

THE ROLE OF TARGETED KILLING IN THE CAMPAIGN AGAINST TERROR

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USAWC STRATEGY RESEARCH PROJECT

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THE CAMPAIGN AGAINST TERROR**

by

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Targeted killing is “the intentional slaying of a specific individual or group of individuals undertaken with explicit government approval.” In recent years, targeted killing as a tactic in the ongoing campaign against terrorism has generated considerable controversy. Some commentators view it as an indispensable tool in the fight against terrorism and argue for its expanded use, while others question its legality and claim that it is immoral and ultimately ineffective. The tactic of targeted killing is most closely associated with Israel’s campaign against the Second Palestinian Intifada, but since 11 September 2001 the United States has consistently conducted targeted killing operations against terrorist personnel. This paper examines the legality, morality, and potential efficacy of a U.S. policy of targeted killing in its campaign against trans-national terror. The conclusion is that, in spite of the genuine controversy surrounding this subject, a carefully circumscribed policy of targeted killing can be a legal, moral, and effective tool in a counter-terror campaign. Procedures to guide the implementation of a U.S. policy of targeted killing are proposed.

THE ROLE OF TARGETED KILLING IN THE CAMPAIGN AGAINST TERROR

Targeted killing¹ is “the intentional slaying of a specific individual or group of individuals undertaken with explicit government approval.”² In recent years, targeted killing as a tactic in the ongoing campaign against terrorism has generated considerable controversy. Some commentators view it as an indispensable tool in the fight against terrorism and argue for its expanded use, while others question its legality and claim that it is immoral and ultimately ineffective. The tactic of targeted killing is most closely associated with Israel’s campaign against the Second Palestinian Intifada,³ but since 11 September 2001 the United States has consistently conducted targeted killing operations against terrorist personnel. This paper examines the legality, morality, and potential efficacy of a U.S. policy of targeted killing in its campaign against trans-national terror.⁴ The conclusion is that, in spite of the genuine controversy surrounding this subject, a carefully circumscribed policy of targeted killing can be a legal, moral, and effective tool in a counter-terror campaign. Procedures to guide the proper implementation of a U.S. policy of targeted killing are proposed.

While the U.S. has not explicitly acknowledged pursuing a policy of targeted killing, insights can be gleaned from published national security documents⁵ and official statements⁶ that shed light on the willingness of the U.S. to employ targeted killing as a tactic in the campaign against terror. This was most recently demonstrated by the use of a U.S. Air Force AC-130 Spectre Gunship in January 2007 to target suspected al-Qaeda terrorists in Somalia.⁷ Based upon publicly available information, if the capture of designated terrorists is not deemed to be feasible, the U.S. is prepared to use Central Intelligence Agency (CIA) or U.S. military assets to target them in lethal operations.⁸ In addition to the recent operations in Somalia, targeted killings attributed⁹ to the U.S. since 2001 have included attacks in the Federally-Administered Tribal Areas (FATA) of Pakistan and in the Yemen.¹⁰ These operations resulted in the deaths of numerous civilians,¹¹ highlighting the grim reality of collateral damage that adds greatly to the controversy surrounding targeted killing operations.

Legal Considerations

There is broad divergence of opinion in the extensive literature on the legality of targeted killing of trans-national terrorists. On one side, it is argued that targeted killings constitute extrajudicial killings or assassinations that are prohibited under international law. Proponents of this position argue that terrorists are civilians, not combatants, and should be dealt with using conventional law enforcement methods rather than the more permissive law of war. They

contend that terrorists can be killed only when there is no other way to prevent them from perpetrating an attack that endangers the lives of others. In all other circumstances, it is argued, terrorists should be arrested, prosecuted, and punished under the law for their crimes. On the other side, it is argued that terrorists are direct participants in an armed conflict who may be lawfully targeted. According to this position, a state threatened by terrorists may always act in self-defense and properly target terrorists provided the methods used are in compliance with the law of war.

That the topic of targeted killing can generate such genuinely divergent opinions from informed commentators attests to the fact that the campaign against trans-national terrorism represents a new paradigm with which international law has yet to come to terms. Public international law, accustomed to regulating actions by states, is in uncharted legal territory when dealing with non-state actors and their involvement in the changing face of war. The ongoing U.S. campaign against terrorism does not fit neatly into the existing system on the use of force in international law. Although we are now in the fifth year of the campaign against trans-national terror, legal commentators are still wrestling with how best to analyze the legal issues generated when states use force against trans-national terrorists.

Given the current need to reassure allies of its strong commitment to the rule of law, the U.S. must ensure its policy on targeted killing is able to withstand proper legal scrutiny and not be viewed as pushing the outer limits of authorized state action.¹² The case for targeted killing must demonstrate that the U.S. is authorized to use force against terrorists in compliance with the law of conflict management, or *jus ad bellum*, and that the manner in which targeted killings are executed complies with the law on the conduct of war or *jus in bello*.

(1) Authority to Use Force Against Trans-National Terrorists (*Jus ad Bellum*). Article 2(4) of the United Nations (UN) Charter outlaws the use of aggressive force by a state in its international relations. One recognized exception is a state's inherent right of self-defense found in Article 51 of the UN Charter. This authorizes a state to use military force to defend itself against an armed attack and the continuing threat of such an attack.¹³ The limitations on this right of self-defense are that the force used to defend against the attack must be both "necessary" and "proportionate." Clearly, al-Qaeda's terrorist actions on 11 September 2001 constituted an armed attack on the U.S. and its subsequent actions and statements confirm that it represents a continuing and serious threat to the U.S. against which the U.S. is entitled to defend itself through the use of force, specifically the targeting of key al-Qaeda personnel.

It has been argued that the right of self-defense only applies to inter-state conflicts and not to a conflict with a trans-national terrorist organization such as al-Qaeda and its associated

movements (AQAM).¹⁴ This textual interpretation of the UN Charter, however, is overcome by customary international law which recognizes a state's inherent right of self-defense. This permits the U.S. to use force against non-state actors such as trans-national terrorists. It is a right that has not been challenged by the UN Security Council. Since AQAM remains a continuing threat to the U.S., the targeted killing of its key personnel is a military necessity to prevent future attacks. It is not designed to be punitive in nature or serve as a reprisal. This tactic is also a proportionate, or reasonable, response that is not excessive given the serious threat that AQAM pose to the U.S.

Article 2(4) of the UN Charter also requires the U.S. to respect the sovereignty of other nations. This means that if the U.S. wishes to conduct a targeted killing operation on the sovereign territory of another nation, it must first obtain the permission of that government. In the documented instances of U.S. targeted killing operations in Pakistan, Yemen, and Somalia, it has been reported that these nations granted approval for these actions to be conducted within their borders.

(2) Legality of the Tactic of Targeted Killing (*Jus in Bello*). Although the U.S. is authorized to use force in self-defense against AQAM for the duration that they remain a threat, each specific use of force, such as a targeted killing, must also comply with the law on the conduct of war. The primary sources of *jus in bello* are found in the four Geneva Conventions of 1949 and its two Additional Protocols of 1977.¹⁵ Application of the law of war is triggered if a state of "armed conflict" exists between the U.S. and AQAM. Treaties do not define this term. It is broader than "war," which is limited to inter-state conflict.¹⁶ Commentators recommend looking to the nature, intensity, and duration of the violence to make this determination.¹⁷ The level and frequency of actual or planned violence around the globe between the U.S. or its allies and AQAM satisfy these criteria. Certainly, the U.S. Supreme Court in its recent *Hamdan v. Rumsfeld* decision had little difficulty in determining that U.S. military operations against AQAM were properly characterized as an "armed conflict."¹⁸

It is also necessary to determine the type of conflict that exists between the U.S. and AQAM; namely, is it an international or a non-international armed conflict? The answer to this question determines which rules regulate the conduct of the armed conflict. With the exception of Common Article 3,¹⁹ the four Geneva Conventions only apply to international armed conflicts. Recently, the U.S. Supreme Court in *Hamdan*²⁰ concluded that the armed conflict between the U.S. and AQAM was of a non-international nature. This type of conflict is normally regulated by Additional Protocol II, but its provisions are limited to internal conflict between a government and non-state actors within its territory. Clearly, this is not the case with the current U.S. conflict with

AQAM which is taking place primarily on the territory of third countries such as Pakistan, Yemen, and Somalia. Since such a restrictive interpretation would place the parties to the armed conflict between the U.S. and AQAM outside *jus in bello* and create an unacceptable gap in the law's coverage, it is necessary to expand the definition of a non-international conflict to include one between a state and non-state actors outside the state's own territory.²¹ At a minimum, the provisions of Additional Protocol II relating to non-international armed conflict that reflect standards of customary international law should regulate this type of armed conflict,²² to include that between the U.S. and AQAM.

Article 13(2) of Additional Protocol II²³ incorporates the principle of distinction and mandates that the civilian population and individual civilians shall not be the object of attack. An exception to this is found in Article 13(3) which states that civilians forfeit protection "for such time as they take a direct part in hostilities." The combatants in a non-international armed conflict are the armed forces of the state and, inter alia, "organized armed groups." In the International Committee of the Red Cross commentary on Additional Protocol II, it states that "[t]hose who belong to the armed forces or armed groups may be attacked at any time."²⁴ In the context of the armed conflict between the U.S. and AQAM, this means that active members of AQAM are combatants and may be lawfully targeted at will.²⁵ Given the status of AQAM operatives as combatants, the U.S. is under no obligation to attempt to arrest an individual before targeting him or her. This combatant status remains in effect for the duration of the armed conflict unless the individual takes some action to renounce this status.

This analysis raises the question of how are active members of a terrorist organization to be properly identified. Unlike combatants in international armed conflicts, they are not required to display "a fixed distinctive sign recognizable at a distance."²⁶ Nor should their combatant status be limited to the time they have a weapon in their hands. The answer lies in designating as combatants those members of the terrorist organization who have taken an active part in hostilities. Proponents of this position argue that this status is established if the individual takes a direct part in hostilities by planning, directing, or executing attacks or "if there is other evidence of his or her combatant role."²⁷ Such evidence will be primarily derived from intelligence information, often supplemented by the statements and admissions of the individuals themselves. A difficult issue is whether an individual who provides purely financial support for terrorist activities can be targeted as a combatant. Given the critical enabling role of finance in terrorist activities, such individuals should be viewed as having an active role in hostilities. The requirement for active participation, however, would exclude individuals from being targeted who provide purely political support to a terrorist organization.

Even where terrorists are properly designated as combatants under Additional Protocol II and therefore subject to targeting at will, the actual targeting itself must still meet the requirement of proportionality under customary international law. The targeting operation will be held to violate international law if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁸ Although the principle of proportionality is easy to state, it is notoriously difficult to apply. There is no mathematical formula to turn to that will assist in determining whether the successful targeting of a terrorist outweighs the potential for collateral damage. The question of proportionality must be resolved based upon the facts known at the time of the attack and not on the actual outcome of the operation. In reviewing the targeted killing operations attributed to the U.S., it is clear that many, if not most, have resulted in the deaths of non-combatants. What is less certain is how many such operations have been aborted due to risk they posed to non-combatants. Professor David Kretzmer properly identified the dilemma facing decision-makers as follows, “when as a result of an attack innocent persons are killed or wounded, a heavy burden rests on the state to show either that this could not reasonably have been foreseen, or that even if it could have been foreseen, the necessity of the attack was great enough to justify the risk.”²⁹

Jus in bello also contains a prohibition of assassination in armed conflict.³⁰ This is often cited as a legal objection to the policy of targeted killing. Assassination in this context, however, is a term of art. It refers to the targeting of an individual using treachery or perfidy in time of war. There have been longstanding prohibitions of such unlawful ruses that undermine adherence to the law of war. Provided the manner of a targeted killing does not involve treachery or perfidy, it is not an illegal assassination under international law.

(3) Legality of Targeted Killing under Domestic Law. Even if the targeted killing of terrorists by the U.S. is legal under international law, it is also necessary to determine its legality under U.S. domestic law. Some commentators have pointed to Executive Order 12,333³¹ and its prohibition on assassination. Although this Executive Order regulating intelligence activities does have legal effect, it does not apply to actions in time of war or to the U.S. Armed Forces. Accordingly, it does not impact military operations that target terrorist operatives outside the United States.³² Even if these exceptions were not available, it can reasonably be argued that the congressional resolution of 18 September 2001 authorizing the President to “use all necessary and appropriate force in order to prevent any future acts of international terrorism against the United States,”³³ would suffice to address any domestic legal concerns about a policy of targeted killing of AQAM operatives.

While Executive Order 12,333 presents no legal impediment to targeted killings executed by the U.S. armed forces, it could impact such operations conducted by Central Intelligence Agency (CIA) personnel. They are considered to be non-combatants under the law of war. Existing intelligence oversight laws have established a legal regime requiring presidential findings and reporting to the Intelligence Committees before U.S. intelligence agencies can engage in covert actions, to include targeted killing operations.³⁴

In summary, a review of the U.S. policy of targeted killing confirms that it has a valid basis under international and domestic law. The U.S. is legally justified in taking military action against AQAM as a matter of self-defense. AQAM are an organized force and their operatives are combatants in a non-international armed conflict who can be targeted at will provided such action is proportionate, does not involve perfidy or treachery, and respects the sovereignty of other nations.

Moral Considerations

Provided targeted killing operations comply with the law of war, one can make a convincing argument that they are consistent with the just war tradition. By their very nature, they seek to target those terrorists who are intent on killing, maiming, and injuring innocent civilians. Even if targeted killings are lawful from a technical perspective, however, the question still remains whether a democracy should choose to pursue such a policy in its campaign against terrorism. There are the inevitable concerns that targeted killing operations often result in the death of innocent civilians, even if proportionality concerns are satisfied.

These concerns highlight some of the dilemmas that terrorism presents any democratic society. It is part of the asymmetric advantage that terrorism enjoys. The alternatives to targeted killings, however, can also carry significant downsides. While the apprehension of a terrorist may seem an attractive option, it can often pose a grave risk of harm to the people conducting the arrest operation and endanger innocent non-combatants. Perhaps, the best example of this was the attempt by U.S. personnel to arrest senior aides to Mohammed Farah Aidid, the Somalia clan leader in Mogadishu, in December 1993. This single operation ultimately led to the death of 18 U.S. military personnel and hundreds of Somalis, both militia members and non-combatants.³⁵ If targeted killing is removed as an option and arrest is precluded, the remaining alternative – letting the terrorist continue to kill innocent civilians – is surely the least attractive moral option.

It is also important to remember that the terrorists bear great responsibility for the collateral damage associated with targeted killing operations. These fatalities are unintended

deaths that result from terrorists deliberately hiding and operating among civilians. Significant moral responsibility for civilian casualties during targeted killing operations rests with the terrorists themselves. Finally, it must always be remembered that the sole reason for such operations is that the U.S. is acting in self-defense and seeking to protect its citizens from the continuing threat of attack by terrorists.

Targeted killing operations are a moral option provided earnest efforts are taken to verify the accuracy of the intelligence upon which they are based and that the operations are conducted in a manner to minimize civilian casualties. Nevertheless, as a matter of policy, they should be used sparingly and only when no other reasonable alternative is available. They must be preventive in nature, designed to forestall terrorist operations rather than as measures of punishment or reprisal.

Efficacy of Targeted Killing

Is targeted killing likely to be an effective policy choice for the U.S.? Even if it is legal and moral, if it is not effective in combating terrorism, it should not be employed.

Opponents of targeted killing challenge the effectiveness of the policy on a number of grounds. The most frequent criticism is that successful targeted killings are counter-productive in that they create martyrs and generate a desire for revenge or retaliation. As such, they are viewed as motivating the terrorists and their base of support and thereby intensifying the cycle of violence. The counter-argument to this is that terrorists such as AQAM have demonstrated that they are already highly motivated and their terrorism needs no encouragement.

Another criticism is that the policy is strategically flawed. The U.S.-led global campaign against terror is fundamentally a battle of ideas³⁶ in which a belief in freedom, democracy and the rule of law competes against terror, intolerance, and extremist ideology. In this context, critics argue that targeted killings severely diminish global support for the U.S. position among friends and allies. Unfortunately, targeted killings have yet to be broadly accepted as a legitimate exercise of a state's right to defend itself against terrorism. Criticism of U.S. targeted killings has come from respected entities such as the United Nations Special Rapporteur,³⁷ Amnesty International,³⁸ and the U.S.-based Human Rights Watch.³⁹ The U.S. must counter this position by doing more to promote the legitimacy of the policy. The U.S. must articulate the policy's legal and moral bases to our international partners and the public-at-large and push for a formal updating of *jus in bello* to reflect a state's legitimate right to defend itself against trans-national terrorism.

A third criticism is that in the campaign against terror that is so dependent on intelligence, it does not make sense to kill the target when capture and interrogation would produce significant benefits. This would be a valid criticism if the U.S. consistently passed on opportunities to apprehend targets in favor of killing them. This is not the case. There are numerous instances where the U.S. has worked with allies to apprehend key terrorists. The targeted killings that have occurred were presumably under circumstances where capture was not a viable option or presented unreasonable risk to U.S. personnel.

The opposition to targeted killings increases dramatically when targeting errors occur and innocent non-combatants are killed. The answer, however, is not to stop targeted killings when they are justified, but to minimize mistakes with more timely and reliable intelligence and a careful process that reviews and approves all targeting missions.

In spite of the likelihood that mistakes may occur, the policy of targeted killing remains an effective tactic in the campaign against terror. The persistent targeting of key leaders significantly disrupts terrorist operations. Although the impact on AQAM is somewhat diminished because of their decentralized structure, skilled leaders in global terrorism are always difficult to replace, especially in the short-term. Of equal importance is the fact that it compels terrorists to act defensively and devote a disproportionate amount of their time and energy to avoid being targeted instead of planning and executing terrorist attacks.

There are no metrics to measure the effectiveness of targeted killing. Although the Israeli government remains a strong proponent of targeted killings in its campaign against terrorism, its situation is so different from that of the U.S. that its experience may not be a useful reference.⁴⁰ It is necessary to view the policy of targeted killing as one element of the broader U.S. campaign against global terror. It may be necessary to await the passage of more time before it is possible to truly evaluate the cumulative impact of the policy of targeted killing. It is clear, however, that the targeted killing policy has at least contributed to a situation where there have been no AQAM attacks on U.S. territory and, outside of the Iraq and Afghanistan theaters of operations, no significant attacks on major U.S. interests since 11 September 2001.

Proposed Guidelines

The U.S. policy on targeted killing remains extremely controversial. It is a high risk, high payoff component in the campaign against terror. When successful, it eliminates key adversaries, disrupts terrorist planning, and highlights U.S. military prowess. When unsuccessful, however, it undermines U.S. credibility and severely strains relations with other nations. As with any critical policy, it must be constantly reviewed, refined, and improved based

on lessons learned. The following guidelines on targeted killing propose limitations that are designed to ensure the policy's continued legality and make it more acceptable to the world community without compromising its effectiveness.⁴¹ Establishing formal guidelines would also provide some legal reassurance to those who are assigned the difficult task of planning and executing such operations.

(1) Who may be targeted? Although all active members of AQAM can legally be targeted, political considerations favor limiting the candidates for such operations to a short list⁴² of key AQAM operatives who are high-value targets. The list should be reviewed and updated on a regular basis using the latest intelligence.

Generally, political leaders should not be targeted. This comes too close to political assassination and would only encourage retaliatory attacks on U.S. or friendly nation political leaders. The distinction between members of the military and political wings of terrorist organizations may often be very difficult to draw, but the focus should remain on those individuals who take a direct role in planning, financing, or executing terrorist operations.

Targeted killing operations should not be conducted against U.S. citizens⁴³ or persons located within the territory of the U.S. Targeted killing operations in either circumstance would raise significant political concerns and some troublesome issues related to domestic U.S. law.⁴⁴ If a legitimate terrorist target is located in another country, the U.S. must first obtain authorization from the host nation before launching the operation. This avoids any violation of sovereignty under Article 2(4) of the UN Charter.

(2) Under what circumstances may a targeted killing operation be authorized? As an exercise of the right of self-defense, each targeted killing operation should be conducted to avoid reasonably imminent harm to U.S. or allied personnel or interests.⁴⁵ Given the continuing serious threat posed by AQAM, this requirement can be easily met. Targeted killing operations, however, should always be an option of last resort, where arrest is not feasible or the risk of casualties to U.S. personnel in apprehending the target is too great.

(3) Who should be authorized to conduct targeted killing operations? The analysis supporting the legality of targeted killings was premised on the fact that these operations are conducted by U.S. military personnel who qualify as combatants under the law of war. It is clear, however, that many U.S. targeted killing operations have been conducted by the CIA, whose personnel are non-combatants. Apart from the legal issues this creates, the use of CIA paramilitary personnel in this manner is troublesome because of the CIA's past association with illegal assassinations and assassination attempts.⁴⁶ Such involvement produces skepticism in the international arena and makes it very difficult to prevail in the information war on this topic.

The CIA clearly has an important role in developing the actionable intelligence that is key to the success of these operations. The operations themselves, however, should be executed solely by military personnel.⁴⁷ Another option, however, is to encourage the governments within whose territory the terrorists are located to take the lead in conducting these operations, with appropriate assistance from the U.S.⁴⁸

(4) How should targeted killing operations be conducted? Targeted killing operations must always comply with the law of war. They must be a necessary and proportionate use of force in which every effort is made to minimize collateral damage. The use of treachery or perfidy is specifically prohibited.

The availability of precision-guided munitions for targeted killing operations is both a benefit and a hindrance. While such munitions are extremely effective in targeted killing operations and help minimize collateral damage, they have also exponentially increased expectations that these operations can be conducted surgically without harm to non-combatants. As a result, there is much less tolerance for collateral damage of any kind. This creates an almost impossible standard as potential targets will deliberately seek refuge in civilian areas to discourage attack by the U.S.

(5) Who should approve U.S. targeted killing operations? Given the sensitivity of such operations, approval should be at the highest levels, preferably the President. This would help ensure a thorough vetting of each proposed operation before it is submitted for approval. The current system used in approving covert intelligence operations⁴⁹ – Presidential findings of fact and reporting to the Intelligence Committees of Congress – is a model worth following. The Presidential finding would be that the operation is a matter of necessity – the target poses a serious threat to the U.S. and that arrest is not a viable option – would have to be based upon clear and convincing evidence utilizing the most current intelligence available. Once approved, the mission would be tasked to the U.S. military for execution.⁵⁰

The notification to Congress is an important check on the process and will help ensure that the policy maintains public support. Obviously, notification may be difficult in the case of extremely time sensitive operations, but every effort should be made to notify the Intelligence Committees prior to the operation or immediately thereafter.

Some have even argued there should be legislative authorization for any policy of targeted killing.⁵¹ While legally superfluous, such legislation would ensure a public debate of the policy and its implications and a political consensus in support of its execution.⁵²

Others have argued that a Foreign Intelligence Surveillance Act (FISA) type court should be established whose review and approval would be required before launching a targeted killing

operation.⁵³ Establishing judicial oversight of what is essentially an operational decision with clear political overtones would be excessive and set a precedent that might be problematic for other types of counter-terror operations in the future.

Finally, the approval of the government in whose territory the terrorist is located will also be required. In the rare case of governments who actively support terrorism, such as the Taliban in Afghanistan in 2001, the U.S. may fall back on the inherent right of self-defense as the basis for acting without the authority of the host government.

The National Security Advisor should be responsible for overseeing the process and ensuring it is properly implemented. In order to be effective, targeted killings must be an inter-agency operation supported by all elements of national power. This would include a review of each operation to ensure compliance with procedures and to identify lessons learned.⁵⁴

Conclusion

The long-term success or failure of targeted killing as a component of the campaign against terror will depend on two capabilities in which the U.S. has been deficient to date: first, obtaining actionable intelligence to identify and locate targets and second, winning the information war to persuade the domestic and international communities of the legality, morality, and effectiveness of such operations. The U.S. is expending considerable resources to improve its intelligence systems, but much more needs to be done to enhance our information operations capabilities.

The U.S. cannot afford to take a passive posture citing operational security and allow critics to dominate the debate and characterize the tactic as extrajudicial killings or assassinations. The U.S. must aggressively explain the strong legal and moral bases for the policy and assure the world community that the tactic is invoked sparingly and only when no other reasonable alternatives are available to prevent the target from threatening the U.S. and innocent civilians. It must be clearly demonstrated that all reasonable efforts are made to minimize collateral damage and, where it does occur, responsibility rests with the terrorists who operate out of civilian areas. All of this requires a more transparent policy on targeted killing in which there is public confidence in its checks and balances to ensure proper targeting decisions are being made. If targeted killing operations are supported by a comprehensive information operations strategy and are professionally executed using timely and accurate intelligence, they will become an even more potent weapon against trans-national terrorism.

Endnotes

¹ A variety of terms are used to describe this tactic, to include: preventive killings, active self-defense, extrajudicial killings, and interceptions. The term “targeted killing” has achieved the broadest acceptance and is preferred in this paper because it does not presume approval or disapproval of the tactic.

² Steven R. David, “Fatal Choices: Israel’s Policy of Targeted Killing.” *The Begin-Sadat Center for Strategic Studies: Mideast Security and Policy Studies* 51 (September 2002): 2.

³ According to B’Tselem, an Israeli human rights organization, between 29 September 2000 and 31 January 2007, Israeli security forces targeted and killed 210 Palestinians. An additional 128 civilian bystanders were also killed during these operations. This statistical data is available from <http://www.btselem.org/English/Statistics/Casualties.asp>; Internet, accessed 3 February 2007.

⁴ While this paper focuses on the threat posed to the United States by Al-Qaeda and its Associated Movements (AQAM), its conclusions apply equally to other terrorist organizations that present a similar danger to the United States.

⁵ See George W. Bush, *National Strategy for Combating Terrorism* (Washington, D.C.: White House, 5 September 2006), 11; and Donald H. Rumsfeld, *National Military Strategic Plan for the War on Terrorism* (Washington, D.C.: The Pentagon, 1 February 2006), 20 and 24.

⁶ “Gen. Peter Pace, chairman of the Joint Chiefs of Staff, told members of Congress on Friday [January 12, 2007] that the strike in Somalia was executed under the Pentagon’s authority to hunt and kill terrorism suspects around the globe, a power the White House gave it shortly after the Sept. 11 attacks.” Mark Mazzetti, “Pentagon Sees Move in Somalia as Blueprint,” *New York Times*, 13 January 2007, sec. A, p. 6.

⁷ Ibid.

⁸ William C. Banks, “The Predator,” 2003; available from www.law.syr.edu/Pdfs/Opredator-final.pdf; Internet; accessed 3 February 2007. This article cites numerous newspaper reports that President Bush signed an intelligence finding shortly after 11 September 2001 explicitly authorizing the targeting of designated al-Qaeda personnel.

⁹ Amnesty International Statement, “Pakistan: U.S. Involvement in Civilian Deaths,” 31 January 2006; available from <http://web.amnesty.org/library/Index/ENGASA330022006>; Internet; accessed 3 February 2007.

¹⁰ Norman Printer, “The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen,” *UCLA Journal of International Law and Foreign Affairs* 8 (Fall/Winter 2003): 331, 335.

¹¹ Amnesty International Statement.

¹² U.S. government practices concerning extraordinary rendition, secret CIA-operated prisons, interrogation practices, and military commissions have been criticized by other nations and international organizations. The U.S. needs strong international support and cooperation if

it is to be successful in its global campaign against terror. See Daniel Byman, "Do Targeted Killings Work?" *Foreign Affairs* 95 (March/April 2006): 108-109.

¹³ Under this theory of active defense, "a state may use past practices of terrorist groups and past instances of aggression as evidence of a recurring threat. In light of this threat, a state may invoke Article 51 to protect its interests if there is sufficient reason to believe that a pattern of aggression exists." Howard A. Wachtel, "Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy" *Duke Law Journal* 55 (2005): 677, 693.

¹⁴ Tom Ruys, "License to Kill: State-Sponsored Assassination Under International Law," May 2005: 10; available from www.law.kuleuven.be/iir/nl/wp/WP/WP76e.pdf; Internet; accessed 3 February 2007.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter Additional Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereinafter Additional Protocol II). The U.S. has not ratified either of these protocols, but much of their content is now considered to be part of customary international law.

¹⁶ Kenneth Watkin, "Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives, and Targeted Killing" *Duke Journal of International and Comparative Law* 15 (Spring/Summer 2005): 281, 292.

¹⁷ Thomas Michael McDonnell, "Assassination/Targeted Killing of Suspected Terrorists – A Violation of International Law?" December 2005 [Jus in Bello Weblog]; available from http://library.law.pace.edu/blogs/jib/2005/12/assassinationtargeted_killing.html; Internet; accessed 24 October 2006.

¹⁸ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795-96 (2006).

¹⁹ Common Article 3 reads as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 3, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁰ Hamdan, 2795-2796

²¹ David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense” *European Journal of International Law* 16 (2005): 171,190.

²² Ibid., 195.

²³ Article 13(2) of Additional Protocol II states, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

²⁴ International Committee of the Red Cross, “Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,” paragraph 4789; quoted in Kretzmer, 198.

²⁵ Kretzmer, 198. Although designated as combatants under Additional Protocol II, al-Qaeda personnel enjoy none of the protections afforded combatants, such as immunity from prosecution for combat actions or prisoner of war status. See Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings,” *Cornell International Law Journal* 36 (Spring 2003): 233, 268.

²⁶ Art. 4A(2)(b), Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 United Nations Treaty Series 135.

²⁷ Kretzmer, 199.

²⁸ This language is drawn from Art. 51(5)(b) of Additional Protocol I. Although this applies to armed conflicts of an international nature, it nevertheless accurately reflects the principle of proportionality under customary international law.

²⁹ Kretzmer, 201.

³⁰ Article 23(b) of the Annex to Hague Convention IV of 1907 (Convention Respecting the Laws and Customs of war on Land) stated that it was forbidden “to kill or wound treacherously individuals belonging to the hostile nation or Army.” Articles 37 and 44 of Additional Protocol I prohibit the perfidious killing or wounding of enemies. These provisions are now viewed as part of customary international law. Wachtel, 686-687.

³¹ Executive Order No. 12,333, United States Intelligence Activities, 3 Code of Federal Regulations 200 (1982); reprinted in 50 U.S. Code, sec. 401 (2000).

³² If an Al-Qaeda operative were physically present within the territory of the United States, this would become a matter for law enforcement and the criminal law of the U.S.

³³ Public Law No. 107-40, 115 Stat. 224 (2001).

³⁴ William C. Banks & Peter Raven-Hansen, “Targeted Killing and Assassination: The U.S. Legal Framework,” *University of Richmond Law Review* 37 (March 2003): 667, 727-728.

³⁵ Michael R. Gordon & Thomas L. Friedman, “Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep,” *New York Times*, 25 October 1993, sec. A, p. 1.

³⁶ Bush, *National Strategy for Combating Terrorism*, 7.

³⁷ United Nations Commission on Human Rights, Report of the Special Rapporteur, “*Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*,” E/CN.4/2006/53/Add.1, 27 March 2006, 264.

³⁸ Amnesty International Statement, “United States of America: An Extrajudicial Execution by the CIA?” 18 May 2005; available from <http://web.amnesty.org/library/index/engamr510792005>; Internet; accessed 4 February 2007.

³⁹ Kenneth Roth, “Drawing the Line: War Rules and Law Enforcement Rules in the Fight Against Terrorism,” 2004; available from <http://hrw.org/wr2k4/9.htm>; Internet; accessed 4 February 2007.

⁴⁰ Israel’s experience with targeted killing is of limited relevance to the U.S. campaign against terror. The Israeli security forces have significantly better intelligence that is focused on a limited geographical area over which they can apply lethal force very quickly. In contrast, the U.S. has limited intelligence on al-Qaeda and is seeking to cover a global landscape. See Byman, 107.

⁴¹ These proposals draw on recommendations outlined in Philip Heymann & Juliette Kayyem, “Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism,” 2004; available at <http://www.terrorisminfo.mipt.org/Long-Term-Legal-Strategy.asp>; Internet; accessed 3 February 2007.

⁴² Press reports indicate that President Bush approved just such a list as far back as 2002. "The Bush administration has prepared a list of terrorist leaders the Central Intelligence Agency is authorized to kill, if capture is impractical and civilian casualties can be minimized, senior military and intelligence officials said. The previously undisclosed list includes key Qaeda leaders like Osama bin Laden and his chief deputy, Ayman al-Zawahiri, as well as other principal figures from Al Qaeda and affiliated terrorist groups, the officials said. The names of about two dozen terrorist leaders have recently been on the lethal force list, officials said." James Risen & David Johnston, "Bush has Widened Authority of C.I.A. to Kill Terrorists," *New York Times*, 15 December 2002, available at <http://www.nytimes.com/2002/12/15/international>; Internet; accessed 30 January 2007.

⁴³ There is evidence that at least one U.S. citizen, Ahmed Hijazi, died during the targeted killing of Abu Ali al-Harithi on 1 November 2002 in Yemen. Hijazi was an occupant in the vehicle in which al-Harithi was traveling when it was struck by a Hellfire missile. Printer, 335.

⁴⁴ Banks & Raven-Hansen, 674-679.

⁴⁵ Heymann & Kayyam, 67.

⁴⁶ These incidents were fully documented in the Senate Report No. 94-465, "Alleged Assassination Plots Involving Former Leaders," 20 November 1975, better known as the Church Committee Report. Banks & Raven-Hansen, 702.

⁴⁷ For a contrary opinion on the role of U.S. military personnel in such operations, see Jennifer Kibbe, "The Rise of the Shadow Warriors," *Foreign Affairs* (March/April 2004): 102. See also Richard A. Best, Jr. & Andrew Feickert, "Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress," Congressional Research Service Report for Congress, updated December 6, 2006; available at <http://www.fas.org/sgp/crs/intel/index.html>; Internet; accessed 3 February 2007.

⁴⁸ An excellent example of such international cooperation was the joint Philippine-U.S. operation against the Abu Sayyaf terrorist group. Mark Bowden, "Jihadists in Paradise," *The Atlantic*, March 2007, 54-75.

⁴⁹ Banks & Raven-Hansen, 726-729.

⁵⁰ It is instructive to review the process followed by the Israeli government before authorizing a targeted killing operation as described by Laura Blumenfeld, "In Israel, a Divisive Struggle Over targeted Killing," *Washington Post*, 27 August 2006, sec. A, p. 1.

⁵¹ Heymann & Kayyam, 69.

⁵² Daniel Byman, "Targeted Killing, American Style," *Los Angeles Times*, 20 January 2006, sec. B, p. 13. Mr. Byman argues that the U.S. would be well served by mirroring Israel and having a robust public debate on the policy of targeted killing.

⁵³ Avery Plaw, "Fighting Terror Ethically and Legally: The Case of Targeting Terrorists," (2006) available at <http://www.cpsa-acsp.ca/papers-2006/Plaw.pdf>; Internet; accessed 3 February 2007. Mr. Plaw argues for a Federal Counterterrorism Oversight Court (FCOC). See also Byman, *Do Targeted Killings Work?*, 8.

⁵⁴ On 11 December 2005, the Israeli Supreme Court ruled on the legality of targeted killings in the *Palestinian Territories in The Public Committee Against Torture in Israel v. The Government of Israel*, available at http://elyon1.court.gov.il/files_ENG/02/690/007/a34/02007690.a34.htm; accessed 3 February 2007. The court instituted a requirement for an investigation of each targeted killing after the fact. This would have the advantage of ensuring compliance with mandated procedures (especially the avoidance of collateral damage), enable accurate responses to questions about specific operations, and institutionalize the process of identifying lessons learned.

