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## Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing

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# Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing

Luis E. Chiesa\*

Alexander K.A. Greenawalt\*\*

## *Abstract*

*Using the May 2011 killing of Osama bin Laden as a case study, this Article contributes to the debate on targeted killing in two distinct ways, each of which has the result of downplaying the centrality of international humanitarian law (IHL) as the decisive source of justification for targeted killings.*

*First, we argue that the IHL rules governing the killing of combatants in wartime should be understood to apply more strictly in cases involving the targeting of single individuals, particularly when the targeting occurs against nonparadigmatic combatants outside the traditional battlefield. As applied to the bin Laden killing, we argue that the best interpretation of IHL would have required the SEALs to capture bin Laden in conditions short of surrender, if he was in fact manifestly defenseless or otherwise could have been readily captured with little risk.*

*Second, we take seriously the possibility that the law should tolerate some targeted killings under conditions that are justified neither by reference to IHL nor by reference to the traditional*

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*justifications available in peacetime. Drawing upon the example of Colombian crime family leader Pablo Escobar, who died in a police raid in 1993 in circumstances suggesting the authorities were not interested in capture, we suggest that targeted killings in these circumstances may be morally—if not legally—justified when (1) killing the targeted individual will protect society from a serious threat, (2) the individual is undeniably culpable for past atrocities, and (3) trying the individual is either logistically impossible or extraordinarily dangerous.*

*Although we conclude that the bin Laden killing does not clearly satisfy the third criterion, this model nevertheless provides—in important ways—a superior framework for understanding public responses to bin Laden’s death than does the war paradigm.*

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### *I. Introduction*

On the evening of Sunday, May 1, 2011, President Barack Obama appeared on television to announce that a United States operation had killed Osama bin Laden following a raid upon the al Qaeda leader's secret home in Abbottabad, Pakistan.<sup>1</sup> In the United States, the news that the mastermind of the 9/11 attacks had finally been taken down after a decade of false leads and

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1. See President Barack Obama, *Osama Bin Laden Dead*, THE WHITE HOUSE BLOG (May 2, 2011, 11:35 p.m.), <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead> (last visited Sept. 24, 2012) (transcribing President Obama's address) (on file with the Washington and Lee Law Review).

intelligence failures was met, understandably, with widespread jubilation, and crowds gathered in New York City and Washington, D.C., to celebrate the event.<sup>2</sup> As the *New York Times* reported the following morning, “Bin Laden’s demise is a defining moment in the American-led fight against terrorism, a symbolic stroke affirming the relentlessness of the pursuit of those who attacked New York and Washington on Sept. 11, 2001.”<sup>3</sup>

News reports in subsequent days and weeks revealed additional details of the suspenseful operation against bin Laden: A Navy SEAL team flew clandestinely by helicopter deep into Pakistan and undertook its mission by cover of night in a sprawling compound.<sup>4</sup> Analysts debated the significance of the killing for future anti-terrorism efforts and the implications for the United States’ relationship with Pakistan, given the startling revelation that bin Laden was not hiding in the remote tribal areas of the Northwest, where Pakistan has struggled to establish control, but in an affluent suburb only thirty miles outside Islamabad.<sup>5</sup>

Comparatively little public attention, at least inside the United States, has focused on the killing’s legality.<sup>6</sup> Was the

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2. See Peter Baker et al., *Bin Laden Is Dead, Obama Says*, N.Y. TIMES, May 2, 2011, at A1 (describing the American public’s reaction to President Obama’s announcement of bin Laden’s death). For a more detailed summary of existing reports of the operation, see Beth Van Schaack, *The Killing of Osama Bin Laden & Anwar Al-Aulaqi: Uncharted Legal Territory*, 14 Y.B. INT’L HUMANITARIAN L. 255, 258–60 (2012).

3. *Id.*

4. See *How the Raid Unfolded*, N.Y. TIMES, May 7, 2011, <http://www.nytimes.com/interactive/2011/05/02/world/asia/abbottabad-map-of-where-osama-bin-laden-was-killed.html> (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review); *Osama Bin Laden’s Death: How It Happened*, BBC, (June 7, 2011), <http://www.bbc.co.uk/news/world-south-asia-13257330> (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review); Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, Aug. 8, 2011, at 34, 35 (providing a detailed account of the mission and its planning).

5. See Schmidle, *supra* note 4, at 36 (describing American efforts to locate bin Laden in Pakistan since 2001 and stating “it remains unclear how [bin Laden] ended up living in Abbottabad”).

6. Although some members of the human rights community voiced objections, the raid sparked substantially more public criticism abroad. See WILLIAM SHAWCROSS, JUSTICE AND THE ENEMY: NUREMBERG, 9/11, AND THE TRIAL OF KHALID SHEIKH MOHAMMED 194–200 (2011) (discussing international human rights organizations’ reactions to the bin Laden killing).

killing an exercise of individual self-defense on the part of Navy SEALs? Or were U.S. forces operating under more permissive rules of engagement that did not require bin Laden to pose an immediate threat? In his speech to the nation, the President did not address these questions explicitly. To the extent his remarks provided an answer, they gave mixed signals.<sup>7</sup> On the one hand, President Obama emphasized the gravity of the al Qaeda leader's criminality and appeared to portray the mission as an exercise in criminal justice. Bin Laden was "the leader of al Qaeda, and a terrorist who's responsible for the murder of thousands of innocent men, women, and children."<sup>8</sup> The operation the President authorized was one "to get bin Laden and bring him to justice," and by his killing, the President could "say to those families who have lost loved ones to al Qaeda's terror: Justice has been done."<sup>9</sup> The President struck a similar chord in a television interview the following week, in which he explained that "the one thing I didn't lose sleep over was the possibility of taking bin Laden out. Justice was done. And I think that anyone who would question that the perpetrator of mass murder on American soil didn't deserve what he got needs to have their head examined."<sup>10</sup>

Few could doubt the President's assessment of bin Laden's individual desert, but desert alone does not supply a justification for killing. The law, after all, generally does not authorize law-enforcement officials to kill dangerous criminals in lieu of a criminal trial conducted in accordance with due process of law.<sup>11</sup>

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7. See Obama, *supra* note 1 (recounting bin Laden's role in the 9/11 attacks, efforts to track bin Laden, and Obama's order "to get Osama bin Laden and bring him to justice" but not addressing any legal grounds supporting the killing).

8. *Id.*

9. *Id.*

10. *Killing Bin Laden: The President's Story*, 60 MINUTES (CBS television broadcast May 8, 2011), available at <http://www.cbsnews.com/video/watch/?id=7365396n&tag=mncol;lst;10>.

11. In U.S. law, this prohibition finds expression in the Fifth and Fourteenth Amendments to the Constitution. See U.S. CONST. amends. V, XIV (codifying due process rights). At the international level, equivalent protections are found in major human rights treaties among other sources. See NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 91–139 (2008) (analyzing protections found in the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR), and the European Convention

Accordingly, killing by law-enforcement officials is generally only permitted on urgent preventive grounds, to deflect an imminent lethal threat to self or others, or to prevent a dangerous suspect's escape.<sup>12</sup>

In his speech, the President also indicated a separate consideration that has significant legal implications: the United States was at “war against al Qaeda to protect our citizens, our friends, and our allies.”<sup>13</sup> Although the discourse of war received only passing mention in this context, it assumed prominence in later days as administration officials more explicitly addressed the legality of the bin Laden killing. In a May 19, 2011 blog post on the international law blog *Opinio Juris*, State Department Legal Advisor Harold Hongju Koh relied exclusively on the law regulating the conduct of war—the “law of war” in U.S. legal terminology, or international humanitarian law (IHL) in the terminology of international law—to justify the operation against bin Laden.<sup>14</sup> He noted that, following 9/11, Congress authorized the use of force against al Qaeda, and he referred to the current existence of an “armed conflict with al-Qaeda, the Taliban and associated forces.”<sup>15</sup> Pursuant to the applicable rules of war, argued Koh, U.S. forces were permitted to kill bin Laden as an enemy combatant without prior due process because he had not affirmatively provided a “genuine offer of surrender that [was] clearly communicated . . . and received by the opposing force,

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for the Protection of Human Rights and Fundamental Freedoms (ECHR), along with relevant authority).

12. See *infra* Part III (discussing permissive killings); MELZER, *supra* note 11, at 232 (providing the circumstances, based on a review of international legal sources, in which lethal force may be used). Melzer concludes that “[a]s a general rule, *potentially* lethal force should not be used except to: (1) defend any person against an imminent threat of death or serious injury, (2) prevent the perpetration of particularly serious crime involving grave threat to life, or (3) arrest a person presenting such a danger and resisting arrest, or to prevent his or her escape.” *Id.*

13. Obama, *supra* note 1.

14. Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011, 6:00 AM), <http://opinionjuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/> (last visited Sept. 24, 2012) (setting forth grounds for the legality of bin Laden's killing) (on file with the Washington and Lee Law Review).

15. *Id.*

under circumstances where it [was] feasible for the opposing force to accept that offer of surrender.”<sup>16</sup>

The invocation of the more permissive approach to killing applicable in wartime raises its own set of questions, concerning whether the war paradigm applies and which rules of engagement this body of law permits. The tension revealed in Obama’s speech—between bin Laden as a criminal suspect and bin Laden as an enemy combatant—is emblematic of the broader difficulties raised in recent years by the practice of targeted killing as a component of the United States’ efforts to combat al Qaeda in Afghanistan, Pakistan, Yemen, and elsewhere, and by Israel’s counterterrorism efforts in the West Bank and Gaza.<sup>17</sup>

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16. *Id.* Subsequent statements by U.S. government officials have expanded upon the legal basis of U.S. targeted-killing policy without impacting this aspect of the basis for the bin Laden killing. *See, e.g.*, Eric Holder, U.S. Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (last visited Sept. 24, 2012) (maintaining that the targeted killing of a U.S. citizen terrorist is lawful if: “. . . the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles”) (on file with the Washington and Lee Law Review); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, The Ethics and Efficacy of the President’s Counterterrorism Strategy, Remarks to the Wilson Center (Sept. 6, 2012), *available at* <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (last visited Sept. 24, 2012) (stating that certain “targeted strikes are legal,” ethical, and wise under international and U.S. law and policy) (on file with the Washington and Lee Law Review); Jeh Charles Johnson, Gen. Counsel of the Dep’t of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Address at Yale Law School (Feb. 22, 2012), *available at* <http://ylsm mediaserv.law.yale.edu/netcasts/2012/YLSThomasJohnson022212.mp3> (last visited Sept. 24, 2012) (summarizing “some of the basic legal principles that form the basis for the U.S. military’s counterterrorism efforts against Al Qaeda and its associated forces”) (on file with the Washington and Lee Law Review).

17. Recent academic literature addressing these issues is substantial. For selected works of particular relevance to this Article, see generally TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012); MELZER, *supra* note 11; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145 (2010); Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, 23 J. APPLIED PHIL. 323 (2006); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE



Gabriella Blum and Philip Heymann have aptly summarized how this emerging practice has tested the intuitions underlying the traditional legal paradigms that regulate the conditions under which governments may kill individuals as exercises of either law enforcement or war powers:

A targeted killing entails an entire military operation that is planned and executed against a particular, known person. In war, there is no prohibition on the killing of a known enemy combatant; for the most part, wars are fought between anonymous soldiers, and bullets have no designated names on them. The image of a powerful army launching a highly sophisticated guided missile from a distance, often from a Predator drone, against a specific individual driving an unarmored vehicle or walking down the street starkly illustrates the difference between counterinsurgency operations and the traditional war paradigm. Moreover, the fact that all targeted killing operations in combating terrorism are directed against particular individuals makes the tactic more reminiscent of a law enforcement paradigm, where power is employed on the basis of individual guilt rather than status (civilian/combatant). Unlike a law enforcement operation, however, there are no due process guarantees: the individual is not forewarned about the operation, is not given a chance to defend his innocence, and there is no assessment of his guilt by any impartial body.<sup>18</sup>

We do not attempt in this Article to resolve every problem associated with targeted killing. Nor do we attempt a definitive answer regarding the legality of bin Laden's killing itself. However, the circumstances surrounding bin Laden's demise bring into sharp focus the war paradigm's limits as a justifying framework for the evolving practice of targeted killing. In this respect, this Article contributes to the debate on targeted killing in two distinct ways, both of which have the result of downplaying the war paradigm as the decisive justification for targeted killing.

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IN CONTEXT (Simon Bronitt ed.) (forthcoming), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES L. 179 (2004); Van Schaack, *supra* note 2.

18. Blum & Heymann, *supra* note 17, at 147–48.

In Part II, we argue that IHL, assuming it applies, does not play the decisive role in justifying targeted killing that is often assumed.<sup>19</sup> The problem here is twofold. First, there is indeterminacy in IHL itself. It remains unclear how the requirements of IHL—in particular, the overarching mandate that killing pursue military necessity—apply to operations, such as the bin Laden killing, whose functional requirements do not resemble those traditionally associated with the battlefield, but rather mirror those of traditional law-enforcement operations.<sup>20</sup> Second, the problem of targeted killing exposes a deeper uncertainty about the moral status of IHL. At its root, IHL is a body of law that relaxes the deep-seated rule against murder.<sup>21</sup> Its expanded permission to kill most plausibly reflects realism in the face of the historical inevitability of war rather than a fully developed moral justification for killing.<sup>22</sup> Because of this feature of IHL, the possibility that other law might similarly evolve to accommodate expanded forms of killing outside the war paradigm cannot be ruled out. However, it also urges deep caution with respect to the interpretation and the application of IHL in nonparadigmatic cases.

These considerations justify the intuition—reflected already, to a degree, in both U.S. policy<sup>23</sup> and Israeli judicial doctrine<sup>24</sup>—that the rules governing killing should be stricter in cases involving the targeted killing of single individuals, particularly when the targeting occurs against nonparadigmatic combatants outside the traditional battlefield. They also indicate that IHL's

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19. See *infra* Part II (discussing moral and legal justifications for targeted killing in war).

20. See *infra* Part II.C (discussing the difficulties of applying traditional criteria for targeting killing to the circumstances involving bin Laden).

21. See MELZER, *supra* note 11, at 74–81 (defining basic principles of IHL and the legal framework it provides for justifying targeted killings).

22. See *infra* Part II.A (discussing how IHL's justification for killing illustrates the law's adapting to real needs).

23. See, e.g., Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1 (outlining President Obama's stipulations for targeted killing).

24. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel paras. 18–23 [2005] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (recognizing the need to balance humanitarian considerations against military need).

generally expansive approach to killing is inappropriate in operations that are not supported by functional requirements or reasons that plausibly sound in military advantage.<sup>25</sup>

Although these considerations alone cannot tell us whether it was permissible to kill bin Laden under the circumstances—much depends on facts that may never be known—they do call into question the breadth of the standard that the State Department applied in justifying the killing. It is not enough, we argue, to establish that bin Laden was a combatant engaged in armed conflict against the United States who had not affirmatively and clearly surrendered under conditions that would have facilitated a safe capture. We argue that the best interpretation of IHL required an attempt to capture bin Laden absent surrender unless the decision to kill in lieu of capture was justified by recourse to conventional understandings of military advantage, was in fact motivated by the pursuit of military advantage, and would have spared U.S. military personnel from risks greater than those generally expected of law-enforcement officials acting under like circumstances.<sup>26</sup> Although it is correct, as commentators have noted, that IHL does not impose any general duty to capture non-surrendering combatants, the requirements we identify are implied in other rules of IHL and, more deeply, by the structure of IHL itself.<sup>27</sup>

The remainder of the Article takes seriously the possibility that the law should tolerate some targeted killings under conditions that are justified neither by reference to an armed conflict nor by reference to the traditional parameters of the law-enforcement paradigm. Part III explores the limits of existing legal categories rooted in self-defense, lesser-evils, and law-enforcement authority as frameworks for justifying targeted killings.<sup>28</sup> In Part IV, we identify what we believe to be one of the

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25. See *infra* Part II.B (discussing the importance of military necessity to justify targeted killing).

26. See *infra* Part V.D (laying out criteria to justify killing rather than capture).

27. See *infra* Part II.B (arguing that IHL implicitly requires a duty of capture in some cases).

28. See *infra* Part III (discussing legal grounds for targeted killing outside of war, including defense of self or others, law enforcement, and a necessary or lesser evil).

most persuasive cases for justifying targeted killing beyond the currently accepted paradigms: that of late Colombian crime family leader Pablo Escobar, who died in a police raid in 1993 in circumstances suggesting the authorities were not interested in capture.<sup>29</sup> As we explore in Part V, we are uncertain whether the lessons of the Escobar killing can or should be reduced to a judicially enforceable legal standard, but the intuition that Colombian authorities would have acted justifiably in ordering the killing is supported by three features that distinguish Escobar from other criminal suspects.<sup>30</sup> First, at the time of his death, he remained a dangerous individual who posed demonstrable dangers to Colombian society and was almost certain to continue his involvement in serious crimes.<sup>31</sup> Second, he was unquestionably guilty of horrendous crimes that rank among the worst of the late twentieth century.<sup>32</sup> Third, his track record—including the murder of incorruptible judges and his prior escape from confinement—indicated that it was infeasible and unacceptably dangerous to try him.<sup>33</sup>

Might these criteria that support the killing of Escobar likewise justify the killing of Osama bin Laden? We think not. As we explain in Part VI, although the bin Laden case mirrors Escobar's in the combination of grave, unquestionable guilt and continuing danger, the obstacles to trial remain speculative and lack the demonstrable urgency witnessed by the case of Escobar, who, by the time of his death, had already established a track record of corrupting and murdering the officials whom the legal system relied on to bring him to justice.<sup>34</sup> There is no parallel in the case of bin Laden, and to justify his killing based on the more generalized fear that a trial would bring security risks would create a dangerous slippery slope.

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29. See *infra* Part IV (discussing the killing of Pablo Escobar as well as reactions to and justifications for the killing).

30. See *infra* Part V (analyzing what Escobar's killing teaches about the morality of targeted killing and its justifications).

31. See *infra* Part IV.A (describing Escobar's threat to the justice system).

32. See *infra* Part IV.A (describing Escobar's crimes).

33. *Id.*

34. See *infra* Part VI (comparing Escobar and bin Laden and considering whether justifications for killing Escobar extend to bin Laden's killing).

Nevertheless, the Escobar precedent remains relevant to the bin Laden killing. As a descriptive matter, we believe that the Escobar precedent better explains the public reception of bin Laden's killing—if not the government's actual motives—than does a focus on wartime hostilities. In other words, the reason why bin Laden's killing occasioned so little debate in the United States is that the public saw bin Laden much as the President presented him in his May 1 speech: not simply or even primarily as a military opponent, but as a dangerous and deeply culpable criminal.<sup>35</sup> As a normative matter, moreover, the Escobar precedent arguably provides a superior—if ultimately unsuccessful—argument for why, assuming bin Laden could have been readily captured at minimal risk, it was nevertheless appropriate to kill him. Finally, Escobar's case is informative for understanding the bin Laden killing as a precedent, one that may point toward a developing law in action that justifies a limited set of targeted killings based on considerations of culpability and danger, rather than a connection to armed conflict.

Although we are concerned about where this precedent could lead and would sharply limit the evolving law to privilege criminal trials whenever feasible, there is also value to speaking honestly about the possible bases of government action. The temptation to rely on IHL to justify targeted killings understandably derives from the fact that this is the body of law that makes it easiest to justify killing. But relying on IHL comes with the risk that states will expansively interpret that body of law so as to justify policies that have little basis in the values or functional requirements that initially gave rise to IHL. If governments are in fact looking to culpability considerations in developing policies of targeted killing, then there is value to considering the circumstances under which such policies might be justified and to debating concrete cases pursuant to the criteria that are likely of most relevance to decision makers.

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35. See Obama, *supra* note 1 (“[B]in Laden has been al Qaeda’s leader and symbol, and has continued to plot attacks against our country and our friends and allies.”).

*II. Justifying Targeted Killing in War*

When people debate the legality of targeted killings, they usually have in mind one or more cases that they believe represent core examples of the practice. A common case—call it TK 1—takes place in the theater of war and invokes IHL<sup>36</sup> to justify the killing.<sup>37</sup> As a general matter, the world's legal systems forbid the intentional killing of individuals except in narrowly defined circumstances, such as when necessary to prevent the imminent use of lethal force by a wrongdoer.<sup>38</sup> But if TK 1 cases are properly subject to IHL, the legal landscape changes considerably. Pursuant to these war rules, the norm against killing is remarkably relaxed. Provided that a number of status-based requirements are met, combatants in armed conflicts are permitted to use lethal force against their opponents in ways that would otherwise violate the peacetime prohibition against murder. When combatants aim to kill their opponents, there is no requirement that those targeted pose an imminent threat, or indeed pose any sort of direct threat beyond their participation in the broader war effort.<sup>39</sup> As Michael Walzer has

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36. See MELZER, *supra* note 11, at 74–81 (defining basic principles of IHL and the legal framework it provides for analyzing targeted killings).

37. See *id.* at 55–58 (discussing the application of IHL to justify targeted killing in conflicts).

38. See *infra* Part III (addressing the scope of permissible killing in peacetime).

39. See, e.g., Blum & Heymann, *supra* note 17, at 146 (“[T]he enemy combatants belong to another identifiable party and are killed not because they are guilty, but because they are potentially lethal agents of that hostile party.”). The core international rules governing the conduct of hostilities are laid out in the 1977 First Additional Protocol to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (providing, *inter alia*, rules governing the conduct of hostilities). Even for states such as the United States and Israel, which have not ratified the treaty, these rules are generally recognized to reflect requirements of customary international law. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 75 (July 8) (noting that “[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity” of the “large number of customary rules [that] have been developed by the practice of States”); *id.* ¶ 78 (summarizing “[t]he cardinal principles contained in the texts constituting the fabric of humanitarian law”); HCJ 769/02 Pub. Comm. Against Torture in Israel

put it, the law of war permits the killing of “naked soldiers,” those who, for example, are eating their breakfast or are asleep in their beds.<sup>40</sup> The potential for combatants to be attacked derives from the general danger posed by their status.<sup>41</sup> So long as hostilities persist, the potential to be killed terminates only upon a combatant becoming incapacitated—or “*hors de combat*”—on account of his falling into the power of an adverse party; his clearly expressed surrender; or his being rendered unconscious or “otherwise incapacitated by wounds or sickness” such that he is “incapable of defending himself.”<sup>42</sup>

Civilians, by contrast, may not be targeted “unless and for such time as they take a direct part in hostilities,”<sup>43</sup> and the intentional targeting of civilians is a war crime under international law.<sup>44</sup> Nor may belligerents employ weapons or

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v. Gov’t of Israel ¶ 4 [2005] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf) (stating that Additional Protocol I “reflects the norms of customary international law, which obligate Israel”); see, e.g., JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 72 (2005) (mentioning an Israel–Lebanon ceasefire understanding relying on customary international law principles and outlining rules of customary international law governing the conduct of hostilities).

40. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 138 (1977) (“The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 71 (2010) (noting that “[t]he existing interpretation of the laws of war supports Walzer’s conclusion” that a soldier stripped naked and swimming in the lake is a legitimate target during an armed conflict); Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN THE HONOUR OF KNUT IPSEN 144, 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (“[O]rdinary combatants . . . can be attacked (and killed) wherever they are, in and out of uniform: even when they are not on active duty. There is no prohibition either of opening fire on retreating troops (who have not surrendered) or of targeting individual combatants.”).

41. See Blum, *supra* note 40, at 71 (stating that one’s liability to attack is based on his or her status as a combatant).

42. Additional Protocol I, *supra* note 39, art. 41. Thus, IHL prohibits the denial of quarter, including orders that there shall be no survivors. *Id.* art. 40; see also MELZER, *supra* note 11, at 367–71 (discussing the IHL rule against denial of quarter).

43. Additional Protocol I, *supra* note 39, art. 51(3).

44. See, e.g., Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 2187 U.N.T.S. 3 (declaring that “[i]ntentionally

means of warfare that are indiscriminate or that cause unnecessary suffering.<sup>45</sup> Even so, civilians are also subject to reduced protection under the war rules. When combatants attack military targets, they may do so knowing that their actions will kill civilians, so long as the anticipated loss of civilian life is not disproportionate to the anticipated military advantage.<sup>46</sup>

These rules apply equally to all sides in conflict, without distinction based on whether the party invoking IHL is supported by a just cause.<sup>47</sup> Thus, the rules are the same even if the killers are invaders engaged in an illegal aggressive conquest, and their opponents have taken up arms justly because self-defense requires it. In the case of international armed conflicts covered by the Geneva Conventions of 1949, states are affirmatively prohibited from criminally prosecuting as murderers those who have complied with IHL's requirements.<sup>48</sup> No corresponding

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directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" is a war crime).

45. Additional Protocol I, *supra* note 39, arts. 35(2), 51(4).

46. *See id.* art. 51(5)(b) (stating that attacks should be considered indiscriminate if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

47. *See id.* pmb. (applying this protocol "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"). Here as well, these rules are more permissive than those generally enforced by the criminal law. A bank robber who kills a police officer in self-defense may not justify the killing if the police officer herself was justified in using lethal force against the robber under the circumstances. *See* WALZER, *supra* note 40 at 127–28 (offering this hypothetical). Yet precisely such a privilege attaches to those who, fighting an illegal war of aggression, kill enemy combatants who fight a just war of self-defense. *See id.* at 128 ("The moral equality of the battlefield distinguishes combat from domestic crime.").

48. This immunity appears, among other places, in the Geneva Convention Relative to the Treatment of Prisoners of War. Pursuant to Article 87, "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." Geneva Convention Relative to the Treatment of Prisoners of War, art. 87, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention]. Article 99 in turn provides that "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." *Id.* art. 99.



combatant privilege applies in the case of internal armed conflicts (thus, governments may invoke their domestic laws to prosecute rebels for their rebellion), but even here the Second Additional Protocol to the Geneva Conventions endorses “the broadest possible amnesty to persons who have participated in the armed conflict.”<sup>49</sup>

In light of this extraordinary permission that IHL affords, it is unsurprising that the legal debate over the United States’ targeted killing policy has focused predominantly on whether and how this body of law applies.<sup>50</sup> These are the rules that the United States has invoked to justify its targeted killing policies in Afghanistan, Pakistan, and Yemen, and as already noted, to justify the specific targeting of bin Laden.<sup>51</sup> Similarly, Israel’s Supreme Court invoked IHL when ruling on the permissibility of targeted killings in the West Bank and Gaza.<sup>52</sup>

The invocation of IHL in these circumstances has triggered various points of controversy.<sup>53</sup> One set of questions focuses on targeted killing’s *jus ad bellum* dimension. When the United

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As one U.S. court has noted, “[t]hese Articles, when read together, make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war.” *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002).

49. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(5), June 8, 1977, 1125 U.N.T.S. 609.

50. See MELZER, *supra* note 11, at 262–69 (examining the U.S. government’s arguments that the war on terrorism falls outside of traditional categories of “conflict” and therefore is not governed by IHL).

51. See Koh, *supra* note 14 (using IHL’s framework, including its principles of distinction and proportionality, in arguing that the targeted killing of bin Laden was legal); Johnson, *supra* note 16 (discussing when targeted killing is legal); Holder, *supra* note 16 (stipulating conditions under which targeted killing is legal); Brennan, *supra* note 16 (discussing legal principles behind targeted killing).

52. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel para. 18 [2005] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (applying IHL to the armed conflicts in the West Bank and Gaza).

53. For a summary of the principal legal questions involved, see Philip Alston, U.N. Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, paras. 28–92, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].

States launches an attack against an individual residing in Pakistan or Yemen, does the attack represent a legitimate use of force, or is the United States committing an act of aggression against the territorial sovereignty of the state in which the attack has taken place?<sup>54</sup> Another set of questions focuses on whether IHL is the operative body of law governing a particular killing, the central issue being whether the use of lethal force reflects a requisite nexus to an armed conflict (either international or non-international in character).<sup>55</sup> A third set of questions focuses on

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54. See *id.* paras. 37–45 (describing the necessary conditions to allow a targeted attack on an individual in another state’s territory); Van Schaack, *supra* note 2, at 266–81 (surveying the *jus ad bellum* issues present in the killing of Osama bin Laden and Anwar al-Aulaqi); O’Connell, *supra* note 17, at 13 (“The drones used in Pakistan are lawful for use only on the battlefield. The right to resort to them must be found in the *jus ad bellum*; the way they are used must be based on the *jus in bello* and human rights.”); Paust, *supra* note 17, at 279 (concluding that, when acting in self-defense, a nation may attack non-state actors in another state without that state’s permission); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 369–70 (Benjamin Wittes ed., 2009) (discussing the targeting of terrorist suspects without the territorial state’s consent).

On this point, special attention has focused on the scope of the right to self-defense under international law, considering that non-state actors are often killed across international borders. The ICJ has denied that such a right exists with respect to armed attacks by non-state actors that are not imputable to a state. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, paras. 138–39 (July 9) (refusing to apply the inherent self-defense right to permit armed attacks when the “attacks against [the U.N.-member state] are [not] imputable to a foreign State”); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, paras. 235–36 (Dec. 19) (stating that international responsibility only arises if injurious acts are imputed to a state). Current U.S. policy dictates that the use of force can be permissible in those circumstances, absent consent of the third state, provided the state is unable or unwilling to deal effectively with the threat to the United States posed by the non-state group. See Holder, *supra* note 16 (“[T]he use of force in foreign territory [without consent] would be consistent with these international legal principles . . . after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”); Brennan, *supra* note 16 (“There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action . . .”).

55. See Alston Report, *supra* note 53, paras. 46–56 (describing the existence and scope of an armed conflict); MELZER, *supra* note 11, at 76–81 (stating that “the applicability of IHL presupposes the existence of an international or non-

whether the targets of attack—often un-uniformed individuals suspected of membership in terrorist groups—are in fact subject to attack under IHL, either because they have the status of combatants who may be targeted at any time or because they are civilians directly participating in hostilities when they are targeted.<sup>56</sup>

These are vital questions whose resolution is critical to establishing both the permissibility of many targeted killings and the broader scope of anti-terrorism efforts. They are not, however, the primary focus of this Article. We will instead largely assume in this Part that IHL does in fact apply to bin Laden's killing and to other instances of targeted killing. We nevertheless argue that IHL does not play as determinative a role in justifying targeted killing as the current debate would suggest.

Subpart A strikes a cautionary note about the moral status of the IHL rules.<sup>57</sup> Understood in its best light, the scope of the permission to kill in wartime does not reflect a fully developed moral framework for killing, but instead reflects a body of law that is largely reactive to the historical experience of warfare as an inevitable evil that can at best be regulated on the margins so

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international 'armed conflict'). The United States maintains that it is engaged in armed conflict with al Qaeda and that the conflict extends beyond the borders of Afghanistan. See Holder, *supra* note 16 ("Our legal authority is not limited to the battlefields in Afghanistan. . . . We are at war with a stateless enemy, prone to shifting operations from country to country."); Johnson, *supra* note 16 (stating that the conflict against al Qaeda requires military authority for necessary and appropriate force to extend beyond the "hot' battlefields of Afghanistan"); Koh, *supra* note 14 (acknowledging "our armed conflict with al Qaeda"). Thus far, the Obama Administration has not specified whether it considers this to be an international or non-international armed conflict. For a discussion about the complexities associated with both views, see Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 223, 231 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) ("There continues to be debate over the exact parameters of non-international armed conflict, which are relevant to the controversy over the validity of the claim that the United States is, as a matter of law, engaged in a 'transnational armed conflict' with [a] Qaeda and others." (citations omitted)).

56. See Blum & Heymann, *supra* note 17, at 146–47 (explaining that an attack on an individual not wearing a uniform but suspected of involvement in terrorism must be based on the target's status as a combatant or as an agent of a hostile force).

57. See *infra* Part II.A (highlighting moral issues implicated by targeted killing and related international law).

as to temper its inhumanity. This animating feature of IHL cautions against efforts to interpret or expand the war rules to nonparadigmatic cases, but it also cannot preclude the possibility of such expansion. The law, after all, has already once accommodated the reality that states employ more permissive rules of killing than are generally permitted.

Subpart B explores problems of application that arise when justifying targeted killings under IHL.<sup>58</sup> Although the mere fact of combatants being individually targeted need not raise unique problems for IHL, the evolution of targeted killing as a distinct and significant method of warfare puts pressure on IHL, testing how the core legal requirements of necessity and discrimination apply to operations whose mechanics depart significantly from the types of combat that have traditionally informed IHL.

Subpart C details how the killing of Osama bin Laden presents an especially difficult test case for the IHL rules given that the functional mechanics of the operation—an isolated raid on a single house in a noncombat area—resemble in many respects the types of operations associated with law enforcement.<sup>59</sup> We are therefore skeptical that the scope of the permission to kill should depend upon whether we label the operation a wartime attack as opposed to, for example, an operation to apprehend an especially dangerous criminal. Our conclusion does not change, moreover, even assuming that the United States could have permissibly elected alternate, less discriminating means of killing bin Laden, such as by firing a missile from an unmanned aerial vehicle.

#### *A. The Morality of War and the Limits of International Law*

As we just described, to invoke IHL in order to justify targeted killing is to invoke a more permissive legal framework toward killing. Underlying, but often ignored, in the interpretation and application of IHL is a broader moral question concerning why the law recognizes multiple legal paradigms for

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58. See *infra* Part II.B (discussing the application of IHL to targeted killings).

59. See *infra* Part II.C (examining the circumstances of bin Laden's killing with respect to the IHL framework).

killing at the outset. If society maintains that killing is wrong except in very narrow circumstances—such as to prevent the imminent use of lethal force by a wrongdoer—why should our moral judgment change when dealing with wartime scenarios? Why, in particular, should combatants not be bound by the same rules that apply to law-enforcement officials in peacetime? The question is not merely theoretical, as evidenced by the ongoing debate over the application of IHL to targeted killing. Whether and how we apply IHL to borderline or nonparadigmatic cases should be informed, to some degree, by the moral arguments supporting IHL's creation.

Although the morality of killing in wartime is the central focus of multiple intellectual traditions, including just-war theory, the United Nations charter system, and, of course, IHL itself, the nature of the permission to kill in war remains, in many ways, perplexing.<sup>60</sup> The conventional approach to justifying this state of affairs generally proceeds along the following lines: A state's decision to employ the barbaric tactics of war must first be justified only by overriding interests of utmost importance, most paradigmatically the interest of self-defense against an armed attack by another state.<sup>61</sup> The nature of this interest further necessitates, under strictly defined circumstances, the tactics commonly associated with warfare. A state facing an invading army will likely find it impossible to fend off the attack if it commits itself to rules of engagement that limit killing to the circumstances permitted by the law-enforcement paradigm.<sup>62</sup>

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60. See JEFF MCMAHAN, *KILLING IN WAR* 104–07 (2009) (discussing the conflation of morality and legality in the body of international law governing armed conflicts).

61. The right of self-defense is enshrined in Article 51 of the U.N. Charter, which provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.

62. This reasoning finds expression in customary international law's general requirement that the use of armed force in self-defense be both necessary and proportionate, precluding the use of force beyond that necessary to repel an attack or restore the status quo ante. See, e.g., *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, para. 74 (Nov. 6) (“[W]hether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and proportionality of the measures taken in self-defence.” (second alteration in

Therefore, IHL grants a broader permission to kill, albeit the permission is not absolute. Like the law-enforcement paradigm, IHL places certain non-negotiable limits on killing.<sup>63</sup> However, it draws the line in a different, more permissive place.

Those who accept justifications of this nature still have difficulty explaining why international law should embrace the strict separation between *jus ad bellum* and *jus in bello*, such that combatants fighting for illegal aggressors benefit from the same permissive rules that apply to those acting in legitimate self-defense. Walzer has defended this “moral equality of soldiers” by appealing to the moral intuition that it is unfair to blame soldiers merely for fighting wars on behalf of their state, when doing so reflects their “routine habits of law-abidingness, their fear, their patriotism, their moral investment in the state.”<sup>64</sup> Moreover, because most combatants will predictably perceive themselves to be fighting for the just side in war, a rule that privileges just combatants over unjust combatants could serve to increase the cruelty of war.<sup>65</sup> There would be less incentive to comply with even minimal rules of humane treatment if combatants expect to be prosecuted by the opposing side merely for participating in combat.<sup>66</sup> Yet, even if one accepts these arguments, it remains difficult to explain why the law should not

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original) (quoting *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 194 (June 27)).

63. See MELZER, *supra* note 11, at 176 (stating that IHL, like the law-enforcement paradigm, requires necessity, proportionality, and precaution).

64. WALZER, *supra* note 40, at 39; see also GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 21–22 (2008) (“The reason for adopting a rigorous distinction between *jus ad bellum* and *jus in bello* is the need for a bright-line cleavage . . . . Soldiers . . . know that, regardless of who started the conflict, certain means of warfare are clearly illegal.”).

65. See WALZER, *supra* note 40, at 127–28 (stating that soldiers “are most likely to believe that their wars are just,” and that the perspective of all soldiers as morally equal allows for rules governing wartime conduct).

66. See MCMAHAN, *supra* note 60, at 191 (“[Soldiers] might reason, for example, that if they will be punished in any case if they are defeated, . . . each might have nothing to lose . . . from the commission of war crimes or atrocities that would increase their chance of victory and thus of immunity to punishment.”).

impose some duty to resist participation upon combatants who know that they are fighting an unjust war.<sup>67</sup>

As a historical matter, IHL did not emerge from abstract deliberations concerning when killing might be morally permissible. The modern *jus in bello* rules, developed through international agreement in the nineteenth and twentieth centuries, reflect instead an evolving response to the established reality of warfare. For instance, the first international agreement to prohibit the use of a weapon of war—the 1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight<sup>68</sup>—speaks of the “progress of civilization . . . alleviating as much as possible the calamities of war” and of “conciliat[ing] the necessities of war with the laws of humanity.”<sup>69</sup> The literature on IHL is replete with similar indications of a compromised morality, in which the interests of humanity must compete against those of military necessity.<sup>70</sup>

As Jeremy Waldron has written, the development of IHL in this way “proceeded on the basis of moral sociology, discerning the possibility of a viable norm of restraint in this area,” one “that has emerged from centuries of ghastly conflict.”<sup>71</sup> That IHL relaxes the rule against murder, in other words, does not imbue killing in war with a deep moral justification. Instead, IHL

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67. See *id.* at 6 (arguing that “it is morally wrong to fight in a war that is unjust because it lacks a just cause”). The author presents a systematic argument rejecting the separation between *jus ad bellum* and *jus in bello*. See *id.* (arguing “against the view that unjust combatants act permissibly when they fight within the constraints of the traditional rules of *jus in bello*”).

68. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, available at <http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument>.

69. *Id.* at 474–75.

70. See, e.g., Int’l Comm. of the Red Cross, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 392–93 (“The law of armed conflict is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other.”); *id.* at 399 (“Warfare entails a complete upheaval of values.”).

71. Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 112, 127 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

principally seeks to impose at least some “regulative line that can be defended (just!) in the midst of an activity that is otherwise comprehensively murderous.”<sup>72</sup>

This feature of IHL has at least two important implications for the debate over targeted killing. First, as Waldron argues, one should exercise great caution about expanding IHL’s permissive approach to killing.<sup>73</sup> In particular, one should avoid the automatic assumption that IHL reflects a principled approach to killing that is readily susceptible to expansion by analogy.<sup>74</sup> That, as Waldron argues, is precisely “how a norm against murder unravels.”<sup>75</sup> This caution is warranted both with respect to expanding the IHL rules beyond their present scope and to interpreting the requirements of IHL as they apply within the acknowledged scope of the law.

At the same time, the uncertain moral status of IHL also makes it difficult to identify absolute limits on when states may develop more permissive approaches to killing. In this respect, the development of IHL stands as an important precedent for the law’s adjusting the norm against murder to accommodate the inevitability of certain state practices. Notwithstanding the extreme caution that is warranted by this exercise, the very existence of IHL also makes it difficult to preclude the development of other analogous accommodations. If, for example, technological advances facilitate the effective use of targeted killing by states to combat terrorist organizations in ways that fall outside the traditional boundaries of IHL, it becomes difficult to say when precisely the law must hold the line and forbid the practice or when, by contrast, the law may once again surrender and draw a different line, one that tolerates the general practice while seeking, as IHL does, to align it with some basic, more minimal, principles of humanity.

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72. *Id.*

73. *See id.* (“Understanding the background just outlined helps us understand the great caution that must be brought to any attempt to change the laws of war.”).

74. *See id.* at 128 (arguing that, in this context, the common analogies are “all reckless ways to proceed”).

75. *Id.* at 131.



It is instructive here to draw a contrast between the issue of targeted killing and another debate that has figured prominently in recent years, namely, the debate over U.S. interrogation policy with respect to detainees at Guantanamo Bay and elsewhere. Those who condemn the waterboarding of detainees, as well as other “enhanced interrogation techniques,” may persuasively invoke an absolute legal ban on any practices that qualify as torture as defined under international law.<sup>76</sup> This prohibition appears most prominently in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>77</sup> an international treaty that has received near-universal ratification by states.<sup>78</sup> In addition to prohibiting both torture and cruel, inhuman, or degrading treatment, the Convention defines *torture* as a criminal offense subject to extradition obligations<sup>79</sup> and specifies that states may not torture individuals for purposes of information gathering or

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76. See, e.g., David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61, 79–81 (2005) (describing the legal issues surrounding the Justice Department's interpretation of what actions constitute torture). Tellingly, the Administration of President George W. Bush did not assert a justification for torture, but instead denied that government interrogation practices amounted to torture. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A at 27 (Aug. 1, 2002) (stating that international decisions “have found various aggressive interrogation methods” to not constitute torture); Sheryl Gay Stolberg, *Bush Defends Interrogations, Saying Interrogation Methods Aren't Torture*, N.Y. TIMES, Oct. 6, 2007, at A1 (pointing out the controversies regarding the ever-expanding executive authority to pursue terror suspects).

77. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113.

78. See U.N. Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Participants, <http://treaties.un.org/doc/Publication/MTDSDG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (listing the signatories to the Convention and their respective reservations).

79. See U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 77, art. 1 (defining torture); *id.* art. 4 (mandating that “acts of torture” be punishable criminal offences); *id.* art. 8 (mandating that these acts be “included as extraditable offences”); *id.* art. 16 (requiring states to prevent public officials’ “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”).

any other reason.<sup>80</sup> It also states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>81</sup> Thus, opponents of torture may invoke the Convention as evidence that the international community has given the question of torture explicit attention and has judged that an absolute ban is required, one that allows no derogation.

The problem of killing, by contrast, is accompanied by no such absolute ban. And the ways in which IHL already permits killing are dependent on precisely the type of instrumental reasoning that international law rejects in the torture context.<sup>82</sup> Again, this is not to say that one should proceed lightly in justifying expansive permissions for government-sponsored killing. The norm against murder, as Waldron notes, is not just any norm, and proposals to further dilute it must be met with great skepticism.<sup>83</sup> But the structure of IHL also cautions against absolute proclamations.<sup>84</sup>

In Parts III and IV, we will explore further the possibility of justifying some targeted killing outside of both IHL and traditional law-enforcement paradigms. In the remainder of this Part, we explore reasons why, when IHL does govern a targeted

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80. See *id.* arts. 1–2 (defining torture and requiring measures to prevent torture).

81. *Id.* art. 2, para. 2. The Convention also obligates each state to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” *Id.* art. 16, para. 1. The Convention does not explicitly define these practices or regulate them with the same detail it employs for torture, but neither does the Convention acknowledge any exceptions to this prohibition. See *id.* (prohibiting cruel, inhuman, or degrading treatment without listing any exceptions).

82. See *id.* arts. 1–2 (prohibiting torture for any reason, including state of war or other public emergencies).

83. See Waldron, *supra* note 71, at 131 (“What is objectionable is the inherently abusive character of the attitude [behind] reasoning that says: ‘We are allowed to kill some people by principles we already have; surely, by the same reasoning, in our present circumstances of insecurity, there must be other people we are also allowed to murder.’”).

84. See, e.g., U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 77, arts. 1–16 (refusing to proscribe killing explicitly and absolutely).

killing, this body of law is not as determinative as is often supposed.<sup>85</sup>

### *B. IHL and Targeted Killing*

#### *1. The Permission to Kill by Name*

A threshold question is whether a practice of individualized, “named” killing is ever compatible with IHL. Some scholars have questioned the practice of targeted killing on the grounds that it personalizes the conduct of war in a manner incompatible with the underlying moral vocabulary of war.<sup>86</sup> Michael Gross, for example, traces a prohibition on named killing to the seminal Lieber Code of 1863,<sup>87</sup> which admonishes:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.<sup>88</sup>

As Gross elaborates, the permission to kill in wartime presupposes the moral belligerents’ innocence, and both the combatants’ permission to kill and their vulnerability to being killed derives from their role as impersonal agents of a collective entity, the state.<sup>89</sup> The problem with targeting individuals on this

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85. See *infra* notes 86–148 (discussing the application of IHL to targeted killing).

86. See, e.g., Gross, *supra* note 17, at 327–29 (questioning the morality of targeted killing in wartime); Statman, *supra* note 17, at 190 (arguing that “the problem with targeted killing” is that it undermines “*the very justification for killing in war*,” which is that we ignore an enemy’s personal merits or demerits).

87. See Int’l Comm. of the Red Cross, Instructions for the Government of Armies of the United States in the Field (Lieber Code), (Apr. 24, 1863) [hereinafter Lieber Code], available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (setting forth a code of conduct for martial law).

88. *Id.* art. 148.

89. See Gross, *supra* note 17, at 326 (“No one is suggesting that soldiers do not represent material threats . . . . [A]ny uniformed soldier is vulnerable. . . . Soldiers may kill in the service of their state and are therefore innocent of any wrongdoing, a sweeping authorization that international law and all nations endorse.”).

account is that “[o]nce we name soldiers for killing, . . . we upset this innocence with precisely the argument that Lieber presents. Naming names assigns guilt and, as Lieber suggests, proclaims soldiers outlaws. In doing so, named killing places war itself beyond convention.”<sup>90</sup>

We do not share Gross’s concern about named killing. More precisely, we do not believe that it is the practice of naming targets itself that triggers Gross’s concern. Indeed, even the Lieber Code passage just quoted addresses a concern distinct from the practice of named killing per se. The Code focuses on a broad class of potential victims, including not only those belonging to “the hostile army,” but also those who are merely “citizen[s]” or “subject[s],” and thus outside the class of those permissibly targetable in war.<sup>91</sup> It is, moreover, concerned with the proclaiming of individuals as “outlaw[s]” such that they “may be slain without trial by any captor.”<sup>92</sup> The focus, therefore, is on the punitive killing of captured persons. The Code does not address whether belligerents may conduct named killings for other reasons and in other contexts.

There are indeed contexts in which named killing may operate as a routine battlefield practice without violating the moral innocence of targeted combatants. Fernando Tesón supplies the helpful example of a soldier who is targeted on the battlefield because he is an especially skilled machine gunner, who has proven adept at cutting down opposing soldiers seeking to advance.<sup>93</sup> He maintains, correctly in our view, that it is permissible to target the machine gunner as a battlefield strategy.<sup>94</sup> This sort of individualized targeting of an especially

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90. *Id.*

91. Lieber Code, *supra* note 87, art. 148.

92. *Id.*

93. See Fernando R. Tesón, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 403, 411 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (giving the example of soldiers on a battlefield who target a particularly effective enemy machine gunner).

94. See *id.* (“He is an unjust enemy combatant and as such may be permissibly killed, named or unnamed.”).

dangerous opponent reflects a straightforward pursuit of military advantage.<sup>95</sup>

Suppose now, as Tesón posits, that the opposing army happens to have learned the name of its target. Suppose, for example, that the belligerents facing the skilled machine gunner know that he is the infamous “Private Gunner.”<sup>96</sup> The permissibility of an order to “take out Private Gunner before he cuts down any more of us” does not become illegal, or even immoral, merely because the target has now been named. What makes this an easy case is that the naming is incidental. Although Gunner is individually targeted, he is not targeted in his individual capacity. In this case it is wrong to say that “[n]aming names assigns guilt and . . . proclaims soldiers outlaws.”<sup>97</sup> The targeting of Gunner preserves his moral innocence; it recognizes the danger that he poses as an especially effective combatant.

As Gross himself recognizes,<sup>98</sup> such naming also assumes importance in the context of conflicts against terrorist groups who do not observe the formalities of war, including the core requirements that combatants carry arms openly, have a “fixed distinctive sign recognizable at a distance,” and “conduct[] their

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95. One need not draw on hypothetical examples to justify such targeting. Consider the example of World War II German panzer ace Michael Wittmann who, at the battle of Villers-Bocage, commanded a tank that destroyed, within a space of fifteen minutes, at least eleven Allied tanks, nine half-track vehicles, four troop carriers, and two anti-tank guns, singlehandedly prompting Allied forces to abandon the recently captured village before a single German reinforcement had arrived. See GEORGE FORTY, VILLERS BOCAGE 57–86 (Simon Trew ed., 2004) (describing Michael Wittmann’s fighting at Villers-Bocage and stating that he personally destroyed “seven cruiser/medium tanks (including one Firefly), three Stuart light tanks, one Sherman OP, nine half-tracks, four carriers and two anti-tank guns”); DANIEL TAYLOR, VILLERS-BOCAGE: THROUGH THE LENS OF THE GERMAN WAR PHOTOGRAPHER 33 (1999) (describing Wittmann’s role in the battle and stating that he destroyed “seven gun tanks, one of which may have been a Firefly, three Stuarts, one Sherman OP, nine half-tracks, four carriers and two anti-tank guns”). To the extent Allied forces were subsequently capable of identifying Wittmann on the battlefield, surely they would be justified in taking special effort to destroy his tank.

96. In Tesón’s original hypothetical, he is named “Colonel Sanders.” Tesón, *supra* note 93, at 411.

97. Gross, *supra* note 17, at 326.

98. See *id.* at 329 (assessing the appropriateness of named killing against terrorists).

operations in accordance with the laws and customs of war.”<sup>99</sup> Those who fail to qualify as privileged combatants may nevertheless be attacked “for such time as they take a direct part in hostilities.”<sup>100</sup> The reach of this provision is currently a matter of controversy.<sup>101</sup> A civilian targeted in the act of firing a machine gun on the battlefield is an easy case, and the legal advisor to International Committee of the Red Cross (ICRC) has further opined that civilians who have assumed a “continuous combat function” may be treated as regular members of organized armed groups.<sup>102</sup>

More divisive is how to apply IHL to terrorism suspects who may spend months or even years planning attacks in hiding.<sup>103</sup> Assuming we do treat such persons as belligerents, a practice of named killing may in fact be essential because, as Gross observes, there are no means to identify such persons as belligerents absent individualized assessment.<sup>104</sup> Accepting this logic does not, however, require us to adopt a special terrorism-based exception to a prohibition against named killing, as Gross would seem to suggest.<sup>105</sup> Instead, it merely reinforces the broader point that there is no inherent tension between the

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99. POW Convention, *supra* note 48, art. 4(A)(2).

100. Additional Protocol I, *supra* note 39, art. 51(3).

101. See Gross, *supra* note 17, at 326 (noting the lack of consensus “about the status of those who belong to an organization that does not meet the minimal standards set by [Additional] Protocol I”).

102. See Legal Adviser to the Int’l Comm. of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 31–36 (May 2009) (by Nils Melzer) [hereinafter ICRC Guidance], available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (distinguishing between civilians and members of organized armed groups).

103. See, e.g., Jens David Ohlin, *Targeting Co-Belligerents*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 60, 63 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (discussing the threats terrorists pose, individually and collectively, and arguing for a membership-based approach to identifying belligerents).

104. See Gross, *supra* note 17, at 330 (discussing the problem of identifying as combatants “guerrillas, militants, terrorists and others without uniforms” and stating that naming can be useful or even necessary in such cases).

105. See *id.* at 331 (“Perhaps targeted killings are an appropriate response to terrorism precisely because terrorists deserve to suffer harm in a way that just combatants do not.”).

concept of named killing itself and the paradigm of international humanitarian law.

## *2. Targeted Killing in a Global Battlefield*

None of this is to say, however, that there is nothing in the practice of naming targets that challenges the structure of IHL. Returning to Tesón's machine-gunner example, suppose that military officials deem Gunner so dangerous that, so long as the war continues and he remains in military service, he is to be tracked and killed wherever he may be found. Intelligence officials trace Gunner to an island resort where he is enjoying an extended vacation with his family. A special commando unit is dispatched to kill him with instructions to follow the usual war rules of engagement. The commandos locate Gunner and shoot him while he is sunbathing on the beach. We suspect that many readers will be more troubled by this scenario than by our previous hypothetical, although it can be difficult to explain why.

### *a. The Feasibility of Capture*

One troubling aspect of this hypothetical scenario is that the commandos have elected to neutralize Gunner's machine-gun skills by killing him instead of capturing him and holding him as a prisoner of war until the termination of hostilities. Note that under Koh's justification of bin Laden's killing, this aspect of the operation is permissible so long as Gunner has not clearly communicated his surrender.<sup>106</sup> If we embrace Koh's statement as reflecting an inflexible rule applying to all belligerents in war, then it makes no difference to the law that Gunner poses no risk at all to the commandos, or that capture would be easy under the circumstances.<sup>107</sup>

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106. See *supra* notes 14–16 and accompanying text (describing Koh's justification of the bin Laden killing).

107. Note that U.S. government officials have indicated that the feasibility of capture may be a factor in the lawfulness of a targeted killing when the killing is directed against a U.S. citizen, as was the case with Anwar al-Aulaqi. See Holder, *supra* note 16 (stating that targeted killing of a U.S. citizen terrorist is lawful at least when there is an imminent threat of violent attack, "capture is

This, however, cannot be an accurate statement of the *jus in bello* rules, at least not if they are to be interpreted and applied in a way that is consistent with a plausible account of morality. The question of whether and when international law imposes a duty to capture rather than kill lawful targets of war has provoked debate in recent years. The Supreme Court of Israel's 2005 ruling on Israel's targeted killing policy stated that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed,"<sup>108</sup> and the ICRC's subsequent non-binding guidance on the notion of direct participation in hostilities argued more broadly that "it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force."<sup>109</sup> But these pronouncements have not attracted widespread acceptance; the ICRC's conclusion, in particular, faced significant resistance from many of the experts whom the ICRC had invited to participate in its study.<sup>110</sup>

The doctrinal argument favoring attempted capture in these circumstances appeals to a requirement of military necessity, the idea that the law permits "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely

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not feasible," and the operation would be conducted according to law of war principles). This distinction between citizens and non-citizens does not derive from IHL, and official statements regarding the killing of bin Laden and other foreign terrorists have not included the general feasibility of capture as a legally relevant factor, except in the narrowly defined circumstances Koh identified, which require "a genuine offer of surrender that is clearly communicated" and that may be safely received. Koh, *supra* note 14.

108. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel ¶ 40 [2005] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

109. ICRC Guidance, *supra* note 102, at 82.

110. See *id.* at 82 n.221 ("During the expert meetings, it was generally recognized that the approach [to choose capture over killing] is unlikely to be operable in classic battlefield situations . . . and that armed forces . . . may not always have the means or opportunity to capture rather than kill."); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 799–801 (2010) (summarizing experts' objections to Part IX of the ICRC Guidance).



the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”<sup>111</sup> The problem with this appeal is that IHL has traditionally declined to translate the necessity principle into rules that protect the lives of combatants themselves.<sup>112</sup>

This asymmetry finds expression in the Civil-War era Lieber Code, which provides that “[m]ilitary necessity admits of all direct destruction of life or limb of ‘armed’ enemies.”<sup>113</sup> A similar selectivity appears in the requirements of Additional Protocol I, which gives effect to the restraint of military necessity. The employment of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” is forbidden.<sup>114</sup> Objects are not proper military targets unless their destruction “offers a definite military advantage.”<sup>115</sup> Attacks on military targets are forbidden if expected to result in incidental loss to civilians or civilian objects that is excessive compared to the “concrete and direct military advantage anticipated.”<sup>116</sup> Yet no parallel provision imposes a necessity-based limitation on the use of lethal force against combatants themselves.<sup>117</sup>

How does one reconcile this omission with the general principle that necessity justifies the permissive rules of IHL? The most plausible explanation appeals to military necessity itself.

111. ICRC Guidance, *supra* note 102, at 79 (quoting United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, ¶ 2.2). This language closely mirrors that set forth in the Lieber Code. *See* Lieber Code, *supra* note 87, art. 14 (“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”).

112. *See infra* note 117 and accompanying text (pointing out the inconsistent application of the necessity principle).

113. Lieber Code, *supra* note 87, art. 15. Only with respect to “other persons” does the Code require that destruction be “incidentally ‘unavoidable.’” *Id.*

114. Additional Protocol I, *supra* note 39, art 35.

115. *Id.* art. 52(2).

116. *Id.* art. 51(5)(b).

117. *See* Parks, *supra* note 110, at 804 (“There is no ‘military necessity’ determination requirement for an individual soldier to engage an enemy combatant or a civilian determined to be taking a direct part in hostilities, any more than there is for a soldier to attack an enemy tank.”).

The law generally permits the killing of all enemy combatants, without imposing any obligation to assess the military value of individual targets or to consider less lethal means, because the modalities of war generally do not permit those pursuing military advantage to make such individualized assessments. The nature of armed conflict through history has been to pursue victory precisely through the destruction of the opposing forces. In the context of the traditional battlefield, belligerents are generally justified in treating all opposing forces as sources of danger and as targets whose destruction has military advantage. A rule to the contrary, one that requires combatants to make individualized threat assessments for each targeted enemy, would burden the waging of war in ways not acceptable to states, including by exposing combatants to increased risk.<sup>118</sup> On this

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118. Such practical considerations inform W. Hays Parks's opposition to Part IX of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law. See Parks, *supra* note 110, at 809–10 (arguing against a necessity-based limit on the use of lethal force against combatants). Parks reasoned:

[O]ther than the law of war prohibitions on perfidy and denial of quarter, governments and courts have seen the prudence in declining to draw such a line owing to the many vagaries that exist not only in domestic law enforcement situations but also, and in particular, on the battlefield. This is the case in combat in recognition of the obligation imposed by many nations on their military forces not to surrender and, indeed, to resist surrender either by force or through escape and evasion.

*Id.* On this point, Parks is especially concerned by the prospect that the ICRC Guidance would require individual soldiers to apply a “use-of-force continuum.” See *id.* at 796 (arguing that the ICRC Guidance wrongly “resurrects and offers Pictet’s unaccepted use-of-force continuum theory as if it were an internationally accepted, binding legal formula”). Pictet’s theory is best summarized by his statement that

[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.

JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985). The ICRC Guidance, however, interprets this statement to support the more basic point that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” ICRC Guidance, *supra* note 102, at 82. The ICRC Guidance also acknowledges that

account, the general rule permitting the targeting of all combatants who are not *hors de combat* is not so much a violation of the necessity principle as an expression of it.

This account loses all plausibility, however, when we imagine circumstances, such as the killing of Gunner on vacation, that bear no resemblance to the battlefield modalities that have historically animated IHL, and that present no functional reason why a more permissive rule to killing should prevail. When Gunner is found isolated from active combat or other military presence and is defenseless in a bathing suit, there is no account of military necessity with which one can make sense of a rule that permits killing short of surrender, or indeed of any rule that would be more tolerant of killing than that applicable to law-enforcement officials seeking to apprehend Gunner under like circumstances.

One could argue that Gunner's utter defenselessness has already placed him "in the power of an adverse Party" and thus rendered him *hors de combat*.<sup>119</sup> The ICRC Commentary to Additional Protocol I supports this view.<sup>120</sup> If that is correct, then the permission to kill Gunner under IHL is already weaker than suggested by Koh's account of IHL in the context of the bin Laden killing. More broadly, however, a rule permitting the killing of Gunner under these circumstances runs up against a deep structural constraint that is foundational to IHL: the idea that IHL's expanded permission to kill is, at some level, linked to and

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Pictet's proposed approach "is unlikely to be operable in classic battlefield situations involving large-scale confrontations and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or the opportunity to capture rather than kill." *Id.* at 82 n.221 (citations omitted).

119. Additional Protocol I, *supra* note 39, art 41.

120. See Int'l Comm. of the Red Cross, *supra* note 70, at 484 (maintaining that Protocol I reflected the determination of states to embrace the protections of *hors de combat* status in cases in which land forces "have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat"). This claim has support in the change from the Third Geneva Convention's reference to those who have "fallen into the power' of the enemy" to Protocol I's parallel reference, "in the power of an adverse Party." *Id.* "A defenceless adversary," the Commentary continues, "is 'hors de combat' whether or not he has laid down arms." *Id.*

justified by considerations of military necessity.<sup>121</sup> The problem is not merely that Gunner's specific killing lacks military necessity given the feasibility of capture but also that a general rule permitting him to be killed under these circumstances is itself irreconcilable with an account of military necessity, or indeed with the pursuit of any military advantage.<sup>122</sup>

Accordingly, to identify a capture duty in these circumstances does not, as W. Hays Parks has feared, implement a fundamental alteration in IHL by requiring individual soldiers to always consider the feasibility of capture before deploying lethal force.<sup>123</sup> Instead, our conclusion rests on the more modest insight that IHL's generally broad permission to kill reflects some basic assumptions about battlefield modalities. When IHL travels to contexts that, as a functional matter, fail the most expansive definition of a battlefield, the overarching requirement of necessity must be appraised anew.

Some scholars have reached a similar conclusion on the ground that targeted killing occupies a hybrid position between the IHL paradigm and the law-enforcement paradigm. This, for instance, is how Gabriella Blum and Philip Heymann understand the Israeli Supreme Court's ruling that IHL properly applied to Israel's policy of targeted killings, but that the legality of those killings hinged on the absence of a reasonable alternative for capturing the targeted terrorists.<sup>124</sup> Or, as Nils Melzer would see it, the case we have just presented supports the view that necessity itself must dictate whether the legal paradigm is IHL or law-enforcement.<sup>125</sup> In other words, the law-enforcement

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121. See *supra* note 111 and accompanying text (discussing the importance of military necessity in state-sanctioned killing).

122. Given the lack of necessity, moreover, any resultant risk to civilians posed by employing lethal force against Gunner would necessarily be impermissible under the proportionality test. See Additional Protocol I, *supra* note 39, art. 51(5)(b) (protecting civilians from harm that "would be excessive in relation to the concrete and direct military advantage anticipated").

123. See *supra* note 118 (discussing Parks's concern).

124. See Blum & Heymann, *supra* note 17, at 158 (arguing that "the court's requirement to try to apprehend the terrorist is far more easily situated within a law-enforcement model of regular policing operations and signifies the uneasiness that the court felt about the war paradigm").

125. See ICRC Guidance, *supra* note 102, at 82 ("[I]t would defy the basic notions of humanity to kill an adversary or to refrain from giving him or her an

paradigm applies to the Gunner killing because there is no necessity supporting the invocation of the IHL paradigm. Whether we phrase the argument that way or not is largely a matter of semantics in this instance, however, because we arrive at the same conclusion under the IHL paradigm itself. Indeed, in our example, Gunner is a lawful combatant participating in a traditional armed conflict, and we have made no assumptions that his targeting is informed by law-enforcement considerations of any sort. Either paradigm yields the same result under the facts presented.

Critically, the difficulties we have just described are not a direct consequence of named targeting per se. It is not the act of naming Gunner for killing that complicates the decision to kill rather than capture. At the same time, this problem is one that is distinctly associated with a practice of individualized targeting. The impulse to follow Gunner across the world is one that derives from assigning unique danger to him as an individual, rather than as an anonymous and substitutable member of the broader collective force that remains engaged on the battlefield. And it is this impulse that puts pressure on IHL by asking us how its requirements apply under nonparadigmatic conditions that do not resemble those of a conventional battlefield.

### *b. The Harm of a Diffuse Battlefield*

Killing Gunner on vacation also raises other problems that are distinct from the question of capture. We may bring these into focus by assuming that capturing Gunner is infeasible. Perhaps there is only a short window of time to neutralize him before he becomes untraceable, and the only feasible option is a missile strike. The operation now entails killing Gunner and unavoidable risk to the civilians in Gunner's proximity.

This version of the hypothetical more directly raises the issue of proportionality: is the risk to civilians justifiable in light of the military advantage to be gained by killing Gunner?<sup>126</sup> But the

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opportunity to surrender where there manifestly is no necessity for the use of lethal force.”).

126. Additional Protocol I, *supra* note 39, art. 51(5)(b).

problem is also broader than the direct risk to specific civilians. There is something unsettling in the spread of war tactics beyond the conventional battlefield, in the idea that war may follow individual belligerents wherever they go. It is disturbing in particular to reflect on the fate of the persons and property in the area surrounding Gunner, that may now be victimized by *jus in bello* rules that treat them as potential collateral damage whose incidental destruction may be weighed against the utility of targeting Gunner. This fear that war may strike anywhere at any time has figured prominently in recent debates over U.S. targeted-killing policy. Critics have asked whether, with the inevitable spread of technology, we are willing to commit to a reading of the law that would allow, for example, Iran to launch missile strikes on U.S. cities against discrete individuals whom it considers to be enemy combatants.<sup>127</sup>

Typically, this problem is treated as one of *jus ad bellum*. International law takes account of the dangers of spreading war by limiting the conditions under which states may permissibly resort to armed force,<sup>128</sup> and the targeting of Gunner may constitute an act of aggression against the state where he is vacationing. The conditions under which a state may resort to armed force on the territory of a neutral third state is currently a matter of debate,<sup>129</sup> but that debate is not the end of the matter. The *jus ad bellum* issue may be overcome: perhaps Gunner is vacationing in a state that has given its consent to the raid,<sup>130</sup> or that is already party to the conflict. We will further assume, for

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127. See, e.g., STEPHEN L. CARTER, *THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA* 60–61 (2010) (acknowledging that a similar strike against the United States would be justified if our targeted killings are justified against those we deem terrorists).

128. See *supra* II.A (discussing IHL's limits on use of force).

129. See *supra* note 54 (providing several scholars' discussions about targeting terrorist suspects on third-party territory).

130. Indeed, in many cases of targeted killing, including in northwest Pakistan and in Yemen, the United States has benefitted from persuasive claims to state consent. See, e.g., Van Schaack, *supra* note 2, at 267 (noting that targeting killing operations in northwest Pakistan "likely enjoy at least some tacit diplomatic acquiescence, even though Pakistani officials occasionally publicly criticize them for domestic political consumption"); *id.* at 266 (observing that the operation against Anwar al-Aulaqi "appears to have had the benefit of Yemen's consent and perhaps its involvement").

purposes of this discussion, that IHL applies away from the traditional battlefield and follows Gunner to his vacation spot.<sup>131</sup>

There is some debate in the literature concerning whether a combatant is ever targetable when located away from the battlefield.<sup>132</sup> Yet even assuming that IHL governs this scenario, the attack remains troubling pursuant to IHL's requirement of proportionality. In real life, even an ace machine gunner like Gunner is unlikely to be perceived, simply on account of his combat skills, as sufficiently dangerous to justify the type of dedicated operation we have imagined. We may therefore also question whether it is permissible, consistent with the demands of proportionality, to risk civilian lives in this way merely to neutralize a single combat soldier.

Arguments of this nature are complicated by the indeterminacy of the legal standard. To compare—as the proportionality formula requires—the “concrete and direct military advantage” against the expected “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof”<sup>133</sup> requires the weighing of incommensurables.<sup>134</sup> The law also fails to specify the extent to which combatants must put their own forces at risk in order to reduce risks to civilians.<sup>135</sup> As a consequence, application of the

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131. On problems associated with the geography of IHL, see Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism*, 39 GA. J. INT'L & COMP. L. 1, 2–6 (2010).

132. Compare Tesón, *supra* note 93, at 412–15 (arguing that a combatant on vacation is an impermissible target), with Statman, *supra* note 17, at 196 (rejecting the distinction between a combatant in military headquarters and a combatant on vacation).

133. Additional Protocol I, *supra* note 39, art. 51(5)(b).

134. See Final Rep. to the Prosecutor by the Comm. Established to Review the NATO Bombing Campaign Against the Fed. Republic of Yugoslavia, ¶ 48 (June 13, 2000), available at [www.icty.org/sid/10052](http://www.icty.org/sid/10052) (“Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms . . . . One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.”).

135. Additional Protocol I requires combatants to take “all feasible precautions” to avoid loss of civilian life but does not specify what is meant by “feasible.” Additional Protocol I, *supra* note 39, art. 57(2)(a)(ii). On the problem of force protection versus enemy civilian protection, see David J. Luban, *Risk Taking and Force Protection* 38 (Georgetown Pub. Law Research, Paper No. 11-

proportionality formula inevitably extends great deference to military judgment.

Does this already-difficult calculus necessarily change because Gunner is on vacation? We think it does. Although it is impossible to demark the precise point at which claims of military advantage fail to outweigh incidental risk to civilians, we believe that many will intuitively and justifiably conclude that any version of our Gunner-on-vacation hypothetical involving risk to civilians presents a case in which an attack on a military target cannot be justified in light of the danger posed to civilians.

With respect to the military advantage side of the equation, one difference between the battlefield and vacation settings is that the killing of Gunner on the battlefield more readily contributes to an immediate, more general military goal. If, for example, Gunner is killed during a battle to seize a strategic village, advance the front line, or defend a position, then the value of his individual death is subsumed by the military advantage associated with that broader objective. Even though he is targeted individually, the targeting occurs in the context of an operation that necessitates the killing of enemy combatants, and, in that broader context, there are sound reasons to give special attention to the threat posed by Gunner. When Gunner is specifically targeted on vacation, by contrast, one is forced to focus on him in isolation and ask how much military advantage is anticipated from the neutralization of Gunner alone, outside of any immediate battlefield context. It is true that Gunner is now unable to return to the battlefield and thus is prevented from making future military contributions. But this causal link is more speculative and attenuated, and it is harder to demonstrate why Gunner merits such individualized attention.

The dangers to civilians likewise require more focused attention. When a rocket attack on the vacationing Gunner kills bystanders, it is clear that the lives lost are casualties of the attack on Gunner alone. Individual incidents on the battlefield may also have this but-for quality, but there is also a generalized risk that exists in areas of continuous combat. Consider the Allied advance in Normandy during World War II, which, by

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72, 2011), in *READING WALZER* (Itzhak Benbaji & Naomi Sussman eds., forthcoming), available at <http://ssrn.com/abstract=1855263>.



some estimates, claimed close to 20,000 French civilian lives.<sup>136</sup> At a broad level of generality, one can say that these large-scale civilian deaths were a tragic, but predictable, feature of the campaign to liberate France. Although that broad point did not relieve individual combatants of a duty to protect civilian life in particular engagements, it was easier to justify incidental civilian losses in the context of a broader campaign that necessarily imposed a generalized risk on all of Normandy's residents. When Gunner is targeted on vacation, by contrast, it becomes clearer that the attack has put a class of civilians in danger, a class that faced no special risks otherwise. The risk to civilians, in other words, is a risk associated most directly with the decision to target Gunner. This feature of the attack only serves to exert further pressure on the planners of the attack to justify the special attention owed to Gunner.

One may, in addition, identify harm to Gunner himself. Although Gunner is targetable as a combatant in the theater of war, his liability to be killed derives not from personal culpability, but from his commitment—voluntary or not—to render himself liable through service as a combatant fighting for a broader collective. Although the point is arguable, one can reasonably maintain that there is a limit to this commitment, and that Gunner has a justified expectation that his liability to be killed in battle does not entail a liability to be singled out and chased across the world in this manner.

For reasons already addressed, it is impossible to demark the precise point at which claims of military advantage fail to outweigh incidental risk to civilians, but we believe that many will intuitively conclude that our Gunner-on-vacation hypothetical presents a case in which an attack on a military target cannot be justified if the attack poses any danger to civilians. These considerations all urge special caution with respect to targeted-killing operations that invoke the permissive IHL rules in contexts outside the traditional battlefield.

We do not argue, however, that IHL can or should be interpreted to impose a blanket ban on targeted killings. Our

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136. See ANTONY BEEVOR, *D-DAY: THE BATTLE FOR NORMANDY* 519 (2009) (stating that 19,890 French civilians were killed during the liberation of Normandy).

hypothetical case of Gunner on vacation is admittedly far-fetched, and the cases of targeted killing that have provoked controversy in recent years have benefited from more compelling appeals to necessity than what we have imagined here. Our point, rather, is that when targeted killing moves away from the traditional battlefield, its permissibility will generally require special justification in at least two interrelated ways, both of which flow naturally from the application of IHL and do not borrow from the law-enforcement paradigm.

First, the targeted killing of an individual in these circumstances generally cannot be justified merely by the target's status as a combatant. The targeting instead requires special justification regarding the threat that the individual poses, either in isolation or in combination with others who are similarly targeted.<sup>137</sup> For example, such a justification may present itself when the target poses an imminent or especially high threat; the target wields significant authority within an enemy organization; or there is sound reason to believe that a policy of targeting like-situated persons will, in the aggregate, prove sufficiently feasible to have a significant military advantage. Second, when military operations target isolated individuals, the acceptable risk of civilian casualties must generally be lower than in more conventional military operations.

These considerations are especially salient to the difficult interpretive question of how to determine which nontraditional combatants may be targeted, pursuant to IHL, as civilians directly participating in hostilities.<sup>138</sup> For example, even if one maintains (as we do not) that this category should be read broadly to encompass all members of terrorist organizations engaged in hostilities,<sup>139</sup> that interpretation will be unlikely to satisfy the requirements of necessity and proportionality in concrete cases of targeted killing. Civilian lives should not be risked, for example, in order to kill a member of al Qaeda whose

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137. See *supra* notes 93–97 and accompanying text (describing circumstances in which an individual may be targeted because of the especially dangerous threat that he poses).

138. See *supra* notes 43–44 and accompanying text (stating that civilians may be targeted if they participate in hostilities).

139. See, e.g., Ohlin, *supra* note 103, at 84–85 (suggesting that all members of terrorist organizations might be engaged in continuous combat function).

contribution to the group is known to consist only of cooking meals or sweeping floors.<sup>140</sup> This remains the case whether or not one labels the target a combatant under IHL.

Notwithstanding the difficulties inherent in reducing these intuitions to concrete operational guidance, evolving U.S. policies affirm the special sensitivities that accompany targeted killing as a strategy of war. Gregory McNeal has documented that U.S. policy for preplanned aerial drone strikes in Afghanistan have generally required a collateral damage estimation process that is intended to ensure that there will be a less than 10% probability of serious or lethal wounds to non-combatants.<sup>141</sup> He reports that “less than [1%] of pre-planned operations that followed the collateral damage estimation process resulted in collateral damage.”<sup>142</sup> Moreover, when even one civilian casualty is expected, the President of the United States or the Secretary of Defense must personally approve the strike.<sup>143</sup> Even considering that official U.S. casualty claims reportedly rely on a contested criterion that generally “counts all military-age males in a strike zone as combatants,”<sup>144</sup> these policies reflect a concern for limiting incidental civilian casualties that goes far beyond the indeterminate guidance provided by Additional Protocol I.

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140. The more difficult cases concern financiers and others who occupy significant positions in the group but whose functions are not obviously analogous to traditional combat functions. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel ¶ 35 [2005] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf) (noting that “a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid” does not directly participate in hostilities, but that there “is a debate surrounding the following case: a person driving a truck carrying ammunition”).

141. Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 326, 328 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012).

142. *Id.* at 331.

143. *Id.* According to a recent *New York Times* article, the President's involvement is even greater than mandated by this policy. See Becker & Shane, *supra* note 23 (“[N]ominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name. He signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan—about a third of the total.”).

144. Becker & Shane, *supra* note 23.

### 3. *The Problem of Guilt*

Our final twist on the Gunner scenario deals with questions of culpability and mixed motives. Suppose that the officer who orders Gunner's killing on the battlefield is motivated by reasons other than Gunner's machine-gun skills. It turns out that Gunner is a villain who, before the war, murdered the officer's family. The officer therefore invokes the rules of war opportunistically, as a cloak to disguise what is in fact a desire to exact revenge.

One might argue that Gunner, as a combatant in armed conflict, remains liable to be killed under the IHL rules, and thus has no right to complain of his killing. So long as hostilities persist, opposing combatants may kill Gunner at any time. From one perspective, that the officer has a grudge against Gunner should not matter any more than that the officer might be fighting only for reasons of financial self-interest rather than patriotism. The individual motives of combatants have, at best, limited relevance when combatants act in conformity with the broader policy of the state or collective entity they serve. And here it is the state's policy that combatants such as Gunner should be attacked even when they are not villains.

Nonetheless, we suspect that most readers will agree that the targeting of Gunner under the circumstances described is unsustainable under the IHL paradigm. The problem with killing Gunner on account of his past crimes is that his targeting is not informed in any way by military considerations. Thus, the problem is similar to the one presented by our Gunner-on-the-beach hypothetical. This culpability-driven targeting is precisely the sort of killing that justifiably triggers Gross's objection, which he associates more broadly (and incorrectly in our view) with the very concept of targeted killing.<sup>145</sup> Here, the killing assigns guilt to Gunner in his individual capacity, thereby abusing the permission to kill that derives solely from Gunner's impersonal status as an agent of the state.<sup>146</sup>

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145. See Gross *supra* note 17, at 328 (suggesting that targeted killings based on an assumption of guilt place these killings outside the scope of just-war conventions that allow killing combatants without due process of the law).

146. We do not attempt here to resolve more difficult permutations of our hypothetical in which the officer's motives are mixed. For example, suppose

In Parts III and IV, we explore the possibility that individual culpability may, in special circumstances, factor into justifications for targeted killing that do not draw from the IHL paradigm.<sup>147</sup> Note, however, that even within the structure of IHL, individual guilt may inform targeting decisions, provided it does so for reasons that speak to considerations of military necessity.<sup>148</sup> If we suppose that Gunner is a notorious war criminal, his targeting serves to prevent further abuses against civilians and enemy combatants. Similarly, if Gunner is deeply involved in the perpetration of an ongoing genocide, whose prevention is the very cause of war, then targeting Gunner on culpability-based criteria serves a preventive function that directly advances the *jus ad bellum*. The critical distinction in both cases, however, is that the targeting remains rooted in preventive, rather than punitive, considerations.

The question of improper or mixed motives has obvious salience to the context of terrorism, in which government officials invoke IHL to justify the targeted killing of alleged combatants who are simultaneously accused of serious crimes. It is partly on account of this duality that the practice of targeted killing has elicited so much controversy over whether IHL or law enforcement is the correct legal paradigm. Our hypothetical brings to light a limitation of the IHL paradigm that receives no explicit attention in the law and is often overlooked in this debate: an attack that is objectively justifiable under IHL may nevertheless be impermissible because it is pursued for the wrong reasons. At the same time, this limitation is complicated by the

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pressing military considerations dictate that a machine gun be destroyed at some point during a particular twenty-four-hour period. The machine gun is continuously manned in shifts so that destroying the gun will also entail killing a machine gunner, and personal grudges lead the gun to be destroyed during the precise moment when Gunner is manning it. This example is more difficult because we may assume that the officer would never have ordered Gunner's killing absent pressing military necessity. Nevertheless, improper motives resolved the arbitrary question of precisely when to attack the machine gun.

147. See *infra* Parts III–IV (discussing the scope of permissible killing in peacetime and discussing possible revisions to contemporary theory).

148. See, e.g., Gross, *supra* note 17, at 327 (addressing the difficulties of placing targeted killings within the framework of either the IHL or law enforcement).

ambiguity that culpability-based targeting is sometimes justified by the logic of IHL when rooted in preventive rather than retributive considerations.

### *C. The War Paradigm and the bin Laden Killing*

Although the hypothetical scenarios we have outlined do not focus on terror cases, they highlight many of the issues that have provoked controversy over targeted killing in recent years, whether in the context of U.S. drone strikes in northwest Pakistan and Yemen or the more recent raid on bin Laden's compound in Abbottabad. These cases demonstrate a trend toward targeted killing away from the conventional battlefield of named individuals who, in many cases, are also wanted for serious crimes.

The bin Laden killing is, in some respects, an easier case than it might have been. In authorizing the operation, President Obama reportedly rejected Defense Secretary Robert Gates's recommendation to deploy a missile strike to obliterate the suburban compound.<sup>149</sup> Although doing so would have minimized the risks to U.S. military personnel, the President was reportedly uncomfortable with the risk to civilian lives and property that would have resulted from deploying bombs of the required intensity into the suburban area.<sup>150</sup> Reports have also noted uncertainty regarding whether bin Laden was, in fact, residing in the compound, pointing out that a missile strike would not have allowed the same positive identification of the target in the way the Navy SEALs' raid on the compound did.<sup>151</sup>

These considerations supply powerful moral and political support to the President's choice. Whether they reveal a legal obligation to privilege a special-forces raid over less discriminate

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149. See Schmidle, *supra* note 4, at 38 (providing a detailed narrative of the planning of and raid on Osama bin Laden's Abbottabad compound).

150. See *id.* (noting that the amount of explosives necessary to penetrate bin Laden's compound would have created "the equivalent of an earthquake" and "[t]he prospect of flattening a Pakistani city made [President] Obama pause").

151. See *id.* at 40 (reporting that the confidence among CIA analysts that bin Laden was in the compound ranged from forty percent to ninety-five percent).

means under the circumstances raises a more difficult question about the limits of IHL. Unlike our hypothetical machine gunner, Osama bin Laden was a leadership figure of central importance, whose targeting was a priority of U.S. military efforts for the last decade.<sup>152</sup> Although we have argued that cases of targeted killing will frequently justify a stricter application of the proportionality test, the possibility of incidental civilian losses in the pursuit of important military objectives remains a core feature of IHL's permissive approach to killing.<sup>153</sup> The general requirement to discriminate between military and civilian objects, moreover, has resisted the development of determinate standards dictating how much personal risk combatants must assume in order to minimize risk to civilians.<sup>154</sup> Although we are inclined to agree with those who argue that military planners should not assign greater value to their own combatants' lives than to those of civilians, this is not an issue that is firmly resolved by existing legal standards.<sup>155</sup>

It is tempting to argue that if the U.S. military would have been justified in conducting a missile attack on the bin Laden compound, then any less destructive method of killing the al Qaeda leader would have also been permissible. We should be glad, as some have argued, that the military did not simply obliterate the Abbottabad compound but instead subjected U.S. servicemen to substantial risk to protect civilian lives.<sup>156</sup> We should therefore avoid imposing additional legal requirements that might deter similar humanitarian gestures. There is some merit to this argument, but this line of thinking only goes so far.

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152. See *id.* at 36 (stating that, after several previous failed attempts, the Abbottabad raid was the team's "first serious attempt since late 2001 at killing [bin Laden]").

153. See *supra* notes 126–33 and accompanying text (discussing the proportionality requirement with respect to risk to civilians).

154. See *supra* note 135 and accompanying text (pointing out vagueness in the proportionality requirement).

155. See Luban, *supra* note 135, at 12 (discussing the viability of the idea that "soldiers must place higher value on their own civilians than on themselves, but higher value on themselves than on enemy civilians").

156. See Schmidle, *supra* note 4, at 38 (noting that an airstrike would have avoided the risk of "having American boots on the ground in Pakistan" and lessened the risk to American soldiers).

It is one thing to employ a means of attack, such as a remote missile strike, which, if permissible, permits neither perfect discrimination between combatants and civilians nor capture in lieu of killing. But the justification for employing such means, if legitimate, must be rooted in considerations of military advantage, including some degree of force protection, and not in a simple desire to kill rather than capture. The decision to neutralize bin Laden by means of a raid complicates the picture because, by electing to undertake a more discriminating and risky operation, the military opened up the possibility of capture in lieu of killing. The challenge, then, is to explain why the commandos should remain free of any duty whatsoever to capture short of bin Laden's affirmative surrender.

This challenge is particularly acute in this case because the mechanics of the operation—a raid on a residential compound in an (at least nominally) allied state, and in an area that was not otherwise the site of ongoing hostilities or of a hostile military presence—resemble peacetime law enforcement so closely that it is difficult to explain why considerations of military necessity impose functional requirements distinct from those we associate with law enforcement.

This is not to argue that the operation was illegal. Clearly, the Navy SEALs who raided the Abbottabad compound faced great risks in pursuing bin Laden, a fact that distinguishes their situation from our hypothetical combatants who pursue Gunner on vacation. As we discuss below, it is quite possible, depending on the facts, that the use of lethal force was justified even if we assume that traditional law-enforcement principles applied.<sup>157</sup> We do not possess sufficient knowledge of the rules of engagement or the facts on the ground to answer this question, but surely even law-enforcement officials undertaking a dangerous raid on a notorious terrorist's well-guarded residential compound will generally be justified in acting under the assumption that they are under a constant threat, and the decision to use lethal force must be understood with this in mind.

These considerations support arguments that the killing of bin Laden was justified under either standard law-enforcement

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157. *Infra* Part VI.



rules or under what we will describe below as a TK 2 case of self-defense or defense of others. They do not explain, however, why one should treat the operation as a TK 1 case, in which IHL supplies more permissive rules of engagement than the rules that would otherwise apply if one imagines, for example, that Pakistan's own police forces—acting on a tip from U.S. intelligence officials—conducted the operation themselves. In particular, these considerations do not support the blanket rule, suggested by Koh's public statements, that only affirmative surrender would have triggered an obligation to take bin Laden into custody.<sup>158</sup> Like our hypothetical of Gunner on vacation, it is hard to see how considerations of military necessity could have supported the killing of bin Laden if capture would have been feasible, if he was in fact manifestly defenseless, or if the circumstances were such that one would demand that law-enforcement officials attempt capture.

Additionally, although we hesitate to speculate on the accuracy or completeness of the picture provided by unofficial, often anonymously sourced accounts, some media reports provided a narrative that, if true, raises questions about whether the rules of engagement were in fact consistent with our reading of IHL. An August 2011 *New Yorker* article quoted an anonymous special-operations officer, reportedly involved in the operation, as stating, “[t]here was never any question of detaining or capturing him—it wasn’t a split-second decision. No one wanted detainees.”<sup>159</sup> The same article also described bin Laden's killing as having taken place after Navy SEALs had already killed every armed man in the compound, and immediately after one serviceman undertook great personal risk to clear a path to the al Qaeda leader by bear-hugging a woman feared to be armed with explosives.<sup>160</sup> The killing was then succeeded by approximately thirty minutes of intelligence-gathering, during which time surviving residents of the

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158. See Koh, *supra* note 14 (“[C]onsistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. . . . But where that is not the case, those laws authorize use of lethal force . . .”).

159. Schmidle, *supra* note 4, at 43.

160. *Id.* at 42–43.

compound were bound and guarded.<sup>161</sup> The special forces then departed, taking bin Laden's body with them.<sup>162</sup> Although none of these facts are legally conclusive in our view (assuming that they provide an accurate picture), they do suggest that the decision to kill bin Laden is more difficult to explain by reference to potential sources of military advantage, such as a desire to avoid personal risk or an inability to take detainees for lack of resources or time.<sup>163</sup>

Finally, we maintain that avoiding detention is not itself a justifiable reason to kill rather than capture under IHL. Although one can credibly speak of advantages of avoiding the burdens of detention and trial, and from precluding a charismatic terrorist leader from exploiting the publicity of legal process as a recruiting tool, these are not the sorts of benefits embraced by the concept of military advantage, which focuses on actions aimed at weakening the military forces of the enemy, and not on the realization of broader political goals.<sup>164</sup> A policy to avoid trial on these grounds would also present irreconcilable tensions with the due process guarantees afforded by IHL to detainees accused of criminal offenses.<sup>165</sup> These guarantees affirm that the avoidance of due process is not the type of military advantage that IHL generally privileges combatants to pursue.

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161. *See id.* at 43 (describing the cuffing of surviving residents and the scouring of the compound).

162. *See id.* at 44 (describing how bin Laden's body was given Muslim rites and then heaved into the sea).

163. *See id.* at 43 (stating that bin Laden was found unarmed and could have been taken alive if he had immediately surrendered).

164. *See* IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* 61–68 (2009) (describing what military advantage entails with respect to IHL).

165. *See* POW Convention, *supra* note 48, art. 3(d) (prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

### III. The Lawfulness of Targeted Killings Beyond War

#### A. A Typology of Cases

Thus far, we have focused on so-called TK 1 cases, in which IHL is invoked to justify targeted killing. We now turn to cases that do not rely on IHL. One case—call it TK 2—involves a governmental actor instructed to kill an evildoer who is believed to be planning an attack that would endanger the lives of many innocent people. The government agent catches up to the evildoer seconds before he detonates a bomb that will destroy a residential building. The agent thwarts the attack by killing the evildoer. In a sense, this case involves a targeted killing, for the government named an individual beforehand as a target for killing. Nevertheless, the case is uncontroversial because the killing is clearly lawful under the domestic laws pertaining to defense of self and others.<sup>166</sup> Because killing the evildoer was necessary to prevent an imminent attack against innocent people, the act is obviously justified.<sup>167</sup> For this reason, cases like TK 2 do not trigger the sort of concerns that make the practice of targeted killing morally and legally problematic.

A more interesting case—call it TK 3—arises when the agent kills the evildoer before the attack commences. In some cases it could be argued that such a killing is necessary to thwart a future attack.<sup>168</sup> However, the timing makes it unclear whether the act is justified under the conventional understanding of defense of self and others. Cases like TK 3 raise the problem of preemptive or anticipatory self-defense.<sup>169</sup> In these cases, the killing is

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166. See, e.g., MODEL PENAL CODE § 3.04(1) (1985) (stating that the use of force is justifiable if “immediately necessary” to protect against an attack).

167. Killings that thwart an imminent wrongful attack are clearly justified. It is unclear, however, whether killings that thwart a non-imminent future attack are justified. See Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 215 (2004) (discussing the challenges to stringent imminence requirements in the law).

168. See *id.* at 224 (discussing the “complex” issues raised by anticipatory self-defense in the international context).

169. See Amos N. Guiora, *Anticipatory Self-Defence and International Law: A Re-Evaluation*, 13 J. CONFLICT & SEC. L. 3, 5 (2008) (proposing that international law needs to be revised to allow for preemptive action against a non-state actor, provided that sufficient intelligence is present).

deemed necessary to prevent an attack that is neither imminent nor ongoing but is certain to take place in the future.<sup>170</sup> Even though these cases are difficult to justify under the traditional approach to the law of self-defense,<sup>171</sup> more modern formulations of the rules governing the use of force in protection of the person seem to allow enough leeway to justify such acts, at least in some circumstances.<sup>172</sup> As a result, TK 3 cases are more controversial than TK 2 cases, but the legality of such conduct can be justified fairly easily by effecting some modifications in the traditional law of self-defense.<sup>173</sup>

The more difficult and controversial case—call it TK 4—arises when a named target, one who is believed to be dangerous but who is not a member of enemy armed forces, is killed while she is not engaging in an attack and when there is no knowledge of a specific future attack that the target is planning, which can only be prevented by use of lethal force. Arguably, this is the case most reflective of the bin Laden killing.<sup>174</sup> TK 4 cases are

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170. See *id.* at 4 n.3 (positing that preemptive self-defense “allows for reaction when a serious threat to national security exists,” but in doing so it “expands the notion of imminence”).

171. These cases are difficult to justify under the traditional law of self-defense because the deadly force is not used to prevent an *imminent* attack. This is also the problem with providing a justification defense to battered women who kill their abusers in nonconfrontational settings. See Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. LAW 457, 461 (2006) (introducing the problem of the self-defense justification when the domestic abuse is not imminent).

172. The Model Penal Code’s self-defense provision authorizes killings that are “immediately necessary” to thwart a future attack even if the attack is not yet imminent. MODEL PENAL CODE § 3.04(1) (1985); see also Russell Christopher, *Imminence in Justified Targeted Killing*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 253, 256 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (“Some argue that targeted killings of terrorists [representing continuous and ongoing threats of unlawful aggression] do satisfy the imminence requirement.”).

173. See Guiora, *supra* note 169, at 5 (proposing a strict-scrutiny test that would allow states to act in self-defense to prevent an attack).

174. As a result of the raid on bin Laden’s compound, U.S. officials reportedly gained evidence of the al Qaeda leader’s involvement in multiple terror plots, but reports do not indicate that officials viewed the raid as necessary to prevent a particular, known attack. See, e.g., Mark Mazzetti & Scott Shane, *Data From Raid Shows Bin Laden Plotted Attacks*, N.Y. TIMES, May 6, 2011, at A1 (discussing documents taken from the Abbottabad compound).

problematic because the target does not meet the status-based requirements of IHL, and, therefore, the killing cannot be justified by appealing to the permissive rules governing the targeting of combatants in wartime.<sup>175</sup> These cases are also difficult to justify under conventionally accepted accounts of domestic criminal law defenses, given that it cannot be shown that killing the person was necessary to prevent an ongoing or future attack.<sup>176</sup> As a result, TK 4 cases raise some of the most challenging questions about the justifiability of targeted killings.

In the remainder of this Part, we consider the legality of targeted killings under current understandings of the domestic criminal law defenses of self-defense, lesser evils, and law-enforcement authority. Our discussion focuses on U.S. law and precedents for illustrative purposes because each of these defenses is consistent in definition and scope across most common and civil law jurisdictions and finds support in international human rights jurisprudence.<sup>177</sup> Accordingly, we do not suggest targeted killings taking place abroad are themselves subject to U.S. criminal law. Moreover, while we examine the legality of TK 1, TK 2, and TK 3 scenarios, our primary emphasis is on the potential justification of killing in TK 4 cases.

### *B. Targeted Killing as Traditional Defense of Self or Others*

One way to argue for the legality of targeted killings is to invoke the traditional law of self-defense or defense of others. It is worth clarifying that we refer to the domestic law of self-defense rather than to the international rule that authorizes countries to resort to force in the exercise of so-called national self-defense. Pursuant to Article 51 of the United Nations Charter, states have

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175. See *supra* Part II (discussing the treatment of targeted killings under the conventions of *jus ad bellum*).

176. TK 4 cases are difficult to justify under both traditional and expansive formulations of the law of defense of self and others. See Christopher, *supra* note 172, at 255 (stating that, because terrorists are not combatants, targeting them for killing cannot be justified under the existing self-defense paradigms).

177. See, e.g., MELZER, *supra* note 11, at 232 (summarizing the circumstances, based on a review of international legal sources, in which lethal force may be used).

a right to use force in order to thwart an armed attack against the nation.<sup>178</sup> As we have already described, this right is the source of much debate in ways critical to the legality of a targeted-killing policy that crosses international borders. That debate, however, is largely outside the scope of this Article because it is principally concerned with breaches of state sovereignty, rather than the rules pertaining to killing itself. Not all cases, moreover, will implicate problems of state sovereignty. A state, for example, may avoid sovereignty concerns by inviting a foreign government onto its territory to carry out targeted killings, but that consent does not make the killings themselves legal.<sup>179</sup>

Domestic self-defense can sometimes succeed when the international law of self-defense fails. It is plausible to imagine a targeted killing that can be justified under the domestic law of self-defense but cannot be justified under the international rules governing the use of force. Imagine, for example, an intelligence officer who is dispatched overseas to monitor a suspected terrorist. Suppose that the officer kills the terrorist right before the terrorist is to detonate a bomb inside a restaurant that will kill several innocent people. Putting aside whether the officer is otherwise legally present in the state, his actions do not implicate the international rules governing the use of force. The killing of a single individual in this manner does not rise to the level of an “armed attack” under Article 51.<sup>180</sup> At most, he might be guilty of murder, but he is not in this case because the killing is easily

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178. See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”).

179. See, e.g., Van Schaack, *supra* note 2, at 268 (“While Yemen can consent to another state entering its territory, . . . it cannot consent to that state violating IHL or human rights law while there. Thus, some lawful justification for the use of deadly force must still be identified.”).

180. See TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 378 (2010) (examining what constitutes an “armed attack” in the context of modern warfare); Kirsten Schmalenbach, *The Right of Self-Defense and the ‘War on Terrorism’ One Year After September 11*, 3 GERMAN L.J. 63, 63 (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=189> (noting that under the traditional concept of Article 51, the armed attack has to be “comparable to inter-state combat in its scale and effects”).

justified under the domestic law of individual self-defense or defense of others, which allows a person to kill an aggressor in defense of self or others if he reasonably believes that killing the aggressor is necessary in order to repel an imminent and unlawful threat of death or serious bodily injury.<sup>181</sup> The killing of the terrorist thus amounts to a justifiable act of individual defense of self or others as long as it was reasonable to believe that the act was necessary to save the lives of third parties, which it surely was.

The law of domestic self-defense is therefore well equipped to deal with cases such as TK 2, in which an evildoer is killed just before he engages in conduct that would endanger the lives of others. Nevertheless, as we have already described, the domestic law of self-defense cannot be invoked to justify targeted killings in TK 3 cases, in which an evildoer is killed in order to prevent a future but non-imminent attack—at least not as this body of law has been understood traditionally. The conventionally accepted account of the domestic law of self-defense authorizes killings only when this course of action is believed to be necessary to repel an unlawful and *imminent* threat.<sup>182</sup> Therefore, assuming that the evildoer is poised to engage in an attack that will take place sometime in the next few days, weeks, or months, rather than shortly after he is killed, his killing cannot be justified under the traditional law of domestic self-defense. Such cases fall within what criminal theorists call “preventive” self-defense, which, although hotly debated, is almost universally recognized to fall outside of the core of traditional justifiable self-defensive action.<sup>183</sup>

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181. See, e.g., N.Y. PENAL LAW § 35.15 (McKinney 2004) (stating that a person may “use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself”); *People v. Goetz*, 497 N.E.2d 41, 47 (N.Y. 1986) (recognizing that self-defense permits the use of deadly force when the actor reasonably believes use of such force is necessary to repel an imminent attack).

182. See FLETCHER & OHLIN, *supra* note 64, at 90–91 (discussing how an imminence requirement helps to distinguish self-defense from unlawful preemptive attacks and punitive reprisals).

183. *Id.* at 162 (noting that preventative self-defense is analogous to describing war as “politics by other means”).

If domestic self-defense cannot legally justify killing in TK 3 cases, it *a fortiori* cannot justify killing in TK 4 cases, in which an evildoer who does not pose an imminent threat is killed despite a lack of specific knowledge of planned future attacks that would be thwarted by the killing. The nonexistence of an imminent threat is, once again, fatal to any purported claim of justification under the domestic law of self-defense in these types of cases. As a result, the laws of individual self-defense are useful only in justifying targeted killings in easy cases, in which no one but the most radical pacifist would oppose the use of force. The laws of individual self-defense fail to justify targeted killings in the more complicated TK 3 and TK 4 scenarios.

### *C. Targeted Killing as Expanded Defense of Self or Others*

If the most controversial aspects of the practice of targeted killings cannot be legally justified by appealing to the traditional formulation of the law of self-defense, perhaps a more modern and expanded version of self-defense can better justify these acts. Common reformulations start by arguing that the concurrence of an “imminent attack” should not be considered amongst the conditions that trigger the justifiable use of deadly force against another.<sup>184</sup>

Why do some scholars argue in favor of abandoning the imminence requirement? One reason is that there are situations in which it seems the only way of repelling a future deadly attack is to use force in a nonconfrontational situation before the attack becomes imminent.<sup>185</sup> These cases present a conflict between necessity and imminence.<sup>186</sup> For Jane to save her own life, it might be necessary to kill Bill when he is not attacking her. If she

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184. See, e.g., Christopher, *supra* note 172, at 255 (asserting that the imminence requirement, which “bars targeted killing of terrorists, should be rejected”).

185. See, e.g., FLETCHER & OHLIN, *supra* note 64, at 163 (“Suppose a terrorist threatens to implant an undetectable nuclear device that is set to explode in a year. He can be stopped now, but once the device is implanted, it will be too late.”).

186. For a lucid discussion of the tensions between imminence and necessity, see Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993).



waits for an attack, she stands no chance. If the necessity of using force is deemed to be more important than the concurrence of an imminent attack, then Jane's preemptive strike ought to be justified. If, on the contrary, imminence trumps necessity, then Jane's anticipatory use of force should not be justified.

The debate is of significant practical importance in battered women cases, in which wives defend the killing of their husbands in nonconfrontational situations, such as when their husbands are asleep, on the ground that waiting until the attack became imminent would have prevented the wives from successfully curbing the future attack that the husbands would have surely launched.<sup>187</sup> Normally, of course, one would demand that the victim call the authorities to prevent a non-imminent attack, but in some cases the battered spouse has reached out to authorities to no avail, indicating that authorities are unwilling or unable to help her.<sup>188</sup>

There are many who argue that in such cases the traditional law of self-defense should give way, the imminence requirement should be relaxed or abandoned, and the emphasis should be placed on whether or not the use of force is necessary to prevent the future attack.<sup>189</sup> There are also many staunch supporters of the imminence requirement who oppose such an expansion of self-defense law.<sup>190</sup> Regardless of which of these views is more

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187. This is the issue presented in the well-known case of *State v. Norman*. See *State v. Norman*, 378 S.E.2d 8, 9 (N.C. 1989) (concluding that a woman who had been physically and mentally abused by her husband over period of several years, and who had been diagnosed as suffering from battered woman's syndrome, was not acting in self-defense when, in order to prevent future abuse, she shot her husband while he slept). Much ink has been spilled analyzing the issues raised by *Norman*. See, e.g., Dressler, *supra* note 171, at 458 (suggesting that expanding self-defense to include nonconfrontational homicide would be a mistake); Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 343 (2007) (arguing that the imminence rule is an essential element of the law of self-defense and should not be modified).

188. See *Norman*, 378 S.E.2d at 19 (stating that a police officer told the wife that "he could do nothing for her unless she took out a warrant on her husband" and left, even after the wife said that "if she [took out a warrant], her husband would kill her").

189. See, e.g., Rosen, *supra* note 186, at 380 ("If action is *really* necessary to avert a threatened harm, society should allow the action, or at least not punish it, even if the harm is not imminent.").

190. See, e.g., Ferzan, *supra* note 167, at 217 (positing that "imminence serves as the actus reus for aggression, separating those threats that we may

normatively appealing, it is worth noting that the more modern and expansive account of self-defense is slowly but surely gaining supporters. The Model Penal Code's formulation of the defense rejects the imminent-attack limitation on the use of force in defense of self or others, and instead includes the more lenient and necessity-based requirement that the force be immediately necessary to repel an unlawful aggression.<sup>191</sup> Assuming, for the sake of argument, that this position is correct, can it serve to justify targeted killings in the more interesting and complicated cases discussed here?

For starters, an expanded version of self-defense that does away with the imminence requirement fares better in justifying TK 3 cases than the traditional imminence-based account of self-defense. In such scenarios, much like in certain battered-women cases,<sup>192</sup> deadly force is used to prevent a near certain future attack, and waiting until the future aggression becomes imminent will significantly reduce or even eliminate the defender's chance of successfully warding off the aggression. As long as the use of such force is the only way of thwarting the future attack, the absence of imminence does not preclude a finding of legal justification under the more expansive necessity-based account of self-defense.<sup>193</sup> This is precisely the argument recently put forth by Russell Christopher as a possible justification for targeted killings.<sup>194</sup> Building primarily on what

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properly defend against from mere inchoate and potential threats" and it therefore "is independent of the needs of the defender").

191. See MODEL PENAL CODE § 3.04(2)(b) (1985) ("The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . .").

192. See, e.g., *Norman*, 378 S.E.2d at 9 (concluding that a woman who suffered from battered woman's syndrome was not acting in self-defense when she shot her husband while he slept in order to prevent future abuse); see also Dressler, *supra* note 171, at 459–61 (detailing the constant verbal and physical abuse that Judy Norman endured from her husband and discussing whether Mrs. Norman was justified in killing her husband despite the lack of an imminent attack).

193. See Rosen, *supra* note 186, at 404–07 (discussing the viability of a self-defense statute without an imminence requirement).

194. See *supra* note 172 and accompanying text (discussing how the imminence requirement is becoming easier to satisfy).

others before him have argued in the context of battered-women cases, Christopher argues that the absence of an imminent attack need not be fatal to the claim that targeted killings ought to be justified under the rubric of self-defense.<sup>195</sup>

What Christopher does not do, however, is explain whether this expanded version of self-defense can account for the legality of TK 4 cases. Unfortunately for those who believe that targeted killing can be justified even in some TK 4 cases, the paradigm of expanded self-defense is inadequate. The problem is that TK 4 cases involve killing an individual who is believed to be dangerous, without any degree of certainty about whether doing so is necessary to prevent a future attack. Although in such cases the agent has knowledge that the evildoer is dangerous and that, in light of his past acts, he will likely attack again in the future, there is no concrete evidence of specific future attacks that can only be prevented by killing him. An expanded version of self-defense would thus fail to justify such killings because the essential element of the defense—that the use of force be necessary to prevent the death or serious bodily injury of third parties—is missing.

#### *D. Targeted Killing as Law-Enforcement Action*

Claire Finkelstein has suggested that some targeted killings might be legally justified by appealing to the rules governing the use of deadly force pursuant to law-enforcement authority.<sup>196</sup> In particular, Finkelstein contends that law-enforcement authority can justify targeted killings that are not justified by the law of defense of self or others.<sup>197</sup> Can law-enforcement authority justify

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195. See Christopher, *supra* note 172, at 284 (concluding that “[t]he imminence requirement for justified self-defense is problematic and should be abandoned”).

196. See Claire Finkelstein, *Targeted Killing as Preemptive Action*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 156, 178–79 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (arguing that “there is justification for the use of force . . . as applied to a targeted killing situation” and that the justification is “most clearly demonstrated by certain domestic law enforcement circumstances”).

197. See *id.* at 179 (considering the reach of law-enforcement authority in cases in which the standard justifications are inapplicable).

these more controversial cases? It depends on the scope of the rules governing law-enforcement authority, an issue that Finkelstein unfortunately does not address in much detail.

U.S. legal history demonstrates the complexity of the issue. At early common law, deadly force could be used by law-enforcement agents to arrest a fleeing felon.<sup>198</sup> The right to use such force was quite expansive because its use was not conditioned on whether the fleeing felon posed a danger to the officer or to third parties.<sup>199</sup> Deadly force could also be used to prevent the commission of a felony.<sup>200</sup> This expansive view of law-enforcement authority subsequently eroded in many states, either by statute or case law.<sup>201</sup> Presently, many, if not most, states limit the use of deadly force by government officials to the prevention of violent felonies.<sup>202</sup> The Model Penal Code adopted a similar limit on the use of deadly force by law-enforcement officers, which is authorized pursuant to Section 3.07 if the crime for which the arrest is made involved the use or threatened use of deadly force.<sup>203</sup>

Although the common law rules are fairly clear and easy to apply, the U.S. Supreme Court complicated matters when it held that the Fourth Amendment right against unreasonable seizures placed constitutional limits on the amount of force that a police officer may use to make an arrest.<sup>204</sup> In *Tennessee v.*

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198. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 21.03 (6th ed. 2012) (discussing the rules governing use of deadly force at common law).

199. See *id.* (noting that the common law crime-prevention defense “is remarkably broad in that it authorizes use of necessary deadly force to prevent nonviolent felonies”).

200. See *id.* (explaining that deadly force at common law is justified if the user of force reasonably believes such other person is committing a felony).

201. *Id.*; see also, e.g., *People v. Ceballos*, 526 P.2d 241, 245 (Cal. 1974) (adopting the common law rule that the use of deadly force to prevent a felony is justifiable only if the offense is a “forcible and atrocious crime”).

202. DRESSLER, *supra* note 198.

203. See MODEL PENAL CODE § 3.07(2)(b) (1981) (explaining that deadly force is not justified unless the actor believes “the crime for which the arrest is made involve[s] conduct including the use or threatened use of deadly force”). There are additional requirements that must be met under § 3.07 before deadly force by law enforcement is authorized. See *id.* § 3.07 (listing the requisite elements that justify use of deadly force).

204. See *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985) (rejecting the argument that, as long as there is probable cause to warrant an arrest, the

*Garner*,<sup>205</sup> the Court held that the killing of a fleeing unarmed youth suspected of committing a nonviolent felony amounted to an unreasonable seizure that ran afoul of the Fourth Amendment.<sup>206</sup> Subsequently, the Court held in *Scott v. Harris*<sup>207</sup> that the police could use deadly force by ramming a fleeing driver's car from behind because the driver's reckless conduct could have jeopardized the life or limb of other motorists.<sup>208</sup> It is unclear whether these cases impose additional limits on the use of deadly force pursuant to law-enforcement authority, beyond the ones statutorily in place in most states today.<sup>209</sup>

Regardless of whether the U.S. Constitution imposes additional limitations on the use of deadly force by governmental agents, it is fairly obvious that police officers may sometimes use more force than private citizens would be allowed to employ pursuant to the law of self-defense and defense of others. The facts of *Harris* constitute a case in point. The police officers in *Harris* were allowed to use deadly force against the fleeing motorist even though the motorist was not endangering the life or limb of third parties at the time force was used.<sup>210</sup> While the driver's conduct was reckless and dangerous in the abstract (it could have endangered someone had someone been there), there was no evidence that the life or bodily integrity of another motorist was in imminent danger at the moment the police

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Fourth Amendment has no role in determining how an arrest is made).

205. *See id.* at 22 (holding that an officer's use of lethal force without adequate physical threat of harm was unconstitutional).

206. *See id.* at 20–21 (stating that the officer did not have probable cause to believe the suspect posed any physical danger).

207. *See Scott v. Harris*, 550 U.S. 372, 386 (2007) (“A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”).

208. *See id.* at 383–84 (balancing the extent of the intrusion on the defendant's Fourth Amendment interests against the government's interests and finding that the latter prevails because of the number of innocent lives at risk).

209. *See, e.g., Tennessee v. Garner*, 471 U.S. at 13–19 (considering the common law rule and the history of other jurisdictions' rules).

210. *See id.* at 384–86 (finding that the Fourth Amendment did not prevent the police officers from using deadly force against a fleeing motorist who had not definitively placed any lives in imminent danger).

rammed the driver's car.<sup>211</sup> The reasonable possibility of future harm that might be caused by the motorist seemed to be sufficient to justify using deadly force. Such reasonable probability of future harm would not be enough to trigger the imminence requirement in self-defense.

Applied to targeted killings, the rules governing the use of deadly force by law-enforcement officers could authorize using deadly force against the evildoer if he is fleeing. In many targeted-killing cases, the person targeted is suspected of criminal responsibility for grave atrocities, which would satisfy the violent-felony requirement, assuming the accusations can be substantiated. The problem, however, is that law-enforcement authority justifies the use of deadly force only to prevent a felon from escaping or to thwart the imminent commission of a violent felony.<sup>212</sup> In TK 4 cases (as well as in many TK 3 cases), however, the person targeted is not fleeing and might not even be aware that the agent is targeting him.<sup>213</sup> Also, the targeted individual in these cases is not about to commit a crime when he is targeted. Therefore, the version of law-enforcement authority that has prevailed in domestic law cannot justify using force in the more complicated and controversial TK 4 cases unless the targeted suspect is fleeing or about to commit a crime.

### *E. Targeted Killings as Necessity or Lesser Evils*

Perhaps some targeted killings can be justified as cases of necessity or lesser evils. Under the Model Penal Code, an actor is entitled to a lesser-evils or necessity justification if she inflicts an evil in order to prevent an even greater evil.<sup>214</sup> Thus, the person

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211. *See id.* at 384 (acknowledging that there was a less than certain probability that the defendant's actions would cause death).

212. *See* DRESSLER, *supra* note 198, § 21.03 (explaining the circumstances in which deadly force is permissible under the modern majority rule).

213. This would almost always be the case when the targeted killing is carried out by way of an aerial strike. For obvious reasons, most targeted individuals will not be aware of the fact that they are about to be killed by a missile or a drone strike.

214. *See* MODEL PENAL CODE § 3.02(1)(a) (1985) (providing that conduct one believes to be necessary to avoid harm to oneself or another is justifiable if "the harm or evil sought to be avoided by such conduct is greater than that sought to

who breaks a car window without the owner's consent in order to save a child who is suffocating inside the car acts justifiably pursuant to the lesser-evils defense. Although her conduct nominally satisfies the elements of the offense of criminal mischief,<sup>215</sup> it is not considered wrongful because the evil prevented by the act (the death of a child) is greater than the evil inflicted (damage to the property). Similarly, it could be argued that killing the targeted individual may sometimes be justified because doing so prevents the occurrence of some greater harm. Perhaps, for example, by killing the target, one can foil the target's plot to bomb a residential building. Doing so would save dozens or hundreds of people by killing one. Although it is controversial whether one can ever kill a person in order to save other people in circumstances other than self-defense or law-enforcement authority,<sup>216</sup> many have argued that such killings ought to be justified if the amount of people saved by the conduct is considerable.

Fernando Tesón has recently defended some targeted killings by appealing to a logic similar to the one undergirding the lesser-evils justification.<sup>217</sup> More specifically, he argues that it might sometimes be justified to engage in the targeted killing of an evil

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be prevented by the law defining the offense charged"). For the defense to succeed, there must also be no statutory exceptions relevant to the specific facts involved, and there must be no apparent legislative purpose preventing the situation from being deemed justifiable. *Id.* § 3.02(1)(b)–(c).

215. The Texas Penal Code is representative of a criminal-mischief statute, stating that the offense is committed when a person "intentionally or knowingly damages or destroys the tangible property of the owner." TEX. PENAL CODE ANN. § 28.03(a)(1) (2009). This is one of three ways in which criminal mischief can be committed in Texas. *See id.* § 28.03(a)(2)–(3) (providing for an offense if one causes pecuniary loss or substantial inconvenience to another or makes markings on the tangible property of another).

216. The German Federal Constitutional Court struck down a law authorizing the government to shoot down a plane headed toward a heavily populated area, ruling that the state does not have a right to take innocent life even if doing so is the only way of saving hundreds of people. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 1 BvR 357/05, ¶ 137, 2006 (Ger.). According to the Court, authorizing such action would violate the dignity of the passengers inside the plane, for they would be treated as fungible objects that can be killed as long as more lives are saved than destroyed. *Id.* ¶ 34.

217. *See* Tesón, *supra* note 93, at 405, 411 (discussing the narrow circumstances in which he asserts that targeted killings are not immoral).

ruler or a terrorist if doing so prevents him from killing hundreds or thousands of people.<sup>218</sup> It is important to note that Tesón's proposal justifies the targeted killing only if engaging in such tactics is the *only* way to prevent the *en masse* killing of human beings.<sup>219</sup> According to Tesón, this means that, in the *sui generis* context of terrorism, "the state reasonably knows that acting now may be its only chance to avert a terrorist strike."<sup>220</sup>

Tesón's proposal illustrates how and when the lesser-evils defense can be invoked to justify targeted killings. Although Tesón's argument is plausible, it has at least two limitations for purposes of our analysis. First, and taking into account that Tesón does not impose an imminence requirement, it is unclear whether his justification for targeted killings is any different from the expanded defense of self or others justification that we have already described. If killing the target now is the only way to thwart a future threat to innocent lives, it would seem that engaging in such conduct would also be justified under the expanded concept of self-defense. Perhaps the most important contribution of this proposal, therefore, is its novel approach to the international-relations dimension of targeted killing: the ability to save a substantial number of lives may explain why a particular state may violate the territorial integrity of another state to carry out the killing.

Second, and more importantly, Tesón's proposal cannot justify killings in TK 4 scenarios, for it is the nature of such cases that it is not known with any certainty whether the targeted individual was about to launch an attack. Although it is reasonable to believe that the individuals targeted in cases like TK 4 could help plan or launch future attacks, there is no concrete evidence about specific plans that can only be thwarted by killing the person. This is why it is difficult, if not impossible, to invoke traditional lesser-evils principles to justify targeted killings in TK 4 scenarios. Given that the government official in

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218. See *id.* at 423 (proposing that targeted killing of terrorists in a peacetime setting is permissible "only when necessary to prevent the deaths of a substantial number of innocent persons").

219. See *id.* (explaining that it must be impossible or prohibitive to capture the target for a targeted killing to be justified).

220. *Id.* at 427.



such cases is unaware of any specific future (and reasonably imminent) attacks that would be foiled by killing the target, it cannot be said with any reasonable degree of certainty that killing the individual is indeed the *only* way to prevent the killing of innocent human beings in the future.

#### *IV. Another Paradigm for Targeted Killings? The Killing of Pablo Escobar*

Pablo Escobar was one of the most infamous criminals of the late twentieth century.<sup>221</sup> Escobar was the head of the “Cartel de Medellín,” Colombia’s largest and most feared criminal organization.<sup>222</sup> At its zenith, the Cartel de Medellín was one of the most successful and sprawling criminal organizations of all time, smuggling tons of cocaine into the United States on a weekly basis.<sup>223</sup>

Escobar kept his grip on power by employing a double strategy. First, he would create a loyal following amongst many people living in dire poverty, especially in his hometown of Medellín and, more generally, in the province of Antioquia.<sup>224</sup> He did this by building housing complexes for the poor, helping the needy, and performing other charitable acts, such as building soccer fields with lighting so that workers could play at night.<sup>225</sup> Although Escobar tried to get these sectors of the population to love him, he simultaneously attempted to get governmental

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221. See MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD’S GREATEST OUTLAW* 59 (2001) (noting that, by 1989, Escobar was “one of the richest men in the world, and perhaps its most infamous criminal”). At least ten books have been written about Pablo Escobar, including books written by his accountant, some of his lovers, and some of his coconspirators. See, e.g., ROBERTO ESCOBAR & DAVID FISHER, *THE ACCOUNTANT’S STORY: INSIDE THE VIOLENT WORLD OF THE MEDELLÍN CARTEL*, at inside cover (2009) (stating that Pablo Escobar’s brother, Roberto Escobar, is the author of the book and was the top accountant for the Medellín Cartel).

222. At one time, Escobar’s Cartel “dominated the cocaine traffic through Colombia to the United States.” *Death of a Cocaine King*, *BALT. SUN*, Dec. 4, 1993, at 8A.

223. ESCOBAR & FISHER, *supra* note 221, at viii.

224. See BOWDEN, *supra* note 221, at 28–29 (noting that Escobar was one of Medellín’s largest employers and spent millions of dollars improving the city).

225. *Id.* at 29.

actors to fear him.<sup>226</sup> He did this by implementing, with ruthless efficiency, his infamous policy colloquially known as “*plata o plomo*.”<sup>227</sup> Translated literally, the phrase means “silver or lead,”<sup>228</sup> which meant that one would either have to accept bribes to allow Escobar to continue his business or face the bullet fire that would ensue if one refused to do so.<sup>229</sup> The policy was a huge success for Escobar, as he was able to bribe most government officials who could have gotten in his way.<sup>230</sup> Those who could not be bribed were often killed.<sup>231</sup> There is even evidence that he managed to kill a popular presidential candidate who had publicly vowed to go after Escobar with all of the government’s might.<sup>232</sup> When such strategies failed to work, it is believed that Escobar would resort to even more sinister means, including terroristic strategies such as suicide and commercial-aircraft bombings.<sup>233</sup> Some have even suggested that Escobar was involved in the murder of nearly half of the justices of the Colombian Supreme Court, carried out by guerillas from the 19th of April Movement.<sup>234</sup>

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226. See *id.* at 24–29 (describing citizens’ love for Escobar and government officials’ fear of him).

227. *Id.* at 24.

228. See *id.* (providing the English translation of the phrase).

229. See *id.* (“One either accepted [Escobar’s] *plata* (silver) or his *plomo* (lead).”).

230. See, e.g., *id.* at 52 (detailing Escobar’s bribes of the Columbia Attorney General and judiciary).

231. At least 228 judges and court officers were killed during the 1980s. Steven Gutkin, *Colombia Trying to Repair Judicial System Battered by Organized Crime*, TIMES-NEWS (Hendersonville, N.C.), Jan. 10, 1991, at 25.

232. See Brian Byrnes, *Sins of the Father*, NEWSWEEK, Nov. 12, 2009, <http://www.thedailybeast.com/newsweek/2009/11/12/sins-of-the-father.html> (last visited Sept. 24, 2012) (stating that Escobar ordered the death of presidential candidate Luis Carlos Galàn) (on file with the Washington and Lee Law Review).

233. See BOWDEN, *supra* note 221, at 80–81 (describing an airline bombing plot ordered by Escobar). Escobar was implicated in the downing of an Avianca airliner in an unsuccessful effort to kill then-presidential-hopeful César Gaviria. *Id.* at 59.

234. See *id.* at 52–53 (discussing Escobar’s targeting of Colombia’s judicial system in the 1980s). The 19th of April Movement—known in Colombia as the M-19—was a Colombian guerrilla group that operated in the 1970s and 1980s. STEPHEN E. ATKINS, *ENCYCLOPEDIA OF MODERN WORLDWIDE EXTREMISTS AND EXTREMIST GROUPS* 185 (2004).

Eventually, Escobar decided to strike a deal with Colombian authorities in order to avoid extradition to the United States, where he was wanted for various drug-related offenses.<sup>235</sup> The terms of the deal were quite favorable to Escobar. He would surrender only if the government agreed to give him a lenient sentence and to not extradite him.<sup>236</sup> Escobar also demanded that he serve his prison time in a facility that he himself would build for the purposes of serving his sentence.<sup>237</sup> He was eventually sentenced to five years of imprisonment and was allowed to serve his sentence in the facility he built, which came to be known as “La Catedral” (meaning “The Cathedral”).<sup>238</sup> More Ritz Carlton than San Quentin, La Catedral was essentially a mansion equipped with a discotheque, gym, “dirt bike track,” and several “chalets” for entertaining his female friends.<sup>239</sup> His pseudo-imprisonment did not stop his drug dealings, as he was able to surround himself with “prison guards” who were loyal to him and allowed him to meet with clients and continue managing his criminal enterprise.<sup>240</sup>

A little over a year after his sentence, Escobar murdered a pair of subordinates whom he believed to be disloyal to him.<sup>241</sup> This was the impetus for then-President of Colombia César Gaviria to order the transfer of Escobar to a real correctional facility.<sup>242</sup> Unfortunately for the government, Escobar was able to

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235. See, e.g., *U.S. Charges Escobar for Jetliner Bombing*, WILLIAMSON DAILY NEWS, Aug. 14, 1992, at 17.

236. See BOWDEN, *supra* note 221, at 96–97 (describing Escobar’s deal with the Colombian government to avoid extradition to the United States).

237. See *Prison Prepares to Welcome Drug Billionaire*, TORONTO STAR, June 16, 1991, at H3 (noting that Escobar “could equip the room as he wished,” which would be “no problem” considering his “personal fortune of \$3 billion”).

238. See *id.* (referring to the location from which the article was reported as “La Catedral, Columbia”).

239. DOMINIC STREATFEILD, COCAINE: AN UNAUTHORIZED BIOGRAPHY 444 (2001).

240. See BOWDEN, *supra* note 221, at 110 (“The prison guards were no more than Pablo’s employees . . .”).

241. See *id.* at 118 (describing how Escobar had two of his “powerful lieutenants” killed because he was “[s]uspicious . . . of their loyalty”).

242. See *id.* at 120 (describing President Gaviria’s decision, after the killings, to move Escobar “to a real prison”).

learn of the plan beforehand.<sup>243</sup> Although the prison was surrounded by “an entire brigade of the Colombian army, roughly four hundred men,” Escobar managed to escape unharmed.<sup>244</sup>

### A. *Killing Escobar*

Escobar’s escape from La Catedral was the last straw for the Colombian government. With full knowledge that capturing Escobar would require more training and resources than those that Colombia could offer at the time, the government turned to the United States for help.<sup>245</sup> The same year that Escobar escaped from his prison hotel, agents from the United States’ elite combat team, Delta Force, started training and advising the Colombian police and military.<sup>246</sup> This led to the creation of the “Bloque de Búsqueda” (Search Bloc),<sup>247</sup> a Colombian police force trained and assisted by Delta Force that was tasked with finding and capturing Escobar.<sup>248</sup> Commanded by Colonel Hugo Martínez, members of the Search Bloc were meticulously screened to ferret out any prospective agent that might be susceptible to corruption, or who might already be working as a spy for Escobar.<sup>249</sup> The Search Bloc was also assisted by a U.S. Army special unit known as Centra Spike<sup>250</sup> and American planes, which provided vital

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243. See *id.* at 123 (“[B]ecause of radio and TV reports, Escobar . . . knew that armed forces were massing around his prison. Any hope of surprise was gone.”).

244. *Id.* at 134.

245. See *id.* at 140 (noting that, in seeking help from the United States, Gavaria had “opened the door to *anything*”).

246. See *id.* at 141–42 (describing U.S. officials’ deliberations, and ultimate decision, to use Delta Force to track down Escobar in Colombia).

247. *Id.* at 66.

248. See *Inquiry Details U.S. Role in Killing of Drug Lord*, LAKELAND LEDGER, Nov. 12, 2000, at A5 (noting the involvement of the Delta Force in the Escobar operation and that “U.S. officials . . . acknowledged training the Search Bloc”).

249. See BOWDEN, *supra* note 221, at 67 (noting that officers on the Search Bloc could not be “native Antioquian[s]” from Escobar’s home town and that the men chosen were “considered elite and incorruptible”).

250. See *id.* at 73 (describing Centra Spike and its purpose); Mark Bowden, *Quietly, Search Bloc Pins Escobar Down*, PHILA. INQUIRER, Dec. 14, 2000, at A2 (noting that “American surveillance experts at Centra Spike” worked with the Search Bloc to locate Escobar).

intelligence that proved decisive in tracking down Escobar.<sup>251</sup> The United States agreed to provide all of this help pursuant to President Reagan's 1986 order that declared drug trafficking to be a threat to the national security of the country, and thus authorized the use of military assets to assist police forces in neutralizing the threat.<sup>252</sup>

While the Search Bloc was hunting Escobar down, a vigilante group—financed both by Escobar's enemies in the drug world and by right-wing paramilitaries—began a bloody campaign designed to weaken Escobar by killing his closest associates and relatives and to exact vengeance for what he had done to them and the country.<sup>253</sup> The group called themselves "Los Pepes," which stood for "Los Perseguidos por Pablo Escobar" (People Persecuted by Pablo Escobar).<sup>254</sup> Los Pepes were almost as ruthless as Escobar, often employing the same tactics that Escobar used to terrorize his enemies.<sup>255</sup> The group would achieve its objective by any means necessary, including planting bombs, setting fire to Escobar's property, and murdering many of his lawyers, bankers, and extended family.<sup>256</sup> There is also much evidence suggesting that there was some collaboration between the Search Bloc and Los Pepes and, indirectly, between the American military and Los Pepes.<sup>257</sup> While there is no direct evidence linking the Search

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251. See BOWDEN, *supra* note 221, at 154 (noting the volume of U.S. military aircraft monitoring Escobar's activity over Medellín).

252. See *id.* at 54 (noting that National Security Decision Directive 221, signed in 1986, "opened the door to direct [U.S.] military involvement in the war on drugs").

253. See *id.* at 176–77 (describing Los Pepes, a group committed to retaliating against Escobar and his associates); *Los Pepes: Sed de Venganza*, EL TIEMPO, Dec. 2, 1993, <http://www.eltiempo.com/archivo/documento/MAM-278283> (last visited Sept. 24, 2012) (describing Los Pepes and their retaliation efforts) (on file with the Washington and Lee Law Review).

254. BOWDEN, *supra* note 221, at 176.

255. See *id.* ("If [Escobar] stood atop an organizational mountain that consisted of family, bankers, *sicarios*, and lawyers, then perhaps the only way to get him was to take down the mountain.").

256. See *id.* at 191–95 (listing Escobar's associates that were targets in the "bloodbath").

257. See Mark Bowden, *U.S. Spy Data, Vigilante Killings Start to Coincide*, PHILA. INQUIRER, Dec. 1, 2000, [http://articles.philly.com/2000-12-01/news/25579871\\_1\\_escobar-vigilante-squad-los-pepes](http://articles.philly.com/2000-12-01/news/25579871_1_escobar-vigilante-squad-los-pepes) (last visited Sept. 24, 2012) (stating that "[m]ore and more of the people identified by Centra Spike's Beechcraft spy planes were turning up dead" in killings orchestrated by Los

Bloc and the American military to the perpetration of the crimes committed by Los Pepes, some have suggested that both the United States and the Colombian government tolerated the actions carried out by Los Pepes, albeit never expressly approving of them.<sup>258</sup>

Slowly but surely, the combined pressure exerted by the Search Bloc and Los Pepes wore Escobar down. By 1993, he was constantly on the run and feared not only that the Search Bloc would catch up to him, but also that Los Pepes would kill his wife and children.<sup>259</sup> On December 2, 1993, the Search Bloc located Escobar using radio triangulation technology provided by the United States.<sup>260</sup> After the Search Bloc stormed the Medellín house in which Escobar was hiding, Escobar opened fire.<sup>261</sup> Realizing that he was outnumbered and outgunned, Escobar jumped out of a window and started running across the roofs of surrounding houses in a desperate attempt to escape.<sup>262</sup> Members of the Search Bloc shot and killed Escobar on the spot.<sup>263</sup> He was shot three times: once in the leg, once in the torso, and a fatal shot in his ear.<sup>264</sup> Although the exact circumstances of his death are unknown, it is widely believed that Escobar was executed by the police, as there is evidence tending to demonstrate that the fatal shot was fired after Escobar was already neutralized by the Search Bloc.<sup>265</sup>

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Pepes) (on file with the Washington and Lee Law Review).

258. See *id.* (noting that “[i]f Los Pepes were working with the Search Bloc, that would explain their apparent access to fresh U.S. intelligence” but that any evidence of “American linkage with Los Pepes remained circumstantial” at best).

259. See *Escobar on Run from Vigilante Attacks*, TOLEDO BLADE, Feb. 28, 1993, at D5 (noting that Escobar was “on the run and getting what he dishes out” from Los Pepes, who recently bombed the homes of his “family members”).

260. See BOWDEN, *supra* note 221, at 239–43 (describing the details of locating Escobar with radio triangulation).

261. See *Drug Lord Escobar Killed in Shootout*, MILWAUKEE SENTINEL, Dec. 3, 1993, at 1A, 19A (describing the Search Bloc’s raid and ensuing shootout at Escobar’s home in Medellín).

262. BOWDEN, *supra* note 221, at 248.

263. *Id.*

264. *Id.* at 253.

265. See *id.* (opining that “[t]he shots to his leg and back most likely would have knocked him down, but probably would not have killed him,” thus making it more likely that Escobar was “shot in the head after [he] fell”).

*B. Domestic and International Reaction to Escobar's Killing*

Most Colombians received the news of Escobar's death with jubilation.<sup>266</sup> His demise marked an important milestone for the country. The government was finally able to triumph over the "biggest and baddest" drug lord the world had ever seen. Stifling the Medellín Cartel was a first win in a series of victories over the country's cartels and thugs. The government focused on dismantling Escobar's rivals, especially the Cali Cartel, and Colombia embarked on its slow but steady journey to regain control over the country.<sup>267</sup> First would come the drug cartels and then the infamous FARC (Fuerzas Armadas Revolucionarias Colombianas) guerillas.<sup>268</sup> Although we do not wish to exaggerate the significance of this single event, Escobar's death played an important role in Colombia's resolution of its security problems. Today, the country is characterized by optimism in the fight against drug-smuggling and guerillas. There is also cautious optimism about the economic growth that goes hand-in-hand with the political stability that such victories bring. In recent years, Colombia has been doing well economically and politically by Latin-American standards.<sup>269</sup> Drug- and guerilla-related violence is down dramatically from 1990 levels.<sup>270</sup> All in all, Colombia is

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266. See *id.* at 261 ("[T]his day was for celebration."); see also, e.g., *Al Fin Cayó Escobar!*, EL TIEMPO, Dec. 31, 1993, <http://www.eltiempo.com/archivo/documento/MAM-282510> (last visited Sept. 24, 2012) (breaking news that Escobar was killed) (on file with the Washington and Lee Law Review).

267. See BOWDEN, *supra* note 221, at 272 (discussing the unraveling of the Cali cartel).

268. See TIMOTHY P. WICKHAM-CROWLEY, GUERRILLAS AND REVOLUTION IN LATIN AMERICA: A COMPARATIVE STUDY OF INSURGENTS AND REGIMES SINCE 1956, at 17–18 (1992) (explaining that many disgruntled Columbians formed FARC, the Colombian Revolutionary Armed Forces, due to a government military campaign to quell "quasi-independent zones" of Columbian farmers formed for "self-defense and self-administration in agrarian matters").

269. See Stephen Manker, *Colombia's Economic Growth to be 3rd Strongest in Region for 2011: IMF*, COLUMBIA REPORTS, June 17, 2011, <http://colombiareports.com/colombia-news/economy/17058-colombias-economic-growth-to-be-3rd-strongest-in-region-for-2011-imf.html> (last visited Sept. 24, 2012) (stating that Colombia's economic growth was approximately 5% in the first quarter of 2011) (on file with the Washington and Lee Law Review).

270. See Enrique S. Pumar, *Colombian Immigrants*, in MULTICULTURAL AMERICA: AN ENCYCLOPEDIA OF THE NEWEST AMERICANS 353, 371–72 (Ronald H. Bayor ed., 2011) (finding that the Colombian government has become regarded

now a relatively safe country.<sup>271</sup> Escobar's death was an important component of this recovery.

This is not to say, of course, that Colombia has solved all of its problems. The guerrillas retain control over a small portion of the country, and drug violence is still a problem.<sup>272</sup> Nonetheless, Colombia is undeniably a safer, less violent country than it was twenty years ago.<sup>273</sup> This is due, at least in part, to the government's dismantling of the Medellín cartel, including its killing of Escobar.

Perhaps the most important consequence of Escobar's death was that it proved to the government and to Colombians that they were capable of defeating serious threats to their national security. The Search Bloc was so effective in tracking down Escobar that it was used as a model for other operations carried out by the government. Subsequent Search Blocs were successful in dismantling most of the remaining drug cartels in the country.<sup>274</sup> The victory over Escobar also proved to be determinative of Colombian–U.S. relationships. The strong ties that developed between the two countries continue to thrive to this day. The United States has also learned from Colombia's struggle against terrorism and organized crime. After all—as

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as “a strong democracy with an improving economy and reduced levels of violence” since it began receiving aid from the United States in the year 2000 to deal “with the ramifications of civil strife fueled by drug money”).

271. See *id.* at 372 (describing the reduced levels of violence in Colombia).

272. See, e.g., *Colombia's Defense Minister Steps Down*, SEATTLE TIMES, Aug. 31, 2011, [http://seattletimes.nwsources.com/html/nationworld/2016065962\\_aplt\\_colombiadefenseminister.html](http://seattletimes.nwsources.com/html/nationworld/2016065962_aplt_colombiadefenseminister.html) (last visited Sept. 24, 2012) (noting that the recent “rise in guerrilla attacks” is fueled by drug trafficking conflicts) (on file with the Washington and Lee Law Review).

273. See, e.g., Vicky Baker, *Bogotá's Age of Rediscovery*, GUARDIAN, Aug. 19, 2011, <http://www.guardian.co.uk/travel/2011/aug/19/bogota-colombia-city-restaurants> (last visited Sept. 24, 2012) (“Bogotá's landscape is changing rapidly. People who abandoned its centre . . . at the height of internal conflict in the 1990s are coming back.”) (on file with the Washington and Lee Law Review).

274. See Mark Peceny & Michael Durnan, *The FARC's Best Friend: U.S. Antidrug Policies and the Deepening of Colombia's Civil War in the 1990s*, 48 LATIN AM. POL. & SOC'Y 95, 105–06 (2006) (noting that the Colombian government, responding to pressures from the U.S. government, “[l]aunched an all-out campaign to capture the [Cali] cartel's leaders,” which led to its defeat by the end of 1995).



others have pointed out—the Colombian experience helped the United States formulate its post-9/11 counterterrorism policies.<sup>275</sup>

In spite of the widespread jubilation with which the news of Escobar's death was received in the country, some Colombians were saddened when they learned about his killing.<sup>276</sup> For some, Escobar was a modern day Robin Hood who took from the government and the corrupt rich people and gave back to the poor. This was especially the case in some *barrios*<sup>277</sup> of Escobar's hometown of Medellín.<sup>278</sup> These were the same people who knew of his whereabouts and never said a word to local authorities: the silent accomplices of Escobar's effort to hide from the Search Bloc.

Most, however, were ready to turn the page and explore what a world without Escobar would mean for the country. Of special significance is the fact that Escobar's death failed to attract vocal criticism from defenders of civil liberties and individual rights, either in Colombia or abroad. This is a telling fact. After all, at that time, it was widely rumored that Escobar was killed execution-style after he had been incapacitated by shots to the leg and torso.<sup>279</sup> If so, the fatal shot would have clearly been unlawful under domestic and international law. Law-enforcement agents can only use deadly force when it is the only way to prevent a fleeing felon from escaping.<sup>280</sup> But if—as many believe—Escobar was already shot down before the fatal shot was fired, the third shot was not necessary to prevent his escape.<sup>281</sup> The alleged

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275. See, e.g., Michael Kenney, *From Pablo to Osama: Counter-Terrorism Lessons from the War on Drugs*, 45 SURVIVAL 187, 187 (2003) (“Indeed, members of the US intelligence community acknowledge that drug enforcement raids in Colombia during the 1990s serve as models for today’s counter-terror operations in Afghanistan . . .”).

276. See BOWDEN, *supra* note 221, at 266 (describing Escobar’s funeral as “an occasion for grief” for many Colombians).

277. See WEBSTER’S THIRD NEW INT’L DICTIONARY 179 (1993) (defining “barrio” as “a ward, quarter, or district of a city or town in Spanish-speaking countries”).

278. See BOWDEN, *supra* note 221, at 266 (noting that those who lived in Medellín were especially aggrieved over Escobar’s death and directed “promises of revenge” toward the government).

279. See *id.* at 253–54 (describing the circumstances surrounding Escobar’s death and the possibility that he was executed during the Search Bloc’s raid).

280. See *supra* note 198 and accompanying text (stating the common law rule that lethal force may be used against a fleeing felon).

281. This, in fact, is what journalist Mark Bowden concluded after

firefight that erupted between Escobar and the authorities when the Search Bloc stormed Escobar's hiding place does not justify his killing either, at least if the aforementioned accounts of the incident are believed. Escobar was killed while attempting to escape from the police. Assuming that the police agents shot him twice and, by doing so, successfully prevented him from escaping, the previous firefight did not give them lawful authority to use deadly force against him again if, at the time, Escobar was already neutralized and no longer posing a threat.

### *C. Was Escobar's Killing Justified?*

Although the facts of Escobar's killing suggest that Colombian authorities may have violated the law, the death did not generate outrage amongst the Colombian people, the academy, or the international community. At an abstract level, this is rather startling. How can the possibility of an extrajudicial execution carried out by governmental authorities not raise serious concerns? At a more basic level, however, there is nothing puzzling about the lack of attention paid to the legality of Escobar's killing. Everyone knew that Escobar was a ruthless killer. There was no doubt that he was responsible for some of the worst crimes perpetrated in the latter portion of the twentieth century. He was still a very dangerous man, and it seemed impossible to bring him to justice. Members of the judiciary were either in cahoots with him or feared for their lives. There seemed to be no way out. Escobar had been imprisoned, and he had escaped. Capturing him alive was an option fraught with peril.

The extrajudicial killing of any human being is a matter of grave concern, and there remain powerful arguments against the killing of Escobar. We are also mindful that Escobar's killing did not take place in a vacuum, and that the struggle against and between Colombia's drug lords included other extrajudicial killings under different, less sympathetic circumstances, including many by paramilitary groups suspected of government

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examining the evidence. According to Bowden, the evidence suggests that the shot that likely killed Escobar "is consistent with a shooter administering a coup de grâce while standing over a downed man." BOWDEN, *supra* note 221, at 254.

ties.<sup>282</sup> Our aim is not to endorse Colombian government policy as a whole, or even to mount a full-blown defense of the Escobar killing.

Our aim, instead, is more modest: to consider the Escobar case in isolation and to identify features that favor its justification. Escobar's case presents, in many ways, the best case that could be made for ordering the killing of someone outside of war, in circumstances not necessary to prevent the person's escape, or to neutralize an imminent threat to the life or limb of government officials or third parties. In other words, Escobar's killing presents us with the best case that can be made for justifying a TK 4 case.

At least three factors seem to favor a justification for Escobar's killing. First, although not judicially established, Escobar's guilt for killing innocent human beings on numerous occasions was never in serious doubt. This, of course, is not enough to justify killing him in circumstances other than those that allow for the use of deadly force pursuant to law-enforcement authority, or defense of self or others. Absent these circumstances, there are very powerful reasons militating in favor of capturing and trying an individual for his crimes, rather than allowing government officials to kill him without affording him due process of law. Nevertheless, the fact that Escobar's guilt was clearly established helps explain—along with other factors—why an order to kill rather than capture him may have been justified in this particular case.

A second factor justifying Escobar's killing was that he clearly remained a dangerous individual with the potential to cause massive amounts of harm in the future. Even if it is assumed that Escobar did not pose a threat to the life or limb of the police officers or third parties at the time he was killed, there were good reasons to believe that he would continue to engage in serious crimes in the future. Once again, this alone is not enough to justify killing Escobar. Many, if not most, people who are guilty of committing homicide are dangerous and could thus continue to engage in similar conduct in the future. Nonetheless, Escobar's

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282. See, e.g., *supra* notes 253–58 and accompanying text (describing actions of paramilitary groups).

dangerousness was different in kind from that of the typical violent felon. Escobar was widely considered during the 1980s and up to the time of his death to be the most dangerous drug trafficker in the world.<sup>283</sup> His crimes were different in scale from the offenses committed by ordinary criminals. Before car bombs became associated with the Middle East, Escobar used them to kill innocent people and terrorize the citizenry.<sup>284</sup>

Escobar was complicit in the killing of police officers and presidential candidates.<sup>285</sup> He was widely believed to have played a role in the killing of half of the members of the Colombian Supreme Court.<sup>286</sup> There was overwhelming evidence suggesting that he ordered the downing of a commercial jetliner.<sup>287</sup> Escobar was no ordinary criminal. And his dangerousness was not ordinary either.

Furthermore, Escobar showed no signs of slowing down, so the authorities had every reason to expect his criminal activities would continue and that, as a result, so would the body count. His death put an end to the bloodbath. Coupled with the fact that there was no doubt that Escobar was guilty of past serious offenses, the case in favor of neutralizing him by whatever means necessary was strong.

In spite of this, Escobar's dangerousness could not, in and of itself, justify killing him extrajudicially, even though his guilt for committing serious offenses was not in doubt. These factors clearly provide enough reasons to justify using force—deadly if necessary—to capture an individual. They do not, however, justify killing a person in a nonconfrontational scenario if it is assumed that he could have been neutralized before he was

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283. See *id.* at 138 (stating that DEA Chief Toft labeled Escobar “the most notorious and dangerous cocaine trafficker in history”).

284. See *id.* at 57 (describing Escobar's attempt to kill a high-ranking Colombian general in charge of hunting him down by setting off a car bomb alongside his vehicle, wounding numerous civilians).

285. See *supra* notes 226–42, 248–49 and accompanying text (describing Escobar's numerous egregious crimes).

286. See *supra* note 234 and accompanying text (noting that Escobar was accused of being responsible for the deaths of multiple Colombian Supreme Court Justices).

287. See *supra* note 233 and accompanying text (referencing accusations that Escobar downed a commercial airliner as a means to assassinate a potential presidential candidate).

killed.<sup>288</sup> An additional element was present here: the unavailability of the traditional justice system as a secure means to punish and incapacitate him.

Trying Escobar was virtually impossible. He had managed to render the judiciary ineffective, at least with regard to him, by either killing judges who were willing to take a stand against him, or by bribing those who would accept the money. Furthermore, even if trying him would have been feasible, imprisoning him would have been nearly impossible. As his escape from La Catedral demonstrated, Escobar was able to get to almost anyone in order to have his way, including prison guards and government officials. At the time, there appeared no way of successfully trying, and subsequently imprisoning, Escobar in Colombia. Finally, even if it is assumed, for the sake of argument, that Escobar could have been successfully tried and imprisoned, there is little reason to doubt that doing so would have endangered the lives of those who played a role in the process, including the officers who would escort him to and from court, the judges who would preside over his trial, and the guards who would be in charge of his custody. Additionally, Escobar's trial and imprisonment could very well have endangered the lives of civilians who did not play a role in his capture and detention. Escobar had shown that he was willing to do anything to get what he wanted, and he had no trouble killing innocent people. He would not have hesitated to do what he needed to prevent trial and imprisonment, even if it meant killing innocents. Given this reality, Colombia had strong reasons to avoid paying the price involved in capturing and trying Escobar. These factors help explain the absence of complaints in Colombia or elsewhere following Escobar's death.

Despite these considerations, there remains at least one troubling aspect of Escobar's demise, even under an account that gives weight to the factors outlined above. This is the reported fact that Escobar was already cornered and debilitated at the time of his shooting.<sup>289</sup> The problem here is similar to the one we

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288. See *supra* note 281 and accompanying text (noting that Escobar was probably neutralized before the fatal shot was fired).

289. See Schmidle, *supra* note 4, at 43 (stating that bin Laden was found unarmed).

briefly considered with respect to *hors de combat* status as defined in IHL.<sup>290</sup> Under the war paradigm, the permissive approach to killing ceases upon the target's incapacitation, namely upon his having been rendered unconscious "or otherwise incapacitated by wounds or sickness" and being, therefore, "incapable of defending himself."<sup>291</sup> This distinction reflects the logic of risk—combatants are presumptively dangerous and are targetable only so long as that presumption retains plausibility—but not entirely. The wounded soldier maintains her immunity from attack even as she is evacuated to a friendly hospital where she may recover to rejoin the fight. Manifest, here, is also a sense of chivalry, a moral revulsion against killing the helpless irrespective of their potential future danger.

This applies to the Escobar case, as well. The considerations favoring his killing, as we have outlined them, apply whether or not he was at large at the time of his targeting. But even if one accepts a more permissive approach to lethal force in cases like Escobar's, the killing of a suspect already arrested presents a different moral calculus, one in which the use of lethal force becomes indefensible, even in the extraordinary circumstances we have described. One might also draw the line at the moment of Escobar's incapacitation, when he effectively fell into the power of government authorities.

This qualification, however, is not fatal to the broader claim that a more permissive approach to killing was appropriate in Escobar's case. For example, one could object to the specific circumstances of his killing while nevertheless maintaining that he, like a combatant in armed conflict, was appropriately subject to being targeted in a broad set of nonconfrontational scenarios, so long as he remained at large.

#### V. Pablo Escobar and the Morality of Targeted Killings

The suggestion that Escobar might have been a justifiable TK 4 target presents a *prima facie* conflict with the limits that

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290. See *supra* note 42 and accompanying text (discussing *hors de combat* status).

291. Additional Protocol I, *supra* note 39, art. 41(e).

deeply ingrained principles of criminal law impose on official action. In this Part, we discuss how a narrowly drawn TK 4 justification might be integrated into conventional criminal law thinking. In particular, we consider the relationship of this justification to limits on preemptive action, punishment philosophy, and due process values.

In addition, we consider whether this justification is reducible to a judicially administrable test. We acknowledge that there is indeterminacy in the framework we outline, and we observe that this indeterminacy is not qualitatively different from that already inherent in administering established justifications for the use of lethal force. That said, we are mindful that special caution is warranted when considering proposals to relax the norm against killing, including concerns about official abuse of an expanded rule and the risk of creating a slippery slope. If these concerns preclude the acceptance of a TK 4 justification within the law, our model may nevertheless have value in indicating when targeted killings can be tolerated as a matter of social morality, even if not technically legal.

Finally, we qualify our argument by highlighting several important questions that arise in the context of targeted killing but remain outside the scope of our analysis.

#### *A. Targeted Killing Partially Justified as Preemptive Action*

Most justifications afford individuals a defense to criminal liability when they harm another in order to prevent a future harm to self or others. Self-defense is a paradigmatic example. The person who employs defensive force takes preemptive action in order to avoid harm to his person. Although there is much debate about the reasons that justify acting in self-defense in borderline cases,<sup>292</sup> there is wide agreement about the fact that the harm avoided by the defensive action is relevant to explaining the justifiable nature of such conduct.<sup>293</sup>

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292. See George P. Fletcher & Luis E. Chiesa, *Self-Defense and the Psychotic Aggressor*, in CRIMINAL LAW CONVERSATIONS 365, 365–72 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (discussing the justifications of use of defensive force against the psychotic aggressor).

293. See *id.* at 365 (noting that “it is hard to see either the justice or efficacy

The use of deadly force pursuant to law-enforcement authority is also morally justified because it prevents a future harm. By using such force, police officers prevent harm to themselves, harm to others, and the harm inherent in allowing a dangerous felon to escape.<sup>294</sup> Admittedly, it is debatable whether the harm inherent in escaping from police custody is sufficiently grave to warrant using deadly force to prevent it.<sup>295</sup> Nevertheless, once it is accepted that the harm of escaping capture is significant enough to justify employing deadly force, it becomes clear that the justification for using such force is prospective rather than retrospective. The individual is not harmed to exact retribution for what he is suspected to have done, or to retaliate in response for past wrongdoing, but rather to prevent the occurrence of a future harm.

The use of force pursuant to the lesser-evils defense can be morally justified in a similar manner. The reason why it is acceptable to cause harm to an innocent person pursuant to this defense is that, by doing so, one prevents an even greater harm from taking place.<sup>296</sup> Once again, the moral justification for engaging in this harmful conduct is preemptive because the use of force in these circumstances is a way of averting an untoward state of affairs that will take place in the future, rather than a method for punishing the harmed individual for past behavior.

Can TK 4 killings be morally justified by appealing to such preemptive rationales? There is certainly a preemptive dimension to such targeted killings. A salutary consequence of killing a manifestly dangerous individual such as Escobar is that doing so

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of punishing someone who kills [a deadly attacker] for the sake of self-preservation”).

294. Allowing a suspected felon to escape hinders the effective operation of the criminal justice system.

295. See MODEL PENAL CODE § 3.07(2)(b)(i), (2)(b)(iv)(B) (1962) (restricting justifiable use of deadly force by law-enforcement officers to certain situations, including arrests for felonies or if “there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed”).

296. See *id.* § 3.02 (“Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law . . .”).



eliminates the possibility that he will be involved in future attacks.<sup>297</sup> If the possibility of future attacks is substantial, then the prospect of preventing them by killing the actor certainly counts in favor of this course of action.

Nevertheless, this factor alone should not be enough to justify the killing of an individual in TK 4 cases. Domestic criminal law circumscribes the authorization to use deadly force to cases in which the force is necessary to prevent an imminent future attack<sup>298</sup> or a non-imminent, known future aggression that can only be averted by the preemptive use of deadly force.<sup>299</sup> There are good reasons for imposing these strict limitations. When the attack is not sufficiently imminent, or there is uncertainty about when and if a future aggression will take place, it is likely that the conflict may be resolved without using deadly force.<sup>300</sup> Perhaps the individual will not carry out the attack or the police may thwart it without resorting to deadly force. It is a generally accepted principle that force calculated to take life should only be used when all else fails.<sup>301</sup> It is unclear whether

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297. It is worth noting that killing the dangerous individual might also generate violence. For example, the associates of the killed individual might harm innocent people in order to avenge the death.

298. See Ferzan, *supra* note 167, at 222–23 (noting that the use of deadly force in “[d]omestic self-defense is wholly preventative,” but a threat of unlawful force must be imminent to “trigger the right to self-defense”).

299. See MODEL PENAL CODE § 3.04(1), (2)(b) (stipulating that the use of deadly force is justified if “immediately necessary for the purpose” of protection against “death, serious bodily injury, kidnapping or sexual intercourse” on the “present occasion”).

300. See Dressler, *supra* note 171, at 467 (noting the importance of “imminency” in self-defense justifications and that, because there is no imminence when a battered woman murders her sleeping spouse, “we will never know for sure . . . whether some other, less extreme, remedy *would* have been sufficient”).

301. This is why deadly force pursuant to self-defense, law-enforcement authority, and the lesser-evils defense is only justified when it is *necessary* to prevent a harm. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (authorizing the use of deadly force if the law-enforcement officer reasonably believes it is necessary to defend himself or others); see also MODEL PENAL CODE § 3.02 (1985) (stating that, under certain circumstances, “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable”); Dressler, *supra* note 171, at 466 (“Stemming from the common law, a core feature of self-defense law is that *the life of every person, even that of an aggressor, should not be terminated if there is a less extreme way to resolve the*

using lethal force is necessary in TK 4 cases because the agents who order the killing simply do not know with sufficient certainty whether the targeted individual is actually planning a future attack, one which can only be thwarted by killing the target.<sup>302</sup> Although they might justifiably expect that future attacks will take place, that expectation is not enough to authorize the killing of a human being.

This does not mean that the possibility of thwarting a future attack is irrelevant to justifying the killing of the targeted individual. It surely is. More needs to be demonstrated, however, in order to flout the basic principle that a person should not be killed unless it is the only way of preventing future harm to the lives of others. The likelihood of averting a future attack is, in sum, a necessary, but insufficient, condition for justifying a TK 4 killing.

*B. Targeted Killing Partially Justified as Retaliatory  
(Punitive) Action*

It is sometimes morally justified for the government to inflict harm to a non-threatening individual deliberately. Sometimes it may even be morally justified for the government to kill a non-threatening person deliberately.<sup>303</sup> The paradigmatic example is state-sanctioned punishment.

Many theories have been advanced to justify the imposition of punishment. Consequentialist theories of punishment—such as those rooted in deterrence, incapacitation, and rehabilitation—justify punishment primarily by reference to the good consequences that follow from its imposition.<sup>304</sup> Deontological theories of punishment—such as retribution—justify punishment primarily by reference to the fact that punishing a person who

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*problem.*)

302. In cases of group crime, for example, killing a group's leader might fail to prevent others from carrying out a planned attack.

303. This statement, however, assumes that the death penalty is morally justified, which is an issue that is beyond the scope of this Article.

304. See R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 3–4 (2001) (discussing consequentialism, which “insists that the justification of any human practice depends on its actual or expected consequences”).

has done something worthy of condemnation is intrinsically good even if no additional good consequences follow from doing so.<sup>305</sup> In spite of their differences, consequentialist and deontological approaches to punishment have something important in common. Both theories conceive of the imposition of punishment as a response to a wrongful act committed by the person to be punished.<sup>306</sup> Thus, regardless of what is believed to be the aim of punishment, it is imposed *for* an act of wrongdoing that took place in the past.<sup>307</sup> Otherwise, the imposition of sanctions would seem random and arbitrary because punishment is, by definition, something that happens only after a determination that the person to be punished has committed an offense.<sup>308</sup> In other words, there is an essential feature of punishment that is backward-looking even if its imposition is justified by appealing to forward-looking consequentialist criteria.<sup>309</sup> Punishment is imposed *because* someone has done something wrong, even if the aim of imposing it is to deter others from engaging in similar acts in the future or to prevent the offender from recidivating.<sup>310</sup>

Can targeted killings in TK 4 cases sometimes be morally justified by appealing to reasons that are similar to those that

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305. See MICHAEL MOORE, PLACING BLAME 87 (1997) (stating that in retributivism “the good that punishment achieves is that someone who deserves it gets it”). Furthermore, “[p]unishment of the guilty is thus for the retributivist an *intrinsic* good.” *Id.*

306. See Luis Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 102, 109 (2007) (explaining that “punishment is imposed for the commission of an act that represents an untoward state of affairs”).

307. See *id.* at 113 (“[N]o punishment can be coherently imposed when there is no wrongdoing *no matter what theory of punishment one espouses.*”).

308. See *id.* at 106 (stating that “punishment would simply not make sense without wrongdoing”). Furthermore, “imposing punishment without the commission of an offense would be akin to the state’s production of random and arbitrary violence.” *Id.* at 110.

309. See *id.* at 109–10 (explaining that the connection between punishment and offense “highlights the centrality of the concept of ‘wrongdoing’ in explaining the true nature of punishment insofar as it entails inflicting pain upon a person *for* having committed an offense and not just *for the sake* of social protection”).

310. See *id.* at 106–07 (explaining that scholars have agreed over the years that punishment is a response to wrongdoing even though the aim of punishment varies with different theories).

justify the practice of state-sanctioned punishment? Perhaps a state-ordered targeted killing is nothing more than an extrajudicial way of imposing punishment. This is especially the case if it is assumed that the targeted person has committed grave crimes in the past.

The problem with justifying targeted killings in this manner is that it runs afoul of the basic principle that the state is not allowed to harm an individual for punitive purposes without first establishing his guilt in a judicial proceeding. There are many sound reasons for that principle. First, we trust the judicial process more than any other government process, both in terms of providing unbiased outcomes and in terms of providing the best forum for discovering the truth. Second, we are skeptical of consolidating in one branch of government the power to investigate wrongdoing, adjudicate guilt, and carry out sentences. We simply do not trust the executive to be judge, jury, and executioner. Although it can be argued that judicial proceedings are a formality when there is no doubt about the offender's guilt, it is generally best to adhere to such formalities. Making exceptions to this rule would rapidly take us down a dangerous, slippery slope, which makes it very difficult to tell when a judicial proceeding is necessary.

This does not mean that targeted killings in TK 4 cases do not have a punitive dimension or that this feature of the practice is irrelevant to explaining its moral justifiability. Certainty about past wrongful acts committed by the targeted person is relevant to the legitimacy of authorizing his killing. If there is no certainty about such matters, it is not legitimate to order the killing. Such certainty, however, cannot by itself establish the moral legitimacy of orders to kill an individual in a nonconfrontational setting.

*C. Targeted Killing Partially Justified Because of Difficulty or  
Dangerousness of Trying the Perpetrator*

Targeted killings in TK 4 cases serve a preemptive function. The government protects its citizens when it kills a manifestly dangerous individual who is nearly certain to engage in future acts of wrongdoing. These killings also serve a punitive function.

There are good desert-based and consequentialist-based reasons for punishing a person who has engaged in unspeakable crimes. Although one would prefer that judicial means be used to adjudicate guilt and mete out punishment in such cases, achieving justice is not always so easy. Ordering the killings of individuals may sometimes be the only available means of doing some kind of justice. Nevertheless, morally justifying this practice requires more than demonstrating that it serves preemptive and punitive functions. In the case of preemptive strikes, deadly force is usually authorized only if its use is necessary to thwart an imminent attack.<sup>311</sup> If there is no imminent attack, the use of deadly force is usually not necessary and therefore not morally justifiable.<sup>312</sup> In the case of punitive acts, deadly force is only authorized pursuant to a judicial determination of guilt. The rule of law requires no less.

There are a handful of cases, however, in which ordering the use of deadly force in a nonconfrontational setting and without a judicial adjudication of guilt becomes more defensible as a reasonable and morally acceptable course of action. The cases that come to mind involve TK 4 scenarios in which deadly force is used in a nonconfrontational setting against a dangerous individual who has engaged in serious crimes in the past. The use of deadly force appears to be morally justified when trying the individual will be either extraordinarily difficult or unacceptably dangerous. The difficulty or dangerousness of capturing and trying the targeted person is morally relevant to ordering her killing because it makes a judicial determination of guilt impossible or too risky.

The difficulties involved in trying the individual can be insurmountable, depending on the circumstances. Perhaps the individual cannot be apprehended without exposing law enforcement or bystanders to excessive risks. The jurisdiction in which the individual is going to be tried might not have a properly functioning legal system, if it is in a war-torn area, for instance. In other cases, despite the existence of a legal system

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311. See *supra* notes 169–72 and accompanying text (discussing preemptive strikes and the requirement of an imminent attack).

312. See *id.* (explaining that deadly force is not necessary without an imminent attack during a preemptive strike).

that works acceptably in most cases, the trial of a particular person or group of persons is not possible for whatever reason.

This is what happened in the case of Pablo Escobar. Although Colombia's legal system was not entirely dysfunctional, it was not properly equipped to deal with the likes of Escobar and other top-level drug traffickers.<sup>313</sup> As a result of Escobar's *plata o plomo* policy, there appeared to be no judge in Colombia who could preside over his trial.<sup>314</sup> Those courageous enough to defy him were killed.<sup>315</sup> Those who were not as courageous were bought off by Escobar.<sup>316</sup> By the late 1980s, it was obvious that the Colombian judiciary did not have the tools necessary to try a man as ruthless and dangerous as Escobar.<sup>317</sup>

In addition, trying the individual could sometimes be unwarranted because, although logistically feasible, doing so would prove unacceptably dangerous. It is important to note the risks inherent in detaining and trying the suspect would need to be extraordinarily high before contemplating an extrajudicial killing.

It is not enough, in our view, to claim that trying the targeted individual *might* jeopardize the lives of innocent people. Speculative harm, even probable harm, is not enough to justify dispensing with due process. One would have to know to a substantial certainty that trying the targeted individual would cause significant harm to innocent parties. It would also be necessary to know to a substantial certainty that the harms inherent in trying the individual would significantly outweigh the harms inherent in killing him.

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313. See BOWDEN, *supra* note 221, at 51 (explaining that Pablo Escobar, through his power and popularity, was able to buy off and threaten the Colombian court system).

314. See *id.* (stating Escobar's *plata o plomo* strategy became so effective by 1984 that Escobar became untouchable to the courts, and Colombia's democracy was undermined).

315. See *id.* at 53 (stating that by the end of 1986 there were few judges alive who defied Escobar's *plata o plomo* strategy).

316. See *id.* at 52 (stating that Escobar was responsible for the deaths of at least thirty judges).

317. See *id.* at 53 (discussing that by the late 1980s the drug cartel had taken over and "Colombia had been corrupted and terrorized to its core").

This last qualification is essential, given that every course of action generates certain kinds of benefits and costs. Although killing the individual could have the salutary consequence of stopping some violence, it could also generate significant societal costs inherent in not observing due process. It might also generate retaliatory bloodshed. On the other hand, trying the individual could have the positive effect of enhancing the perceived legitimacy of imposing punishment on the individual. It might, however, generate negative consequences, such as kidnappings, suicide bombings, and other terrorist attacks orchestrated by the detainee's supporters intent on securing his release.

In sum, regardless of the specific costs and benefits that attach to either killing or trying the individual, killing in a TK 4 case should not be permissible unless it is known with substantial certainty that the risks inherent in capturing and trying the individual are extraordinarily high and significantly greater than the risks inherent in killing without trial. Because the right to due process of law is crucial to maintaining a legitimate and just system of criminal justice, this right must always be observed, except in the most extraordinary of circumstances, when killing without capture and trial is necessary to avoid certain and significant harm to innocent human beings.

Escobar's case is again a case on point. Even if logistically feasible, trying Escobar was unacceptably dangerous. The government was acutely aware of this because an organization known as "Los Extraditables" publicly vowed to kill any judge who dared try Escobar for murder.<sup>318</sup> It also threatened to kill the families of those who wanted to indict Escobar in the local courts.<sup>319</sup> Escobar's supporters were also known for kidnapping innocent people whom he would then use as bargaining chips to obtain what he wanted from the government.<sup>320</sup> There was,

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318. *See id.* at 55 (revealing that, when a judge had attempted to indict Pablo Escobar for murder, Los Extraditables threatened to kill the judge and his family).

319. *See id.* ("We are capable of executing you at any place on this planet . . . in the meantime, you will see the fall, one by one, of all the members of your family.").

320. *See id.* (detailing how supporters of Pablo Escobar kidnapped "the

therefore, reason to expect with some certainty that kidnappings would have increased had Escobar been caught and detained for trial. Escobar had also successfully escaped from prison the one time he had been detained.<sup>321</sup> He would surely have attempted to do so again, and he had demonstrated an ability to kill those who might stand in his way.

Asking for a judicial determination of guilt in cases like Escobar's is quixotic. Sometimes a legal system is not equipped to make the necessary determinations, and setting the judicial wheels in motion is likely to trigger a series of events that endanger so many innocent people that it is better not to proceed. Circumstances such as these do not occur often. But when they do, ordering the extrajudicial killing of the individual might not only be sensible but also morally justifiable.

*D. Justifiable Targeted Killings in TK 4 Cases—In Search  
of a Test*

The TK 4 justification we have outlined centers on three criteria, all present in the Escobar case. First, an extrajudicial killing in a TK 4 case should only be authorized if the targeted individual is likely to carry out, or to substantially help carry out, atrocities in the future. There need not be proof of an imminent attack that is being planned by the individual, but there must be an expectation, grounded on specific and articulable facts, that would lead a reasonable person to conclude that a future attack on innocent human beings is likely, even if its occurrence is not absolutely certain. Furthermore, the future attacks must be of a particularly grave nature that transcends the commission of a discrete offence. As a general rule, the attack must be part of some widespread or systematic campaign. Future large-scale terrorist attacks surely satisfy this standard. A typical robbery or murder will not.

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journalist son of a former president and Conservative candidate for mayor of Bogotá").

321. See *id.* at 107–55 (describing the details of Escobar's escape from prison).



Second, there must be no reasonable doubt about the targeted individual's responsibility for past atrocities. This requirement is often satisfied because the targeted individual has publicly taken responsibility for such atrocities.

Third, the capture and trial of the individual must be logistically impossible or extraordinarily dangerous. As we discussed in the previous subpart, this standard is limited to exceptional circumstances and will seldom be satisfied because there is a very strong presumption in favor of affording the targeted individual the due process of law. The legal system must be unavailable to try the individual because it is not functioning, because it is impossible to try the specific individual for reasons such as the killing and intimidation of those judges willing to try the targeted individual, or because capture and trial would involve a substantial certainty of harm to innocent parties—a harm that significantly outweighs the harms inherent in killing the individual.

Even if one accepts, in principle, that certain killings meeting the above criteria can be morally justified, distinct concerns center on the desirability of reducing these factors to a legal test. It may be objected, for example, that the factors we have outlined fail to provide sufficient guidance in concrete cases and are resistant to judicial application (assuming that judicial review is available), thus exposing the law to a slippery slope. There is also the potential for governmental abuse, in which the TK 4 justification is invoked to legitimize killings that do not rightfully fall within the narrow exception we have outlined.<sup>322</sup>

As a general matter, it is difficult—if not impossible—to craft a bright-line test for determining when the killing of a human being should be justified. Even in easy cases, such as self-defense, the general parameters of the justification are crafted in relatively vague terms that allow for some leeway in the application of the rule. Thus, we say that using deadly force in self-defense is justified if such force was *reasonably* believed to be *necessary* to avert an *imminent* and *unlawful* aggression, and only if such force was *proportional* to the threatened harm.<sup>323</sup> The

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322. See Waldron, *supra* note 71, at 5–9 (discussing bad faith examples of targeted killing).

323. See Dressler, *supra* note 171, at 461 (stating that the traditional rule

precise scope of the italicized terms is rather fuzzy, especially in borderline cases. Is the reasonable belief to be judged from an impartial perspective that does not take into account the experience and physical and mental attributes of the actor, or should it be judged according to what would appear reasonable in light of the specific traits and experience of the individual? Is the force used by the actor necessary only if it is the sole available means to avert the threat, or is it necessary as long as the actor is unaware of other means that may also defuse the threat? Does a threat to use force within the next five minutes count as an “imminent” threat, or does the defender need to wait several minutes until the force is about to be employed? Is a threat unlawful if it violates any law or regulation regardless of whether it is civil, administrative, or criminal law, or is it unlawful only if it violates some particular body of law (criminal or tort law, for example)? Finally, is force lawful only if it is strictly proportional to the harm threatened, or is some degree of disproportionality allowed?<sup>324</sup>

Determining whether deadly force is lawful pursuant to other justification defenses is equally problematic. Consider the case of deadly force used pursuant to law-enforcement authority. As a general rule, such force is only lawful if it is necessary to prevent the escape of a fleeing felon that poses a threat to the lives of the officer or third parties.<sup>325</sup> Furthermore, as the U.S. Supreme Court pointed out in *Scott v. Harris*, deadly force used by law-enforcement agents comports with Fourth Amendment standards only if the use of such force was reasonable given the dangerous

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for self-defense “is that self-protective force can only be used to repel an *ongoing* unlawful attack or what the defender reasonably believes is an *imminent* unlawful assault”). Furthermore, the “use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.” MODEL PENAL CODE § 3.04(2)(b) (2010).

324. This is an under-studied question in American criminal law. It would seem that self-defense allows for the use of disproportionate force as long as it is not grossly disproportionate. For example, in every jurisdiction one may use deadly force to avert serious bodily injury, although the force used causes more harm (death) than the threatened harm (grave bodily injury). Similarly, it would seem that one may use deadly force to thwart rape.

325. See *supra* notes 198–203 and accompanying text (discussing what force is necessary to use for law enforcement in the case of a fleeing felon).

circumstances.<sup>326</sup> Although perhaps necessary, the vagueness of this approach is evident.

Given that the parameters for using deadly force are fuzzy even in the case of well-established justification defenses, such as self-defense and law-enforcement authority, it should come as no surprise that we have not provided a bright-line test for authorizing targeted killings. It is simply impossible, in this context, to come up with something other than general guidelines that frame the relevant issues that ought to be considered when assessing the justifiability of targeted killings in TK 4 cases.

Although admittedly fuzzy, the framework proposed here does not strike us as being significantly vaguer or more problematic than the general frameworks that are currently in place to assess the justified nature of force used pursuant to self-defense and law-enforcement authority.

We further acknowledge the possibility—indeed probability—that some governments will abuse a legal doctrine establishing a justification along the lines we have set forth. Once again, however, this problem is ever-present and not unique to the particular context of our analysis. A government wishing to abuse its authority under the cloak of the law already has ample room to do so within existing accepted legal doctrines, for example, by manufacturing claims of self-defense to justify what is in fact an impermissible extrajudicial killing. Indeed, we suspect this would typically be the easier path, considering the strictness of the factors we have offered. The question, therefore, is not whether governments would seek to abuse a new legal doctrine justifying a limited number of TK 4 cases, but whether the establishment of such a doctrine would be uniquely susceptible to abuse. We doubt that it is.

Nevertheless, we are mindful of the sensitivity and caution that is warranted whenever contemplating any expansion of the legal permission to kill. We therefore have our doubts about the advisability of adopting our framework as law, but it may nevertheless have value as a measure of social morality. In other words, even if the law does not itself justify any TK 4 killings,

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326. See *Scott v. Harris*, 550 U.S. 372, 383–84 (2007) (stating that the officer's actions were reasonable considering the high likelihood, although not certainty, of danger from the fleeing motorist's driving).

those that meet the criteria we have outlined will receive a de facto public justification. In this sense, our framework has descriptive value: it identifies circumstances in which TK 4 killings, whether or not legally permitted by codified law, will receive broad public acceptance and prove resistant to official scrutiny.

### *E. Some Qualifications*

The criteria we have identified provide, in our view, the best justification for using lethal force in a TK 4 case. It is important to acknowledge, however, several points that further qualify and limit our framework.

First, we do not address the threats to international security that can result from targeted killings that cross international borders. In suggesting that Colombian authorities may have been justified in using lethal force to neutralize Escobar in a nonconfrontational setting,<sup>327</sup> we do not suggest that the United States, for example, could have invoked the same justification to deploy agents into Colombian territory to target Escobar without the consent of Colombian authorities. Whether and when the interests justifying a TK 4 targeting might likewise justify a cross-border intervention is an important question that remains outside the scope of this Article.

Second, we do not maintain that the interests justifying a TK 4 targeting might likewise justify the expected incidental loss of innocent life, as is permitted, for example, by the IHL proportionality test that applies to the conduct of armed conflict.<sup>328</sup> Our framework instead presumes the continued force of the general criminal law rule dictating that governmental agents may not knowingly take innocent life even if doing so is the only way of killing or capturing a fleeing felon or an otherwise dangerous individual.<sup>329</sup> Whether or not extraordinary

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327. See *supra* Part IV (discussing the Escobar case).

328. See *supra* note 126 and accompanying text (describing the proportionality requirement).

329. See *supra* Part III.D (providing the law-enforcement defense).

circumstances might justify relaxing this rule is a matter we do not consider.<sup>330</sup>

Finally, we emphasize that the three-part test we have identified requires an individualized assessment of the targeted individual. For example, an individual targeted based solely on her membership in a group that meets our criteria only on a collective basis would fall outside the framework. For the criteria to apply, they must be met on an individualized basis.

#### *VI. The Killing of Osama bin Laden as Self-Defense or Law Enforcement*

With this framework in mind, we now return to the killing of Osama bin Laden and consider whether justifications other than that provided by IHL might apply.

##### *A. Was bin Laden's Killing Justified Pursuant to Self-Defense?*

Assuming, for present purposes, that IHL is inapplicable, might bin Laden's killing nevertheless have been justified as an act of self-defense? Of course, the answer depends on what exactly transpired the day of his killing. If he was in fact armed, or if he fired at members of the Navy SEAL team that raided his compound, his killing would amount to a justifiable act of defense of self or others.

Matters become more complicated, however, if one assumes—as some reports indicate<sup>331</sup>—that bin Laden was unarmed and did not threaten physical violence. In that event, killing is not as easily justified as an act of self-defense. The reason for this is simple. The use of force in self-defense is triggered by the use or threat of unlawful force.<sup>332</sup> The unlawful aggression must also be

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330. For an analysis of this question as applied to the defense of self and others, see Chiesa, *supra* note 306.

331. See, e.g., Schmidle, *supra* note 4, at 43 (stating that bin Laden was unarmed).

332. See FLETCHER & OHLIN, *supra* note 64, at 89 (explaining that it would be “hard to find a national statute on self-defense that failed to require that the attack be unlawful”).

imminent.<sup>333</sup> If bin Laden was unarmed and not about to attack the SEAL team, there would have been no imminent wrongful aggression to trigger the right to use defensive force.

It should be noted, however, that the absence of an imminent and wrongful aggression is not in and of itself fatal to a claim of self-defense. Bin Laden's killing would also be justified in self-defense if the shooter acted upon a *reasonable* belief that bin Laden was about to attack them.<sup>334</sup> The reasonable belief would justify the killing even if the belief happened to be mistaken.<sup>335</sup> This is, in fact, one of the arguments advanced by U.S. officials in defense of the bin Laden killing.<sup>336</sup>

But what if one assumes that it was unreasonable for the SEAL team to believe that bin Laden was about to launch an attack? Of course, we will likely never know whether such a belief was reasonable or not for the SEALs to hold. For that matter, we may never know whether individual members of the team subjectively believed that bin Laden was a threat. For all we know, the question may have played no role in the operation because the team members were acting under rules of engagement derived from IHL. Thus, it is worth asking whether the killing of bin Laden would have been justified even if the SEALs did not believe that their lives were in danger at the time.

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333. See *id.* at 90–91 (explaining that most jurisdictions require an unlawful attack to be imminent to justify self-defense).

334. See, e.g., *supra* note 181 and accompanying text (describing one state's self-defense law, which requires reasonable belief); *People v. Goetz*, 497 N.E.2d 41, 49 (N.Y. 1986) (applying the test that a sufficient basis to use deadly force is justified if “the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked”).

335. *Goetz*, 497 N.E.2d at 48 (emphasizing that if a reasonable belief is established, then “deadly force could be justified . . . even if the actor's beliefs as to the intentions of another turned out to be wrong”).

336. See Matt Apuzzo & Adam Goldman, *Osama Bin Laden Was Unarmed During Navy SEAL Raid, Says White House*, HUFFINGTON POST, May 3, 2011, [http://www.huffingtonpost.com/2011/05/03/osama-bin-laden-unarmed-during-raid\\_n\\_857257.html](http://www.huffingtonpost.com/2011/05/03/osama-bin-laden-unarmed-during-raid_n_857257.html) (last visited Sept. 24, 2012) (quoting CIA Director Leon Panetta as asserting that the SEALs fired because bin Laden made “some threatening moves . . . that clearly represented a clear threat to our guys”) (on file with the Washington and Lee Law Review).

Self-defense is off the table if this assumption is made. A person's lack of an objectively reasonable belief that his life or the life of another is in danger is fatal to a claim of self-defense.<sup>337</sup>

The same would be true under an expanded version of self-defense. Even if we assume that the U.S. government possessed credible and specific information that bin Laden was going to launch an attack against American interests in the near future, the killing could not be justified as an instance of preemptive self-defense unless killing was the only way to prevent the attack.<sup>338</sup> This requirement could not be met under the circumstances if bin Laden were readily susceptible to capture. Moreover, absent the type of specific information we have just hypothesized, mere speculation about possible attacks that bin Laden might launch in the future would not be enough to justify killing him pursuant to the standard arguments favoring preemptive self-defense.<sup>339</sup>

*B. Was bin Laden's Killing Justified Pursuant to Law-Enforcement Authority or the Lesser-Evils Defense?*

Governmental agents may on occasion use more force in furtherance of law-enforcement authority than they may use pursuant to self-defense or defense of others. Although deadly force in defense of self or others may only be employed in order to deflect an imminent aggression, police officers may sometimes use lethal force in order to prevent a fleeing felon from escaping even if, at the time the force is used, the felon is not threatening imminent harm.<sup>340</sup> This defense, as Finkelstein has persuasively argued, may thus justify certain killings in circumstances in which traditional self-defense is inapplicable.<sup>341</sup> Can it be invoked to justify bin Laden's killing?

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337. See *Goetz*, 497 N.E.2d at 48 (stating that for self-defense to be justified, there must "be a reasonable basis, viewed objectively, for the beliefs").

338. See *supra* Part III.C (explaining the elements of an expanded version of self-defense).

339. See *supra* Part III.C (explaining the elements of an expanded version of self-defense).

340. See, e.g., *supra* Part III.D (describing when law-enforcement agents may use deadly force against felons).

341. See *supra* notes 196–97 (discussing Claire Finkelstein's theory that

Again, the answer to this question depends on the circumstances surrounding the killing. If bin Laden was attempting to flee, then the SEAL team members might have been justified in using deadly force to prevent his escape. On the other hand, if the SEALs fired at bin Laden without first attempting to arrest him, or if bin Laden did not attempt escape, conventional law-enforcement authority could not supply a justification for the use of deadly force.

Assuming that bin Laden was not armed when he was killed and that he did not threaten harm, the choice-of-evils or necessity defense would likewise fail: necessity may only be invoked to justify a use of force that is necessary to prevent an imminent harm from taking place.<sup>342</sup> Once again, bin Laden's dangerous character does not by itself justify using deadly force against him. The use of force pursuant to necessity, like self-defense, is triggered by the threat of suffering imminent harm, not by the possibility that a dangerous individual will try to cause harm in the future.

### *C. Was bin Laden's Killing Otherwise Justifiable?*

Assuming that bin Laden's killing was not supported by a reasonable belief that he threatened to harm the SEAL team members, it becomes difficult to justify by appealing to the conventionally accepted justification defenses recognized under domestic law. Might bin Laden's killing be an instance of a TK 4 case, in which ordering the killing of an unarmed and non-threatening individual is nevertheless justifiable?

The case is similar in some aspects to Escobar's case. First, bin Laden had publicly taken responsibility for engaging in unspeakable crimes.<sup>343</sup> There was thus no doubt about his

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targeted killings might be legally justified pursuant to the law-enforcement authority to use deadly force).

342. See *supra* Part III.E (explaining the elements of the necessity defense for use of force).

343. See *Bin Laden Claims Responsibility for 9/11*, CBC NEWS, Oct. 29, 2004, [http://www.cbc.ca/news/world/story/2004/10/29/binladen\\_message041029.html](http://www.cbc.ca/news/world/story/2004/10/29/binladen_message041029.html) (last visited Sept. 24, 2012) (announcing that bin Laden officially and publicly claimed "direct responsibility for the 2001 attacks against the United States") (on file with the Washington and Lee Law Review).



responsibility for the death of thousands of innocent human beings. As a result, trying him would have been, in a sense, a formality. Although perhaps deemed necessary to uphold the rule of law, bin Laden's trial would not really be necessary to establish his guilt beyond a reasonable doubt.

Second, bin Laden, like Escobar, was the head of a very dangerous organization that was still operating at the time of his killing. We had (and still have) good reasons to believe that al Qaeda will attempt to kill innocent people in the future.<sup>344</sup> As a result, bin Laden's killing could be viewed as serving both punitive and preventive functions. On the one hand, his killing could be construed as punishment for his past crimes. On the other, his killing could prevent crime by helping debilitate al Qaeda's command structure.

In a typical case, these considerations are insufficient to justify killing a non-threatening individual. As a general rule, deadly force should only be authorized in order to defuse an imminent threat or pursuant to a sentence secured after affording the individual the due process of law.<sup>345</sup> As Escobar's case demonstrates, however, extrajudicially killing the individual may be a reasonable course of action, even assuming capture is feasible, if trying him is either impossible or unacceptably dangerous. This is where significant differences arise between Escobar's case and bin Laden's.

First, it is difficult to argue that trying bin Laden would have been logistically impossible. The United States certainly has the resources to orchestrate trials of dangerous individuals. Although setting up a fair trial for bin Laden might have been difficult and costly, there is no doubt that it would have been feasible.

Second, it is speculative to assume that the dangers associated with capturing and trying bin Laden would have been sufficiently high to justify dispensing with a trial. Of course, trying bin Laden would have posed certain risks. For instance,

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344. See Obama, *supra* note 1 (“[The United States] quickly learned that the 9/11 attacks were carried out by al Qaeda—an organization headed by Osama bin Laden, which had openly declared war on the United States and was committed to killing innocents in our country and around the globe.”).

345. See *supra* notes 170–73 and accompanying text (explaining that deadly force is usually authorized in cases when the force is necessary to prevent an imminent future attack).

his capture and trial might have prompted retaliatory terrorist attacks or put American citizens at risk of being kidnapped and used as bargaining chips to gain his release. This is a risk that Colombian authorities had to ponder when deciding whether to capture and try Escobar.<sup>346</sup> Although these concerns should not be trivialized, one can only speculate with regard to the likelihood that they would actually materialize. Also, it is quite possible that the risks inherent in killing bin Laden were as significant as the risks inherent in capturing and trying him. The risk of retaliatory attacks, for example, exists under either scenario.

We do not believe these risks suffice to justify dispensing with a trial in bin Laden's case. The decision to order the extrajudicial killing of an individual should not be taken lightly, and speculative assessments of the dangerousness of trying the actor should not justify taking such momentous action.

At the same time, however, we believe that the reasons that undergird our theory of justifiable killings in TK 4 cases may explain public intuitions about the bin Laden killing better than the reasons associated with the other available justifications for targeted killings. That is, many people seem to believe that killing bin Laden was the right thing to do because he was a dangerous individual, he was responsible for mass atrocities, and trying him would be a complicated affair. This helps explain why President Obama asserted that "justice has been done" when bin Laden was killed.<sup>347</sup> This assertion does not sound like the language of preventive self-defense or law-enforcement authority. It does not sound like the language of national self-defense either. The American ideal is that justice is meted out in the courtroom after observing due process and judicially establishing the defendant's guilt. A killing in individual or national self-defense is not a way to do justice, but rather a way to defuse a threat. The language originally used by President Obama to describe the killing did not fit this preventive paradigm. Similarly, most Americans who celebrated bin Laden's death described it as something that provided them with some "sense of closure."<sup>348</sup>

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346. See *supra* note 320 and accompanying text (discussing that Escobar kidnapped innocent people to threaten legal authorities).

347. Obama, *supra* note 1.

348. See, e.g., David Jackson, *Bush on Bin Laden: 'A Sense of Closure,'* USA

But closure has nothing to do with self-defense. Closure is what one feels after justice has been done.

What the President tapped into, we believe, was a deeply felt and widely shared intuition that some extrajudicial killings that do not squarely fit within the self-defense or law-enforcement paradigms may nevertheless be justified for both preventive *and* retributive reasons. This is the same intuition underlying the widespread agreement regarding the justifiability of Pablo Escobar's killing. Escobar's killing appeared morally acceptable, even if not in self-defense or pursuant to law-enforcement authority, because he was dangerous and he was undoubtedly responsible for past atrocities of an incredible scale. This is why his death provided a sense of closure for Colombians. Escobar's killing—like bin Laden's—was a way of preventing possible future attacks, but it was also a way of doing some justice.

Accordingly, and unlike the war paradigm, this account provides a superior explanation of why one might defend a more tolerant approach to justifying killing—an approach that does not require the feasibility of capture—in cases that do not share the functional requirements generally associated with war. To the extent that governments turn to targeted killing in this context, there is value to considering such cases on their own terms, rather than stretching IHL to contexts far removed from the battlefield realities that led to IHL's creation.

The problem with the Escobar analogy, as we have argued, is that it was both logistically impossible and extraordinarily dangerous for Colombians to try Escobar. Nevertheless, it appears that it was logistically possible and not unacceptably dangerous to try bin Laden. Therefore, although feelings of closure and justice are understandable responses to the killing of a dangerous individual and a mass killer, bin Laden's extrajudicial killing is difficult to justify under the residual justification that explains the moral propriety of certain TK 4 killings. Retributive and preventive reasons are necessary, but not sufficient, conditions to authorize an extrajudicial killing. In

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TODAY, July 27, 2011, [http://content.usatoday.com/communities/theoval/post/2011/07/-bush-on-bin-ladene-sense-of-closure/1#.T\\_GxjI5kiFY](http://content.usatoday.com/communities/theoval/post/2011/07/-bush-on-bin-ladene-sense-of-closure/1#.T_GxjI5kiFY) (last visited Sept. 24, 2012) (describing the public reaction to the death of bin Laden) (on file with the Washington and Lee Law Review).

addition, it must be clear that trying the targeted individual is not feasible. If bin Laden could have been tried, due process should have been observed. Accordingly, although we have suggested that some targeted killings may be justifiable even if they fall outside the traditional defenses supplied by IHL and the criminal law, the bin Laden case does not appear to fall within this narrowly defined category.

### *VII. Conclusion*

As we observed at the outset of this Article, the aim of our analysis is not to find a definitive answer to the legality of the bin Laden killing. Depending on circumstances that may never be known, the killing may have been readily justifiable even under the rules generally applicable to law-enforcement operations. If, for example, the killing resulted from a reasonable belief that bin Laden posed an imminent threat that could be defused only through the immediate use of lethal force, then the killing was justified as a classic case of self-defense or defense of others.

Our interest in the bin Laden case focuses instead on the legal landscape of targeted killing and asks whether the killing might be justified under a more permissive legal regime, one that relaxes the restrictions generally imposed by criminal law. Public statements of government officials have identified such a regime in the rules applicable to killing in wartime. We have raised questions about that account. Although there is much about IHL's requirements that is indeterminate and debatable, we have argued that the best reading of IHL (assuming this law applies to non-battlefield scenarios, such as the bin Laden killing) is inconsistent with the view that bin Laden remained a proper target even if capture was feasible under the circumstances.

We have further considered whether some targeted killings might be acceptable, even if not supported by IHL, by the conventional justification defenses generally afforded to law-enforcement officials, or by more expansive models of preemptive self-defense. We have identified, in the case of Pablo Escobar, a best-case scenario for a rule that does not hinge on the existence of an armed conflict and, unlike IHL, emphasizes culpability considerations alongside preventive considerations. If the

Escobar case can supply such a standard, it is a narrow one: in addition to demanding that such killings be justified by compelling evidence, both of the target's undeniable guilt for grave atrocities and of compelling evidence that killing will thwart serious future crimes, we argue that this category of targeted killings should only be allowed when it is not feasible to detain or try the individual because doing so would be logistically impossible or extraordinarily dangerous.

We have also argued that the bin Laden killing, considering the apparent feasibility of trial, does not fall within this narrow category of cases. Nevertheless, the model we have outlined retains explanatory power. It provides, we suspect, the best account of the public understanding of bin Laden's demise, one in which his killing was an act of justice, and not merely the neutralization of a wartime opponent. More broadly, we believe that the criteria we have outlined identify circumstances in which similar operations are likely to receive public legitimation even if they fail de jure requirements.