

## TARGETING CO-BELLIGERENTS

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The central debates about targeted killings, whether they conclude legality or illegality, take one of two tracks: self-defense under *jus ad bellum*, or compliance with the prohibition against killing civilians under *jus in bello*. Although the *jus ad bellum*/*jus in bello* distinction is central to the issue's resolution, it unfortunately obscures a deeper problem that spans both sides of the spectrum: how to link a targeted individual to a larger collection of terrorists who are plotting attacks.

Under the self-defense theory, targeted killings are permissible as a lawful exercise of defensive force against a national threat, provided that one rejects the ICJ's view that international self-defense is unavailable against non-state actors. However, it is rare that the targeted individual—by himself—is a threat. More commonly, the individual plays a supporting role in a larger cause and the larger cause constitutes the threat. The *jus ad bellum* account implicitly requires a sufficient link between the individual and the collective, though scholarly defenses of targeted killings rarely offer such an account. Traditional international law doctrines of state responsibility (based on control or acceptance) do not apply.

Similarly, the *jus in bello* analysis also requires a linking principle. The traditional IHL linking principle of belonging to an armed fighting force (by carrying arms openly and displaying a fixed emblem) does not apply to terrorists. Although the United States is in an armed conflict “not of an international character” with al-Qaeda, targeted individuals may not necessarily be card-carrying members of al-Qaeda, but rather part of a much larger and more nebulous confederation of organizations with overlapping objectives, sometimes borrowing rhetoric without sharing direct operational control. One might label these terrorists as “co-belligerents” of al-Qaeda, though it is unclear if the doctrine of co-belligerency from the state-based law of neutrality can be successfully transported to the realm of non-state actors.

Alternatively, one could link targeted individuals to a larger cause through criminal law concepts, such as complicity or conspiracy, which are used to establish vicarious or derivative liability in criminal cases. At first glance this appears to be an attractive strategy, because criminal law standards for attributing individual responsibility are usually stricter than standards used in other areas of private law. However, even criminal law concepts may not be strict enough for targeted killings, since targeted killings mark the individual for summary execution—a consequence that is much closer to the risk of death faced by combatants rather than the liberty-deprivation faced by criminal defendants.