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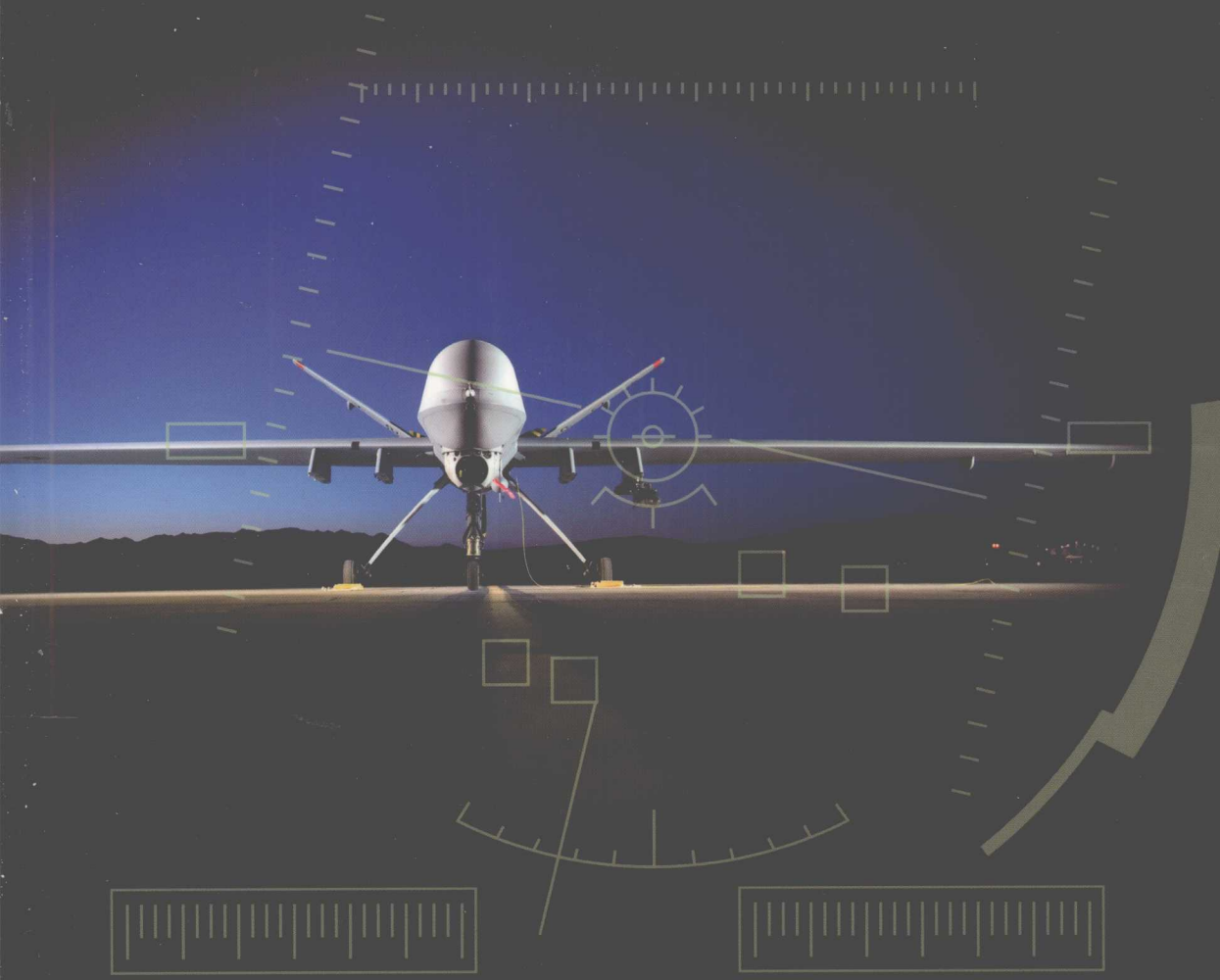
TARGETED KILLINGS

Law and Morality in an Asymmetrical World



EDITED BY
Claire Finkelstein, Jens David Ohlin, and Andrew Altman

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Law and Morality in an Asymmetrical World

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PREFACE

The law of armed conflict has traditionally been organized around the symmetry of rules of conduct: the idea that the permissions and restrictions that govern the soldiers of one side in war are the same as for the other side, regardless of the justice of each party's *causus belli*. Thus a German and an American soldier during the Second World War have an equal right to kill one another, regardless of the moral justification for the belligerency of their respective countries. Modern warfare, however, is fundamentally asymmetrical. Instead of the traditional reciprocal form of combat, where members of sovereign states fight co-belligerents from other states, we now have a war between traditional forces of a sovereign power, on the one hand, with what might be thought of as a band of civilian outlaws, namely individuals whose aggressive designs are enacted through membership of a criminal organization instead of the military forces of a sovereign state. Thus while co-equal sovereignty—on which the *ius in bello* is premised—is symmetrical, the principles of the War on Terror are necessarily asymmetrical: we regard it as permissible to target members of Al-Qaeda, for example, but we do not accept their right to target us. Similarly, although we regard members of Al-Qaeda as permissible targets, we regard them as exempt from the protections traditionally extended to ordinary enemy combatants, such as prisoner of war status and, according to some, the right of repatriation upon the conclusion of hostilities. The asymmetrical nature of the War on Terror is captured by the concept of the 'unlawful combatant.'

The pressures of modern warfare are nowhere more visibly displayed than in the policy surrounding the Obama Administration's use of targeted killing, otherwise known as 'kill or capture' raids on individuals on the JPEL ('Joint Prioritized Effects List'). While there has been a steady increase in reliance on targeted killing as a technique of war, the willingness on the part of the Obama Administration to subject the new policy to the legal and moral examination it appears to warrant has not kept pace. Yet the expanded conception of combatant status, reflected in the 'unlawful combatant' category, depends heavily on the asymmetrical logic that the traditional law of war rejects. The most crucial question for the modern theory of war, then, is whether the transformation from symmetrical to asymmetrical conceptions of military engagement is ethically and legally defensible. Should we see the concept of unlawful combatants, and all that this view expresses, as a justifiable adaptation to the realities of modern warfare? Or should we see it as a corruption of the values of reciprocity that have for many years formed the moral core of permissible aggression in war? This is one of the most important questions the essays in this volume attempt to answer.

A second question raised by the asymmetry of modern warfare is about the line between law-enforcement and military action. Traditionally, even highly organized aggressive action on the part of civilians has fallen within the domain of law enforcement: if members of Al-Qaeda are civilians, then the correct approach to handling the threat they pose would be based on law-enforcement techniques and authority. Thus, comparable to the War on Drugs, the War on Terror might be handled under the auspices of international and coordinated domesticated police action. Once again, however, if we think of enforcement efforts against international terrorists as properly falling within the domain of law-enforcement, we should also see terror suspects as entitled to the guarantees of domestic criminals, according to which rules of evidence prohibit the use of coercive interrogation techniques and the accused has a right to a fair trial and to competent legal representation. On this view, limitations on the use of preemptive force would in all likelihood render kill or capture raids morally and legally impermissible. One can frame these important questions another way: if we are correct in thinking of terrorists as engaging in military attacks on the United States, in keeping with a reconceived view of war as asymmetrical, then what is to restrict our taking such a view of the appropriateness of military conduct in fighting terrorists on United States soil? Insofar as the targeted killing of Al-Awlaki, an American citizen, can be justified under the Law of Armed Conflict, could we not extend such justification to a comparable killing of a suspected terrorist in the United States? And if so, why not extend such treatment to key players in the War on Drugs? In what does the difference between law enforcement and military action now consist?

None of these gripping questions were present in my mind in the fall of 2010, as I rounded up the list of usual suspects, searching for one that would suit for the spring conference of the Institute for Law and Philosophy (ILP). Around that time, I happened to attend a conference, jointly organized between West Point and Columbia Law School, on War and the Rule of Law. There I encountered a number of experts in military law, several of whom were active in the Judge Advocate General Corps, and others of whom had been in active duty and who were now turning to more academic pursuits. Among the topics they discussed was the permissible use of targeted killing. Much to my amazement, these experts turned out to disagree on key issues with one another. We are, of course, all accustomed to the disagreements of high theory: while they can be pointed, and at times downright aggressive, we sometimes comfort ourselves with the thought that many such academic debates will always remain just that, exercises in high theory that rarely, if ever, make a difference to the real world. But debates about the permissible use of military force?! Here disagreement was unnerving. How could those responsible in the Department of Defense and the State Department fashion military policy if the foundations of that policy were *essentially contested*? How could life in the trenches, so to speak,

continue when the guardians of key military practices had disagreements so sharp that one thought pulling the trigger permissible and another not?

The closest legal theorists seemed to me to have come to this kind of practical standoff was in the area of criminal law theory. The debates in military ethics were to my mind immediately suggestive of discussions relating to the permissible scope of justifications like self-defense, defense of others, or law enforcement. I thought, moreover, that it might be useful to address the military debate through the lens of philosophical discussions about domestic law, in keeping with a principle many scholars have written about in connection with international law generally, an idea Michael Walzer dubbed the 'domestic analogy.' At the time I thought mainly of enriching theoretical debate with a clearer understanding of the ethical issues that arose 'on the ground.' I could not have anticipated what later emerged: theoreticians with only limited knowledge of the actual workings of military operations could actually help to clarify foundational concepts in military practice, at the same time that the carefully studied practices of military conduct could shed light on the structure of ethical reflection more generally.

Soon thereafter I approached my dean, Michael Fitts, with an unorthodox idea: I would gather a number of prominent philosophers working on applied ethics, combine them with legal philosophers working on Just War Theory, and bring this group of academics together with military lawyers focused on ethical issues in war, as well as statesmen and policymakers, in the hope that this eclectic combination would generate an interdisciplinary conversation about killing in war. It was not that the topic of targeted killing struck me as so worthy in and of itself. Rather, it seemed a good vehicle for an attempted marriage between theory and practice, a chance to explore an issue in applied ethics from multiple perspectives at once. It was one of those moments: Mike responded with a look that signaled a combination of incredulity and amusement: 'You want ILP to hold a conference on *what*?!' One must understand his reaction in context, of course. At that time targeted killing was not yet prominently in the public eye; still less had it entered the realm of legal academic debate. Some military topics were beginning to creep into academic, and eventually into philosophical, consciousness. The logic and permissibility of using 'enhanced interrogation techniques' had caught philosophers' attention, and conferences on torture had sprung up in law schools around the United States. But torture was an easier case: that topic had a history in moral philosophy, in the debates about the merits of Utilitarianism versus Deontology, and a battery of familiar hypotheticals with which deontologists armed themselves against the morally questionable implications of social utility maximization. Even with the revival of torture as a topic of renewed philosophical interest, however, the idea of theorizing targeted killing seemed as absurd as attempting to theorize the relative merits of the cruise missile! Fortunately, my dean was willing to indulge the

targeted killing experiment, and we prepared for what was to be one of the more unusual academic gatherings I have attended.

By the time the conference rolled around, in April 2011, it was already clear that targeted killing was more than just a pretext for combining theory and practice around issues in applied ethics. It showed itself to be a crucial, perhaps *the* crucial, issue of military ethics of our day. It turned out to be a lens through which to study the heart of modern warfare, which specializes in the use of high-level technology in selective killing operations to eliminate enemies who are at the very least intermingled with a civilian population, if not properly considered civilians themselves. Because it lies at the intersection of ethical discussions about life and death, the theory of warfare, the legitimate scope of self-defense of sovereign nations, the relation between individuals and the state, the line between the civil and the military police functions, the relation between ordinary morality and legal ethics, and finally the impact of advances in technology on modern warfare, it creates a kaleidoscope through which major shifts in our ethical and legal norms can be viewed.

This volume collects most of the papers that were presented at that April 2011 conference, plus some an additional one. Most of the papers have evolved significantly since they were first presented in April—a result of the growth in sophistication that only conversation off-the-beaten track from one's own discipline can provide. As we grappled with a new, and increasingly important, technique of modern warfare in terms often uncomfortable and unfamiliar, we all moved up the learning curve. And in that sense, the enterprise was an unmitigated success. In another, probably less important sense, it was a failure: as the depth and complexity of the issues we discussed became apparent, the hope of arriving at definitive answers to the ethical questions surrounding targeted killing diminished. But in that failure lay another kind of success: we became aware that the practice of targeted killing exposes significant complexities in the moral justification for killing in war. Hopefully, the increased sense of the difficulty of the topic lies increased hope that collective efforts like the current volume will eventually yield solutions.

A number of thanks are overdue. First and foremost, I would like to thank my dean, Michael Fitts, for first indulging, and then enthusiastically embracing, not only the Institute's work on targeted killing, but its work on applied ethics and the rule of law more generally. His generous funding of ILP, and of the conference and much of the labor on the present volume, have made what was intended as an interesting interdisciplinary foray into a project with the potential for real ethical impact. There was another source of funding for the original conference on targeted killing, and that was the Jean Beer Blumenfeld Center for Ethics at Georgia State University. I am grateful to Andrew Cohen, Director of the Center, and Andrew Altman, the Center's Director of Research, for their willingness to leap into the

unknown with ILP with their generous donation to conference expenses. Next are the respective contributions of my co-editors of this volume, Jens Ohlin and Andrew Altman. While the conception for the conference may have begun at West Point, Georgia State, and the University of Pennsylvania Law School, the design and conception of the volume occurred primarily at Cornell Law School. Jens was an extraordinarily clear-sighted, energetic, and disciplined leader for me and Andrew of the original proposal to Oxford University Press. The ink had barely dried on the last-minute drafts many of us turned in for clandestine circulation among our fellow conference participants, when Jens had drafted the proposal and conceived its basic format. He was also a disciplined editor, at times a task-master, in making sure contributors, and to the best of his ability, his fellow editors stuck to our agreed upon timetables and followed through with ensuring the standards for contributions to which we had aspired. He was and is, moreover, the only true expert of international law among the three of us, and the knowledge and subtlety he brought in that area to our work on the volume was essential to its success. Finally, I should say that Jens was unstinting in the time he was willing to put into the editorial process, often bearing the laboring oar on tasks that by rights should not have been his.

Andrew Altman was involved in the project from an early stage. Not only did he agree to commit funds to the realization of the conference, but he proved a quiet but clear-sighted 'editor' of the original conference I had envisioned, helping to shape the format and list of contributors that proved invaluable to the final product. As an editor of the volume, he was also steadfast and disciplined, relentlessly exacting in his rightly high standards, and essential to the volume's polish in his detailed and penetrating editorial eye. And, of course, he bore the burden of writing the Introduction to the volume alone, an invaluable help in the middle of a busy production schedule. Perhaps needless to say, the three editors are also extremely grateful to the respective contributors to the volume. All papers are original and all underwent multiple drafts and edits. We thank the authors for the very significant time and effort they have been willing to devote to this project, and for their willingness to engage with one another, both at the April conference and in their work on their contributions in the months thereafter, to make the volume a truly interdisciplinary endeavor.

Other thanks are also due. Douglas Weck, the Academic Coordinator of the Institute for Law and Philosophy at the time of the April conference, was involved in every detail of the conception and planning of that event. Now an advanced graduate student in Penn's Joint Law and Philosophy program, Doug was able to help me to think through the conference, as well as execute so many, many of the myriad details that an undertaking of this magnitude requires. In addition, Anna Gavin, the Administrative Coordinator for the Institute, worked tirelessly to make the conference a success. No detail was too small for her watchful and dedicated

attention. The current Academic Coordinator of the Institute, Chris Melenovsky, along with another Penn graduate student, Justin Bernstein, were indefatigable in working on the first round of edits when the volume came back from the Oxford University Press copy-editor. After several weeks of trying to render usage, spelling, citation format, etc consistent across a large number of participants from widely divergent contexts, Chris and Justin both looked as though they had emerged from a kill or capture raid of their own. Finally, the Faculty Support Unit of Penn Law School, as well as individuals on the library staff, provided crucial infrastructure and proofreading. For their help I am grateful to the individual members of both sets of staff, as well as to the Law School once again for its willingness to commit extensive resources once again to the realization of this project.

Claire Finkelstein
Philadelphia
December 2011

LIST OF ABBREVIATIONS

AQ	Al Qaeda
AUMF	Authorization for the Use of Military Force
CCR	Center for Constitutional Rights
CDM	collateral damage methodology
CIA	Central Intelligance Agency
CIL	customary international law
CRS	Congressional Research Service
DoD	Department of Defense
FBI	Federal Bureau of Investigation
FSCL	Fire Support Coordination Line
HVT	High-Value Target
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israeli Defense Forces
IED	improvised explosive device
IHL	international humanitarian law
IHRL	international human rights law
JPEL	Joint Prioritized Effects List
JSOC	Joint Special Operations Command
JTAC	Joint Terminal Attack Controller
JWT	just war theory
LOAC	law of armed conflict
NCV	noncombatant casualty value
NSA	non-state actor
OEF	Operation Enduring Freedom
ROE	Rules of Engagement
SEAL	sea, air, land
SOF	Special Operations Forces
STAR	sensitive target approval and review
TK	targeted killing
UAE	United Arab Emirates
UAVs	unmanned aerial vehicles
UCCs	Unified Combatant Commands
UN	United Nations
USCENTCOM	United States Central Command
USSOCOM	United States Special Operations Command

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