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TARGETED KILLINGS—NEVER NOT AN ACT OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

BARRY KELLMAN*

Abstract: Defenders of targeted killings proffer a straightforward elaboration of military necessity in the context of modern technological capabilities and conclude that killing members of terrorist organizations is legal under international law. In this essay, I assert that targeted killings to combat terrorist threats should not be governed predominantly by the law of war but should be synthesized with widely recognized principles of international criminal justice. Targeted killings are now the only aspect of counter-terrorism policy that operates outside constraints of criminal justice and beyond judicial review. That many people are being killed without anything like due process of law undermines the pursuit of strategies to strengthen law enforcement's role in global counter-terrorism. A targeted killing is never not an act of criminal law enforcement and therefore must be governed by a foundational commitment to the primacy of criminal justice in defeating threats of terrorism.

INTRODUCTION

Targeted killings¹ are among the most significant matters in international law at this time, a topic of substantial public and academic controversy.² De-

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¹ According to Philip Alston:

The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison. The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from . . . law enforcement operations.

Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6, at 4–5 (May 28, 2010).

² See, e.g., PEW RESEARCH CTR., GLOBAL OPINION OF OBAMA SLIPS, INTERNATIONAL POLICIES FAULTED (2012), www.pewglobal.org/2012/06/13/chapter-1-views-of-the-u-s-and-american-foreign-policy-4/#drones [<https://perma.cc/547Y-V58A>]. Many legal scholars debate clarification of international legal norms. See Thomas Byron Hunter, *Targeted Killing: Self-Defense, Preemption, and the War on Terrorism*, 2 J. STRATEGIC SECURITY 1, 1 (2009); Michael Ramsden, *Assessing U.S. Targeted Killings Under an International Human Rights Law Framework*, 1 GRONINGEN J. INT'L L. 19, 19

fenders of the practice advance a thesis entirely derived from the law of war to conclude that killing members of terrorist organizations, including Al Qaeda and its affiliates and successors, is legal under international law.³ The United States and its allies, having suffered unjustifiable attacks, having reason to anticipate more attacks, and having properly authorized the use of force, may assert the right of national defense to allow killing of members of designated terrorist organizations. At the core of this argument is a straightforward elaboration of military necessity in the context of modern technological capabilities.⁴

According to one leading expert, “while terrorists are always criminals,” and to target terrorists in the United States and other nations having effective law enforcement systems would not be necessary and appropriate,⁵ targeting persons associated with designated terrorist organizations in other places, “may be lawful as well as the only practical course.”⁶ As sniping members of designated organizations is legal within the scope of the law of war, it matters not whether the weapon used is a rifle or an armed drone—a mere question of means of warfare. So long as the instrument is not one of a handful of treaty-banned weapons, international law is broadly unconcerned.

(2013); Mary Ellen O’Connell, *The International Law of Drones*, ASIL INSIGHTS (Nov. 12, 2010), www.asil.org/insights/volume/14/issue/37/international-law-drones [perma.cc/KX7E-XKC9]. For a discussion of the debate on international drone use norms in targeted killings and whether those norms will either reinforce or constrict U.S. use of drones, see Sierra Rayne, *Debate Emerging Over International Norms for Drone Use*, AM. THINKER (May 14, 2015), www.americanthinker.com/blog/2015/05/debate_emerging_over_international_norms_for_drone_use.html [https://perma.cc/8859-JMX9].

³ See Nicholas Rostow, *The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends*, 63 RUTGERS L. REV. 1215, 1222, 1231 (2011). On terminology: (1) like Professor Rostow, I prefer the term “law of war” instead of the more vacuous “law of armed conflict” and (2) like Professor Rostow, I generally limit analysis here to targeted killing of non-Americans; the case of *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (involving the targeting of an American) is discussed *infra*.

⁴ By this logic, the words “necessary” and “appropriate” within the Authorization for the Use of Military Force (AUMF) signify that the military instrument is limited to situations where police action, by the United States or the state in which the terrorist is located, is impossible. In states unable or unwilling to take action to prevent their territories from being used by terrorists, a use of force may be lawful as the only practicable course. Rostow, *supra* note 3, at 1219. Professor Paust has argued that “selective use of armed force in self-defense is not simplistically ‘law enforcement,’” but more aptly is an act of self-defense. See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 249–50 (2010). But the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has concluded that reliance on the exceptional self-defense argument under Article 51 in support of targeted killings “would diminish hugely the value of the foundational prohibition contained in Article 51.” Alston, *supra* note 1, at 13.

⁵ Nicholas Rostow, *Targeted Killing of Terrorists*, 74 JOINT FORCE Q. 98, 98 (2014). Professor Rostow notes that Congress used these words in the AUMF to “limit the use of the military instrument to those situations where police action, by the United States or the state in which the terrorist is found, is impossible.” *Id.* at 99.

⁶ *Id.* at 99.

In this essay, I assert that targeted killings to combat contemporary terrorist threats should not be governed predominantly by the law of war, but should be synthesized with widely recognized principles of international criminal justice. My objection is not with application of the law of war to targeted killing, but to the implicit proposition that only the law of war need be applied. With respect to advocates of current targeted killing practices, there is more twist heaven and earth than is dreamt of in your philosophy.

Not long ago, the legality of targeted killings was something of an arcane topic, if only because of the sheer rarity of accomplishing the deed. But the technological advances associated with armed drones take targeted killings from the exception to the weekly (at least) reality. Three states—the United States, United Kingdom, and Israel—have used armed drones for targeted killing. The majority of such strikes have been by the United States outside battlefield domains (Iraq and Afghanistan), in Pakistan, Yemen, and Somalia; no end is in sight.⁷

In this writer's view, international law does not deny a state the right to use military force to disrupt, degrade, and ultimately defeat terrorist threats to the security of its citizens, property, or interests. Accordingly, there would seem to be no basis for a *per se* prohibition on targeted killing at this time. But killing a terrorist target may be a pyrrhic victory from which more antagonism is often bred.⁸ More centrally, a targeted killing of terrorists is never not an act of criminal law enforcement and therefore must be governed by essential principles of international criminal justice. Accordingly, resort to the law of war's justifications for the use of force outside the scope of international criminal law must be desisted.

My thesis is this: Law enforcement tends to reduce violence; the use of military force, even if initially justified, tends to self-perpetuate, even metastasize into more violence. Accordingly, law enforcement offers the only long-run

⁷ On the legal implications of an eventual end to the war on terror, see Steve Vladeck, *Has the Government Conceded That Courts Can Review Detainees' End-of-War Claims?*, JUST SECURITY (Apr. 30, 2015, 1:11 PM), <http://justsecurity.org/22586/governments-implicit-concession-end-of-hostilities-claims-justiciable/> [<https://perma.cc/F9KF-JJ7M>].

⁸ See *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 3–5, 7 (2013) (statement of Farea Al-Muslimi), www.judiciary.senate.gov/imo/media/doc/04-23-13Al-MuslimiTestimony.pdf [<https://perma.cc/4GGF-CFXP>]; INT'L CRISIS GRP., DRONES: MYTHS AND REALITY IN PAKISTAN 25, 34 (2013), [www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/247-drones-myths-and-reality-in-pakistan.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/247-drones-myths-and-reality-in-pakistan.pdf) [<https://perma.cc/JK4J-N29T>]; INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH. & GLOB. JUSTICE CLINIC, NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 73–101 (2012), <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf> [<https://perma.cc/8BNK-FVQJ>]; Akbar Nasir Khan, *The US' Policy of Targeted Killings by Drones in Pakistan*, 11 ISLAMABAD POL'Y RES. INST. J. 21, 22–24, 33–34 (2011).

successful strategy for defeating terrorism.⁹ The tactics of warfare should be acceptable only in the rarest of cases when law enforcement tools are unavailing. International law imposes obligations on all states, especially states that use force, to strengthen these tools, especially now.

At this time, targeted killings are the act which all international lawyers should be most self-conscious about, the only aspect of counter-terrorism policy that operates outside constraints of criminal justice and beyond judicial review. That many people are being killed without anything like due process of law undermines pursuit of strategies to strengthen law enforcement's role in global counter-terrorism. Counter-terrorism strategies might better focus on how to adapt law enforcement to terrorism's unique challenges than to relegate authority over killing terrorists to military and intelligence communities.

Thus, to satisfy international law, a program of targeted killing should satisfy three core criteria:

- 1) The selection of people for killing should entail judicial intervention, very carefully crafted to respect the government's security imperatives, so as to ensure that there is a strong evidentiary basis that an individual poses a significant risk of committing serious crimes;
- 2) Targeted killings should be exclusively a last resort in favor of bringing culprits to criminal justice, and the obligation to arrest entails positive responsibilities for strengthening capacities for apprehension and prosecution; and
- 3) Claims related to innocent casualties should be justiciable because legal accountability is essential to minimizing such casualties.

These three propositions must be presented sequentially, but they are best conceived as three mutually reinforcing pillars upon which a policy of targeted killing under law should stand.

⁹ Former United Nations Secretary General Kofi Annan stated:

[W]e should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.

Press Release, Security Council, Secretary-General, Addressing Council Meeting on Counter-Terrorism, Says United Nations 'Stands Four-Square' Against Scourge, U.N. Press Release SC/7277 (Jan. 18, 2002). Said the Israeli Supreme Court: "The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection." H CJ 7015/02 Ajuri v. IDF Commander 56(6) PD 352, ¶ 41 (2002) (Isr.) (quoting H CJ 168/91 Morcos v. Minister of Def. 45(1) PD 467, 470 (Isr.)).

I. SELECTION OF PERSONS FOR TARGETED KILLING—THE JUDICIAL ROLE

An analysis of how persons are selected for killing might usefully begin by asking whether these persons are *criminal suspects* or *enemy combatants*.¹⁰ The premise of targeted killings is that such persons are combatants against whom the use of force has been legally authorized under national and international law. Unlike criminal suspects who are entitled to legal protections including the presumption of innocence and the right to be heard before punishment is inflicted, and who certainly may not be blasted by an armed drone, terrorists are most certainly not presumed innocent and therefore are subject to the use of lethal force by virtue of their status.

This assertion, however, is only half true. Terrorists are, of course, criminals. Murder, kidnapping for ransom, and infrastructure destruction are criminal acts everywhere. Moreover, as there is often strong collaboration between terrorist organizations and narco-criminals, human traffickers, and weapons proliferators, it would be unsound to distinguish terrorists from other criminals.¹¹ Unlike traditional combatants, terrorists wear no uniforms nor typically self-identify according to the mores of battlefield behavior. Hiding within modern means of telecommunications and striking at vulnerable civilians, the terrorist is the precise opposite of a soldier. Whatever legal respect should be afforded to combatants, even enemy combatants, has not and should not be afforded to terrorists.¹² Significantly, counter-terrorism is less about vanquishing an enemy's forces than about the typical criminal concepts of punishment: retribution, deterrence, interdiction, and pre-emption.

Yet terrorists are, in important respects, not like other criminals. The threat that terrorists pose is more horrific, and more destructive of personal, national, and global security. Throughout the world is an endlessly morphing yet continuous strain of violence that poses a direct, life-threatening, and undeterrable danger, ideologically founded on destruction of modern societies that they find despicable. Motivated not by revenge or greed, but by seeking to spread fear throughout the community, terrorists pose a danger very different from ordinary criminals who rely on the continued vitality of the societies from which they pillage. And terrorists' apparent willingness to use any and all

¹⁰ For a fuller discussion of how the Bush administration used the war on terror to determine which groups of people targeted killing is acceptable for, see Kenneth Roth, *Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terrorism*, HUM. RTS. WATCH (2004), www.hrw.org/legacy/wr2k4/download/9.pdf [<https://perma.cc/FQ53-UMUL>].

¹¹ For a fuller discussion of the numerous examples of intimate connections terrorist organizations have with criminal organizations to achieve certain objectives, see JOHN ROLLINS ET AL., CONG. RESEARCH SERV., R41004, INTERNATIONAL TERRORISM AND TRANSNATIONAL CRIME: SECURITY THREATS, U.S. POLICY, AND CONSIDERATIONS FOR CONGRESS (2010).

¹² See Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, INT'L HERALD TRIB. (Aug. 8, 2007), <http://www2.law.ucla.edu/raustiala/publications/Why%20terrorists%20aren't%20soldiers.pdf> [<https://perma.cc/RWK8-YBGX>].

means of violence, including chem-bio and perhaps nuclear weapons, means that terror threats are inherently global in scope. It is not that terrorists are more inherently evil than genocidal heads-of-state, more depraved than human traffickers, or more ultimately destructive than weapons proliferators. What makes terrorists distinctive among criminals is that their danger is explicitly to the stability and security of civilized order.

We are instructed that law offers only a bipolar option: a terrorist must be either a criminal or a combatant. Great legal minds have attested to there being no third category.¹³ But law, however brilliantly framed, cannot make something that it is not, and terrorists are not either criminals or combatants but a combination of both. Manifestly, the world's leaders have not yet developed a hybrid framework for addressing these threats—indeed have resisted its development.¹⁴ In such a frameless context, to analyze the international legality of targeted killings represents a challenge of trying to pound a square peg into the intersection of two round holes.

My critique here is with the asserted justification for targeted killings based on the premise that rightful authorization of the use of force is sufficient to justify targeted killings; the target's individual criminal responsibility is without legal significance. According to this justification, if authorization of force is legal, then military or intelligence officials have exclusive responsibility to determine who should be targeted. But as terrorists are both criminals and combatants, this logic is at best incomplete.

The logic's flaw is manifest in the very term, *targeted killing*. Under the law of war, the personal culpability of a combatant is essentially irrelevant, tactically subjugated to the us-versus-them prerogatives of military necessity and therefore outside legal inquiry. A soldier shoots an adversary, and the law does not impose much obligation to know who gets the bullet. The all-

¹³ The Israeli Supreme Court noted the “expert opinion” of Professor Cassese for the proposition that “[t]hose who do not fall into the category of combatants are, by definition, civilians. There is no third category of ‘unlawful combatants.’” H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. 62(1) PD 507, ¶ 7 (2006) (Isr.), http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf [<https://perma.cc/W7G9-RQR2>]; see ANTONIO CASSESE, EXPERT OPINION ON WHETHER ISRAEL’S TARGETED KILLINGS OF PALESTINIAN TERRORISTS IS CONSONANT WITH INTERNATIONAL HUMANITARIAN LAW 20, <https://www.stoptorture.org.il/files/cassese.pdf> [<https://web.archive.org/web/20151210231513/http://stoptorture.org.il/files/cassese.pdf>].

¹⁴ See Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 665 (2007) (“Terrorists, and counterterrorism efforts, generally defy simple characterization into one category or another because terrorists resemble enemy combatants in some ways and criminal suspects in others.”); see also Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, 23 J. APPLIED PHIL. 323, 332–34 (2006); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 180, 182, 190–204 (2005); Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. & POL’Y 343, 347, 352–53 (2010); Greg Travaglio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 98–99 (2003).

important question is whether force is properly authorized. If so, any particular adversary, by becoming a combatant, forfeits his right to life and is vulnerable to the infliction of lethal force. Indeed, at the heart of the concept of military necessity is the adversary's personal anonymity and moral neutrality. His identity is confined to his combatant status.

But the whole idea of targeted killing is that the identity of the specific terrorist does matter; it is his identity and behavior that justifies the use of force. Debates about whether a state may have legal authority to pursue counter-terrorism measures entailing the use of force, even lethal force are, therefore, not centrally relevant. What is at issue with targeted killings is whether the process for selecting persons for authorized countermeasures is legally sufficient.¹⁵ The tolerance for battlefield combat inherent in the law of war is based on the idea that combatants are impersonal targets, but today's and tomorrow's targeted killings of terrorists are very personal.

This first part of my argument considers how terrorists are selected for killing and whether the selection process satisfies international standards of criminal justice. The answer here should hinge on the judicial role within that process. Simply offered, selection of terrorists for actions affecting their fundamental human rights, *e.g.*, their life, should entail a role for the judiciary, and the absence of any judicial role cannot satisfy these standards. The argument proceeds through two sections. In Section A, I focus on the risk of misidentification and argue that this risk is unique with regard to modern terrorism for various reasons. Key here is the role of intelligence communities in making selection decisions. In Section B, I argue that international law has rejected the idea that authorization of the use of military force is sufficiently specific to justify the killing of most terrorists, and I call for a process of judicial intervention as a prerequisite for targeted killings.

A. The Risk of Misidentification and the Unique Role of Intelligence in Targeted Killings

A primary concern about targeted killings is the risk that someone might be misidentified. In the United States, intelligence is analyzed among civilian and military agencies to consider whether elimination of a person will disrupt, even temporarily, the terrorist organization's decision-making processes and networks.¹⁶ Targets are surveilled, both visually and financially, and linkages

¹⁵ Amos N. Guiora, *Targeted Killing: When Proportionality Gets All Out of Proportion*, 45 CASE W. RES. J. INT'L L. 235, 247 (2012) ("Targeted killing rests on the specific identification of individuals who pose an imminent threat to the state's national security and are, therefore, legitimate targets within the framework of lawful self-defense. The state thus needs a method and a process for figuring out who poses a threat, why they pose a threat, and how that threat can be deterred or eliminated.")

¹⁶ See David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, ASIL INSIGHTS (Feb. 15, 2013), <https://www.asil.org/insights/volume/17/issue/8/>

are drawn among sites and persons with whom they interact, generating a network diagram that reveals key nodes where an attack can maximally impact the organization.¹⁷ “The effects sought by killing are not merely the immediate effects of eliminating a person, but also the second- and third-order effects such as pressuring, desynchronizing, and debilitating the effectiveness of terrorist networks.”¹⁸

A formal and reiterative inter-agency process, managed by the National Counterterrorism Center, allows multiple officials to vet concerns about the target’s identification and significance, estimates of collateral damage, and possible jeopardy of intelligence sources.¹⁹ Throughout, the intelligence that is the basis for selection as well as the strategic and tactical implications of conducting a strike are vetted and validated.²⁰ Significant consideration is given to how the strike may impact diplomatic relations and the extent to which an attack might generate local or international antagonism.²¹ Moreover, senior State Department, military, and intelligence lawyers participate by offering legal opinions of the strike’s merits and implications. The ultimate decision to strike a target may be made by the President, but in other cases may be made by senior intelligence or military officials.²²

Notably, this process, while manifesting great care, has little similarity to a determination of criminal guilt by a court of law. Criminal law, obviously, makes many more fine distinctions with regard to how force is used than does the law of war. Gradations of suspicion are fundamental to the execution of police, prosecutorial, or judicial responsibilities. A hunch is different from a reasonable suspicion, which is different from probable cause for arrest, which is different from finding someone guilty of an offense. While terminology differs among law enforcement systems worldwide, every system known to this writer manifests recognition of the different shadings of belief in a person’s culpability.

international-law-issues-department-justice-white-paper-targeted-killing [https://perma.cc/ARS5-98GW].

¹⁷ Four factors are considered: (1) value of the individual to the group’s ability to conduct operations, (2) time between the target’s elimination and its impact on the enemy system, (3) time required for the system to recoup its functional capability, and (4) the capacity of the system to inflict harm. See WALTER L. SHARP, DIR. OF THE JOINT STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING app. D, at 2–4 (2007).

¹⁸ Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 711–12 (2014).

¹⁹ *Id.* at 727–29.

²⁰ *Id.* at 708.

²¹ *Id.* at 727–31. For a discussion of the consequences of U.S. drone warfare in the Middle East as a study on how such counter-terror operations complicate U.S. policy in such regions, see Leila Hudson et al., *Drone Warfare: Blowback from the New American Way of War*, 18 MIDDLE EAST POL’Y 122 (2011).

²² See Gregory S. McNeal, *Obama’s Kill List Story a Self Serving Campaign Piece Built from Selective Leaks*, FORBES (June 8, 2012), www.forbes.com/sites/gregorymcneal/2012/06/08/obama-kill-listleaks/227 [https://perma.cc/AQQ4-SJ3U].

Such considerations, however, are shrunk in the process that selects terrorists for killing. This is a process of winnowing; anyone may be a potential target until intelligence suggests reasons why it is not worth killing them. Membership in a designated terrorist organization might suffice for a targeting, but a non-member could in unique circumstances be included, especially in light of how terrorist organizations mutate, forming and deforming associations over time. Even if the target's affiliation with the terrorist organization is correctly identified, he might be a low-level functionary, an intimidated "supporter" of an organization without sincere commitment, or he could be contemplating, unbeknownst to his remote attackers, how to end whatever association with terrorism he has had.²³

Such ambiguities are resolved entirely within the military or intelligence bureaucracies, isolated from judicial oversight and shielded from NGO or media intrusion. The risk here is that ambiguity about what is a "senior operational leader" combined with a disregard of the imminence of the threat "creates a slippery slope that inevitably results in the deaths of otherwise innocent individuals If everyone who constitutes 'them' is automatically a legitimate target, then careful analysis of threats, imminence, proportionality, credibility, reliability, and other factors become meaningless. Self-defense becomes a mantra that justifies all action, regardless of method or procedure."²⁴

This is where attention must be given to the sheer numbers of targeted killings. According to the most recent information from the Bureau of Investigative Journalism, in Pakistan, Yemen, and Somalia (which are not battlefield domains and where intelligence officials, not the military, have authority over targeted killings) the United States has conducted 764 to 872 attacks that have taken at least 4031 and as many as 6477 lives, including 620 to 1316 civilians, of which more than 200 were children.²⁵ The total number of casualties due to targeted attacks far exceeds the comparable number in Afghanistan, which the United States has viewed as an active combat domain for more than a decade and where the highest estimate of civilians killed is 200 and of children killed is forty-nine.²⁶

²³ See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 699 (2010).

²⁴ Guiora, *supra* note 15, at 254, 256 (analogizing the problem here to the interrogation excesses that occurred in the wake of the Bybee Memo).

²⁵ These numbers are cumulative of strikes in Pakistan, Yemen, and Somalia and, for Yemen and Somalia, unconfirmed drone strikes or other covert activities. See *Get the Data: Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> [<https://perma.cc/33PY-KNP2>]; see also Micah Zenko, *America's 500th Drone Strike*, COUNCIL ON FOREIGN REL. (Nov. 21, 2014), <http://blogs.cfr.org/zenko/2014/11/21/americas-500th-drone-strike/> [<https://perma.cc/RC49-5CRF>].

²⁶ See *Get the Data: Drone Wars*, *supra* note 25.

An obvious problem is that no government conducting targeted killings has accurately reported the number of terrorists killed, much less the number of civilians or children killed.²⁷ Here is a catch-22: governments claim that targeted killings are conducted against only rightful targets, but it is impossible to disprove this assertion without access to data that the government refuses to provide. Relevant here is that the United States may over-classify victims as terrorists, counting all adult men within the target's vicinity as his associates.²⁸

Any notion that targeted killings outside battlefield domains are isolated and about Bin Laden and merely a few other of humanity's worst examples is belied by these numbers. More to the point, it would seem to need no citation to suggest that a process which leads to the killing of 200 children is a process that must be scrutinized for any logical flaw.

That logical flaw is to invoke the law of war on behalf of operations coordinated by intelligence officials who have a long history of confidence in their situational knowledge, which, while often well-founded, occasionally proves fallacious. There may have been a sincere misjudgment, a faulty transmission of information, or an institutional bias that infected the decisional metrics. Terrorist identification is often based on human intelligence—snitches—who may have ulterior motives for implying that an adversary carries sympathies for radical causes.²⁹ Such “Hum-Int” would rarely, if ever, satisfy legal standards for conviction of any crime. In any event, someone might be killed who did not do what his executioners believed, or at least did not deserve to die. Subsequent rectification of the loss is, of course, impossible.

In an important sense, the distinction between law enforcement governed by principles of criminal justice and military force governed by the law of war is superseded by the fact that targeted killings outside battlefield theatres—*i.e.*, in Pakistan, Yemen, and Somalia—proceed under the authority of intelligence agency officials.³⁰ For this reason alone, the legal justification of *military necessity* for these targeted killings would seem awry as these killings are, literal-

²⁷ REPRIEVE, YOU NEVER DIE TWICE: MULTIPLE KILLS IN THE US DRONE PROGRAM 10 (2014), https://www.reprive.org/uploads/2/6/3/3/26338131/2014_11_24_pub_you_never_die_twice_-_multiple_kills_in_the_us_drone_program.pdf [<https://perma.cc/48BK-G8RU>].

²⁸ See *id.* at 6.

²⁹ For an in-depth analysis of the intelligence flaws that have, in fact, infiltrated the target selection process, see ANDREW COCKBURN, KILL CHAIN: THE RISE OF THE HIGH-TECH ASSASSINS 99–117 (2015).

³⁰ While the CIA has been most associated with targeted killings, the Washington Post has reported that the NSA has also been extensively involved. Greg Miller et al., *Documents Reveal NSA's Extensive Involvement in Targeted Killing Program*, WASH. POST (Oct. 16, 2013), https://www.washingtonpost.com/world/national-security/documents-reveal-nsas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html [<https://perma.cc/8TT2-MFT5>] (“To handle the expanding workload, the NSA created a secret unit known as the Counter-Terrorism Mission Aligned Cell, or CT MAC, to concentrate the agency’s vast resources on hard-to-find terrorism targets.”).

ly, the actions of covert agents who, under the law of war, are themselves not lawful combatants, operating outside the combatant versus combatant logic of the law of war as spies and saboteurs.

The history of the CIA's involvement in targeted killing traces back to the early Cold War, from sabotaging Fidel Castro's cigars, to well-known plots (some successful) against identified national security threats, including Iranian Prime Minister Mohammed Mossadeq, Congolese Prime Minister Patrice Lumumba, and Libyan leader Muammar Qaddafi. There is an unbroken chain of experience and logic that connects these schemes to today's targeted killing of terrorists.³¹ In each case, the heinousness of the target may have been widely appreciated, and certainly the risk of misidentification was low. But few international lawyers would propound the legality of these often fatal, sometimes laughable, attempts to promote national security by killing someone.

What is different now is not the national security imperative evoked to justify these killings; what has changed is the technological capacity to successfully accomplish the mission. Yesterday's covert targeted killings were hard to execute, requiring significant planning, offering little chance of success, and likely putting our personnel at substantial risk. But armed drones make yesterday's hard-to-do killing far less challenging and never dangerous to attacking personnel. These are not just another type of missile delivery system but a weapon that enables a remote attacker to match intelligence about the terrorist with real-time surveillance in order to make the kill, offering a near one hundred percent chance of destroying the target, whether the target is or is not the suspected culprit.

Moreover, armed drones auger a very imminent future when technological advances will enable individuals to be killed with remarkable accuracy virtually anywhere on Earth,³² literally without knowing what hit them and entirely without due process. Looking forward, automated drones will be superseded by autonomous (robotic) weapons that search for and eventually kill a very specific individual.³³ It is not difficult to anticipate a technological capacity for killing individuals that is the epitome of precision.

³¹ For analysis on how the military and intelligence communities have focused on targeted killings for national security interests, see COCKBURN, *supra* note 29, at 99–117.

³² See Derek Gregory, *The Everywhere War*, 177 GEOGRAPHICAL J. 238, 247 (2011).

³³ For discussions of the legality of autonomous weapon systems under the laws of armed conflict, see Gary E. Marchant et al., *International Governance of Autonomous Military Robots*, in HANDBOOK OF UNMANNED AERIAL VEHICLES (Kimon P. Valavanis & George J. Vachtsevanos eds., 2015) (discussing the guidelines that apply to the use of military robots and the potential of codes of conduct to address important policy considerations); Kenneth Anderson et al., *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, 90 INT'L L. STUD. 386, 386, 388, 390–91 (2014), <http://stockton.usnwe.edu/cgi/viewcontent.cgi?article=1015&context=ils> [<https://perma.cc/KPP7-MR6M>] (asserting that autonomous weapon systems are not inherently illegal or unethical and offering a three-tiered approach to resolving challenges raised by the law of armed conflict); Jack M. Beard, *Autonomous Weapons and Human Responsibilities*, 45 GEO. J. INT'L L. 617, 633 (2014),

In sum, many targeted killings are based on selection information of perhaps dubious quality, assessed by officials who are the least accountable of all parts of government, and undertaken by technology that poses almost no risk either of failure or of harm to the attackers. Here is a system for making decisions literally of life and death significance that operates entirely outside of the processes and prescriptions of international criminal justice, calling into serious question states' commitment to governance under law.

B. The Obligation of Judicial Intervention in the Selection of Terrorists for Targeted Killing

As selection of terrorists for targeted killing is personal, the process for their selection necessarily must entail legal protections—protections that are not satisfied by the authorization of the use of force against traditional combatants. My brief in this section is not about the injustice of any specific selection and certainly does not attribute wrongful intent or recklessness to persons responsible for selections. Nor would I concur with various legal experts who call for reconsideration of how various *jus ad bellum* standards should apply to the target selection process.³⁴

My brief is based on the proposition that killing—the gravest injury that can be done to a mortal human—is never not an act of international criminal justice, and therefore must engage the judiciary, independent of the intelligence and military chains of command. This proposition is supported by recent case law from the world's leading tribunals attesting to the legal difference between

www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00314000617.PDF [https://perma.cc/6ARF-B24Q] (an analysis of state accountability for autonomous weapons in view of international legal obligations to exercise human judgment in regard to protecting civilians in armed conflicts); Benjamin Kastan, *Autonomous Weapons Systems: A Coming Legal "Singularity"?*, 2013 J.L. TECH. & POL'Y 45, 52–53 (2013), <http://illinoisjltlp.com/journal/wp-content/uploads/2013/05/Kastan.pdf> [https://perma.cc/F2KK-A2YX] (applying legal principles to the development of autonomous military robots); Michael A. Newton, *Back to the Future: Reflections on the Advent of Autonomous Weapons Systems*, 47 CASE W. RES. J. INT'L L. 5, 6, 21 (2015), <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1004&context=jil> [https://perma.cc/6DR7-434E] (considering the potentially salutary effects of autonomous weapons systems and concluding that a ban would not advance humanitarian goals); Jens David Ohlin, *The Combatant's Stance: Autonomous Weapons on the Battlefield*, 92 INT'L L. STUD. 1, 1–2 (2016), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2584&context=facpub> [https://perma.cc/Q9F3-RAZF] (arguing that military commanders can and should be held responsible for unleashing an automatic weapons system that commits a war crime); Heather M. Roff, *The Strategic Robot Problem: Lethal Autonomous Weapons in War*, 13 J. MIL. ETHICS 211, 211–13 (2014), www.tandfonline.com/doi/pdf/10.1080/15027570.2014.975010 [https://perma.cc/6BAX-FKXN] (asserting the need to look to the targeting process to fully understand the consequences of creating or fielding lethal autonomous robots).

³⁴ See, e.g., Amos N. Guiora & Monica Hakimi, *A Legal Framework for Targeted Killing in PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW* 161, 164–67, 169–71, 177 (Harvey Rishikof et al. eds., 2012).

authorization of counter-terrorism powers and selection of a target against whom such powers are exercised.

For example, in the joint *Kadi and Al Barakaat International Foundation* cases³⁵, the European Court of Justice rejected financial restrictions imposed by the Council of Europe to implement Security Council sanctions against funding the Taliban or Al Qaeda; such restrictions, held the court, deprived defendants of their legal rights.³⁶ The court conceded that it did not have authority to review the Security Council's authority to impose economic sanctions against terrorist organizations and their supporters as "the freezing of assets, in and of itself, could not be regarded as inappropriate or disproportionate to the fundamental interest in fighting acts of terrorism."³⁷ But, ruled the court, an individual must have the right to be heard—to establish his identity and demand that prosecutors prove his selection for sanctions was justified.³⁸ In *Kadi II*, the court held that the evidence against the petitioners, in the sole possession of the Security Council Sanctions Committee, did not satisfy minimal standards of effective judicial protection against wrongful confiscation of property.³⁹

The United States Supreme Court invoked similar logic in two leading terrorist detention cases: *Hamdi*⁴⁰ and *Hamdan*.⁴¹ Justice Thomas dissented in each case arguing that the Authorization for the Use of Military Force was manifestly broad enough to utilize military commissions in the current conflict and that the Court majority was undermining the President's broad war-making powers.⁴² Justice Stevens wrote in *Hamdan* that the authorization for the President to convene military commissions in circumstances justified by the Constitution and the law of war did not relieve the Court of its task "to decide whether Hamdan's military commission is so justified."⁴³

³⁵ Joined Cases C-402 & C-415/05, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n (Kadi)*, 2008 E.C.R. I-6351.

³⁶ *Id.* ¶¶ 336–337. The appellate panel ruled that by not communicating to the appellants the evidence against them, the appellants' rights of defense were not respected. *Id.* ¶ 348.

³⁷ 2 NUCLEAR NON-PROLIFERATION IN INTERNATIONAL LAW: VERIFICATION AND COMPLIANCE 258 (Jonathan L. Black-Branch & Dieter Fleck eds., 2016).

³⁸ *Kadi*, 2008 E.C.R. ¶¶ 336–337. In Joined Cases C-584, C-593 & C-595/10 P, *Comm'n v. Kadi (Kadi II)*, 2013 C.M.L.R. 1, the court held that the evidence against the petitioners, in the sole possession of the Security Council Sanctions Committee, did not satisfy minimal standards of effective judicial protection against wrongful confiscation of property. 2013 C.M.L.R. ¶¶ 135, 138, 139, 150.

³⁹ *Kadi II*, 2013 C.M.L.R. ¶¶ 140–142.

⁴⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴² *Hamdan*, 548 U.S. at 680; *Hamdi*, 542 U.S. at 587–88.

⁴³ *Hamdan*, 548 U.S. at 559–60. Similarly, Justice O'Connor wrote in *Hamdi* that the judiciary must not defer to the executive branch with respect to detentions. *Hamdi*, 542 U.S. at 535–36 ("Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers."). For an analysis of the rejection of Justice Thomas' argument and its applica-

Most recently, the England and Wales High Court of Justice in *Serdar Mohammed v. Ministry of Defence* held that although the United Kingdom's (U.K.) use of force in Afghanistan was authorized by Security Council resolutions, those resolutions did not specify how detainees were to be treated.⁴⁴ Assuming for the sake of argument that the decision to send U.K. troops to Afghanistan as part of ISAF was a Crown act of state not justiciable in the English courts, a decision to detain a particular individual captured by U.K. troops in Afghanistan falls into a very different category. It is not necessary to question the legality of the decision to send troops in order to judge the legality of detention applying Afghan law. The latter does not depend on the former.⁴⁵ Going further, Justice Legatt dismissed the entire idea that invoking the principle of *lex specialis* could signify the displacement of human rights law, undercutting the legal basis for any status-based operations, including targeted killing.⁴⁶

There is important reasoning in all these decisions that defers to the political branches on questions about the authorization of the use of military force but insists upon judicial review of how individuals are selected for sanction or detention. Ironically, although a person's rights to property and liberty are judicially recognized and compel judicial intervention in counter-terrorism measures that would deprive him of such rights, he may be killed without any comparable protection. In this writer's view, however, a process for selecting people to be killed that is insulated from judicial oversight is inherently illegitimate. To be consistent with the central premise that a targeted killing is never not an act of criminal justice, the judiciary must have a capacity to intervene in the selection process.

Some experts have proposed that an independent executive branch panel evaluate whether an individual is an operational leader of an enemy group and poses an "imminent" threat; on the basis of that evaluation, the panel would offer a non-binding recommendation to the President.⁴⁷ Whatever might be the policy merits of introducing another layer of review onto the executive branch's decision tree, international law would seem to be largely agnostic. A process that involves administrative review may be a better national security process, but it cannot even begin to satisfy the requirement of criminal justice

tion to targeted killings, see Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410–11 (2009).

⁴⁴ *Mohammed v. Ministry of Defence* [2014] EWHC (QB) 1369 [418] (Eng.).

⁴⁵ *Id.* at [382].

⁴⁶ *Id.* at [274]–[75]. This decision has been strongly criticized for having taken this extra leap. See Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT'L L. STUD. 60, 111–13 (2015).

⁴⁷ David Medine & Eliza Sweren-Becker, *The United States Needs a Drone Board*, DEF. ONE (Apr. 23, 2015), www.defenseone.com/ideas/2015/04/oversight-targeted-killing-americans-overseas-new-model/110926/ [<https://perma.cc/B4UZ-WZB6>].

that available evidence concerning an individual's culpability be presented to an independent judiciary.

Other experts favor *post hoc* judicial review of targeted killings based on claimed violations of rights.⁴⁸ In the context of target selection, however, such backward-looking judicial review would necessarily focus on how the target had been selected. As a result, a claim for judicial review would mean delving deep into the core of classified information, raising the full doctrinal barriers that stop courts from interceding into matters of national and military security. Thus, in *Al-Aulaqi v. Obama*,⁴⁹ the District of Columbia District Court refused to judge whether an alleged terrorist presented an imminent threat to life or physical safety and whether there were any means other than lethal force to neutralize the threat; the court ruled that these are precisely the types of complex policy questions traditionally held to be non-justiciable.⁵⁰

These objections, however, would apply far less to a specialized court that reviews target selections under explicit rules for the conduct of *ex parte* proceedings, admissibility and confidentiality of evidentiary submissions, and standards for challenging the reliability and credibility of such submissions.⁵¹ Some American experts have advocated engagement of the FISA court to war-

⁴⁸ Stephen I. Vladeck, *Judicial Review, but Not Secretive Drone Courts*, N.Y. TIMES (Apr. 24, 2015), <https://www.nytimes.com/roomfordebate/2015/04/24/should-a-court-approve-all-drone-strikes/judicial-review-but-not-secretive-drone-courts> [https://perma.cc/5CD9-AU6J]. This view has been shared by human rights groups who do not believe that accountability and transparency will be improved by recent proposals to establish a FISA-like court to sanction lethal targeting operations. See Letter from American Civil Liberties Union et al. to Barack Obama, President of the U.S. (Apr. 11, 2013), <https://www.emptywheel.net/wp-content/uploads/2013/04/130412-Drone-Letter.pdf> [https://perma.cc/REG6-KC7V] (“[A] special targeted killing court would give a veneer of judicial review to decisions to launch lethal strikes without offering a meaningful check on executive power.”); see also Kevin Gosztola, *Human Rights Groups Challenge Obama’s Claimed Targeted Killing Authority & Secrecy*, SHADOW PROOF (Apr. 13, 2013), <http://firedoglake.com/2013/04/13/human-rights-groups-challenge-obama-administrations-targeted-killing-authority-secrecy/> [https://perma.cc/7PAN-46PG]. These groups have successfully sought release of redacted documents relating to targeted killings of U.S. citizens. *New York Times Co. v. U.S. Dep’t of Justice*, 752 F.3d 123 (2nd Cir.), *superseded by* 756 F.3d 100 (2nd Cir. 2014).

⁴⁹ 727 F. Supp. 2d 1 (D.D.C. 2010).

⁵⁰ For a discussion of how Anwar al-Aulaqi was targeted during the war on terror despite insufficient evidence to identify him as a terrorist, see Lesley Wexler, *Litigating the Long War on Terror: The Role of Al-Aulaqi v. Obama*, 9 LOY. U. CHI. INT’L L. REV. 159, 164–65 (2011).

⁵¹ Guiora, *supra* note 15, at 235, 240. (“Rather than relying on the executive branch making decisions in a ‘closed world’ devoid of oversight and review, the intelligence information justifying the proposed action must be submitted to a court that would ascertain the information’s admissibility. . . . The standard the court would adopt in determining the information’s reliability is the same applied in the traditional criminal law paradigm. The intelligence must be reliable, material, and probative.”) Guiora proposes a “strict scrutiny standard [that] would enable operational engagement of a non-state actor predicated on intelligence information that would meet admissibility standards akin to a court of law.” *Id.* at 239. *Contra* James Robertson, *Judges Shouldn’t Decide About Drone Strikes*, WASH. POST (Feb. 15, 2013), https://www.washingtonpost.com/opinions/judges-shouldnt-decide-about-drone-strikes/2013/02/15/8dcd1c46-778c-11e2-aa12-e6cf1d31106b_story.html [https://perma.cc/87JL-RG6K].

rant targeted killings as it now warrants surveillance of national security threats,⁵² and there is substantial value in this model in contrast to having the normal judiciary undertake this role.⁵³ The process of preparing and submitting available intelligence information to a court would compel the executive branch to actually meet high standards of evidentiary support for its actions and significantly contribute to minimizing operational error that might otherwise occur.

The important point here is that as the judiciary should have capacity to assess individual culpability deserving of death, there should be a mechanism by which the evidence of the suspected target's culpability may be challenged, obviously not by the target, but by a judicial officer responsible for compelling proponents of targeting to make each individual case. The purpose of judicial intervention in the target selection process is not vindication of any particular outcome but to ensure that high evidentiary standards are objectively upheld. Moreover, there is a fundamental difference between such review and effects-based targeting: the latter is entirely prospective, focusing on how elimination of an individual might weaken the terrorist organization. By contrast, judicial review of an individual's selection should focus on a different set of questions; as to each, the government should bear the burden to establish by the substantial preponderance of evidence that: The individual committed or participated in grave crimes causing widespread or terrifying loss of life, for example, he has committed acts that substantially manifest his forfeiture of his own right to life; and if he has not committed or participated in such grave crimes, there is grave risk that he will imminently do so such that law enforcement criteria for the use of lethal force (*e.g.*, to save innocent lives) are satisfied.

Thus, from this writer's perspective, the purpose of judicial review is less to manage the executive branch's determination of the value of the target in terms of destroying the adversary's fighting capability than it is to compel a focus on the target's criminality rather than his status. Essential to the selection of a person for killing is evidence of the individual's culpability by way of significant participation in instigating and executing acts of terrorism. Mere

⁵² See Guiora, *supra* note 15, at 240. For a discussion of the need for judicial review of drone warfare in cases of targeting U.S. citizens in counter-terror operations, see Michael Eshaghian, *Are Drone Courts Necessary? An Analysis of Targeted Killings of U.S. Citizens Abroad Through a Procedural Due Process Lens*, 18 TEX. REV. L. & POL. 169, 194–96 (2013) (discussing the need for and structure of 'drone courts' to inset judicial process in the targeting of U.S. citizens abroad), and J. Brian Meskill, *Discounting the Fourth Amendment: Implications at Home with Targeted Killings Abroad*, 12 CONN. PUB. INT. L.J. 231, 260 (2012) (analyzing the death of Anwar al-Aulaqi and arguing in favor of FISA courts reviewing executive branch decisions on targeting American citizens).

⁵³ In Israel, the Supreme Court has an oversight role with regard to targeted killings, but critics complain that this role is too broad and the Supreme Court's focus too generic to positively impact the target selection process. See Amnon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel*, 2011 UTAH L. REV. 63, 74–76.

membership in a prohibited organization, even membership that contributes to that organization's viability, is insufficient. The reason to compel evidence of individual culpability is that de-emphasis of such evidence tends to escalated killing. With cheaper and more effective technology, this is precisely what has happened: the logic of targeted killings as an extraordinary measure is now applied routinely and often.⁵⁴

C. Part I Summation

As a terrorist is both a criminal and a combatant, a targeted killing is never not an act of criminal justice. Therefore, the process for selecting someone for targeted killing must entail judicial review, independent of the intelligence and military chains of command. To kill someone without that review is to remove from legal process the risk of misidentification. The fine distinctions inherent in assigning criminal culpability—virtually irrelevant to armed combat and significantly shrunk in the process that selects terrorists for killing—are exclusively matters for judicial consideration. By contrast, a secretive intelligence-driven process of selection taking advantage of remotely operated weapons leads to a self-justifying cycle of violence that has killed thousands of people, including perhaps more than 200 children.

Judicial review, in this context, need not impede but should complement the pursuit of security and the conduct of counter-terrorism strategies. The challenge of handling confidential information and overseeing exceptionally sensitive operations is not, in this writer's view, best assigned to the nation's judiciary as a whole, handling specific selections on a random case-by-case basis, but by a specialized tribunal applying explicit procedural and evidentiary rules. The purpose of such review is not to re-assess the determination that killing an individual will weaken a terror network but to ensure that high evidentiary standards are objectively upheld with regard to the individual's criminal responsibility for acts of terrorism.

⁵⁴ As I wrote nearly a quarter century ago:

Of course, the United States has real security needs, and the military's response to those needs should not be matters for judicial review. But those security needs are not always at stake. There have to be limits to this concept of judicial deference. If there are no limits, then the threat of an external enemy, ever vigilant to destroy us if our military is at all constrained, will be used to justify the loss of the very freedom and security that we seek. If there are no criteria by which courts may determine whether a given decision is indeed the essence of national security policy, then the primary force of accountability—judicial review—will be barred at the Pentagon's gate.

It is important to acknowledge that targeted killings lists are prepared before the conduct of a lethal operation.⁵⁵ The notion that judicial review might somehow “delay” a strike is no more valid than the notion that the already time-consuming intelligence process for selection might delay an operation. In any event, if exigent circumstances arise, a specialized tribunal should certainly be familiar with how to handle such matters on an expedited basis.

II. THE OBLIGATION TO ARREST

This Part considers the obligation to arrest suspected terrorists in preference to attacking them. This obligation is well accepted. As earlier mentioned, the Israeli Supreme Court’s ruling on targeted killing made clear that such killings may be legally undertaken only when no reasonable means of arrest are available.⁵⁶ Similarly, American CIA Director John Brennan has proclaimed: “Our unqualified preference is only to undertake lethal force when we believe that capturing the individual is not feasible.”⁵⁷

The problem, however, is that the obligation to arrest has little objective content; there are no standards to judge whether capturing the individual is feasible such that, in any particular case, the use of lethal force may constitute a breach of the obligation. The question here is whether states that undertake targeted killing programs are, in fact, doing all they can to enable arrests of terrorists or are reclining on the ease of drone attacks and subsequently purporting that arrest was infeasible.

To repeat, the United States has conducted some 800 lethal attacks in three countries: Pakistan, Somalia, and Yemen. It is not clear why, in each of these instances, an arrest could not have been reasonably feasible. Absent criteria by which to consistently judge the infeasibility of arrest, the obligation to arrest takes on the vacuous logic of tautology: *the targeted killing must have been the last resort because why else would the victim have been killed?*

The obligation to arrest terrorists should be made of sterner stuff. The thesis of this Part is that an international legal analysis of targeted killing must assess States’ claims of infeasibility of arrest. The backward-facing accounts of intelligence officials may or may not be based on fact, but today it is impossible to know in any testable sense. My concern here is that armed drones have effectively inverted a legal paradigm that should favor arrest. As firing a drone missile is relatively easy and certainly safe for the operator, it has become the

⁵⁵ See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/EST2-65NN>].

⁵⁶ See Reichman, *supra* note 53, at 74–76.

⁵⁷ Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES (Apr. 7, 2013), <https://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html> [<https://perma.cc/D8YV-WF8H>].

preferred mechanism for dealing with terrorists unless the feasibility of arrest is patent. Even then, the choice of arrest rather than attack is entirely a matter for military or intelligence leaders, subject to all of the politics of modern counter-terrorism campaigns and certainly never judicially reviewable.⁵⁸

The argument proceeds through two sections: Section A assesses the evidentiary burden to establish that arrest is impossible allegedly because the host state of the alleged terrorist will not or cannot extradite him for prosecution. Section B considers the targeting state's obligation to use nonlethal force, especially in light of emerging weapons for incapacitating targets.

A. Establishing Infeasibility of Arrest

Arrest means to compel the suspect be brought to criminal justice without the use of lethal force except as a last resort necessary to prevent harm to the arresting officer or proximate persons; the objective is nonviolent detention under judicial oversight. To arrest, law enforcement must overleap myriad substantive and procedural hurdles established to protect human rights and with the full understanding that these hurdles mean that some who are guilty will walk free.

This is a fundamental distinction between law enforcement and the law of war: under the law of war, an attacker carries no primary obligation to capture rather than kill, especially if to do so would put one's forces at risk.⁵⁹ While a combatant must respect an adversary's surrender by doing him no physical harm, the onus is on the adversary to plea for quarter; absent any indication of an adversary's intention to accept capture, a combatant has no inherent obligation to take the adversary into custody rather than kill him.⁶⁰ If the cause is just

⁵⁸ For a fuller discussion of targeted killings by the United States and Israel and what the legal, moral, and strategic implications are, see Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 163, 168 (2010) ("[T]he 'exceptional' use of force has been turned, in the context of the war on terrorism, into a continuous practice It is, however, harder to justify targeted killing operations under a law enforcement paradigm when the tactic is used as a continuous and systematic practice rather than as an exceptional measure.").

⁵⁹ W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 7 n.6, https://www.loc.gov/frd/Military_Law/pdf/12-1989.pdf [<https://perma.cc/69R8-MFMA>] ("In the employment of military forces, the phrase 'capture or kill' carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great . . . it would be legally permissible to employ (e.g.) an airstrike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.").

⁶⁰ *Id.* at 5; see McNeal, *supra* note 18, at 702–12; Murphy, *supra* note 43, at 417; see also J.G. Fleury, *Jus in Bello and Military Necessity* (Nov. 17, 1998) (unpublished research essay) (on file with Canadian Forces College), <https://www.cfc.forces.gc.ca/259/260/261/fleury2.pdf> [<https://perma.cc/Y6BT-LR6S>].

and the target is legitimate, his elimination is not merely an incident of war but a proper tactical objective.

It would be a fundamental misreading of international law to view *arrest* or *attack* of terrorists as co-equal alternatives that states may choose between in light of particular circumstances. On the contrary, “[h]ost country cooperation in capture and extradition must be the first alternative considered.”⁶¹ United Nations Security Council resolutions, anti-terrorism conventions, and a long list of pronouncements from international and regional bodies all attest to the obligation to bring terrorists to justice.⁶² At root, the obligation to first arrest manifests a deeply respected focus on individual criminal responsibility as opposed to collective guilt, rejecting the age-old inclination to blame an entire people for the crimes committed by certain individuals who might claim to be fighting in the name of the group. Focusing on an individual’s criminal responsibility makes it easier to view his crimes as a disturbance of the peace and, following conviction, for others to accept post-conflict reconciliation and governance that respects their rights.⁶³ Moreover, arrests initiate a system of impartial justice, which builds an objective record of events that is a historical and ultimately transparent account of what happened.⁶⁴ “Individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace.”⁶⁵

The obligation first to arrest strives for the elimination of safe havens where terrorists can perpetrate crimes untroubled by police. The lesson of Al Qaeda in Afghanistan before 2001 is that safe havens for international terrorists cannot be tolerated. In operational turns, therefore, states are obligated to extradite or prosecute accused terrorists. If State A suspects that a terrorist threatening crimes against its citizens or interests is now in the jurisdiction of

⁶¹ Blum & Heymann, *supra* note 58, at 169.

⁶² See *UN Global Counter-Terrorism Strategy*, UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, <https://www.un.org/counterterrorism/ctitf/un-global-counter-terrorism-strategy> [<https://perma.cc/M99E-FN74>].

⁶³ As framed by Judge Cassese:

The holding of trials is a clear statement of the will of the international community to *break with the past* (*rompre avec le passé*) by punishing those who have deviated from acceptable standards of human behaviour. In delivering punishment, the international community’s purpose is not so much retribution as stigmatization of the deviant behaviour.

Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 10 (1998).

⁶⁴ See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 12–13 (2001).

⁶⁵ See *id.* at 10. For a discussion of the need for an international criminal court and the disfavor for granting amnesty in the prosecution of international human rights violations, see Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996).

State B, then State A should seek the suspect's extradition. If the crime is within the scope of anti-terrorism resolutions and conventions, then a request for surrender of persons accused of participation in or support of those crimes must be binding on all states.⁶⁶ A requested state must comply with a request for surrender of a suspected terrorist, subject to broadly accepted modalities of evidence sharing and of international legal cooperation, either by arresting the individual or by showing cause why surrender is improper or unjustifiable.⁶⁷ Each state is positively obligated to enact or amend implementing legislation so as to facilitate such compliance.⁶⁸

The obligation first to arrest means that, with regard to tactics for weakening terrorist networks by disabling their key agents, reasonable options to execute an arrest must never go unconsidered. If arrest is an option, then the invocation of self-defense to justify a lethal attack must fall. States must not be permitted to lethally target persons when arrest is an option. In contrast to the law of war, this obligation to arrest before killing is not dependent on the target's surrender but on the state claiming a self-defense interest in his incapacitation to show that arrest cannot be accomplished.

As earlier mentioned, the United States is firmly on record as disinclined to use lethal force in the majority of states where law enforcement is cooperative in countering terrorism—a suspect in the jurisdiction of a state willing and able to arrest and either prosecute or extradite him will not be lethally targeted. By necessary implication, the program of targeted killings in Pakistan, Yemen, and Somalia means that there has been and continues to be a negative assessment of these three states' capacity and willingness to arrest suspected terrorists whose whereabouts and identity are concealed and where local antagonism to police intrusion may be vehement. This program of targeted killing must signify an assessment that it is dangerous to rely on these states' willingness or capacity to bring terrorists to justice; military action is appropriate, therefore, in order to combat security threats from international outlaws.⁶⁹ Thus it has

⁶⁶ Cassese, *supra* note 63, at 12. Individuals may not be killed on suspicion of membership in a group. Rather, authorities must at least make the attempt to arrest a suspect and not simply kill him. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, at 112, U.N. Doc. A/CONF.144/28/Rev.1 (May 1991).

⁶⁷ Usman Hameed, *Mandatory Obligations Under the International Counter-Terrorism and Organised Crime Conventions to Facilitate State Cooperation in Law Enforcement* (Jan. 2014) (unpublished Ph.D. thesis, University of Glasgow School of Law) (on file with Glasgow Theses Service, University of Glasgow), <http://theses.gla.ac.uk/5118/1/2014hameedphd.pdf> [<https://perma.cc/YRN5-MP8C>]; see also Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals. An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After '11 September'* (Inst. for Int'l Law, Working Paper No. 56, 2004).

⁶⁸ See Scharf, *supra* note 65.

⁶⁹ Kretzmer, *supra* note 14, at 179 ("The problem with the law-enforcement model in the context of transnational terror is that one of its fundamental premises is invalid: that the suspected perpetrator

been argued, “in those cases where law enforcement measures fall short, one can look to a different legal framework.”⁷⁰

But the conclusion that law enforcement is ineffectual must not be reached impetuously. Ultimately at issue is not the reason for seeking the target’s incapacitation, but whether it is appropriate to discredit the territorial state’s will and capacity for apprehending him. This is a serious accusation against a state and deserves to be closely scrutinized. At minimum, the state claiming a self-defense imperative for targeting someone in a foreign state should be obligated to make a legal finding that arrest and extradition are unrealistic in light of the territorial state’s incapacity or unwillingness to participate in internationally mandated counter-terrorism measures that demand extradition of terrorists to states claiming jurisdiction. Even if the state is generally uncooperative, has there been a case-specific attempt to gain cooperation? Such a determination should require a showing that, for each name on the targeted killing list, all reasonable attempts to gain cooperation, however difficult and previously unrewarding, have been exhausted. Such attempts include bilateral diplomacy as well as engagement of international organizations (*e.g.*, Interpol) to facilitate legal assistance.

As a counterpoint, it merits recognition that, in some cases, to exhaust law enforcement remedies could entail divulging classified information to the territorial state that might enable the suspect to altogether elude being targeted, much less arrested. This raises what is perhaps the core issue in the entire debate over targeted killing: May the intelligence and military communities of a state, claiming a self-defense need to incapacitate a suspected terrorist, circumvent the obligation to effectuate legal cooperation with the territorial state on the basis of sensitive information that it refuses to divulge? That is, may the attacking state obviate the need to pursue international legal process for a terrorist’s extradition because of its national security prerogatives to retain the confidentiality of intelligence?

There is an unavoidable quandary here, as international law provides no obviously applicable mechanism or even guidelines about how to answer these questions. On the one hand would be to deny a State, especially one that has been victimized by global terrorism, the prerogative of defending its citizens from an identified harm because modalities of international legal cooperation are, as yet, unavailing or diplomatically unrealistic in particular circumstances. On the other hand is to perpetuate a cycle of violence on the circular logic that these modalities are unavailable because it is not in the state’s national security interests to avail themselves of these modalities. Why bother with difficult-to-

is within the jurisdiction of the law-enforcement authorities in the victim state, so that an arrest can be effected.”).

⁷⁰ Rebecca Perlman, *Targeted Killings: Does Drone Warfare Violate International Law?*, J. PUB. & INT’L AFF. 68, 74 (2011).

achieve progress in strengthening trans-national legal cooperation for arresting suspected terrorists when there is a safe and comparatively easy way of simply eradicating them?

In view of the seriousness of the harm that a targeted killing inflicts not exclusively on the target but on proximate communities, the perpetuation of violence that targeted killings so obviously signify, and the fact that claims of the legality of targeted killings rest on recognition of an exceptional status in international law, it would seem incumbent to require that states conducting targeted killings engage a capacity for judicial intercession on the question of whether attempts to arrest terrorists have been fully exhausted. It is the judiciary that can impose strict evidentiary requirements as to whether the executive has diligently sought to work with the territorial state, including participation in bi- and multilateral efforts to strengthen anti-terrorism legal cooperation as the primary means for incapacitating terrorists. It is the judiciary that can appropriately balance the competing interests for transparency and for confidentiality that are inherently at stake.

In conjunction with the determinations associated with terrorist selection, therefore, are determinations associated with whether the territorial state cannot or will not cooperate in incapacitating the target, rendering arrest infeasible. For many of the reasons discussed in Part I, it would seem appropriate to confine this review to a specialized tribunal with appropriate mandate and capacities to handle confidential information that would exercise independent review outside the military and intelligence chains of command. Put simply, in addition to the finding, discussed in Part I, that an individual's selection for targeted killing is justified; a determination that arrest is infeasible must be a matter of case-by-case review by an independent judiciary.

B. Enabling Technological Alternatives for Capture

If, in fact, arrest of the terrorist by the territorial state is not an available option, is the attacking state's use of force subject only to the constrictions of the law of war or does the obligation to first arrest extend to the attacking state? Historically, the law of war would prevail. Indeed, the rationale of targeted killing may fairly be encapsulated as: if there is (1) a national self-defense interest in the terrorist's elimination from the terrorist network and (2) no reasonably available legal assistance by the host state, then the attacking state has the right to use lethal force to eliminate the threat. The purpose of this section is to take issue with that logic in light of emerging technologies for facilitating a target's incapacitation and thereby arrest.

In this context, appreciation must be given to the technological revolution in armed drones that has transformed targeted killings from the extraordinary to the routine, and the comparably significant though less deployed revolution

in ordnance that drones can launch. Armed drones are capable of accomplishing military tasks with enviable dexterity and precision and without risk to one's own personnel. An armed drone can go over essentially any terrain using its own surveillance system as its guidance and hover undetectably over a target for lengthy periods. When a target is detected, the drone operator, who may be thousands of miles away, can fire a missile with a guidance system that virtually guarantees the target's destruction. Never before has there been a way to deliver lethal force anywhere in the world with such individualized effect.

A pause for consideration is due for what armed drones will soon become, indeed may already be: autonomous weapons. Whatever distinction there may be between today's remotely operated armed drones and tomorrow's robotic weapons is quickly losing real meaning as more aspects of drone operations are programmed into the paradigm of decisions available for the device itself to make. There is no inherent technological barrier to the prospect of programming self-guiding, fast-moving devices that can search out a single individual and, when the risk of ancillary harm is low, deliver a lethal attack.

From a perspective grounded in the international humanitarian law (IHL) principle of distinction, today's armed drones and tomorrow's robotic weapons can reduce violence by offering a far more precise alternative to other forms of aerial attack, whether from guided missiles or aircraft. Every other at-distance weapon since the invention of artillery has served to destroy blocks of space, killing or harming everyone in that space. But emerging weapons' surveillance and precision guidance capabilities enable an attack to be executed far more selectively than with cruise missiles or aerial bombers. Thus, these weapons offer "a potentially effective way of avoiding broad military deployment while still confronting a perceived threat."⁷¹

At the same time, however, these weapons lower the threshold for claiming "just cause" under *jus ad bellum*. Critics assert that the persistence and range of armed drones enables more attacks in remote areas, causing more—not fewer—civilian casualties. They allege that, heretofore, military leaders might have declined to fire cruise missiles at a target due to an unacceptable risk of ancillary casualties, but armed drones' targeting capability undercuts such hesitation.⁷² Also troubling is the potential for armed drones to spawn proliferation of prohibited weapons, especially chem-bio weapons that could be effectively delivered by a guidable hovering aircraft equipped for pinpoint

⁷¹ Daniel Brunstetter & Megan Braun, *The Implications of Drones on the Just War Tradition*, 25 ETHICS & INT'L AFF. 337, 344 (2011) (citing MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2006)).

⁷² Markus Wagner, *The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems*, 47 VAND. J. TRANSNAT'L L. 1371, 1409–12 (2014).

warhead delivery; enhanced delivery capacity might be temptation to deploy these prohibited weapons.⁷³

Thus, reliance on increasingly autonomous weapons is said to be a slippery slope to dehumanization of warfare whereby IHL proscriptions against inflicting civilian casualties might be ignored by machines incapable of subtly assessing complicated battlefield conditions.⁷⁴ “Drones forestall the threshold of last resort for larger military deployment, but that the last resort criterion does not apply to drone strikes themselves because the targeted killing of (alleged) terrorists becomes the default tactic.”⁷⁵

Inherent in an inquiry about the legality of targeted killings is the prospect of flotillas of armed drones, and soon robotic weapons, selectively targeting individuals with lethal force. Even if the targeted individuals have done horrible crimes, this prospect represents a troubling crossroads in the use of armed force and, accordingly, in international law, especially if military and intelligence officials disregard nonlethal alternatives that might have enabled the terrorist’s arrest.⁷⁶

The point here is that the technologies used for targeted killing could be used for isolating and immobilizing a terrorist suspect, making arrest a practical alternative to killing. The arrested person, once in custody, would have the rights and prerogatives guaranteed to accused felons of comparably horrific crimes, and his ultimate fate would similarly be decided pursuant to due process of law. The question here—one which has received far too little attention from international law experts—is whether emerging weapons technologies might raise the potential for a successful arrest, meaning that the use of lethal force is not the only option and thus would be contrary to international law.

It is important in this context to consider the potential for incapacitating weapons—so called because they are designed to temporarily impede a target’s freedom of movement. There are projectile nettings for ensnaring a target, even

⁷³ See Armin Krishnan, *UVs, Network-Centric Operations, and the Challenge for Arms Control*, 21 J.L. INF. & SCI. 61, 68–69 (2011); see also Alan W. Dowd, *Drone Wars: Risks and Warnings*, 42 PARAMETERS 7, 8–9, 14 (2013).

⁷⁴ Noel E. Sharkey, *The Evitability of Autonomous Robot Warfare*, 94 INT’L REV. RED CROSS 787, 788–89 (2012); see also David Hastings Dunn, *Drones: Disembodied Aerial Warfare and the Unarticulated Threat*, 89 INT’L AFF. 1237, 1244–46 (2013); Daniel R. Brunstetter, *Can We Wage a Just Drone War?*, ATLANTIC (July 19, 2012), <http://www.theatlantic.com/technology/archive/2012/07/can-we-wage-a-just-drone-war/260055/> [<https://perma.cc/VN9J-BPDK>].

⁷⁵ Brunstetter & Braun, *supra* note 71.

⁷⁶ Editorial, *Lethal Force Under Law*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/opinion/10sun1.html?_r=0 [<https://perma.cc/S29F-6R6W>] (“Before a decision is made to kill, particularly in areas away from recognized battlefields, the government needs to consider every other possibility for capturing the target short of lethal force.”) For a discussion of how warrant-based targeting, more specifically search and detention, in military operations is a meaningful alternative to targeted killings, see Kevin H. Govern, *Warrant-Based Targeting: Prosecution-Oriented Capture and Detention as Legal and Moral Alternatives to Targeted Killing*, 29 ARIZ. J. INT’L & COMP. L. 477 (2013).

a vehicle; electrical pulse weapons can be used to stun the target; directed energy beams can disable vehicles' power systems.⁷⁷ Various foams can stick to a target or make traction impossible—in either case, the target cannot move.⁷⁸ More controversial are chemical calmatives or disorienting agents that disable without inflicting lasting harm.⁷⁹ There are also darts that can be used to paralyze a target.⁸⁰

The military use of incapacitants has sparked recurrent debate among international lawyers as has the prospect of autonomous delivery systems to get them to their target.⁸¹ The issue here is whether these technologies have potential utility for law enforcement agents to arrest (rather than kill) persons on terrorist-targeted killing lists. If, at least in some cases, there is a reasonable choice between killing and incapacitating the target, then the law's interest in bringing the culprit to justice must weigh significantly. Of course, operational consideration must be given to the risks of arresting personnel or removing an incapacitated terrorist from potentially hostile communities or environments; that risk can never be as low as the risk to the operator of an armed drone, which is what makes targeted killing so attractive.

But to hypothesize briefly, if a drone identifies a target in a vehicle on a desolate road and the drone is equipped not only with explosive missiles but incapacitants as well, the tactical implications of extracting the target do not seem so obviously herculean as to render arrest undoable. Substantial tactical questions of how to execute an arrest using emerging nonlethal weapons are

⁷⁷ See David A. Koplow, *Tangled Up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT'L L. 703, 704 (2005), for cases studies of how non-lethal weapons have enabled successful outcomes in combat situations. For a discussion of how directed energy would give the U.S. military an operational advantage and the emerging technologies that have the potential to transition into real-world military capabilities, see MARK GUNZINGER & CHRIS DOUGHERTY, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENTS, CHANGING THE GAME: THE PROMISE OF DIRECTED-ENERGY WEAPONS 26–27 (2012).

⁷⁸ See Koplow, *supra* note 77.

⁷⁹ Treasa Dunworth, *The Silent Killer: Toxic Chemicals for Law Enforcement and the Chemical Weapons Convention*, 10 N.Z. Y.B. INT'L L. 3, 7 (2012).

⁸⁰ See *id.*

⁸¹ It must be acknowledged that the status of incapacitants in international law is a matter of substantial debate. For a discussion of non-lethal weapons and incapacitants in international warfare and the growing consensus for legal oversight on their use, see Duncan Blake & Joseph S. Imburgia, "Bloodless Weapons"? *The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as "Weapons"*, 66 AIR FORCE L. REV. 157, 159 (2010) (analyzing the potential legal consequences of recognizing certain means of bloodless warfare as "weapons, means or methods of warfare"), Pauline Kaurin, *With Fear and Trembling: An Ethical Framework for Non-Lethal Weapons*, 9 J. MIL. ETHICS 100, 101–02 (2010) (arguing in favor of a holistic and integrated ethical approach to non-lethal weapons and creating restrictions on their use), and Eve Massingham, *Conflict Without Casualties . . . A Note of Caution: Non-Lethal Weapons and International Humanitarian Law*, 94 INT'L REV. RED CROSS 673 (2012) (cautioning against any weakening of existing international humanitarian law frameworks regarding non-lethal weapons despite their potential suitability for specific situations).

far beyond the scope of this discussion. My more focused objective is to ask whether the “virtues” of armed drones—precision, persistence, and range—offer realistic options to use incapacitants for arrest instead of lethal ordnance for killing.

If such options are realistic, then resort to the use of lethal force may be seen as a breach of the obligation to first arrest: even if the use of force is justified, it may not be necessary and hence not appropriate for the force used to be lethal. It would seem difficult for international law to tolerate invocation of the law of war so as to disregard nonlethal capacities for arrest. On the contrary, as international legal standards stipulate that law enforcers may use lethal force only where less lethal options are unavailable or dangerous,⁸² and as the targeted killing of a terrorist is never not a law enforcement matter, then rationalizations for why an arrest may be infeasible must be strictly scrutinized.

Worth emphasizing here is that the obligation to first arrest should not be thought of exclusively in operational terms, but in terms of readiness as well. With regard to technologies that can make arrest reasonably feasible, law enforcement officials should be trained to plan for and use less-than-lethal measures—including restraint, capture, and the graduated use of force. The onus should be on the states conducting targeted killings to consider how to improve arrest capabilities, including specifying the level of force that can be used in various circumstances.

Put more simply, drones open unimaginable capacities to use smaller, individually targeted ammunition, *e.g.*, a dart instead of a missile shell. Equipped with incapacitating agents rather than explosives, drones could be instruments for facilitating arrest instead of exclusively instruments for inflicting lethal force. It is not difficult to envision how, if equipped with incapacitants, there could be technological capacity for conducting arrests of terrorists, wherever they may be, with acceptable risks to allied personnel. Consideration could be usefully devoted, therefore, to specifying the circumstances where the use of nonlethal force should be prescribed, rendering the use of lethal force inherently excessive.

C. Part 2 Summation

The preference for arresting suspected terrorists instead of attacking them is widely acknowledged, and states conducting targeted killings claim to prefer

⁸² For a discussion of how the International Committee of the Red Cross attempts to protect innocent people throughout the world by respecting the international legal framework, see INT’L COMM. OF THE RED CROSS, INTERNATIONAL RULES AND STANDARDS FOR POLICING 35–37 (June 2015), <https://www.icrc.org/eng/assets/files/other/icrc-002-0809.pdf> [<https://perma.cc/R9VE-PZDT>], and U.N. High Comm’r for Hum. Rts., Human Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police, at 95, U.N. Doc. HR/P/PT/5/Add.2 (2002), <https://www.ohchr.org/Documents/Publications/training5Add2en.pdf> [<https://perma.cc/7PCW-JR4E>].

arrest, but there are no objective criteria to assess whether the use of lethal force in any particular case is warranted. Statistics on targeted killings suggest that military and intelligence leaders often disregard conducting an arrest, and this decision is never judicially reviewable.

It is important to first ask whether the attacking state can avail itself of modalities of international legal cooperation to convince the host state where the suspected terrorist resides to arrest him. No self-defense rationale based on the threat posed by a terrorist would permit a lethal attack in a state where his arrest is feasible, and it has never been so argued. With regard to just a few states, however, there has been a negative assessment of their capacity and willingness to arrest suspected terrorists, and this assessment undergirds states' targeted killings programs. But this assessment has not been subject to judicial review, certainly not on a case-by-case basis. The concern here is with an institutional instinct to resort to lethal force when an enemy can be eliminated instead of engaging the one branch of government highly trained in evaluating capacities for executing legal process: the judiciary.

Thus, while a state may protect itself from a terrorist located in a state that will not or cannot arrest him, the targeting state should still respect the obligation to first arrest, especially if there are technologies that can make an arrest, instead of a lethal strike, potentially feasible. The substantial advances in drone technology, moving rapidly toward development of autonomous systems for delivering ordnance of whatever type, along with substantial advances in incapacitants, suggest that the constraints on law enforcement's weapons, tactics, and training should apply in connection with targeted killings. Whatever justifications there may be for the use of force, states that have the military wherewithal to conduct programs of targeted killings should be required to develop and use nonlethal targeting and apprehension technologies.

Altogether, the target's "arrest-ability" is a matter that should be judicially reviewable. The problem with an approach based on the law of war is that the key questions concerning the obligation to first arrest—whether the host state can be relied upon, or whether a nonlethal capture can be executed—are now answered by executive branch officials, not by judges. Their answers may be irrefragable in many cases, but the number of targeted killings would advise engagement of judicial officials who, in every legal system, are responsible for supervising the conduct and conditions of arresting criminals.

III. MANDATORY INVESTIGATION OF TARGETED KILLINGS OF INNOCENT CASUALTIES

This Part considers the legal implications of killing someone who was in no meaningful sense selected for killing nor was a combatant-affiliate of the target but was an innocent either mistaken for a target or simply in the wrong

place at the wrong time. It is in this context that the starkest distinction between the law of criminal justice and the law of war appears.

In the law of war, because targets are not selected based on their moral turpitude but rather for their significance to the enemy's war-fighting capability, killing someone who is proximate to the enemy's material assets is not murder if the attack satisfies IHL requirements of military necessity and proportionality. This precept evolved in the context of state-versus-state warfare, which focused substantial attention on territory and so little on individual responsibility. Even though a civilian in or near valid military targets might not deserve to be personally targetable, circumstances might justify her death as an incident of war.⁸³ But as earlier asserted, this paradigm unrealistically describes today's targeted killing of terrorists outside battlefield theatres.

To repeat a central refrain: targeted killings are remarkably personal, focused on individual responsibility for crimes past and future. The individual's killing is not based on any concept of nationality, much less of territory. Targeted killings are enabled by technology that renders successful execution easier than it has ever been before and without geographic limitation. Properly viewed, the very logic of targeted killing undermines the logic of tolerating harm to innocent casualties; there is no reason to view the killing of proximate but innocent persons as reasonable collateral damage. If there is a death of a child, a geriatric, or someone incapable of posing any type of threat, any contention that this is an unfortunate incident of lawful warfare makes no sense in view of how targeted killings have changed combat.

The United States under the Obama Administration announced commitment to the idea that their targeted killings should not entail collateral harm to innocent persons.⁸⁴ But, as earlier noted, the Bureau of Investigative Journalism reports that targeted killings by drones outside battlefield theaters are responsible for between 620 and 1316 civilians, of which more than 200 have been children.⁸⁵ Most targeted killings occur in isolated regions because that is

⁸³ For a more thorough discussion and critique of the law of war's tolerance of this justification of killing of noncombatants, see Barry Kellman, *Of Guns and Grotius*, 7 J. NAT'L SEC. L. & POL'Y 465 (2014).

⁸⁴ According to CIA Director John Brennan, "By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft." John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> [<https://perma.cc/VYE7-4Y85>].

⁸⁵ See *Get the Data: Drone Wars*, *supra* note 25; see also COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & CTR. FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 20 (2012), http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf [<https://perma.cc/7MHA-UTDB>]. For a discussion of how evidence showing U.S. airstrikes causing civilian casualties casts doubts on whether the United

where terrorists tend to be. Whatever innocent casualties may have occurred, a lack of internet access combined with traditional communities' deeply held notions of privacy complicate access to information. To repeat, as governments hold the best evidence of innocent casualties, refusals to reveal that information stymie refutation of assertions that there have been no innocent casualties. But that does not mean, of course, that these assertions are true.

The central point here is that, in today's international law, only targeted killings sustain the proposition that States may kill innocent people without accountability. In no other context would this proposition be even remotely accepted. Here, the relics of the law of war sustain a legal shield around targeted killing because it is said that, in war, sometimes innocent people must die.

International law, if it is to stand for anything, must postulate that to cause the death of someone not suspected of being a terrorist is, necessarily, a homicide, and a state that causes innocent casualties must be held accountable. It may not be a war crime; it may not even be premeditated murder. But the use of lethal force can never be an act for which legal responsibility is ignorable. It is by definition tortious and must give rise to a legal inquiry and, if the facts warrant, imposition of legal consequences, whether civil or criminal.

Section A of this Part recounts how claims of innocent casualties from targeted killings have fared before various national courts. Section B frames such claims as raising fundamental issues of the right to truth.

A. Doctrinal Quasi-Impunity

This section recounts how and why courts in both Europe and the United States, with only rare exceptions, have established doctrinal barriers to civil accountability for wrongful death or injury due to targeted killings by denying access to judicial process. Judicial determination of fault based on a thorough and adversarial investigation is obviated by these doctrinal barriers. As a result, the victim's family, nor anyone else, can challenge the reason for the loss. In this writer's view, the cumulative effect of no judicial accountability for innocent casualties constitutes a gaping hole in the operation of international law.

Perhaps the barrier most litigated has been jurisdictional: whether the consequences of the use of force in foreign lands are within the jurisdictional scope of the acting state's courts. For example, *Al-Skeini v. United Kingdom*⁸⁶ concerned claims for the deaths of claimants' civilian relatives from drone

States' "near-certainty" standard for drone strikes is being met, see OPEN SOCIETY JUSTICE INITIATIVE, DEATH BY DRONE: CIVILIAN HARM CAUSED BY U.S. TARGETED KILLINGS IN YEMEN (2015), www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf [<https://perma.cc/8GKQ-2TE5>] (detailing nine cases in which at least twenty-six civilians, including children, were killed or injured by drone strikes in Yemen between May 2012 and April 2014).

⁸⁶ *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99.

strikes.⁸⁷ Claimants invoked the European Convention on Human Rights' (ECHR) protections of life.⁸⁸ But the injury was inflicted in a place outside the ECHR's jurisdiction, and the victims were nationals of states not party to the Convention.⁸⁹ In the court's view, jurisdiction was essentially territorial; that an act committed by a contracting state or its agents caused harm to an individual did not establish that the individual was within that state's jurisdiction.⁹⁰ To hold otherwise would open the floodgates of litigation to every individual against whom force was used, compelling the judiciary to micromanage military activities which courts lack the necessary evidence and competence to judge.⁹¹ The ECtHR overturned the U.K. House of Lords' dismissal of the claims, but only on the exceptional ground that acts of states occurring or producing effects outside their territories can constitute exercises of jurisdiction if agents of the state exercise authority over an individual.⁹² Because the U.K. exercised some public powers in the occupied city of Basrah, it was obliged to officially investigate the deaths.⁹³ Nothing in the opinion, however, suggested that killing is, in and of itself, authority or control, especially if the state is merely firing missiles from an aircraft.⁹⁴

The notion of a court not having jurisdiction over foreigners' claims based on homicides allegedly committed by its state is puzzling, as it seems to negate the active personality theory of jurisdiction and suggest that states may do to foreigners with impunity what they would not be allowed to do their own citizens, as if every man's inalienable rights to life and liberty were territorially delimited, as if their creator endowed those rights using a partially filled-in map where only nationals of certain states could complain of wrongful death. The ECtHR had to find the U.K.'s authority in Basrah to be an exception on which to order an investigation of the plaintiffs' relatives' deaths and was compelled to acknowledge that the shooting of the missile was not, in and of itself, the exercise of jurisdiction over the victims. It is troubling that state action of such palpable significance to a private person in another state is jurisdictionally barred by the courts of the acting state.

⁸⁷ See *id.* at 120–21, 126–29, 132, 134.

⁸⁸ See *id.* at 136.

⁸⁹ See *id.* at 160–61.

⁹⁰ See *id.*

⁹¹ For a fuller discussion on how the *Bankovic* standard was overturned by a human rights approach in *Al-Skeini*, see Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121, 127 (2012); see also Anna Cowan, *A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini*, 1 CAMBRIDGE J. INT'L & COMP. L. 213, 214 (2012); Marek Szydło, *Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda*, 12 INT'L CRIM. L. REV. 271, 283 (2012).

⁹² *Al-Skeini*, 2011-IV Eur. Ct. H.R. at 167.

⁹³ See *id.* at 167–68.

⁹⁴ See Milanovic, *supra* note 91, at 123.

Doctrinally distinguishable but to similar effect are recent decisions involving U.S. drone strikes but filed in other states' courts. In *Khan v. Secretary of State for Foreign and Commonwealth Affairs*,⁹⁵ the defendant allegedly provided locational intelligence for the drone strike that killed forty people, including claimant's father.⁹⁶ Claimant argued that turning over such information, foreseeing a serious risk that the information would be used to kill someone, should render the passer liable for aiding and abetting murder.⁹⁷ But the court refused to forbid the secretary to pass such information, holding that to pursue the claim would put the court in the position of judging the discretionary acts of a sovereign state.⁹⁸

From an international law perspective, the disinclination of the courts of one nation to review another state's use of force is easily understood: questions about the host state's aiding and abetting that use of force would tread heavily on respected concepts of sovereign immunity. But such disinclination is less relevant if the claim of wrongful death is brought in the state that committed the attack. This is why the recently filed complaint, *Bin Ali Jabar Families v. United States*, deserves attention.⁹⁹ Allegedly, a drone strike killed innocent bystanders and thus violated the Torture Victim Prevention Act.¹⁰⁰ Claimants do not seek monetary damages nor injunctive relief but only an official apology.¹⁰¹

B. The Right to Truth

The purpose of this section is to assert that international law propounds a *right to truth* and that unaccountable innocent casualties of targeted killings violate this right. Increasingly recognized by international tribunals,¹⁰² the right to truth is inherently entwined with principles of accountability, obligating states to enable analysis of their actions that pertain to the human right to

⁹⁵ *Khan v. Sec'y of State for Foreign & Commonwealth Affairs*, [2014] EWCA (Civ) 24.

⁹⁶ *See id.* at [1]–[3].

⁹⁷ *Id.* at [4].

⁹⁸ *See id.* at [29].

⁹⁹ Complaint, *Jaber v. United States*, No. 15-0840 (D.D.C. July 6, 2015), https://www.reprive.org.uk/wp-content/uploads/2015/06/2015_06_07-PUB-Jaber-v.-United-States-et-al-Complaint-Filed.pdf [<https://perma.cc/NG22-SXDT>]; *see* Scott Shane, *Families of Drone Strike Victims in Yemen File Suit in Washington*, N.Y. TIMES (June 8, 2015), www.nytimes.com/2015/06/09/world/middleeast/families-of-drone-strike-victims-in-yemen-file-suit-in-washington.html?_r=2 [<https://perma.cc/TV55-MSRM>]. Complainant's suit against German authorities for having allowed U.S. forces to use its air base to conduct drone attacks was dismissed, and the court held that "the German government is not obliged to prevent the United States from using the air base in Ramstein for executing drone strikes in Yemen." Ryan Devereaux, *German Court Turns Down Drone Lawsuit but Leaves Door Open to Others*, INTERCEPT (May 30, 2015), <https://firstlook.org/theintercept/2015/05/30/german-court-turns-drone-lawsuit-leaves-door-open-others/> [<https://perma.cc/89LJ-6HSV>].

¹⁰⁰ Complaint, *supra* note 100, paras. 1, 12; Shane, *supra* note 100.

¹⁰¹ Complaint, *supra* note 100, para. 22; Shane, *supra* note 100; Devereaux, *supra* note 99.

¹⁰² *See* Al Nashiri v. Poland, App. No. 28761, Eur. Ct. H.R. ¶ 292 (2014), <http://hudoc.echr.coe.int/eng?i=001-146044> [<https://perma.cc/G2MV-8D46>].

life. When a state is implicated in a use of force causing death or grave injury, the right to truth compels not only clarification of how the harm was inflicted, but also of the general context, the policies and institutional failures and decisions that enabled that harm.¹⁰³ The right to truth signifies a negation of impunity claims; no one may be absolved of legal responsibility when innocent lives are lost.¹⁰⁴ If the facts warrant, culpable parties including government officials should be prosecuted (or extradited).¹⁰⁵

States should have a legislative framework in place for conducting investigations of serious allegations of fundamental human rights violations, even if no prima facie indication of illegality is shown.¹⁰⁶ The duty to investigate is owed simultaneously to the particular victims and to the society at large—to rectify whatever the harm, punish the perpetrators, and deter further wrongful behavior.¹⁰⁷ Investigations have the further virtue of helping to identify organizational and procedural deficiencies that may have allowed the violation.

Even if there is a strong state interest in maintaining the secrecy of information, the difficulties that this causes should be counterbalanced so as to allow legal interests to be effectively defended.¹⁰⁸ The converse proposition is important here: negative inferences may be drawn from the absence of such capacities or their ineffectiveness in any particular case. That is, the right to truth posits that a state's failure to inquire as to serious allegations of breach of significant obligations, or its interference with such inquiries, raises, in and of itself, inferences of non-compliance.¹⁰⁹

Investigations should be: (1) effective, (2) independent, and (3) reasonably transparent both as to process and result.¹¹⁰ *Effectiveness* is not an obliga-

¹⁰³ For a discussion of the traditional focus on the Geneva grave breaches regime in the context of military investigation and an argument that the duty to investigate is far broader, see Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 Y.B. INT'L HUMANITARIAN L. 37 (2012), https://www.researchgate.net/profile/Yuval_Shany/publication/228184717_Beyond_the_Grave_Breaches_Regime_The_Duty_to_Investigate_Alleged_Violations_of_International_Law_Governing_Armed_Conflicts/links/54dc57830cf28d3de65f7d80.pdf [<https://perma.cc/BPR4-2TMH>].

¹⁰⁴ See *Al Nashiri*, Eur. Ct. H. R. ¶¶ 479–483.

¹⁰⁵ For a discussion of how victims of human rights abuses have the right to truth from the culpable parties, see Dermot Groome, *The Right to Truth in the Fight Against Impunity*, 29 BERKELEY J. INT'L L. 175 (2011).

¹⁰⁶ See Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 472–73 (1990).

¹⁰⁷ *Al-Nashiri*, Eur. Ct. H.R. ¶ 482.

¹⁰⁸ *Id.* ¶ 492.

¹⁰⁹ *Id.* ¶¶ 490–491. The submission of the UN Special Rapporteur was cited for the proposition that “[a] specific sub-set of international standards had emerged, in the post-2001 era, concerning disclosure of documents and transparency in cases where national security interests were involved.” *Id.* ¶ 480.

¹¹⁰ See Cohen & Shany, *supra* note 104, at 6, 24.

tion of result, but of means.¹¹¹ Authorities should take reasonable steps to secure the evidence concerning the loss of life; any deficiency in the investigation that undermines ability to establish the cause of death or the person(s) responsible will risk falling foul of this standard.¹¹² It is important that authorities investigate promptly to prevent any appearance of collusion or tolerance of unlawful acts.¹¹³ A slow investigative process may be ineffective in identifying past violations due to the loss of evidence and fading memory.

Because an investigation should genuinely strive to ascertain the truth and hold wrongdoers accountable, the persons responsible for carrying out the investigation should be independent from those implicated in the events.¹¹⁴ Some commentators advocate entrusting investigative tasks to permanent investigative bodies—a mechanism used in other human rights contexts—invested with powers to require witnesses to appear before them, to receive documents, and to gather information.¹¹⁵ Permanent investigative bodies have the virtue of being able to accumulate considerable expertise in handling problems and can thereby improve the effectiveness of investigations over time.¹¹⁶

Transparency ensures that the beneficiaries of the right to truth—the victim's representatives and the general public—have their interests safeguarded.¹¹⁷ At minimum, relevant information should be sufficiently disclosed to allow the victim's family to fully participate in the investigation.¹¹⁸ Claims by state officials that certain information could not be disclosed to the alleged victim and the public on national security or related grounds should be reviewed by some entity outside the chain of command. Investigators (or courts) should have ultimate authority to decide what information should or should not be published. Where information is withheld, there should be a way for persons appointed to act in the victim's interests to test official assurances and defenses. Again, a standing investigatory body offers the advantage of systematically balancing tension between the military need for secrecy and the principle of public scrutiny.

The right to truth offers a straightforward approach to innocent casualties of targeted killings. Any state that would undertake a program of targeted killings should, according to the right to truth, have in place a capacity for effective, independent, and transparent investigation of claims of innocent casual-

¹¹¹ *Id.* at 25.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.* at 40–41.

¹¹⁶ *Id.* at 40.

¹¹⁷ See *id.* at 26; G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

¹¹⁸ Cohen, *supra* note 104, at 26.

ties. International law would not prescribe the specific procedures of such consideration—indeed, each state must have procedures that reflect and comport with its constitutional system. Yet, international law has an abiding interest in ensuring that any innocent person who is directly and substantially harmed by a foreign state has a remedy against that state, and any state that would deny such remedy is, necessarily, violating international law.

Key here is the difference between claims of innocent casualties and the earlier discussed rights of persons selected for targeted killing. A challenge to being selected for targeted killing necessarily would require that a court delve into military and intelligence decisions exclusively within the prerogatives of the executive branch, raising risks of disclosure of government secrets. If indeed there is a process of judicial intercession in the selection process as earlier discussed in Part I—if the victim's rights were, in effect, addressed in a process that respects the criminal justice implications of a targeted killing—then *post hoc* judicial review risks precisely the intrusion that worries critics of a judicial role.

But a victim who was not selected for targeting lost rights that were not protected in the selection process. Whether the law of war might allow the strike against someone else is essentially irrelevant to what happened to the claimants who were innocent casualties. As there was no decision that targeted the claimants, there is no decision to review. Because the military (or intelligence) considerations that underlay the decision to attack are not central to why a different innocent person was killed, much less the policy for using force in general, *post hoc* investigation and legal accountability are not threatening to that process, and there is no acceptable alternative to rectify the loss to the injured party and to ensure that there is a legal record of that loss and how it was caused.

CONCLUSION

This essay has argued that targeted killings may be legal only if the attacking state: (1) selects individuals pursuant to a process that includes judicial intercession for determination of their past or future crimes; (2) establishes that arrest is impossible both because the host state is unwilling or unable to execute an arrest request and that emerging nonlethal capacities for incapacitating the individual have been thoroughly considered but are likely to be ineffective; and (3) is legally accountable under the *right to truth* for innocent casualties of targeted killing operations.

Readers may be dismissive that this is but one writer's wish list, a compendium perhaps of what international law should be but not a dispassionate portrayal of what it actually stipulates. This is a fair critique. But it is also a circular critique: the best defense of current targeted killings policy is that it

violates no strict and certain prohibition of international law, but the proponents of this defense have done little to clarify applicable international law. My analysis may be said to be more aspirational than descriptive because targeted killing operations are alleged to operate in a black hole of international law, but in fact it is a hole that relevant decision makers have themselves not filled in—the hole's persistence serves targeted killings well because the perpetrators do little to demand better international law. It is the ultimate manifestation of the *Lotus* logic that what is not prohibited to states is necessarily allowed, invoked by states to allow their military and intelligence communities to do as they deem best.

Such circular logic resulting in no effective legal control of the killing of thousands of people is, in this writer's view, a cynical manipulation of international law's interstices, offering self-perpetuating ambiguity about how to operate in these interstices as permission to take lives. Looming is the slippery slope of such logic: with technology that enables detection, identification, and elimination of persons deemed to pose a terror threat, security can be pursued under a veil of unaccountability. Tomorrow, perhaps, we may all be saved from the dangers of terrorists and other horrific villains with the mere push of a robotic button and without the complexities of criminal justice. Such a world, even if momentarily more secure, would not deserve to be called more respectful of international law.

Ours is a moment to advocate the international legal imperative that every loss of life must be governed by fundamental principles of criminal justice.