

Explain the drone attacks

The UN rapporteur on extrajudicial killings, **Christof Heyns**, and NYU professor **Sarah Knuckey** argue America's targeted killings are setting precedent for the rest of the world — without clear justification.

One of the most crucial and enduring questions about "targeted killings" by the United States is: How will the currently expanding practices of singling out individuals in advance and eliminating them in other countries without accountability impact the established international legal system?

Targeted killings are not a new practice — governments have long sought to prevail over their enemies by engaging in premeditated killings of individual suspects. What is new is the rapid development and proliferation, and increasing deployment, of technologies that permit such killings to be carried out with greater ease and with little immediate risk to one side's citizens, together with concerted efforts by some to offer general legal justifications for current targeted killings practices, and, in some cases, to attempt to redefine existing legal frameworks to expand the circumstances in which such killings may be carried out "lawfully."

Current targeted killings practices and the attempts to legally justify those strikes present a challenge to the systematic protection of the right to life under international law. They present a serious risk of leaving everyone less

secure, particularly if other states around the world, as they acquire the new technology, claim for themselves the same expanded rights to target their enemies without meaningful transparency or accountability.

The applicable basic principles of international law relevant to the taking of life are clear and tested by time. International law does not wholesale prohibit targeted killings. Rather, rules have developed to impose principled limits on all uses of lethal force, and to ensure that the limits are respected through meaningful transparency and accountability. (Indeed, in some circumstances, "targeted" killings are precisely what international law prescribes.) However, as evidenced by both government practices and legal pronouncements, some states appear to want to offer only general legal justifications for highly contentious practices, to invent new law or to stretch existing law beyond long-accepted understandings.

Operations in the territory of other countries could violate state sovereignty, and they may be considered acts of aggression in violation of the U.N. Charter absent consent or legitimate self-defense. While self-defense has been advanced as a justification for targeted killings, it is far from



clear that its established legal confines have been satisfied in actual current practice. Self-defense (and the use of force on another state's territory)

is justified in response to an "armed attack" that meets the required threshold, and there must be a direct link between the "armed attack" and the subsequent use of force in self-defense. As a general rule, self-defense may only justify force in response to attacks that have already occurred. It is difficult to see in most cases how targeted killings carried out in 2012 can be justified as a self-defense response to the 2001 terrorist attacks in the United States. As targeted killings take place in more and more countries and against more groups with at-best tenuous

links to those responsible for the Sept. 11 attacks, this difficulty only increases.

What about new threats? While states may engage in self-defense against truly imminent attacks, there is little available evidence to suggest that all of those individuals targeted by drone attacks would meet this requirement. The premeditated nature of targeted killings means that, in many cases, claims of imminence ring hollow. The reported

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presence for long periods of time of the names of those on "kill lists," for example, undermines claims of such an imminent threat. More permissive standards of "pre-emptive strikes," without a clear basis in the U.N.



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Pakistani tribesmen carry the coffin of a person allegedly killed in a U.S. drone attack in the North Waziristan village of Tapi.

Charter, are being advanced in support of what would normally be regarded as acts of aggression. If one government is allowed to use force whenever it is of the opinion that there is some perceived danger that may be realized at some point, with no transparency or accountability, there is no basis on which to hold others back from doing the same.

Moreover, it is clear that even where consent or a self-defense justification for interstate force is present, it does not obviate the need for further inquiry into whether the demands of international humanitarian law or international human rights law have been met in respect of the particular use of force. The question of the legality of extraterritorial use of force should not be confused with the question of the legality of the use of lethal force against a particular target. These are two *separate* inquiries. Questions of *jus ad bellum*

(the right to wage armed conflict) and *jus in bello* (law in an armed conflict) should not be conflated. The "self-defense" test pertains to whether the use of interstate force is or is not a violation of state sovereignty, and to when a state may use force extraterritorially. It does not answer the question of whether the specific type, level, timing or scope of force used is lawful *vis-à-vis* the individual targeted person. The legality of this use of force depends on whether it complies with either human rights law or humanitarian law.

Where there is no armed conflict, international human rights law applies. Human rights law affords a high level of protection to the right to life: The use of force must be strictly *necessary* and *proportionate*. Lethal force may only intentionally be used where necessary to counter an imminent threat to life.

In the exceptional situation of

armed conflict, the *lex specialis* rules of international humanitarian law also apply, and any killings must satisfy the foundational principles of proportionality, distinction, necessity and humanity. With respect to the question of whether an armed conflict exists, it is unhelpful to talk about a "hot" or "cold" battlefield — either the killing is carried out in an armed conflict or it is not. The test for determining whether an armed conflict exists is objective, and it is not determined according to the mere subjective will or pronouncements of the parties involved. In addition, and importantly, the targeted individuals must be lawful targets: In the context of noninternational armed conflict, the key legal test is that they must directly participate in hostilities.

Although U.S. officials have relied on the existence of an armed conflict against al-Qaida and the ill-defined "associated forces" category as the basis for the legality of targeted killings, the U.S. government has presented little to no evidence to indicate that all strikes have in fact taken place against direct participants in hostilities or — if the category is used — against individuals who have a continuous combat function in an armed group that is a party to a recognized armed conflict. Strikes have also taken place in circumstances where it is far from evident that sufficient precautions in attack were taken or that the principles of proportionality and distinction were adequately observed.

The requirements of transparency and accountability with respect to the use of force apply under international human rights law, as well as under international humanitarian law. The "first line of defense" against violations of the right to life is at the level of the national legal system. But if violations are not properly addressed domestically, the position of the state in question becomes a matter of legitimate international concern. This is the kind of accountability that the U.N. Human Rights Council deals with on a regular basis — for example, currently with respect to

Syria, and previously with respect to Sri Lanka. Accountability for violations of the right to life is not a matter of choice or policy; it is a duty to be observed under both domestic and international law in all cases.

Consistent with the demands made by successive U.N. special rapporteur mandate holders over the last decade, the U.S. public and the international community urgently need clarity from the governments concerned on the general question about the legal basis upon which they carry out targeted killings, and also transparency about the facts that make a full assessment of legality and accountability possible. Key questions include: Who has been killed? What was the factual basis for targeting them? Were there civilian casualties, and what procedures are in place to ensure compliance with international law? Only on this basis can the questions of legality be determined, and can redress be provided where necessary.

Let us fast forward 10, or perhaps just five, years. Should there be an international legal order that permits governments around the world to operate "secret" and unaccountable programs to eliminate their enemies wherever they are with few binding limits and no meaningful international scrutiny? Some officials no doubt hope that they can expand the scope of lawful killings through sheer force of repetition of practice and claims of "legality." This cannot and should not be accepted. The international community should act to uphold and restore the integrity of the international rule of law, and the protections guaranteed by human rights and international humanitarian law. ■

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