

Targeted Killing: The Limits of Power

Written by Amos N Guiora

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<https://www.e-ir.info/2012/09/04/targeted-killing-the-limits-of-power/>

AMOS N GUIORA, SEP 4 2012

Targeted killing sits at the intersection of law, morality, strategy and policy. For the very reasons that lawful and effective targeted killing enables the state to engage in its core function of self-defense and defense of its nationals, I am a proponent of targeted killing. However, my support for targeted killing is conditioned that it be subject to rigorous standards, criteria and guidelines. My advocacy of both—targeted killing and criteria based decision-making—rests largely on my 20 years of experience with a ‘seat at the table’ of operational counterterrorism. The dangers inherent in the use of state power are enormous. On the opposite side of the equation, however, is the terrible cost of terrorism because terrorists, in deliberately targeting innocent civilians, disregard both legality and morality.

At present, however, new conceptions of threat and new technological capabilities are drastically affecting the implementation of targeted killing and the application of core legal and moral principles. Tactical and strategic gain, seemingly, has disproportionate importance in comparison to respect for narrow definition of criteria-based legal and moral framework. My concern is enhanced because of the realities of collateral damage and its inevitable consequences. However, that concern is tempered with recognition that an effective targeted killing provides the nation state with significant advantages in the context of counter-terrorism.

The fine-line that separates those two mutually distinguishable concerns is paper-thin. While success is undoubtedly seductive, the ramifications of a targeted killing gone awry must give pause to decision makers. My concern is that the seemingly surgical precision of a drone attack is so powerful and alluring that it will blind us from its powerful and compelling downsides – and from the legal and moral failures that it may well spawn.

In the current environment, proportionality – in all its many forms – is out of proportion. Expanded notions of imminence, flexibly and broadly defined, married with increasing reliance on sleek new technology, lie at the heart of re-conceptions of proportionality capacious enough to encompass nearly all targeting decisions as consistently reported in traditional and non-traditional media in the US and overseas. This article, whose foundation is my experience in operational counter-terrorism, is intended to be a clarion call proposing that we undertake—immediately and intensely—a significant re-appraisal of U.S. counterterrorism policy.

The call is complicated: the U.S. is a nation based on democratic values that deeply believes in ethics and values; yet, when push comes to shove, does not always act in accordance with those articulated principles. The shining city on the hill that John Winthrop articulated and that President Reagan fondly recalled^[1] has, frankly, been called into question by certain U.S. counterterrorism measures. This is not the first time that American responses in the face of crisis (whether real or perceived) have reflected “over-board” and “over-broad” approaches.

This article focuses on targeted killing as a central component of U.S. operational counterterrorism. Although targeted killing is applied in a wide array of circumstances, including Afghanistan, its use as self-defense against individuals deemed posing a direct threat to national security raises a significantly broader and more complex set of considerations extending beyond the law of armed conflict and its application. U.S. counterterrorism policy – and targeted killing strategy in particular – highlight a number of important issues: 1) a failure to articulate threats in a manner that defines and operationalizes imminence in a careful, effective and moral way; 2) an over-reliance on technology in intelligence-gathering and potentially intelligence analysis; 3) ends-based decision making rather than

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decision making based on morality and law; and 4) a failure to develop and use a process to move from the articulation of a threat to the lethal targeting decision in a discriminating and moral, law-based manner.

Morality in Armed Conflict

One of the dominant, and admittedly controversial, themes this article proposes is the state's obligation to conduct itself morally. Some will find that premise inherently immoral. However, 'morality in armed conflict' is a term of art (and not an oxymoron) that lies at the core of the instant discussion. Its overriding motif is the absolute requirement that soldiers treat the civilian population where they are engaged in conflict with the utmost dignity and respect. This obligation holds true whether combat takes place "house-to-house" or using remotely piloted aircraft tens of thousands of feet up in the sky. Simple to write, difficult to implement, for the operational reality of armed conflict short of war is that a soldier must make multiple decisions involving various factors, all of which have never-ending "spin-off" potential. After all, every decision is not only complicated in and of itself, but each operational situation has a number of "forks." The implication is that no decision is linear, and every decision leads to additional dilemmas and spurs further decision-making.

Operational decision-making is thus predicted on a complicated triangle that must incorporate the rule of law, morality, and effectiveness. I have been asked repeatedly whether that triangle endangers soldiers while giving the "other side" an undue advantage. The concern is understandable; however, the essence of armed conflict is that innocent civilians are in the immediate vicinity of combatants and there is a duty to protect them even at the risk of harm to soldiers. The burden to distinguish between combatant and civilian is extraordinarily complicated and poses significant operational dilemmas for, and burdens on, soldiers.

For armed conflict conducted in accordance with the rule of law and morality, this burden of distinction can never be viewed as mere mantra. Distinction, then, is integral to the discussion. It is as relevant and important to the soldier standing at a check-point, uncertain whether the person standing opposite him is a combatant or civilian, as *it must be* in any targeted killing dilemma. The decision whether to operationally engage must reflect a variety of criteria and guidelines. Otherwise, the nation state conducts itself in the spirit of a video game where victims are not real and represent mere numbers, regardless of the degree of threat they pose.

At the most fundamental level, operational decision-making in the context of counterterrorism involves the decision whether to kill an individual defined as a legitimate target. That is its reality. Although some argue killing is inherently immoral, I argue that killing in the context of narrowly defined self-defense is both legal and moral – provided that the decision to 'pull the trigger' is made in the context of a highly circumscribed and criteria-based framework. When limits are not imposed in defining a legitimate target then decisions take on the hue of both illegality and immorality.

Nature of Conflict

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, although 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, in contrast, has been marked by both random and deliberate 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 the 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?

It is unfortunately easy in the face of terrorism to take an expansive view regarding self-defense and the definition 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, to strike at those responsible and to deter those considering

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future acts of terrorism. The U.S. right after 9/11 offers an excellent example. Former U.S. Attorney General Alberto Gonzales' disdainful description of international law as 'quaint'^[ii] was matched only by former Vice President Richard Cheney's reference to water-boarding as a mere 'dunk in the water'.^[iii] The result was an operational counterterrorism model predicated on lawlessness and state power subject neither to the rule of law or morality. From the perspective of the 'boots on the ground', there is extraordinary danger when national decision makers adopt a paradigm best described as lawless.

The concern for a moral and legal basis in conflict and counterterrorism is not based on compassion for terrorists. Anyone who deliberately targets innocent men, women, and children is a legitimate target. However, decision making subject to moral and legal restraints must go beyond an indiscriminate application of power devoid of articulated and narrowly applied criteria. Although collateral damage may well be inevitable to war and counterterrorism alike, it is, nevertheless, essential that nation states recognize their absolute obligation to *proactively* minimize the deaths of innocent individuals.

That burden is unduly impacted by the callous decision by non-state actors to deliberately place *their* innocent civilians in harm's way. Human shielding is a clear violation of international law and reflects extraordinary disregard for the value of human life. As made clear during Operation Cast Lead,^[iv] terrorist organizations deliberately use *their* own civilians as human shields.^[v] However, that fact does not—must not—justify targeted killing that results in undue collateral damage. The fact terrorist organizations violate standards of law and morality must be universally condemned but does not justify a paradigm whereby in which collateral damage is tolerated. Ethical decision-making, human judgment, a moral conscience, and the rule of law must all work together to ensure that we do not become the enemy we are fighting.^[vi] This is the essence of the paradigm in which we find ourselves today.

Role of Modern Technology

To the already complicated mix of counterterrorism as aggressive self-defense and morality in armed conflict, we must add the high technology arena of drones, or unmanned aerial vehicles (UAVs). Many argue that the combination of modern technology and sophisticated intelligence analysis all but ensure that the UAV, 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? We are in an age where shiny technology and seemingly sophisticated intelligence gathering and analysis converge, potentially removing the human element—and humanity—from decision-making. In the context of targeted killing, few things could be more dangerous and fraught with extraordinary risk.

Computers and advanced technology are, without a doubt, essential to intelligence gathering and other important aspects of counterterrorism and armed conflict – suggesting otherwise would be folly. But in the context of the current trend towards relaxed or flexible definitions of imminence, legitimate target and proportionality, as highlighted in this article, increasing reliance on technology can exacerbate rather than curtail these dangers.

Looking Forward

The nation-state's right to engage in pre-emptive self-defense must be subject to powerful restraints and conditions. A measured, cautious approach to targeted killing reflects understanding that the nation-state has the absolute, but not unlimited right and obligation, to protect its civilian population. Targeted killing is a legal, legitimate and effective form of active self-defense provided it is conducted in accordance with international law, morality and a narrow definition of legitimate target. Self-defense, according to international law, is subject to limits; otherwise, Administration officials would not press for flexibility in defining imminent. The call for a flexible conception of imminence is a deeply troubling manifestation of a 'slippery slope'; it opens the door to operational counterterrorism not conducted in accordance with international law or principles of morality. Therefore, analyzing the reliability of intelligence, assessing the threat posed and determining whether the identified target is a legitimate target facilitates lawful, moral and effective targeted killing.

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Expansiveness and flexibility are at odds with a measured approach to targeted killing precisely because they eliminate our sense of what is proportional, in the broadest sense of the term. Flexibility with regard to imminence and threat-perception means that the identification of legitimate targets – the true essence of moral operational counterterrorism – becomes looser and less precise. In turn, broader notions of legitimate target and the right of self-defense introduce greater flexibility with regard to collateral damage – both who constitutes collateral damage and how much collateral damage is justified in the course of targeting a particular threat.

The result: flexibility plus the absence of criteria, process and procedure means that any notions of proportionality that should guide decision-making and operations end up all out of proportion. In the high-stakes world of operational counterterrorism, there is no room for imprecision and casual definitions – the risks, to innocent civilians on both sides and to our fundamental values, are just too high.

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[i] <http://www.reagan.utexas.edu/archives/speeches/1989/011189i.htm>, last viewed July 23, 2012

[ii] http://www.legalaffairs.org/webexclusive/debateclub_gonzales0105.msp, last viewed July 23, 2012

[iii] <http://www.msnbc.msn.com/id/15443701/ns/politics/t/snow-cheney-doesnt-support-water-boarding/#.UAzmre0lZSV>, last viewed July 23, 2012

[iv] Conflict between Israel and Hamas, December 2008-January 2009

[v] http://www.youtube.com/watch?v=n_YP6AtdwJQ&feature=fvwrel;
<http://www.youtube.com/watch?v=2vHDyuSTneA>, last viewed July 23, 2012

[vi] My gratitude to Margaret Hu for articulating this point so clearly for me.

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