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OPERATION NEPTUNE SPEAR: WAS KILLING BIN LADEN A LEGITIMATE MILITARY OBJECTIVE?

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Under U.S. domestic law, as well as foreign domestic and international law, targeted killings may be conducted by governmental elements under fairly specific circumstances. Forces conducting such targeted killing operations tend to encounter unique moral and legal dilemmas that do not admit of resolution according to the traditional principles of war. Nevertheless, targeted killing, as currently practised, can be conducted in ways that are consistent with time-tested and customarily accepted norms of legality, morality, and the general constraints of just war theory.

In this chapter I take the killing of Osama bin Laden as a test case for considering the moral and legal status of intentionally killing individuals deemed a threat to national security, under conditions in which the object of the targeted attack is offered little or no opportunity to surrender to attacking forces. The target in such operations, in short, is treated as though he were a belligerent: a person placed on a kill list may be targeted in a way that would be legitimate if he were an enemy combatant. In such cases, we think of him as having no personal right to self-defense and we attempt to use the element of surprise to avoid affording him an opportunity to surrender or evade capture. But where we are targeting non-uniformed civilians, who do not possess all the trappings of an enemy combatant, is it legitimate to target them in the same open-ended way that we target co-belligerents? In particular, is it legitimate to target them in a way that deprives them of a right of surrender?

My assertion in this chapter is that bin Laden was a legitimate military target, and that the decision-makers involved in his killing had thoroughly considered the range of options available to stop bin Laden from further terroristic acts, and were

warranted in the decision to lean towards targeted killing in lieu of a capture operation. I thus conclude that those who carried out the killing were within their scope of authority and responsibility for killing rather than for capturing bin Laden. The structure of the operation, then, and the set of moral prohibitions operating on any such plan, should in theory *not* require new rules or new law of war prescripts. This holds true, despite the short- and long-term implications of this use of force. What is critical is an abiding and firm moral force underlying this and every other form of warfare, regardless of any minor or significant changes to the legal or operational framework in which it may be undertaken.

Section I will examine the political and military necessity considerations that gave rise to the Neptune Spear “capture or kill” decision-making process at the very highest echelons of the Executive Branch, with the evolution of political will, expressed into military directive, reflecting a careful analysis of authority and opportunity to end bin Laden’s reign of terror. This will afford us an opportunity to distinguish between those who can be the permissible subject of “targeted killing” and those who cannot. Section II considers the operational and legal foundation for undertaking a war against one person via targeted killing. As to the targeted killing of bin Laden, this section will show the operation to be on a continuum of legitimate, operational options, from pursuit and capture under warrant-based targeting. Section III examines the moral foundations of foregoing war in favor of more isolated military operations, such as is involved in targeted killing. Section IV concludes with an examination of how the polarizing paradigm of Neptune Spear affects not only current contexts of counterterrorism operations but how it will shape U.S. and international political will to accept targeted killing over capture and prosecution, not just out of political pragmatism and military necessity, but as an emergent norm of customary international law.

I. The politics and military necessity behind Operation Neptune Spear

In order to understand why bin Laden became America’s “Public Enemy Number One,”¹ and the subject of what may prove to be the most (in)famous “targeted killing” to date, we must understand the history, activities and implications of Al Qaeda (AQ) (Arabic for “the base”), and the evolution of a plan, ultimately executed, to conduct what resulted in a licit targeted killing of bin Laden. As an organization, AQ’s origins lay in what the Congressional Research Service (CRS) described as “a

¹ Associated Press, “Bin Laden’s Path To Public Enemy Number One,” *Washington Post National Online* (Washington, D.C., May 2, 2011), available at <http://www.washingtonpost.com/national/bin-ladens-path-to-public-enemy-number-one/2011/05/02/AFt0RGYF_video.html> accessed October 28, 2011.

core cadre of veterans of the Afghan insurgency against the Soviet Union, with a centralized leadership structure;² Co-founders Abdullah al Azzam, a key figure in the Jordanian Muslim Brotherhood,³ and bin Laden, seventeenth of 20 sons of a Saudi construction magnate, struggled over the structure of so-called *mujahedin*⁴ factions that had successfully fought and helped expel Soviet forces from Afghanistan.⁵

Following Azzam's death,⁶ bin Laden gained control of the organizational mechanisms, but continued to adhere to the shared principle of global *jihad* that he and Azzam had devised.⁷ After Azzam, bin Laden's key advisors became anti-Soviet *jihad* leader Umar Abd al Rahman (also known as "the blind *shaykh*" or elder leader), the spiritual leader of radical Egyptian Islamist group *Al Jihad*,⁸ and Ayman al-Zawahiri operational leader of Al Jihad in Egypt, who was acquitted of the October 1981 assassination of Egyptian President Anwar Sadat and arrived from Egypt in the Afghanistan theater in 1986.⁹ Abd al Rahman came to the United States in 1990 from Sudan and was convicted in October 1995 for terrorist plots related to the February 1993 bombing of the World Trade Center.¹⁰ Zawahiri stayed with bin Laden and became bin Laden's main strategist until six weeks after bin Laden's targeted killing, whereupon he assumed leadership of AQ.¹¹ Bin Laden and Zawahiri vowed to take the loose coalition of radical Islamic cells and associates in over 70 countries to create a global threat to U.S. national security, with at least nine separate attacks against the United States or U.S.-supported regimes¹² prior to the culminating event of the September 11, 2001 attacks on U.S. soil.¹³

² John Rollins, "Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy," Congressional Research Service (CRS) Report R41070, January 25, 2011, available at <<http://www.fas.org/sgp/crs/terror/R41070.pdf>> accessed October 28, 2011.

³ As noted by Rollins, *ibid.* at 5, the Muslim Brotherhood was "founded in 1928 in Egypt, and it has since spawned numerous Islamist movements throughout the region, some as branches of the Brotherhood, others with new names."

⁴ The term "mujahadeen," also sometimes spelled "mujahideen," "mujahedin," "mujahidin," and "mujaheddin," refers to a military force of Muslim guerrilla fighters engaged in a "holy war" or "jihad," available at <<http://www.thefreedictionary.com/mujahadeen>> accessed October 28, 2011.

⁵ Rollins, *supra* n. 2, 5.

⁶ Asaf Maliach, "Abdullah Azzam, Al-Qaeda, And Hamas," *Military and Strategic Affairs* Vol. 2, No. 2 October 2010, at 83, available at <[http://www.inss.org.il/upload/\(FILE\)1298359986.pdf](http://www.inss.org.il/upload/(FILE)1298359986.pdf)> accessed October 28, 2011.

⁷ *Ibid.* at 83.

⁸ See, e.g., Omar Abdel Rahman, *NY Times.com*, available at <http://topics.nytimes.com/top/reference/timestopics/people/a/omar_abdel_rahman/index.html> accessed October 28, 2011.

⁹ Rollins, *supra* n. 2, 6.

¹⁰ *Ibid.*

¹¹ See, eg, Ayman Al-Zawahiri, *NY Times.com* <http://topics.nytimes.com/top/reference/timestopics/people/z/ayman_al_zawahiri/index.html?scp=1-spot&sq=Zawahiri&st=cse> accessed October 28, 2011.

¹² *Ibid.* at 3–4 for a listing of those attacks between 1993 and 2000.

¹³ *Ibid.*

In the wake of the September 2001 terrorist attacks on the United States, President George W. Bush launched major military operations in South and Southwest Asia as part of the global U.S.-led counterterrorism effort. Operation Enduring Freedom (OEF) in Afghanistan has seen substantive success with the assistance of neighboring Pakistan, but not without some U.S. criticism of Pakistani incompetence, if not complicity, with respect to AQ presence on its soil. This included allegations by the U.S. Ambassador to Islamabad that the Pakistani government had ties to a terror network causing attacks in Afghanistan, and the U.S. Chairman of the Joint Chiefs of Staff supporting that claim and directly naming Pakistani Inter-Service Intelligence (ISI) as supporting terrorist activities.¹⁴ While successes mounted against Taliban, and certain elements of AQ that it supported, top AQ leadership largely eluded U.S. forces in Afghanistan and other efforts in Pakistan.¹⁵ This was part of a U.S. move towards “anticipatory self-defense” acts that would eventually involve killing or capturing terrorist suspects worldwide, to include coercive interrogations that, in the absence of classified confirmatory data, produced unknown quantities of actionable intelligence to prevent future attacks or prosecute past perpetrators.¹⁶

In October 2001, on the first night of the Congressionally authorized campaign against AQ and the Taliban, a Predator drone deployed over southern Afghanistan identified Taliban leader Mullah Mohammed Omar in a convoy of cars fleeing Kabul. Following its agreement with military commanders, the Central Intelligence Agency (CIA) operators sought approval from the United States Central Command (USCENTCOM) in Tampa, Florida to launch a Hellfire missile at Mullah Omar, who by then had sought cover in a building with an estimated 100 guards. General Tommy Franks reportedly declined to give approval, based upon on-the-spot advice

¹⁴ Omar Waraich, “US Ambassador Stokes Anger in Pakistan Over Embassy Attack Claims,” *The Independent*, September 19, 2011, available at <<http://www.independent.co.uk/news/world/asia/us-ambassador-stokes-anger-in-pakistan-over-embassy-attack-claims-2356871.html>> accessed October 28, 2011, and see Elisabeth Bumiller and Jane Perlez, “Mullen Asserts Pakistani Role in Attack on U.S. Embassy,” *New York Times*, September 22, 2011, available at <<http://www.nytimes.com/2011/09/23/world/asia/mullen-asserts-pakistani-role-in-attack-on-us-embassy.html>> accessed October 28, 2011.

¹⁵ See, e.g., Greg Bruno and Eben Kaplan, *The Taliban in Afghanistan*, Council on Foreign Relations Background, available at <<http://www.cfr.org/afghanistan/taliban-afghanistan/p10551>> accessed October 28, 2011. See also CRS conversations with journalists and experts in Washington, D.C. December 2004–January 2005; James Risen and David Rohde, “A Hostile Land Foils the Quest for Bin Laden,” *New York Times*, December 13, 2004.

¹⁶ For an in-depth analysis of U.S. foreign policy under the Bush Administration, see Betty Glad and Chris J. Dolan, *Striking First* (New York: Palgrave Macmillan, 2004), cited with authority in Thomas Byron Hunter, “Targeted Killing: Self-Defense, Preemption, and the War on Terrorism,” *Journal of Strategic Security* (2009) 18. For the perspective of the co-author of the so-called “torture memos,” issued by the Department of Justice, regarding coercive/enhanced interrogation techniques, see John Yoo, “The Cost of Killing bin Laden,” Reuters, September 7, 2011, available at <<http://blogs.reuters.com/great-debate/2011/09/07/the-cost-of-killing-osama-bin-laden/>> accessed October 28, 2011.

of his military lawyer.¹⁷ Since that time, Predator drones have reportedly been used “at least hundreds of times to fire on targets in Afghanistan, Pakistan, Yemen, Iraq, and elsewhere.”¹⁸ Apart from Osama bin Laden, a number of senior Taliban and AQ operatives have been killed in these attacks, including AQ’s reputed chief of military operations, Mohammed Atef,¹⁹ as well as the unintended “collateral damage (incidental to the intended strike)” deaths of an untold number of civilians.²⁰

Focusing on bin Laden, from December 2001 onward, in the course of the post-September 11 major combat effort, U.S. Special Operations Forces (SOF) and CIA operatives reportedly narrowed their combined US-Afghan-Coalition unconventional warfare pursuit of bin Laden to the Tora Bora mountains in Nangarhar Province (near the city of Khost and 30 miles west of the Khyber Pass),²¹ but in the ensuing years between 2001 and 2011, bin Laden was not found, captured or killed.

In a foreshadowing of their future stances on targeted killing as a component of a national security strategy, and the politics of targeted killing, then Senator Barack Obama faced off to debate Senator McCain in a debate at Belmont University,

¹⁷ See, e.g., Institute for National Security and Counterterrorism (INSCT), Syracuse University, “Case Study: Targeted Killing by the United States After 9/11,” [insct.org](http://insct.org/commentary-analysis/2011/05/04/case-study-targeted-killing-by-the-united-states-after-911/), available at <<http://insct.org/commentary-analysis/2011/05/04/case-study-targeted-killing-by-the-united-states-after-911/>> accessed October 28, 2011.

¹⁸ *Ibid.* The NSC made a decision that all potentially sensitive targets were to be cleared by Secretary Rumsfeld himself. The authority for these decisions was eventually delegated to Gen. Tommy Franks, the CENTCOM Commander and Joint Forces Commander (JFC). See Michael W. Kometer, *Command in Air War: Centralized vs. Decentralized Control of Combat Airpower*, Doctoral Dissertation in Partial Fulfillment of Doctor of Philosophy in Technology, Management, and Policy, Massachusetts Institute of Technology, May 2005, 104, citing with authority William M. Arkin, “The Rules of Engagement,” *Los Angeles Times*, April 21, 2002. See also Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002) 166. The exception was “if CIA had bin Laden or al Qaeda leadership in its crosshairs,” according to Woodward.

¹⁹ For a glimpse into the U.S. targeted killing program and use of drones by the CIA, see, e.g., Nils Melzer, *Targeted Killing In International Law* (Oxford University Press, 2008), 41–2; A. John Radsan, “An Overt Turn On Covert Action,” 53 *St Louis U. L.J.* 485, 488–9, 539–42 (2009); Mohammed Khan and Douglas Jehl, “The Reach of War: Anti-Terrorism: Attack Kills a Top Leader of Al Qaeda, Pakistan Says,” *N.Y. Times*, December 4, 2005, 24; Josh Meyer, “CIA Expands Use of Drones in Terror War,” *L.A. Times*, January 29, 2006, A1; James Risen and Mark Mazzetti, “C.I.A. Said to Use Outsiders to Put Bombs on Drones,” *N.Y. Times*, August 21, 2009, A1; and Jordan J. Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan” (December 8, 2009), *Journal of Transnational Law & Policy*, Vol. 19, No. 2, 237, 2010.

²⁰ Glen W. Johnson “Mortus Discriminatus: Procedures in Targeted Killing” (M.S. thesis, Naval Postgraduate School 2007) 22. Johnson notes that “[a]ll targeted killing guidelines should include directives on capture, collateral damage, mission approval, timing, and areas of operation.” *Ibid.* at 43.

²¹ Rollins, *supra* n. 2, 8. See U.S. Joint Publication (JP) 1-02, Department of Defense (DoD) *Dictionary of Military and Associated Terms*, April 12, 2001, as amended through July 31, 2010, 375, available at <http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf> accessed October 28, 2011, for a definition of Unconventional Warfare: “Activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area. Also called UW.”

in Nashville, Tennessee.²² Fielding a question from the audience as to whether he would pursue AQ leaders inside Pakistan, even if that meant invading an ally nation, candidate Obama replied with a statement of prospective policy consistent with customary international law, wherein sovereignty of the state is not absolute under international law or impervious to the reach of another nation in its exercise of self defense. He said:

If we have Osama bin Laden in our sights and the Pakistani government is unable, or unwilling, to take them out, then I think that we have to act and we will take them out. We will kill bin Laden. We will crush Al Qaeda. That has to be our biggest national-security priority.²³

Up to that point, Obama castigated McCain's foreign policy stances as laden with "hysterical diatribe"²⁴ or being "naïve and irresponsible;"²⁵ of Obama's vow to kill bin Laden, McCain characterized the promise as foolish, saying, "I'm not going to telegraph my punches."²⁶

From the time of his inauguration in 2009, U.S. President Obama bolstered the U.S. military presence in Afghanistan with a central goal of neutralizing the AQ threat emanating from the region,²⁷ yet neighboring Pakistan would come to be identified as the "epicenter of terrorism"²⁸ from which threats to the U.S. and other western countries had come, and from which they would continue to emanate. The U.S. government uncovered evidence suggesting that the 9/11 hijackers were themselves based in western Pakistan in early 2001 and, by one account, AQ and its Pakistani affiliates provided operational direction in 38 per cent of the serious terrorist plots against Western countries since 2004.²⁹

It is within this context that we next consider the so-called "hunt for bin Laden" as the target came into clearer view, and targeted killing "crosshairs" were being aimed from the 2009–2011 timeframe. Four months after the start of the Obama Administration, CIA Director Leon Panetta briefed Obama on the agency's latest

²² Transcript of Second McCain, Obama Debate, CNN Politics, cnn.com (October 8, 2008), available at <http://articles.cnn.com/2008-10-07/politics/presidential.debate.transcript_1_commission-on-presidential-debates-obama-debate-town-hall-format?_s=PM:POLITICS> accessed November 3, 2011.

²³ Ibid.

²⁴ See comment by John McCain on Barack Obama's foreign policy in Mike Glover, "Obama Criticizes McCain for "Naïve" Foreign Policy," *USA Today* (May 17, 2008), available at <http://www.usatoday.com/news/politics/2008-05-16-2967008008_x.htm> accessed October 28, 2011.

²⁵ See comment by Barack Obama on John McCain's foreign policy, *ibid.*

²⁶ Transcript, *supra* n. 22.

²⁷ Ibid. at 13.

²⁸ "PTI, Pakistan 'Epicenter' of Terrorism, Says Mullen," *Times of India*, January 13, 2011, available at <http://articles.timesofindia.indiatimes.com/2011-01-13/pakistan/28371105_1_safe-havens-kayani-ways-that-two-years> accessed October 28, 2011.

²⁹ "In Military Campaign, Pakistan Finds Hint of 9/11," *New York Times*, October 30, 2009; Paul Cruickshank, "The Militant Pipeline," New American Foundation Counterterrorism Strategy Initiative Policy Paper, February 2010, cited with authority in Rollins, *supra* n. 2, at 13.

programs and initiatives for tracking bin Laden.³⁰ Obama in turn drafted a memo to Panetta in June, 2009 directing the CIA to create a “detailed operation plan” for finding the AQ leader and to “ensure that we have expended every effort” to track bin Laden down, as well as to intensify the CIA’s classified drone program. In the execution of this plan, more missile attacks were carried out during the first year of the Obama Administration than the eight years of the preceding Bush Administration; since bin Laden’s death, the United States has been “doubling down” on its strategy of covert targeted missile strikes in Pakistan, believing that Al Qaeda is susceptible to a decisive blow via targeted killings.³¹

After nearly a decade of hunting Osama bin Laden, a breakthrough came in August of 2010 when bin Laden’s most trusted courier was located and identified, and the large, secure compound where deliveries were made became a High Value Target (HVT).³² The CIA began to brief President Obama on assessments³³ that led them to believe that bin Laden may have been located at the million-dollar compound in Abbottabad, Pakistan, some 800 yards away from the Kakul Military Academy.³⁴ In late 2010, Obama ordered CIA Director Panetta to begin exploring options for a military strike on the compound;³⁵ Panetta then reportedly contacted the commander of U.S. Special Operations Command’s (USSOCOM’s)³⁶ Joint Special Operations Command (JSOC)³⁷ to begin planning a kill-or-capture mission.³⁸

³⁰ Nicholas Schmidle, “Getting Bin Laden,” *The New Yorker* August 8, 2011, available at <http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle?currentPage=all> accessed October 28, 2011.

³¹ Ibid. See “9/11 and Al Qaeda: The Price of Victory,” *LA Times* August 29, 2011, available at <<http://opinion.latimes.com/opinionla/2011/08/911-al-qaeda-homeland-security-spending-war-dead.html>> accessed October 28, 2011.

³² “How Osama Bin Laden Was Located and Killed,” *New York Times*, May 8, 2011, available at <<http://www.nytimes.com/interactive/2011/05/02/world/asia/abbottabad-map-of-where-osama-bin-laden-was-killed.html>> accessed October 28, 2011.

³³ Ibid.

³⁴ “Osama Was Just 800 yards from the Pakistan Military Academy,” World News NDTV, ndtv.com, May 2, 2011, available at <<http://www.ndtv.com/article/world/osama-was-just-800-yards-from-the-pakistan-military-academy-102890>> accessed October 28, 2011.

³⁵ Schmidle, *supra* n. 30.

³⁶ At the time of this chapter’s writing there were 10 Unified Combatant Commands (UCCs) within the U.S. Department of Defense; four were organized as functional commands with specific capabilities like Special Operations, as in the case of USSOCOM, and six geographical commands with regional responsibilities like U.S. Africa Command (USAFRICOM). See U.S. Joint Publication JP 1–02, *supra* n. 21, at 487.

³⁷ Created in 1980 after the disastrous hostage-rescue mission in Iran, JSOC is part of the U.S. Special Operations Command. Over the past 10 years, JSOC units, which include Army, Navy, and Air Force elements operating jointly with each other and in interagency operations with other government agencies, have been essential to U.S. military efforts in Afghanistan and Iraq. Purportedly, in annexes to several presidential directives not available for public viewing, JSOC is designated as the official executive agent for counterterrorism worldwide. See, e.g., Marc Ambinder, “Then Came ‘Geronimo,’” *The National Journal* (May 5, 2011), available at <<http://www.nationaljournal.com/magazine/practicing-with-the-pirates-these-navy-seals-were-ready-for-bin-laden-mission-20110505>> accessed October 28, 2011.

³⁸ Schmidle, *supra* n. 30.

The kill-or-capture campaign that JSOC would be conducting involved targeting enemies on a classified list called a JPEL (Joint Prioritized Effects List).³⁹ According to Matthew Hoh, a former U.S. Foreign Service officer, “the list included bomb makers, commanders, financiers, people who coordinate the weapons transport and even [public relations] people.”⁴⁰ John Nagl, a former counterinsurgency adviser to the former commander of forces in Afghanistan and current Director of the CIA, General Petraeus, described JSOC’s kill-or-capture campaign to PBS Frontline as part of “an almost industrial-scale counterterrorism killing machine.”⁴¹ Nagl went on to say of the JPEL process in 2011 that “[w]hat’s happened over the past five years is we’ve gotten far, far better at correlating human intelligence and signals intelligence to paint a very tight, coherent picture of who the enemy is and where the enemy hangs his hat,” and in his estimation “we’ve gotten better at using precision firepower to give those people very, very bad days.”⁴²

In January 2011, JSOC was said to have developed and presented a raid plan—an in-progress version of what would become code-named Neptune Spear⁴³—to USSOCOM. Interagency CIA-USSOCOM planning continued through March 2011 to develop for the President and National Security Council various options for capturing or killing bin Laden,⁴⁴ to include a raid or airstrike, with or without Pakistani cooperation or even prior knowledge of the mission.⁴⁵ Sources indicate Obama decided against informing or working with Pakistan, consistent with a confidential Presidential advisor’s assessment that there was “a real lack of confidence that the Pakistanis could keep this secret for more than a nanosecond.”⁴⁶

³⁹ Nick Davies, “Afghanistan war logs: Task Force 373—Special Forces Hunting Top Taliban,” *The Guardian* July 25 2010, available at <<http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban>> accessed October 28, 2011.

⁴⁰ Gretchen Gavett, “What is the Secretive U.S. ‘Kill/Capture’ Campaign?,” PBS Frontline, June 17, 2011, available at <<http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/kill-capture/what-is-the-secretive-us-killca/>> accessed October 28, 2011. See also Kevin Govern, “Resigned to Failure or Committed to a Just Cause of Justice? The Matthew Hoh Resignation, Our Current Politico-Military Strategy in Afghanistan, and Lessons Learned from the Panama Intervention of Twenty Years Ago,” *Oregon Review of International Law*, Spring 2011, Vol. 13, No. 1, 161–77. As an aside, Hoh resigned in 2009 because he felt U.S. tactics were only fueling the insurgency in Afghanistan.

⁴¹ Gavett, *ibid.*

⁴² *Ibid.*

⁴³ Note: operational code words are intended to not relate in any way to the action, and so they are quickly and easily identified and communicated. For a good article on the history of these code words, see Ed O’Keefe, “Why Is It Called ‘Operation Odyssey Dawn’?” *Washington Post*, March 22, 2011, available at <http://www.washingtonpost.com/blogs/federal-eye/post/why-is-it-called-operation-odyssey-dawn/2011/03/22/ABLaaFDB_blog.html> accessed October 28, 2011.

⁴⁴ See, e.g., Philip Sherwell, “Osama bin Laden Killed: Behind the Scenes of the Deadly Raid,” *The Daily Telegraph*, May 7, 2011, available at <<http://www.telegraph.co.uk/news/worldnews/al-qaeda/8500431/Osama-bin-Laden-killed-Behind-the-scenes-of-the-deadly-raid.html>> accessed October 28, 2011.

⁴⁵ “How Osama Bin Laden was Located and Killed,” *supra* n. 32.

⁴⁶ Schmdle, *supra* n. 30.

The order to execute the mission against bin Laden came on April 29, 2011,⁴⁷ and shortly after eleven o'clock on the night of May 1st, the assault team of 23 SEAL⁴⁸ operators and additional support members lifted off from Jalalabad Air Field, in eastern Afghanistan. They embarked on what the media has questionably called a “covert”⁴⁹ mission into Pakistan to capture or kill bin Laden.⁵⁰ The assault team entered the compound, and what happened next is subject to conjecture, shaped by unclassified press releases as well as confidential leaks. With regards to senior administration oversight, former CIA Director Panetta said “I can tell you that there was a time period of almost twenty to twenty-five minutes where we really didn't know just exactly what was going on.”⁵¹ This meant during the critical decision-making period of confronting bin Laden, and opting to capture or kill him, that the assault team would not have had real-time input from, or feedback to, the National Command Authority.⁵² This was despite the fact that the operation had been monitored by dozens of defense, intelligence, and Administration officials watching the drone's video feed.⁵³

The *New Yorker* journalist Nicholas Schmidle's compilation of reports indicates next that:

Three SEALs shuttled past [bin Laden's 23-year-old son] Khalid's body and blew open another metal cage, which obstructed the staircase leading to the third floor.

⁴⁷ See, e.g., Matt Apuzzo, “Inside The Raid That Killed Bin Laden,” *The Seattle Times*, *seattletimes.nwsourc.com*, May 02, 2011, available at <http://seattletimes.nwsourc.com/html/nationworld/2014933984_apusbinladentheraid.html> accessed October 28, 2011.

⁴⁸ SEAL stands for “Sea, Air, Land,” and is a common acronym used to describe those specially trained Special Operations Force (SOF) “operators” who are part of USSOCOM's Naval Special Warfare Command. See, e.g., Naval Special Operations Command (NSW), available at <<http://www.public.navy.mil/nsw/Pages/welcome.aspx>> accessed October 28, 2011. See also Sherwell, *supra* n. 44.

⁴⁹ U.S. Joint Publication JP 1-02, *supra* n. 21, defines “covert” as “[a]n operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor,” *ibid.* at 87. Contrast this with the definition of “clandestine,” which is an “operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.” *Ibid.* at 55.

⁵⁰ Schmidle, *supra* n. 30.

⁵¹ Steven Swinford, “Osama Bin Laden Dead: Blackout During Raid on Bin Laden Compound,” *The Telegraph*, May 4, 2011, available at <<http://www.telegraph.co.uk/news/worldnews/al-qaeda/8493391/Osama-bin-Laden-dead-Blackout-during-raid-on-bin-Laden-compound.html>> accessed October 28, 2011.

⁵² The “National Command Authority” (NCA) is comprised of the President and Secretary of Defense together or their duly deputized alternates or successors. The term NCA is used to signify constitutional authority to direct the Armed Forces in their execution of military action. Both the movement of troops and execution of military action must be directed by the NCA; by law, no one else in the chain of command has the authority to take such action. See e.g., Naval Doctrine Publication (NDP) 1, Naval Warfare March 28, 1994, 9, available at <http://www.dtic.mil/doctrine/jel/service_pubs/ndp1.pdf> accessed October 28, 2011.

⁵³ Swinford, *supra* n. 51.

Bounding up the unlit stairs, they scanned the railed landing. On the top stair, the lead SEAL swiveled right; with his night-vision goggles, he discerned that a tall, rangy man with a fist-length beard was peeking out from behind a bedroom door, ten feet away... Crankshaft [code word for bin Laden himself]... The Americans hurried toward the bedroom door. The first SEAL pushed it open. Two of bin Laden's wives had placed themselves in front of him. Amal al-Fatah, bin Laden's fifth wife, was screaming in Arabic. She motioned as if she were going to charge; the SEAL lowered his sights and shot her once, in the calf. Fearing that one or both women were wearing suicide jackets, he stepped forward, wrapped them in a bear hug, and drove them aside... A second SEAL stepped into the room and trained the infrared laser of his M4 on bin Laden's chest. The Al Qaeda chief, who was wearing a tan *shalwar kameez* [tunic and trousers] and a prayer cap on his head, froze; he was unarmed. "There was never any question of detaining or capturing him—it wasn't a split-second decision. No one wanted detainees," the special-operations officer told me... The first round, a 5.56-mm. bullet, struck bin Laden in the chest. As he fell backward, the SEAL fired a second round into his head, just above his left eye. On his radio, he reported, "For God and country—Geronimo, Geronimo, Geronimo." After a pause, he added, "Geronimo E.K.I.A."—"enemy killed in action."⁵⁴

Aside from bin Laden, and his son Khalid having been killed, assaulting commandos killed the brother of the courier known as Kuwaiti—Tareq Khan—both reported to have been unarmed, and a fourth person, a woman, believed to be the wife of one of the compound residents.⁵⁵ Accounts indicate next that the assault team "swept through the buildings, collecting a 'mother lode' of intelligence material—computers, cell phones, thumb drives and written documents," then went back into the compound to demolish to the extent possible sensitive equipment in a downed helicopter.⁵⁶

The body of bin Laden was photographed, and biometric measurements taken, with confirmation of bin Laden's demise relayed back to the White House Situation Room.⁵⁷ Within 38 minutes of the raid's initiation, another helicopter joined the operation to ferry out the uninjured raid team and the body of bin Laden to Bagram, Afghanistan for further identification and disposition, departing before the Pakistani military ever had forces on site to investigate what had happened.⁵⁸ Then, bin Laden's body was transported to the U.S.S. Carl Vinson, a U.S. aircraft carrier off the Pakistani coast in the Arabian sea.⁵⁹ His body was then prepared for burial under Islamic tradition, and as a lawful military target during a time of armed conflict, bin Laden's remains were interred by burial at sea.⁶⁰

⁵⁴ Schmidle, *supra* n. 30.

⁵⁵ Sherwell, *supra* n. 44.

⁵⁶ *Ibid.*

⁵⁷ Schmidle, *supra* n. 30.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ David Crane, "Burial at Sea: The End of Osama bin Laden," *JURIST*—Forum, May 4, 2011, available at <<http://jurist.org/forum/2011/05/burial-at-sea-the-end-of-osama-bin-laden.php>> accessed September 22, 2011.

II. Legal and moral foundations of a law of war against terrorists

Since September 11, 2001, the US has categorized its fight against AQ as an armed conflict, a framework upheld by all three branches of the US government.⁶¹ Having recounted the circumstances leading up to bin Laden's death, a number of normative questions arise, not the least of which is consideration of whether there are distinctions with a meaningful difference between assassinations and targeted killings.

Due to the complexity of conducting surprise attacks for political reasons, targeted killings cannot occur without significant legal ramifications. Our ability to make sense of such operations from the standpoint of justification is further complicated by the classified nature of sensitive activities such as these.⁶² Concurrently, no widely established standard or published set of unclassified guidelines or planning considerations exist for operational planners to conduct targeted killing operations.⁶³ This begs the question: what exactly constitutes a permissible targeted killing, as compared with a morally permissible assassination? The answer to this question is far from settled, largely because there is profound disagreement about which body of law should be used to authorize targeted killing operations. By contrast, the category of assassinations refers to killings of a similar nature, but these are illegal *per se* given the absence of legal necessity and/or authority to kill.⁶⁴

Targeted killings, whether conducted by Israel, the United States, Great Britain, or other nations, are "more frequently the result of action undertaken not by conventional military forces, but rather by specialized troops, such as SOF, police, and intelligence agents."⁶⁵ Alternately, some nations have turned increasingly to specialized equipment, such as unmanned aerial vehicles (UAVs), commonly known as drones, in order to track their enemies. These specialized troops and equipment have

⁶¹ Laurie Blank, "Finding the Paradigm: Investigating bin Laden's Demise," *JURIST*—Forum, May 8, 2011, available at <<http://jurist.law.pitt.edu/forum/2011/05/laurie-blank-finding-the-paradigm.php>>; <http://jurist.org/forum/2011/05/laurie-blank-findingthe-paradigm.php>> accessed October 28, 2011.

⁶² See, e.g., Army Regulation (AR) 380–1, Special Access Programs (SAPs) and Sensitive Activities, April 21, 2004, available at <<http://www.fas.org/irp/doddir/army/ar380-381.pdf>> accessed October 28, 2011. AR 380–1 defines sensitive activities as "Programs that restrict personnel access, such as [Alternative Compensatory Control, or] ACC measures; sensitive support to other Federal agencies; clandestine or covert operational or intelligence activities; sensitive research, development, acquisition, or contracting activities; special activities; and other activities excluded from normal staff review and oversight because of restrictions on access to information." *Ibid.* at 84.

⁶³ Johnson, *supra* n. 20, v. Having said this, we must not discount the likelihood that classified guidelines and/or planning considerations have existed for U.S. targeted killing operations.

⁶⁴ For a detailed yet accessible review of this subject, see Elizabeth B. Bazan, Assassination Ban and E.O. 12333: A Brief Summary, Congressional Research Service (CRS) Report RS21037, 2004, available at <<http://www.fas.org/irp/crs/RS21037.pdf>> accessed October 28, 2011.

⁶⁵ See, e.g., David Tucker, "Counterterrorism and the Perils of Preemption Problems and Command and Control" in Betty Glad and Chris Dolan (eds), *Striking First: The Preventative War Doctrine and the Reshaping of U.S. Foreign Policy* (New York: Palgrave MacMillan, 2004) 75–89, cited with authority in Hunter, *supra* n. 16, 3.

proven to be an essential component of targeted killing, due primarily to the elusive and clandestine nature of terrorists themselves.

Law of war expert Professor Gary Solis terms “targeted killing” “the targeting and killing, by a government or its agents, of a civilian or ‘unlawful combatant’ taking a direct part in hostilities in the context of an armed conflict who is not in that government’s custody and cannot be reasonably apprehended.”⁶⁶ Former Special Ambassador for Counterterrorism Dell Dailey, has said “targeted killing, as understood by select members of Special Operations Forces (‘Operators’), is the employment of a weapons platform designed for both sensing and destroying an identified enemy target with the maximum use of current technology while retaining a human in the decision making process.”⁶⁷ Taking exception to the notion that targeted killings can be permissible, U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston has said “a targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”⁶⁸

Perhaps most indicative of what is or is not a permissible targeted killing comes from the Naval operational history scholar Glenn Johnson, who examined successful and unsuccessful targeted killings operations in the twentieth and twenty-first centuries: Operation Anthropoid in October 28, 1941 and the ultimately successful targeted killing of *Obergruppenführer* (“Senior Group Leader”) Reinhard Heydrich, who chaired the 1942 Wannsee Conference that discussed plans for the deportation and extermination of all Jews in German-occupied territory;⁶⁹

⁶⁶ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010) 542.

⁶⁷ Keynote Address from Ambassador (Retired) Dell L. Dailey at Conference “Using Targeted Killing to Fight the War on Terror: Philosophical, Moral and Legal Challenges” University of Pennsylvania Law School (April 15, 2011). Among his many military and diplomatic assignments, Dailey commanded JSOC, and directed the new Center for Special Operations, the military hub for all counterterrorism, before retiring to control of the State Department’s counterterrorism office, from which he “promoted interagency collaboration and built closer partnerships between military personnel and the members of other U.S. Government departments and agencies involved in global counterterrorism activities.” “Biography—Dell L. Dailey” U.S. Dep’t of State Website, available at <<http://www.state.gov/outofdate/bios/87639.htm>> accessed October 28, 2011.

⁶⁸ Philip Alston, *The Project on Extrajudicial Executions*, U.N. General Assembly Special Report 5/2010, available at <<http://www.extrajudicialexecutions.org/application/media/14%20HRC%20Targeted%20Killings%20Report%20%28A.HRC.14.24.Add6%29.pdf>> accessed October 28, 2011.

⁶⁹ Glen W. Johnson, *supra* n. 20, v. Johnson’s Abstract noted that as of 2007, at least in the unclassified realm, a consequentialist viewpoint that “[d]ue to the political complexity intertwined with targeted killing these types of operations rarely occur without repercussion. Operational planners need to understand that targeted killing operations cannot exist solely at the operational level because their consequences have strategic and political ramifications. By utilizing a case study analysis, this thesis will identify the operational planning considerations that need to be addressed to successfully conduct a targeted killing mission.”

the successful targeted killing of Admiral Isoroku Yamamoto, Japanese Naval Marshal General and the commander-in-chief of the Combined Fleet during the Second World War, on April 18, 1943;⁷⁰ the successful targeted killing of the Palestinian terrorists in Israel's 1972 Operation Wrath Of God—also known as Operation Bayonet—who were involved in the 1972 massacre of Israeli Olympians at Munich, Germany;⁷¹ Israel's unsuccessful efforts of targeted killing aimed at A. Ahmed Jibril, the founder and leader of the Popular Front for the Liberation of Palestine, from the 1980s through present;⁷² the operations against Pablo Escobar, Colombian drug lord, with combined U.S.–Colombian targeted killing ultimately successful on July 2, 1994;⁷³ and, the targeted killing of Hamas terrorists on various dates in the mid-2000s with varying success by Israel.⁷⁴

This chapter does not consider, for instance, the prescriptions and proscriptions on targeted killing in other nations, or the ways in which other nations have addressed legal aspects related to targeted killing. For instance, Israel's Supreme Court ruled in 2006 that the Israeli government's targeted killing policy was legal, within certain specified constraints.⁷⁵ While other nations have prescribed or proscribed various forms of targeted killings in contemporary times, U.S. presidents have been delegated by inferred rather than explicit authority, the power to order and authorize targeted killing operations under the U.S. Constitution. On December 4, 1981, President Ronald Reagan signed into law Executive Order 12333, "United States Intelligence Activities," which came about from a long line of Congressional concerns expressed regarding alleged abuses by the U.S. intelligence community in the 1970s.⁷⁶ Section 2.11 of the order provides the following brief but powerful proscription: "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."⁷⁷ Unfortunately, while this Executive Order prohibits assassination, it does not define what constitutes assassination, nor does any other U.S. statute or law define that term!

⁷⁰ Ibid. at 34–36.

⁷¹ Ibid. at 39–41.

⁷² Ibid. at 30–33.

⁷³ Ibid. at 25–29.

⁷⁴ Ibid. at 39–42.

⁷⁵ Note: See HCJ 760/02, *The Public Committee Against Torture in Israel v. The Government of Israel*, Decision of the Israeli Supreme Court, issued on December 14, 2006, available at <<http://www.jewishvirtuallibrary.org/jsource/Politics/scterror.html>> accessed October 28, 2011. For more on Israeli targeted killing, superbly written about by one of the world's foremost counterterrorism experts, see Amos N. Guiora, "Targeted Killing as *Active Self-Defense*," *Case Western Research Journal Int'l Law*, Vol. 36, 319, 2004.

⁷⁶ Office of the President of the United States, *United States Intelligence Activities* (E.O. 12333, 1981), available at <<http://www.au.af.mil/au/awc/awcgate/whitehouse/eo12333.htm>> accessed October 28, 2011.

⁷⁷ Executive Order 12333 was the last of three executive orders banning assassination. For a detailed yet accessible review of this subject, see Elizabeth B. Bazan, "Assassination Ban and E.O. 12333: A Brief Summary," Congressional Research Service (CRS) Report RS21037, 2004, available at <<http://www.fas.org/irp/crs/RS21037.pdf>> accessed October 30, 2011.

Section 2.12 of Executive Order 12333 forbids indirect participation in activities prohibited by the order, stating: “Indirect participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”⁷⁸ While Executive Order 12333 is still in force, post September 11, 2001 legislation has “opened the door” to a very significant reinterpretation of the assassination ban, if not repealing it entirely. On Friday, September 14, 2001, both the House and the Senate passed joint resolutions, S.J. Resolution 23 and H.J. Resolution 64, authorizing the President to:

Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷⁹

Published reports in popular media⁸⁰ as well as governmental sources⁸¹ have suggested that in the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counterterrorism intelligence activities, and targeted killing as a subset of the latter, while Congress has maintained legal authority for oversight of such activities. Sections 601–604 of the 1991 Joint Explanatory Statement of the Committee of Conference, H.R. 1455, set forth significant provisions regarding such congressional oversight of intelligence activities, including requirements relating to the authorization of covert actions by the President and the reporting of covert actions to Congress. If we are to assume that bin Laden’s targeted killing was part of a covert operation, either in intelligence collection, dissemination, or the conduct of the operation, then those aspects which were covert would have included a written “finding” and be subject to Congressional notification and oversight in order to comply with U.S. Federal law on covert operations.⁸²

⁷⁸ Ibid. at n. 3.

⁷⁹ Note: The Senate passed S.J.Res. 23, before 11:00 a.m. on Friday, September 14, 2001. The House passed it late Friday evening, September 14, 2001. The President signed it into law on Tuesday, September 18, 2001 as P.L. 107–40, 115 Stat. 224 (2001). For a detailed discussion of authorizations of the use of U.S. military force see Jennifer K. Elsea and Richard F. Grimmett, *Congressional Research Service Report* (RL31133, 2007), *Declarations of War and Authorizations of Use of Military Force: Historical Background and Legal Implications* (2007), available at <<http://www.fas.org/sgp/crs/natsec/RS22357.pdf>> accessed October 28, 2011.

⁸⁰ Siobhan Gorman, “CIA Had Secret Al Qaeda Plan,” *The Wall Street Journal*, July 13, 2009, available at <<http://online.wsj.com/article/SB124736381913627661.html#mod=djemalertNEWS>> accessed October 28, 2011, and see Marc Ambinder, “What Was That Secret CIA Operation? Targeted Assassinations?,” *The Atlantic*, (Boston, July 31, 2009), available at <<http://www.theatlantic.com/politics/archive/2009/07/what-was-that-secret-cia-operation-targeted-assassinations/21144/>> accessed October 28, 2011.

⁸¹ Alfred Cumming, *Covert Action: Legislative Background and Possible Policy Questions*, (CRS Report RL33715, 2009), available at <<http://www.fas.org/sgp/crs/intel/RL33715.pdf>> accessed October 28, 2011.

⁸² Ibid. citing Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b], and see U.S. Joint Publication JP 1–02, *supra* n. 21, regarding the differentiation between “clandestine” and “covert.”

One might suppose that bin Laden was an obviously permissible target. He was the head of AQ, a non-state-actor that had declared war on the United States,⁸³ and that his compound in Abbottabad had served as the headquarters for running the AQ operations since 2005.⁸⁴

Though it is not our central concern in the present chapter, in addition to other concerns about the legitimacy of the operation, some may contest as illegal the use of force against the territorial integrity and political independence of a foreign state, Pakistan.⁸⁵ Recently leaked revelations rebut this assertion, with claims by serving and retired Pakistani and U.S. officials that the then-U.S. President George Bush and Pakistan's then military leader Pervez Musharraf "struck a secret deal almost a decade ago permitting a US operation against Osama bin Laden on Pakistani soil, after Bin Laden escaped US forces in the mountains of Tora Bora in late 2001."⁸⁶ The reported terms were that "Pakistan would allow US forces to conduct a unilateral raid inside Pakistan in search of Bin Laden, his deputy, Ayman al-Zawahiri, and the al-Qaida No 3 [and a]fterwards, both sides agreed, Pakistan would vociferously protest the incursion."⁸⁷ Such an agreement would have been consistent with Pakistan's unspoken policy towards CIA drone strikes in the tribal belt, which was revealed by the publicly revealed WikiLeaks U.S. embassy cables of November 2010,⁸⁸ which contained amongst other messages an account that current Pakistani Prime Minister Syed Yousaf Raza Gillani told a US official: "I don't care if they do it, as long as they get the right people. We'll protest in the National Assembly and then ignore it."⁸⁹

Regardless of preserved or violated sovereignty, and national consent or lack thereof to such operations, the question of moral justification circumscribed in law, not politics, remains a profound challenge. Regarding this question, there are two major

⁸³ According to Paust, *supra* n. 19, 262, "[t]he targeted killing of certain persons is clearly lawful under the laws of war, during war the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (and, thus, excluding captured persons of any status), would not be impermissible 'assassination'." See also Benjamin Davis, "Post-Osama: The Way Forward for the United States," *JURIST*—Forum, May 2, 2011, available at <<http://jurist.org/forum/2011/05/benjamin-davis-post-osama.php>> accessed October 28, 2011. See also David Crane, "Legal Arithmetic: Adding Up the Legality of Operation Geronimo," *JURIST*—Forum, May 14, 2011, available at <<http://jurist.org/forum/2011/05/david-crane-legal-arithmetic.php>> accessed October 28, 2011.

⁸⁴ *Ibid.*

⁸⁵ See, e.g., Curtis Doebbler, "The Illegal Killing of Osama Bin Laden," *JURIST*—Forum, May 5, 2011, available at <<http://jurist.org/forum/2011/05/curtis-doebbler-illegal-killing-obl.php>> accessed October 28, 2011.

⁸⁶ Declan Walsh, "Osama bin Laden Mission Agreed in Secret 10 Years Ago by US and Pakistan," *The Guardian*, May 9, 2011, available at <<http://www.guardian.co.uk/world/2011/may/09/osama-bin-laden-us-pakistan-deal>> accessed October 28, 2011.

⁸⁷ *Ibid.*

⁸⁸ See, e.g., "The US Embassy Cables," *The Guardian*, September 22, 2011, available at <<http://www.guardian.co.uk/world/the-us-embassy-cables>> accessed October 28, 2011.

⁸⁹ Walsh, *supra* n. 86.

camps that have emerged with competing views about choice of law that should have governed the prescriptions and proscriptions regarding bin Laden's targeted killing, as well as other targeted killings in the international arena. First, there is international human rights law (IHRL), which argues a more restricted view of targeted killings.⁹⁰ Second, there is international humanitarian law (IHL), also known as the law of war or the law of armed conflict, which argues for a broader view of targeted killings.⁹¹ Generally speaking, IHL is a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.⁹²

Targeted killings are largely viewed as illegal from the framework of IHRL because this view gives a presumption of innocence that would be violated by a targeted killing from, say, a predator drone-launched missile attack. Instead, the objects of targeted killings, under such a theory, "should be arrested, detained,⁹³ and interrogated with due process of law;" and force should be employed only if necessary. Under such a theory, there must be no other measures available, and lethal force should not be used if a lesser degree of force can be effective."⁹⁴ Thus, for bin Laden's targeted killing to be permissible, lethal force would have to have been not the only option or course of action given in military directive to the SEAL team conducting the raid, and their responsibility among all their tactical and operational considerations must have necessarily included exhausting all nonlethal means available.

It is nevertheless crucial to clarify the important nature of the difficulty here: critics often confuse the IHL prohibition against declaring that no quarter will be given (which is also a war crime under the Rome Statute) with an affirmative obligation to capture rather than kill. But these two points are conceptually and legally distinct. The prohibition against declaring no quarter establishes that no party to the conflict may simply kill soldiers who have clearly surrendered. The underlying rationale

⁹⁰ W. Jason Fisher, "Targeted Killing, Norms, and International Law," (2007) 45 *Colum. J. Transnat'l L.* 711, 719.

⁹¹ *Ibid.* at 719. See also Office of the High Commissioner for Human Rights, "International Human Rights Law" (*United Nations Human Rights*, June 23, 2011), available at <<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> accessed October 28, 2011, noting that "International human rights law lays down obligations which States are bound to respect."

⁹² For what comprises IHL, see "What is International Humanitarian Law?," Advisory Service On International Humanitarian Law, 07/2004, available at <<http://www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/index.jsp>> accessed October 28, 2011. This is also consistent with the United Nations Global Counter-Terrorism Strategy, adopted by Member States on September 8, 2006, available at <<http://www.un.org/terrorism/strategy-counter-terrorism.shtml#poa2>> accessed October 28, 2011.

⁹³ See John Embry Parkerson, Jr, "United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause," 133 *Mil. L. Rev.* 31, 41–2 (1991) and Kevin H. Govern, "Sorting the Wolves from the Sheep," 19 *Military Police* 1, 1–5 (2004); see also Major Geoffrey S. Corn and Major Michael Smidt, "To Be or Not to Be, That is the Question: Contemporary Military Operations and the Status of Captured Personnel," *Army Law*, June 1999, 1.

⁹⁴ Fisher, *supra* n. 90, 719.

behind this legal norm is the classic distinction between civilians and combatants, and the notion that surrendering soldiers are “hors de combat” and have therefore regained the same protections that civilians have under the laws of war. They are no longer combatants because they have laid down their arms and firmly indicated their surrender. Their status calls them out as deserving of protection.

This is not, however, the same thing as requiring a party to the conflict to give enemy targets the opportunity to surrender before killing them. If the targets communicate their surrender, that surrender must be respected, but there is no affirmative requirement to give them an opportunity to surrender before killing them. If there were such an obligation, aerial bombardment per se would be illegal under the laws of armed conflict, which it clearly is not. This would require a wholesale revision in the practice of modern warfare, something that is clearly not supported by the state practice by any state that has military aircraft. This demonstrates the *reductio ad absurdum* of this argument. Of course, some critics assert that the obligation to capture versus kill comes from IHRL. While this may be a plausible reading of IHRL, it simply assumes precisely what is denied here; that is, that the appropriate law governing the armed conflict with Al Qaeda is IHL and the law of armed conflict. Therefore, the obligation to capture versus kill is only legally sustainable if the critic can muster a convincing argument that IHL does not apply here at all. This, arguably, they cannot do.

The administration has consistently maintained that the operatives engaged in the bin Laden raid were counseled regarding their IHL obligations. Both John Brennan and Harold Koh have explained that bin Laden was to be captured if he clearly surrendered. Even if we speculate that U.S. commandos did not give him an opportunity to surrender, they were not required to do so under IHL. To suggest that they were under such an obligation is to presuppose that the raid was governed by the law enforcement paradigm with its typical “police-freeze!” predicate that begins a domestic arrest situation. As a final point, there is absolutely no evidence on the record that the Navy SEALs violated the IHL norm and in fact executed a surrendering bin Laden. Such an explosive allegation ought to be accompanied by some proffer of proof, which is currently lacking. Alleged comments that commanders indicated a preference for killing bin Laden do not qualify. As explained above, denying bin Laden the opportunity to surrender is far different from issuing an order that no quarter would be given to him during the raid, even if he affirmatively surrendered. That would indeed have made the raid illegal, but there is no evidence that this happened.

III. Resolving moral doubts about targeted killing

The choice of legal analysis framework for combating terrorism, and specifically the targeted killing of bin Laden, is integrally tied into the so-called just war tradition

that is coupled with a concurrent moral condemnation of terrorism.⁹⁵ Professor of Religion Edmund Santurri, who directs The Great Conversation program at St Olaf College, has surveyed what he calls “a rough consensus among contemporary proponents of that [just war] tradition—moralists, philosophers, theologians and international legal theorists” with respect to terrorism.⁹⁶ In so doing, he finds the spectrum of just war thinkers who argue that while a group might resort to political violation under certain moral conditions (for example, to protect the innocent), this use of political violence—even when the cause is just—must still be governed by certain moral constraints prohibiting terrorist acts *inter alia*.⁹⁷ Santurri counters the notion that “Islamic radicals like bin Laden are [or were] right in their assessments of the state of affairs, that Islam is, indeed, threatened decisively by American actions, or that figures like bin Laden have morally legitimate authority to issue such judgments, to call for belligerent response.”⁹⁸ For Santurri, “terrorism is a moral wrong but that the distribution of responsibility for particular terrorist acts is an enormously complex matter—when the cause of the terrorist is just,”⁹⁹ something which Santurri stops short of saying existed as the basis for bin Laden’s directing, leading, and taking part in terrorism.

Did the U.S. government ever consider any moral obligation, if any, to capture bin Laden and bring him to justice, versus ending his leadership through targeted killing? Can and should operational expediency ever trump legal and moral propriety with regards to the choice between kill and capture? We have no unclassified documentary proof, or definitive policy statement, which indicates that the Bush or Obama Administrations ever considered these matters as factors with regards to the targeted killing program in general, or the operation against bin Laden in particular. What is evident in inferred motive from change of policy is that expediency became a significant factor in bringing swift, decisive action against AQ in the Spring of 2011.

In April 2011, the Obama Administration ended the CIA’s role in capturing and interrogating terror suspects overseas, with the exception of the battlefields of Iraq and Afghanistan.¹⁰⁰ With bin Laden’s location being pinpointed to Pakistan, was there a political, if not legal or moral reason not to capture bin Laden from that point onward? International humanitarian law expert Laurie Blank has opined that “[w]hen the law of armed conflict mandates the use of deadly force as a first resort

⁹⁵ Edmund N. Santurri, “Philosophical Ambiguities in Ostensibly Unambiguous Times: The Moral Evaluation of Terrorism,” *Journal of Peace & Justice Studies* 12:2 (2002) 137.

⁹⁶ *Ibid.* at 138.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at 153.

⁹⁹ *Ibid.* at 155.

¹⁰⁰ Ken Dilanian, “CIA has Slashed its Terrorism Interrogation Role,” *LA Times* April 10, 2011, available at <<http://articles.latimes.com/2011/apr/10/world/la-fg-cia-interrogation-20110411>> accessed October 28, 2011.

and human rights law prohibits the use of deadly force except as a last resort, we can see that the two paradigms will often be irreconcilable when applied to the same incident,” yet both regimes “have the protection of persons as a core value.”¹⁰¹ John Brennan, the Obama Administration’s top counterterrorism official, told reporters after the successful operation that if “we had the opportunity to take him alive, we would have done that.”¹⁰² A senior intelligence official echoed that sentiment in an interview on the Tuesday following bin Laden’s death, telling *National Journal* that if bin Laden “had indicated surrender, he would have been captured.”¹⁰³ While the JPEL remains classified,¹⁰⁴ and the kill-or-capture order remains unknown to the general public, we have strong indications as to the mindset of the then-CIA director Panetta on the operation and of bin Laden’s opportunity to surrender and be captured or resist and be killed: “To be frank, I don’t think he had a lot of time to say anything.”¹⁰⁵ In Panetta’s estimation, “[i]t was a firefight going up that compound. By the time they got to the third floor and found bin Laden, I think this was all split-second action on the part of the SEALs.”¹⁰⁶ If these accounts by some of the United States’ top national security advisors happen to be true, it would be appropriate then to not “second-guess” the SEAL operatives in their making a professional judgment call that was within the range of what would have been briefed as legal and appropriate options within their “Rules of Engagement,” or “ROE,”¹⁰⁷ which rules would have necessarily been crafted to cover any instance of bin Laden being *hors de combat* (out of combat by injury or surrendering).¹⁰⁸ Once bin Laden was killed, assaulting

¹⁰¹ Blank, *supra* n. 61.

¹⁰² UPI, “Officer: Raid Was Always to Kill bin Laden,” UPI.com, August 2, 2011, available at <http://www.upi.com/Top_News/US/2011/08/02/Officer-Raid-was-always-to-kill-bin-Laden/UPI-92811312270200/#ixzz1X12GywZF> accessed October 28, 2011.

¹⁰³ Yochi J. Dreazen, Aamer Madhani and Marc Ambinder, “For Obama, Killing—Not Capturing—bin Laden Was Goal,” *National Journal*, May 4, 2011, available at <<http://www.nationaljournal.com/for-obama-killing-not-capturing-nobr-bin-laden-nobr-was-goal-20110503>> accessed October 28, 2011.

¹⁰⁴ Davies, *supra* n. 39.

¹⁰⁵ Gavett, *supra* n. 40, cited with authority in Dreazen, *supra* n. 103.

¹⁰⁶ *Ibid.*

¹⁰⁷ ROE are directives issued by competent superior authority that delineate the circumstances and limitations under which military forces will initiate and continue engagement with other forces. ROE are drafted in consideration of the law of war, national policy, public opinion, and military operational constraints. ROE are often more restrictive than the law of war would allow. ROE will normally determine the legally justified uses of force during international military operations. See, e.g., U.S. Joint Publication JP 1–02, *supra* n. 21, 309.

¹⁰⁸ The ROE for Neptune Spear would have necessarily been drafted to be in accord with the so-called Common Article 3 protections of the Geneva Conventions. See, e.g., *Convention (III) Relative to the Treatment of Prisoners of War. Geneva*, August 12, 1949, available at <<http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>> accessed October 28, 2011. This Convention and its Commentaries fail to address the rights and responsibilities of terrorists other than noting in the Commentaries that “it was not possible to talk of ‘terrorism,’ ‘anarchy’ or ‘disorder’ in the case of rebels who complied with humanitarian principles,” which has never been persuasively alleged that bin Laden or AQ ever did. See *Commentaries to Convention (III) Relative to the Treatment of Prisoners of War. Geneva*, August 12, 1949, available at <<http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument>> accessed October 28, 2011.

forces would also have been obligated under their ROE, to handle his remains in accordance with IHL and concurrently with respect for Islamic law.¹⁰⁹

IV. Conclusion: the polarizing paradigm of Neptune Spear

The targeted killing of bin Laden has already been thought to have a strong influence on U.S. and international responses to terrorism. Significantly, on May 16, 2011, the United Kingdom Parliament indicated that the bin Laden killing portends not only a trend within the United States defense strategy, but also an emergent international political and operational orientation towards intractable terrorist regimes and individuals. In a report, prepared by the House of Commons Library as charting future politico-military and legal approaches to terrorism, bin Laden's "targeted killing" had "significant implications" for how the United States and other countries deal with terrorist suspects.¹¹⁰ Such methods could be seen to be "accepted politically," it argues, with a trend in customary international law emerging with "[a] wider implication is that the killing may be seen as a precedent for targeted killings of individuals by any state, across international boundaries, at least where terrorism is involved. The more states act in this way, the more likely it is to become accepted, at least politically if not as a matter of international law."¹¹¹

As customary national security policy if not customary international law, President Obama has authorized nearly four times the number of drone strikes for targeted killing in Pakistan in his first two years in office as President Bush did in his eight years. According to unclassified media accounts of attacks, some 225 strikes have taken place since 2009, resulting in the targeted killing of between 1,100 and 1,800 militants at the time of writing.¹¹² This, of course, does not account for casualties not involving deaths; under this escalation of targeted killing force, some 1,100 militants and noncombatant civilian deaths may have occurred in Pakistan alone.¹¹³ This trend in targeted killing is not just a distantly removed drone-fired

¹⁰⁹ Crane, *supra* nn. 60 and 83.

¹¹⁰ Arabella, Thorp, "Killing Osama bin Laden: Has Justice Been Done?," *House of Commons Library Standard Report* SN/IA/5967, May 16, 2011, available at <<http://www.parliament.uk/briefing-papers/SN05967>> accessed October 28, 2011.

¹¹¹ *Ibid.* at 9.

¹¹² "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2011," *New America Foundation*, 11 September 2011, available at <<http://counterterrorism.newamerica.net/drones>> accessed October 28, 2011. The New America Foundation claimed to rely upon open-source (unclassified) reports as available from including the *New York Times*, *Washington Post*, and *Wall Street Journal*, accounts by major news services and networks—the Associated Press, Reuters, Agence France-Presse, CNN, and the BBC—and reports in the leading English-language newspapers in Pakistan—the *Daily Times*, *Dawn*, the *Express Tribune*, and the *News*—as well as those from Geo TV, the largest independent Pakistani television network.

¹¹³ Chris Woods, "Covert Drone War—'You Cannot Call Me Lucky'—Drones Injure Over 1,100," *The Bureau of Investigative Journalism*, 10 August 2011, available at <<http://www.thebureauinvestigates.com/category/projects/drones/>> accessed October 28, 2011.

missile tactic; the use of special operations raids (to capture or conduct targeted killing) have increased from 675 covert raids in 2009 to 1,879 so far in 2011, with Pentagon reports assessing that approximately 84 to 86 per cent of these night raids end without violence;¹¹⁴ NATO reports further clarify those ambiguous statistics, stating that in such raids, the target is successfully killed or captured 50 to 60 per cent of the time.¹¹⁵ As conventional U.S. forces begin to draw down and redeploy to their home stations, “the role of counterterrorism operations, and in particular these kinds of special missions, will become prominent,” says International Security Assistance Force (ISAF) commander General John Allen.¹¹⁶

This trend towards killing instead of capturing following the death of bin Laden has continued, with notable examples being the September 30, 2011 targeted killings by drone-launched missile attack on the radical U.S.-born Islamic cleric in Yemen, Anwar al-Awlaki, along with Samir Khan, U.S.-born editor of AQ’s online jihadist magazine.¹¹⁷ As with the attack on bin Laden, evidently this strike on AQ militants was planned and authorized long in advance. Nine months before that strike, the U.S. Director of National Intelligence, Dennis C. Blair, told a House of Representatives hearing in February 2011 that such a step was possible, even if not naming al-Awlaki specifically: “We take direct actions against terrorists in the intelligence community . . . If we think that direct action will involve killing an American, we get specific permission to do that.”¹¹⁸ Then, open-source media identified six months before the strike that the Obama administration had “taken the extraordinary step of authorizing the targeted killing of an American citizen.”¹¹⁹ In that same reportage, Obama administration officials claimed “it is extremely rare, if not unprecedented, for an American to be approved for targeted killing,” while a former senior legal official in the Administration of George W. Bush said “he did

¹¹⁴ Sean Naylor, “Chinook Crash Highlights Rise in Spec Ops Raids”, *Army Times*, 21 August 2011, available at <<http://www.armytimes.com/news/2011/08/army-chinook-crash-highlights-rise-in-spec-ops-raids-082111w/>> accessed October 28, 2011.

¹¹⁵ Joshua Partlow, “Karzai Wants U.S. to Reduce Military Operations in Afghanistan”, *Washington Post*, November 14, 2010, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/11/13/AR2010111304001.html>> last accessed October 28, 2011.

¹¹⁶ Naylor, *supra* n. 114, cited with authority in Jonathan Masters, “Background—Targeted Killing, Council on Foreign Relations,” 29 August 2011, available at <<http://www.cfr.org/intelligence/targeted-killings/p9627>> accessed October 28, 2011. Readers are reminded that counterterrorism operations are ordinarily, but not exclusively, conducted by highly trained SOF and/or national intelligence assets.

¹¹⁷ See, e.g., Martin Chulov and Paul Harris, “Anwar al-Awlaki, al-Qaida Cleric and Top US Target, Killed in Yemen,” *The Guardian* September 30, 2011, available at <<http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-killed-yemen>> accessed October 28, 2011.

¹¹⁸ Jason Ryan, ‘License to Kill? Intelligence Chief Says U.S. Can Take Out American Terrorists’, ABC News website, available at <<http://abcnews.go.com/Politics/license-kill-intelligence-chief-us-american-terrorist/story?id=9740491>> accessed October 28, 2011.

¹¹⁹ Scott Shane, “U.S. Approves Targeted Killing of American Cleric,” *New York Times*, April 6, 2011, available at <<http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>> accessed October 28, 2011.

not know of any American who was approved for targeted killing under the former president.”¹²⁰

Abdul-Rahman al-Awlaki, son of Anwar al-Awlaki, also met his demise in Yemen a scant two weeks after his father’s death, on October 15, 2011; the modality again was drone launched missile strike, killing the younger al-Awlaki, the Egyptian-born AQ media chief Ibrahim al-Bana, and six other militants.

To the acclaim of governments around the world and the relief of the Libyan people, Colonel Muammar Qaddafi’s rule came to a decisive end on October 20, 2011, through a demise facilitated, but not directly accomplished, by a drone strike attempting a targeted killing in conjunction with a NATO aircraft strike on his convoy near Sirte, Libya.¹²¹ Injured during the strike, Qaddafi was then captured by Libyan National Transitional Council (NTC) rebels and later killed along with his son Muatassim.¹²²

Finally, at the time of writing, another U.S. drone strike on October 27, 2011 killed Hazrat Umar, a brother of the Pakistani Taliban commander, Maulvi Nazir, Khan Muhammad, another top commander in the group, and two other aides in Pakistan’s northwestern region.¹²³ Hours later, five missiles hit the militant hideout near North Waziristan’s town of Mir Ali, killing six men.¹²⁴ These latest targeted killings of AQ-affiliated militants has potentially created the conditions for regime change in Pakistan. Within a day of that strike, the cricketer-turned-politician Imran Khan led more than 2,000 tribesmen in protest at Parliament in Islamabad.¹²⁵ Khan condemned the “criminal silence” of non-governmental organizations, over the killings of civilians in drone attacks and has said that the

¹²⁰ Ibid.

¹²¹ David Sperry, “Officials: US Drone Fired in Gadhafi Strike; Administration Looking Ahead to Libya’s Future,” *Washington Post* October 21, 2011, available at <http://www.washingtonpost.com/politics/congress/gadhafi-death-amounts-to-victory-for-obamas-approach-but-little-impact-likely-on-election/2011/10/21/gIQAxAGi2L_story.html> accessed October 28, 2011.

¹²² Ibid.

¹²³ Salman Masood, “Drone Strike in Pakistan Kills Brother of Militant Commander,” *New York Times*, Oct 27, 2011, available at <http://www.nytimes.com/2011/10/28/world/asia/drone-strike-in-pakistan-kills-brother-of-taliban-fighter.html?_r=1&emc=eta1> accessed October 28, 2011.

¹²⁴ AP, “US Drone Strikes Kill Prominent Militant Commander, 10 Others in NW Pakistan,” *Washington Post*, October 27, 2011, available at <http://www.washingtonpost.com/world/asia-pacific/bomb-explodes-in-food-market-in-northwest-pakistan-city-of-peshawar-injuring-11-people/2011/10/27/gIQALBooKM_story.html> accessed October 28, 2011.

¹²⁵ “Pakistani Tribesmen Rally Against US Drone Strikes,” *Daily News and Analysis India* website, available at <http://www.dnaindia.com/world/report_pakistani-tribesmen-rally-against-us-drone-strikes_1604371> accessed October 28, 2011. Note: Khan is a common surname of Central Asian origin, primarily found in Afghanistan, Bangladesh, India and Pakistan, and Imran Khan is no relation to the previously mentioned Tareq Khan or Samir Khan. See Sir Henry Yule, Hobson-Jobson, *A Glossary of Colloquial Anglo-Indian Words and Phrases, and of Kindred Terms, Etymological, Historical, Geographical and Discursive* (new edn edited by William Crooke, B.A. London: J. Murray, 1903), Digital Dictionaries of South Asia Website, available at <<http://dsal.uchicago.edu/dictionaries/hobsonjobson/>> accessed October 28, 2011.

“government should quit if it could not take action in this regard.”¹²⁶ As a follow-on consequence impacting U.S.-coalitional operations in Afghanistan, sitting protesters in various places in Peshawar suspended the vital NATO supply chain of vehicles.¹²⁷

Not limited to governmental agencies, this targeted killing as customary national security policy has also led to the opportunity for some increased “privatized” efforts in targeted killing operations. An offshoot of the former Blackwater International/Xe private military company (PMC),¹²⁸ now called “Select PTC,” has allegedly been involved in classified clandestine activities in countries around the world, including Pakistan, Afghanistan, Iraq, Syria and the Philippines, and the same unit was also purportedly awarded a classified contract to assist U.S. government assets in targeted killing of AQ leaders around the world.¹²⁹ “There are skills we don’t have in government that we may have an immediate requirement for,” General Michael V. Hayden, who ran the CIA from 2006 until early 2009, said during a panel discussion on the privatization of intelligence and alluding to a foundational need for contractors to fill needs inherent to successful targeted killing planning and execution.¹³⁰ Quoting one government official familiar with the CIA program and the role of contractors in targeted killing, “[t]he actual pulling of a

¹²⁶ Ibid.

¹²⁷ “Imran Khan starts his Two Day Protest Against Drone Attacks,” Latest BBCNews website, available at <<http://www.latestbbcnews.com/imran-khan-starts-his-two-day-protest-against-drone-attacks.html>> accessed October 28, 2011.

¹²⁸ With respect to mercenarism and Private Military Firms/Private Military Corporations, see, e.g., P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell: Cornell University Press, 2003) 8, and see Kevin H. Govern and Eric C. Bales, “Taking Shots at Private Military Firms: International Law Misses its Mark (Again)” (2008) 32 *Fordham Int’l L.J.* 55, and Louise Doswald-Beck, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) ch. 7. These authors significantly distinguish between and among those categories of legal versus illegal actors subject to national and international criminal law, and the laws of war/international humanitarian law.

¹²⁹ “Same Blackwater, Different Names,” ABC News website, available at <<http://abcnews.go.com/Blotter/blackwater-names/story?id=9634372&page=2>> accessed October 28, 2011. According to a 2009 report in *The Nation*, JSOC, in tandem with Blackwater/Xe, has an ongoing drone program, along with “snatch and grabs” of high-value targets, along with targeted killing operations based upon “plans developed in part by Blackwater,” with operations based in Karachi and conducted both in and outside of Pakistan. See Jeremy Scahill, “Blackwater’s Secret War in Pakistan,” *The Nation*, 23 November 2009, available at <<http://www.thenation.com/article/secret-us-war-pakistan>> Accessed October 28, 2011. Note: this is not to be confused with the similar-sounding “PTC Select,” whose “highly trained network support engineers build, upgrade, secure and maintain computer network through scheduled visits.” See PTC Select website, available at <<http://www.ptcselect.com/>> accessed October 28, 2011.

¹³⁰ “CIA Said to Use Outsiders to Put Bombs on Drones,” *NY Times.com*, available at <<http://www.nytimes.com/2009/08/21/us/21intel.html>> accessed October 28, 2011. By way of caveat, the article goes on to say “General Hayden, who succeeded Mr. Goss at the agency, acknowledged that the CIA program continued under his watch, though it was not a priority. He said the program was never prominent during his time at the CIA, which was one reason he did not believe that he had to notify Congress. He said it did not involve outside contractors by the time he came in.”

trigger in some ways is the easiest part, and the part that requires the least expertise . . . It's everything that leads up to it that's the meat of the issue."¹³¹

Following the United States' lead in hiring "privatized" support to targeted killing, the crown prince of Abu Dhabi, Sheik Mohamed bin Zayed al-Nahyan has hired former president of Blackwater/Xe, Erik Prince, to build an 800-member battalion of foreign troops nicknamed "Reflex Responses" (R2) for the United Arab Emirates (UAE).¹³² The private force's intended purpose is "to conduct special operations missions inside and outside the country, defend oil pipelines and skyscrapers from terrorist attacks and put down internal revolts."¹³³ The crown prince of Abu Dhabi also intends for such troops to deploy if they are confronted with pro-democracy uprisings such as similarly situated Arab countries have experienced in 2011,¹³⁴ and as part of such internal defense missions, that battalion may well be called upon to conduct targeted killing of key insurgent or insurrection leaders.

As apparent validation of the above-mentioned emergent "political acceptance" of targeted killing, the U.S. predator drone strike the week of June 20, 2011 against senior members of al Shabab in Somalia reportedly ensued from "growing concern within the U.S. government that some leaders of the Islamist group are collaborating more closely with al-Qaeda to strike targets beyond Somalia."¹³⁵

This most recent airstrike makes Somalia "at least the sixth country where the United States is using drone aircraft to conduct lethal attacks, joining Afghanistan, Pakistan, Libya, Iraq and Yemen," with reports indicating that the CIA is "expected to begin flying armed drones over Yemen in its hunt for al-Qaeda operatives."¹³⁶ Targeted killing is a "growth industry" as far as modern warfare is concerned. The difficulty that stems from the need to justify the rejection of the traditional rule of capture in just war theory, and in international humanitarian law, poses a significant challenge to establishing its legitimacy.

Few if any nations, groups, or individuals outside of those allied or sympathizing with AQ have chosen to challenge the targeted killing of bin Laden by moralizing the acts of those who might be wrongfully identified for assassination or targeted killing. Even so, some academics challenge the legitimacy of the targeted killing, or the potential targeted killing of some other AQ operatives.¹³⁷ That is to say,

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Mazzetti, *supra* n. 19.

¹³⁵ Greg Jaffe and Karen DeYoung, "U.S. Drone Targets Two Leaders of Somali Group Allied with al-Qaeda, Official Says," *Washington Post*, June 29, 2011, available at <http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFzrH_story.html> accessed October 28, 2011.

¹³⁶ Ibid. See also Afsheen John Radsan and Richard Murphy, "Measure Twice, Shoot Once: Higher Care For Cia-Targeted Killing," *University of Illinois Law Review*, Vol. 2011, 1201 *et seq.*

¹³⁷ See, e.g., Doebller, *supra* n. 85, and Ryan P. Alford, "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens, March 7, 2011," *Utah Law Review*, forthcoming,

those targeted may have had justifiable cause to lead, follow, order or act as individuals, or on behalf of groups, organizations, or nations.¹³⁸ Still, one might return to think upon the time-tested, and oft-emulated logic, espoused by St Augustine, that nation-states are themselves “large-scale terrorist gangs:” “Because I do it with one small ship, I am called a terrorist. You do it with a whole fleet and are called an emperor.”¹³⁹ By implied, dualistic effect under such logic, and taken to its extreme end, mercenaries, pirates, terrorists, and insurgents could gain the same legal and moral status—and liability—as nations.¹⁴⁰

What is the propriety, and preference, from a moral standpoint, of capturing adversaries to bring them to justice instead of illicit assassination or licit targeted killing? From a non-legal perspective, the House of Commons Library Report also considered the present-day philosophical and pragmatic rationales that would support capturing terrorists, compared or contrasted to making them the subject of targeted killing. Quoting A.C. Grayling, professor of philosophy at the University of London:

It would have been preferable to do that [capture bin Laden rather than kill him]—not because it would have been easier and not because it would have saved other lives in future—but because in the ideal, if we were to live up to the principles of our civilization (sic) (or the ones we claim anyway) it would have been the right thing to do. But practicality makes very, very different demands.¹⁴¹

What cannot be denied about targeted killing, regardless of the calculations of the cost-to-benefit ratio, is that there is a growing trend of nations seeking the assassination of adversaries and, with it, increasing legitimacy of targeted killing in any given case, depending on the norms and particular details under those norms

Targeted killing can and should be only one of a series of politico-military strategies for national security and homeland defense, neither solely within the purview of governmental agencies, nor contracted out entirely to PMCs and others. As a

available at SSRN: <<http://ssrn.com/abstract=1780584>> accessed October 28, 2011, and Chibli Mallat, “The Geneva Conventions and the Death of Osama bin Laden,” *JURIST*—Forum, August 4, 2011, available at <<http://jurist.law.pitt.edu/forum/2011/08/chibli-mallat-bin-laden.php>> accessed October 28, 2011, and see also Afsheen, *supra* n. 136, and Robert Chesney, “Who May Be Killed? Anwar al-Awlaki As a Case Study in the International Regulation of Lethal Force,” 13 *Y.B. Int’l Humanitarian L.* (forthcoming).

¹³⁸ See Christian Bueger, Jan Stockbruegger and Sascha Werthes, “Pirates, Fishermen and Peacebuilding: Options for a Sustainable Counter-Piracy Strategy in Somalia,” *Contemporary Security Policy* Vol. 32, No. 2 (2011).

¹³⁹ Augustine of Hippo, *De Civitate Dei* (400), IV, 4, as quoted in Christopher Kirwan, *Augustine* (1989).

¹⁴⁰ See, e.g., Govern and Bales, *supra* n. 128.

¹⁴¹ *Ibid.* at 8, citing with authority “Osama bin Laden’s Death—Killed in a Raid or Assassinated?,” *The Guardian*, May 6, 2011, available at <<http://www.guardian.co.uk/world/2011/may/06/osama-bin-laden-death-assassination>> accessed October 28, 2011.

model for such a balanced approach, we might look to the United States' most recent counterterrorism strategy released on June 29, 2011.¹⁴²

But counterbalancing the weight of strategy, our inquiring into the legitimacy of targeted killing must include an investigation into the relationship between targeted killing and a set of core values, including rule of law and the privacy, civil rights, and civil liberties of all citizens.¹⁴³ The nation must employ every means and methodology at its disposal, including intelligence, military, homeland security and law enforcement, and securing much-needed cooperation from others. A crucial aspect of securing that cooperation is to establish fair and lawful terms of cooperation. The practice of targeted killing is not merely a philosophical debate, or an academic exercise regarding the conflict of laws in abstraction; this emergent method of fighting wars has risen to prominence as our primary strategy in the war on terror. Unless carefully theorized, and squarely addressed in real-world application, actual people around the globe who may be legally entitled—and might have the physical opportunity—to surrender under IHL may have not just their rights marginalized, but their lives cut short with or without justification by the developing trend towards kill rather than capture.

Nations that want to ensure their own security must also build partnerships with international institutions and partners so that they can counter threats where they begin when they begin.¹⁴⁴ The United States, in particular, “partners best with nations that share [its] common values, have similar democratic institutions, and bring a long history of collaboration in pursuit of our shared security,”¹⁴⁵ while “recognizing and working to improve shortfalls in cooperation with partner nations,”¹⁴⁶ lest adversaries exploit those shortfalls first.

The United States' Joint Special Operations University recently assessed the span of U.S. and foreign military operations throughout history, finding that the “[h]unting for persons of national interest and high value targets has been emblematic of U.S. operations—direct action—whereas indirect methods such as foreign internal defense should have been seen as the main effort.”¹⁴⁷ Effectively planning

¹⁴² The National Strategy for Counterterrorism, June 2011, available at <http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf> accessed October 28, 2011.

¹⁴³ *Ibid.* at 4.

¹⁴⁴ *Ibid.* at 2.

¹⁴⁵ *Ibid.* at 6.

¹⁴⁶ *Ibid.* at 4.

¹⁴⁷ George A. Crawford, “Manhunting: Counter-Network Organization for Irregular Warfare,” JSOU Report 09-7 (Hurlburt Field, FL: The JSOU Press, 2009) vii, available at <http://www.bibliotecapeyades.net/archivos_pdf/manhunting.pdf> accessed October 28, 2011. Foreign Internal Defense is defined by the U.S. DoD as “Participation by civilian and military agencies of a government in any of the action programs taken by another government or other designated organization to free and protect its society from subversion, lawlessness, insurgency, terrorism, and other threats to its security. Also called FID.” U.S. Joint Publication JP 1-02, *supra* n. 21, 145.

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for and executing national security and homeland security in the manner outlined above will likely mean fewer *in extremis*¹⁴⁸ requirements for direct action/targeted killing of persons such as bin Laden. Future efforts to “free and protect [societies] from subversion, lawlessness, insurgency, terrorism, and other threats to . . . security” will increase demand for highly trained, culturally astute, superbly disciplined uniformed service members such as SOF “operators” to promote and maintain a vigilant and active peace. In this manner, rather than targeting the symptomatic expressions of terror, the United States will instead prescriptively promote the rule of law abroad as one of many measures to eliminate the root causes of terrorism, while maintaining the capability to deliberately and carefully tailor uses of authorized, licit force around the world.

Finally, in the spirit of the best offense being a good defense, the United States must aid other nations in fostering proactiveness, “to deter and interdict threats without resorting to the expense and turbulence associated with deployment of major military formations,”¹⁴⁹ and should sustain a “culture of preparedness and resilience” that will allow them “to prevent or—if necessary—respond to and recover successfully” from threats posed to their security.¹⁵⁰ Understanding the origins of AQ and bin Laden’s leadership of that organization, and the operational, legal, and moral aspects behind bin Laden’s targeted killing, will become key to developing sound future U.S. strategies, policies, and programs against AQ and its successors-in-interest.¹⁵¹ Such multidisciplinary approaches to future national security matters should, have, and will involve (re-)considering some tested-and-true methods of mastering present and future destiny by principled action, not merely idle, amoral ambition or convenience of choice.

¹⁴⁸ Ibid. at 22 says “‘In-extremis’ refers to a situation of such exceptional urgency that immediate action must be taken to minimize imminent loss of life or catastrophic degradation of the political or military situation.”

¹⁴⁹ Crawford, *supra* n. 147, 40.

¹⁵⁰ National Strategy, *supra* n. 142, 8.

¹⁵¹ Rollins, *supra* n. 2, i.