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Assassination or Targeted Killings After 9/11

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JOHN YOO

Assassination or Targeted Killings After 9/11

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I. INTRODUCTION

On November 4, 2002, Abu Ali al-Harithi, al-Qaeda's top operative in Yemen and a planner of the 2000 bombing of the USS *Cole*, and five other suspected al-Qaeda members were driving in a car outside the Yemeni capital of Sana. An unmanned Predator drone, controlled remotely by a CIA pilot from a base in Djibouti and overseen by commanders in Saudi Arabia, located the car and fired a Hellfire missile.¹ The six men were killed. All that was left was the charred hulk of a bombed-out car sitting in the desert. Soon after, unnamed government sources boasted of the strike to the *New York Times* as an example of how high technology and actionable intelligence could produce victories in the war on terror.²

Among the dead was an American citizen, Kamal Derwish, who was said to be the leader of an al-Qaeda sleeper cell that had been discovered near Buffalo, New York.³ Other members of the sleeper cell, known as the "Lackawanna 6," were arrested in 2003 for providing material support to terrorists.⁴ They pled guilty soon after and are currently serving seven- to ten-year terms in prison.⁵ Derwish, however, left the country and ended up in the car in Yemen with al-Harithi. Derwish did not benefit from an arrest warrant, lawyers, or a plea bargain. Instead, he escaped the reach of the FBI only to be within range of a CIA missile.

The successful strike in Yemen was not a one-time event. It is just one example of targeted killing—or what some would call assassination—in the war on terrorism. During the November 2001 invasion of Afghanistan, CIA Predator drones attacked a high-level al-Qaeda meeting in Kabul, missing Osama bin Laden but killing his military chief, Mohammed Atef.⁶ In May 2002, the CIA reportedly launched a missile strike against Gulbuddin Hekmatyar, an Afghani warlord who had joined forces with the Taliban against the U.S.-allied government.⁷ And in May 2005, the

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1. See Walter Pincus, *U.S. Strike Kills Six in Al Qaeda; Missile Fired by Predator Drone; Key Figure in Yemen Among Dead*, WASH. POST, Nov. 5, 2002, at A01; David Johnston & David E. Sanger, *Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16, available at <http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-for-suspects-fatal-strike-yemen-was-based-rules-set-bush.html>.
 2. See Johnston & Sanger, *supra* note 1; see also Pincus, *supra* note 1.
 3. Michael Powell & Dana Priest, *U.S. Citizen Killed by CIA Linked to N.Y. Terror Case*, WASH. POST, Nov. 9, 2002, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A30332-2002Nov8>; *Aftereffects: Buffalo Case; 7th Man Is Accused of Role in Terror Cell with Al Qaeda Link*, N.Y. TIMES, May 22, 2003, at A14, available at <http://www.nytimes.com/2003/05/22/world/aftereffects-buffalo-case-7th-man-accused-role-terror-cell-with-al-qaeda-link.html?src=pm>.
 4. *Aftereffects*, *supra* note 3.
 5. *Final 'Buffalo Six' Member Pleads Guilty*, Fox News (May 19, 2003), <http://www.foxnews.com/story/0,2933,87264,00.html>.
 6. See James Risen, *A Nation Challenged: Al Qaeda; Bin Laden Aide Reported Killed by U.S. Bombs*, N.Y. TIMES, Nov. 17, 2001, at A1, available at <http://www.nytimes.com/2001/11/17/world/a-nation-challenged-al-qaeda-bin-laden-aide-reported-killed-by-us-bombs.html>.
 7. Thom Shanker & Carlotta Gall, *U.S. Attack on Warlord Aims to Help Interim Leader*, N.Y. TIMES, May 9, 2002, at A15, available at <http://www.nytimes.com/2002/05/09/international/asia/09MILI.html>.

CIA reportedly killed al-Qaeda leader Haitham al-Yemeni, who had been hiding in the fiercely independent area of northwestern Pakistan, out of reach of government troops.⁸ More recently, press reports claim that the Obama administration has added an American Muslim cleric, Anwar al-Awlaki, currently wanted for terrorism-related crimes and thought to be in hiding in Yemen, to a secret list of targets for drone strikes.⁹

And of course, targeting enemy leaders need not depend on unmanned drones. A Navy SEAL team achieved President Barack Obama's greatest success in the war on terrorism, the killing of Osama bin Laden in May 2011 in Abbottabad, Pakistan. But the hallmarks of the U.S. approach were the same. Intelligence agencies ascertained the identity and location of the al-Qaeda leader using a variety of information sources including interrogations, electronic intercepts, satellite reconnaissance, and human agents. This intelligence eventually supported a real-time operation targeting a specific individual rather than a military unit, asset, or location. The use of a strike team, rather than a drone missile, allowed SEALs to verify bin Laden's death and capture items of valuable physical intelligence. But the ultimate goal of the bin Laden operation was identical to that of prior operations: to kill a specific individual because of their leadership role in al-Qaeda.

President George W. Bush authorized drone strikes in a secret order less than a week after the September 11 attacks.¹⁰ He obliquely referred to its purpose on September 17, 2001, when responding to the press about the reservist call-up. "Do you want bin Laden dead?" a reporter asked. "There's an old poster out West, as I recall, that said, 'Wanted Dead or Alive,'" the President replied.¹¹ The President's order authorized the CIA to seek to kill or capture the leaders of al-Qaeda and other allied terrorist organizations.¹² As with all approvals of covert activity, the executive order was required by law to be set down in writing, with copies sent to the House and Senate intelligence committees.¹³ Reportedly, the order also included a list of the

8. See Douglas Jehl, *Remotely Controlled Craft Part of U.S.-Pakistan Drive Against Al Qaeda, Ex-Officials Say*, N.Y. TIMES, May 16, 2005, at A12, available at <http://www.nytimes.com/2005/05/16/politics/16qaeda.html>.

9. See Scott Shane, *A Legal Debate as C.I.A. Stalks a U.S. Jihadist*, N.Y. TIMES, May 14, 2010, at A1, available at <http://www.nytimes.com/2010/05/14/world/14awlaki.html>; Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A12, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0CE6D8103DF934A35757C0A9669D8B63>.

10. See BOB WOODWARD, *BUSH AT WAR* 101 (2002).

11. *Id.* at 100.

12. *Id.* at 101.

13. See National Security Act of 1947, 50 U.S.C. § 413b (2006); see generally W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992).

leading al-Qaeda figures to be targeted, such as Osama bin Laden and Ayman al-Zawahiri.¹⁴

Satellite imagery, sophisticated electronic surveillance, unmanned drones, and precision-guided munitions allow American intelligence and U.S. military forces to strike enemy targets virtually anywhere in the world at any time. Today, the United States can reach beyond the traditional battlefield. It no longer relies on strategic bombing of the enemy and its support structure. Once U.S. intelligence agents receive information that, for instance, an enemy leader is in a safe house in western Pakistan or in a car in Yemen, they can deploy force in hours, if not minutes, rather than the days or weeks it used to take to plan and execute attacks. These capabilities allow the United States to match the unconventional organization and tactics of al-Qaeda with a surgical response that can target its leaders without the extensive harm to civilians that has characterized previous wars.

Precision strikes against enemy leaders have lately been the focus of media scrutiny and critical commentary.¹⁵ For example, in May 2010, Philip Alston, the U.N. Special Rapporteur on Extrajudicial Killings, issued a report suggesting that the United States' use of drones may violate international human rights law and the laws of war.¹⁶ Critics argue that targeted killing also violates U.S. law banning assassinations.¹⁷ They also argue that, even if technically legal, targeted attacks are unwise because they risk reprisals against Americans.¹⁸

Perhaps the most well-known strike targeted Saddam Hussein's sons, Uday and Qusay, who also served as his top aides. At the outset of the Iraq war, President Bush ordered an acceleration of the invasion timetable to take advantage of intelligence revealing the location of Saddam Hussein and his top leaders. The Air Force attack was unsuccessful.¹⁹ Once Baghdad fell, a team of elite Army soldiers set out to hunt down the missing leaders of the Hussein regime. In July 2003, U.S. Special Forces

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14. James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A1, available at <http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html>.
 15. See, e.g., Josh Meyer, *CLA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1, available at <http://articles.latimes.com/2006/jan/29/world/fg-predator29>; Chris Downes, 'Targeted Killings' in an Age of Terror: *The Legality of the Yemen Strike*, 9 J. CONFLICT & SEC. L. 277 (2004).
 16. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, 9–11, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.
 17. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981); see, e.g., Downes, *supra* note 15, at 284–91; Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 331–32 (2003); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV. 127, 129, 133–35 (2007).
 18. See, e.g., Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 115 (2010).
 19. David E. Sanger & David Johnston, *A Nation at War: Intelligence; Allies Think Iraqi Leader Eluded Death in U.S. Strike*, N.Y. TIMES, Mar. 24, 2003, at B12, available at <http://www.nytimes.com/2003/03/24/world/a-nation-at-war-intelligence-allies-think-iraqi-leader-eluded-death-in-us-strike.html>.

tracked Uday and Qusay to a house in Mosul and killed them after a long firefight.²⁰ Flanked by former secretary of defense Donald Rumsfeld and Paul Bremer, civilian administrator in Iraq, President Bush praised the action in a Rose Garden speech.²¹

Many of the claimed successes in the war on terrorism have come about thanks to targeted strikes against specific al-Qaeda higher-ups. Despite its campaign criticism of Bush's approach to the war, the Obama administration has accelerated the use of drones.²² According to media reports, it has resorted to strikes not just in Iraq and Afghanistan but also in Pakistan and Yemen.²³ Leon Panetta, the director of the Central Intelligence Agency, has publicly stated that the drone strikes in Pakistan are "the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership."²⁴ In the new administration's first year, the number of drone attacks reportedly exceeded the total under the Bush administration's eight years.²⁵ In March 2010, Harold Koh, who had criticized the Bush administration's policies on detention, interrogations, use of drones, and other issues while serving as the dean of the Yale Law School, now vigorously and publicly defended drone strikes as the legal adviser of the State Department.²⁶

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20. Kevin Sullivan & Rajiv Chandrasekaran, *Hussein's Two Sons Killed in Firefight with U.S. Troops; Tip Led Soldiers to Raid Northern Iraq Mansion*, WASH. POST, July 23, 2003, at A01.
 21. *President Bush Discusses Progress in Iraq*, THE WHITE HOUSE (July 23, 2003, 10:16 AM), <http://merln.ndu.edu/merln/pfiraq/archive/wh/20030723-1.pdf>.
 22. *Obama Has Increased Drone Attacks*, CBS NEWS (Feb. 12, 2010), <http://www.cbsnews.com/stories/2010/02/12/politics/main6201484.shtml>.
 23. See, e.g., Helene Cooper & David E. Sanger, *U.S. Will Widen War on Militants Inside Pakistan*, N.Y. TIMES, Dec. 17, 2010, at A1, available at http://www.nytimes.com/2010/12/17/world/asia/17afghan.html?_r=1&pagewanted=2; Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, WASH. POST, Feb. 26, 2009, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/25/AR2009022503584.html>; David Ignatius, Editorial, *Is Killing Our Only Option for Terrorists?*, WASH. POST, Dec. 2, 2010, at A25, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120106294.html>; Greg Jaffe & Karen DeYoung, *U.S. Drones on Hunt in Yemen*, WASH. POST, Nov. 7, 2010, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120106294.html>; David E. Sanger & Peter Baker, *Obama Reorients Approach of National Security Strategy*, N.Y. TIMES, May 28, 2010, at A8, available at <http://www.nytimes.com/2010/05/28/world/28strategy.html>.
 24. *U.S. air strikes in Pakistan called 'very effective,'* CNNPOLITICS (May 18, 2009), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes>.
 25. Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan*, N.Y. TIMES, Dec. 4, 2009, at A1, available at <http://www.nytimes.com/2009/12/04/world/asia/04drones.html>; see also Cooper & Sanger, *supra* note 23.
 26. Compare Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> ("U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." (emphasis omitted)), with Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L. J. 1145, 1167 (2006) (stating that "[t]he President cannot, on his own constitutional authority, authorize violations of jus cogens norms [basic human rights]" as part of his criticism of the Bush administration's intelligence policies), and Harold Hongju Koh, *Setting the World Right*, 115 YALE L. J. 2350, 2353 (2006) ("We now downplay torture and violations of the Geneva Conventions committed by ourselves or our allies as necessary elements of the war on terror, claiming that freedom

Civil liberties lawyers have complained loudly of the treatment of captured enemy alien combatants held at Guantánamo Bay, in Afghanistan, or in Iraq.²⁷ But few protested the summary killing of an American citizen by remote control until 2010, when civil liberties groups filed a lawsuit on behalf of al-Awlaki.²⁸ The same civil liberties lawyers now argue that, with few exceptions, drone strikes violate the U.S. Constitution. They reason that the rules that apply to uniformed combatants do not apply to an undefined war with a limitless battlefield. They concede that the United States may use targeted killings against American citizens, but only under the “most extraordinary circumstances,” such as when they join an enemy at war. Otherwise, the United States should try to apprehend these individuals and provide them with judicial due process.²⁹ The lawsuit follows a report by the U.N. Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions, which concluded that the use of drones to carry out targeted killings violates the laws of war, a claim echoed by some American legal scholars.³⁰

Critics also believe that such uses of force violate executive orders and make bad policy. Executive Order 12,333 states that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”³¹ After the attacks to kill Uday and Qusay, George Gedda of the Associated Press asserted that “pursuing with intent to kill violates a long-standing policy banning political assassination.” He claimed that the attack violated the rule: “It was the misfortune of Saddam Hussein’s sons that the Bush administration has not bothered to enforce the prohibition.”³² Intelligence analyst Thomas Powers argued in the *New York Times* that efforts to kill Iraqi’s Baathist regime leaders would invite retaliation: “Mr. Hussein is not the only figure in danger of sudden death in Iraq at the moment, and it is a tossup who is in greater danger—Mr. Hussein or Paul

from fear is now the overriding human rights value.”), and Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337, 338 (2002) (“[B]y failing to deliver justice that the world at large will find credible, the Military Order undermines the U.S. ability to lead an international campaign against terrorism under a rule-of-law banner.”).

27. See Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT’L L. STUD. 343, 346 (2009); see, e.g., Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 CHAP. L. REV. 615 (2009).
28. Complaint for Declaratory and Injunctive Relief (Violation of constitutional rights and international law—targeted killing), *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), 2010 WL 3478666, http://www.aclu.org/files/assets/alaulaqui_v_obama_complaint.pdf.
29. *Id.* ¶¶ 2, 4 (“Outside the context of armed conflict, the intentional use of lethal force without prior judicial process is an abridgement of [the right to life] except in the narrowest and most extraordinary circumstances [B]oth the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury.”).
30. See Keith Johnson, *U.S. Defends Legality of Killing with Drones*, WALL ST. J., Apr. 5, 2010, at A11, available at <http://online.wsj.com/article/SB10001424052702303450704575159864237752180.html>.
31. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981).
32. George Gedda, *Policy Against Assassinations Was No Barrier*, PHILA. INQUIRER, July 24, 2003, at A07.

Bremer?”³³ Others speculate that the use of drones against al-Qaeda leaders in Pakistan has the effect of encouraging terrorist support and recruitment.³⁴ Some human rights advocates believe that such attacks violate international law because the targets are civilians, not uniformed soldiers. Therefore, they must be handled by the criminal law—making any preemptive attacks illegal.

These criticisms rest on profound misconceptions of the nature of the war on terrorism and the rules of warfare. Because the United States is at war with al-Qaeda, it can use force—especially targeted force—to conduct hostilities against the enemy’s leaders. This does not violate any American law—constitutional, congressional, or presidential—or any ratified treaty. Precise attacks against individuals have long been a feature of warfare. These attacks further the goals of the laws of war by eliminating the enemy and reducing harm to innocent civilians. Legality aside, targeted killing or assassination can be the best policy in certain circumstances. In the new type of war thrust upon the United States by the 9/11 attacks, the enemy resembles a network, not a nation. The better strategy is to attack the individuals in that network; there are no armed forces to target, and destroying training camps alone will amount to no more than “pounding sand.”

Part II of this article discusses the policies underlying the prohibition against peacetime assassination and contrasts them with the rationales for allowing targeted killings during war. It argues that targeted killing is a prime tactic for the United States because of al-Qaeda’s unique characteristics as a decentralized, free-scale terrorist network. Part III traces the history of American law on assassinations and targeted killings in wartime and discusses how today’s circumstances justify the use of the latter. Part IV identifies the limits of the laws of war on the use of targeted killings. Despite al-Qaeda’s lawlessness, the United States must still abide by the limits imposed by necessity, discrimination, and proportionality, as well as standard principles of reciprocity, in its use of force against al-Qaeda.

II. POLICY

Under peacetime conditions, a democratic nation like the United States normally would never consider attempting to kill individuals *before* they have committed a crime. Our criminal justice system acts *retrospectively*; a suspect must first commit a crime before the police can arrest him. Under our Constitution and laws, a police officer in times of peace can only use deadly force to save his life or the life of another from an imminent attack. Police cannot use deadly force to stop a fleeing suspect, even if they believe he might pose a threat to other lives sometime in the non-immediate future. Nor can the police resort to deadly force to stop someone from committing a crime that does not threaten someone’s life, such as robbery.

33. Thomas Powers, *Target Practice; When Frontier Justice Becomes Foreign Policy*, N.Y. TIMES, July 13, 2003, at 41, available at <http://www.nytimes.com/2003/07/13/weekinreview/target-practice-when-frontier-justice-becomes-foreign-policy.html>. Paul Bremer was the chief U.S. civilian administrator in Iraq.

34. See MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 109, 112–13 (2010).

Kamal Derwish, as far as we know, was not an imminent threat to the life of another person. He was bombed while sitting in a car in the middle of the Yemeni desert. If authorities in peacetime had suspected Derwish of conspiring to commit terrorism, they would have had to gather enough evidence to show probable cause that he was involved in a crime in order to arrest him, then try him and prove to a jury his guilt beyond a reasonable doubt. Only if he were sentenced to death by a jury could he have lost his life. These rules represent America's decision as a society that the harms of individual crimes, costly though they will be, must be borne first, and their perpetrators stopped only afterwards.

War, however, brings forth a different set of concerns. When a nation goes to war, it seeks to defeat the enemy in order to prevent future harms to society inflicted by enemy attacks. Because war deals with prospective concerns, it must rely less on exact information and more on probabilities, predictions, and guesswork. Often the military attempts to destroy a building because it estimates with varying degrees of certainty that enemy soldiers are hiding within it or enemy munitions are located there. It does not wait to attack until it has proof beyond a reasonable doubt, or even probable cause; that would risk allowing the enemy forces to escape, to strengthen their position, or to live to attack the country's own forces or citizens another day. War by its nature seeks prevention, not punishment.

When the United States considered terrorism to be a matter for the criminal justice system, it waited until after attacks on the United States had occurred before attempting to capture al-Qaeda leaders. Now that the United States is at war with al-Qaeda, it is entitled to kill the enemy's commanders. This is done in an effort to demoralize the enemy, throw their troops into confusion and disarray, undermine their planning, and remove their most able leaders. Such is a well-documented wartime strategy. World War II and the Korean War witnessed numerous attacks on enemy military leaders.³⁵ In the 1980s, President Ronald Reagan ordered U.S. jets to bomb Libyan locations where Colonel Muammar Qadhafi might be living and working.³⁶

35. In 1941, British commandos attempted to kill German Field Marshal Erwin Rommel in Libya; in 1942, British-supported Czech partisans ambushed Nazi SS General Reinhard Heydrich; in 1943, American fighter planes intercepted and shot down a plane ferrying Japanese Admiral Isoroku Yamamoto over the Pacific; in 1951, Navy planes killed 500 Chinese and North Korean senior officers at a planning conference in North Korea. W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, 1989 ARMY L. 4, 5-6 (1989), http://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf.

36. In April 1986, Libyan agents bombed a Berlin disco frequented by U.S. servicemen; two servicemen died in the explosion. Intelligence agencies stopped a second Libyan attack against the American embassy in Paris. President Reagan responded by sending American bombers against military and intelligence targets in Libya, including one which Colonel Qadhafi himself apparently used as a residence. As Abraham Sofaer, former judge and State Department legal advisor under President Reagan, later wrote, Qadhafi was not

personally immune from the risks of exposure to a legitimate attack. He was and is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on U.S. citizens, diplomats[sic] troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target.

Launching a missile to kill al-Qaeda commanders like Derwish, even though he was an American citizen, is legal. They are members of the enemy forces, the equivalent of officers—Derwish amounted to a captain or major in command of al-Qaeda cells, the equivalent of enemy military units. The U.S. military and intelligence services are legally and morally free to target them for attack whether they were on the front lines or behind them. Killing an enemy commander will better promote the principles behind the rules of civilized war than other means. Over the centuries, the laws and customs of war have developed to reduce the harm to noncombatants and limit the use of force to that which is proportional to military objectives. By specifically targeting enemy leaders, the United States can render enemy forces leaderless and frustrate their operations, prevent the enemy from mounting effective plots and campaigns, and reduce both civilian and military casualties.

Using targeted killing as a primary tactic also takes better account of the new kind of war facing the United States. The United States has prevailed in conventional wars by invading the territory of an enemy nation, destroying its armed forces on the battlefield, and capturing key cities and population centers. It has won by out-producing its opponents. During the lead-up to World War II, President Franklin D. Roosevelt aptly declared the United States to be the great “arsenal of democracy.”³⁷ Historically, the United States has deployed its large productive capacity and population in war, and its large, well-equipped and well-supplied armies and navies have, generally speaking, overwhelmed the soldiers of the other side.

The United States cannot win the war on terrorism by producing more tanks, fielding more army divisions, or setting more carrier battle groups and submarines to sail than this enemy. This did not work in Vietnam and it will not work against the even more diffuse enemy of today. Military plans based on traditional deterrence and the threat of retaliation will not be effective against this terrorist network because it has no territory or armed forces to crush, and its members welcome death. The amount of actual force needed to frustrate or cripple al-Qaeda is quite small, and well within the capabilities of a single division of U.S. troops.

Indeed, the problem is not with the strength of America’s power, but how and where to aim it. Al-Qaeda does not mass its operatives into units onto a battlefield, or at least it has not after its setbacks in Afghanistan in the fall and winter of 2001. Instead, al-Qaeda will continue to disguise its members as civilians, hide its bases in remote mountains and deserts or among unsuspecting city populations, and avoid military confrontation. The only way for the United States to defeat al-Qaeda is to destroy its ability to function—by selectively killing or capturing its key members.

In fact, the unique circumstances of the war on terrorism make a compelling case for taking out individual al-Qaeda leaders. Al-Qaeda is a social network of friends, acquaintances, or companies interlocked through various cross-ownerships and

Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89, 104, 120 (1989).

37. Franklin Delano Roosevelt, President of the U.S., Fireside Chat on National Security (Dec. 29, 1940).

relationships; it is not unlike the Internet, which gives it remarkable resiliency. A killed or captured leader seems to be quickly replaced by the promotion of a more junior member and, as in Iraq, other arms of the network spring to the fore. Most nation-states would have collapsed after the kinds of losses inflicted by the armed forces and the CIA over the last decade: thousands of operatives killed, two thirds of al-Qaeda's leadership killed or captured, and its open bases and infrastructure destroyed in Afghanistan.³⁸ But al-Qaeda operatives continue to attempt to infiltrate the United States, and they have succeeded in carrying out new terrorist attacks in London, Madrid, and Bali.³⁹

Al-Qaeda exhibits the typical characteristics of what is known as a free-scale network.⁴⁰ A free-scale network is not created at random. It is made up of nodes—connected to each other for some purpose—around hubs, which are nodes with multiple connections to other nodes. They are not command-and-control hierarchies like the Defense Department. In terms of the Internet, hubs are highly trafficked websites with connections to many other sites, such as Google.com, Yahoo.com, and MSN.com. Users visit them often in order to connect to other sites, and a great many other sites connect to them as well. In a social or professional network, hubs are people that are widely known, who set trends or whose work influences a great many others.

Decentralization is another attribute. Because of decentralization, a network can quickly collect and process information from a myriad of sources located in different places and connected only by a common interest or affinity. If a node disappears, others simply move their connections. Networks can remain remarkably immune to attack. Randomly destroying its nodes will not cause it to collapse, and the loss of a single hub will not bring down the whole network. Therefore, because it has no real single leader, it can function even after suffering severe losses.

Al-Qaeda is just such a network. Each node is a terrorist seeking to connect with another through a desire to promote Islamic fundamentalism in the Middle East by any means necessary, including violence. Its hubs are leaders, such as bin Laden and Zawahiri, and facilitators, such as Khalid Sheikh Mohammed and Ramzi Binalshibh.⁴¹ Capturing or killing an al-Qaeda member is important for the discovery

38. See Paul R. Pillar, *Counterterrorism After Al Qaeda*, 27 WASH. Q. 101, 101–02 (2004), http://www.twq.com/04summer/docs/04summer_pillar.pdf.

39. See generally Alex Morales & Robert Hutton, *Two London Bombers Known Before 2005 Suicide Attacks*, BLOOMBERG, May 11, 2006, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1Y_PLfojJWU&refer=uk (discussing the London subway bombing); Int'l Sec. Studies, *The 3/11 Madrid Bombings: An Assessment After 5 Years*, WOODROW WILSON INT'L CENTER FOR SCHOLARS (Apr. 10, 2009), http://www.wilsoncenter.org/index.cfm?topic_id=1416&fuseaction=topics.item&news_id=518495 (discussing the terrorist bombings in Madrid); *Bali Bombing Suspect Umar Patek Arrested in Pakistan*, BBC NEWS ASIA-PACIFIC (Mar. 30, 2011, 6:08 AM), <http://www.bbc.co.uk/news/world-asia-pacific-12900555> (discussing the recent capture of an al-Qaeda member in connection with the 2002 Bali bombing).

40. See, e.g., ALBERT-LÁSZLÓ BARBÁSI, LINKED: THE NEW SCIENCE OF NETWORKS 70 (2002).

41. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 47–70 (2004) [hereinafter 9/11 COMMISSION REPORT], <http://www.9-11commission.gov/report/911Report>.

of other cells and plots to which he is connected. However, taking out single operatives is not crippling; other parts of the network can continue to function.

The United States must target al-Qaeda hubs. Random, individual attacks on a free-scale network will not work. Turning off random websites will have almost no effect on the Internet, but closing down a Google.com or Yahoo.com might have a serious effect on Internet usage and traffic. Similarly, killing or capturing an ordinary al-Qaeda operative will cripple one cell, but al-Qaeda will only replace that cell with others. Even significant al-Qaeda facilitators eliminated one at a time will permit replacements to be trained or communications and contacts shifted to other leaders. To cripple al-Qaeda, the United States must gather timely and accurate information and attack its most important planners and leaders simultaneously. Otherwise, targeted killing at best will prevent an imminent attack, but it will not stop them all.

This raises an important difference between law and capability on the one hand, and good policy on the other. Simply because the United States *can* kill a member of al-Qaeda does not mean it always *should*. It can interrogate captured leaders to learn not just about tomorrow's bombing, but about other plans for the future, and the identities and locations of other al-Qaeda facilitators and commanders. It was far more advantageous for American intelligence that al-Qaeda leaders Abu Zubaydah, Khalid Sheik Mohammed, and Ramzi Binalshibh were captured in Pakistan rather than killed by missiles.⁴² According to former CIA director Porter Goss and senator Pat Roberts, chair of the Senate Intelligence Committee, information gained from their interrogation likely produced "actionable intelligence" that has prevented future terrorist attacks.⁴³

Other policy considerations must be taken into account when deciding whether to launch a deadly attack. The United States should rely on its own police or military forces, or those of its allies, to capture and detain hostiles. Strong cooperative relationships with other nations are invaluable in the war on terrorism. Other nations can provide more intelligence, cultural expertise, and capabilities in waging covert warfare against al-Qaeda. This is one reason why effective diplomacy and strong alliances are a crucial factor in wartime success. The United States also needs to reduce harm to civilians found near terrorists. Strikes that kill innocent men, women, and children, either by mistake or because of proximity to the target, could undermine the support of the populations of allied and uncommitted nations.

None of these factors is or should be an absolute, however. Some friendly nations may be unable or unwilling to take the necessary action to stop al-Qaeda activity inside their borders.⁴⁴ They might quietly allow targeted strikes, but popular anger

pdf (describing the origins of al-Qaeda); *id.* at 145–50 (describing Khalid Sheikh Mohammed); *id.* at 161 (describing Ramzi Binalshibh).

42. See *U.S. Races Against Time Interrogating Mohammed*, Fox News (Mar. 3, 2003), <http://www.foxnews.com/story/0,2933,80033,00.html>; Kevin Johnson et al., *Arrest of 9/11 Suspect Yields 'Lots of Names, Information'*, USA TODAY, Mar. 3, 2003, at 1A.

43. See Johnson, *supra* note 42.

44. See, e.g., Mark Mazzetti & Souad Mekhennet, *Qaeda Planner in Pakistan Killed by Drone*, N.Y. TIMES, Dec. 12, 2009, at A8, available at <http://www.nytimes.com/2009/12/12/world/asia/12drone.html>

will also require them to launch formal political protests. Knowing that American leaders do not want to harm civilians, terrorist leaders would intentionally surround themselves with their family members whenever they travel. During the Afghanistan invasion, a Central Command JAG lawyer apparently advised against a missile strike on a caravan of SUVs reinforcing Kandahar. Even though intelligence reported a high probability that it was an al-Qaeda and Taliban unit, the attack was put off because imagery showed women and children in the convoy.⁴⁵ Taliban and al-Qaeda fighters in Afghanistan apparently brought their families onto the battlefield.⁴⁶ Decisions on whether to attack such targets cannot be proscribed by simple rules. Instead, the importance of the target must be balanced against the collateral damage to innocents nearby.

The most important factor to consider is uncertainty. When deciding whether to target someone, American intelligence officials cannot be one hundred percent sure the person is in fact an al-Qaeda leader or that the information about his location and timing is correct beyond any doubt. Even if it has collected all information possible—and information has a cost, just like any other good or service—the United States is still dealing with the probability that something will happen in the future. Terrorists' plans can change at the last minute. American intelligence may have identified the wrong man, or it may have made a simple mistake (as with the erroneous bombing of the Chinese embassy in Belgrade during the Kosovo war).⁴⁷

Using force to prevent future harms can never be done perfectly. No military can choose the right target every time, nor can any military hit its target every time. Soldiers might shoot someone who turns out to be a noncombatant, but was lurking around a known enemy location, or they might fire their cannons at the wrong building. In domestic law enforcement, which is governed by tougher standards, a police officer who fires his weapon on the reasonable belief that his attacker holds a gun is not punished by law, even if it turns out that his belief was in error. We ask that our soldiers make reasonable decisions when they choose their targets and decide how much force to use. Similarly, our policymakers consider all of these factors when they decide whether to use deadly force against a suspected al-Qaeda member. They must balance matters like the effect of an attack on allied governments, local populations, and nearby civilians against the benefit of eliminating an al-Qaeda

(“Though Pakistan has secretly shared intelligence with the United States for the drone strikes and has asked the United States to share the technology with it, the [Pakistani] government publicly condemns the attacks.”).

45. Esther Schrader, *Response to Terror: War, on Advice of Counsel*, L.A. TIMES, Feb. 15, 2002, at A1, available at <http://articles.latimes.com/2002/feb/15/news/mn-28151>.

46. Eric Schmitt, *A Nation Challenged: The Bombing; Pentagon Says U.S. Airstrike Killed Women and Children*, N.Y. TIMES, Mar. 13, 2002, at A14, available at <http://www.nytimes.com/2002/03/13/world/nation-challenged-bombing-pentagon-says-us-airstrike-killed-women-children.html?src=pm>.

47. Daniel Williams, *NATO Missiles Hit Chinese Embassy; Alliance Again Pounds Belgrade*, WASH. POST, May 8, 1999, at A01, available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/china/stories/embassy050899.htm>.

leader and frustrating the plans he might have been organizing, while also keeping in mind the probability of success in the attack.

All this brings us back to al-Harithi and Derwish. Apparently, the United States had good intelligence on al-Harithi and Derwish—consider that our intelligence agencies were able to locate them in a single vehicle speeding across a desert. No one has stepped forward, neither the Yemeni government nor any relatives, to claim that al-Harithi or Derwish were not members of al-Qaeda or were not, in fact, in the car. Because they were traveling through the desert, the chances of “collateral damage” in terms of unintended deaths were extremely low, as there were no civilians in the vicinity to be hit in the blast or by an errant missile. The odds of ever capturing al-Harithi and obtaining intelligence from him were low, as he had succeeded in evading American intelligence for several years. Although the car was traveling in Yemen, which was an ally of the United States, parts of Yemen are also like the Wild West, beyond the control of the national government, which meant that attacks there would not lead to a breakdown in diplomatic relations. The United States would have preferred to capture al-Harithi and Derwish to acquire information in their possession. But between the choices of killing them or letting them continue to run amok, the former would at least stop them from carrying out further plots to attack the United States.

A similar analysis applies to Saddam Hussein and his sons. At the outset of the Iraq invasion, an attack on Saddam, Qusay, and Uday Hussein⁴⁸ promised a high likelihood of success with a low potential for civilian casualties. Furthermore, the benefits of success were substantial: without Saddam or his sons at the top, Iraqi resistance to an invasion might have unraveled, and casualties and destruction would have been dramatically reduced. Congress and Presidents William Clinton and Bush had pursued a policy of regime change in Iraq, in large part because of Saddam’s history of seeking, possessing, and on occasion using weapons of mass destruction (WMDs) against both military and civilian targets.⁴⁹ A surprise missile attack on Hussein’s compound could have produced that regime change in hours, rather than months. Balanced against the low probable costs in civilian casualties, a targeted strike against the Iraqi leadership made a great deal of sense. The question is, why would one treat the al-Harithi/Derwish case any differently from the Hussein case?

III. LAW

Killing an individual, of course, is not legal in all circumstances. Nor is it illegal in all circumstances. Killing an individual can be legal when it is carried out by the state as criminal punishment of a convicted first-degree murder by a capital jury. It can be legal when a police officer shoots an attacker armed with a weapon. It can be illegal when it is murder, as with any of the thousands of premeditated murders that

48. See Sanger & Johnston, *supra* note 19.

49. See, e.g., Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (codified as amended at 22 U.S.C. § 2151 (2006)); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified as amended at 50 U.S.C. § 1541 (2006)).

occur in the United States every year. It is illegal when it is “assassination.” But killing the enemy in wartime is legal.

Killing Martin Luther King, Jr. is assassination. Killing a foreign head of state in peacetime is an assassination. Ordering a SEAL strike on Osama bin Laden is not. Until September 11, 2001, the U.S. government remained confused about this distinction. In the 1990s, the United States passed up at least three chances to kill bin Laden. By 1997, the CIA and the National Security Council became aware that bin Laden was more than just a financier of terrorists.⁵⁰ He was the leader of the terrorist group that posed perhaps *the* most direct threat to American security.⁵¹ Even before the 1998 bombings of the American embassies in Kenya and Tanzania, the CIA had developed a plan to work with Afghan tribes hostile to the Taliban to capture bin Laden at his Tarnak Farms compound.⁵² The CIA’s counter-terrorism head thought the proposal was “the perfect operation,” and the military found no “showstoppers.”⁵³ CIA planning went so far as to hold a rehearsal of the operation that stretched across three time zones.⁵⁴

But concerns about the legal and political implications of targeting bin Laden prevented execution of the plan. President Clinton’s national security advisor, Sandy Berger, argued that there was insufficient evidence against bin Laden to win a conviction in U.S. court.⁵⁵ A senior CIA official worried that the operation would run counter to the ban on assassination.⁵⁶ The cabinet-level principals pulled the plug because of concern that civilian casualties could prove too high, the tribes might be harmed, and “the purpose and nature of the operation would be subject to unavoidable misinterpretation and misrepresentation—and probably recriminations—in the event that bin Laden, despite our best intentions and efforts, did not survive.”⁵⁷

These concerns continued to paralyze the intelligence agencies when other opportunities came along. Through 1998, the CIA’s orders from the President continued to authorize capture of bin Laden only.⁵⁸ Lethal force could be used against him only in self-defense. These limitations, plus shaky intelligence, led the CIA to pass up a chance to take bin Laden out with a cruise missile when he was traveling to and from Kandahar.⁵⁹ Still, a few weeks after the embassy bombings in August 1998, the Clinton administration had no trouble launching cruise missiles against suspected terrorist camps in Afghanistan, in the hope that bin Laden would be there. While

50. 9/11 COMMISSION REPORT, *supra* note 41, at 109.

51. *See id.*

52. *Id.* at 110–12.

53. *Id.* at 112–13.

54. *Id.* at 113.

55. *See id.*

56. *Id.*

57. *Id.* at 114 (quoting interview with unnamed head of the CIA counter-terrorism unit).

58. *Id.* at 131.

59. *See id.* at 130–31.

the cruise missiles hit their targets, bin Laden and his lieutenants were absent. By Christmas Eve 1998, President Clinton expanded his authorization to the CIA to allow America's tribal allies to kill bin Laden if they could not capture him, overriding any objections that it violated the assassination ban. Administration lawyers concluded that the assassination ban would not be broken if the United States acted in self-defense under international law against an imminent threat of attack.⁶⁰ Former attorney general Reno warned President Clinton that relaxing the assassination ban on bin Laden could invite retaliation against U.S. officials.

These missed opportunities were caused by deep misconceptions about American law regarding assassination and killing in wartime, which many held then and some repeat today—even after 9/11. Neither the Constitution nor federal statutes prevent the direct targeting of individual members of the enemy. Only Executive Order 12,333, issued by President Reagan in 1981, states that: “No person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”⁶¹ This was a continuation of a similar ban first issued by President Gerald Ford in 1976, which was subsequently reaffirmed by President James Carter, and has been followed by every President since.⁶²

While it bans assassinations, Executive Order 12,333 does not define them. Since the 1980s, however, government specialists have borrowed standard dictionary definitions to explain assassination as an act of murder for “political purposes.”⁶³ Murder is a specific legal phrase that includes only intentional and illegal homicides.⁶⁴ Deaths that occur by accident or are authorized by law, such as a police officer's use of force to protect the life of another, would not constitute murder, and hence cannot be assassination. Killing an enemy soldier in wartime would not be assassination, because the attack has a lawful military, rather than political, purpose. By contrast, the killings of Martin Luther King, Jr. and Presidents Abraham Lincoln, James Garfield, William McKinley, and John F. Kennedy were assassinations. Their assailants killed them during peacetime and with a political purpose because they were prominent national political figures. The attempt to kill Pope John Paul II, if it had succeeded, would have been assassination because the Vatican was not at war and he was targeted for political reasons. While popular conceptions of assassination probably include ideas that the killing takes place covertly, those connotations do not

60. *See id.* at 132.

61. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981).

62. Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976). There is some debate over whether the Carter and Reagan executive orders intended to broaden the definition of assassination. Ford's version prohibited “political” assassination. The Carter and subsequent Reagan versions dropped the word “political.” Exec. Order No. 12,036, 43 Fed. Reg. 3674 (Jan. 24, 1978). One could argue that the deletion of “political” was meant to include individual killings not of a political nature or that it showed an intent to expand the scope of prohibited killings.

63. *See Sofaer, supra* note 36, at 116–17; Parks, *supra* note 35, at 4.

64. *See Parks, supra* note 35, at 8.

appear in the dictionary, Executive Order 12,333's text, or in the explanations of government attorneys.⁶⁵

It is easier to understand the scope of the American ban on assassination by briefly examining its historical context. President Ford issued the ban in part to head off congressional efforts to ban assassination by statute. In the early 1970s, Congress had sought to act in response to revelations during hearings on the intelligence community, known popularly as the Church Committee investigations, which publicized the CIA's role in devising assassination plans against Fidel Castro, Congo leader Patrice Lumumba, Dominican Republic leader Rafael Trujillo, South Vietnam President Ngo Dinh Diem, and Chilean military leader Rene Schneider.⁶⁶ Senate leaders were concerned that the CIA had pursued these plots without the approval or knowledge of the President. With the Ford order in place, later congressional efforts to ban assassination, some with broader prohibitions, failed.⁶⁷ Several scholars have concluded from this history that the Presidents intended their executive orders to ban political killings in peacetime, but not lawful killing in wartime.⁶⁸ Clearly, neither President Ford nor Congress at the time thought that it would preclude the targeting of perpetrators of attacks upon the United States such as 9/11.

The United States has the right, as a nation, to use force to defend itself. However, under the U.N. Charter, member states must refrain "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁶⁹ No exceptions were granted, such as for preventing humanitarian disasters or rooting out terrorist organizations, except for two: interventions authorized by the U.N. Security Council "as may be necessary to maintain or restore international peace and security"⁷⁰ and "the inherent right of individual or collective self-defence."⁷¹ According to long state practice, and hence customary international law, this right applies not only after a nation has suffered an attack, but also in anticipation of an "imminent" attack.⁷² Despite the arguments of some well-known international law scholars to the contrary, every state has, in the words of former secretary of state Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect

65. See Sofaer, *supra* note 36, at 118.

66. U.S. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975), <http://ia700301.us.archive.org/9/items/allegedassassina00unit/allegedassassina00unit.pdf>.

67. See, e.g., H.R. 15,542, 94th Cong. § 9(1) (1976) ("[W]hoever, except in time of war, while engaged in the duties of an intelligence operation of the government of the United States, willfully kills any person shall be imprisoned for not less than one year.").

68. Sofaer, *supra* note 36, at 119; William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 717-26 (2003).

69. U.N. Charter art. 2, ¶ 4.

70. U.N. Charter art. 42.

71. U.N. Charter art. 51.

72. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 741, 775 (2004).

itself.”⁷³ The United States need not wait until an al-Qaeda attack has occurred before it can launch a missile against a terrorist camp or send a special operations team to take out a terrorist leader.

Imminence is not a purely temporal concept. The concept traces its origins to the 1837 *Caroline* affair, in which British forces pursued Canadian insurgents into American territory, destroyed a vessel, and killed dozens of U.S. citizens.⁷⁴ After that incident, the United States and Great Britain agreed in 1841 that a preemptive attack was justified if the “necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁷⁵ Imminence classically depended on timing. Only when an attack is soon to occur, and thus certain, can a nation use force in preemptive self-defense. What about the magnitude of harm posed by a threatened attack? According to conventional doctrine, a nation must wait until an attack is imminent before using force, whether the attack is launched by a small band of cross-border rebels, as in the *Caroline* affair, or by a terrorist organization armed with biological or chemical weapons. Terrorist groups today can launch a sudden attack with weapons of devastating magnitude. To save lives, it is now necessary to use force earlier and more selectively.

Imminence as a concept also fails to deal with covert activity. Terrorists deliberately disguise themselves as civilians. Their organizations have no territory or populations to defend, and they attack by surprise. This makes it virtually impossible to use force in self-defense once an attack is “imminent.” There is no target to attack in the form of the army of a nation-state. The best defense will be available only during a small window of opportunity when terrorist leaders become visible to the military or intelligence agencies. This can occur, as in the case of bin Laden, well before a major terrorist attack occurs. Imminence doctrine does not address cases in which an attack is likely to happen, but its timing is unpredictable. Rules of self-defense need to adapt to the current terrorist threat.

In addition to imminence, the United States needs to account for the degree of expected harm, a function of the probability of attack times, the estimated casualties, and damage. There is ample justification for factoring this in, just as it ought to be a factor in ordinary acts of self-defense, as when one is attacked with a gun, as opposed to a set of fists. At the time of the *Caroline* decision in the early nineteenth century, the main weapons of war were single-shot weapons and artillery, cavalry, and infantry. There was an inherent technological limit on the destructiveness of armed conflict.

73. Memorandum from Norbert A. Schlei, Assistant Att’y Gen., Office of Legal Counsel, to the Att’y Gen. (Aug. 30, 1962), reprinted in Norbert A. Schlei, *From the Bag: Anticipatory Self-Defense: A 1962 OLC Opinion on Lawful Alternatives for the U.S. in the Cuban Missile Crisis*, 6 GREEN BAG 2D 195, 196 (2003).

74. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105 (Malcolm D. Evans & Phoebe N. Okowa eds., 3d ed. 2000).

75. Letter from Daniel Webster, U.S. Sec’y of State, to Henry Fox, British Minister in Wash. (Apr. 24, 1841), reprinted in *BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT* pt. I, ser. C, vol. 1, at 159 (Kenneth Bourne and D. Cameron Watt eds., 1st ed. 1986).

The speed and severity possible today mean that the right to preempt today should be greater than in the past. Weapons of mass destruction have increased the potential harm caused by a single terrorist attack from hundreds or thousands of innocent lives to hundreds of thousands, or even millions. This is not even counting the profound, long-term destruction of cities or contamination of the environment and the resulting long-term death or disease for large segments of the civilian population. WMDs can today be delivered with ease—a suicide bomber could detonate a “dirty bomb” using a truck or spread a biological agent with a small airplane. These threats are difficult to detect, as no broad mobilization and deployment of regular armed forces will be visible. Probability, magnitude, and timing are relevant factors that must be considered in determining when to use force against the enemy.

This same logic explains why most applauded President John F. Kennedy’s decision to blockade Cuba during the 1962 missile crisis with the Soviet Union.⁷⁶ President Kennedy did not wait until the Soviet missiles in Cuba were on the launching pad and being fueled for flight. Rather, he acted earlier, during a brief window of opportunity, to head off the threat before the Soviet missiles could become operational.⁷⁷ In doing so he risked a U.S.-Soviet war. Today, while the potential harm from a terrorist attack is at least as high as the possibility of a nuclear missile attack from Cuba in 1962, the use of force involved in an assault team or cruise missile to target and kill Osama bin Laden and his lieutenants falls far short of JFK’s imposition of a naval blockade on Cuba and the risk of full-blown war between the superpowers.

Another important principle of the rules of war is that targeted attacks to kill the enemy are permitted. In fact, it is one of the primary tools used by militaries to defeat the enemy. As Hugo Grotius, the father of international law, observed in 1646, “[i]t is permissible to kill an enemy.”⁷⁸ There is no indication that the presidential assassination ban was intended to prevent traditional military operations. Indeed, war would be difficult to win, or would be won at much greater cost to civilians and combatants, if a nation at war could not precisely target members of the enemy armed forces.

In war, the enemy includes foot soldiers and a command-and-control structure that extends up to the Commander in Chief. Also included are personnel and assets not directly engaged in hostilities, such as combat and combat support units, administration, communications, logistical personnel, and suppliers. Anyone who is a legitimate military target can be attacked with a variety of means. “All are lawful

76. See Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 598 (1963); W. T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 348 (1963).

77. See Mark L. Haas, *Prospect Theory and the Cuban Missile Crisis*, 45 INT’L STUD. Q. 241, 260–264 (2001).

78. See HUGO GROTIUS, *THE LAWS OF WAR AND PEACE* bk. III, § XVIII(1)–(2) (Francis W. Kelsey et al. trans., Lonang Inst. Electronic Ed. 2003) (1625), <http://www.lonang.com/exlibris/grotius/gro-304.htm>.

means for attacking the enemy,” wrote W. Hays Parks, one of America’s most respected authorities on the laws of war.⁷⁹ “The choice of one vis-a-vis another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination.”⁸⁰ Those same rules govern American attacks upon al-Qaeda leaders and planners today. It makes little legal sense for the United States to have the discretion to attempt to attack Qadhafi in response to Libya’s terrorism, but to refrain from doing so against bin Laden or Zawahiri.

IV. LIMITS

This is not to say that American agents have a hunting license for anyone suspected of being an al-Qaeda operative. The rules of warfare, which give nations and their military the right to use deadly force to defeat an enemy, impose guidelines. These rules are not abstract, sterile, or restrictive, nor are they broken when a missile goes astray or nearby civilians lose their lives. The laws of war take into account that war is not a precise science and that unanticipated harms or loss of life ancillary to a military attack will occur.

A corollary of the right to kill enemy personnel and destroy assets is that the deaths of civilians that occur as a result of legitimate attacks against military targets are not illegal. This is the source of the idea of “collateral damage,” which made its controversial appearance in the Vietnam War. But the rule is as old as war itself. The central principle of the laws of war is that innocent civilians should not be targeted. On the other hand, the rules of war accept the death of civilians in or near legitimate military targets.⁸¹ Law recognizes that war does not yet amount to antiseptic surgery where we can zap cancers with lasers but leave healthy tissue nearby unharmed.

Thus, the United States does not commit murder if it bombs a location that contains both bin Laden and his associates, on the one hand, and their family members on the other. It does not commit murder in Iraq when, in the course of a firefight with Uday and Qusay Hussein, who were holed up in a residential building in the middle of a densely populated city, civilians living next-door are harmed. Rather, it is the terrorists who violate the rules of war by deliberately hiding themselves and their bases of operation within civilian populations, thereby drawing unwilling and unsuspecting innocents into the fighting. In another example of asymmetric tactics, terrorists multiply their strength by relying on the humanitarian morals of the West not to harm civilians. Terrorists know, depend, and capitalize on

79. See Parks, *supra* note 35, at 5.

80. *Id.*

81. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 48–58, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>.

the fact that American military and civilian leaders are reluctant to launch attacks that might generate large numbers of civilian casualties.

Killing or disabling enemy personnel is of course what warfare is all about, but that does not mean that anything goes. The United States cannot use poison on terrorist leaders, or refuse to accept surrender, or shoot the wounded. One of the early laws of war treaties, known as the 1907 Hague Regulations, prohibits “kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army,” as well as killing or wounding an enemy who is helpless or has surrendered, or declaring “that no quarter will be given.”⁸² The U.S. military interprets this provision as “prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’”⁸³ Assassination, which is equated with killing the enemy using treachery, is prohibited.

Banning “treachery” does not prohibit targeting individual enemy soldiers or commanders. This distinction was drawn in the very first effort to codify the rules of war, undertaken by Francis Lieber during the Civil War, and issued as General Orders Number 100 in 1863 to the Union armies.⁸⁴ Under the laws of war, “treacherously” refers to deceiving the enemy by disguising one’s forces in the form of a noncombatant (and therefore protected from attack) or declaring an enemy outside the protection of the laws of war.⁸⁵ It could also include soldiers disguising themselves as civilians or Red Cross workers,⁸⁶ or refusing to accept a surrendering combat soldier, or placing a bounty on an enemy’s head. The laws of war have never been

82. Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land art. 23(b)–(d), Oct. 18, 1907, 36 Stat. 2277 [hereinafter War Customs Convention].

83. DEP’T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 31 (1956), http://www.loc.gov/tr/frd/Military_Law/pdf/law_warfare-1956.pdf. Hague Regulation 23(b) makes it “especially forbidden” to “kill or wound treacherously individuals belonging to the hostile nation or army.” War Customs Convention, *supra* note 82, at art. 23(b). Article 23(c) makes it forbidden “[t]o kill or wound an enemy, who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.” *Id.* Hague Regulation 23(d) makes it forbidden “to declare that no quarter will be given.” *Id.*

84. Those orders prohibited assassination and declared that

[t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.

U.S. WAR DEP’T, GENERAL ORDERS NO. 100, § IX, § 148 (1863), *reprinted in* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD § IX, ¶ 148, at 41 (1898), http://www.loc.gov/tr/frd/Military_Law/pdf/Instructions-gov-armies.pdf.

85. *See* Parks, *supra* note 35, at 6.

86. *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 633 (1992). Protocol I to the Geneva Conventions, which the United States refused to ratify in 1987, continues the prohibition against “treachery” by prohibiting “resort to perfidy,” which it defines as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Protocol I, *supra* note 81, at art. 37.

understood to prohibit targeting specific enemy commanders or other personnel. Nor do they prohibit the use of surprise, ruses, commando teams operating behind enemy lines, or stealthy tactics to kill enemy personnel. American forces could launch commando assaults to kill bin Laden, but they could not refuse his surrender, or dress as aid workers, or shoot him if he is wounded and unable to fight.

Even though al-Qaeda members are legitimate targets, the United States could not drop a nuclear weapon to kill them (even if al-Qaeda would not feel itself bound by such rules). Under the rules of war, soldiers obey the principles of “necessity,” “discrimination,” and “proportionality.”⁸⁷ Necessity demands that nations engage only in destruction necessary to achieve a military objective.⁸⁸ Discrimination means targeting combatants and, within the limits of military technology, sparing civilians from the cruelty of war.⁸⁹ Proportionality requires that the means used in an attack and degree of destruction reasonably relate to the military goal.⁹⁰ War is not an excuse to wreak havoc or display vindictiveness against whole peoples.

Developed by the practice of armies over hundreds of years, these rules place significant limits on warfare. American bombers could not carpet bomb towns or cities to destroy a few al-Qaeda cells. The forms of attacks must also abide by various laws of war treaties and steer clear of certain types of weapons that cause “unnecessary suffering,” such as explosive bullets, poison, and chemical and biological weapons. But if the United States has a window of opportunity to target bin Laden or his henchmen, it can strike. It need only select means that will cause the least damage possible, under the circumstances, to surrounding civilians and buildings.

Other nations’ experiences provide examples of how these principles work out in practice. Israel has conducted a campaign of “targeted killings” since 2000 in response to the second Palestinian intifada, using helicopter gunships and jet fighters to launch missiles at the leaders of terrorist groups Hamas, Islamic Jihad, and the military wing of the Fatah party.⁹¹ The attacks usually occur on territory transferred to the control of the Palestinian Authority under the Oslo Accords.⁹² Israel considers itself

87. DEP’T OF THE NAVY ET AL., *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* § 5.3 (July 2007), [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

88. DEP’T OF THE ARMY, *supra* note 83, ¶ 3; DEP’T OF THE NAVY ET AL., *supra* note 87, § 5.3.1.

89. DEP’T OF THE ARMY, *supra* note 83, ¶¶ 2, 40.

90. *Id.* ¶ 41. Protocol I defines proportionality by prohibiting operations that can “be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Protocol I, *supra* note 81, at arts. 51(5)(b), 57(2)(a)(iii). The Navy manual defines proportionality as “a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.” DEP’T OF THE NAVY ET AL., *supra* note 87, § 5.3.3.

91. See Steven R. David, *Fatal Choices: Israel’s Policy of Targeted Killing*, MIDEAST SECURITY AND POL’Y STUD., Sept. 2002, at 1, 4, <http://www.biu.ac.il/Besa/david.pdf>.

92. Orna Ben-Naftali & Keren Michaeli, *‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT’L L. J. 233, 243–47 (2003).

in a state of armed conflict with these terrorist groups and judges their leaders to be legitimate military targets. It strives “to use the minimum force necessary to prevent terrorism, acting in compliance with the principles and practice of armed conflict. It takes care to target only those responsible for the violence and makes every effort to avoid the involvement of innocent civilians.”⁹³ While Israel has received a fair amount of international criticism, it has also succeeded in severely reducing the number of terrorist bombings and large civilian casualties that otherwise would have occurred, using both military and nonmilitary means.⁹⁴ In defending its targeted killing of bin Laden and his lieutenants, the United States should borrow a page out of the Israeli anti-terrorism playbook.

Advances in military technology allow the United States to avoid the high civilian death tolls of past wars to reach military targets. To destroy Japan’s industrial base and induce it to surrender in World War II, the United States killed hundreds of thousands of civilians in firebombing attacks on cities such as Tokyo and Osaka, followed by the loss of life from the atomic bombing of Hiroshima and Nagasaki. American and British bombers destroyed German cities such as Berlin and Dresden, causing the deaths of tens of thousands of civilians. If the Allies could have killed Adolf Hitler with similarly indiscriminate levels of force, they surely would have done so. During the Cold War, America’s strategic air and missile commands were prepared to launch assaults that would have killed millions of civilians to deter an attack on the West. The fear factor alone of enormous potential mass-killing, known as the strategy of “mutually assured destruction,” was itself a tactic of the Cold War intended to avert such an outcome.⁹⁵

Today’s technology allows the United States to target enemy commanders with pinpoint accuracy. Satellite reconnaissance and electronic eavesdropping allow it to spot the exact location of al-Qaeda terrorists. Unpiloted drones can circle areas of known terrorist activity for hours on end, permitting the United States to act instantly on intelligence. Precision-guided munitions can hit targets within a margin of error of only yards, reducing civilian casualties. The United States used the lethal combination of intelligence and advanced weaponry on al-Harethi’s car, Saddam Hussein’s compound, and Zawahiri’s dinner party. Even when attacks have failed, and only second-tier al-Qaeda operatives were killed, civilian loss of life has been light in comparison with previous wars.

What about reciprocity? Former attorney general Reno warned President Clinton that attacking Osama bin Laden would make American officials and leaders targets. In retrospect, those concerns were misplaced and the exercise of restraint did not avert 9/11. If anything, it seems to have encouraged it by convincing al-Qaeda’s leaders that the United States would not meaningfully respond to attacks. The 9/11

93. *Israel, the Conflict and Peace: Answers to frequently asked questions*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Nov. 1, 2007), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/11/Israel-%20the%20Conflict%20and%20Peace-%20Answers%20to%20Frequen.

94. See Barry A. Feinstein & Justus Reid Weiner, *Israel’s Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT’L L. REV. 309, 368–69 (2005).

95. See EDWARD N. LUTTWAK, *STRATEGY AND POLITICS: COLLECTED ESSAYS* 37 (1980).

attacks made clear that all of America—leaders and civilians—were al-Qaeda’s target. It is absurd to believe that if the United States refrains from targeting Osama bin Laden or his commanders, then al-Qaeda would refuse to launch similar attacks. Reciprocity is an important principle at work in law and policy, and underlies the laws of war. The international legal system has no supranational government with a legislature that can make laws on behalf of the world, or an executive branch with an army or police force that can meaningfully enforce those laws. War crimes trials at The Hague will not deter al-Qaeda. Usually, nations at war will restrain their conduct if their opponent will do so as well, and neither gains any corresponding advantage. If a nation violates the laws of war, its enemy will do the same.⁹⁶ Restraint in an individual instance can be more humanitarian⁹⁷ and might have the hoped for effect. But it is reciprocity, both positive and negative, that has historically induced the enemy to obey the laws of war. Germany was deterred from using chemical weapons in World War II not out of humanitarian concern for allied suffering, but because the allies were fully prepared to retaliate in kind.⁹⁸

V. CONCLUSION

Al-Qaeda will never follow the rules of war. Al-Qaeda gains its only tactical advantages by systematically flouting them. American restraint in the use of force, the methods of attack, or the treatment of prisoners does not affect the incentives of al-Qaeda members, who seek a goal of salvation in the afterlife. Suicide bombers are not susceptible to deterrence. However, al-Qaeda’s utterly lawless nature does not free the United States from all constraints. Standard principles of reciprocity counsel that the United States follow customary rules on targeting and the use of force. But there is also ample historical and legal precedent for American policymakers to address creatively the unique threat that al-Qaeda poses. There could be some areas in which rules of conduct could be negotiated—terrorist groups in the United Kingdom-IRA and the Israeli-Palestinian conflicts have successfully engaged in prisoner exchanges. But for al-Qaeda to agree to play on a level playing field with the United States would be tantamount to its accepting defeat. Instead, the United States will have to draw on some old concepts, such as those used to confront piracy, and marry them to new ones, such as precision targeting through intelligence and technology. The integration of real-time intelligence with strikes by special forces and drone attacks, under this legal framework, has made possible some of the United States’ most important victories to date.

96. See Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003); see also James Morrow, *The Institutional Features of the Prisoner of War Treaties*, 55 INT’L ORG. 971 (2001).

97. See GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 253 (1994).

98. RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944*, at 272 (2007).