



## UNIVERSAL JURISDICTION & TARGETED KILLING

THE MOST EFFECTIVE PROGRAM WE HAVE TO ELIMINATE TERRORIST THREATS IS IN JEOPARDY FROM TRANS-NATIONAL ORGANIZATIONS THAT CAN ATTEMPT TO CLAIM "UNIVERSAL JURISDICTION" OVER TARGETED KILLINGS OF TERRORISTS. IN ORDER FOR OUR OPERATIONS TO CONTINUE, WE MUST REASSERT AND SUPPORT THE LONG STANDING LEGAL JUSTIFICATIONS FOR THESE LEGITIMATE ACTIONS OF SELF DEFENSE. WE SHOULD ALSO PURSUE AN INTERNATIONAL TREATY ON TERRORISM THAT MIRRORS EXISTING CONVENTIONS ON PIRACY.

JIM HANSON  
B.A. PATTY



## Universal Jurisdiction & Targeted Killing

The most successful part of our strategy and operations in Afghanistan and Pakistan has been the drone strikes against al Qaeda and Taliban leadership. Over the past several years we have killed hundreds of them and severely degraded their command and control and ability to plan and conduct operations. Many of these strikes have taken place in the tribal areas of Pakistan, and it has been asked if we have legal authority to conduct targeted killings of al Qaeda and Taliban members there.

According to US law, that authority is spelled out specifically in the "Authorization for Use of Military Force" (AUMF) passed by Congress after the 9/11 attacks.

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

That is unequivocal and puts no geographic boundaries on the authority. The AUMF places our actions within the framework of the laws of war, and relates to 9/11 actors and enablers. The authority is specific to the 9/11 attacks and the organizations that supported their planning and execution, as well as those who harbored them. Congress can use its Constitutional power to declare war and extend this authority to act against other groups if it is necessary and proper that they should do so. In other words, our authority to act against these groups, as it is currently exercised, extends from the power of our nation to declare war on its enemies. That relies on our unilateral decision-making and could be bolstered by an international agreement providing that strikes against terrorists do not require any such justification. However, that terrorists by their very nature are fair game should be the established norm, even in the absence of a proposed convention on their targeting.

There is a working paper that discusses US authority for these actions at length by Prof. Kenneth Anderson assisted by other members of the Hoover Institution's Task Force on National Security and the Law. [It is available for download here.](#)

### Targeted Killing in U.S. Counterterrorism Strategy and Law

On January 23, 2009 a mere three days into his presidency, strikes by Predator drones in the tribal areas of Pakistan destroyed two compounds and killed numerous people, reportedly including a high-value target. Strikes continued, even expanded, over the successive months, and administration officials made clear that they had no plans to curtail them— even as they reined in coercive interrogations and announced the closure of Guantánamo Bay.....

But there's a paradox in Obama's embrace of targeted killing: Even as the strategic and humanitarian logic for it increases in persuasiveness, the legal space for it and the legal rationales on which it has been traditionally justified are in danger of shrinking. They are at risk of shrinking in ways that might surprise members of Congress and the Obama Administration. And they are at risk of shrinking through seemingly innocuous, unrelated legal policy actions that the Obama Administration and Congress might be inclined to take in support of various political constituencies, usually related to broadly admirable goals of human rights and international law.

American domestic law—the law codifying the existence of the CIA and defining its

functions—has long accepted implicitly at least some uses of force, including targeted killing, as self-defense toward ends of vital national security that do not necessarily fall within the strict terms of armed conflict in the sense meant by the Geneva Conventions and other international treaties on the conduct of armed conflict. Categories of the use of force short of armed conflict or war in a juridical sense—by intelligence services such as the CIA, for example—or by military agents in furtherance of national self defense and vital security interests, yet outside of the legal condition of armed conflict, date back in codified law to the founding of the CIA and, in state practice by the United States and other sovereigns, far further still. Yet as a matter of legal justification, successive administrations have already begun to cede this ground. Even the Bush Administration, with its unrivaled enthusiasm for executive power, always sought to cast its killing targets as the killing of combatants in what it legally characterized as armed conflicts, governed by the laws of war on the conduct of hostilities, known as “international humanitarian law” (IHL). This concession, however, if followed by the Obama Administration and beyond, will likely reduce the practical utility of a policy and security tool of both long-standing provenance and proven current value. It will likely reduce the flexibility of the United States to respond to emerging threats before they ripen into yet another war with non-state terrorists, and it will reduce the ability of the United States to address terrorist threats in the most discriminating fashion advancing technology permits.

The United States has security interests that span the globe and our enemies are able to live, plan and operate anywhere they can hide or find sanctuary. If we are going to maintain a strategy that aims to actively thwart terrorist plans and do all that is possible to stop them before they can act, then we must assert our right to conduct targeted killings regardless of where we find bad actors. We must also seek international agreement that this is proper and legal. We have conducted strikes in Somalia and recently in Yemen against known terrorists, and currently we have no basis to justify these beyond our own Constitution and laws. Failure to expand these authorities could result in actions by international agencies or judiciaries against those involved in prosecuting these activities for us. Recently [the American Civil Liberties Union filed](#) a Freedom of Information Act request for the legal justification of the drone strike program. This will not be the last challenge to this program.

Another example of the potential difficulties is [the case of Augusto Pinochet](#), the Chilean leader whose anti-communist efforts led him to be arrested by the British during a visit to their nation. Both Spanish and British courts asserted the right to arrest and try him for alleged crimes committed in his country, without any request from his own nation to do so. The [issuance of an arrest warrant](#) for former Israeli Minister Tzipi Livni by a British Court is another example, as is Israel’s seizure, trial and even execution of foreign nationals linked to the Holocaust. France, Belgium, Canada, Australia and Germany have also started down this road.

A concept called “Universal Jurisdiction” is behind these nations’ actions. Because it allows one state to “try” another state’s officials as criminals, it undermines the sovereign authority of nation states that underlies the fabric of modern civilization. For example, the British are treating Chileans as subject to their authority, which is an affront to Chile’s stature as a free and independent nation.

Such an action is does not lie within the realm of law: when one state claims the right to assert its own laws on the citizens or territory of another, you are in the realm of war. That is why our Congress passed the AUMF in the first place: because we were claiming the authority to go into Afghanistan, overthrow the Taliban government, arrest and try, or simply kill members of al Qaeda according to our own lights. That is an act of war, not law, and it is bad thinking to claim otherwise.

It is also a claim to an authority that is far greater than such states were ever intended to have. The system of independent nation states that we have today arose out of the wars of the Reformation, especially the Thirty Years' War, one of the most destructive conflicts in human history. This hard-won independence replaced a system in which there was, in fact, an authority capable of claiming the right to "universal jurisdiction" – the Catholic Church. Even kings were at least theoretically subject to this universal authority, so that knights and nobles following Robert the Bruce appealed to the Pope in their Declaration of Arbroath, asserting the independence of Scotland from England. William the Conqueror's claim to the throne of England had likewise been based on Papal authority, which overrode the secular government of Anglo-Saxon England, who had appointed Harold Godwinson as king.

The Church could claim such universal authority because it spoke for God, as His directly appointed guardians on earth. The Thirty Years War and the Protestant Reformation broke the West's belief in that authority, and our own Constitution bars us from recognizing a similar authority by banning a state church. Modern proponents of "universal jurisdiction" claim the same [universal moral authority](#), but without an agreed-upon religion that would allow us to have some certainty about how such universal authority would be exercised. If a court may have universal authority, why not an Islamic court? Why not a Chinese court? If we may not agree to be judged by any one of these courts, we must reject them all.

An alternative approach is to use international NGOs as if they were sovereign legal authorities. This would create a world government with the authority to do what we do not trust any particular state to do. The International Criminal Court (ICC) is an example of this approach. Its Chief Prosecutor [has recently announced](#) that he has jurisdiction over possible crimes committed in Afghanistan by any forces in the theater because the Afghans signed on in 2003. He states they have authority over all coalition forces, even though we have not signed on to the document creating the court.

"We have to check if crimes against humanity, war crimes or genocide have been committed in Afghanistan," Mr. Ocampo told me. "There are serious allegations against the Taliban and al Qaeda and serious allegations about warlords, even against some who are connected with members of the government." Taking up his inquiry of Allied soldiers, he added, "there are different reports about problems with bombings and there are also allegations about torture.".....

Asked repeatedly whether the examination of bombings and torture allegations refers to NATO and U.S. soldiers, Mr. Ocampo finally stated that "we are investigating whoever commits war crimes, including the group you mentioned."

He has effectively decided that his authority trumps our own regarding the actions of US citizens, even when they are taken at the behest or even orders of our government. He has stated that the treaty will be applied to us whether or not we ratify it. A declaration that says 'From now on, our authority will override that of your sovereign state' lies in the realm of war. The United States government may not surrender the independence that our forefathers fought to achieve.

If we did lay down our sovereign rights, the ICC would be able to use its own definitions of war crimes or crimes against humanity and it is not a far stretch at all to see them determining that targeted killings using drones against persons who have not been charged with any offense constitutes a crime against humanity. Additionally collateral damage that kills civilians in the prosecution of these strikes is another factor the ICC could use to award themselves jurisdiction in these situations.

This leaves all those involved with these strikes vulnerable to prosecution for following orders we consider perfectly lawful. Anyone from the operators flying the aircraft from Las Vegas; to the crews arming them in theater; to the chain of command approving the targets and

missions, up to and including the Commander in Chief; all these could be considered a war criminal by this unaccountable trans-national judiciary. We cannot accept a situation where a soldier would be prosecuted by our government for failing to obey a lawful order, yet subject to prosecution from a foreign court if he *did* obey the order.

We can support neither “universal jurisdiction” by individual states, nor surrender of our sovereign authority to an international body. We must avoid giving an international or foreign body the power to set moral standards meant to be binding on all mankind. Universal moral authority belongs to no earthly entity: it is too great a power to entrust to any government. We should not allow any court the right to assert their moral standards on our citizens. Rather, we should defend our sovereign authority, and ensure it continues to be restrained by the limits of our own Constitution.

Both the Obama administration and the Bush administration before it have relied on the AUMF as the basis for conducting targeted killings using drones. This makes a clear cut case in the specific framework of the Afghanistan/Pakistan theater and conflict. However, we should also desire a broader authority to hunt terrorist groups using these tactics. While the Congress may always authorize such force, an international treaty that clarifies the status of terrorist groups as ‘enemies of humankind’ (*hostis humani generis*, as pirates are said to be) could serve as a broader source of authority.

The advantage of such a treaty is that it would permit us to act against terrorist groups before they executed an attack on the United States or any country. The nations of the world would be able to strike terrorist groups because of their very nature as terrorists. This could be based on previous conventions regarding piracy and include pirates and others who perpetrate violence and operate outside the rule of law. As enemies of all mankind, they would be subject to the use of arms without the need for an individual declaration of war or other special authorization by any government. This convention would merely codify the inherent right of all nations to eliminate threats to it's citizens posed by such groups, but could serve as a bulwark preventing legal actions against our forces.

This approach would allow us to take military or other action against such groups anywhere in the world. It would not undermine our sovereignty, nor the system of sovereign states. It would clarify the rightness of our cause, without weakening our independence. Ignoring the encroachment of unaccountable entities into matters that are the core of sovereign power will see those powers eroded, and eventually lost.

Authors:

Jim Hanson has conducted counterinsurgency and counterterror operations as a member of a Special Forces detachment in multiple countries throughout the Pacific Rim. He is Director of the Warrior Legacy Institute.

B. A. Patty (M.A., History) has acted as an advisor on tribal affairs and information operations on extended deployments with US forces in Iraq. He is a Fellow of the Warrior Legacy Institute.