

Targeted Killing—A Proposal for Criteria Based Decision Making

Amos N Guiora*

I. The Foundation of a Framework

A. The Role of Experience and Reflections

I come to this article about “targeted killing” from the twin perspectives of having “been there” as a legal advisor to the Israel Defense Forces (IDF) and now as a professor of law having numerous opportunities to reflect on decisions in which I was involved. (In debating how to construct this article, I reflected on Professor Kamisar’s engaging, enlightening and thought-provoking soliloquy regarding Miranda.¹) It is my modest hope that this article will contribute to the burgeoning literature addressing national security, counterterrorism and decision making. There is, of course, a danger in addressing an issue in which one was directly involved; blurred memories and subjective retrospection are the bane of “looking backwards.” Nevertheless, given the complexity of Israel’s targeted killing policy and the US drone attack policy, I hope my twin perspectives on targeted killing will offer useful vantage points.

I remain convinced—as I was while serving in the IDF – that targeted killing is legal, necessary and effective to protect national security. What has changed, however, is my understanding that the decision making process must be framed by the criteria-based approach I advocate in this article. Thus, it is the process by which a specific decision is actually made that I seek to address. My thinking in advocating discussion regarding “process” is premised on three factors: (1) my professional experience in operational counterterrorism decision making (while serving in the IDF); (2) subsequent engagement with a wide range of academics (in the US, Europe and Israel), journalists (US and Israel) and policy makers (US and Israel); and (3) recognition that both Israel and the US will continue to implement aggressive operational counterterrorism measures and that a criteria-based model of decision making is essential to minimize collateral damage and enhance the effectiveness of implemented policies.

Simply put, lawful targeted killing must be based on criteria-based decision making, which increases the probability of correctly identifying and attacking the legitimate target. The state’s decision to kill a human being in the context of operational counterterrorism must be predicated on an objective determination that the “target” is, indeed, a legitimate target. Otherwise, state action is illegal, immoral and ultimately ineffective. It goes without saying that many object to the killing of a human being when less lethal alternatives are available to neutralize the “target.” Others will suggest—not incorrectly—that targeted killing is nothing but a manifestation of the state acting as “judge, jury and executioner.” On the other hand, the state has a responsibility to develop and implement measures that protect its citizens from enemies who kill and maim innocent civilians as a matter of strategy or tactics against the state. The need for an objective determination that the person in the crosshairs is a legitimate target

* Professor of Law, SJ Quinney College of Law, University of Utah.

¹ Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219 (1962).

means that the essential – and often missing piece, however – is a sound and thorough method for reaching that determination in the face of extreme pressure.

To highlight the complexity and necessity of the dilemma while emphasizing the need to make a decision, I have chosen to analyze a particular targeted killing decision in which I was involved. To that end, the particular decision explored in this article--in which I ultimately concluded that the information a senior IDF commander provided did not meet standards justifying a targeted killing--serves as a reference point for the criteria-based decision making model I propose. In that case, as in all such situations, the commander requested my advice regarding the targeted killing of an individual who the intelligence community had identified as a legitimate target posing an immediate danger to state security. It is important to note that my decision was not second-guessed by the commander in real-time nor subjected to subsequent review by senior IDF commanders.

By way of background, I have been involved in decision-making dilemmas most of my adult life. During the course of my career in the IDF, I served as a prosecutor (West Bank Military Court), judge (Gaza Strip Military Court), a legal advisor to junior and senior commanders in the West Bank and Gaza Strip, Judge Advocate to the IDF Home Front Command, Judge Advocate to the IDF Navy and commander of the IDF School of Military Law. In those capacities, I was tasked with recommending a broad gamut of measures including:

- detention (for purposes of interrogation and/or prosecution);
- administrative detention (when intelligence material is deemed too sensitive to be declassified and presented in a court of law);
- house sealing and demolitions (predicated on deterring other suspected terrorists from committing similar acts);
- deportation of Palestinians whose continued presence in the West Bank and Gaza Strip--based on their actions--was deemed to pose an extraordinary danger to public security;
- personal and community movement restriction orders (in addition to curfews); and
- targeted killing.

My advice was requested on a 24/7 basis and required interpretation of international law, Israeli statutes, Israeli Supreme Court precedent and my assessment whether the Supreme Court, sitting as the High Court of Justice,² would intervene in the commander's decision based on robust and rigorous judicial review.³ The advice, rooted in the rule of law, required that I balance legitimate individual rights with equally legitimate national security considerations. Although I usually had only imperfect

² The Supreme Court sitting as the High Court of Justice (HCJ) is empowered to issue temporary restraining orders and to hear petitions filed on behalf of individuals --including Palestinian residents of the West Bank and Gaza Strip--claiming an executive branch decision will aggrieve them of their rights.

³ Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16 (2002); Amos N. Guiora and Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 Hastings Int'l & Comp. L. Rev. 51 (2005).

information, nevertheless, I had to make decisions because public security was potentially endangered. Imperfect intelligence information is an operational reality; it also presents enormous complexities for the decision maker.

My thinking has been deeply influenced by dialogue with experts in decision-making models and theory based on criteria and measurable achievements (or failures). These discussions have taken place only since I joined academia in 2004. I do not recall having meetings (while serving in the IDF from 1986 to 2004), with either commanders or subordinates to analyze the costs/benefits of particular counterterrorism measures, nor do I recollect development of an effectiveness matrix. I clearly recall presentation of statistics regarding imposition of various administrative sanctions but the discussion—to the best of my recollection—was strictly numerical quantification, largely devoid of any rigorous analysis regarding effectiveness, viability and proper resource allocation and prioritization.

I have written on targeted killing,⁴ been cited by the Israel Supreme Court in its seminal decision regarding the policy's legality,⁵ and been involved in targeted killing decisions while serving in the IDF. Similarly, I have written on US drone attack policy⁶ and been interviewed regarding its comparison to targeted killing.⁷ It was only after engaging other academics from a wide range of disciplines—and perhaps benefitting from time to engage in reflection—that I undertook the analysis at the core of this paper. This has been, obviously, a lengthy personal and professional “work in progress.” That said, decision-making in a time-sensitive, real-time atmosphere with enormous national security interests at stake is fraught with ambiguity and uncertainty that, invariably, imply mistakes, misjudgments, misreading of intelligence and decision-making based on imperfect information. However, concern that mistakes will be made must not paralyze policy makers and therefore unnecessarily impose a “no-decision” regime. The stakes—protecting a civilian population targeted by non-state actors—are far too high. Furthermore, an overly cautious approach will, arguably, be perceived as weak by two distinct audiences: the state's civilian population and terrorist organizations. The former will justifiably feel unprotected; the latter will correctly feel emboldened.

⁴ Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004); Cited by the Israel Supreme Court in *The Public Committee against Torture in Israel vs. The Government of Israel* (HCJ 769/02) and *Yoav Hess vs. The Government of Israel* (HCJ 8794/03).

http://www.foreignpolicy.com/articles/2009/07/13/licence_to_kill (last viewed December 10, 2010),

<http://www.theworld.org/2009/07/15/targeted-killings/> (last viewed December 10, 2010).

⁵ *The Public Committee against Torture in Israel vs. The Government of Israel* (HCJ 769/02) and *Yoav Hess vs. The Government of Israel* (HCJ 8794/03).

⁶ Amos Guiora and Martha Minow, *Guess Who's Coming to Dinner?*,

http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/01/21/guess_whos_coming_to_dinner/?p1=MEWell_Pos4 (last viewed February 20, 2011).

⁷ Neal Conan, Heard on Talk of the Nation (February 24, 2010). “How The U.S. Approaches Targeted Killings”. NPR.

<http://www.npr.org/templates/transcript/transcript.php?storyId=124047251>;

<http://www.theworld.org/2010/04/07/us-approves-muslim-cleric-to-be-assassinated/> (last viewed February 21, 2011); http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (last viewed February 20, 2011).

B. Targeted Killing, Operational Counterterrorism and Today's Conflicts

Targeted killing and drone attacks – the subject of this decision-making analysis and the most oft-discussed counterterrorism measures – are philosophically similar and premised on comparable legal analysis, even though operational differences clearly do exist. Both Israel and the US have determined that aggressive, pre-emptive self-defense justifies killing a target defined as legitimate by the intelligence community. This determination is predicated on intelligence information gathering and analysis concluding the targeted individual is involved in planning and/or executing a future terrorist attack. From the perspective of international law, an expansive reading of the inherent right of self-defense in Article 51 of the U.N. Charter⁸ is at the policy's core.

The Obama Administration has significantly increased the number of drone attacks in comparison to the Bush Administration.⁹ To that end, the Obama Administration is clearly committed to this policy. Many other scholars have written on both targeted killing¹⁰ and the drone attack policy;¹¹ the latter has been the subject of Congressional hearings,¹² public debates, academic conferences, a major public address by the State Department Legal Advisor¹³ and innumerable newspaper articles.¹⁴ Needless to say, the drone attack policy is not controversy free. But law review articles, opinion pieces and debates—regardless of their persuasiveness—will not sway the Administration to change course. At one conference I suggested that the drone attack policy—albeit complicated and controversial—is “here to

⁸ Charter of the United Nations Art. 51 (1945), available at <http://www.un.org/en/documents/charter/index.shtml>.

⁹ See Appendix A (US DRONE STRIKES CHART).

¹⁰ See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra Judicial Executions or Legitimate Means of Defence?*, 2.16 Eur. J. Int'l. L. 171 (2005), 171-212; Steve R. David, *Fatal Choices: Israel's Policy of Targeted Killings*, THE BEGIN-SADAT CENTER FOR STRATEGIC STUDIES BAR-ILAN UNIVERSITY *Mideast Security and Policy Studies No. 51*; Orna Ben-Naftali & Keren Michaeli, *Justice-Ability: A Critique of the Non-Justiciability of The Israeli Policy of Targeted Killing*, 1(2) Journal of International Criminal Justice 368-405 (2003); Niles Meltzer, *Targeted Killing in International Law*, Oxford University Press, (2008); Edward Kaplan and Daniel Jacobson, *Suicide Bombings and Targeted Killings in (Counter) Terror Games*, 51q Journal of Conflict Resolution 5 (2007), 772-792.

¹¹ Jordan Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drone in Pakistan*; 19 Journal of Transnational Law & Policy 2, 237 2010; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009*; Simon Bronitt, ed., Forthcoming, *SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT*; Afsheen John Radsan & Richard Murphy, *Due Process and Targeted Killing of Terrorists*, 31 Cardoza Law Rev 405, 2009; Kenneth Anderson, *Targeted Killing in US Counterterrorism Strategy and Law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070&rec=1&srcabs=1349357, (last viewed December 12, 2010); Kenneth Anderson, *Predators Over Pakistan*, 15 The Weekly Standard 24, 26-34, (2010); Jane Mayer, *The Predator War*, The New Yorker, October 19, 2009 available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer; Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Proof Component: A Fourth Amendment Lesson in Contextual Reasonableness*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762894.

¹² 'Drones II' - Kenneth Anderson Testimony Submitted to U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare, April 28, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619819&rec=1&srcabs=1561229, (last viewed December 12, 2010).

¹³ Harold Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law Washington, DC, March 25, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm> (last viewed December 12, 2010).

¹⁴ <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html?hpid=topnews>, (last viewed February 20, 2011).

stay.” Those engaged in the public debate must therefore focus on proposing legal criteria and operational guidelines to enhance implementation effectiveness and efficacy. Such a criteria-based approach to the decision-making process will simultaneously facilitate operational success and minimize harm to innocent civilians. In essence, the Administration will implement its policy; the question to be discussed is *how*.

Any targeted killing decision must reflect consideration of four distinct elements: law, policy, morality and operational considerations. Traditional warfare pitted soldier against soldier, plane against plane, tank against tank and warship against warship. Present and future asymmetric conflict is state engagement with non-state actors. The traditional military paradigm has been replaced by a dizzying array of acronyms that unintentionally reflect the enormous complexity and amorphousness of a largely undefined conflict. In the targeted-killing paradigm, the questions—*who* is a legitimate target and *when* is the target legitimate—are at the core of the decision-making process. How both questions—in principle and practice alike—are answered determines whether the policy meets relevant international law obligations. If a targeted-killing decision does not reflect careful analysis of the issues below, then the resulting action does not reflect narrow and limited application of self-defense; rather, it is suggestive of indiscriminate state action.

C. Baseline International Law Principles

The principal tenet of a targeted killing policy is that the need to prevent a specific, planned attack justifies killing individuals involved in committing the attack. International law requires that such an attack meet a four-part test: (1) it must be proportionate to the threat posed by the individual; (2) collateral damage must be minimal; (3) alternatives have been weighed, considered and deemed operationally unfeasible; and (4) military necessity justifies the action. In addition, all of these principles build on the fundamental international law principle of distinction, which requires that any attack distinguish between those who are fighting and those who are not in order to protect innocent life. Even though the individual targeted is a legitimate target, if the attack fails to satisfy these obligations, it will not be lawful. Thus, the Special Investigatory Commission¹⁵ examining the targeted killing of Saleh Shehadeh recently concluded that although the targeting of Shehadeh — head of Hamas’ Operational Branch and the driving force behind many terrorist attacks — was legitimate, the extensive collateral damage caused in the attack was disproportionate. As will be shown in greater detail below, the absence of a criteria-based decision-making process can severely compromise adherence to and implementation of these key obligations.

The uncertainty inherent to contemporary conflict has significantly complicated conduct in wartime. However, that ambiguity cannot—must not—be used to justify soldiers committing and commanders justifying war crimes. The self-imposed restraint doctrine articulated by the former President (akin to Chief Justice) of the Israel Supreme Court, Aharon Barak, is the philosophical and jurisprudential essence

¹⁵ <http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2011/02/spokeshchade270211.htm> (last visited March 8, 2011).

of lawful operational counterterrorism.¹⁶ It imposes on commanders the obligation –in accordance with Barak’s legal architecture—to develop strategies that facilitate aggressive counterterrorism while imposing restraint on soldiers facing a foe dressed exactly the same as the innocent civilian standing next to him.

The examination of the "targeted killing" – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex. The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities." Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.¹⁷

While international law—correctly—requires distinguishing between the terrorists and innocent civilians, Barak’s thesis imposes a heavy burden on commanders. According to Barak, the state *must* impose limits on itself; otherwise, illegality and immorality are all but certain in how operational counterterrorism is conducted. How that plays out is essential for our discussion because it accentuates the requirement of command discretion. The following vignette "proves the point:"

¹⁶ Aharon Barak, *The Role of the Judge in a Democracy*, JUSTICE IN THE WORLD MAGAZINE NO. 3, available at <http://justiceintheworld.org/n14/cover.shtml>.

¹⁷ *The Public Committee against Torture in Israel vs. The Government of Israel* (HCJ 769/02).

An IDF battalion commander (LT. COL.) was given an order to detain three suspected terrorists believed to be in the West Bank city of Nablus (Shekem). At the city outskirts, he received an intelligence report at 10:00 am that hundreds of school children were milling about the village square. According to the commander, three options were operationally viable: (1) continue and "damn the consequences;" (2) retreat; or (3) play "cat and mouse" (one step backward –two steps forward/two steps forward-one step backward). It became clear to the commander that the reason why the schoolchildren were milling about (and not in school) was that school principals had been ordered to close school when the IDF force was spotted. This was a classic "human shielding" by the terrorists, which is a clear violation of international law; nevertheless, the risks to the innocent civilian population (schoolchildren) –*willingly and deliberately endangered by terrorists*—led the commander to "abort" the mission. When we spoke regarding his decision-making process—in the face of clear and lawful operational orders—I was struck by his internalizing of Barak's philosophy (although the commander did not phrase it in those words) and how it directly impacted *his* operational decision-making.

II. Creating Criteria-Based Decision Making

A. Decision-Making in Counterterrorism

While other thought leaders and decision makers are confronted on a daily basis with complex fact patterns, few - if any - make decisions that not only directly impact the lives of thousands but can, in certain cases, lead to the deaths of individuals. Some of those who die are directly involved in terrorism and therefore legitimate targets. Others are innocent victims of collateral damage. As a legal advisor, I viewed my primary responsibility as facilitating the commander's balancing of individual civil rights with equally legitimate national security considerations. Doing so requires the analysis and balancing of extraordinary amounts of information and multiple legal and operational imperatives – the only effective way to do so is through a systematic application of criteria and guidelines.

Criteria-based decision-making is intended to foster objective decisions. The proposed model is based on the nation state's obligation to respect international legal principles and norms, such as those emphasized above. That commitment--based on customary international law, international conventions and treaties—imposes restrictions and burdens that inherently limit operational counterterrorism. It is also what distinguishes the nation state from a non- state actor that is held accountable neither to international law nor international public opinion.

The criteria-based decision making process I recommend seeks to enhance understanding of the process and to provide "tools" to the decision maker in a situation where uncertainties far outweigh certainties, where the unknown largely outnumbers the known. Thus, the goal is not to hinder decisions and implementation, but to minimize mistakes. I define "mistake" primarily as the targeting of an otherwise innocent individual because of faulty intelligence information, incorrect assessment of received intelligence, or incorrect calibration of coordinates when "opening fire." Although the death of an innocent individual when a legitimate target is identified, targeted and killed (or wounded) in

accordance with international law principles of self-defense is doubtlessly unfortunate, international law tolerates such “collateral damage” provided it is minimal, although this term is not specifically defined.

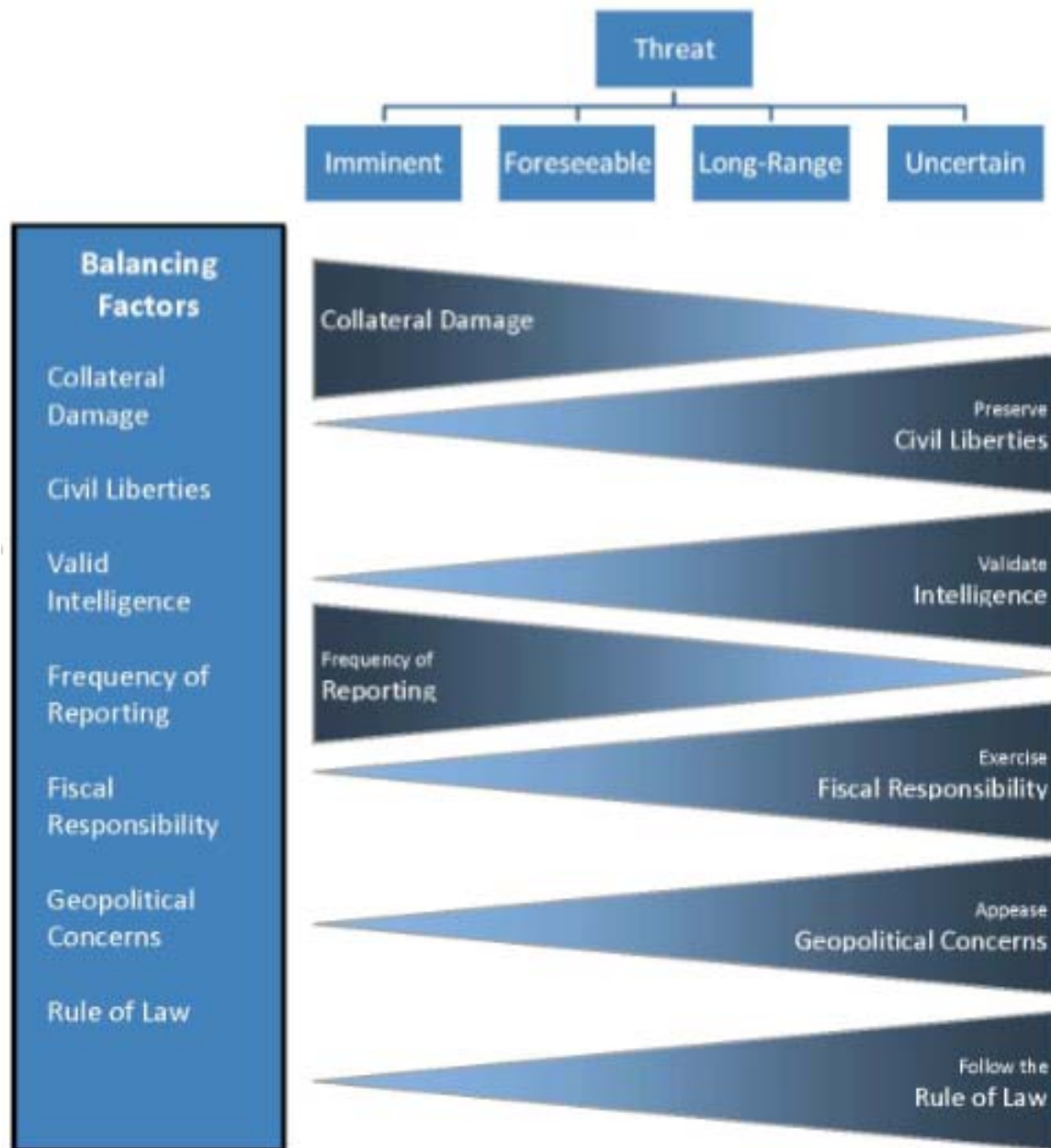
The proposal is not—under any circumstance—intended to facilitate or justify criminal conduct of soldiers; I have long advocated that a soldier or commander who violates standing orders and unlawfully causes the loss of innocent life must be either (circumstances dependent) brought before a disciplinary hearing or court-martialed; the same is true for a soldier who follows a blatantly unlawful order.

In this regard, the legal and moral standard for lawful military action is the guilty verdict issued by an Israeli military court (1957) against members of the Border Police who carried out an order enforcing a curfew against field hands returning to their village when they did not have notice of the curfew. As a result, the Border Police killed 47 innocent Arab-Israelis. The court held the order was blatantly illegal and that a “black flag” should have been raised regarding both its inherent unlawfulness and the absolute requirement to disregard it.¹⁸ According to the court, the black flag standard imposed on soldiers the obligation to disregard a blatantly illegal order even if issued by their commander. A targeted killing, in the context of aggressive self-defense, conducted in accordance with recognized international principles enhanced by the criteria based decision making model proposed in this article is absolutely distinguishable from the ‘black flag’ standard.

A. Defining Threats: the Essence of Counterterrorism

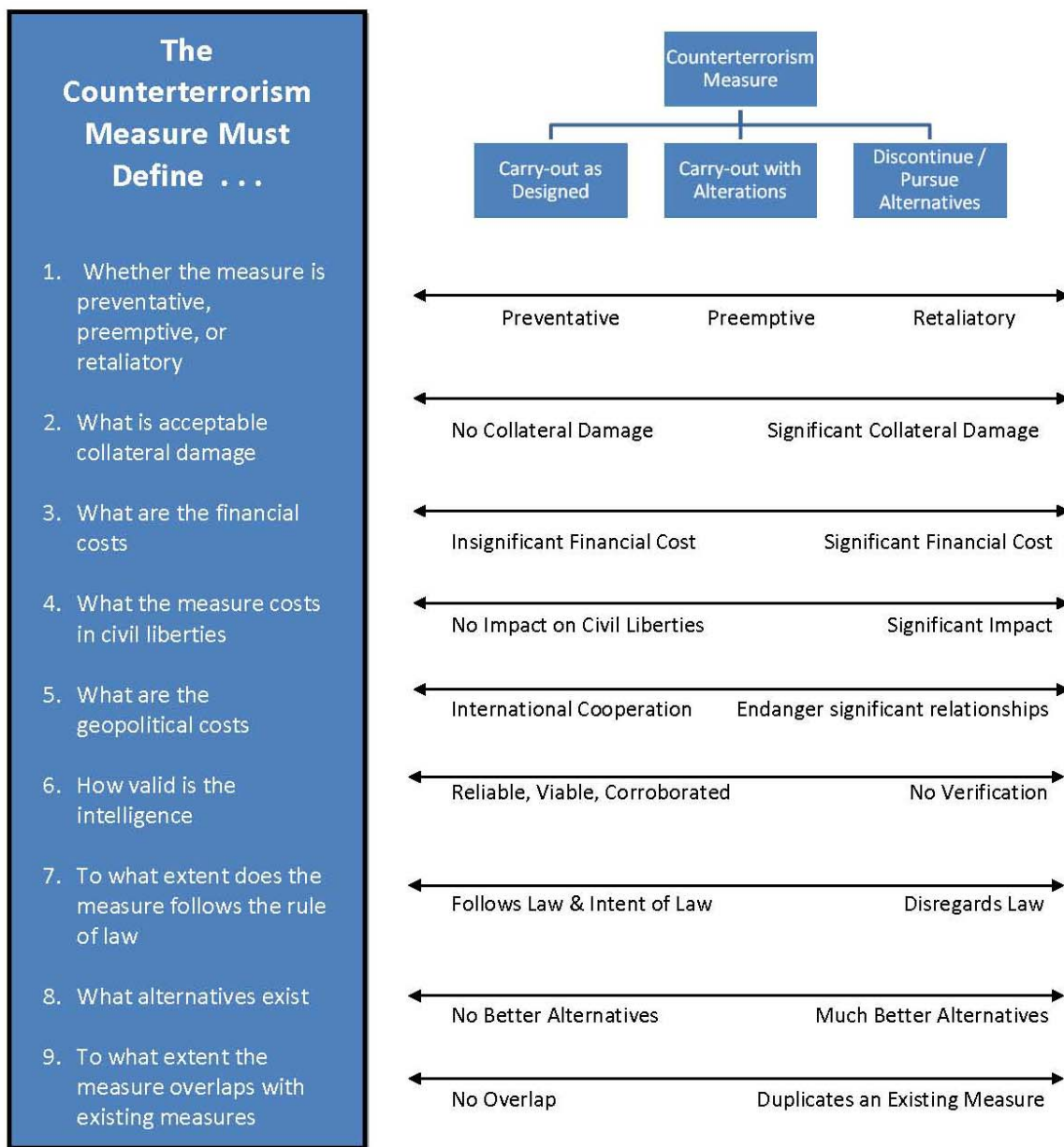
The first step in creating an effective counterterrorism measure is analyzing the threat, including the nature of the threat, who poses the threat, and when it is likely to materialize or be carried out. It is equally important to assess the imminence of any threat, which will have significant impact on the operational and legal choices made in response. The following chart, presented in an earlier article on homeland security, graphically represents the continuum of threats and the corresponding weight of multiple interests in the balancing of individual rights and national security. Targeted killing will – or certainly should – be used only in response to threats that are imminent rather than merely foreseeable or more distant threats.

¹⁸ <http://meretzusa.blogspot.com/2006/11/tom-segev-on-atrocity-at-kafr-kasem.html>, (last viewed February 16, 2011); <http://www.haaretz.co.il/hasite/spages/1026968.html>, (last viewed February 16, 2011), Hebrew version—English unavailable.



This next chart provides additional means for assessing the validity of a particular counterterrorism measure – targeted killing in this instance. Several considerations are especially relevant and build directly on the discussion of principles above: the nature of the strike, i.e., whether it is preemptive or retaliatory; the collateral damage; the existence of alternatives; and the nature of the intelligence information, which bears directly on the obligations of distinction. The need to define threats is most often discussed as a foundational counterterrorism issue – effective counterterrorism depends on defining terms and threats. However, this concept is equally relevant to the discussion here of the implementation of a counterterrorism measure in the form of targeted killing. The essence of the decision to authorize a targeted killing depends on a process that allows for a careful analysis of both

the nature of the threat, the identity of the threat and the imminence of the threat – all factors that invoke the range of principles and considerations posed here. Trying to undertake that analysis in the absence of criteria and guidelines for decision-making can lead to decision paralysis or an incomplete consideration of critical issues.



B. Do I Say Yes or No?

The question that drives this paper is the following: for a particular decision, what were the criteria; was it a "crap-shoot", or were rigorous standards developed and applied, much less analyzed in the

aftermath. To bring the dilemma home, the following monologue—in the spirit of Prof Kamisar’s article—written from the perspective of the Legal Advisor whose operational legal advice the commander requests in “real time” might prove helpful in understanding the dilemma of the decision maker:

*3 AM: most people sleep or at least are trying to. Perhaps a few are having a last drink. Few hear the following words: “**we need to talk; the window of opportunity to neutralize the target is only a few minutes.**” Processing that sentence can take a few minutes, not counting processing the need to get out of bed and then responding intelligently. But the voice on the phone doesn’t have time or patience for niceties. 3 am from his perspective is the same as 8 am or 3 pm. **The actual time a target needs to be neutralized is the only relevant time.** The time appearing on my watch is irrelevant. The commander is calling me – his legal advisor – with the following question: based on the following facts, is the proposed targeted killing legal?*

*The tension in the conversation is compounded by reports the commander receives in his earpiece about the target’s movements. That earpiece is in left ear. The phone receiver is in his right ear. Between his ears, his brain is pounding with operational tension—do I give the “shoot to kill order”? The consequences, that someone will die, are not the core issue from his perspective. **What is of the utmost importance is the safety of his troops after the mission is accomplished** . After all, what drives the commander is “mission accomplished”, which absolutely entails protecting his troops as well. After all, he knows all too well that placing someone else’s child at risk is the ultimate in command responsibility. However, he also understands—as do his soldiers—that engaging an individual identified as a threat to state security is what they signed up for. With all due respect for their willingness –perhaps desire—to engage though, it is his responsibility to ensure an order to “engage” is given only when fully justified by circumstances and in accordance with standing orders regarding rules of engagement.*

That means two things: doing what his commanders told him to do and ensuring that his soldiers get out of the “zone of combat” safely. What is running through his mind is how do I protect my ten soldiers, who are positioned and awaiting the “open fire” order? Every second is vital. The tone of voice in his left earpiece—his spotter—is increasingly agitated both because the target is closer and because the more time the unit is in the field and the closer it is to sunrise the more dangerous the situation is.

What about the target? Is he really a son of a bitch who deserves to have his brains blown out or he is simply "wrong place, wrong time"? Does he even know there is a 3 am phone call determining his fate? Not only does he not have say; no one has talked to him. His thoughts—depending on who he is and whether he is the person he is suspected of being—range from wanting to get home safely to where is the person I am too meet in order to give him the explosives I am carrying. Whichever option it is, he does not want to die tonight. He also does not know the commander's anxiety and irritation with my response rate, which is not that of a 100 meter sprinter.

The phone call affected so many people that I had to compartmentalize in order to reach a decision. Much like a judge or jury, I had to gather facts facilitating a verdict. Unlike a judge and jury, I had no one to consult with. It was the ultimate in loneliness.

I peppered the commander with questions:

- ***Who is the target?***
- ***How do you know he is the correct target (i.e., does what he is wearing and his appearance match what the source told the case officer. The case officer is a civilian in the intelligence community who is the link between the commander and the source)?***
- ***Who is the source (commanders rarely---if ever---had direct contact with sources and were, therefore, totally dependent on analysis and reports from case officers)?***
- ***What are the alternatives (without unduly endangering the lives of the soldiers) to neutralizing the target (i.e., detention)?***
- ***What are the risks of collateral damage and have you endeavored to minimize collateral damage?***
- ***What is the quality and training of your soldiers?***
- ***Has your unit suffered from disciplinary issues (an ill-disciplined unit is, in all probability, not combat ready because the commander has expended more than the otherwise required time and energy on discipline matters rather than operational training)?***
- ***What weapons do your soldiers have at their disposal and when was the last time they participated in a nighttime operational mission?***
- ***How good is the soldiers' nighttime vision?***
- ***Are you (the commander) with your soldiers? if yes, will you be the "trigger man" and if not, who is the officer in command and where are you?***
- ***What is your previous experience with the case officer and when was the last time the case officer spoke with the source (time relevance is essential to the decision-making process) and did the agent assure you that the source met the four-part [test regarding source's reliability (reliable, valid, viable and corroborated)?***
- ***Why are you (and the case officer) convinced the source (with whom the commander does not speak) does not have an agenda (e.g., a grudge regarding the target)?***

My questions were based on a checklist I had worked out in anticipation of such a phone call. My commanders had never given me guidance about either the need to prepare the questions or what questions should be asked; but upon taking the position of Legal Advisor, I instinctively understood that operational international law required me to prepare just as the commander and his soldiers trained and prepared for the ambush.

The commander was expecting a quick “yes” or “no.” Instead, I asked him question after question. In his mind he was surely asking himself, sardonically, if not angrily, “Who has time for this game of 20 questions? Why do I need a lawyer’s permission to kill a fucking terrorist? Do terrorists consult with their lawyers before killing us?”

The intelligence community supplied the commander with information received from a case officer who met with a source who heard from someone that so and so said such and such. If this weren’t so serious, this could be the telephone game played by kids. Based on this flimsy piece of information, the commander had stationed ten soldiers where it was believed the target would be at the time. All according to the source who had told the case officer what he thought he had heard, which then led the case officer to issue a request for a targeted killing. The commander assumed the case officer had received permission from his chain of command in the intelligence community for the attack; as a matter of fact, he didn’t even bother to ask him as he simply, for lack of better word, assumed this was an operational “go” from the intelligence community’s perspective. Whether there had been detailed meetings, discussions and deliberations regarding this individual was beyond his purview; he had received a phone call, made the necessary operational decisions and preparations and was now waiting for me to make my recommendations, if only I would stop asking questions and make that recommendation.

From an operational perspective, he was ready to give the “open fire” order: in response to my questions, he was convinced that he had taken all measures necessary to minimize collateral damage. This he made very clear to me. He had also made clear that his soldiers were operationally ready for his “open fire” order—the ambush was properly organized, the soldiers were ready and the target was in the crosshairs.

My entire being, sitting in my dark living room, was focused on analyzing the information provided from multiple perspectives: legal, moral and operational. Simply put, I was weighing it according to my

understanding and interpretation of operational international law and some sense of morality in armed conflict. In addition, I was trying to visualize the setting of soldiers lying in ambush, commander waiting for the order and the targeted individual unknowingly walking to his death.

With respect to “morality in armed conflict”—a phrase that was still unclear but was increasingly coming into vogue—I liked how it sounded. Perhaps it helped me justify what I did and decided. Was it “self-serving” or “self convincing”? Did it help me explain to myself that this was not the “killing fields” revisited?

*At the end of the day—or in this case—by daybreak, the target, reported to be wearing a blue shirt and blue jeans and holding a bag in his left hand, would either be dead or safely on his way. I was completely locked in on the answers I received from the commander; at that moment, nothing else mattered because it was a matter of absolute focus regarding the decision that **I had to make**. The commander’s answers gave me sufficient information—in obviously as imperfect a situation as one can imagine—to make a recommendation that I could live with – and so I had to make it, immediately. And there was no “second chance” or “instant reply. The decision would be largely irreversible.*

*The paradigm--making a decision at 3 am, in a time-sensitive environment, fraught with anxiety and high risk--depended on imperfect intelligence information provided by someone who neither the commander nor I would ever meet nor know his identity (nor would we want to know). In addition, the case officer—the ‘linchpin’ as I came to call him—was the **true** pivot as all information received and its analysis was in his hands, and yet I was questioning the second-hand recipient of the information rather than its immediate recipient and principal analyzer.*

The more I pressed, the more irritated the commander became, although not necessarily at me; after all, we had previously worked together and had a mutual, albeit cautious, respect. While we were not friends, we were friendly, sharing an occasional laugh at meetings when others would say something inane. One of the realities of command was endless meetings with other commanders—some you respected, some you held in low regard and a few you did not trust, respect or like.

If you found someone you mutually respected, you could afford the luxury of sharing an occasional laugh or thought. That mutual trust and respect also meant that advice would be listened to and if need be,

followed. That was the tone and tenor of the relationship between the commander and me: friendly, not friends; mutual respect, not admiration. It also meant that somewhere the commander understood that I was asking the questions for a reason. We were in this shit together. In essence, I had the commander's back. That didn't mean I decided, but we both knew that if I said "yes," the commander gives "open fire" orders and if I said "no," then the individual identified as a legitimate target is spared. The decision, of course, went far beyond that. If I said no and it was a case of mistaken identity or we never ended up knowing, then likely nothing would ever come of it. If I said no and it turned out that the person indeed was a legitimate target and a grave threat to state security, then what? But If I said yes and it turned out to be a case of mistaken identity, we would all – most of all the innocent person targeted – be SOL.

After having all my questions answered, I felt all the information I could have, I did have. I had 10 soldiers lying in wait, each with 7 magazines with 29 bullets. I also had an unknowing individual – possibly the target, possibly not – about to walk past them. The math was easy. The consequences were enormous.

VI. The Decision

My answer in the necessarily 'fudged' example above was "no." My reason at the time was simple: I was not convinced that the information regarding the person in the cross hairs sufficiently matched the description provided to the commander. The information about the individual unequivocally indicated that the danger posed to national security was palpable. I was also convinced that the alternative option of detention was operationally unfeasible. But – and here is the key point – I was not convinced that the individual in the commander's scope was the individual referenced by the case officer. I had no reason then—and have no reason 15 years later—to doubt that the commander provided the information as conveyed to him by the case agent. Based on my professional experience with the commander, I was—and am—convinced he was an honest conveyer of the information presented to him. The circumstances—3 am, extraordinary tension and responsibility inherent to the decision that had to be made—unquestionably impacted our conversation, which was fast, direct, devoid of bullshit, and business-like. Though my questions (perhaps endless from his perspective) impacted the decision-making process, I felt the answers accurately reflected the commander's situational and operational realities.

I have replayed the conversation endlessly and each time—based on the information conveyed and my analysis—reached the same conclusion. The check-list approach was, in retrospect, the nascent

beginnings (for me) of developing and implementing a criteria-based methodology for operational decision-making. The circumstances are less than ideal: imperfect intelligence information, time-limited decision-making framework, high risk with respect to possible loss of life (soldiers, identified target and innocent civilians alike) and foreseeable danger to national security (premised on what the identified target was assumed to be carrying). In the absence of the check-list I had made before the call, those factors would likely have played a much more substantial – and problematic – role in my decision-making process. In the face of the extraordinary time pressure, I likely would not have been systematic in my questions and would have fumbled from issue to issue in a haphazard way. Without the check-list, I would not have had a clear road map in advance to guide me through the information that I needed to collect; even if I had asked many of the same questions, I likely would not have done so in an effective manner for a highly time-pressured decision. As a result, I would not have been able to be as sensitive to what the commander was telling me – both verbally and through non-verbal signals I picked up – and would have given greater weight to the case officer's report and insufficient weight to what the commander was actually seeing at the time. These considerations form the central impetus for the proposal for a criteria-based decision-making process I advocate here.

My decision—whether right or wrong—with respect to the information provided by the source to the case agent and then to the commander who called me was based on the following:

- The commander's interpretation of that information and his framing of the information, both how he initially framed the dilemma and his responses to my questions based on the check-list above.
- My interpretation and classification of the answers into three distinct categories: legal, moral and operational.
- My pre-existing--personal and professional--skill-set and previous experiences in operational decision-making.
- My understanding of the targeted killing policy and my frame of reference as a senior (LT COL) officer in the IDF, including my significant involvement in the implementation of the Oslo

B. Developing and Implementing Criteria

In a targeted killing decision, three aspects of the decision stand out: 1) can the target be identified accurately and reliably; 2) does the threat the target poses justify an attack at that moment or are there other alternatives; and 3) what is the extent of the anticipated collateral damage. A criteria-based decision-making process must therefore amass, assess and analyze the information necessary to make these determinations effectively. The intelligence community receives information from three different intelligence sources: human sources (i.e., individuals who live in the community about which they are providing information to a case officer who serves in the intelligence community); signal intelligence (i.e., intercepted phone and email conversations); and open sources (i.e., internet and newspapers). The responsibility of the intelligence community is to analyze the gathered information in an effort to develop an accurate operational picture. Targeted killing is largely dependent on the intelligence information received from a source; the recipient of the information is the case officer who is tasked with identifying a potential source and then cultivating that individual over a period of time.



One of the most important questions in putting together an operational "jig saw puzzle" is whether the received information is "actionable;" that is, does the information received from the source warrant an operational response. That question is central to criteria-based decision making or at least to decision making that seeks—in real time—to create objective standards for making decisions based on imperfect information; in other words, to enhance objectivity and therefore minimize subjectivity in the decision making process. However, it is essential that the information be subjected to rigorous analysis, including of the source himself, because determining whether it is actionable without that is literally an impossibility. To that end, the chart below (created to explain detention decisions) articulates the guidelines for determining whether the intelligence is—sufficiently—actionable.

Test Prong	Definition/Use
Reliable	Past experiences show the source to be a dependable provider of correct information; requires discerning whether the information is useful and accurate; demands analysis by the case officer whether the source has a personal agenda/grudge with respect to the person identified/targeted.
Viable	Is it possible that an attack could occur in accordance with the source's information? i.e, the information provided by the source indicates a terrorist attack that could take place within the realm of the possible and feasible.
Relevant	The information has bearing on upcoming events; consider both the timeliness of the information and whether it is time sensitive imposing the need for an immediate counterterrorism measure.
Corroborated	Another source (who meets the reliability test above) confirms the information in whole or part.

Source
<ul style="list-style-type: none"> • What is the source's background and how does that affect the information provided? • Does the source have a grudge/personal "score" to settle based either on past personal or family relationship with the person the information targets or identifies? • What are the risks to the source if the targeted individual is targeted? <ul style="list-style-type: none"> • Source protection is essential to continued and effective intelligence gathering. • Protecting the source is essential both with respect to that source and additional--present or future--sources. • What are the risks to the source if the intelligence is made public? <ul style="list-style-type: none"> • Key to determining the proper forum for trying suspected terrorists:

Target
<ul style="list-style-type: none"> • Who is the "target" of the source's information? <ul style="list-style-type: none"> • What is the person's role in the terrorist organization? • How will detention affect that organization, short-term and long-term alike?

- What insight can the source provide regarding “impact”?
- By example: in the suicide bombing infrastructure there are four distinct actors: the bomber, the logistician, the planner and the financier; determining the legitimacy of the target (for a targeted killing) requires ascertaining the potential target’s specific role in the infrastructure. *Subject to the two four –part tests above*, the four actors are legitimate targets as follows:
 - a) **Planner**—legitimate target 24/7;
 - b) **Bomber**—legitimate target solely when “operationally engaged;”
 - c) **Logistician**—legitimate target when involved in all aspects of implementing a suicide bombing but—unlike the planner—not a legitimate target when not involved in a specific, future attack;
 - d) **Financier**—a largely unexplored subject in the context of targeted killings; a legitimate target when involved in. For example, wiring money or laundering money (both essential for terrorist attacks) but subject to debate and discussion regarding when “not in the act.” To that extent, the question is whether the financier is more akin to the “bomber” or to the “logistician.” Arguably, given the centrality of the financier’s role the correct placing is between the “logistician’ and “planner.”
- What are the *risks/cost-benefits* if the targeted killing is delayed?
 - How time-relevant is the source’s information?
 - Does it justify immediate action?
 - Or is the information insufficient to justify a targeted killing but significant enough to justify other measures, including detention (subject to operational considerations)?
- What is the nature of the suspicious activity?
 - Does the information suggest involvement in significant acts of terrorism justifying immediate counterterrorism measures?
 - Or is the information more suggestive than concrete?
 - In addition, if the information is indicative of minor/not harmful possible action, effective counterterrorism might suggest additional information gathering --from the same or additional source--before authorization of targeted killing.
- What information can the individual provide (premised on the operational feasibility of detention rather than authorizing a targeted killing)?
- Does the individual possess information--to varying degrees of specificity--relevant to future acts of terrorism/individuals?

Although obviously essential to the targeted killing discussion, source analysis is but one piece of an extraordinarily complex puzzle. The larger questions force us to inquire as to the legality and morality of the policy and of its application in specific cases. In examining both legality and morality, decision makers must avoid falling into the pitfall of "decision by routine." There is, perhaps, nothing more dangerous than decision makers who fail to inquire into considerations that extend beyond mere operational factors. That is not to minimize the complicated reality of operational decision-making—the example analyzed above highlights the complexities—but to emphasize that *additional* questions must be asked in the context of criteria based operational counter-terrorism.