

# Targeted Killings from Many Perspectives

TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD.

Edited by Claire Finkelstein, Jens David Ohlin & Andrew Altman.

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This collection of eighteen essays presents views on “targeted killing” from several scholars of law, philosophy, and ethics, along with those of some military lawyer/practitioners. Apart from minor editing deficiencies, it is a beautiful book: large, with print size that is easy on the eyes, and with sufficient space between lines of text to make the complex material at least visually digestible. It has useful tables of cases, instruments, legislation, and abbreviations, as well as an index. The essays are divided into an introduction (by Andrew Altman, Professor of Philosophy at Georgia State University) and five substantive categories to help the reader see the subject from specific perspectives, with inevitable overlap.

The premise of the book is that the attacks of al Qaeda on September 11, 2001 changed the view of the United States and other states on how to protect their civilians from attacks by persons who are not members of a regular military force.<sup>1</sup> Targeted killing has long been used in conventional warfare and in the course of self-defense.<sup>2</sup> In either context, killing members of an enemy’s armed forces is permitted since every member of a conventional force engaged in armed conflict or in self-defense has the right to target and kill the other state’s military forces for the purpose of defeating those forces or mounting an effective defense.<sup>3</sup>

Targeted killing (or other forms of attack) are not allowed under the law of war, however, against noncombatants,<sup>4</sup> and according to the International Committee of the Red Cross (ICRC), anyone who is not a combatant (generally anyone not in a uniform, wearing insignia, or armed) is presumed

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1. Andrew Altman, *Introduction*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 1, 5 (Claire Finkelstein et al. eds., 2012).

2. See Mark Maxwell, *Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?*, in TARGETED KILLINGS, *supra* note 1, at 31, 34–36 (summarizing the history of targeted killings by the United States during and after the Cold War).

3. *Id.* at 31–32.

4. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (establishing provisions for humane treatment of noncombatants).

to be a civilian and not subject to attack.<sup>5</sup> This presumption is rebutted only during the time an individual is involved in “direct” hostilities, in which case such individuals may be attacked as an unprotected “belligerent.”<sup>6</sup>

After the 9/11 attacks, the ICRC issued guidance in 2003, adopted in 2009, establishing for purposes of both international and noninternational armed conflicts the category of “organized armed group.”<sup>7</sup> While this guidance creates a category of persons separate from civilians, seemingly analogous to a military force, individuals become members of such “armed groups” only if their “continuous function [is] to take a direct part in hostilities.”<sup>8</sup> The first essays focus on who should be considered “non-combatants” in armed conflicts.

### I. Targeting “Noncombatants”

Colonel Mark “Max” Maxwell argues in an essay entitled “Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?”<sup>9</sup> that the ICRC’s recognition of a limited right to respond to attacks by “armed groups” of nonstate actors fails to give sufficient significance to a person’s membership in a combat-related function in an organized armed group.<sup>10</sup> He would define noncombatant to exclude members of organized armed groups who perform combat-related functions.<sup>11</sup> These “unlawful combatants” would be subject to attack on the basis of their status just as if they were soldiers, subject to applicable proportionality requirements.<sup>12</sup>

Professor Jens David Ohlin reaches essentially the same conclusion in his essay “Targeting Co-Belligerents,”<sup>13</sup> through a process he characterizes as “linkage.”<sup>14</sup> He insists that the only terrorists that pose a real danger and that the United States should be authorized to attack are those associated with (i.e., linked to) an armed group.<sup>15</sup> He believes the ICRC’s guidance on when members of an “armed group” may be targeted should be understood (or construed) to permit attacks on any individual who deliberately joins a group dedicated to jihad and who in addition carries out orders from the command structure of the group, including engaging in military operations, though not

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5. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 75–76 (2009).

6. *Id.* at 72–76.

7. *Id.* at 31–35.

8. *Id.* at 27.

9. Maxwell, *supra* note 2, at 31.

10. *Id.* at 50–54.

11. *Id.* at 56.

12. *Id.* at 46–49.

13. Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS, *supra* note 1, at 60.

14. *Id.* at 62–65.

15. *Id.* at 63.

necessarily at any discrete moment in time or on a continuous basis.<sup>16</sup> He recognizes that the criminal law model would require far less proof of “linkage” through the application of such concepts as conspiracy or complicity.<sup>17</sup> He advocates, instead, a modified military model as the doctrinal basis for rebutting the civilian presumption, seeing that model as most consistent with the preservation of civil liberties, given the absence on the battlefield of any opportunity to disprove “linkage” based on much looser standards.<sup>18</sup>

The next two essays address the same question of what evidence should be required to justify targeted attacks, but make no effort specifically to address which set of legal rules should apply. Professor of Philosophy Daniel Statman, who participated in drafting rules for the Israeli Defense Forces, addresses the issue “Can Just War Theory Justify Targeted Killing?”<sup>19</sup> by examining “three possible models”: “individualist,” “collectivist,” and “contractualist.”<sup>20</sup> He concludes that targeted killing is a legitimate means of warfare under all three of the models.<sup>21</sup> From the “individualist” perspective the method is justified for the same reason killing is justified in self-defense, so long as the individual targeted is morally responsible for posing an unjust threat to innocent lives.<sup>22</sup> Collectivist responsibility for attacks and the right to defend result from the practical necessity of conflicts between collectives, including organizations tightly enough organized to be seen to have adopted the common policy of conducting unjust attacks.<sup>23</sup> Contractualist regulation of conflict occurs when agreements among states govern conduct, and targeted killing should be allowed (indeed preferred to outright war) in such situations so long as the method is used against those behaving as combatants or those who materially support combat operations (including political leaders), regardless of efforts to obscure their status.<sup>24</sup> He suspects, based on the positive response to NATO’s targeted attacks on Libyan forces, that many who oppose this method *in bello* are in actuality opposed to the underlying conflicts in which the method is used, not to the morality of the method itself.<sup>25</sup>

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16. *Id.* at 83–87.

17. *See id.* at 77 (observing that the “criterion of complicity is notoriously broad and meant to capture a wider scope of participation that plays some causal role in the criminal endeavor even if the causal role is somewhat attenuated”) *see also id.* at 88 (noting that “in some jurisdictions [the case law on conspiracies] imposes stringent requirements on individuals seeking to leave a criminal organization”).

18. *Id.* at 87–88.

19. Staman, *supra* note 2, at 90.

20. *Id.* at 95.

21. *Id.* at 110.

22. *Id.* at 95.

23. *Id.* at 96–97.

24. *Id.* at 97.

25. *Id.* at 111.

Professor Jeremy Waldron of NYU and Oxford also focuses on the morality of targeted killing, but he concludes the method should not be used. Waldron regards all killing as “murder,” a rather nonneutral place to start given his claim to search for “neutral” principles.<sup>26</sup> He sees the law of war as a practical accommodation to the reality that the “murdering” in war would be even more extensive and brutal without *jus in bello* rules.<sup>27</sup> “Relaxing” those rules to permit more “murder,” even of those he agrees are murderers who target civilians, would be a mistake<sup>28</sup> for three reasons: first, because it would give the murderers we target a ground for claiming they can target us; second, because we would apply the new license to kill in a biased and incompetent manner; and third, the “inherently abusive character of the attitude towards killing revealed by reasoning that,” because we are allowed by principles we already have to kill some people then “surely, by the same reasoning, in our present circumstances of insecurity, there must be other people we are also allowed to murder.”<sup>29</sup>

## II. Normative Foundations: Law Enforcement or War?

The second set of essays in the book addresses what rules should apply to targeted killing. Jeff McMahan, Professor of Philosophy at Rutgers, examines the question in “Targeted Killing: Murder, Combat or Law Enforcement?”<sup>30</sup> He regards killing terrorists as “moral” when used for defense.<sup>31</sup> But he agrees with Waldron that targeted killing poses several dangers and concludes that law enforcement rules are best suited to limit that abuse because they require that suspects be arrested rather than killed (if possible), grant a presumption of innocence, impose a burden of proof beyond reasonable doubt, and extend many other protections, including a neutral fact-finding process that in the United States is controlled by independent judges and juries.<sup>32</sup> These protections must be suspended in some cases,<sup>33</sup> however, and in particular when the terrorists live, conspire, train within, and launch attacks from, a state that shelters them from arrest. When an “unusually dangerous terrorist” cannot be arrested with reasonable safety, the situation may be analogous to that of “a rampaging gunman who resists arrest,” and who can therefore be killed under law enforcement

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26. Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principal?*, in TARGETED KILLINGS, *supra* note 1, at 113.

27. *Id.* at 116–18.

28. *Id.* at 129–30.

29. *Id.* at 131.

30. Jeff McMahan, *Targeted Killing: Murder, Combat or Law Enforcement?*, in TARGETED KILLINGS, *supra* note 1, at 135.

31. *Id.* at 136–37, 141.

32. *Id.* at 146–50, 154–55.

33. McMahan, *supra* note 30, at 147; *see also* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (stating that there are times when it is not constitutionally unreasonable to inflict deadly force).

rules.<sup>34</sup> Ideally, he concludes, state law enforcement agencies should cooperate to make criminal enforcement effective, but where this is not possible, targeted killing pursuant to the law of war or new standards may be appropriate, at least on a “provisional” basis in case the risks of abuse cannot be contained.<sup>35</sup>

Claire Finkelstein, Professor of Law and Philosophy at the University of Pennsylvania (and the principal editor of the volume) contributes an essay entitled “Targeted Killing as Preemptive Action.”<sup>36</sup> She regards targeted killing as generally indefensible under the law of war other than in actual combat in an armed conflict between conventional combatants.<sup>37</sup> She regards all members of organized armed groups as noncombatants unless they are in uniform, bear insignia, carry weapons, or are directly engaged in hostilities.<sup>38</sup> (At one point she even uses the phrase “noncombatant enemy force.”<sup>39</sup>) She concludes that targeted killing can be justified morally and legally, but only as preemptive force under law enforcement standards when the individual targeted poses an imminent threat that cannot otherwise be effectively negated, and only after the state seeking to use force issues a threat to use force unless the individual planned to be targeted surrenders and the individual fails to surrender.<sup>40</sup>

Professor Richard V. Meyer of Mississippi College School of Law and Senior Fellow at the U.S. Military Academy at West Point’s Center for the Rule of Law, considers existing rules and practices related to targeted killing unacceptable.<sup>41</sup> He asserts that, in order to preclude uncertainty and the improper extension of the rules related to the targeting of individuals not strictly combatants, any state seeking to use force should be required to “declare war” on a state, group, or individual.<sup>42</sup> The state against which war is thus declared, or in which the group or individual sought to be attacked is located, would be able to challenge the legality of any such declaration of war before the International Court of Justice (ICJ), which would apply the UN Charter’s rules that allow the use of force only with Security Council approval or in self-defense against armed attack under Articles 2(4) and 51.<sup>43</sup> If the state challenging the declaration wins, then the declaration of war is deemed invalid and the state, group, or individual becomes legally immune

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34. McMahan, *supra* note 30, at 146–48.

35. *Id.* at 155.

36. Claire Finkelstein, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS, *supra* note 1, at 156.

37. *Id.* at 162.

38. *Id.* at 163–64.

39. *Id.* at 160.

40. *Id.* at 181–82.

41. Richard V. Meyer, *The Privilege of Belligerency and Formal Declarations of War*, in TARGETED KILLINGS, *supra* note 1, at 183.

42. *Id.* at 186.

43. *Id.*; U.N. Charter art. 2, para. 4; *id.* art. 51.

from attack; if the ICJ upholds the declaration of war, the state is presumably subject to attack (though Meyer does not go into that), and if the proposed target is a group or individual the state must “intern” them (or him) unless and until such individuals agree to surrender.<sup>44</sup>

### III. Targeted Killing and Self-Defense

The book’s next section—focused on self-defense—begins with an essay by Professor Craig Martin of the Washburn University School of Law entitled “Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime.”<sup>45</sup> He concludes that self-defense is limited to the right under Article 51 to respond to “armed attacks” by states,<sup>46</sup> and is therefore unavailable as a justification for targeted killing.<sup>47</sup> He acknowledges that the George W. Bush and Obama Administrations have relied on self-defense and that the Security Council recognized that the attacks of 9/11 gave rise to the right of self-defense,<sup>48</sup> but he rejects or attempts to distinguish those authorities, relying instead on ICJ rulings and the scholarly literature that ignores U.S. (and other state) practice on this issue.<sup>49</sup> To extend the right of self-defense to attacking nonstate actors within other states without consent would undermine the *jus ad bellum* regime adopted in the U.N. Charter<sup>50</sup> and lead, he predicts, to such unprincipled and dangerous results as using self-defense to attack regimes for the purpose of “preventing” as opposed to “preempting” attacks.<sup>51</sup>

Russell Christopher, Professor of Law at the University of Tulsa School of Law, writes on “Imminence in Justified Targeted Killing.”<sup>52</sup> He reasons, using hypotheticals, that imminence is merely a proxy for other values when used to limit self-defense, and renders self-defense ineffective in many cases.<sup>53</sup> He sees this requirement as the “principal obstacle” for justifying targeted killings<sup>54</sup> (which seems dubious). He rejects as empirically

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44. Meyer, *supra* note 41, at 217.

45. Craig Martin, *Going Medieval: Targeted Killing Self-Defense and the Jus ad Bellum Regime*, in TARGETED KILLINGS, *supra* note 1, at 223.

46. See U.N. Charter art. 51 (affirming that nothing in the Charter “impair[s] the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .”).

47. See Martin, *supra* note 45, at 229, 247 (concluding that the government’s self-defense justification for targeted killings is “not consistent with the principles of self-defense under the *jus ad bellum* regime” and referring to the *jus ad bellum* regime as being “of the U.N. system”).

48. *Id.* at 239.

49. *Id.* at 240–42.

50. See *id.* at 227 (stating that the U.N. system’s creation represented the culmination of a movement to bring legal limits to the use of force).

51. *Id.* at 243–44.

52. Russell Christopher, *Imminence in Justified Targeted Killing*, in TARGETED KILLINGS, *supra* note 1, at 253.

53. *Id.* at 257–60, 269.

54. *Id.* at 257.

unfounded the view that individuals or groups that have established an intention and ability to attack, and who will do so as secretly and suddenly as possible, pose a “continuing” imminent threat, as the U.S. and British governments have concluded.<sup>55</sup> He also rejects the view of other scholars that imminence is based on the political principle that force may be used in defense by a state only when some other, more neutral institution is unable to act.<sup>56</sup> He sees no value in preserving the concept, given the obligation to use force only when necessary.<sup>57</sup>

Phillip Montague, Professor Emeritus of Philosophy at Western Washington University, in his essay “Defending Defensive Targeted Killings,”<sup>58</sup> uses hypotheticals to support the view that attacks on individual terrorists are morally justifiable in situations that represent joint action by a community against the joint actions of the groups to which such terrorists belong.<sup>59</sup> Such attacks are not defensive, in his view, but nonetheless are justified as communal responses to aggression by groups, a rationale consistent with the criminal law concepts of conspiracy, aiding and abetting, or materially assisting a terrorist group.<sup>60</sup>

#### IV. Exercising Judgment in Targeted Killing Decisions

The next section of essays examines the need for, and existence of, processes for evaluating the propriety of targeted killings before they are undertaken. Amos N. Guiora, Professor of Law at the S.J. Quinney College of Law at the University of Utah, considers “The Importance of Criteria-Based Reasoning in Targeted Killing Decisions.”<sup>61</sup> Having served in the Israel Defense Forces (IDF), Guiora bases his conclusions on actual experience in reviewing proposed attacks on particular individuals.<sup>62</sup> He notes the substantial increase in targeted killings, especially by the United States (largely with drones), and believes such attacks, even if lawful in principle as self-defense or military measures, must each be reviewed under pre-established criteria by an attorney rather than entrusted to the intuition of military commanders as are attacks in conventional combat.<sup>63</sup> The process on which he insists, and which is applied in Israel, is based on a formal

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55. *Id.* at 256–57.

56. *Id.* at 269–70.

57. *Id.* at 284.

58. Phillip Montague, *Defending Defensive Targeted Killings*, in TARGETED KILLINGS, *supra* note 1, at 285.

59. *Id.* at 285–87.

60. *See id.* at 294–99 (defining the “special” morality wherein force is justified against those who are not being “individually aggressive” because it is a joint attempt to stop a harm that another group has set in motion).

61. Amos N. Guiora, *The Importance of Criteria-Based Reasoning in Targeted Killing Decisions*, in TARGETED KILLINGS, *supra* note 1, at 303.

62. *Id.* at 307 & n.12.

63. *Id.* at 306–07.

“checklist” that looks at the propriety of the target (degree of danger, reliability of intelligence, timeliness) and the ability to hit the target while protecting innocent civilians and upholding the rule of law (proportionality, necessity, and judicial review).<sup>64</sup>

Professor Gregory S. McNeal of the Pepperdine University School of Law challenges the factual assumptions of critics of targeted killing in “Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence.”<sup>65</sup> He summarizes the “collateral damage methodology” (CDM) used by the U.S. military to screen targeted attacks based on “empirical data, probability, historical observations from the battlefield, and physics-based computerized models for collateral damage estimates.”<sup>66</sup> Based on this process and the extensive evidence the United States has released on its military program, he rejects as unfounded criticisms and factual claims by several commentators, especially those of law professor Mary Ellen O’Connell, whom he accuses not only of baseless factual and policy speculation, but also of outright “false” assertions, particularly with respect to her claim of the lack of military training in the law of war.<sup>67</sup> He recognizes that, while the military’s targeted killing program can be observed, the CIA program is covert, but he insists that “the onus should be on the critics to demonstrate” that “the CIA substantially departs from the military’s collateral damage estimation and mitigation processes.”<sup>68</sup> He does not explain, however, why critics should bear this burden, or why the lack of knowledge about the CIA’s activities does not present a strong case for placing all such activities under military control, or at least explicitly under the military standards.

Kevin H. Govern, Associate Professor of Law at the Ave Maria School of Law, writes specifically about “Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?”<sup>69</sup> He provides the most complete description of targeted killing in any of the volume’s essays, including that of Bin Laden, and concludes that the latter was a “legitimate military target” (as the head of Al Qaeda, which attacked the United States and which Congress authorized the President to attack), and that the decision was “thoroughly considered” and reasonable even if it “lean[ed] towards targeted killing in lieu of a capture operation.”<sup>70</sup> Govern sees targeted killing as having been established through practice and acceptance by all states, groups, and individuals other than “those allied or sympathizing with AQ” and “some

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64. *Id.* at 307, 308 & n.12.

65. Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS, *supra* note 1, at 326.

66. *Id.* at 329.

67. *Id.* at 341.

68. *Id.* at 333.

69. Kevin H. Govern, *Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?*, in TARGETED KILLINGS, *supra* note 1, at 347.

70. *Id.* at 347–48.

academics.”<sup>71</sup> He concludes that targeted killing is being accepted, “not just out of political pragmatism and military necessity, but as an emergent norm of customary international law.”<sup>72</sup>

Professor of Law Kenneth Anderson of the Washington College of Law of American University (and a Visiting Fellow at the Hoover Institution) examines the narrow but important issue whether targeted killing is a form of “Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?”<sup>73</sup> Anderson makes clear the ways in which targeted killing and the use of drones differ, for example, because targeted killing can be conducted from other platforms than drones, and drones can be used for major, conventional attacks, not just targeted killings.<sup>74</sup> He doubts that the relative increased safety for some individuals involved in utilizing drones, along with that of civilians whose lives are spared by more discriminate means, is likely to have a major impact on U.S. government decisions to go to war, given the many other considerations that are taken into account.<sup>75</sup> Ultimately, however, he concludes that although targeted killing may make resort to force “easier,” that does not establish that resort to force may or has become “too easy.”<sup>76</sup> Most people would agree, he believes, that responding to terrorist threats earlier, because drones have made it easier to respond, rather than waiting for a massive attack such as on 9/11, is just.<sup>77</sup> And making humanitarian intervention easier could greatly reduce human suffering, and increasing the ability of states to attack armed rebels may deter unjust conflicts.<sup>78</sup>

#### V. Utilitarian Trade-Offs and Deontological Constraints

The final section of essays returns to the ends-versus-means discussions in some earlier papers. Fernando Tesón, the Tobias Simon Eminent Scholar at Florida State University, writes in “Targeted Killing in War and Peace: A Philosophical Analysis,”<sup>79</sup> that terrorism is a uniquely evil form of conduct when it consists of “principled evildoing,” which he defines as the deliberate killing of civilians in a unjust cause (e.g., to impose a particular religious order).<sup>80</sup> He believes that targeted killing is legitimate in peacetime where it

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71. *Id.* at 370.

72. *Id.* at 348.

73. Kenneth Anderson, *Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?*, in TARGETED KILLINGS, *supra* note 1, at 374.

74. *See id.* at 379–80 (explaining that drones are used in a range of military operations and that targeted killings can be carried out by human beings).

75. *Id.* at 381–86.

76. *Id.* at 395–97.

77. *Id.* at 398.

78. *Id.* at 399.

79. Fernando R. Tesón, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS, *supra* note 1, at 403.

80. *See id.* at 419 (arguing that killings “in the name of Islam” are an example of principled evildoing).

will save many innocent lives, serve a public purpose that is “just,” is only directed against “morally culpable” individuals, and is used only where no nonlethal option is available.<sup>81</sup> Nonetheless, because governments are not good at abiding by limitations and because of the appropriate revulsion for “premeditated” killing, he concludes that “targeted killing in peacetime should be, in principle, *legally* prohibited,” allowing the political leader of a state to waive the prohibition to prevent a deadly terrorist attack, but requiring an explanation thereafter for the waiver.<sup>82</sup>

Michael Moore, Professor of Law and Philosophy at the University of Illinois, contributes “Targeted Killings and the Morality of Hard Choices.”<sup>83</sup> He explains why making a moral judgment of targeted killing (or other actions by our governments) is proper and unavoidable, despite the difficulties of settling on standards for doing so.<sup>84</sup> Moore provides the standards he considers appropriate using the strengths of both pure “consequentialism” or “deontology” and settles on a “three-level analysis of ethics” consisting of applying (1) the consequentialist standard: would the action produce a better state of affairs or worse; and if so (2) the deontological standard: does some moral concern (e.g., deliberately killing an innocent person to save another) trump the possible achievement of a better state of affairs; and if so (3) does some potential catastrophe create a moral imperative to override the deontological “no-no”?<sup>85</sup> Moore recognizes the real-world impracticality of this process (which is far more complicated) and that decision makers will rely on their intuition, experience, and common sense.<sup>86</sup> But he hopes that his methodical approach to the moral issues leads practitioners to be more systematic in their implementation of such policies.<sup>87</sup> His application of the scheme, while based on seven questions, is essentially a set of intelligently formed opinions leading to the conclusion that targeted killings could be moral if they pass the tests in (1) and (2), but should not be allowed on the basis of (3) to avoid potential abuse.<sup>88</sup>

In the final essay, “Targeted Killing and the Strategic Use of Self-Defense,”<sup>89</sup> Professor of Law Leo Katz of the University of Pennsylvania School of Law addresses the morality of a government’s deliberately creating

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81. *Id.* at 405.

82. *See id.* at 430–33 (arguing that governments struggle to make the assessments necessary to determine whether a targeted killing is justified and that premeditated killing is “blameworthy”).

83. Michael S. Moore, *Targeted Killings and the Morality of Hard Choices*, in TARGETED KILLINGS, *supra* note 1, at 434.

84. *See id.* at 436–37 (arguing that targeted killings create a moral dilemma and an ethical framework is needed to resolve moral dilemmas).

85. *Id.* at 447–55.

86. *Id.* at 440.

87. *Id.* at 466 (expressing hope that decision makers will “see the possibility of ordered, rational analysis”).

88. *Id.*

89. Leo Katz, *Targeted Killing and the Strategic Use of Self-Defense*, in TARGETED KILLINGS, *supra* note 1, at 467.

situations in which it is able to claim that it is authorized to kill in self-defense, which he calls “strategic” use of such killing.<sup>90</sup> Katz seems to assume that the United States prefers to kill terrorists rather than arrest them, and that by encouraging terrorists to act out in some way that appears to put the United States in danger, it is able to justify killing them in what it claims is self-defense, an assumption made without any empirical basis. Nonetheless, Katz concludes that moral principles lead to the conclusion that, even “strategic” killings (when dealing with actual terrorists) are solidly based, because the law consistently (and perversely) disregards the moral considerations he finds troubling.<sup>91</sup>

## VI. Critiques

Based on the summary above, it should be clear that a reader seeking a single, nonredundant and objective account of targeted killing should find another book. On the other hand, this collection of essays provides several original and useful treatments of various aspects of the subject.

One shortcoming of this collection is its failure to include a description of U.S. practice relevant to targeted killing, a failure endemic of most international law scholarship. The United States has consistently construed Article 51 of the U.N. Charter to preserve the “inherent” right to act in self-defense, which means “reasonably” on the basis of all the relevant circumstances.<sup>92</sup> Presidents have authoritatively construed “assassination” under the relevant Executive Order to mean “murder” or unlawful killing and not to include killings in self-defense or otherwise legally justified.<sup>93</sup> No U.S. administration would accept the claim that it has acted “preventively” against a state or terrorist group that has attacked the United States and openly threatens to attack again.

There is nothing “new” about the principle that a state is entitled to protect itself from attacks by terrorists from within another state if the latter is unwilling or unable to prevent those attacks.<sup>94</sup> International lawyers

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90. *Id.*

91. *Id.* at 480.

92. See Abraham D. Sofaer, *International Law and the Use of Force*, 13 NAT'L INT. 53, 53–57 (1988) (collecting four official statements confirming this view from two Republican and two Democrat administrations).

93. The Solf Lecture describing this view was cleared in advance by all relevant agencies. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 116–21 (1989).

94. Eric Posner takes this position. See Kenneth Anderson, *Stop Presses: “Even Eric Posner Says Drone Strikes in Pakistan Are Illegal,”* LAWFARE (Oct. 9, 2012), <http://www.lawfareblog.com/2012/10/stop-presses-even-eric-posner-says-drone-strikes-in-pakistan-are-illegal> (responding to Eric Posner, *Obama’s Drone Dilemma*, SLATE (Oct. 8, 2012), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2012/10/obama\\_s\\_drone\\_war\\_is\\_probably\\_illegal\\_will\\_it\\_s\\_top\\_.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_s_top_.html)). Anderson reasonably suggests that Posner’s motive in taking this unjustified position may stem from his skepticism about international law; the less sensible it looks, the more clearly it

dislike this requirement because it is “old,” like the reasonableness standard for self-defense. Secretary of State Daniel Webster’s letter to British Foreign Secretary Henry Fox in 1841, on which international lawyers so heavily rely as authority for the “imminence” requirement, informed the British that they were wrong that the United States was either unable or unwilling to prevent attacks on Canada by rebels from the United States, and therefore must not attack the rebels unless necessary to deal with an “imminent” rebel attack that the United States could not itself prevent.<sup>95</sup> In context, Webster’s statement makes clear that had the United States been unwilling or unable to prevent the rebel attacks, the British would have been justified in doing so themselves.

Of course, any lawyer (or philosopher) is free to reject the U.S. government’s positions on these issues; but to ignore them is to treat as irrelevant to the content of international law the statements and activities of nations that make that law.

A second, flawed assumption prevalent in most of the essays is that the law enforcement model is inadequate for dealing with terrorists, in that it limits deadly force to situations in which its use is “necessary” to save lives. In fact, as some of the essays recognize, deadly force may be used in law enforcement when it is “reasonable” to do so, not just when it is the only way of preventing the loss of innocent human life. It is also incorrect that law enforcement may only be exercised against individuals on the basis of their individual conduct, rather than their status. Law enforcement officials may use deadly force against individual members of gangs or co-conspirators on reasonable expectations based on the prior conduct of other gang members or co-conspirators.

Understating the utility of the law-enforcement model for dealing with terrorism can lead to unjustified claims that the more controversial law of war model is needed to provide adequate protection. That may be correct with regard to members of “armed groups,” but in general it is the lack of jurisdiction to apply law enforcement rules that renders them inadequate, not their content. Understating the law enforcement model can also be used to create the impression that using deadly force against individuals who attack the United States from foreign states represents a departure from the manner in which the United States treats individuals in such situations domestically. U.S. law enforcement allows such individuals to be killed under any set of circumstances in which using deadly force would be reasonable. So, there is nothing morally incongruous about killing “murderers” in foreign countries who refuse to surrender, relative to the usual, law enforcement remedies for dealing with violent individuals. Therefore, both the law enforcement and

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is shown to be useless. Posner need not try so hard; international lawyers can be counted on to provide him with plenty of ammunition to prove his point.

95. Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT’L L. 209, 217–18 (2003).

the law of war models support targeting individuals who participate in killing American civilians. The problem in such situations is that the foreign states in which such individuals are located are unable or unwilling to arrest or surrender them. Rationalizations that attempt to justify treating them as immune from attack despite their indisputably immoral and criminal underlying conduct disregards this morally significant reality.

Targeted killings abroad have taken place exclusively in states that cannot or will not satisfy their obligation to prevent attacks on the United States from their territories. Three of these states have explicitly or implicitly consented to U.S. actions within their borders (Afghanistan, Pakistan, and Yemen). The targeted killings in Libya were part of NATO's humanitarian intervention in response to Libya's directly targeting its civilian population.<sup>96</sup> The need for targeted killing stems, not from an armed confrontation "between states and . . . the irregular forces of non-state groups and movements using terrorist methods to offset the otherwise overwhelming conventional forces arrayed against them."<sup>97</sup> Far more often, the nonstate groups involved are either serving the states from which they operate, or have the support and protection of those states. This reality underlies the significance given by victim states (and by the Security Council) to state culpability or responsibility for terrorist actions, even if the state cannot be shown to have used the terrorist group to conduct attacks. Why should this shift be seen as lawless and immoral, rather than a demand that states satisfy their sovereign obligations? Just as the U.S. response to Soviet aggression accelerated that evil empire's collapse, targeted killing will someday be seen as evidence of a shift that is bringing the world together under rules that deny irresponsible sovereigns the power to support conduct universally recognized as inhumane or criminally antisocial.

A major theme of those opposed to targeted killing is that rules permitting states to target individuals who are killing their nationals would reverse established rules necessary to reign in irresponsible and dangerous uses of force. The changes attacked, however, are either reversals of controverted limitations placed on long-standing powers, such as the "inherent" right of self-defense and the right to kill as war criminals individuals who participate in an armed conflict without distinguishing themselves from the civilian population, or result from a radical increase in the extent of harm that can be caused by noncombatant enemies who are supported rather than prosecuted by the states from which they operate. Governments may in fact abuse the broader authority they are determined to exercise in these respects. But the danger also exists that the failure of international law to recognize rules that enable states to protect themselves

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96. Paul R. Williams & Colleen (Betsy) Popken, *Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity*, 44 CASE W. RES. J. INT'L L. 225, 225–28 (2011).

97. Altman, *supra* note 1, at 2.

against criminal attacks can leave such defensive actions essentially unregulated rather than integrated into an agreed legal regime.

The principal danger in the use of targeted killings, as in other international uses of force, lies in the fact that these attacks on human beings are not subject to the robust review contemplated in our Constitution by the other branches of the U.S. government and the public. This is especially true of the covert CIA program. If a parallel system of drone attacks is necessary in the CIA, despite the availability of military drones, it should be subject to the rules mandated for the military operation. (The same goes for interrogation methods.) If the Executive Branch is able secretly to target persons who are not members of an armed group without review by Congress or the courts, and without periodic public disclosure of the facts, that process will ultimately lead to improper and unjust actions. The U.S. system of checks and balances—nasty, partisan, and public—is what keeps abuse of power in check, and we should cling to this heritage even as we develop new defenses. Congress must establish rules and procedures for implementing and reviewing targeted killings to ensure they are conducted consistent with American constitutional values.

Targeted killings, especially those conducted by drone strikes, have become a central component of U.S. counterterrorism operations around the globe. Targeted Killings. A U.S. airman conducts preflight checks on an MQ-9 Reaper in Afghanistan, 2015. (Robert Cloys/USAF). Targeted killings, especially those conducted by drone strikes, have become a central component of U.S. counterterrorism operations around the globe. Backgrounder by Jonathan Masters. Last updated May 23, 2013.