

NOTE & COMMENT

Smiting Spell: The Legality of Targeted Killings in the War against Terrorism

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Resorting to targeted killings as a measure of counterterrorism spawned a debate on their legality under both international human rights law and humanitarian law. This article attempts to justify the measure under the current body of international humanitarian law. It also claims that discrete acts of targeted killings may be legal provided the existence of specific circumstances and conditions. These conditions, however, make it extremely difficult for a State to legally pursue a 'policy' of targeted killings against alleged terrorists, unless they are considered 'legal combatants.' The article criticizes the practice of labelling terrorists as 'unlawful combatants' unworthy of protections afforded by both international human rights law and international humanitarian law, and argues the lack of compelling legal arguments that would prevent terrorists from being considered as lawful combatants in an armed conflict. Light is also shed on the United States' recent expansion of the drone program in a way that might indicate a gradual acceptance of the terrorist-as-combatant theory.

Keywords

Targeted Killings, Drone Strike, Al-Qaeda, War against Terrorism, Unlawful Combatant, Third Geneva Convention

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1. Introduction

Targeted Killings have been considered “the most coercive tactic” employed in counterterrorism because, unlike other measures, they do not aim to neutralize, contain, or incarcerate individual suspects or perpetrators of terrorist acts. Rather, they aim at eliminating them completely.¹ Targeted Killings may be defined as “the intentional slaying of a specific individual or group of individuals ... with explicit governmental approval.”² The most prominent examples of their use have been operations conducted by Israeli forces against members of Palestinian and Lebanese factions, and by the U.S. Forces against members of Al-Qaeda in Afghanistan, Pakistan and Yemen.

The killing of both Osama Bin Laden by U.S. Special Forces in Pakistan in May 2011 and Anwar Al-Awlaki by a drone attack in Yemen in September of the same year played a significant role in reigniting the debate on the legality of this particular measure of counterterrorism.³ Despite this debate, targeted killings have continued unabated and are likely to increase in future. They indeed extend to other parts of the world where Al-Qaeda offshoots become precariously active.

Traditionally, proponents of targeted killings have pointed towards their utility and effectiveness in counterterrorism to justify their legitimacy despite their questionable legality under international law.⁴ Daniel Byman asserts that Israel’s targeted killings of Hamas leaders during the second Palestinian intifada led directly to a decrease in Israeli civilian and military casualties caused by Hamas-led terrorism, claiming that: “Something more than correlation was at work here.”⁵ He also mentions how this policy led to a decrease in Hamas’s repertoire of able and inspiring leaders, while at the same time helped boost Israel’s national morale.⁶

As for targeted killings against members of Al-Qaeda, the United States has claimed that they led to the elimination of scores of the organization’s top echelons, thus severely limiting the ability to plan and execute terrorist attacks against the United States and its allies, and that the policy has had a deterrent effect by which Al-Qaeda

¹ G. BLUM & P. HEYMANN, *LAW, OUTLAWS, AND TERRORISTS* 71 (2010).

² S. David, *Israel’s Policy of Targeted Killing*, 17 *ETHICS & INT’L AFF.* 112 (2003).

³ See, e.g., P. Goodenough, *Some Foreign Pundits, International Organizations, Question Propriety of Killing Bin Laden*, *CNSNEWS*, May 5, 2011, available at <http://www.cnsnews.com/news/article/legality-morality-killing-terrorist-lead>; M. Crowley, *Was Killing al Qaeda Cleric Anwar al-awlaki Legal?*, *TIME*, Sept. 30, 2011, available at <http://swampland.time.com/2011/09/30/was-killing-american-al-qaeda-cleric-anwar-al-awlaki-legal> (last visited on Oct. 26, 2012).

⁴ *Supra* note 2. See also D. Statman, *Targeted Killing*, 5 *THEORETICAL INQUIRIES IN L.* 179-198 (2004).

⁵ D. Bymann, *Do Targeted Killings Work?*, 85 *FOREIGN AFF.* 103 (2006).

⁶ *Id.* at 102-104.