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The Grotius Sanction: Deus Ex Machina. The legal, ethical, and strategic use of drones in transnational armed conflict and counterterrorism

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Chapter V

“Never think that war, no matter how necessary, nor how justified, is not a crime.”

— Ernest Hemingway: Introduction "*Treasury for the Free World*" by Ben Raeburn. (1946).

Targeted Killing

Targeted Killing

Targeted killing (TK) has both advantages—when used correctly as a limited tactic, and numerous disadvantages when it is not. It is a short-term solution to a long-term problem, and quick fixes—like bubblegum on a radiator leak or a finger in a leaking dike, are not reliable solutions over the longer term. It is essential to emphasize that target discrimination, or target distinction—the target selection process, is a core element of targeted killing strategy. If preemptive strikes and self-defense were controversial issues, they pale in comparison with the heated debate surrounding the phenomenon of targeted killing itself. It is essential to examine the subtle differences and accusations as they pertain to targeted killing and assassination and precisely how these two phenomena differ if indeed, they differ at all. The media has gratuitously conflated the two terms in the public eye. Before getting ahead of ourselves it is perhaps best to provide a clear and concise definition of what constitutes targeted killing (TK).

Justifiable questions relating to the use of targeted killing can be raised. Was the elimination of Osama bin Laden an orchestrated assassination or a legitimate targeted killing?²⁴⁸ Was Operation Wrath of God (also referred to as Operation Bayonet) a legitimate covert action employing targeted killing or was it a series of illegal assassinations?²⁴⁹ In many cases, the

defining features of what differentiates assassination from targeted killing can be qualified by the existence of a recognized state of armed conflict; the criteria of necessity, and a resort to self-defense against possible future threats. These elements separate and distinguish targeted killing from assassination. Legitimate questions, related to targeted killing, have been raised, and merit consideration. Questions such as 1. Can targeted killing be carried out in situations other than a recognized armed conflict? 2. Can targeted killing be carried out within the confines of a domestic regime? 3. How does targeted killing differ from assassination? The answers to such questions must be framed within the legal and ethical framework of national security, including the effective balance of proportionality and a target discrimination.

One guiding principle is the concept of target *discrimination*. This was redefined in the Additional Protocols to the Geneva Conventions and destined to protect innocent victims of armed conflict and limit warfare to recognized participants. Target discrimination is core to the laws of war and fundamental to the conduct of any effective counterterrorism efforts.

Finally, there exists the associated rule of *proportionality*. The concept of proportionality, a reflection of skilled and ethical warfare, is an integral element in both *jus ad bellum* and *jus in bello*, and to a lesser extent, *jus post bellum*.

An alternative view, was expressed by Kenneth Anderson, testifying before a congressional committee. Anderson declared that the laws of war are not the appropriate guidelines. According to Anderson, "...the proper legal rationale for the use of force in drone operations in special, sometimes covert, operations outside of traditional zones of armed conflict is the customary international law doctrine of self-defense, rather than the narrower law of armed conflict."²⁵⁰ This perspective is clearly based upon "naked self-defense," than the more traditional view of

jus ad bellum than many would be willing to countenance and obviously tends to blur the boundaries between *jus ad bellum* and *jus in bello* criteria.²⁵¹ By comparison, Blank on the other hand, writing on targeting outside the zone of actual hostilities relating to the killing of al-Awlaki, advanced that “Here the mixing of paradigms and blurring of legal authority is particularly acute. On one level, the language is of armed conflict: “battlefield;” “enemy combatant.” At the same time, the explanation seems to draw on the international law of self-defense and questions of imminence and necessity: “due process;” “threat;” “holds a gun to your head.” Beyond the fact that no precise justification is offered for any individual strike in the current approach, the immediate consequence of this blurring of lines is to inappropriately mix legal authorities with unfortunate effects.”²⁵²

Strategically, targeted killing has become the “go to” solution in cases where the proposed target cannot be easily extradited (the wilderness of the FATA or the vast deserts of Yemen for instance), in other words, as a last resort where capture is not a viable option, or in situations where the commitment of ground forces would represent an unacceptable risk. Given these two concerns, and in view of a substantial and ongoing threat (such as was represented by al-Awlaki) in the balance of the national security calculus. Given that an armed conflict exists between United States (or any other state) and al-Qaeda and given that al-Awlaki served as a senior component in that conflict, the misguided cleric through his affiliated acts, and future threats rendered himself a legitimate target.

It is essential to note that targeted killing as a term of the art, is not recognized under international law. As for targeted killing being carried out in a domestic context, that is a state

targeting its own citizens within its sovereign territory, this seems highly improbable (though not impossible), since in principle a state of armed conflict is a precondition. Targeted killing differs from assassination by the fact that assassination broadly refers to an act with political goals. Additionally, as pointed out in the research, assassination is most often undertaken upon an unarmed and unsuspecting victim through the use of treachery or perfidy (both condemned under international law), whereas targeted killing simply refers to the execution of an individual (or group of individuals) posing a direct threat to the security of the targeting state. Assassinations, which are more of a political and domestic phenomenon are legally forbidden in the United States under Executive Order (EO) 12333. Legal justifications for targeted killing rely upon the now time-worn AUMF and the inherent right to self-defense as laid out in Article 51 of the UN Charter.

While frequently associated with the use of armed drones (UCAVs), targeted killing may be conducted using any number of tactical solutions including, snipers, aircraft, missiles, and the use of small specialized units of special forces.²⁵³ Targeted killing has been carried out by both military and intelligence components. Though many consider the targeting of al-Awlaki (September 30, 2011) as the first instance of targeted killing, the dubious distinction for the first recorded targeted killing (initially denied), by the United States, belongs to Mohammed Atef (born as *Abu Hafis al-Masri*, but also known as *Abu Hafis al-Masri* signifying “the lion of Egypt”), in November 2001. This targeted killing killed not only Atef but also Abu Ali al-Yafi'i his assistant, and six other al-Qaeda members.²⁵⁴ The first recorded CIA led targeted killing occurred February 2002 and removed al-Qaeda leader Qaed Salim Sinan al-Harethi.²⁵⁵

We may wish to clarify the difference for instance between a targeted killing by drone and say that by a sniper. The fact is that in the case of targeted killings by drone, there exists a formal

structure; a chain of command in place and a system of target validation (See Appendices J, K). In the case of a sniper, this is most often a tactical decision made in response to an immediate and pressing threat. The rules of targeting, however, remain the same. The sniper, however, generally operates with less information than with targeted killing. In the case of a targeted killing, the process is far more complex and includes the elements of Find, Fix and Finish (F3). The “Find” portion is the most complex and relies upon the collection of significant, convincing and confirmed intelligence. To summarize there is no legal or ethical difference between a sniper removing a threat compared with the use of a drone-fired missile. The drone is merely the instrument being employed to carry out that task. Generally speaking, the planning and targeting process will be longer, more complex and backed by intelligence when using a drone than with assigning a sniper mission, which is often reactive in nature

Critics of targeted killing can have claimed quite incorrectly, that the practice can never be justified under any circumstance whatsoever. They have done so by advancing unsupported and thus unjustified claims. While targeted killing is certainly not illegal, according to international law, IHRL renders the task of justifying targeted killing far more difficult. A blanket condemnation of targeted killing runs counter to the laws of war (again think of snipers). Such condemnation and IHRL logic is far more understandable when contemplating the case of the previous administration’s dubious interpretation (or intentional misinterpretation perhaps) of the distinction principle.

Adam C, Gastineau, remarks that, “Critics often refer to the tactic [targeted killing] as ‘assassination’ or ‘extra-judicial execution.’²⁵⁶ Abraham Sofaer extrapolates even further that “When people call a targeted killing an ‘assassination,’ they are attempting to preclude debate on the merits of the action.”²⁵⁷ This forceful and outright condemnation of targeted killing is

framed by investing it with extra martial connotations. As Sofaer further elucidates, “But killings in Self-defense are no more ‘assassinations’ in international affairs than they are murders when undertaken by our police forces against domestic killers.”²⁵⁸ This important point is often easily brushed aside by pacifist rhetoric.

While various principles outlined by Guiora extend generally to all aspects of armed conflict, they are particularly suitable to the use of UCAVs in their targeted killing role. Guiora in an earlier article from 2004, considered targeted killing within a framework of active self-defense.²⁵⁹ Examining targeted killing specifically in the context of the Israeli Palestinian conflict, Guiora offered the following definition:

Targeted killing reflects a deliberate decision to order the death of a Palestinian terrorist. It is important to emphasize that an individual will only be targeted if he presents a serious threat to public order and safety based on criminal evidence and/or reliable, corroborated intelligence information clearly implicating him. Intelligence information is corroborated when it is confirmed by at least two separate, unrelated sources. There also must be no reasonable alternative to the targeted killing, meaning that the international law requirement of seeking another reasonable method of incapacitating the terrorist has proved fruitless.²⁶⁰

Thus, Guiora also carries forth many of the same elements we prosed relating to the definition of targeted killing. While Guiora was addressing the Israeli-Palestinian conflict, his analysis is equally apt for any of the modern, asymmetric armed conflicts engaging State-level actors facing Stateless International Entities (SIE’s) involved in transnational armed conflict. Importantly

Guiora underscores the fact that it is not targeted killing as a strategy that needs to be called into question, rather the legal framework, which seems to be unable to adequately consider the changing reality of armed conflict. When considering the morality of the use of deadly force, for instance, Guiora declares that “Protecting a civilian population does not justify non-target specific counterterrorism; the measure must be based on legal, moral and operational criteria and guidelines.”²⁶¹ Such specific guidelines, when considered in such a manner, therefore, *interact and create a fusional entity worthy of serious policy evaluation* (author’s emphasis). Amos Guiora emphasizes that the boundaries and limitations, involved with a State’s counterterrorism policies, should be limited by three constraints:

- Domestic law;
- International law and;
- Morality.²⁶²

The Legal, Moral, and Ethical Aspects of Targeted Killing

The initial concern here is one of *why* the targeted killing of an individual should even be authorized in the first place. The response to this question shall be examined in detail and will be followed by the related question of *whom* we can legitimately target, if—as this research speculates, targeted killing when used as a tactic, can indeed be legally, morally, and ethically justifiable.

One problem with establishing clear ethical and legal dimensions is that there has been a gradual offsetting in the balance and original strategic conception of the targeted killing program. Drone attacks and targeted killing were initially designed to remove selected high value targets

(HVTs) and disrupt the operations of the terrorist organizations. In this respect, this description flushes out more fully our definition and understanding of the concept of targeted killing. This can be considered a “leadership decapitation strategy.” There has been limited research relating to the topic of leadership targeting practices. The majority of studies published have tended to argue against the effectiveness of leadership decapitation strategies.

The numerous assassination attacks upon Hitler would tend to contradict such a view. Unfortunately, those attacks failed to achieve their objective. Assassination has most often been associated with important individuals. Were it not for the existence of a state of recognized armed conflict states would be conducting targeted assassinations, rather than targeted killings. Decapitation strategy can be effective when the leader or leaders are charismatic and dynamic, as well as when the leadership is difficult or impossible to replace. Such a such a view, as that previously mentioned, also tends to completely overlook the case of Stalin, Pol Pot, Idi Amin Dada, and other sanguinary dictators, who cost the lives of so many.

The issue of targeted killing raises many ethical issues which lie at the center of the current debate. Guiora lays out four important principles that should define the U.S. counterterrorism policy and help to dissipate the misty veil of dubious legality and the sense of improper state conduct, under which it currently struggles. He emphasizes a precisely defined targeting policy which clearly outlines the concept of imminent threat; a greater emphasis on all-source intelligence, as opposed to technological reliance; an ethically, morally, and strategically balanced decision-making process, rather than a simple consequentialist, ‘ends justifies the means’ approach (often misattributed to Machiavelli’s *The Prince*), and finally, that the target determination process should have a moral and legal foundation, when bridging the gap between a threat and a target.

More recently, efforts to control, refine, and rein in the strategy of targeted killing, has resulted in the publication of official guidelines issued by the Joint Chiefs of Staff. The publication of this document and the associated concern may well represent a response to mounting criticism of the opaque and unfettered campaign as directed by the previous Obama administration. The current document serves as the handbook for defining targets and the targeting process, elucidating what is referred to as the “Joint Targeting Cycle,” and clarifying the obligations and responsibilities related to the target selection process. The entire process is based upon the Joint Integrated Prioritized Target List (the Kill list), also known as JPITL.²⁶³

Bryan C. Price and Patrick B. Johnston have both presented insightful and well-researched contributions on questions relating to decapitation strategy. Their studies adopted empirical approaches including quantitative multivariate analyses.²⁶⁴ Both studies, that of Johnston and that of Price, indicate that, in certain specific cases, decapitation strategy may indeed prove effective.

Price’s quantitative analysis is truly a brilliant and thoughtful piece of research. It defies the previous observations made by most scholars who considered leadership decapitation strategies as ineffective or even counterproductive. Price’s study represents a break with earlier research efforts, which were both constrained by small *N* populations, questionable database criteria, and the adoption of short chronological cycles, which in turn concentrated upon the number, frequency, and lethality of attacks, rather than the duration and resilience of the groups. Thus, Price’s study examined existential values rather than performance-based ones. Three specific characteristics make terrorist groups more vulnerable to leadership decapitation. These factors include the violent and illegal nature of their operations; the attendant requirement for secrecy (which enhances relative isolation, small group dynamics, and unit cohesion), and adherence to a

value-laden ideology (as opposed to a profit-based orientation). The findings of Price's study, even after controlling for the impact of time sensitivity, over short, moderate, and long-term periods reproduced the same results. Six significant findings were presented, which are worthy of consideration in relation to targeted killing and the associated leadership decapitation strategy:

1. The groups which experienced leadership decapitation suffered higher overall mortality rates.
2. Implementation of the strikes at an early phase will have a far greater impact upon their mortality rate.
3. Of the three models of group leadership decapitation analyzed—killing, capturing, or killing following capture, was largely irrelevant in correlation with the group mortality factor.
4. Regardless the reason for change in leadership, the result remains the same—increased mortality rates.
5. The size of a group has no impact in determining its resilience.
6. Perhaps the most interesting finding; that religious-based terrorist groups were more vulnerable and easier to decimate than were nationalist groups, following leadership decapitation.²⁶⁵

Johnston's research also provides similar interesting conclusions, which tend to "...challenge previous claims that removing militant leaders is ineffective or counterproductive.²⁶⁶ On the contrary, they suggest that leadership decapitation (1) increases the chances of war termination; (2) increases the probability of government victory; (3) reduces the intensity of militant violence; and (4) reduces the frequency of insurgent attacks."²⁶⁷ Although Johnston's findings are limited

in their overall approach they do offer an alternative perspective and statistical inferences worth considering. Johnston himself adds the judicious caveat that the findings while useful, they do not represent a “silver bullet” solution.

Taken together, these two studies present a direct challenge to previous notions relating to the effectiveness of leadership decapitation theory and the use of targeted killing as a strategy. The studies are more empirically based, with broader and more definitive quantitative analysis and must be considered, given their findings. Contrary to popular belief, if the models hold true to their findings, targeted killing appears to be an effective strategic approach to diminishing the effectiveness of terrorist organizations. This also accords with the emphasis of the current research, that judicious and selective targeting of the leadership, when complemented by actionable intelligence is a far better option than has been previously exercised.

One important point must, however, be borne in mind, when considering large, multivariate, quantitative studies such as those by Price and Johnston. The fact that such studies often attempt to include extensive independent variables, some of them quantifiably immeasurable, reduces the overall precision in the long run. This tends to weaken certain conclusive inferences being drawn. Quantitative analyses are only as strong as their input data. When those variables are numerous and randomly selected then the degree of confidence diminishes accordingly. It does not automatically stand to reason, for instance, that a state with a high GDP, will automatically also have an equally effective counterterrorism strategy.²⁶⁸ To summarize the greater the number of variables involved (especially those that are difficult to quantify) the greater the chance for a larger margin of error.

Strikes carried out by the U.S. were quite successful at the outset, with few civilian casualties compared to high-value targets (HVTs). HVT to total reported death ratio was approximately 1:5 from 2002 – 2004, in the early phase of the program. As the program wore on, however, the number of total deaths increased and the number of HVT deaths decreased substantially, arriving at a rate of a single HVT for approximately 150 total deaths. Finally, according to a report by the London based, human rights group Reprieve, the search for 41, HVTs led to the death of 1,147 persons in Afghanistan, Pakistan, and Yemen, with total casualties standing at nearly three times that number. Of all those killed only 4% were the actual intended targets, the other 96% being unintended targets (whether low-level militants or other).²⁶⁹ Many of the so-called HVTs killed, were in fact, falsely listed as having been killed up to as much as seven times. Of course, these reports produced by the human rights group remain of questionable validity and must be examined with caution.²⁷⁰ Nevertheless, should such figures be confirmed this would be an alarming finding.

Additionally, more than half of those targeted and killed, according to the report, were not among the ranks of senior al Qaeda officials. Moreover, of the strikes which were launched, many were against groups (such as the Haqqani network) which were not yet officially designated as terrorist groups.²⁷¹ They were attacked as a matter of concern, for reasons of political expediency, a lack of accurate intelligence, or quite simply by tactical error. Even though the Haqqani network is replete with sordid and evil individuals that fact is not a justifiable legal basis for launching an attack.²⁷²

The nebulous and morphing nature of modern warfare often precludes a clear delineation, or an appropriate definition of exactly whom, or what is the intended target. Mary Ellen O’Connell, counters that, “The United States has an obligation to take feasible precautions to protect

civilians, such as providing advance warning of an attack; never attacking homes, or only attacking at night in open spaces. The author has found no evidence that the U.S. is taking precautions in Pakistan.”²⁷³ These sorts of precautions had, in fact, been previously implemented by the Obama administration. While Article 57 of AP I lists the precautions that parties must take whenever attacks may harm civilians. The assumptions on the part of O’Connell, are rather extreme in nature. While the United States, or any other belligerent State involved in armed conflict, has an obligation to take necessary precautions to avoid civilian casualties, the battlefield calculus, which weighs military advantage against proposed civilian harm, relies ultimately upon the judgment of the commander in the field. These points have been highlighted it is also worth noting that the protection of civilians is codified in Article 48 and 51 paragraph 2, as well as Article 52, paragraph 2, of API. Additionally, this rule, concerning the protections of civilians from harm, is also considered to form part of customary international law.

Guiora, for instance, emphasizes that “Operational decision-making is thus predicted on a complicated triangle that must incorporate the rule of law, morality, and effectiveness.”²⁷⁴ Effectiveness is *effectively* often overlooked as a criterion. This is important because realistically, war is not only an issue related to humanitarian concerns and reducing civilian casualties, but it is also one of strategic objectives and operational imperatives as well.

Fifth generation warfare or 5GW is a totally asymmetrical approach to warfare, where terrorists strike from random obscurity, and undefined and unseen drones respond likewise from the lurking shadows of distant anonymity. This type of indirect conflict is about as far as one can get from previous traditional state to state warfare paradigms, with large armies facing one another on open battlefields. The lines between what constitutes 3GW, 4GW, and 5GW remain

blurred according to varying criteria. Some authors are now even speaking of 6GW, where the enemy surrenders before a conflict even commences.

Perhaps the single most cohesive and convincing (at least at first glance) ethical argument against robotics and their use in modern warfare is that they tend to lower the barrier for resorting to armed conflict and replace the traditional diplomatic instruments. Singer recalls, “Lowering the bar to more and more unmanned strikes from afar would most resemble the so-called cruise missile diplomacy of the 1990s.”²⁷⁵ Indeed the cruise missile diplomacy of which this Singer refers to has morphed into an unbridled strategy of strong-armed intervention and short-sighted conflict resolution. It was a failed policy exemplified by lackluster operations such as that witnessed during Operation Infinite Reach, on August 20, 1988, in retaliation for the U.S. embassy bombings in Africa, where there were few positive results achieved. Such powerful responses fell victim to political constraints, while simultaneously being plagued by less than perfect technology, which in turn, relied upon even less precise intelligence.

This reasoning and view, that of technology facilitating armed response, is heard across a wide swath of opinion. Brunstetter and Braun underscored this inherent paradox related to drone warfare—and that is, that while drones eliminate the need for troops on the ground and, thus the resort to large-scale warfare, simultaneously they tend to facilitate the recourse to armed conflict more easily due to this perceivable advantage.²⁷⁶ The reason for this ethical transition and the associated dilemmas that it poses is quite simple: The more the factors of risk and danger are reduced, the greater the propensity to call upon lethal force as a solution. This is a simple cost-benefit analysis, which replaces a strategy with a tactic. The traditional “brake” on going to war—the actual risk and cost of conflict—are removed in the case of UCAVs. There is an ironic tension, created by the expanded use of drones. The public, which largely approves of the drone

strikes, since they keep the horror of war at bay, by the same token, paradoxically calls for greater scrutiny and clarity surrounding the use of these weapons.

In defense of critics of this technology, this is a very convincing and strong argument, however, it is only fair to point out that the conflict in question preceded the acquisition of this technology and will continue with or without it regardless. The trend in strategic warfare has always been aimed at minimizing the possibilities for sustained casualties, and since UCAV technology fulfills this requirement it is not only coherent to adopt it as an instrument of warfare but also ethically defensible. Removing this technology would substantially raise the risk to personnel while increasing the possibility of deeper and less discriminant military commitment. An argument might even be made that the use of such complex technology reduces the risk of going to war. Since insurgents are aware of their limited impact, resources, and overall opportunities for success, they may take greater reflection prior to engaging in hostilities where they are outmanned technologically and strategically. This aspect of enhancing the chances of success in armed conflict is an integral component of the Just War tradition. Elshaint cautions, “Be as certain as you can, before you intervene in a just cause, that you have a reasonable chance of success.”²⁷⁷ This is, of course, one of the important *just war* principles.

Guiora’s active involvement for over 20 years in counterterrorism and covert operations has afforded him a unique and measured view. When interviewed, Guiora spoke of the balance between strategic considerations, diplomatic effectiveness, and legal ramifications behind armed drone usage. Guiora stated that “The drone campaigns are lawful *but...*” He then clarified this caveat by explaining that this does not necessarily mean that they are always the wisest choice and that they must be used in accordance with the rules of law, including the avoidance of excessive noncombatant casualties, just like any other type of weapons platform.” He continued

by further acknowledging that “Drone attacks are and can be effective *but...*²⁷⁸ again elucidating his position that they can be effective; however, they must be employed as a tactical source of force and not as an isolated strategic concept. It is also vital to know exactly when, where, and how they might be strategically employed as opposed to their unfettered use.

Military leaders, generally, are not fond of the strategy of targeted killing. As Zenko aptly iterates, “Senior military officials prefer comprehensive strategies to resolve the long-term problems posed by the group or state to which the targeted individual belongs, while civilian officials are willing to use force for the potential short-term gain of eliminating a threatening individual. In addition, military officials are also less likely than civilian officials to believe that targeted killings will succeed militarily.”²⁷⁹ It would seem a wiser proposition to have the military making the strategic decisions about which they are better informed, as to the impact and consequences of operations, than political appointees with limited mandates and even more limited understanding of military strategy. To be fair, it must be borne in mind that civilian policymakers, make their selection from a list of options initially developed by senior military officials, even if it is the civilian policymakers who ultimately decide that military intervention is necessary in the first place.

Regardless the decision-making process, there remains the inherent question of legitimate liability of the intended target, and this in the case of any attack, including that of targeted killing, which is merely an alternative instrument of tactical prosecution. As Jeff McMahan so eloquently points out, it is that by causing harm and forfeiting their noncombatant status that the objects of lethal force have become liable to attack; both ethically and legally. Walzer echoes this perspective throughout his seminal contribution. While speaking on the principle of necessity and the liability of the enemy combatant Walzer states that “He can be personally

attacked only because he is already a fighter. He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man.”²⁸⁰ or “a justification grounded in liability” in the words of McMahan.²⁸¹

The first contention, that of justified liability, is also addressed by Adam C. Gastineau, in his *Key Concepts in Military Ethics*. Here the author lucidly points out two basic justifications for targeted killing, which are the *ex-ante* and *ex-post* justifications. *Ex-ante* justification is a targeted killing, based upon liability of an agent due to an immediate or future threat posed, by the intended target of lethal force; whereas, *ex-post* justification relies upon an event which has occurred in the past, and according to the view of Gastineau, quite correctly, is tantamount to revenge, or *lex Talionis*—an eye for an eye justice,²⁸² which is totally unacceptable both under the tenets of the Just War tradition and international law.

Nevertheless, I would present a counterargument in which *ex-post* justifications are indeed not only acceptable and justified, but also morally sanctioned. A simple manifestation of this principle can be seen in the congressional Authorization for the Use of Military Force (AUMF) passed in 2001. This legislation essentially authorized the hunting down and elimination of those entities related to, or responsible for, the unparalleled attacks of 9/11. As a result, we are faced with an ethical conundrum. How do we separate the desire for revenge from the search for justice, and to an even greater extent the guarantees of self-defense? The simple answer is that we cannot. We must, therefore, rely upon an alternative calculus to determine the moral and legal acceptability of targeted killing under an *ex-post* justification. The fact is that any desire for revenge is subsumed and satiated under the criteria of self-defense. This premise only remains

legal and ethical, however, insofar as the attacks are directed against those entities directly responsible for delivering or developing threats to national security.

Here I would posit that there are two essential and interlinked criteria which apply in such a case: a binary spatio-temporal and imminence consideration, and an impact or consequence consideration. As these factors increase in relevance the justification for *ex-post* targeting increases to legitimate levels and becomes not only legally permissible but also morally incumbent. We should recall that the first obligation of a State is to provide security to its population. Thus, the imminence (I) of any projected event in combination with spatial considerations of actual physical and ‘strategic’ (if relying upon proxies for instance) distance (D) of the perpetrator/intended target, must be balanced by the impact that a future attack will hold and its resultant adverse consequences (I/C), which will or would result in the event of a future attack. Any such intended target will have already proven capable of inflicting further damage to vulnerabilities (V) and looms (intent) as a persistent threat (T), or a risk to national security and public safety. The calculus can be evaluated, and this threat can be countered through several alternative mitigation strategies, including capture and targeted killing (TK). Here we can detect the close relationship entertained by the concepts of self-defense and its adjacent response that of targeted killing.

Given these considerations, targeting such a threat using anticipatory self-defense, considering past events, and in defense against future events, should be both legally and morally permissible. Gastineau seems to concede, if not the point in question, at least the conundrum when pointing out that, “...the question remains whether or not those targeted in cases that are not cases of ‘warfare’ are targeted on the basis of their liability resulting from their status as combatants, or because of past wrongs [hence objects of punishment].”²⁸³ This view has been

shaped by adopting a Security Risk Management Process (SRMP) perspective. Note that Ex-Post considerations refer to actual results and knowledge as opposed to forecasted events. Ex-Post events are based upon objective facts. Refer to the diagram below.

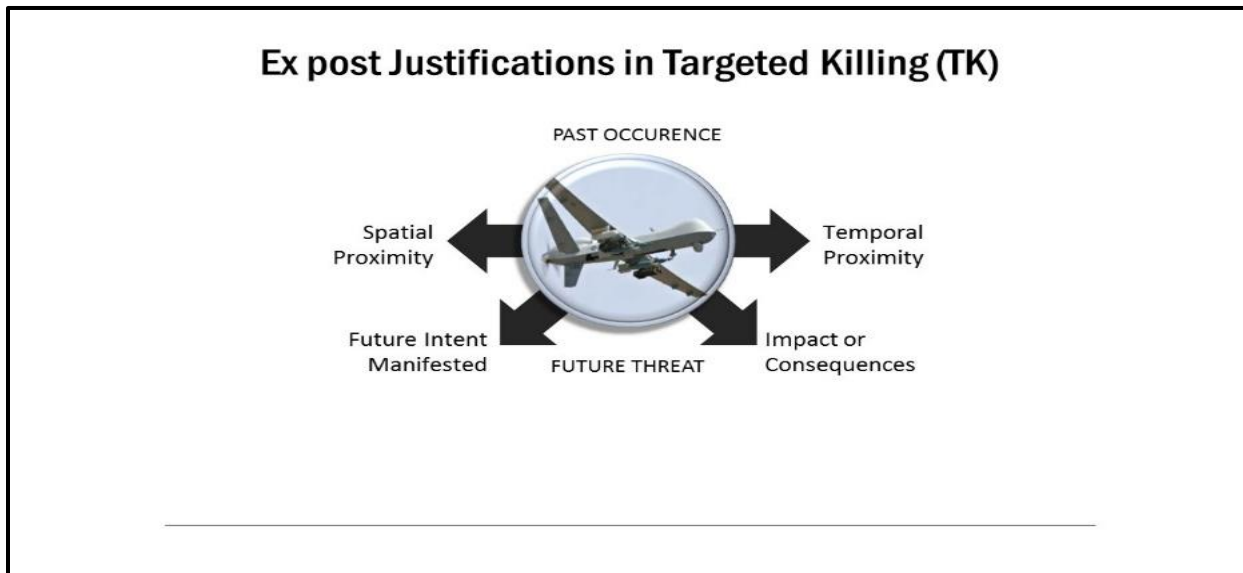


Figure 4© James P. Welch 2018.

Target Discrimination

On an individual level, there is the question of target distinction. Target distinction, according to Kevin Heller and others, is the foundational principle and the jewel in the crown of international humanitarian law. The rules relating to target discrimination are clearly outlined under Geneva Convention Additional Protocol I, Articles 48 and 51.²⁸⁴ The inherent risk must be measured against the possible consequences in each case. For instance, how does one differentiate between a combatant (especially from drone captured imagery) and an individual who is *hors de combat* from one merely momentarily stunned? In the same vein, how does the drone operator distinguish whether a person is rushing to the aid of a fallen fighter, or running to retrieve the weapon and resume combat? It thus becomes clear that, whether rules of engagement (ROE) or

no rules, each case is specific, reaction-based, and the interpretation depends upon the discretion of the operator and the proportion of risk involved. There has been a great deal of latitude and discretion afforded to troops to interpret what constitutes “hostile intent.” For instance, the *Harvard Negotiation Law Review* noted in their background and source sheet on hostile intent that:

U.S. Standing ROE (SROE), issued by the Joint Chiefs of Staff, permit U.S. forces to use lethal force in self-defense against individuals who commit hostile acts (for example, firing at troops) or demonstrate hostile intent (something less than a direct use of force). However, in Afghanistan, U.S. and ISAF troops appear to interpret hostile intent broadly, leading to the killing of civilians not directly participating in hostilities or otherwise demonstrating any hostile intent and therefore protected from attack under international law. In many cases, non-threatening behavior by non-combatants – picking up a cell phone, running away from the scene of an attack, or going to help a family member who has already been shot – is frequently interpreted as ‘hostile intent’ by U.S. forces justifying the targeting and use of lethal force against such civilians.²⁸⁵

The development of such broad interpretation is part of a spiraling cycle of action-reaction response, based on asymmetric inequality. No clear and concise definition of what *intent* entails, outside of a direct threat has been, so far, forthcoming. Intent is closely related to anticipatory self-defense and can be seen on a sliding scale of importance, as indicated in Appendix I.

When considering the definition and questions surrounding target discrimination and civilian casualties. Keifman recalls that “Currently, concerning drone strikes, what constitutes an

indiscriminate attack lacks definition.”²⁸⁶ The assertions of Travalio and Altenberg are no less relevant. Their trenchant statement, “The combination of the law enforcement approach where appropriate, and the use of military force, where justified, should serve the community of nations well in the fight against global terrorism,”²⁸⁷ echoes the premises and recommendations made during the development of the current research.

Bearing in mind the responsibilities for the State to conduct war with humanitarian awareness, Guiora emphatically asserted that, “...the state has both the right to engage in preemptive self-defense and the obligation to protect its own innocent civilian population.”²⁸⁸ These perceptions must, however, be nuanced by the constraints of the respect of the laws of war in conjunction with a call for enhanced and more flexible doctrine regarding modern warfare. It is, after all, the peculiar vagaries of the rules surrounding international humanitarian law which afford both sides the ability to be wrong, while, at the same time, remaining right. In other words, a party is always able to put advance a legal argument that they have the law on their side, i.e. that he is not violating IHL although it is in fact the case.

Holewinski formulates the following recommendation, “On both ethical and strategic grounds, the United States should turn what it has learned about saving lives and dignifying losses into standing policy.” This appears to be very sound advice and worth incorporating into the ethical framework of the current drone policy; something that was sorely lacking under the previous Obama administration. The probing moral and ethical examination concerning precision munitions and the fallacy inherent in the Obama Doctrine²⁸⁹ also raises serious questions about national security policy and its relationship to IHL. One thing that was not shrouded in secrecy was Obama’s disdain for America’s foreign policy community, and leadership in the Middle

East. In relation to the shortcomings of the drone strategy, Kreps and Kaag made two memorable points for policy makers to bear in mind:

- The legitimate definition of targets may not be answered by technologically precise munitions, and secondly,
- Undefined and imprecise goals lead to vague, undefined target discrimination and an ultimate lack of legitimacy.

Asa Kasher makes an interesting suggestion on the moral justification of target distinction. According to Kasher, the question should not rely so much upon combatant status or noncombatant status, rather upon the actual *level of involvement* in the specific conflict. I believe that here Kasher is attempting to clarify the separations between those who materially assist and those who actively contribute to the efforts of the enemy. If this is the case this is clarified by IHL. IHL defines targetable combatants as either members of the armed forces of the enemy, or civilians directly participating in hostilities. Kasher further clarifies “Rather than using a concept of combatants that blurs a variety of morally important distinctions, one can introduce a scale of involvement in hostilities that does not blur such distinctions.”²⁹⁰ Kasher thus, makes a clear distinction between those with direct involvement at the tactical, operational and strategic levels as being legitimate targets. Importantly, Kasher also emphasizes the importance of clearly identifying the targets based on solid evidence and intelligence.

This is something that was a marked shortcoming in the approach of the previous administration’s drone strategy. Charlie Carpenter also appears to adhere to this view, “Even if no new laws are developed in the near future, military planners, government officials, and lawyers could reduce civilian casualties by simply modifying their interpretations of existing

legal doctrines. To begin, clarifying the notion of what constitutes direct civilian participation in hostilities would help states more accurately judge when civilians remain protected and when they have lost their immunity.”²⁹¹ This is an important distinction and a vital insight which should be considered in the drafting of any new legislation concerning TAC. The vagaries of war must not give way to vagary in legislation.

Target distinction has been one of the most troublesome aspects behind the aggressive drone campaign. Guiora and Blank insightfully note that “The notion of counterterrorism as self-defense against imminent threats of harm means that the state *must know*, in a detailed manner who poses such a threat, in what circumstances, and how and when such persons can be targeted.” They further emphasize that “This information and analysis lies at the heart of the legitimate target determination (original authors’ emphasis).”²⁹² The intelligence supporting the identification of High Value Targets (HVTs) has often been, weak, misleading, incomplete, or in some cases entirely incorrect. With targeted killing almost is simply not good enough. The question of who gets targeted, and for what reason, remains veiled largely in mystery. There has been a significant lack of clear and precise organizational intelligence, network topography, or link analysis. In other words, it has been difficult to ascertain the actual position and importance of most figures within the terrorist hierarchy, even though they are designated (correctly or incorrectly) as High Value Targets (HVTs).²⁹³ Jane Myers in her well-known article, for example posited that “The history of *targeted killing* is marked by *errors*.”²⁹⁴

Peritz and Rosenbach echo this insight, “As with Abu Faraj, US counterterrorism analysts could not determine with much degree of precision Abu Hamza’s [Muhammed Rabia Abdul Halim Shuayb] actual position within the organization.”²⁹⁵ These lacunae were somewhat mitigated in 2007 with the introduction of The Protect America Act. This instrument offered the

intelligence community greater flexibility and insight into the organization's structure and communications. It was also at this time that the MQ-9 Reaper, with more than eight times the effective range and more than double the speed of its Predator sibling, entered service and greatly enhanced the technological, ISR, operational and targeting capabilities of the U.S.

While Obama has insisted on strict civilian control of operations, during what has been labeled "Terror Tuesdays," where a select cadre choose future targets for eradication, he had been paradoxically far less forthcoming on the counterpart to civilian control—that of oversight and transparency. Despite the fact that there is no absolute requirement for transparency under IHL, this was a core criticism of the way the campaign was conducted by that administration.²⁹⁶ Journalists, from McClatchy DC news, obtained access to classified U.S. intelligence reports covering the periods 2006-2008 and 2010-2011 the most intensive periods of UCAV activity. Their findings were not encouraging.

The use of force, which includes targeted killing at the level of domestic legislation, is permitted the Authorization for Use of Military Force (AUMF) Resolution of 2001, it specifically relates to senior al Qaeda officials and leaders, the perpetrators and individuals who assisted in the attacks. When the targeted killing takes place outside the zone of armed conflict then the legal regime of IHRL is applicable. The problem is that after more than 15 years of warfare, and the elimination of many from the al Qaeda leadership, the AUMF is beginning to show its age and is a bit thin on the ground as a result. I find it particularly perplexing that a newer more tailored resolution has never been achieved in the interests of good governance despite numerous efforts to do so.

This is particularly troubling if we consider the announcement (at the time of writing) concerning US Federal budgeting as reported by www.bga-aeroweb.com, “In FY (Fiscal Year) 2016, the DoD expects a sharp increase in the number of Hellfire missiles purchased. The DoD plans to purchase a total of 5,950 missiles for the Air Force (5,567) and Army (383) Procurement funds in the amount of \$769.2 million have been allocated to the program. Multiple variants (K, L, M, N, P, R, R-2, R9B, R9E etc.) of the AGM- 114 Hellfire missile may be procured.”²⁹⁷ This works out to an approximate unit price of \$129,250.00 per unit an increase of about \$30,000 per unit since the previous fiscal year.

In purely economic terms, if the U.S. is Hell-bent on using Hellfire missiles to eliminate lower level insurgents, then this does not represent a very sound cost benefits spreadsheet. On a more practical military and diplomatic level, it is not a wise strategic approach either. Note that while the missiles are quoted as being destined for the U.S. Air Force and U.S. Army, there are others destined for the U.S. Navy as well. The increase is dramatic according to any calculation, rising from 1,792 in FY 2015 to a whopping 5,950 in FY 2016. Of course, this does not include the secret budgeting for the CIA program either, which logically must also be substantial.

The McClatchy report found that 265 of the 482, or more than half of the people, reported killed by the CIA, were not senior al Qaeda leaders rather had been “assessed as Afghan, Pakistani or unknown extremists.” Of the estimated 95 strikes during the stated period 43 or just less than half struck at groups other than al Qaeda.²⁹⁸ During my own deployment I remarked that there was a greater tendency to target individuals who no longer met the original targeting criteria according to the standing rules of engagement . Rosa Brooks pointed out, back in September of 2012, that, “...this is precisely what has been happening over the past four years. Increasingly drone strikes have targeted militants who are lower and lower down the terrorist

food chain, rather than terrorist masterminds.”²⁹⁹ While there is absolutely no legal proscription on targeting militants, the question then becomes, although permissible is it wise?

Peritz and Rosenbach caution that “This ‘target creep’ is dangerous and its implications are dizzying. There must be a sober discussion in America to determine whether this road is worth traveling down in the future, long after al-Qaeda is dead and gone.”³⁰⁰ There are ethical, legal, economic, and political reasons, which cast a large shadow of doubt upon such policy. The threat response calculus to such an equation is certainly flawed when. “Individuals who don’t represent an imminent threat in any meaningful sense of those words are redefined, through the subversion of language, to meet that definition,” as remarks Edward Snowden.³⁰¹

One of the fundamental principles debated, yet never clearly elucidated, surrounds the vital question of whether drones are effective in reducing terrorism and achieving the desired goals of stabilization. As with most other areas we have discussed, concerning drone warfare, there are two schools of opposing thought. These arguments are reflective of the previous conversation concerning leadership decapitation strategy. There are, first, those who affirm that they are an effective means for curbing violence, reducing attacks and securing stability. But secondly, the opponents argue just the inverse, i.e. that violence, in fact spikes and increases because of drone strikes and targeted killing of militant and political leadership.

Much of the success lies in measuring the coercion coefficient. In other words, getting the enemy to do what the belligerent desires. In a fascinating article, published in the *Perspectives on Terrorism* series, these phenomena are examined and clarified by Charles Kirchofer. Kirchofer, like many other researchers, considers that terrorists (suicide bombers in particular), work upon the Rational Choice Theory (RCT), that is they make a cost-benefit analysis in

relation to the achievement of their goals. Similar in concept to the theories endorsed by Skinnerian psychology, aversive behavior is avoided due to a lack of rewards.³⁰² Terrorists have a specific logic all their own, which is largely based upon strategic concerns as opposed to the rational logic of the general population.³⁰³

In his article Kirchofer explains that it is vital to adopt a multivariate approach when examining the efficacy of targeted killing. There does not appear to be any clear-cut, direct cause and effect correlation between targeted killings and the frequency of terrorist attacks. There are, however, several intervening factors which must necessarily be taken into consideration. These variables do play a role, in both the efficacy of the strikes and the response by the enemy, as a direct consequence.

First, there is the consideration of whether the strikes are seeking a goal of deterrence (maintaining the status quo) or compellence (causing a radical change of behavior). Secondly, there is the timing within the cycle of escalation, which plays a significant role. As shown in the previous analysis by Brian Price the earlier leadership decapitation occurs the more likely there will be an impact on group mortality. According to Kirchofer, attacks conducted during relatively peaceful periods tend to result in a more prolonged and stronger retaliation. Third, there tends to be a difference of degree in the response to the attacks depending upon whether the target is a militant or political leader. Finally, there is the force of the strike. For it to be truly effective it must be largely disproportionate in response to the initial cause.

We must remember that proportionality is a flexible criterion, established by the individual commander. This being said, there do exist limits when comparing the potential military advantage to be gained when compared with eventual civilian harm. This is clearly defined under

Additional Protocol I, articles 51 and 57. Nevertheless, these limits are not strictly defined and there exists a measure of reasonable flexibility built into this principle. Different commanders will have different opinions concerning the strategic value of a military target and the resultant civilian damage. However,, such lack of clear boundaries could, initially at least, to contravene the fundamental principle of proportionality as enshrined within IHL. Each situation is novel and therefore the flexibility applied in one situation may not be suitable for another. This is another reason, as I have noted elsewhere, that there is a compelling need to reexamine IHL and to adapt or restructure the rules, contingencies, and constraints to better suit the highly irregular nature of 5th generation warfare and the transnational nature of the modern battlespace. Kirchofer sees the question of efficiency as being based upon the presumption of coercion, of getting the enemy to do what one wishes.

Coercion is strategically structured either as deterrence, where the attacker aims to have the enemy cease a certain behavior or activity, and compellence, where the attack is meant to have an enemy feel futility and an obligation to change, thus a more strategic middle-term outcome. It should be noted that, for several different reasons, compelling an entity into a situation is far more difficult to achieve than deterring them. Kirchofer reminds us that "...the actual use, as opposed to the threat of targeted killing is compellent, not deterrent."³⁰⁴ Finally, a very important distinction is drawn between combatting an insurgency (which is a political creature at its roots) and that of a terrorist organization, which is millenarian and nihilist in its conception. Terrorist organizations, as opposed to political ones, do not wish to alter or change a government, rather their goal is to eradicate it and replace it completely.³⁰⁵ Marginal coverage of the ethical, legal, moral and overall strategic and political efficacy of targeted killing, as a strategic tool, has been provided here to offer the reader a basic understanding. Indeed, entire

volumes of research are now dedicated solely to these precise topics. As interesting as these findings and their related research are, we must pose the question can they be generalized as an applicable theory and thus, extrapolated to other actors and theaters of conflict?

Personality and Signature Strikes

When considering the question of legitimate targets, Guiora recalls, “Two central questions with respect to operational counterterrorism are *who* can be targeted and *when* can the identified legitimate target be legitimately targeted.”³⁰⁶ This observation raises a highly problematic issue when considering that, according to the laws of war, fighters are obliged to wear distinctive emblems which can be recognized at a distance. Neither terrorists nor members of the CIA wear such distinctive emblems. In some cases, members of special units have also resorted to wearing traditional tribal garb or have eliminated any identifying insignia.³⁰⁷

The CIA has adopted two different strategies related to targeting. The first is the use of targeted killing for the conduct of *personality strikes* of individuals designated on kill lists; what is referred to as *high value targets*, or HVTs; targets who pose an immediate threat to national security while the second, known as a *signature strike* is far more controversial. The latter refers to targeting unknown individuals based on a pattern of suspicious behavior and is much less precise than the first (which is already a controversial approach).³⁰⁸ Currier and Elliot point out that, “The first public reference to a signature strike appears to have been in February 2008, when *The New York Times* reported a change in drone strike policy, negotiated between the U.S. and Pakistan.”³⁰⁹ It is worth noting that signature strikes are not, by definition “targeted killings.” Regardless the terminology adopted, however, this type of “strategy,” is widely used and highly criticized.³¹⁰ Personality strikes, directed against specific high value targets (HVTs), have not

raised much criticism, compared with the controversy surrounding other signature strikes. Therefore, the thrust of this section will concentrate upon the latter tactic.

Alan Fisher reporting for Al-Jazeera commented, that administration officials (according to a report by the *Washington Post*), admitted approving the controversial signature strikes in Yemen on Thursday, April 27, 2012. The tactic has evidently been employed since at least as early as 2008 when the first reports of this activity appeared in the press.³¹¹ The strikes can be based upon nothing more credible than suspicious behavior, or intercepted telephone communications, known as their *intelligence signature*.³¹² Not content with these enhanced powers the CIA and U.S. military also petitioned the Yemeni government for permission to expand their reach; a request which was subsequently refused.

According to an article published in the Wall Street Journal in April 2012, “The CIA and JSOC asked last year for broader targeting powers, however, which would include leeway to conduct what are known as ‘signature strikes,’ in which targets are identified based on patterns of behavior, such as surveillance showing they are transporting weapons.”³¹³ In April of 2012 Al Jazeera also reported “The Washington Post, quoting administration officials, said on Thursday that the U.S. president approved the use of ‘signature’ strikes this month,”³¹⁴ thus reconfirming the initial report by the Washington Post.

In reports by the *Bureau of Investigative Journalism*, a combined study conducted by legal teams at New York and Stanford Universities and statements by Christof Heyns, UN rapporteur on extra-judicial killings, it appears that the CIA has upped the ante by quite possibly using follow-up strikes on mourners at funeral services. This rather cynical observation has never actually been confirmed. This information has been kept close to the breast and although not

beyond the scope of being plausible, is difficult to corroborate or substantiate. Such accusations have led the UN to organize further investigations under the aegis of the UN Human Rights Council (HRC).

Criticism has been leveled at the agency, some no doubt justified, much of the criticism, however, is most likely exaggerated and unwarranted. “A thorough review of the arguments against the CIA drone campaign, however, shows that most critics invoke laws that do not bind American officials or laws that are vague,”³¹⁵ assert Radsan and Murphy. There were considerations within the administration (at the time of writing) concerning the eventual transferring of drone operations from the CIA to the Pentagon. It is important, however, to recognize the efficiency and precision of this organization and avoid rashly distributing caustic, unfounded criticism of the unknown, and by doing so biting the proverbial hand which protects.

It is worth clarifying that many of the critics of the signature strikes have based support for their opinions upon the Geneva conventions additional protocols I and II (particularly Protocol I), and while the United States generally abides by these rules, they are merely a signatory to Protocols I and II, and they have not acceded. The treaty has never been ratified by the U.S. government. Nevertheless, there are elements enshrined within the Protocols which have passed into international customary law, and hence must be respected. Bearing these caveats in mind, it is interesting to examine some of the details of signature strikes. Signature strikes) are conducted according to the same rules as any other tactical engagement. They require two specific conditions: that the combatant being targeted is either a direct participant in hostilities (DPH) or maintaining a continuous combat function (CCF). To be clear, signature strikes—a descriptive term, are technically not considered targeted killings. The fact of targeting military aged males, who are not wearing distinctive markings, no uniforms, merely for being suspect is,

however, a violation of the laws of armed conflict. If they are not directly supporting hostilities, this is a violation, under the Fourth Geneva Convention, of the protections afforded to all civilians who are not directly participating in hostilities. Additionally, this would be a violation of Article 51, paragraph 5, of AP I, and Customary International Rule 14, whereby “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”³¹⁶ While there are no treaties relating to this the ICRC does provide interpretive guidelines on the notion of DPH. There are three specific criteria for qualification to wit:

1. There must be a minimum threshold of harm and this must be passed
2. There must exist a direct causal link between the act and the harm
3. There must exist a belligerent nexus or, in other words, support to a party in the conflict³¹⁷

Kevin Jon Heller laid out a very interesting, in-depth and precise analysis of the various legal aspects of signature strikes under both IHL and IHRL. Heller points out that, for signature strikes to be legal under the precepts of IHL, they require two supporting requirements: The signature must be validated and qualified as sufficiently responding to the prescribed identification criteria, and there must be sufficient supporting evidence to authorize such a strike. Like many other scholars, and as indicated throughout this text, it is evident that the evidence requirement remains murky and undefined due to U.S. national security protocols and the secrecy surrounding such attacks. Heller, relying upon various sources such as the media and official public pronouncements, cleverly breaks down the signatures into 14 separate parameters. The last point was deemed incorrect and not included. These are, in turn, categorized under three separate,

distinct legal classifications: “*legal Adequacy of signatures, legally inadequate signatures, and possibly adequate signatures.*” Heller’s model, well worth examining in greater detail is presented here modified by several additional comments, observations, and clarifications:

1. Legal adequacy of signatures: this has been broken down into what are considered 5 acceptable parameters according to IHL.

- Planning attacks: This principle could be applied to the strike against al-Awlaki for instance due to his proven direct involvement with planning attacks against the U.S.
- Transporting Weapons: there is a distinction here, under IHL, that this principle requires greater target discrimination. Transporting weapons is not the same as merely being armed. This later condition [being armed] does not qualify as a parameter for individual targeting. Transporting weapons does, however, designate the target as a legitimate military objective.
- Handling Explosives: No questions here as to the validity of those involved being considered as legitimate military objectives.
- Al Qaeda Compounds: The only caveat here is the typical rule forbidding the targeting of public service infrastructures such as hospitals and places of worship. Perfidy, for instance using an abandoned school, as a bunker, or a mosque as a fortified emplacement. A strategic tactic often employed by insurgents, this automatically lifts such a ban against retaliation. If there are still civilians present,

then the question of proportionality arises, and the justification lies in the consequence of the military advantage to be obtained.

- Al Qaeda Training Camp is a legitimate military objective (LMO).

2. Legally inadequate signatures: The following constitute 4 signature characteristics which have been reportedly used by the U.S., but which are banned under IHL.

- **Military-Age Male in Known Area of Terrorist Activity:** Certainly, one of the most controversial, if not indefensible, principles currently practiced under the previous administration. Despite the highly accurate (many have questioned this assertion) optics, used to identify individuals, there have been many errors and collateral victims. How is it possible from such a distance to adequately indicate the difference between a 15-year-old boy, who may be tall for his age, and a 30-year-old terrorist on the ground? Additionally, there is an inherent ethical and moral problem, if an individual is being targeted because of his sex and age and not for any specific tactical criterion. Heller succinctly points out, “These signature strikes have been widely criticized and for good reason—they are plainly inconsistent with the principle of distinction.”³¹⁸
- **Consorting with Known Militants:** While it is quite possible that individuals who do choose to keep company with terrorists and insurgents may become victims of collateral damage, they cannot be legally targeted merely due to the fact of their association. Again, Heller clarifies that consorting with, or frequenting such individuals, in no way confers legitimacy to strike, since this action does not even rise to the level of indirect participation by rendering assistance, or support in any

way. This would be tantamount to guilt by association and fails to meet the direct participation in hostilities (DPH) requirement. Under no circumstances are collaboration, sympathy, or even passive support acceptable criteria for targeting individuals under IHL.

- **Armed Men Traveling in Trucks in AQAP-Controlled Areas:** Heller compares this feature with the male of military age model, with weapons thrown in. This position, however, becomes less tenable when compared against an unarmed male of military age, in my opinion. For these men to be, legally and justifiably, targeted evidence must exist indicating that they are committing targetable actions such as: being part of an organized armed group, transporting weapons, explosives or heading toward a zone of active combat. As an interesting side note, Heller points out that Israel does not consider possession of a weapon to be an automatic loss of protective status. Therefore, to summarize, possession of a weapon does not, in and of itself, constitute legitimate grounds for targeting an individual.
 - **Suspicious Camp in AQ-Controlled Area:** This provision is generally taken under consideration of Geneva Convention Additional Protocol I, concerning the safety of civilians and their infrastructure as discussed elsewhere. Where doubt exists IHL falls on the side of caution.
3. **Possibly adequate signatures:** This represents the third and final legal category as presented by Heller.

- **Groups of Armed Men Travelling Toward Conflict:** This remains, however, a case dependent clause. Probably one of the more questionable regulations, it seems rather logical that a group of potentially armed insurgents headed toward a battlefield might be legitimately targeted. To do otherwise is to invite disaster. According to IHL, however, they must be participating as an integral part of an operation or specific action. There is no way of really knowing their intent; therefore, the burden is upon the belligerent. According to theory, should the U.S. have confirmed evidence of their intent, such as HUMINT or SIGINT, then they do not have to delay in their targeting and are permitted to authorize a strike. Another intervening variable includes their distance from the zone of conflict. Quite obviously the archaic rules established for traditional battlefield warfare are outmoded and impractical when applied to new 4th generation, insurgency type conflicts. The adage “all roads lead to Rome, (modified from the original: a thousand roads lead to Rome, or *mille viae ducunt homines per saecula Romam*)”³¹⁹ might aptly apply in this instance.
- **Operating an AQ Training Camp:** The camp itself is a legitimate target but the trainers, if they are to be specifically targeted, must be targeted under the provisions of DPH/CCF rule.
- **Training to Join AQ:** The standard Geneva Convention rule against attacking off-duty reservists is the only caveat against attacking in this instance.
- **Facilitators:** There are two types of facilitators, direct and indirect. Those involved indirectly: supply food, lodging or logistical support; aiding in escape,

financing, passing of propaganda, recruitment, creating weapons caches as opposed to those who take a more active role: acting as guides; gathering intelligence, providing ammunition. The former roles are considered “sustaining” acts according to IHL, while the latter qualify as DPH, and thus, by their active participation, qualify those individuals as legitimate targets. It should be noted that the term war-sustaining refers to objects and is not used refer to people.

The CIA: Where It All Began: Where It Is Now...

The super-secret shadow agency, which conducts targeted killings outside the zones of official combat, has become far less surreptitious during the current struggle with transnational terrorism. There has always been a love-hate relationship between the Pentagon and the CIA, despite their having worked together on several projects, notably the initial development of the armed predators themselves. The first documented use of offensive drones by the CIA is considered to have occurred on February 4, 2002. According to John Sifton, “The strike was in Paktia province in Afghanistan, near the city of Khost. The intended target was Osama bin Laden, or at least someone in the CIA had thought so.”³²⁰ A more well-known and widely publicized, attack was that carried out in Yemen, on November 3, 2002. The targets of the strike were Qaed Salim Sinan al-Harethi, aka Abu Ali al-Harithi a Yemeni national, and Kamal Derwish (Ahmed Hijazi), a naturalized U.S. citizen. The attack took place in Yemen’s Marib province. Three other al-Qaeda operatives were also slain in the attack. Since two of the targets were linked to the U.S.S. Cole bombing, and the vehicle attacked was part of a convoy, it is reasonable to assume they were also well placed within the al-Qaeda hierarchy. This was the first known instance of a U.S. targeted killing of an American citizen, during the campaign against terrorism.

This was a very significant event, as it marked the first use of force outside the established battlespace of Afghanistan. Significantly, there appear to have been Presidential Findings, (similar in legal standing to Executive Orders), under the George W. Bush administration, expanding the approval for targeted killing, to include terrorists connected to al-Qaeda.³²¹ Even were this not the case, the Harethi operation did not fall specifically under the heading of assassination. It occurred under the auspices of the AUMF, which specifically declares that the president is “authorized to use all necessary and appropriate force,” and could also have been ostensibly supported under the Covert Action Statute (CAS), 50 U.S.C. §413b.

Such widespread, *laissez-faire* application of the AUMF, as an excuse covering all actions, is quite worrisome and limits both the spirit and application of international law. The standing Executive Order 12333, barring political assassinations, does not prohibit targeted killing by the simple fact that a president may rescind the order (Executive Order) at any time of his choosing. If it had indeed stood in the way of the targeted killing campaign, it would have already been long gone. Despite the various justifications, which have been provided, there still tends to exist a cautious skepticism as evidenced by numerous requests from Congress for supporting opinions and reports on the topic of assassination.³²² Finally, President Bush signed into law a Presidential Memorandum of Notification (MON, equivalent in status to an Executive Order, or a Presidential Finding) authorizing the targeting of al-Qaeda members and associated terror networks on September 17, 2001.³²³

Mary Ellen O’Connell, writing on the Derwish strike, indicates, “On November 3, 2002, Central Intelligence (“CIA”) Agents in Djibouti fired laser-guided Hellfire missiles from a drone at a passenger vehicle in Yemen killing all passengers on board, including an American citizen.”³²⁴ The campaign has nevertheless, continued unabated with relentless precision, in a

program controlled by the CIA. “President Obama’s first known authorization of a missile strike on Yemen, on December 17, 2009, killed more than forty Bedouins, many of them women and children, in the remote village of al Majala in Abyan.”³²⁵

But who are flying these “Aethons?”³²⁶ As various investigations have divulged, it is members of the 17th Reconnaissance Squadron, part of the 732d air operations group, assigned to the 432d air expeditionary wing of the Air Combat Command (ACC). They have a long historical lineage and are based out of Creech Air Force Base in Indian Springs, Nevada. These facts were revealed in interviews during the documentary film, “*Drone*,” directed by Tonje Hessen Schei and released in April of 2014.

This raises some very serious issues concerning legal culpability and responsibility, as well as the blurring of lines between domestic law enforcement and military intervention, as outlined under titles 50 and 51 of the USC. Several former Predator operators spoke out in separate interviews. Brandon Bryant, in an interview speaking on the proposed transfer of CIA operations to the military, clarified that “There is a lie hidden within that truth. And the lie is that it's always been the air force that has flown those missions. The CIA might be the customer, but the air force has always flown it.”³²⁷ Operations begin in the United States and taken over from isolated bases abroad. There exist several stationary bases along the Arabian Peninsula, along with several maritime platforms as well. The main task force responsible for launching attacks is TF 48-4 according to secret documents leaked to the digital online magazine *The Intercept*. Their operational bases were situated in Nairobi, Kenya, Sanaa, Yemen and several in Ethiopia, including Arba Minch.³²⁸

As for the CIA's involvement in military operations, it is abundantly clear that they are not afforded the same rights and protections as members of the military, in fact, they are in the same category as that of their opponents. The OLC memo notes that, "It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war-an immunity that the armed forces enjoy by virtue of their status."³²⁹

This discussion will not delve into the complex legal morass surrounding the definition of what constitutes a "lawful combatant." Much ink has flowed concerning this oft-discussed elusive legal and academic topic and it has been broadly treated elsewhere in the literature. Landay, of *McClatchy* newsgroup, highlights the general dissatisfaction among critics; jurists and scholars, of the use of the CIA as a paramilitary force engaged in combat activities, "Obama they think, is misinterpreting international law, including the laws of war, which they say apply only to the uniformed military, not the civilian CIA..."³³⁰ Mary Ellen O'Connell has, for instance, argued out that, "Under the law of armed conflict, only lawful combatants have the right to use force during an armed conflict."³³¹ However, here the eminent scholar is only partly correct. The right to participate in hostilities equates to the granting of special privileges such as prisoner of war status and combatant immunity. It is not illegal for anyone to participate in hostilities, during IAC, however they do lose their civilian protects for such time as they actively participate in the armed conflict. In the case of NIAC, they can be held criminally responsible. According to international law the moment they lay down their arms and cease the hostilities their protections are reactivated. In the case of NIAC, they can be held criminally reasonable as it is the laws of the state which apply.

The use of civilian personnel and contractors does raise ethical issues as to their legitimacy and the rights to which they are entitled during their direct participation in an armed conflict. Some such as Gary Solis contend there is little distinction between the armed combatants of al-Qaeda and those engaged by the CIA. The question becomes even more of a slippery slope when considering the status of civilian contractors working for a civilian organization during a military conflict. Solis further makes the previously ignored distinction that, “While the guidance [ICRC handbook] speaks in terms of non-state actors, there is no reason why the same view is not true of civilian agents of state actors such as the United States.”³³² Hodge cites Loyola Law School’s David Glazer who states, “But employing CIA personnel to carry out those armed attacks...clearly fall outside the scope of permissible conduct and ought to be reconsidered, particularly as the United States seeks to prosecute members of its adversaries for generally similar conduct.”³³³ The drone strikes, conducted by the CIA, have been shrouded in the veil of secrecy which characterizes anything to do even remotely, with the question of national security. Kevin Jon Heller warns of the enormous legal difficulties, which would arise with any attempt to try CIA drone pilots for war crimes under IHL or crimes against humanity for murder under IHRL. There are formidable defenses which make this possibility unlikely.³³⁴

One related and highly topical issue includes the civilian status and attire. W. Hays Parks writing on the legal issue of the military wearing civilian attire cogently elucidates that “From a law of war standpoint, neither “force protection” nor a desire to distinguish soldiers performing “offensive duties” from those engaged in humanitarian assistance constitutes military necessity for soldiers to wear civilian attire in international armed conflict. From the enemy standpoint (particularly the Taliban and al Qaeda), humanitarian assistance to Afghan civilians may

constitute as much a threat as a soldier engaged in offensive operations.”³³⁵ In other words, there does not appear to be any strategic or operational advantage.

During my time in Afghanistan, many members of the CIA paramilitary and various private military contractors (PMCs) indeed wore US uniforms and identification. It was also common practice among both military and nonmilitary actors to wear civilian attire without distinctive emblems and an admixture of both civilian and military attire according to the prevailing regulations in force.³³⁶ Note that this practice had its origins during the first incursion into Afghanistan in 2001 following the events of 9/11 “This attire was not worn to appear as civilians, or to blend in with the civilian population, but rather to lower the visibility of US forces vis-à-vis [*Sic*] the forces they supported” writes Parks³³⁷ After carefully examining the legal contours of the question Parks goes on to state that “The GPW³³⁸ and its predecessors contain no language requiring military personnel to wear a uniform, nor prohibiting them from fighting in something other than full, standard uniform. Nor does it make it a war crime not to wear a uniform.”³³⁹

Arguments related to possible criminal liability and the public authority paradigm indicate that the CIA is not actually behind the kill process, but rather performs the target acquisition and provides the strike authorizations. In this measure, they remain, nonetheless, accountable according to certain scholars.³⁴⁰ Their attacks have, nonetheless, continued unabated and have increased both in number and intensity. The expansion of the lethal targeting to include American citizens has been the topic of heated debate.

The use of civilian operators is not the only conundrum relating to the legal, moral, and ethical aspects of counterterrorist operations and the use of drones in warfare. Schmitt also

highlights the important and often-overlooked fact that “Many worry that misconduct by civilian contractors may cause reprisals against uniformed forces. They also question the rules of engagement under which civilians operate.”³⁴¹ Precision in correctly identifying and carrying out strikes against legitimate designated targets is not only a requirement but also a military necessity. The CIA is rather new to this game and this leads O’Connell to speculate that, “The heavy involvement of the CIA and CIA contractors in the decisions to strike may alone account for the high-unintended death rate. Whether CIA operatives are trained in the law of armed conflict [LOAC] is a questionable point. There exist opinions on both sides of the question.”³⁴² During my periods of deployment to various FOBs in the Paktia and Khost regions of Afghanistan and other sites, I can attest that training in the laws of armed conflict were very limited. Long duty hours often precluded such training. This contention, valid on the surface, nonetheless requires qualification since many of the CIA operators are indeed qualified ex-military personnel as well; a fact often conveniently overlooked.

Yet there exist further issues which require clarification, nonetheless. As well-known author and scholar Peter Singer writes, “Similarly, C.I.A. drone strikes outside of declared war zones are setting a troubling precedent that we might not want to see followed by the close to 50 other nations that now possess the same unmanned technology — including China, Russia, Pakistan, and Iran.”³⁴³ This obviously raises a core question related to this research: *what are the limitations and boundaries on the use of drones?* At the same time, this foreshadows a vision of the expanded use of armed drones, as predicted in the first hypothesis; *the use of drones will become ever more prevalent in the modern battlespace.*

There is the question of a strategic approach to targeted killings. The CIA “hit list,” is an “in-house” project with apparently little control or oversight from anyone outside the Agency.

Radsan and Murphy complain that compared with military initiatives, "...the specific procedures for CIA targeted killing cry out for scrutiny and improvement."³⁴⁴ Although the Joint Special Operations Command (JSOC) and the CIA do have joint targets, an unknown number of targeted hits are exclusive to the CIA itself. The target list for the CIA remains hidden from disclosure, while that of JSOC carries the rather cumbersome and unwieldy title of, the joint integrated prioritized target list. Another significant problem discussed frequently throughout this research is the lack of transparency and accountability. Nowhere is this more evident than within the hallowed walls of the U.S. intelligence community (USIC). Jane Mayer emphasizes this lack of oversight, "...because of the C.I.A. program's secrecy, there is no visible system or accountability in place, despite the fact that the agency has killed many civilians inside a politically fragile, nuclear-armed country[Pakistan] with which the U.S. is not at war."³⁴⁵ Michael Walzer in his important work *Just and Unjust Wars* indirectly poses important questions which relate to the CIA's right to exercise lethal authority. Unfortunately, the silence of the response is deafening.

There is, additionally, the thorny question of Americans being selected as legitimate targets. From one perspective, there is the view that a democratic society, such as the United States, is not in the business of dispatching its own citizen's, at least not before having provided them with due process. Given the complexity of the current asymmetric conflict, however, should the mere virtue U.S. citizenship be enough to keep a belligerent enemy of the state (and by association democratic institutions themselves) from being targeted? John Yoo quite logically, seems to think not, "U.S. citizenship doesn't create a legal force field around Americans who treasonously join the enemy," he continues by citing the now famous, *Hamdi v. Rumsfeld* decision, "Citizens who associate themselves with the military arm of the enemy government...are enemy

belligerents.”³⁴⁶ Fighting on behalf of belligerent enemy forces makes an individual a legally viable target. Equal rights entail equal responsibilities. Yet it is essential that the evidence corroborating such treason be clearly defined, traceable, and well-established beyond a reasonable doubt. To profit from the protections afforded by the democratic process of due rights, an individual must also fully adhere to the laws and conventions of democratic society.

Collateral “Damage”

“But we can’t kill our way out of this mess.”

—Mitt Romney, *Final debate against Barack Obama; Lynn University* (22 October 2012).³⁴⁷

The concern for avoiding noncombatant civilian casualties, interestingly finds its origins, according to James Turner Johnson, in the interaction between Christian canon-based law, notably *De Treuga et Pace* (clarified more fully in this chapter) and the precepts of chivalry common to the knighthood of the middle ages. Thus, early modern *jus in bello* thinking was influenced by these characteristics of chivalrous action and right intention. Together these elements formed the foundations for protection of noncombatant immunity and were crystallized by Western tradition as early as the 14th century, including nascent notions of proportionality.³⁴⁸ It is important to stress that the conceptualization often failed to match actual implementation and practice.

By itself, the term collateral damage is highly misleading. Collateral damage is the measure of unintentional destruction, death, or injuries sustained by civilians following an attack. The concept of *damage* transmits the idea of something which can be repaired. The unending cycle of drone strikes as previously employed by the Obama Administration left little, if anything, to be

repaired. Such an unfettered application is certainly both politically and strategically counterproductive. "... the aggression of the targeted killing tactic mandates its measured use in only the most urgent and necessary of cases. The government's interest should be to tame violence, not exacerbate it. Where alternatives exist, they should be pursued, not just as a matter of law but also as a matter of sound policy."³⁴⁹ Blum and Heymann astutely commented. Meanwhile, Peritz and Rosenbach prophetically asserted that "... firing Hellfire missiles into dwellings in Pakistan without regard to civilian casualties—will undermine these methods politically and morally and make protecting US interests more difficult."³⁵⁰ Back at home the public remains largely uninformed, comfortable in their complacency, and harbor false illusions of safety.

The "war on terror" being levied abroad has only limited impact, acknowledgment and support domestically. For all intents and purposes, the public is entirely oblivious to the consequences of the current drone campaign, which fails to directly impact their daily lives. Mockenhaupt asserts, "People care less about what their government does when they are not asked to contribute."³⁵¹ There are many excellent sources available, in the peer-reviewed literature, which provide information concerning the complex issues surrounding targeted killing and collateral damage.³⁵²

Terrorism and collateral damage are not synonymous, though there are some that would attempt to equate them, that is collateral damage as a form of State-sponsored terrorism. While they both result in the loss of life, by innocent civilian victims, they should never be conflated. Caleb Carr pertinently and importantly remarks that, "It is important to note, while clarifying terms and definitions, that terrorist bloodshed is quite distinct from what many now label (often with utter disingenuousness) 'collateral damage'—that is, accidental casualties inflicted on

civilians by warring military units. While the former is deliberate the latter is entirely accidental.”³⁵³

It is certainly true that the selective use ofUCAVs, may result in unfortunate, yet limited, noncombatant deaths. This is, however, quite often a regrettable, but direct consequence of human shielding. We shall also deal more fully with this phenomenon, later in the body of this work. Other possibilities contributing to noncombatant casualties include human error, weather, data or platform failure, and so forth. The difference is that, when properly employed,UCAVs are targeting—not innocent civilians—rather those guilty of having perpetrated, currently conducting or planning future atrocities. Individuals are selected are for targeting as a result of the threats they pose or their active participation in hostilities, not because of ideological differences, i.e., what they do, not what they say or think.

These targets subsequently make capture impossible, either by remote geographic isolation, harboring themselves among innocent civilian populations, or through armed and active resistance. In this way, it would be equally detrimental to both troops attempting capture operations and innocent civilians on the ground. This comparison illustrates the difference between the wanton destruction and random illegitimate acts of deadly violence, represented by terrorism, and the legal application of applied justice using robotic weapons. While the motivation for terrorism is the taking of lives, that of counterterrorism is that of protecting lives against future threats.

One of the most outspoken critics of the early drone campaign was Phillip Aston, the special rapporteur for the United Nations Commission on Human Rights (UNCHR). According to O’Connell, “In January 2003, the United Nations Commission on Human Rights received a

report on the Yemen strike [November 3, 2002] from its special rapporteur on extrajudicial, summary or arbitrary killing. The rapporteur concluded that the strike constituted a clear case of extrajudicial killing.”³⁵⁴ The drone campaign has nonetheless continued unabated and has even accelerated despite these numerous criticisms and warnings.

Collateral damage also came under international scrutiny and condemnation. Bi Mingxin of *Xinhua News* of China, reporting on a previous drone attack wrote, “The strike destroyed the compound completely and also damaged many other houses located nearby. Local people rushed to the site for rescue work as there was no official or private rescue service available in the restive region.”³⁵⁵ Putting the debate into ethical perspective, Bill Moyers speaking on, Juan Coles’ site, *Informed Comment*, asserts, “It brought us to grief in Vietnam and Iraq and may do so again with President Obama’s cold-blooded use of drones, and his seeming indifference to so-called collateral damage, otherwise known as innocent bystanders.”³⁵⁶ This is particularly applicable in the case of what is euphemistically referred to as a signature strike (discussed in detail within the body of this research).

RT journal, in 2011, warned that despite various condemnations, “As the U.S. continues its War on Terror, however, the deaths continue to add up.”³⁵⁷ The damage sustained is not only affecting the enemy, it has taken its toll both home and abroad. Amster submitted that “Despite the distance from their targets, drone operators are not fully immunized from the psychological effects of killing people by dint of their not-so-subtle deployment of Reaper and Predator technologies.”³⁵⁸ Indeed, whether the killing takes place up close and personal, or at a great distance the result remains the same.

Interestingly, those espousing a more pacifist view would have it both ways it seems. Critics of drone policies often show two faces of the same argument, which tend to invalidate one another; claiming that drones are incapable of accurately discriminating between targets and civilians, and, at the same time, capable of precise identification. O’Connell, for instance, poses the question, “But can drones ever be precise enough to comply with the rule of distinction in the situation of Western Pakistan?”³⁵⁹ Turse, another arch critic, replies, “...the [drone] cameras are so powerful the ‘pilots’ can reputedly watch the facial expressions of those being *liquidated* (my emphasis added) on their computer monitors ‘as the bomb hits.’”³⁶⁰ T. Mark McCurley, who was actually involved in Predator operations and had the benefit of actual experience, clarified the question of optical precision, “We were required to have a long standoff from the target. This limited our chance of being detected. But it also degraded the optics so that facial recognition was impossible.”³⁶¹ So, while the optics used are indeed of a high precision—theoretically enough so to confirm facial recognition—such precision is dependent upon many variables including, operating conditions, movement, ambient light, optical calibration and the standoff distance, to mention but a few. Deciphering individual facial expressions may be a future possibility, however, for the present, it stretches reality.

Careful examination of such statements indicates the inherent contradiction of such reasoning. The official government position has been that the precision targeting offered byUCAVs armed with Hellfire missile (not bombs) strikes is so precise, as to limit collateral damage to far more acceptable levels than say using 500-pound laser-guided munitions (bombs). This is also the position of the current research and appears to be a logical conclusion. The alternatives to using laser guided munitions are certainly a far less attractive option.

Occasionally, there have also been inaccurate views and questionable statistics reported. Amitai Etzioni, for instance, cites the case of Syed Munawar head of the powerful Pakistani Islamic party, Jamat-e-Islami as (alternatively, Jamaat-i Islami) claiming a rate of *nearly 100 percent innocent civilian casualties* (my emphasis). Etzioni also pointed to an article which appeared in *The New York Times*, authored by former military officers, David Kilcullen and Andrew Exum, which made the dubious and convenient claim of 50 civilians killed for each militant.³⁶² But it is not only critics who are throwing out questionable and suspicious figures.

Etzioni also remains circumspect as to claims, made to *The New York Times*, by former National Security Advisor, John Brennan that, “there hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.”³⁶³ While the accuracy of the weapons platform may well be precise, the differing, all-or-nothing, claims are doubtless less so. Such expansive declarations and drastic percentages of clear-cut figures do not reflect the reality on the ground and should certainly lead us, to speculate as to their validity. Regardless, the numbers reported on both sides of the debate are drastically different and are, therefore, unreliable. As for the numerous research organizations that report on the effects of drone warfare, their findings are, quite unsurprisingly, most often situated between the extremes of Brennan and Munawar. Like the debate over drone warfare, the true answer doubtlessly lies somewhere in-between.

Noel Sharkey, a most vociferous opponent of UCAV technology, depicts drones, in a poetically dystopian fashion, as the final stage of evolution in “a clean factory of slaughter.” This sort of metaphorical and biased language, unfortunately, tends to discredit the author and any eventual serious contribution he may make. Etzioni responds appropriately that, “This kind of cocktail-party sociology does not stand up to even the most minimal critical examination.”³⁶⁴

Rosa Brooks certainly concurred and argued against the emotionally laden rhetoric presented by many of these critics, as lacking any empirical foundation. She stated, “that many common objections to U.S. drone strikes don’t hold up well under scrutiny.” She further emphasized the fact that during any period of armed conflict, “*every* weapons system can cause civilian casualties, and planes and tomahawk missiles and snipers, all enable killing from a distance (author’s emphasis).”³⁶⁵ Etzioni also concurs with this assessment and sees drones as merely another step in the evolutionary process of weapon development and refinement.³⁶⁶ Killing from a distance is not a new phenomenon by any means. From long-range artillery and mortars to long range bombers, death in warfare has been increasingly dealt out at greater distances. Greater distance, after all, is equivalent to enhanced safety for troops on the ground.

Collateral damage falls under the umbrella of *jus in bello* and more specifically the doctrine of double effect (DDE).³⁶⁷ It is important to bear in mind, however, that the doctrine of DDE is a moral argument and not a legal one. And while there exists conceptual similarity DDE is not the same as proportionality and the collateral damage principle as outlined under API article 51 and 57. This basically refers to the fact that proportionally limited serious harm or injuries may be permissible in the quest to achieve positive military outcomes. Just War Theory sees war as an inevitable manifestation of the aggressiveness of human nature.³⁶⁸ Lying mid-path between pacifism and realism, JWT attempts to find a humanitarian-based middle way, to alleviate suffering and reduce the harsh reality of armed conflict.

The theory, however, is based upon a realistic understanding. Part of that understanding is expressed in the knowledge that there will always be civilian casualties in warfare. JWT attempts to limit those noncombatant losses and associated infrastructure damage to “acceptable minimum standards.” Again, the calculus which is made to what is acceptable or not remains the purview

of the commander in the field. This does not mean, however, that the commander in the field has unlimited discretionary power since strong oversight and legal control are exercised prior to conducting any military operation. Civilians and civilian objects must be cared for and afforded protections. Article 51 concerning proportionality and Article 57 relating to precautions relate to the care that must be exercised prior to any offensive action. Additional Protocol I Article 57, of the Geneva Conventions clearly indicates:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 [\[Link \]](#) and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;³⁶⁹

Thus, according to this doctrine of double effect, there are two ways in which noncombatant casualties may occur. They may be either *unforeseen and unintended* (an unfortunate but natural consequence of armed conflict), or they may be *foreseen and unintended*. This is where the calculus of the doctrine of double effect occurs, by attempting to establish acceptable parameters for civilian casualties in proportion with military advantage gained.³⁷⁰

We will expand further on this concept later in the research. The question has been posed with increasing frequency, however, as to whether there is any real difference between the two conditions and it has been suggested that there is no moral relevancy between intent and foresight. The pacifist argument would then, by consequence, entail a series of conditions based upon modus ponens, if/then, or if/therefore propositional logic:

IF	If the doctrine of double effect is considered invalid	THEN	Foresight & intent are equivalent conditions
IF	The intentional killing of Civilians is forbidden	THEN	Their incidental deaths as collateral damage is also forbidden
IF	War can be expected to produce civilian casualties	THEN	All armed conflict is unjustified and should be forbidden

Of course, this offers a very neat little package which appears difficult to counter until we consider the realities of modern warfare. The above schematic was based upon the excellent chapter on pacifism, by, Ned Dobos, within *Key Concepts in Military Ethics*.³⁷¹ Here the author lays out the crux of the argument as presented by the pacifist camp.

Stanley Milgram's research offers a few insights worth considering in the current context. Particularly when we ask ourselves the question of whether is it possible for an operator to inflict collateral damage without feeling any sense of remorse? In other words, can obedience to authority override our basic humanity and is such a sociopathic approach even desirable? Milgram performed several valuable experiments relating to power and obedience to authority and its effect on those carrying out orders. The most notable of these was the infamous obedience experiment carried out in the 1960s. These results were verified many times over and the findings are consistent. Individuals will carry out orders, even fatal ones, obediently, despite personal stress and personal convictions to the contrary. In this case, subjects delivered, what they perceived as lethal doses of electric shocks under orders by a lab assistant to innocent persons with whom they had no connection.³⁷² We can easily see how such an experimental model might be applicable to the current situation relating to targeted killing.

Another interesting examination into this area, and along similar lines, was the now famous "Stanford Experiment", conducted by Philip Zimbardo at Stanford University in 1971. During this experiment, certain participants were designated as prison guards and others as prisoners. Briefly, the experiment got out of hand with severe psychological torture and maltreatment occurring and the experiment had to be stopped and cut short.³⁷³ Both these experiments had as their wellspring the examination of the rationalization behind the Nazi atrocities of WWII. The authors were questioning the limits of personal control when faced with overwhelming authority. While the situations are very different, there are important lessons that can be drawn from their work.

These experiments are well worth considering in the context of orders received and actions undertaken by drone operators. Randall Amster observes. "Virtual warfare still produces tangible

effects on civilians and combatants half a world away as well as on those who are asked to control the misnamed 'joysticks' here at home,"³⁷⁴ he explains. Distance is but one part of a dichotomous relationship which can manifest itself psychologically. The drone operators, analysts and crew members also partake of the life of their intended targets over varying periods of time. Sometimes they are observing a family for weeks on end, and they finish by making an unconscious connection with these individuals. For many, they see themselves not as detached players in a theatre of the absurd, rather as participants in an active conflict.

The spatiotemporal divide plays no role for them as far as the ends and the means are concerned. "We were not drones, but professional pilots and planners who scrutinized every target to make sure the shot was legal and just,"³⁷⁵ explains Lt. Col. T. Mark McCauley. When the order comes down the line that cathartic relationship may prove psychologically traumatizing for certain persons. Imagine, for instance, after having given the order to fire an AGM-114 Hellfire missile, that a child from the family, or the mother, suddenly appears unexpectedly having been thought of as safely out of the target area. The point to understand here is that collateral damage is a two-way street and can impact different actors, at different levels and to different degrees. When we speak of collateral damage it is not enough to merely consider the consequences of the strike. The extremely high number of post-combat related suicides and PTSD related illnesses bear witness to this assertion.

In an article for *Foreign Affairs* magazine, Sarah Holewinski, executive director for the Center for Civilians in Conflict, brilliantly tied the issues of collateral damage, and grand strategy development within an international relations framework. She insists, "...the United States needs to turn its recent ad hoc progress into a permanent and formal policy followed not only by its own military but also by those of its partners."³⁷⁶ This is a logical approach given the

premise that if the United States leads in the sphere of strategic planning, then they should also lead in the realm of diplomacy and soft power as well. Diplomatic and Military power are the left and right hands of international relations.

One of the major drawbacks politically and diplomatically has been the indiscriminate nature of attacks exercised during drone warfare. Lev Grossman writing for *Time Magazine* pertinently notes “Since President Obama took office; the U.S. has executed more than 300 covert drone attacks in Pakistan, a country with which we’re not at war.”³⁷⁷ To date, this number has not ceased to increase, with ever greater reliance upon this technology. The principle problem here, and this is reiterated throughout the current research, has become one of *mistaking a technology for a strategy*.

Cristopher Swift, speaking to McClatchy, on the topic of targeted killings pointed out that. “We are doing this on a case by case basis, rather than a systematic or strategic basis.”³⁷⁸ If Pakistan has surreptitiously allowed targeting of its own citizens for political expedience, or merely for concessions and convenience sake they are at fault under international law. The United States is also at fault should they be carrying out unauthorized and illegitimate attacks. The flexible rendition of the wording contained within the self-defense clause of Article 51 of the UN Charter, according to some critics, has been used as an excuse and a “*Passepartout*” to override national sovereignty, which was certainly not the original intent, nor the spirit of the law.

As of January 2014, according to the Bureau of Investigative Journalism, the drone strikes undertaken in 5 years, by the Obama administration, resulted in nearly 2,400 deaths.³⁷⁹ This has created a lack of legitimacy, due to issues of transparency and waning support internationally. It

has also created a loss of credibility in the eyes of an aggrieved and victimized public, both at home and abroad. Peter Cullen, speaking about the tightening of information and the use of drones for targeted killing, asserted, “All this requires a more transparent policy on targeted killing in which there is public confidence in its checks and balances to ensure proper targeting decisions are made.”³⁸⁰ Michael Schmitt also underlines a most significant concern relating to civilian casualties and asymmetric conflict, “...asymmetry creates a paradoxical situation. The more a military is capable of conducting ‘clean’ warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable).”³⁸¹ Interestingly this statement highlights yet another troubling paradox, that of the military and politicians touting and vaunting the successes of their precision munitions and the efficacy of their weapons platforms. Just how does one define precise in a zone of conflict without affordable access? How can such precision be verified? Another related issue of concern when reflecting on noncombatant casualties is respect for the proportionality principle.

It is not because warfare may become robotic, automated and more humanly isolated that these constraints are any less important. The victims, as well as their suffering, will always remain very human. There needs to be a continued balance in the aspects of humanity, proportionality, and necessity. These elements must be measured and based upon fundamental and universal moral and ethical criteria such as:

- The taking of human life is ultimately wrong;
- This fact must be balanced with the obvious realization that warfare is unavoidable;
- War is an integral component of interstate relations and conflict resolution;
- Therefore, a balance must be struck;

- That balance is to conduct war in the most acceptably humane fashion possible;
- The absolute injunction against targeting noncombatants;
- Prosecution for failure to respect the applicable laws of war;
- The humanitarian, *jus post bellum*, conditions extend to alleviating suffering, minimizing damage, and helping to restore peace and prosperity as rapidly as possible in its wake.

The interest of strategic victory must not preclude the rule of law and principles upon which democracy is founded. Should the U.S. flout international law, ignore ethics, and bend them to its own needs, the state will ultimately lose its legitimacy and finish little more than a powerful, yet failed state ruled with despotic tyranny much like those it purportedly abhors and attacks itself. The solution lies in judicious *jus ad bellum* decision-making or knowing how to pick your battles well.

Summary

The chapter began by defining what precisely the term targeted killing (TK) refers to and why it is not tantamount to assassination. Following this brief introduction, the discussion turned to examining the questions surrounding the legal, moral and ethical dimensions of targeted killing as a strategy. It was noted that targeted killing is a strategy, whereas the drones used to conduct such operations were merely the tactics employed to carry out that strategy. Foundational principles which satisfy the multiple criteria of Guiora were emphasized by four distinct points: the development of a precisely defined targeting policy which clearly outlines the concept of imminent threat; a greater emphasis on all source intelligence, as opposed to technological reliance; an ethically, morally, and strategically balanced decision-making process, rather than a

simple, ‘ends justifies the means’ approach, and finally, the target determination process should have a moral and legal foundation, when bridging the gap between a threat and a target.

Covering the concept of target discrimination, or target distinction, it was asserted that this is a core feature to international humanitarian law, particularly when attempting to identify and avoid noncombatant casualties. Target discrimination helps to identify and classify whether the responding action pertains to a law of war or law enforcement paradigm. Travalio and Altenberg, drew the interesting conclusion that the appropriate response—either law enforcement or the use of military force, should be situation dependent, a sentiment echoed, and a theoretical model proposed in the current research. One of the major difficulties involved in the war against terrorism is the actual identification of legitimate targets. This is one of the fundamental elements which led to the creation and adoption of the new category of illegal combatant. It was noted that according to Keifman, there is no established definition as to what might possibly constitute an *indiscriminate* attack.

Since the enemy seeks safe harbor among the civilian population, discriminating between fighters and innocent noncombatants becomes even more difficult. The unfortunate and unavoidable end result is often extended civilian “collateral damage” to both lives and infrastructure. Such loss of innocent life contributes to an increase in the ranks of the enemy.

The standing rules of engagement (ROE) were presented and it was noted that in the Afghanistan theater of operations a rather broad exercise of discretion was permitted in the interpretation of hostile intent.

Target discretion exists upon a spectrum. Response to the threat is based upon the criteria of imminence. The spectrum ranges from target identification, to direct observation, followed by

the assumption of intent, and in the best-case scenario confirmed by reliable actionable intelligence. As mentioned elsewhere in this research, intelligence is unfortunately incorrect, misguided or manipulated in many cases.

One of the points seldom elucidated revolves around the question of whether drones are effective in curbing terrorism. There is no clear-cut answer to this question and there exist two schools of thought locked in contentious opposition on the matter. There has been little empirical evidence forthcoming to shed light on the discussion. One side argues that the decapitation strategy helps reduce effective leadership and minimize the threat, while the opponents argue that the strategy merely helps to increase resilience and helps to swell the ranks of the terrorist groups.

Personality and signature strikes were the next item of concern in the previous chapter. Two core concerns relating to the legitimacy of any type of targeted killing, according to Amos Guiora, revolve around the questions of *who* can be targeted and *when* is it legally permissible to do so. Given that those posing the threat do not wear uniforms or distinctive insignia, this compounds the problem and renders positive identification far more difficult. This impedes the effective prosecution of targets in the *area of operations* (AO).

Personality and signature strikes as conducted by the CIA, were then defined. This first practice related to the singling out of high value targets (HCTs) for elimination, in what is commonly referred to as a decapitation strategy. Such a strategy would be far less questionable were it not being conducted by a civilian organ of the state as is currently the case. The signatures strikes are even more problematic since they are based upon a vague notion of patterns of personal behavior.

Signature strikes under international humanitarian law (IHL) generally require two specific conditions: that the combatant being targeted is either a direct participant in hostilities (DPH) or maintaining a continuous combat function (CCF). According to Kevin Jon Heller for the signature strikes to be considered legal under IHL two essential criteria are mandatory: the signatures must be validated sufficiently to assure proper identification of the designated target, and secondly, there must be sufficient supporting evidence. Kevin Jon Heller's 14 points relating to the legitimacy of signature strikes, including some related comments and observations, were then presented for examination.

Many current analysts including Micah Zenko, feel that the signature strike is a counterproductive strategy and this research fully concurs with the view. Targeting according to this stratagem is often based upon what is referred to as their intelligence signature. This is a rather vague and imprecise method of identifying an individual through their alleged communications. The obvious problem arises that phones can be passed about and there is no guarantee that the signal intelligence identifying that individual indeed belong to that specific target. Yet another rather distasteful strategy possibly employed by the agency concerns post-funeral strikes upon mourners supported by a combined study conducted by legal teams at New York and Stanford Universities and statements by Christof Heyns, UN rapporteur on extra-judicial killings.

The concept of collateral damage was the following topic for examination, since it too, is also closely related to and often a consequence of targeted killing. It was suggested that the term collateral damage is often misleading in the face of the havoc, chaos and destruction which remains in the wake of modern warfare. Damage infers that there is something left to repair whereas the increased power and precision of modern weaponry often precludes such a

possibility. It was further advanced that the rather unfettered application of the drone tactic during the Obama administration, served to exacerbate and contribute to increasingly violent responses rather than reducing or alleviating the threat. It was also asserted that the public is largely oblivious and exhibit careless disregard concerning the conduct of the distant conflict.

A drone strike may be criticized for resulting in civilian casualties, while at the same time overlooking the fact that a high value target or a terrorist group had strategically hidden themselves among the civilian population. The effective use of precision guided munitions to engage a target are a much safer alternative than resorting to traditional strategies such as dropping bombs. Certainly, the use of an AGM -114 Hellfire missile is a preferable solution and will result in far fewer noncombatant casualties than dropping a 500-pound guided bomb unit (GBU). Additionally, and this is a core argument of the current research: the spirit of international humanitarian law would appear to argue for the use of drones and precision guided munitions, contrary to arguments stating otherwise. Given the proportionality requirements and the injunction in IHL to minimize noncombatant harm, the use of these weapons appears entirely justified. Specifically note the wording of Article 57(2)(a)(iii) which stipulates:

With respect to attacks, the following precautions shall be taken: *a)* those who plan or decide upon an attack shall: ...*(iii)* take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects...³⁸²

It was advanced that there exist two ways in which noncombatant casualties might occur. They may be either *unforeseen and unintended* (an unfortunate but natural consequence of armed

conflict)—in other words, accidental, or they may be *foreseen and unintended*; for example, during a situation which is unavoidable. There has been some debate as to whether there actually exists a difference between these two conditions. A schematic, representing the pacifist arguments, developed from information provided by Ned Dobos, in his *Key Concepts in Military Ethics*.³⁸³, was then presented for consideration.

The chapter concluded with an evaluation of possible alternative approaches to be used in conjunction with or in the place of a strategy based purely upon targeted killing. Numerous authors have also asserted that the blind reliance upon a single tactic to determine strategy is not only misguided but that it is also highly counterproductive. Although there exist other models, four alternative examples were presented for possible consideration.