

Green highlights: Self-defense (jus ad bellum)

Red highlights: Killing in armed conflict (jus in bello)

Jack Goldsmith, “The Legal Basis for the Mughniyah Killing,” *Lawfare*, Jan. 31, 2015 (excerpt)

...

*What about the assassination ban?* Section 2.11 of E.O. 12,333 provides: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” The government probably determined that this provision did not apply because actions properly taken in self-defense are not assassinations for these purposes. The Post says that the killing of Mughniyah reflects “a philosophical evolution within the American intelligence services that followed the Sept. 11, 2001, attacks” with regard to assassination. I think this is wrong, or misleading. The almost-exactly-on-point precedent for the action in 2008 is the Clinton-era covert action to capture or kill Osama Bin Laden in 1998. As James E. Baker, who was the legal advisor to the National Security Council in 1998, explained in his book *In the Common Defense*, “the targeting of legitimate military targets consistent with the law of armed conflict is not considered ‘assassination’ under [EO 12.333].” As Baker described the administration’s deliberations in 1988:

[The lawyers concluded that] the United States could, and as a matter of legal policy should, lawfully respond to the threat [from Osama Bin Laden] within the framework of the Law of Armed Conflict (LOAC). In other words, the United States faced an imminent threat of attack and might appropriately respond in anticipatory self-defense using the full array of military and intelligence instruments available to the president as commander in chief. That meant that Osama Bin Laden (then referred to as UBL) and his organization were legitimate military targets. It also meant that in combating this enemy the United States must otherwise adhere to the law of armed conflict including the principles of necessity and proportionality in the use of force. The attorney general agreed.

(Note that in the case of the killing of Anwar Al-Awlaki, which the Post mentions, the assassination ban was obviously not relevant because Al-Awlaki was deemed an operational leader of Al Qaeda in the Arabian Peninsula, a group against whom we were in a congressionally authorized armed conflict. In the case of Mughniyah, the United States was (presumably) not in an armed conflict – but see below – and so the self-defense rationale was vital.)

...