing threat against U.S. forces in Iraq, or is focused on those involved in the 9/11 attack or on those who aided or harbored them, or is intended to prevent future acts of terrorism against the United States, it does not violate U.S. domestic law and is in accord with Congress's authorizations of force.

CHARACTERISTICS OF TARGETED KILLING

The 1949 Geneva Conventions are silent on targeted killing and who might constitute a lawful target. There is no announced American policy directive regarding targeted killing. Assassination is addressed in Executive Order 12333, which does not prohibit killing absolutely but does require presidential approval, which the president may give in secret or otherwise. But assassination and targeted killing are different acts. Given that there is no official protocol, one looks to LOAC for guidelines for the execution of a targeted killing.

First, an international or noninternational conflict must be in progress. Without an ongoing armed conflict the targeted killing of a civilian, terrorist or

not, would be assassination—a homicide and a domestic crime. Moreover, “IHL [international humanitarian law, or LOAC] can only be applicable when the terrorists are involved in an existing international or internal armed conflict, or when the conflict between a state and a terrorist group within its territory rises to the level of an armed conflict.”⁴⁹ If one contests the view that an armed conflict is ongoing, the lawfulness of any targeted killing is necessarily contested as well. It is the predicate armed conflict that raises the right to kill an enemy.

Second, the victim must be a specific civilian. Obviously, civilian victims may not be random targets. They must be selected by reason of their activities in relation to the armed conflict in progress. Were the identified civilians lawful combatants, uniformed and openly armed, they would be opposing combatants’

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lawful targets, with no further discussion merited. On the other hand, it is clear that noncombatants may not be lawfully targeted.⁵⁰ But civilians who take up

arms may be. A vital distinction, then, is that between a “civilian” and a “non-combatant.” The two terms are often conflated; such descriptive carelessness is usually irrelevant, but not in this case. The targeted civilian must be a civilian unlawful combatant.

A civilian is any person *not* belonging to one of the categories referred to in Geneva Convention III who is eligible for prisoner-of-war status upon capture.⁵¹ As Additional Protocol I points out, “Civilians shall enjoy the protection afforded by this Section [General Protection against Effects of Hostilities], unless and for such time as they take a direct part in hostilities.”⁵² In other words, a civilian who injects himself directly into ongoing hostilities violates the basic concept of distinction and becomes something other than a noncombatant. He forfeits civilian immunity and becomes a lawful target. “For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities. . . . [A] person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to the other.”⁵³

Only a specific civilian may be singled out for targeted killing. If an unaffiliated gathering of civilians is targeted it is unlikely (although possible) that all will have violated the distinction above and thereby made lawful targets of themselves and the entire group, or that all will have shared equally in the unlawful participation in hostilities. Were it otherwise, the forfeiture of immunity by one member of a group’s taking a direct role in fighting would render all group members targets. A critical exception is groups—terrorists, for example—

whose membership as a whole is dedicated to active engagement in unlawful combatancy.

Third, the individual who has engaged directly in hostilities, the unlawful combatant, must be beyond possible arrest by the targeting state. Since the focus of U.S. targeted killing is on noncitizens abroad, where the United States has no arrest authority, the issue does not arise. Presumably, neither would an allied state be in a position to make an arrest. U.S. constitutional issues, such as probable cause, do not arise when noncitizens abroad are targeted. If capture is possible, however, that option must be exercised. The status of previously targeted civilians would be that of arrestees, subject to interrogation and trial for the precapture acts that rendered them unlawful combatants.⁵⁴ They fit none of the various criteria for prisoner-of-war status contained in 1949 Geneva Convention III.⁵⁵

Fourth, only a senior military commander, as a representative of the targeting state, may authorize a targeted killing. Of course, the authorizing individual may also be the president or a senior government official to whom the president has delegated targeting authority, such as the secretary of defense or the director of the Central Intelligence Agency.

THE AUTHORIZING DECISION

Under current directives, the president's personal approval for specific operations is reportedly not required for persons already designated by him as potential targets.⁵⁶ "As commander in chief, the President has the constitutional authority to command the use of deadly force by troops in war, whether it has been declared by Congress or thrust upon us by enemy attack or invasion."⁵⁷ Once beyond targets authorized by the president, what level of military commander may authorize a targeted killing on behalf of the United States? Army commanders? Battalion commanders? Press reports indicate that in Israel such decisions must be approved by "senior cabinet members," which apparently translates to the prime minister.⁵⁸ For the United States, the decision to carry out a targeted killing, with its potential political repercussions, should be made, if not by the president, only by the most senior military officers. The four-star commanders of the five geographically defined unified U.S. commands (Northern Command, Southern Command, Central Command, Pacific Command, and European Command) seem the lowest-ranking military officers who should be delegated such authority.⁵⁹

The military commander's initial consideration is military necessity: Is the planned action indispensable for securing the submission of the enemy? The death of no one person will end global terrorism, but would the killing of this

particular target constitute a substantial injury to its cause or seriously disrupt its plans?

High among the commander's considerations is collateral damage.⁶⁰ Collateral damage, like proportionality and unnecessary suffering, is a difficult issue allowing for lenient judgment and moral assessment. In 2002, the Israeli chief of military intelligence, haunted by civilian deaths in killings he had overseen, asked a mathematician to write a formula to determine the number of acceptable civilian casualties per dead terrorist. Unsurprisingly, the effort was unsuccessful.⁶¹ Each proposed targeted killing raises its own unique considerations and moral dilemmas. There are no preconceived solutions.

DIRECT PARTICIPATION IN HOSTILITIES

The lawfulness of targeted killing turns on interpretation of the term "direct participation in hostilities." As 1977 Additional Protocol I specifies, civilians are not lawful targets "unless and for such time as they take a direct part in hostilities."⁶² For Israel, such activities reportedly include "persons recruiting certain other persons to carry out acts or activities of terror" and "developing and operating funding channels that are crucial to acts or activities of terror," among other definitions.⁶³ These are broad definitions of direct participation in hostilities. Professor Raphael Cohen-Almagor, director of the Center for Democratic Studies at the University of Haifa, holds that "Israel has the right and duty to kill these terrorists. . . . Furthermore, it is justified to kill chiefs of terrorist operations who plan and orchestrate murderous attacks."⁶⁴ Professor Robert K. Goldman of American University's Washington College of Law offers a U.S.-centric viewpoint, saying, "The basic premise is that the U.S. regards itself as at war with al-Qa'ida. That being the case, it regards members of al-Qa'ida as combatants engaged in war against the U.S."⁶⁵ Is mere membership in al-Qa'ida enough to make a member a target wherever and whenever he may be found, or is something more required?

The civilian driver delivering ammunition to combatants and the civilian gathering military intelligence in enemy-controlled territory are arguably actively participating in hostilities. But when does their participation end? May the driver be targeted after he has returned to his starting point and walked away from the truck? May he be targeted when he is being toasted in the mess, late that evening? The next day? What if he were driving an ammunition truck miles away from the scene of any combat activity? May the intelligence gatherer be killed before he actually embarks on his task? Is a civilian POW-camp guard directly participating in hostilities? A civil defense worker who directs military traffic through his town? A civilian clearing land mines placed by the enemy? Is a civilian seated in the Pentagon, controlling an armed Predator over Iraq, directly

participating in hostilities? The United States authorizes the arming of civilian defense contract workers in combat zones, and they “may be authorized to provide security services.”⁶⁶ Are they directly participating in hostilities?

But these conundrums, relating to civilians of no particular political import or military significance, do not describe the probable targeted killing candidate in a war on terrorism. More apropos, when is Pakistan’s al-Qa‘ida coordinator a civilian, and when is he an unlawful combatant “directly participating in hostilities”? Only when he is actually engaged in a firefight with American or Pakistani forces? Only when he is actively directing terrorist activities? Or, by virtue of his leadership position, is he not *always* a legitimate target—when asleep, or when playing with his children? In 2002, was the senior al-Qa‘ida lieutenant, al-Harethi, who planned the bombing of the USS *Cole*, a lawful target while he was on the move in Yemen, fighting no one, formulating no terrorist plan? Israel takes the view that enemy leaders, including strategists who plan and advise, and technical experts are not foot soldiers in the army of unlawful combatants and that they are *always* legitimate targets, wherever they may be, whatever activity they are engaged in, and require no warning of attack.

Civilians are protected unless they take a direct part in hostilities, and only *for such time* as they do. Professor Antonio Cassese writes, “When civilians taking a direct part in hostilities lay down their arms, they reacquire noncombatant immunity and may not be made objects of attack although they are amenable to prosecution for unlawfully participating in hostilities (war crimes).”⁶⁷ But, one may argue, by virtue of their positions, civilians who lead terrorist groups seldom literally pick up arms and so, metaphorically, never lay them down. As Brigadier General Kenneth Watkin, judge advocate general of Canada’s armed forces, says, “It is not just the fighters with weapons in their hands that pose a threat.”⁶⁸

Not all law of war scholars agree that terrorists may be targeted only when actually engaged in terrorist activities:

If we accept this narrow interpretation, terrorists 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 a terrorist act. Is this theory, which has been termed the revolving door theory, tenable? . . . Another argument is that a “combatant-like” approach based on membership in the military wing of a group involved in hostilities, rather than on individual actions, should be adopted in deciding whether persons may be targeted. If we adopt the restricted theory, according to which international terrorists are civilians who may only be targeted while taking a direct part in hostilities, the right of self-defence under Article 51 of the UN Charter . . . may become meaningless.⁶⁹

Is the civilian cofounder of Hamas, Ahmed Yassin—half-blind, paralyzed, and wheelchair-bound, killed as he left morning prayers at a local mosque—immune from attack because he was engaged in innocent activity at the moment of his death? Is Yehiya Ayash, the civilian who constructed diabolically effective bombs but led no combatants, gave neither orders nor instructions, who acted only as a fabricator of tools of insurgency, a lawful target only when actually constructing a bomb? A combatant general—for example, Dwight Eisenhower during World War II—is by virtue of his position of command and authority a legitimate target whenever and wherever he can be found by enemy combatants. Eisenhower, whether in London or Kansas, in civilian clothes or uniform, was always on duty, always an Allied commander, and could have been lawfully killed by any Axis combatant. Should civilian terrorist leaders, and terrorists with critical war-making skills, be free from the same threat by consciously avoiding lawful combatancy? Should not they, like the uniformed lawful combatants *they* target, be considered legitimate targets whenever and wherever they are found? It is reasonable that “the effect of the ‘temporal’ wording found in Article 51(3) of Additional Protocol I is significantly more limited than commonly believed.”⁷⁰ Columbia University School of Law professor George Fletcher points out:

This phrase “direct part” conjures up a picture of someone picking up a gun and aiming it at the enemy. But . . . ordinary principles of self-defence apply against people pointing guns, whether they are civilians or not. Targeted assassinations are usually aimed at the organizers of terrorist attacks—not those who are aiming weapons. . . . The targets are the key figures behind the scenes who organize the suicide bombings, the hijacking and other terrorist activities. Are they “taking direct part in hostilities”? I think the phrase lends itself to this construction.⁷¹

Two hundred years ago, the great eighteenth-century legal scholar Emerich de Vattel wrote, “Assassins and incendiaries by profession, are not only guilty in respect to the particular victims of their violences, but likewise of the state to which they are declared enemies. All nations have a right to join in punishing, suppressing, and even exterminating these savages.”⁷²

One may ask: If civilian terrorist leaders and terrorists with critical skills may be targeted, why not *all* terrorists? If it is lawful for some to be killed, is it not lawful for all to be killed? Logic compels a positive response: yes, it is lawful for all terrorists potentially to be subject to targeted killing, regardless of their positions or “duties.” But logic and practicality similarly dictate that only senior leaders and particularly dangerous specialists in groups dedicated to unlawful combatancy be singled out for targeted killing. The availability of resources—Predator drones and laser-directed munitions, for example—will severely limit the number of terrorists who may be targeted. The availability of mission

planners and support personnel—intelligence officers and agents, communications analysts, and interpreters—is similarly limiting. Just as in past wars, in which only senior combatants—Isoroku Yamamoto, Dwight Eisenhower, Bernard Montgomery, and Erwin Rommel—could be singled out for the demanding effort required for their targeting, so it would inevitably be for today’s terrorists. Finally, the judgment and reason of the senior leaders permitted to authorize targeted killing would also act as a natural brake upon the tactic.

That is not to say that a terrorist is a target for life. A soldier is a lawful target only so long as he or she remains a soldier. Soldiers who have retired from armed service and, in the words of 1949 Geneva Convention common article 3, “members of armed forces who have laid down their arms” are no longer combatants or lawful targets. A civilian terrorist who lays down his arms or, more significantly, lays down his arms and departs the combat zone would no longer be a legitimate target. Again, the reason and judgment of those authorized to order targeted killing would act as a brake upon targeting simple terrorist apostates.

Determining an individual’s “direct participation” should not be confused with testing for lawfully targeting *objects*.⁷³ The criteria for targeting “people” and “objects” differ. Direct participation remains the thorniest issue in targeted killing, something that states and their political leaders and military commanders must resolve in each case, recalling that their resolutions may eventually be under international review. The law of armed conflict boldly states the criteria for targeting but does not clearly apply its criteria to kaleidoscopic real-world situations.

ADVANTAGES AND DISADVANTAGES

Killing senior terrorists, expert bomb makers, and those who provide philosophical guidance for terrorists may spare countless noncombatant victims while, at the same time, forgoing risk to friendly combatant forces. A successful targeted killing removes a dangerous enemy from the battlefield and deprives the foe of his leadership, guidance, and experience. The targeted killing of terrorist leaders leaves subordinates confused and in disarray, however temporarily. Successors will feel trepidation, knowing they too may be in the enemy’s sights. Targeted killing unbalances terrorist organizations, making them concerned with protecting their own membership and diverting them from their goals.

But targeting mistakes are made, whether the intended victim is killed one on one or by missiles.⁷⁴ In 1973, in Lillehammer, Norway, Israeli Mossad agents murdered a Moroccan waiter they mistook for a Palestinian involved in killing Israeli athletes at the Munich Olympics the year before.⁷⁵ On the Pakistan-Afghanistan border in February 2002, a U.S. Predator tracked and killed a tall individual in flowing robes believed to be Osama Bin Laden. He was not.⁷⁶ Tactical

situations may change in the moments between the order to fire and impact—women and children enter the impact area, the target moves to cover. Stuff does happen.⁷⁷

Innocent bystanders are often killed in targeted killings. Crowded city streets, even isolated houses, inevitably yield “collateral damage.” Are the anticipated deaths proportional? What level of probable noncombatant lethality is acceptable? “An extremely strong case has to be made to justify an attack on suspected terrorists when it is likely, not to mention inevitable, that the attack will cause the death of civilians. After all[,] . . . the military advantages to be gained by targeting them are based largely on speculation.”⁷⁸ Does a more significant targeted individual justify a greater potential number of innocent deaths? Does the possible death of Osama Bin Laden justify the probable deaths of five bystanders? Ten? Fifty? In January 2006, in the village of Damadola, Afghanistan, seventeen Afghans died in a futile U.S. missile strike on several houses. The attack was aimed at al-Qa’ida deputy Ayman Zawahiri.⁷⁹ American commanders apparently thought the risk of multiple noncombatant deaths was outweighed by the possibility of killing Zawahiri.

Targeted killings may prove counterproductive, in that they can instigate greater violence in revenge or retaliation. “I hope it will reduce the violence and bring back reason to this area,” an Israeli major general said in 2000 after three missiles killed a Palestinian leader and two middle-aged female bystanders.⁸⁰ Instead, the killings touched off a week of the most intense fighting seen in that round of the conflict.

In a world where the enemy has missiles too, a targeted killing by the United States “makes every American official both here and in the Middle East a target of opportunity.”⁸¹ If an expanded interpretation of who constitutes a legitimate civilian candidate for targeted killing is accepted, we must accept that our own nonuniformed leaders and weapons specialists will become legitimate targets. “The United States and countries that follow its [targeted killing] example must be prepared to accept the exploitation of the new policy by adversaries who will not abide by the standards of proof or evidential certainty adhered to by Western democracies.”⁸² Some believe the bombing of Pan Am flight 103 over Lockerbie, Scotland, on 21 December 1988, killing 270, was Muammar Qaddafi’s revenge for the 1986 U.S. bombing of his Libyan home that killed his fifteen-month-old daughter.⁸³ “Many past and present military and intelligence officials have expressed alarm at the Pentagon policy about targeting Al Qaeda members. Their concerns have less to do with the legality of the program than with its wisdom, its ethics, and, ultimately, its efficacy.”⁸⁴

It is argued that civilian victims of targeted killing, not afforded an opportunity to surrender, are deprived of due process and denied the “inherent right to

life.”⁸⁵ The victim is unable to contest that he is a terrorist, seek judicial review, or lodge an appeal; no legal assessment of the legality of the targeting is available.⁸⁶ But these objections accompany the initial question of direct participation in hostilities; if an individual is directly involved in hostilities, he forfeits noncombatant immunity and becomes a lawful target. Soldiers engaged in armed conflict are not afforded due-process rights. Even away from the battlefield, “deprivation of life shall not be regarded as a violation of the right to life when it results from the use of force which is no more than absolutely necessary in . . . defence of any person from unlawful violence.”⁸⁷ If considered a case of proportional self-defense, targeted killing would not violate the right to life off the battlefield.

With the limitations discussed here, targeted killing is within the bounds of law of armed conflict. Terrorists should not be permitted the shield of Additional Protocol I, article 51.3. This conclusion requires a broader interpretation of article 51.3, granting civilians targeting immunity except when they are directly participating in hostilities, than is currently universally accepted. But expansive interpretations of treaty provisions are not novel. (Although the United States has not ratified Additional Protocol I, article 51.3 is widely considered an expression of customary law.) Dean Anne-Marie Slaughter, of Princeton University’s Woodrow Wilson School of Public and International Affairs and a former president of the American Society of International Law, argues that the United Nations should itself target individuals identified by the Security Council as murderous despots. (She adds, however, “Such a course would never be acceptable, if undertaken by a single nation.”)⁸⁸ Still, LOAC is not contravened if a targeted killing is carried out by a nation acting within the parameters described here. In U.S. law, and in the law of armed conflict, the targeting killing of civilians taking a direct part in hostilities, while they are taking a direct part, is not forbidden. The issue is in deciding what constitutes “a direct part.” As always, the devil is in the details.

NOTES

1. There are definitions in scholarly articles—for example, “Premeditated killing of an individual by a government or its agents.” William C. Banks and Peter Raven-Hansen, “Targeted Killing and Assassination: The U.S. Legal Framework,” 37 *University of Richmond Law Review* (2002–2003), p. 671.
2. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977* [hereafter *Commentary*] (Geneva: Martinus Nijhoff, 1987), p. 515. Grotius, in his landmark 1625 work, writes, “According to the law of nations, anyone who is an enemy may

- be attacked anywhere. As Euripides says: ‘The laws permit to harm a foe where’er he may be found’; Hugo Grotius, *The Law of War and Peace* (Buffalo, N.Y.: Hein reprint of Kelsey translation, 1995), Book III, chaps. IV, VIII.
3. 1977 Additional Protocol I [hereafter AP I], art. 43.2. AP I is one of two treaties that update and supplement the familiar 1949 Geneva Conventions: “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants [and] have the right to participate directly in hostilities.”
 4. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, U.K.: Oxford Univ. Press, 2004), ¶ 4.1: “Combatants have the right to attack and to resist the enemy by all the methods not forbidden by the law of armed conflict.” See also ¶ 5.4.5, listing lawful military objectives (“a. combatant members of the armed forces and those who take a direct part in hostilities without being members of the armed forces [who are not hors de combat]”).
 5. President George W. Bush in Camp David interview, 18 April 2006, available at www.cnn.com/2006/POLITICS/04/18/rumsfeld/. On 1 May 2003, aboard the aircraft carrier USS *Lincoln*, President Bush wore a military flight suit while announcing the conclusion of armed operations in Iraq.
 6. U.S. Army Dept., Judge Advocate Memorandum of Law (27-1a), Subject: Executive Order 12333 and Assassination, n.d., reprinted in *The Army Lawyer* (December 1989), p. 4.
 7. Maj. Matthew J. Machon, “Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror” (25 May 2006, unpublished monograph, School of Advanced Military Studies, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, on file with author).
 8. *Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations* [hereafter HR IV], 18 October 1907, Annex 1, 36 Stat. 2277, TS 539 (26 January 1910), art. 23(b).
 9. U.S. Army Dept., *The Law of Land Warfare, Field Manual* [hereafter FM] 27-10 (Washington, D.C.: U.S. Government Printing Office, 1956), para. 31.
 10. Judge Advocate Memorandum of Law (27-1a), ¶ 3.a. Even were targeted killing considered assassination, EO 12333 presents no real impediment to targeting individuals in wartime. An EO is not law, and it may be revoked or excepted by the president as readily as it was applied.
 11. Abraham D. Sofaer, “Terrorism, the Law, and the National Defense,” 126 *Military Law Review* (1989), p. 117.
 12. Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), pp. 200–201.
 13. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, U.K.: Cambridge Univ. Press, 2004), p. 199.
 14. FM 27-10, para. 31.
 15. 1949 Geneva Conventions, common art. 3(1). For hors de combat, Dinstein, *Conduct of Hostilities*, p. 28.
 16. Seymour M. Hersh, “Manhunt,” *New Yorker*, 23 and 30 December 2002, p. 66.
 17. “No Holds Barred,” *Economist*, 9 November 2002, p. 49.
 18. Asa Kasher and Amos Yadlin, “Assassination and Preventive Killing,” 25-1 *SAIS Review of International Affairs* (Winter–Spring 2005), p. 45.
 19. Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge, U.K.: Cambridge Univ. Press, 2005), p. 180.
 20. “Dr. Condoleezza Rice’s Opening Remarks to Commission on Terrorist Attacks,” 8 April 2004, available at www.whitehouse.gov/news/releases/. Presidential Decision Directive 62, signed in 1998, ordered the secretary of defense to provide transportation to bring individual terrorists to the United States for trial.
 21. Vincent Joël Proulx, “If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists,” 56 *Hastings Law Journal* (2004–2005), p. 873.
 22. HR IV, art. 23(d).
 23. Anthony Dworkin, “The Killing of Sheikh Yassin: Murder or Lawful Act of War?” Crimes of War Project, 30 March 2004, available at www.crimesofwar.org/onnews/news-yassin.html.

24. Sandoz, Swinarski, and Zimmermann, eds., *Commentary*, p. 476.
25. *Prosecutor v. Pavle Strugar & Others* (ICTY Case IT-01-42-AR72), Appeals Chamber decision of 22 November 2002, paras. 9–10 on interlocutory appeal.
26. David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 16-2 *European Journal of International Law* (2005), p. 179.
27. O. Ben-Naftali and K. R. Michaeli, “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings,” 36 *Cornell International Law Journal* (2003), p. 239.
28. Keith B. Richburg and Lee Hockstader, “Israelis Kill Arab Militia Official,” *Washington Post*, 10 November 2000, p. A1.
29. Deborah Sontag, “Israelis Track Down and Kill a Fatah Commander,” *New York Times*, 10 November 2000, p. A1.
30. Clyde Haberman, “Israeli Raid Kills 8 at Hamas Office; 2 Are Young Boys,” *New York Times*, 1 August 2001, p. A1.
31. In 2005, I asked an IDF judge advocate who was involved in planning the Shehade operation what he had been thinking to allow a one-ton bomb to be employed in such a manner. His response, inadequate but understandable to any military planner, was, “We f—d up.”
32. Craig R. Whitney, “War on Terror Alters U.S. Qualms about Assassination,” *International Herald Tribune*, 29 March 2004, p. 2.
33. Dinstein, *Conduct of Hostilities*, p. 150.
34. Ori Nir, “Bush Seeks Israeli Advice on ‘Targeted Killings,’” *Forward*, 7 February 2002, p. 1, available at www.forward.com/issues/2003/.
35. For dissenters, Prof. Robert F. Turner, “In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden,” *USA Today*, 26 October 1998, p. 17A. For the Western press, “Self-Licensed to Kill,” *Economist*, 4 August 2001, p. 12 (“Israel justifies these extra-judicial killings as self-defense. . . . But the usual context of such a discussion would be that the two sides involved were at war. . . . The barely remembered truth is that the Israeli government and the Palestinian Authority are supposed to be partners in a peace process”) and, “Assassination Ill Befits Israel,” *New York Times*, 7 October 1997, p. A24 (“Trying to assassinate Palestinian leaders in revenge is not the answer”).
36. Reuters, “Nixon Solution: He Would Order Hussein Killed,” *International Herald Tribune*, 15 April 1991, p. 3.
37. Joel Greenberg, “Israel Reaffirms Its Policy of Assassinating Militants,” *New York Times*, 6 July 2001, p. A6.
38. Sofaer, “Terrorism, the Law, and the National Defense,” p. 121.
39. Bob Woodward and Vernon Loeb, “CIA’s Covert War on Bin Laden,” *Washington Post*, 14 September 2001, p. A1.
40. Paul Richter, “White House Justifies Option of Lethal Force,” *Los Angeles Times*, 29 October 1998, p. A1.
41. On dissenters, Proulx, “If the Hat Fits,” p. 884: “I contend that targeted killing amounts to a violation of customary international law . . . effectively stripping the target of his right to claim POW status, which is in direct violation of Articles 4 and 5 of *Convention III*.”
42. “No Holds Barred,” *Economist*.
43. N. G. Printer, Jr., “The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen,” 8 *UCLA Journal of International Law and Foreign Affairs* (2003), pp. 359–60.
44. James Risen and David Johnston, “Bush Has Widened Authority of C.I.A. to Kill Terrorists,” *New York Times*, 15 December 2002, p. A1.
45. Josh Meyer, “CIA Expands Use of Drones in Terror War,” *Los Angeles Times*, 29 January 2006, p. A1.
46. *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 945 (DC Cir. 1988).
47. 116 Statute 1498: Public Law 107-243 of 16 October 2002, “Authorization for Use of Military Force against Iraq Resolution of 2002,” sec. 3.
48. Public Law 107-40, 115 Stat. 224 (18 September 2001).
49. Tom Ruys, *License to Kill? State-Sponsored Assassination under International Law*, Working Paper 76 (Leuven, Belg.: Institute for International Law, May 2005), available

- at www.law.kuleuven.ac.be/iir/eng/wp/title.html.
50. HR IV, art. 25, and 1977 AP I, art. 3 (1)(a) and (d). Also, "It is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them." UK Ministry of Defence, *The Law of War on Land: Part III of the Manual of Military Law* (London: Her Majesty's Stationery Office, 1958), para. 13. All nations' military manuals are in agreement.
51. AP I, art. 50.1.
52. *Ibid.*, art. 51.3.
53. Dinstein, *Conduct of Hostilities*, pp. 27–28.
54. FM 27-10, paras. 80, 81; HCJ 769/02, *Public Committee against Torture, et al. v. Government of Israel, et al.* (13 December 2006), para. 25.
55. The targeted individual would not fall under Geneva Convention III, art. 4.A(2), as a member of a "volunteer corps, including those of organized resistance movements," because in the war against terrorism a nonstate enemy cannot be a party to the Geneva Conventions.
56. David Johnston and David E. Sanger, "Fatal Strike in Yemen Was Based on Rules Set Out by Bush," *New York Times*, 6 November 2002, p. A14.
57. Banks and Raven-Hansen, "Targeted Killing and Assassination," p. 677, citing *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).
58. Laura Blumenfeld, "In Israel, a Divisive Struggle over Targeted Killing," *Washington Post*, 25 August 2006, p. A1.
59. For a listing of commands (less, when visited, African Command) see *United States Department of Defense*, available at www.defenselink.mil/specials/unifiedcommand.
60. AP I, art. 51.5(b).
61. Blumenfeld, "In Israel, a Divisive Struggle."
62. AP I, art. 51.3.
63. Kasher and Yadlin, "Assassination and Preventive Killing," p. 48. Professor Kasher is an academic adviser to the Israeli Defense Force College of National Defense. Major General Yadlin is the former commander of the same college.
64. "Targeting Assassination," *Washington Post*, 25 April 2004, p. B4.
65. Esther Schrader and Henry Weinstein, "U.S. Enters a Legal Gray Zone," *Los Angeles Times*, 5 November 2002, p. A1.
66. U.S. Defense Dept., "Contractor Personnel Authorized to Accompany the U.S. Armed Forces," Instruction 3020.41, 3 October 2005, para. 6.3.5.
67. Antonio Cassese, "Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law" (unpublished manuscript on file with author, n.d.), p. 3.
68. Kenneth Watkin, "Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, ed. David Wippman and Matthew Evangelista (Ardsley, N.Y.: Transnational, 2005), pp. 137, 147.
69. Kretzmer, "Targeted Killing of Suspected Terrorists," p. 193.
70. Watkin, "Humans in the Cross-Hairs," p. 155.
71. George P. Fletcher, "The Indefinable Concept of Terrorism," 4 *Journal of International Criminal Justice* (November 2006), p. 898. ICRC writings also support the position that an individual may take an active part in hostilities without touching a weapon. See Sandoz, Swinarski, and Zimmermann, eds., *Commentary*, pp. 618–19.
72. Emerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature* (Northampton, Mass.: Thomas M. Pomroy for S. & E. Butler, 1805), p. 327. Spelling rendered contemporary.
73. AP I, art. 52(2).
74. John R. Crook, "Contemporary Practice of the United States Relating to International Law," 100-2 *American Journal of International Law* (April 2006), p. 488, a brief account of a Predator missile intended for Ayman al-Zawahiri, al-Qa'ida's second in command, killing several noncombatant civilians (and an al-Qa'ida planner) instead. For one-on-one killings, Elissa Gootman, "Israeli Military Says It Regrets Killing of a Palestinian Lecturer," *New York Times*, 30 April 2004, p. A6.

75. Serge Schmemmann, "The Harsh Logic of Assassination," *New York Times*, 12 October 1997, p. A1.
76. Meyer, "CIA Expands Use of Drones."
77. Secretary of Defense Donald Rumsfeld, Pentagon press briefing, 12 April 2003, available at www.cnn.com/2003/.
78. Kretzmer, "Targeted Killing of Suspected Terrorists," p. 201.
79. Griff Witte and Kamran Khan, "U.S. Strike on Al Qaeda Top Deputy Said to Fail," *Washington Post*, 15 January 2006, p. A1. Other sources say eighteen noncombatants were killed; see, for example, Daniel Byman, "Targeted Killing, American-Style," *Los Angeles Times* (online), 20 January 2006, p. A1.
80. John Kifner, "Assassination of Palestinian Fuels Fighting in Middle East," *New York Times*, 12 November 2000, p. A4.
81. Thomas Powers, "When Frontier Justice Becomes Foreign Policy," *New York Times*, 13 July 2003, p. WK1.
82. Kristen Eichensehr, "On the Offensive: Assassination Policy under International Law," 25-3 *Harvard International Review* (Fall 2003), available at harvardir.org/articles/1149.
83. See Michael Ashkouri, "Has United States Foreign Policy towards Libya, Iraq and Serbia Violated Executive Order 12333: Prohibition on Assassination?" 7 *New England International and Comparative Law Annual* (2001), p. 168. On 15 April 1986, in response to an alleged Libyan bombing of a German discotheque frequented by U.S. military personnel, the United States conducted an air attack on Libya (Operation ELDORADO CANYON), striking five military targets, including Qaddafi's headquarters at the Al-Azzizya Barracks. An estimated 100–150 Libyans were killed, in addition to two U.S. fliers. The UN General Assembly subsequently condemned the U.S. action.
84. Hersh, "Manhunt."
85. "International Covenant on Civil and Political Rights," art. 6(1). The right to life is the only right referred to in the covenant as inherent, lending it particular significance. Also see "Universal Declaration of Human Rights," art. 3; the "European Convention for the Protection of Human Rights"; the "African Charter on Human and Peoples' Rights," art. 4; and the "American Convention on Human Rights," art. 4(1).
86. See *McCann & Others v. the United Kingdom*, No. 18984/91, 31 Eur. Ct. H. R. (1995), paras. 205–14, in which the European court specifies three requirements for employing lethal force against terrorists: there must be a strict and compelling necessity test; the threat and the targeting state's response must be proportional; and the targeting state must consider nonlethal alternatives.
87. Kretzmer, "Targeted Killing of Suspected Terrorists," p. 177, citing art. 2(2) of the European Convention on Human Rights.
88. Anne-Marie Slaughter, "Mercy Killings," *Foreign Policy* (May–June 2003), p. 73.