

BOOK REVIEW

Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (OUP, 2012), 440 pp. \$190.00 (Hardback) ISBN 978-0-19-964647-0

While the Bush administration introduced the use of unmanned aerial vehicles (commonly referred to as drones) to target and kill suspected terrorists, the Obama administration has turned this tactic into a central pillar of its counterterrorism policy. Consequently, this edited volume exploring the legal and moral contours of a new technology, as well as more conventional forms of targeted killing, is a timely and welcome addition to the expanding scholarship on the evolving means of state-sponsored killing.

To accomplish this task, distinguished as well as junior scholars have been brought together from a range of disciplines to study what one of the editors has called the 'heart of modern warfare'.¹ That is to say, the tactic of targeting suspected terrorists and/or combatants on the conventional battlefield, as well as across international borders, represents the manner in which the United States is confronting the 'asymmetrical world' evoked in the book's title. Since such action engages various bodies of law — at a minimum humanitarian law, human rights law and the *jus ad bellum* regime, along with domestic criminal and constitutional law — while raising demanding ethical questions over the use of lethal force, conditions of self-defence and the line between civil and military police functions, this volume provides a valuable entry point for investigating this kaleidoscope of legal and moral issues.

The book grew out of a law and philosophy conference held in April 2011 that pulled together philosophers working on applied ethics, legal philosophers working on just war theory, military lawyers focused on ethical issues in war, along with statesmen and policymakers.

Such an eclectic group has indeed produced a constructive work with a wide purview onto one of the most pressing and difficult policy questions of our time. Notably, this project was initiated before targeted killing had become a hot topic for the public, with one of the most high profile instances occurring just two weeks after the conference when the US military conducted an operation into Pakistan to target and kill Osama bin Laden. Though this action represents but one form of targeted killing, the practice continues to be a fast-moving subject with persistent changes in the legal and moral landscape as more details become known about the actual counterterrorism programme.

This essay will treat a number of the chapters that particularly piqued the interest of this reviewer, yet some must be inevitably left out. This certainly should not be taken as a comment upon their comparative strength, but rather as an invitation for the reader to pick up and look further into this stimulating volume herself.

The book is composed of 17 chapters divided into five parts, plus an introduction by one of the editors, Andrew Altman. As the structure and relationship between the chapters is sometimes difficult to appreciate, this aspect will be set aside. Nonetheless, in the opening presentation by Altman a blueprint is put forward for how counterterrorism issues have been typically treated since the attacks of 11 September 2001. Traditionally, there has been an impassioned debate over the application of an armed conflict model versus a law enforcement model and the questions over the intentional killing by a state of an identified individual outside of that state's custody can again be organized into these broad categories.

What is contained in the first two chapters is genuine engagement with these traditional paradigms of armed conflict versus law enforcement, with each author arriving at a comparable conclusion of endorsing a standard of 'functional membership' (described by some as a fusion of the concepts of *status* and *conduct*). While traversing different intellectual ground, these chapters do an excellent job of laying

1 C. Finkelstein, 'Preface', in C. Finkelstein, J.D. Ohlin and A. Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford University Press, 2012) v, at viii.

out the applicable humanitarian law and its interpretation today.

To begin, Mark Maxwell finds the 9/11 attacks set up a law of war paradigm between the United States and Al Qaeda along with its so-called 'associated forces'.² For Maxwell, this shifts the right to self-defence from being based on *conduct*, to the question of *status*. In other words, targeting must be based on identifying whether an individual is a civilian or combatant and not on whether the individual poses a direct threat. Of consequence, Maxwell believes that the attacks of 2001 demonstrated the weaknesses in the law enforcement paradigm, which portends his finding that if a terrorist is assumed to be a protected civilian when not participating in hostilities, this offers an enormous strategic advantage. To explore this cardinal principle of distinction, Maxwell provides an adroit analysis of the International Committee of the Red Cross Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law.³ The conclusion drawn is that its focus on the individual and not the group is flawed, thus a pattern of conduct should determine functional membership for targeting practices.

In the following chapter, Jens David Ohlin struggles with the uneasy question that international lawyers are forced to contemplate when treating the issue of targeted killing: what body of law provides protection of civil liberties while best augmenting national security? Ohlin properly explains that for questions of targeting, regardless of whether one chooses *jus ad bellum*, *jus in bello* or domestic criminal law, there is inevitably the need to find a linking principle that connects an individual to an organized terrorist group representing the necessity to use lethal force. What is especially praiseworthy is Ohlin's deliberate wrestling with the philosophical questions that are intricately merged with legality. In the end, after

carefully examining a series of different linking principles, Ohlin arrives at the conclusion that although many are inclined to believe that criminal law would maximize civil liberties, in fact, redefined and reformulated law of war principles delineating a functional membership concept are superior. Since this standard must be self-administered, the public and transparent nature of this international law better serves to protect individual rights in the absence of a judicial system.

In moving forward to the contribution by Claire Finkelstein within Part II, we find the underscoring of a point that should not go unnoticed. While the Bush administration's counterterrorism strategy focused on detention and interrogation — one that provoked worldwide repulsion from indefinite detention at Guantánamo Bay and ill-treatment in an attempt to acquire intelligence — there has been a striking shift in policy during the Obama presidency. To distance itself from the previous administration's most problematic policies, '[i]t is perhaps no accident, then, that targeted killing emerged as the central strategy for fighting the war on terror.'⁴ Without capture, there is no need for detention or interrogation. However, Finkelstein's central point lies in the breakdown of the distinctions fundamental to conventional war and the geography spawned by state versus state armed conflict.⁵ In the context of asymmetric conflict there is a more suitable legal analogy; law enforcement principles allow for the use of lethal force in pursuit of a person suspected of a felony. Thus her belief is that a preemptive use of force for targeted killing can be justified if appropriately fashioned.

In Part III, Craig Martin puts forward a remarkably cogent chapter that approaches the question from the less investigated legal

2 Precisely who is classified as 'associated forces' is a central question that remains unanswered by the Obama administration, even if it is continually employed in its public reference to counterterrorism.

3 N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (International Committee of the Red Cross, 2009).

4 C. Finkelstein, 'Targeted Killing as Preemptive Action', in *supra* note 1, 156 at 157.

5 For a further discussion on the underdeveloped aspect of the geographical scope of application of international humanitarian law see, K. Schöberl, 'Konfliktpartei und Kriegsgebiet in bewaffneten Auseinandersetzungen — zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikte', 25 *Journal of International Law of Peace and Armed Conflict/Humanitäres Völkerrecht - Informationschriften* (2012).

perspective of the *jus ad bellum* regime. By addressing the complex issues found in the invocation of 'self-defense' in reaction to an 'armed attack' by 'non-state actors', Martin lays the foundation for his overarching point that the manner in which this is being carried out by the United States serves to radically undermine the United Nations Charter system put in place to limit and constrain war between states. Since international armed conflict assuredly unleashes widespread suffering and death, Martin contends that the terrorist threat, no matter how real, must not weaken this fundamental legal regime. Although the author might stop short of saying it explicitly, Martin alerts us to the fact that the contention that states can wage war against non-state groups within the territory of other states actually allows individuals to provoke an armed conflict between states. The danger can be readily discerned through the example provided by Martin of the ramifications if India had characterized the Mumbai attack of 2008 as an 'armed attack' authorizing the use of force against the Lashkar-e-Taiba group concealing itself in Pakistan. However, one point could merit further clarification in this chapter. The notion of defensive war to prevent the development of future threats is said to belong to the Grotian period, yet Grotius himself could be quite strict in his limitations on anticipatory war.⁶ Nonetheless, Martin's contribution is certainly well worth knowing in its entirety.

Another chapter of impressive quality that deserves discussion in this review is that of Amos Guiora. Personal experience as a military lawyer for the Israeli Defense Forces offers the author keen insight into the difficulty presented by the life and death decisions

involved in a targeted killing program. Guiora recognizes that there are some who warn against imposing strict legal criteria on a targeted killing programme because it significantly hampers command discretion, and he takes this argument seriously. However, a strong case is made explaining that a criteria-based process in fact enhances the effectiveness of the programme. Through a distinctive weaving of legality, morality and effectiveness in his assessment, Guiora points out that such a decision, 'must be predicated on an objective determination that the "target" is, indeed, a legitimate target. Otherwise, the state's action is illegal, immoral and ultimately ineffective.'⁷ To pursue the goal of self-imposed restraint in counterterrorism championed by former president of the Israeli Supreme Court, Aharon Barak, there must be articulated standards, guidelines and operating procedures. As such, this chapter offers a welcome preliminary discussion aimed at codifying this criteria-based process. At the same time, this reviewer has questions regarding the discussion over a switch from 'imminence' to 'immediate necessity' (albeit not fully endorsed by Guiora) for self-defence to be effective. It is not clear that 'imminence' is simply a proxy for necessity, or that there is a requirement that self-defence be effective. Rather, this reviewer believes that 'imminence' plays the vital role of providing verifiability to a self-administered international system.

Although it was not precisely the intention of Gregory McNeal, his chapter presented as 'A Case Study in Empirical Claims without Empirical Evidence' in Part IV underlines a critical aspect shaping all analysis relating to the United States targeted killing programme. McNeal's objective was to challenge some of the critical academic literature and he undoubtedly raises valid questions regarding the empirical claims that have been made. Indeed, the empirical data are cloaked in an opaque veil of secrecy.⁸ While McNeal shines a light

6 See e.g. '[b]ut to maintain that the bare probability of some remote, or future annoyance from a neighbouring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity. Such however is the condition of human life, that no full security can be enjoyed. The only protection against uncertain fears must be sought, not from violence, but from the divine providence, and defensive precaution'. H. Grotius, *The Rights of War and Peace*, Book II, Chapter 1, Section XVII, A.C. Campbell (translator) (Elibron Classics Series, 2005), at 83.

7 A. Guiora, 'The Importance of Criteria-Based Reasoning in Targeted Killing Decisions', in *supra* note 1, 303 at 307–308.

8 For one account of the enormous difficulties faced in acquiring credible information in 'one of the world's most inaccessible areas', see the article by a Fellow at Nieman Foundation for Journalism at the University of Harvard and native to the

on some of the questionable numbers that have been put forward (almost always qualified as such in the original literature), he is unable to replace them with any of his own empirical figures thus weakening his point to a serious degree. His research into the decision protocol employed by the US military in Afghanistan is welcome,⁹ yet the argument that 'it seems questionable that the Central Intelligence Agency would exercise less care in its targeted killing operations just over the border' is entirely unpersuasive.¹⁰ Historical precedent, media leaks and legal obligation indicate that the two cannot be so easily equated.¹¹ Hence, somewhat unintentionally, this chapter brings into sharp relief the difficulty of how legality and morality are to be properly assessed when many of the key facts are held in secret or unattainable.

In Part V, Michael S. Moore presents us with a work that purposely aims to avoid the topics of law or political philosophy, and instead discusses whether targeted killing can ever be morally permissible (and perhaps even obligatory). This chapter written by a scholar with broad interests in law and philosophy, along with their intersection, is indeed well worth

region, P.Z. Shah, 'My Drone War', *Foreign Policy*, March/April 2012, available online at <http://www.foreignpolicy.com/articles/2012/02/27/my.drone.war?page=full> (visited 31 July 2012). Shah explains that: '[a]lthough the drone campaign has become the linchpin of the Obama administration's counterterrorism strategy in Central Asia ... we know virtually nothing about it. I spent more than half a decade tracking this most secret of wars across northern Pakistan Yet even I can say very little for certain about what has happened.'

- 9 However, it would be preferable for this research to be less reliant upon the author's own unpublished working paper.
- 10 G. McNeal, 'Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence', in *supra* note 1, 326 at 332.
- 11 For a valuable discussion on the legal obligation of transparency, see the article written by the former United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, P. Alston, 'The CIA and Targeted Killing Beyond Borders', 2 *Harvard National Security Journal* (2011) 283.

the time for readers looking into methods to investigate the possibility of objective answers to questions of pure morality, even if general scepticisms often demotivate all moral enquiries. Moore develops and puts forward a decision tree aimed at illuminating the relationship between what he considers the valid aspects of consequentialist and deontological reasoning. In applying his three-leveled analysis, he concludes that there is a strong permission to kill terrorists who would otherwise visit harm on us, 'innocent aggressors', and those deserving of retributive punishment (terrorists whose past acts merit a death sentence). However, this reviewer has difficulty with the conclusion put forward that this framework helps clarify that there are at times clear moral cases, such as the 1938 proposed assassination of Hitler if it would have prevented the Second World War and the Holocaust. Questioning our ability to know the gravity of a particular person's future crimes is surely more than merely 'quibbling ... on epistemic grounds'.¹² Would this epistemic question not be the crux of the moral quandary?

To close the chapter reviews it is appropriate to return to the rousing contribution in Part I by Jeremy Waldron. This writing is especially significant for its elucidation of the magnitude of what is under discussion with targeted killing. Waldron plums the depths of expanding one of the most important norms we have: the norm against murder. Alas, the justifications put forward by policymakers and scholars alike represent a significant modification of our usual way of arguing about this grave act; killing is reduced to be a matter of merely balancing social advantage. As Waldron lucidly explains:

It seems that our first instinct is to search for areas where killing is already 'all right' — killing in self-defense or killing of combatants in wartime — and then to see if we can concoct analogies between whatever moral reasons we presently associate with such licenses and the new areas of killing that we want to explore. In my view, that is how a norm against murder unravels. It unravels in our moral repertoire largely because we have forgotten how deeply such a norm needs to

- 12 M.S. Moore, 'Targeted Killings and the Morality of Hard Choices', in *supra* note 1, 434 at 465.

be anchored in light of the military and political temptations that it faces and how grudging, cautious, and conservative we need to be — in order to secure that anchorage — with such existing licenses to kill as we have already issued.¹³

Finally, there are a pair overall assessments of this volume worthy of discussion here. The first is regarding the question of interdisciplinarity. It is undoubtedly of enormous value that the editors of this work chose to reach outside of one single discipline to investigate this pressing issue, particularly as targeted killing develops into a dominant part of United States counterterrorism. When it comes to its legitimacy as a policy, the spheres of legality and morality (along with that of efficacy) are central elements that converge in the minds of citizens as they evaluate the tactics exercised in their name. Thus it is important that this book comprises a multidisciplinary approach investigating this subject from various perspectives within the fields of law and morals. At the same time, a further step could be envisaged. If we understand multidisciplinary to be the collection of various pieces of a jigsaw puzzle, interdisciplinarity is when one tries to assemble these puzzle pieces together by comparing them, finding the concave and projecting portions, so as to discover how they might usefully interact, join together and even overlap.¹⁴ Although it is recognized as particularly difficult to accomplish in this type of edited work,¹⁵ fully taking this next step of interdisciplinarity would surely be constructive for this complex subject.

As an example of how law and morals might be discussed on an interdisciplinary level one can look to the work of the renowned legal philosopher H.L.A. Hart. Known for his sophisticated view of legal positivism, Hart spends two chapters in his celebrated work, *The Concept of Law*, exploring their rapport and notably finds a place of overlap between them.¹⁶

Hart found that the core of this intersection is a prohibition against the free use of violence: 'such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points.'¹⁷ Although there are purportedly valid justifications for the targeted killings, the fact that the reasoning and evidence remain entirely undisclosed leaves citizens wondering (at home, in the target country and the world over) whether this is, in fact, a free use of violence.

The concluding point here is not a critique of this book specifically, but rather to draw attention to the fact that the legal and moral contours of targeted killing continue to shift in important ways. Since this book went to press, the administration has indicated a legal focus upon the question of 'imminence',¹⁸ put forward the outlines of its own definition,¹⁹ and formally admitted to drone strikes in countries where the United States is not at war.²⁰ Additionally, there have been significant revelations about the programme in the media. Most pointedly, there have been reports that the drone strikes in Pakistan are of two different types: (1) 'personality' strikes where the target is a known terrorist leader; and (2) 'signature' strikes which target groups of men believed to be militants associated with

13 J. Waldron, 'Justifying Targeted Killing With a Neutral Principle?' in *supra* note 1, 112 at 131.

14 A. Repko, *Interdisciplinary Research: Process and Theory* (Sage Publications, 2012), at 20–21.

15 Some authors indeed took this step in their own chapter as recognized in this review and there was notable cross-referencing of each other's work throughout.

16 H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961, re-published 1994), at Chapters VIII and IX.

17 H.L.A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) 593, at 621.

18 Remarks of J.O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, 'Strengthening our Security by Adhering to our Values and Laws', Program on Law and Security, Harvard Law School, 16 September 2011.

19 Attorney General Eric Holder, Speech delivered to Northwestern University School of Law, 5 March 2012.

20 Remarks of J.O. Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', Woodrow Wilson International Center for Scholars, 30 April 2012.

terrorist groups.²¹ Since the latter action is said to constitute the bulk of the strikes carried out in that country, this suggests that much of the drone programme might be more accurately termed *targeting on suspicion*, rather than applying the more conventional term of 'targeted killing'.

There is little doubt that this book opens a valuable discussion on a rapidly changing subject that the general public and scholars have yet to fully comprehend. It is for this reason that the editors and authors are to be

commended for moving this dialogue forward and for laying some legal and moral groundwork for future investigations as we learn more about this technologically novel use of lethal force across international borders.

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doi:10.1093/jicj/mqs073

21 See J. Becker and S. Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *New York Times*, 29 May 2012; exposing so-called 'signature strikes' versus 'personality strikes', see A. Entous, S. Gorman and J. Barnes, 'U.S. Tightens Drone Rules', *Wall Street Journal*, 4 November 2011.