



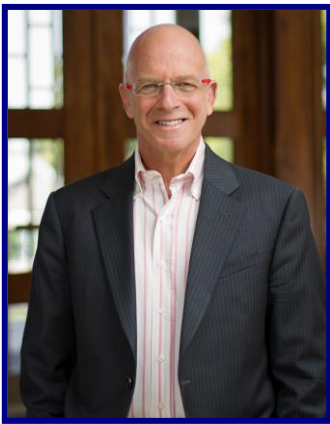
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E-NOTES

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TARGETED KILLING AND THE LAW: Who is a Legitimate Target and When is the Target Legitimate?

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It's 3 a.m. Most people are sleeping or at least are trying to. Perhaps a few are having one last drink. But few ever hear the following words and fewer hear them at 3 a.m.:

"We need to talk. The window of opportunity to neutralize the target is only open for a few minutes."

Processing such a sentence at such an hour can take a few minutes. Processing the need to get out of bed would be enough, not to speak of intelligently responding. But the voice on the phone doesn't have time or patience for niceties. 3 a.m. from his perspective is the same as 8 a.m., or 3 p.m., or any hour of the day. The time the target needs to be neutralized is the only relevant time. The rest is irrelevant.

The scenario above is not a fictional account of a targeted killing dilemma: quite the opposite. It is the beginning of a specific dilemma I was confronted with while serving as the Legal Advisor to the Gaza Strip Military Commander.¹

Targeted killing is here to stay. It is the preferred method of warfare today, tomorrow and for the foreseeable future. It has its advantages and it has its disadvantages. Needless to say, it is not controversy free; there are legitimate legal, moral, operational and policy concerns justifiably raised by important and legitimate voices. To gainsay the power and import of arguments raised by policy opponents is to miss the point.

After all, the policy represents a decision by the nation state to kill an individual suspected of involvement in terrorism. With the exception of a seminal ruling regarding the legality of targeted killing by the Israeli Supreme Court (sitting as the High Court of Justice) no judiciary has tackled the issue. In the US, the executive branch alone, devoid of judicial review or legislative oversight, determines both who is a legitimate target and when that legitimate target is a legitimate target. Given the absoluteness of executive power with respect to implementation of targeted killing the policy *must* be subject to careful scrutiny, careful review and public criticism.

I write these lines from the perspective of 'having been there'. During the course of my 20-year career in the Judge Advocate General's Corps, Israel Defense Forces I was involved in targeted killing decisions. While the policy is, ultimately, predicated on an aggressive articulation of the nation-state's right to engage in self-defense that right is

¹ I served as Israel Defense Forces Legal Advisor in the Gaza Strip from 1994-1997.

not unlimited. Re-stated: while self-defense is the basis for targeted killing powerful limits must be imposed on how self-defense is defined and applied. Otherwise, targeted killing will be—in simple terms—the nation state run amuck devoid of standards, criteria and guidelines.

From the perspective of the nation-state, the benefits of targeted killing are clear: aggressive measures against identified targets with minimal, if any, risk to soldiers for the obvious reason that the killings are conducted from an unmanned aerial vehicle. But while the risks to soldiers are minimal, there are other risks that are not insignificant. Particularly, there is always the possibility of collateral damage, and there are also legitimate concerns regarding how a target is defined as legitimate.

The essence of targeted killing, arguably the most aggressive form of operational counterterrorism, is killing an individual the nation-state has identified as posing a danger to national security; and there is no alternative, in the name of national security, but to kill the individual. The decision must reflect rigorous application of “checks” to ensure legality and morality.

Active self-defense aimed at the terrorist must contain an element of “pin-pointing” so that the state will only attack those terrorists who are directly threatening society. The first step in creating an effective counterterrorism operation is analyzing the threat—including the nature of the threat, who poses it, and when it is likely to be carried out. It is crucial to assess the imminence of any threat, which significantly impacts the operational and legal choices made in response.

To ensure both the legality and morality of drone strikes, I propose the following standards:

1. A target must have made significant steps directly contributing to a planned act of terrorism.
2. An individual cannot be a legitimate target unless intelligence action indicates involvement in future acts of terrorism.
3. Before a hit is authorized, it must be determined that the individual is still involved and has not proactively disassociated from the original plan.
4. The individual’s contribution to the planned attack must extend beyond mere passive support.
5. Verbal threats alone are insufficient to categorize an individual as a legitimate target.

The significant advantage of active self-defense—subject to recognized restraints of fundamental international law principles—is that the state can act against terrorists who present a real threat prior to the threat materializing (based on sound, reliable and corroborated intelligence information or sufficient criminal evidence) rather than reacting to an attack that has already occurred.

While there is much disagreement amongst legal scholars as to the meaning and, subsequently, timing of words such as *planning to attack*, the doctrine of active self-defense enables the state to undertake all operational measures required to protect itself.

Lawful targeted killing must be grounded in criteria-based decision-making, which increases the probability of correctly identifying and attacking the legitimate target. The state’s decision to kill a human being in the context of operational counterterrorism must be predicated on an objective determination that the “target” is, indeed, a legitimate target. Otherwise, state action is illegal, immoral and ultimately ineffective. It goes without saying that many object to the killing of a human being when less lethal alternatives are available to neutralize the target.

Any targeted killing decision must reflect consideration of four distinct elements: law, policy, morality and operational details. Traditional warfare pitted soldier against soldier, plane against plane, tank against tank, and warship against warship. Present and future asymmetric conflict reflects state engagement with nonstate actors. In the targeted-killing paradigm, the questions of who is a legitimate target and when is the target legitimate are at the core of the decision-making process. How both questions—in principle and practice alike—are answered determines whether the policy meets international law obligations.

The dilemma of the decision-maker in the targeting paradigm is extraordinary; the time to make the decision is short, limited and stress-filled. After all, national security is at stake. However, not all individuals identified as posing a threat to national security are indeed a threat. A criteria-based decision-making model is necessary to ensure that the identified target is, indeed, the legitimate target.

Any use of force under international law must meet a four-part test:

1. it must be proportionate to the threat posed by the individual;
2. collateral damage must be minimal;
3. alternatives have been weighed, considered and deemed operationally unfeasible; and
4. military necessity justifies the action.

In addition, all of these principles build on the fundamental international law principle of distinction, which requires that any attack distinguish between those who are fighting and those who are not in order to protect innocent life. Regardless of whether a target is legitimate, if an attack fails to satisfy the requirements listed above, it will not be lawful. Thus, the Israeli Special Investigatory Commission examining the targeted killing of Salah Shehada concluded that although the targeting of Shehada—head of Hamas’ operational branch and the driving force behind many terrorist attacks—was legitimate, the extensive collateral damage caused in the attack was disproportionate.

In any targeted killing decision, three important questions must be answered: First, can the target be identified accurately and reliably? Second, does the threat the target poses justify an attack at that moment? And finally, what is the extent of the anticipated collateral damage? To answer these questions using the criteria-based process, extensive intelligence must be gathered and thoroughly analyzed. The intelligence community receives information from three different sources: human, such as individuals who live in the community about which information is sought; signal intelligence, such as intercepted phone and email conversations; and open sources, such as the Internet and newspapers.

One of the most important questions in putting together an operational jigsaw puzzle is whether the received information is “actionable”—that is, does the information warrant a response? This question is central to the criteria-based method, or at least to a process that seeks—in real time—to create objective standards for making decisions based on imperfect information (as almost all intelligence is). It is essential that intelligence information, particularly from humans, be subjected to rigorous analysis.

To that end, the working model proposed above for defining both the legitimate-target categories and when those targets may be legitimately engaged suggests a way forward. While inevitably subject to criticism and concern, it reflects a balancing approach required by international law in a conflict that I have previously referred to as “mission impossible.” After all, identifying a legitimate target in the traditional war paradigm posed minimal challenges to operational decision-makers; defining a legitimate target in the state/nonstate paradigm poses extraordinary challenges. Targeted killing is the most aggressive form of self-defense; in the present paradigm its morality, legality and effectiveness demand narrow definitions of the term *legitimate target* strictly applied. That is the model I have proposed. How criteria-based decision-making is applied determines whether the nation-state conducts itself in accordance with international law.

Distinction, then, is integral to the discussion. It is as relevant and important to the soldier standing at a checkpoint uncertain whether the person standing opposite him is a combatant or civilian as it *must be* in any targeted killing dilemma. The decision must reflect a variety of criteria and guidelines subject to human analysis, control and discretion. Otherwise, the nation state conducts itself in the spirit of a video game where the victims are not real and represent mere numbers, regardless of the degree of threat they pose.

It has, repeatedly, been brought to my attention that my proposal is antediluvian as the combination of modern technology and sophisticated intelligence analysis predicated on complex algorithms and computer modeling all but ensure that Unmanned Aerial Vehicle, or drone policy is the most effective contemporary means to conduct

operational counterterrorism. The theory sounds compelling and convincing: what is more attractive than killing terrorists from the air with the use of sleek technology while minimizing risk to ground forces? After all, databases can arguably be programmed to determine whether the intelligence evidence gathered is “clear and convincing” or meets another level of evidentiary burden to justify the targeted killing. It is so extraordinarily seductive that how can anyone be opposed to this theory and its practical application? However, at the risk of being labeled the ‘last of the Mohicans’ I raise my hand and say—loud and clear—not so quickly.

We are at a crossroads: traditional state war has morphed, by force of circumstances, into conflict between states and non-state actors. Previously, International Law sought to establish criteria and limits by which nation states fought wars though violations of the laws of war inevitably occurred. Nevertheless, the rules were clearly articulated and understood, although not always implemented or respected. The era of state/non-state conflict has been marked by random attacks against innocent civilians by non-state actors. The nation state, in response, has been forced to develop and implement operational counterterrorism measures intended to protect their civilian population while striking at those responsible for the attacks. That has been legitimate and necessary. The primary obligation of the nation state is to protect its innocent civilian population, valuable national resources, and assets. Of that there is little doubt. However, the question is how the state meets that obligation: should there be limits imposed regarding the use of force? And if yes, what are those limits?

The criteria-based approach to targeted killing is significantly enhanced if national decision makers subject operational counterterrorism to a checklist approach akin to what on the ground commander’s use; that said, I am cautious to add that checklists invariably induce discomfort because they minimize “wiggle room” and minimize plausible deniability. Nevertheless, given the dramatic fall-out from operational counterterrorism operations gone awry, the positives of a criteria-based checklist enhanced process significantly outweigh perceived negatives. To that end, the checklist is intended for national decision makers. Needless to say, the issues considered are significantly different than the checklist proposed for ‘on the ground’ commanders. This checklist reflects the geo-political realities of targeted killing (as distinct from the operational considerations) both from the perspective of domestic and international considerations alike. While different nations have distinct political, social, cultural, legal and judicial realities, the checklist is sufficiently broad to reflect those inherent differences. One word of disclaimer: the checklist is predicated on decision makers having determined that targeted killing as a policy is legal, moral, and effective, and that specific categories of legitimate target have been defined.

Ten-Point Criteria Based Checklist	
“Past” Questions	1) What have been the local community reactions to previous targeted killings?
	2) What has been the international community’s reactions to previous targeted killings?
Predictive Questions	3) Does recent terrorist activity/lack of terrorist activity justify implementing the policy?
	4) Are there current political circumstances that preclude conducting a targeted killing?
	5) What are the predicted/expected reactions to a proposed targeted killing?
Legal Questions	6) What are the predicted/expected consequences if an otherwise legitimate targeted killing is not conducted?
	7) What are the expected/predicted geo-political ramifications of a particular killing?
	8) Do recent legislative or judicial decisions impact executive branch decision-making with respect to the targeted killing policy?
	9) What weight is ascribed to sovereignty considerations?
Other	10) Is domestic public pressure a consideration (particularly in the aftermath of a terrorist attack)?

It is unfortunately easy in the face of terrorism to take an expansive view regarding self-defense and defining of legitimate target. That 'ease' is magnified in the immediate aftermath of an attack when the public, media, and politicians are clamoring for aggressive responses. Whether that 'call to action' is legitimate and understandable is irrelevant for it represents human nature and the desire for revenge. It imposes pressures on government and military leaders to act in order to both strike at those responsible and to deter those considering future acts of terrorism. The fine points of distinction and international law obligations regarding collateral damage, alternatives, and proportionality are, from the perspective of the larger public, expendable principles that only hamper the government and are, frankly, perceived as self-defeating.

The Obama Administration's drone policy represents a disturbing continuum on how operational counterterrorism is actually conducted. My deep concern is based on my experiences in operational decision-making. The drone policy raises profoundly important questions regarding the very nature of operational counterterrorism; how it is implemented reflects on how morality and the rule of law are applied in an inherently ambiguous and amorphous paradigm. The relative clarity of traditional war has, undoubtedly, been replaced by fog that represents the reality of operational counterterrorism.

That fog is manifested not by the state's right to engage those randomly targeting innocent civilians but the *extent* and *manner* by which the state may target and engage. It is far from sufficient to articulate an aggressive policy for the devil, truly, is in the details. What the nation state must do is carefully define the limits of how force is to be applied. That is the essence both of morality in armed conflict and the rule of law: to deliberately operate in an open-ended paradigm with opaque definitions whereby state power is broadly defined and implemented opens the door, unnecessarily, to significant violations of morality and law.

To the point: unlimited drone warfare where limits, targets, and goals are not narrowly defined creates an operational environment whereby anyone killed—regardless whether intended or unintended—is considered a legitimate target. This expanded articulation of legitimate target premised on significant expansion of tolerable collateral damage reflects a slippery slope that inevitably results in the deaths of otherwise innocent individuals. Lost in the bluster of robotic warfare is a disturbing minimizing of the need to carefully distinguish between individuals who pose a threat and those who do not. It is important to recall that operational counterterrorism is primarily based on assessment of received intelligence information; justifying a targeted killing based on such information is sufficiently problematic.

To implement a policy whereby collateral damage is not narrowly defined nor applied based on the same information that justified an otherwise lawful targeted killing, raises extraordinarily important questions of morality and legality. Those questions have, largely, been ignored at best and unanswered at the worst. That does a profound injustice to two distinct population groups: commanders and soldiers and the general public. The former are mis-served for the very reason that Dean Martha Minow and I articulated in our article, "Protecting the Junior Commander"²: senior leadership deliberately obfuscates policy ensuring wiggle room and plausible deniability. The latter are mis-served because what is done in our collective name poses danger both to our safety and value system. Safety because of the possibility of blow back attacks responding to a drone attack that resulted in significant collateral damage; values because the policy is loosely articulated and problematically implemented.

When asked my advice whether to authorize a targeted killing I well understood the stakes; this was neither a video game nor movie but the most awesome and powerful decision state agents, or perhaps anyone, can make. Ideally there is no margin for error though the reality of operational counterterrorism is that mistakes will be made. Troubling yes, problematic indeed, and deeply sobering. For those reasons, the increasing reliance on technology must give us significant pause. While I fully support and understand the state has the right to engage in aggressive self-defense the question is one of degree and standards.

Perhaps more than anything else it is my deep concern that criteria regarding legitimate target and threat have not been fully and consistently articulated and implemented by the United States. In the context of targeted killing the danger of failing to narrowly define both terms directly leads to violations of the rule of law and morality. Given the lure of high-tech warfare my concern is deep; that concern is what has convinced me that application of the rule of

² National Objectives in the Hands of Junior Leaders: IDF Experiences in Combating Terror, co-authored with Martha Minow, in *Countering Terrorism in the 21st Century* (James J.F. Forest ed., Praeger Security International 2007).

law and morality standards predicated on a criteria-based approach reflecting person-specific drone policy take on heightened urgency.

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