Determining a Legitimate Target: The Dilemma of the Decision-Maker

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SUMMARY

INTRODUCTION ........................................................................................................... 315

I. A WORD OF CAUTION: DECISION MAKING IN THE AGE OF UNCERTAINTY ............................................................. 318

II. OPERATIONAL COUNTERTERRORISM ................................................................ 319

III. TARGETING CRITERIA FROM JUST WAR THEORY TO ASYMMETRIC WARFARE .............................................................................. 323

IV. THE NON-STATE ACTOR AND INTERNATIONAL LAW ........................................... 327

V. DEFINING THE LEGITIMATE TARGET ................................................................ 330

VI. LEGITIMATE TARGETS: A PRACTICAL DISCUSSION OF CURRENT APPLICATION .................................................................................. 332

CONCLUSION: MOVING FORWARD ...................................................................... 336

INTRODUCTION

Nation-states are under attack by non-state actors; whether non-state actors present an existential threat to nation-states is debatable, probably unlikely. Nevertheless, the threat to innocent human life that terrorism poses must not be underestimated. Because terrorist organizations have defined the innocent civilian population as legitimate targets, the state must develop and implement aggressive counterterrorism measures. That, in a nutshell, is the state of the world post-9/11. While reasonable minds may disagree as to the degree of threat that terrorism poses, there is little (never say never) disagreement that terrorism poses a (not necessarily the) threat to the nation-state.

This reality has forced decision-makers to address terrorism and terrorists literally “on the fly.” In retrospect, Tuesday morning September 11, 2001, not only caught world leaders by surprise, but most were also unprepared and untrained to
respond in a sophisticated and strategic manner. In the United States, as thoroughly documented elsewhere, the lack of preparation directly contributed to significant violations of human rights including torture, rendition, indefinite detention, and unauthorized wiretapping. The Executive Branch in the United States chose the path of granting itself unprecedented powers, with Congress and the Supreme Court largely acquiescing. While historians will judge whether this combination made America safer, the wise words of Benjamin Franklin—"Those who would give up essential Liberty, to purchase a little temporary Safety deserve neither Liberty nor Safety"—were largely ignored in the aftermath of 9/11.

The ten-year anniversary of 9/11 serves as a useful benchmark for looking back to gauge what measures have been implemented, to what degrees of effectiveness, and at what cost. The anniversary additionally serves as a useful benchmark for looking forward and addressing how to develop, articulate, and implement changes to existing counterterrorism strategy. This Article does not offer a broad retrospective of post-9/11 decisions; rather, this Article focuses on the definition of "legitimate target."

Discussion regarding the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) is particularly relevant to the legitimate target discussion. After all, air and missile warfare is related directly to the legitimate target dilemma. Any analysis of air and missile warfare must include discussion regarding defining a legitimate target and then, subsequently, determining when the individual defined as a legitimate target is, indeed, a legitimate target. In that context, the link between the definition of a legitimate target and the AMW Manual is inexorable.

Two central questions with respect to operational counterterrorism are who can be targeted and when can the identified legitimate target be legitimately targeted. Those two questions go to the heart of both self-defense and the use of power. In a counterterrorism regime subject to the rule of law, use of power is neither unlimited nor unrestrained. When regimes subject neither to external nor internal restraints may engage in maximum use of force, needless to say, operational results will be uncertain.

A comparative survey of operational counterterrorism is telling, for it highlights how distinct approaches color the legitimate target discussion. The Russian experience in Chechnya presents a particularly stark example of maximum force with questionable results. Conversely, Spain's experience in the aftermath of the Madrid...
train bombing reflects a different paradigm, one implementing minimum force and maximum restraint.\textsuperscript{6} Seven years after 191 people found their deaths at the hands of Islamic extremists, Spain—as these lines are written—has not experienced a second attack by Islamic extremists.\textsuperscript{7} China’s policy regarding Uyghurs in Xinxiang Province is best captured in its name: the “Strike Hard” campaign.\textsuperscript{8} India, largely in the face of Pakistani-supported and -facilitated terrorism, has adopted a policy of restraint predicated, largely, on mutually assured deterrence.\textsuperscript{9} Colombia’s policy, in the face of twin threats posed by drug cartels and terrorists, is aggressive, not unlike China’s.\textsuperscript{10} Israel and the United States have largely, but certainly not consistently, sought to implement person-specific counterterrorism policies.\textsuperscript{11} Policies implemented by the United States and Israel include targeted killing/drone attacks, Operation Cast Lead,\textsuperscript{12} and detention of thousands of individuals in Afghanistan and Iraq, often for what can best be described as little, if any, cause.\textsuperscript{13}
With the primary focus on who is a legitimate target and when the target is legitimate, this Article is organized as follows: Section I offers a "word of caution" in an age of uncertainty; Section II discusses operational counterterrorism; Section III offers a survey of how the term legitimate target has been defined historically and applied in the battlefield; Section IV focuses on the non-state actor and international law; Section V discusses defining the legitimate target; Section VI focuses on the practical application of the legitimate target definition from the commander’s perspective; and the conclusion proposes a road map for both the definition of legitimate target and its application.

I. A WORD OF CAUTION: DECISION MAKING IN THE AGE OF UNCERTAINTY

It is important to note that the killing of Osama Bin Laden is, arguably, a "once in a lifetime" event representing a perfect confluence of intelligence gathering, intelligence analysis, and extraordinary operational capability. When the Navy SEALS stood opposite Bin Laden there was, according to reports, no doubt that this was, indeed, Bin Laden. The legitimate target dilemmas that are the focus of this Article are, largely, not relevant either to the planning or implementation of the Bin Laden operation because the "operation" was dilemma-free. That is distinct from the norm in operational counterterrorism decision making, which is largely characterized by extraordinary uncertainty. The Bin Laden operation was clear-cut; most counterterrorism operations are far more gray than black and white. This reality is essential to the legitimate target discussion.

Once President Obama (and before him President Bush) authorized the operation, there was an extraordinary (actually, unprecedented) focus on one individual with practically unlimited resources available. The efforts of all involved in the Bin Laden killing are, undoubtedly, exemplary and represent professionalism at the highest levels; however, the overwhelming majority of special operations present operational dilemmas not confronted by those involved in this very unique, specific act of counterterrorism. The legitimate target questions addressed in this Article were, largely, not relevant to the Bin Laden operation; to extrapolate from the latter to create a legitimate target model would be disingenuous. It would also create a false paradigm, as the overwhelming majority of counterterrorism operations lack the intelligence and absolute operational clarity that characterized the Bin Laden "hit."


Rather, as I have suggested elsewhere, operational counterterrorism can be defined as “mission impossible”; tasks imposed on 19-year-old soldiers and junior commanders “senior” to their soldiers by but a few years are extraordinarily complicated. Without a doubt, the mission of a corporal or junior officer engaged in traditional war was substantially less complex than dilemmas facing their counterparts of today. That is not to diminish the horrors of war faced by soldiers in wars previously fought; Tennyson's timeless poem, Charge of the Light Brigade, is as extraordinarily poignant now as when first penned:

"Forward, the Light Brigade!"
Was there a man dismay'd?
Not tho' the soldier knew
Someone had blunder'd:
Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die:
Into the valley of Death
Rode the six hundred."

While Tennyson suggests a lamb-to-the-slaughter type cruelty awaiting the grunt who knows both his enemy and his fate, operational counterterrorism represents significantly different complexities. The uncertainty at the heart of these complexities is a direct result of the legitimate target question. In traditional combat, soldiers could easily identify their foe; in operational counterterrorism, the foe is extraordinarily difficult to identify, for his attire resembles that of the general population with whom he easily mingles and to whom he quickly retreats after committing an act of terrorism. The certainty of enemy identification that was the essence of traditional combat has been replaced by extraordinary uncertainty in state/non-state conflicts.

II. OPERATIONAL COUNTERTERRORISM

Failure to create a framework for the operational decision-maker is arguably convenient for politicians and the public. However, in a rule of law paradigm this

17. In that vein, when my son was inducted into the IDF I wished for him four things: 1) commanders who understand command; 2) fellow soldiers who will have “each other’s back” (akin to “Band of Brothers”); 3) that he will know how to take care of himself; and 4) that he will never lose his moral compass. On the day he was inducted, as my wife and children parted from him he held up four fingers. Never have I, as a parent, been prouder.
18. In a remarkably candid observation, an IDF one-star general commented to me in 1996 that were he then a company commander he would resign his position given the inherent uncertainty in articulating to soldiers under his command both who presents a clear and present danger and what are clear rules of engagement.
20. GUIORA, GLOBAL PERSPECTIVES, supra note 5, at 22.
21. For purposes of this Article, the phrase 'operational decision-maker' refers to an “on the ground” commander.
disturbing failure places the commander at a significant disadvantage; he is expected to act in accordance with international law and the laws of war, while the non-state actor is beholden neither to law nor morality. However, even though the framework has not been sufficiently constructed, the nation-state remains distinct from the non-state actor. Simply stated, the nation-state's operational counterterrorism measures should be subject to three limits: 1) domestic law, 2) international law, and 3) morality. The first and third are largely self-imposed and self-regulated; the second is a reflection of international treaties, agreements, rules, and principles. Ostensibly, domestic law must comply with international law, but what if the current state of international law is insufficient to meet the needs of operational decision-makers distinct from the traditional warfare Tennyson so compellingly addressed?

International law, in its current articulation, is inadequate regarding the state/non-state conflict; after all, the laws of armed conflict were codified in an era where warfare was conducted between nation-states with rules clearly articulated and understood, though tragically not always respected.22 Needless to say, today's conflict is fundamentally different. Therefore, to address the two-fold question of who a legitimate target is and when the target is legitimate requires defining the conflict; that task is far easier said than done.

What Israel has defined as “armed conflict short of war,”23 others have termed in a similarly vague, uncertain manner reflecting the inherent linguistic and structural ambiguity of a conflict between a state and a non-state actor.24 A non-state actor is, undoubtedly, distinct from the nation-state; the latter, after all, is a definable and distinguishable entity in accordance with the terms of the Peace of Westphalia.25 The post-9/11 geo-strategic map, however, is rife with non-state actors that both defy definition and lack firm borders, both of which are the essence of the nation-state.

In the face of this troubling and complicated uncertainty, democratic regimes must develop effective counterterrorism measures that are both legal and moral. While the history of warfare is replete with violations of the laws of war, those laws were known to combatants and commanders alike who willfully violated them. In the present state/non-state actor paradigm the rules are known and largely respected by one side and largely ignored by the other side who consistently claims that nation-state created rules of war do not apply to them.26 In essence, non-state actors claim unilateral immunity from international law obligations while crying “foul” when the nation-state engages in aggressive operational counterterrorism.

That, however, does not release the state from honoring its international law commitments; after all, international law clearly articulates that violations by one

22. See Section III for further discussion.
party do not justify violations by another party. The state, then, is limited to how it may prevent or react to terrorism. While the public may clamor—arguably encouraged by the media—for aggressive measures, the reality of operational counterterrorism is that limits, more often than not, guide decision-makers. While those limits are largely self-imposed, they are a reality; how limits are determined and applied in a time-sensitive environment is at the core of lawful counterterrorism. While recommending forceful action is second nature to pundits and politicians alike, counterterrorism decision-makers confront a largely unseen enemy who benefits from dark shadows and back alleys.

The concept of proportionality is often raised to condemn state actors for engaging in conduct presumed to violate international law. While state actions often result in significant damage, the proportionality concept is largely misapplied in state/non-state actor conflicts. The state has resources and military material far exceeding those of the non-state actor; therefore, proportionality is an intellectual and semantic misnomer. There is no—and there cannot be—proportionality between the conduct of the two sides. The two are inherently dissimilar; to equate them in terms of proportionality is disingenuous.

The more appropriate inquiry is to determine whether operational counterterrorism measures applied by the state are proportionate to the threat posed by the non-state actor. In conducting this inquiry, the inherent disproportionality regarding means available is a given; the question—at the heart of lawful counterterrorism—is whether the means used reflect an appropriately measured response to the threat posed. Targeted killing and drone attacks are, in many

29. For a fuller discussion of this issue, see generally id. and its response piece, Amos N. Guiora, Proportionality "Re-Configured", 31 A.B.A. NAT'L SEC. L. REP. 9 (Jan./Feb. 2009) [hereinafter Guiora, Proportionality "Re-Configured"].
ways, at the heart of this question; in both cases, the state’s quantitative advantage—
elaborate and expensive intelligence-gathering infrastructure, sophisticated weapons
systems,32 and significant resources—distinguish the state from the non-state actor.
That is not to suggest that non-state actors do not have resources and weapons
capable of inflicting significant harm on innocent civilians whom they target. It is
important to recall that the most famous terror attack of the past decade was
successfully completed with the use of inexpensive box cutters. That is not, however,
intended to minimize the threats posed by terrorist organizations whose weapons of
choice include suicide and roadside bombings,33 firing thousands of missiles at
innocent civilians,34 and reported efforts to develop nonconventional weapons.35

Protecting the civilian population does not justify random counterterrorism
measures devoid of legal criteria and operational guidelines. The threat posed by
terrorism—ranging from minor to major—does not create a paradigm whereby the
state can ignore principles such as proportionality and limits on self-defense. The
“black flag” standard articulated by Judge Halevy36 has direct implications on how
the state implements both targeted killing and drone attacks.37 That is, while both
Israel and the United States have determined that aggressive self-defense is
necessary and justified in protecting innocent civilians, lawful counterterrorism must
be conducted morally and in accordance with existing international and domestic law
obligations. Otherwise, ensuring implementation of restrained measures
emphasizing identification of specific targets is all but a tragic non-starter.

32. The United States largely utilizes unmanned weapons (unmanned aerial vehicles, or UAVs),
while Israel relies mainly on firing missiles from manned helicopters.

33. See Marshall Billingslea, Combating Terrorism Through Technology, NATO REV. (Autumn
explosive devices, or homemade bombs, are the current weapon of choice for terrorists and greatest cause
of casualties among Allied forces and civilian populations in terrorist attacks. These weapons are
deployed and employed using a wide range of means and techniques, including car and truck-bombs,
roadside bombs and suicide bomber belts and jackets.”). For further discussion regarding terror
bombings, see generally Amos N. Guiora, Pre-empting Terror Bombing: A Comparative Approach to

34. Defiant Hamas Hits Israel with Rockets, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/
stories/2008/12/29/world/main4689076.shtml (noting that “[s]ince 2005, Hamas militants and their allies
have launched more than 6,000 rockets at Israeli targets”); see also Amos N. Guiora, Legal Aspects of
‘Operation Cast Lead’ in Gaza, JURIST (Jan. 11, 2009), http://jurist.law.pitt.edu/forumy/2009/01/legal-
aspects-of-operation-cast-lead-in.php (discussing Israel’s justification of Operation Cast Lead in response
to the Hamas rocket attacks on Israel).

35. See OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP’T OF STATE, COUNTRY
(discussing terrorist organizations’ attempts to acquire or develop weapons of mass destruction).

36. On the eve of the 1956 Sinai Campaign, curfew was imposed on villages whose residents were
Israeli Arabs. When Border Police soldiers assigned to enforce the curfew asked for instructions
regarding the fate of the field hands who, when they were to return to the village (Kfar Kassem), did not
know of the curfew, their commander responded “God have mercy on them.” That response led to the
killing of forty-seven Israeli Arabs. In a subsequent trial, Judge Benjamin Halevy held that manifestly
illegal orders—that fly like a “black flag”—must be disobeyed. Leslie C. Green, Fifteenth Waldemar A.
Solf Lecture in International Law: Superior Orders and Command Responsibility, 175 MIL. L. REV. 309,

37. See Tom Dannenbaum, Translating the Standard of Effective Control into a System of Effective
Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State
that a “discussion of individual criminal responsibility [for following manifestly unlawful
orders] . . . demonstrates that the criminal nature of a superior order temporarily severs what is ordinarily
a firm chain of command”).
The complexity of identifying the legitimate target in the present conflict—which I agree should be deemed an “armed conflict short of war”—poses extraordinary challenges. This need is particularly acute as international law does not provide clear criteria or criteria extending beyond the four “holy grails” of international law: the principles of military necessity, collateral damage, proportionality, and alternatives. In the legitimate target discussion, it is increasingly questionable whether those four principles provide sufficient direction to commanders making “real time” decisions.

Protecting a civilian population does not justify non-target-specific counterterrorism; the measure must be based on legal, moral, and operational criteria and guidelines. This is predicated on aggressive self-defense with legitimate operational requirements; however, the road map international law provides is unclear, particularly because the conflict itself is inherently nebulous. The “on the ground” commander is placed in the difficult position of operating in a “gray” zone largely marked by amorphousness and vagueness. Simply put, when an “open fire” order may be given is, in many circumstances, unclear; this is particularly the case when ambiguity surrounds the question of whether an identified target individual poses a sufficient enough threat regarding either the future or present.

III. TARGETING CRITERIA FROM JUST WAR THEORY TO ASYMMETRIC WARFARE

The codified laws of armed conflict, as they exist today, are insufficient to deal with the threats posed by modern terrorist organizations. International law is behind the curve regarding the national security dilemmas nation-states currently confront. This deficiency is particularly apparent when it comes to defining who is a legitimate target and when. In order to appreciate the inadequacies of current operational paradigms, examining the evolution of targeting criteria throughout history is enlightening.

In the fifth century, St. Augustine helped articulate a theory that granted moral legitimacy to warfare and became the foundation for modern military philosophy. The Just War Doctrine, expanded and refined by subsequent scholars, including St. Thomas Aquinas, acknowledged that resorting to war may sometimes be necessary


39. For further discussion on this issue from the commander’s perspective, see generally Matthew V. Ezzo & Amos N. Guiora, A Critical Decision Point on the Battlefield—Friend, Foe, or Innocent Bystander, in SECURITY: A MULTIDISCIPLINARY NORMATIVE APPROACH 91, 91-95 (Cecilia M. Baili eit ed., 2009) and Amos N. Guiora & Martha Minow, National Objectives in the Hands of Junior Leaders, in COUNTERING TERRORISM AND INSURGENCY IN THE 21ST CENTURY 179 (James J.F. Forest ed., 2007).

40. This section is, admittedly, a western-centric version of the evolution of warfare.

to obtain justice and to protect peace. Inherent in this theory are criteria and conditions regarding the legitimate use of force. These conditions include the exercise of discrimination and proportionality and the prohibition against targeting non-combatants.

The medieval code of chivalry, which revolved around the concept of knighthood, added another branch to the evolutionary tree of western warfare. Chivalry existed as a code of conduct for knights and placed an emphasis on honor, which became a dominant theme regarding how knights could behave on and off the battlefield. It was honorable and appropriate to target opposing knights on the battlefield, but it was against the code of chivalry to either attack another knight's horse or the weak and defenseless. According to Professor Michael Walzer, "some sense of military honor is still the creed of the professional soldier, the sociological if not the lineal descendent of the feudal knight." The U.S. Army specifically instructs its soldiers that the law of war requires them to "conduct hostilities with regard for the principles of humanity and chivalry."

The Treaty of Westphalia (1648) established the modern framework for warfare—a framework inextricably linked to the concept of the modern nation-state. Perhaps the most important development that came from this time period, as it relates to current targeting issues, was the evolution of war into a public, state-sponsored enterprise. Uniforms became standardized and soldiers became increasingly professionally trained; the transition of war into a public enterprise increased transparency regarding norms and expectations of behavior and conduct.

The centuries that followed saw the codification of the modern rules of warfare. In 1863, in the midst of the American Civil War, Francis Lieber drafted the Instructions for the Government of Armies of the United States in the Field, subsequently known as the Lieber Code. According to Article 20 of the Lieber Code:

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42. Donovan, supra note 41.
43. Id.
44. SOLIS, supra note 24, at 5.
45. Id.
46. RICHARD W. KAEPNER, CHIVALRY AND VIOLENCE IN MEDIEVAL EUROPE 170 (1999).
47. WALZER, supra note 41, at 34.
48. LAW OF WAR HANDBOOK, supra note 38, at 2 (quoting U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, 3 (1956)).
49. See Christopher Harding & C.L Lim, The Significance of Westphalia: An Archaeology of the International Legal Order, in RENEGOTIATING WESTPHALIA 1, 5–6 (Christopher Harding & C.L. Lim eds., 1999) ("[T]he Treaty of Westphalia symbolically indicated a sea-change in international organization—the transition to a system of sovereign states . . . .").
51. See Christopher Kurtz, The Difference Uniforms Make: Collective Violence in Criminal Law and War, 33 Phil. & Pub. Aff. 148, 160 (2005) ("The systematic uniforming of armies in fact tracks the post-Westphalian establishment of a system of internally ordered, sovereign states . . . . A norm that war should be between uniformed combatants simply mirrors the claim that war is a relation between states, not citizens.").
52. Ascorihuela, supra note 50, at 328–29.
Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.\(^{54}\)

The Lieber Code specifically draws a distinction among enemies between combatants and non-combatants\(^{55}\) and articulates a class of protected persons and property.\(^{56}\) Though never used expressly as a code of conduct by other states, the Lieber Code informs many international treaties and conventions of the nineteenth and twentieth centuries.\(^{57}\)

The Hague Conventions of 1899 and 1907 established important restrictions regarding battlefield conduct that are still in effect today.\(^{58}\) The Hague Conventions are generally referred to as the “means and methods” of warfare.\(^{59}\) To be defined as a combatant—or “belligerent,” in Hague parlance—a soldier, militia member, or volunteer must meet four conditions: (1) operate under the command of a superior officer, (2) wear a fixed, distinctive emblem that is recognizable at a distance, (3) carry arms openly, and (4) behave in accordance with the laws and customs of war.\(^{60}\) The Hague rules prohibit attacking undefended towns, villages, habitations, or buildings and also prohibit killing or wounding “treacherously individuals belonging to the hostile nation or army.”\(^{61}\)

In the wake of World War II, the Geneva Conventions further codified and solidified the rules of modern warfare.\(^{62}\) The Geneva Conventions divided armed

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54. Id. art. 20.
55. Id. art. 155. Interestingly, the Lieber Code also differentiates between citizens who sympathize and citizens who aid the rebel movement. The code goes on to say that the disloyal citizens should be expelled, imprisoned, or fined if they refuse to declare loyalty to the legitimate government. Id. arts. 155–56.
56. Id. arts. 35, 44.
57. See, e.g., LAW OF WAR HANDBOOK, supra note 38, at 78 (“Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.”).
58. See generally Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.
59. LAW OF WAR HANDBOOK, supra note 38, at 3.
61. Id. arts. 23, 25.
conflict into two categories: armed conflict between two or more states (also known as an international armed conflict or IAC)\(^6\) and armed conflict not of an international nature occurring within the territory of a state (also known as a non-international armed conflict or NIAC).\(^6\) According to the Geneva Conventions, "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ."\(^65\) Thus, a soldier who has put down his or her weapon, has stepped out of uniform, and has returned to civilian life can no longer be considered a legitimate target;\(^65\) conversely, a soldier during wartime—who is in uniform and carrying arms—may be considered a legitimate target.\(^67\)

In 1956, the U.S. Department of the Army published its Field Manual 27-10 (FM 27-10).\(^68\) The Army subsequently updated the manual as the Law of War Handbook in 2005.\(^69\) FM 27-10 does not preclude attacks on individual soldiers of the enemy—whether in the "zone of hostilities . . . or elsewhere."\(^70\) but it does prohibit specific targeting of civilians.\(^71\) According to FM 27-10, both combatants and those objects that make an effective contribution to military action are targetable.\(^72\)

Finally, the Additional Protocols to the Geneva Conventions (1977) introduced the concept of direct participation in hostilities—a new class of combatants (occasionally referred to as those who DPH or are DPH-ing).\(^73\) Article 13(3) of Additional Protocol II asserts that "[c]ivilians shall enjoy the protection afforded by [this portion of the protocol], unless and for such time as they take direct part in hostilities."\(^74\) Civilians who take direct part in hostilities are not lawful belligerents under the Geneva Conventions, nor are they afforded immunity from attack or the prisoner of war protections laid out in the various international treaties governing armed conflict.

The nature of armed conflict has changed dramatically in the past century, most notably in two ways: (1) weaponry has evolved significantly and (2) the actors are different. The rise of non-state actors, acting outside the purview of the nation-state, has led to what scholars term "asymmetric warfare."\(^75\) Those who do not abide by international conventions and treaties, or the general laws of warfare, place the nation-state in an extraordinary quandary regarding the appropriate targeting paradigm. It is to that issue that we now turn our attention.

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63. GC I-IV, supra note 62, art. 2.
64. Id. art. 3.
65. Id.
66. LAW OF WAR HANDBOOK, supra note 38, at 169.
67. Id.
68. FIELD MANUAL 27-10, supra note 48.
69. LAW OF WAR HANDBOOK, supra note 38.
70. FIELD MANUAL 27-10, supra note 48, art. 31.
71. Id. art. 25.
72. Id. art. 40(c) (as amended July 15, 1976).
73. AP II, supra note 62, art. 13(3).
74. Id.
IV. THE NON-STATE ACTOR AND INTERNATIONAL LAW

When a state is engaged in conflict with a non-state actor, the state is—ironically and counterintuitively—at a profound disadvantage. Asymmetric warfare—where the state possesses strength and means disproportionate to that of the non-state actor—is an unquestionably apt description of many current conflicts. However, because most states seek to conduct themselves in accordance with international law, the advantage they possess cannot be utilized. Conversely, non-state actors have chosen to operate free from such limits; they are, therefore, able to maximize the means available to them. The self-imposed limits paradigm, then, is an essential aspect of the legitimate target discussion.

While terrorists target innocent civilians in an effort to advance their respective causes, international law demands that the state distinguish between innocent civilians and combatants; the former are not legitimate targets whereas the latter are. However, from an operational perspective, implementing the distinction between civilian and combatant is enormously complicated, largely because the contemporary "zone of combat" is far different from the battlefield of traditional warfare. In the zone of combat, innocent civilians and combatants are often indistinguishable, whereas on the traditional battlefield, combatants were readily identifiable.

According to the traditional law of armed conflict, in order to be defined as a lawful combatant—and thus a person who may rightfully be identified as a legitimate target on the battlefield—a participant in a conflict must carry his weapon openly, belong to a chain of command, have readily identifiable insignia, and follow the laws of war. Because terrorist organizations deliberately fail to distinguish themselves, identifying the legitimate target is exponentially more complicated. In other words, non-state actors consciously place their own civilian population "at risk" by blending in. Additionally, human shielding, a clear violation of international law, is practiced by non-state actors in an effort to minimize the state's ability to operationally engage legitimate targets. That is, terrorists seek to protect themselves by surrounding themselves with innocent civilians. Colonel Richard Kemp, CBE, describes this practice:

In Gaza, according to residents there, Hamas fighters who previously wore black or khaki uniforms, discarded them when Operation Cast Lead began, to blend in with the crowds and use them as human shields.

We have of course seen all this before, in Lebanon, in Iraq and in Afghanistan.

Today, British soldiers patrolling in Helmand Province will come under sustained rocket, machine-gun and small-arms fire from

76. GC III, supra note 62, art. 4(2).
77. GC IV, supra note 62, art. 28.
within a populated village or a network of farming complexes containing local men, women and children.

The British will return fire, with as much caution as possible.

Rather than drop a 500 pound bomb onto the enemy from the air, to avoid civilian casualties, they will assault through the village, placing their own lives at greater risk. They might face booby traps or mines as they clear through.

When they get into the village there is no sign of the enemy. Instead, the same people that were shooting at them twenty minutes ago, now unrecognised by them, will be tilling the land, waving, smiling and talking cheerfully to the soldiers.80

There is, then, a significant burden imposed on the state: in determining when to operationally engage an identified legitimate target, the state's working assumption must be that the individual has deliberately surrounded himself with innocent individuals. In the context of operational counterterrorism, then, the state has to determine what costs it is willing to incur with respect to collateral damage. Effective and lawful counterterrorism is predicated on successful targeting of a specific, identified individual; killing innocent individuals— in addition to raising significant questions with respect to collateral damage— also has significant "blowback" potential that enlarges the circle of potential terrorists.

However, the state has both the right to engage in preemptive self-defense and the obligation to protect its own innocent civilian population. The operative question is whether the willful endangerment of innocent individuals by non-state actors must, necessarily, deter the state from engaging in operational counterterrorism. That is, identifying the legitimate target and determining when that individual is a legitimate target (in the context of what activities the individual must be involved in to determine his legitimacy) are but two of the three steps in the decision whether to engage. The third step— on the assumption that the first two have been correctly assessed— is no less complicated, as it raises profound moral and legal dilemmas.81

In turning asymmetric warfare theory on its head, non-state actors, in essence, seek to take advantage of the state's commitment to international law. The introduction of innocent civilians as human shields in the legitimate target decision-making process illustrates the difference between traditional warfare and modern conflicts. In the former, soldiers fought soldiers, tanks with soldiers attacked tanks with soldiers, fighter planes flown by highly trained pilots engaged planes flown by highly trained pilots, and fully manned battle ships engaged fully manned battle ships. The legitimate target dilemma was less convoluted— until surrender, capture,

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81. For an analysis of ethical dilemmas in operational counterterrorism, see generally Amos N. Guiora, Teaching Morality in Armed Conflict: The Israel Defense Forces Model, 18 JEWISH POL. STUD. REV. 3 (Spring 2006) (discussing military culture in the modern context); Walzer, supra note 41; Asa Kasher & Amos Yadlin, Military Ethics of Fighting Terror: An Israeli Perspective, 4 J. MIL. ETHICS 3 (2005) (discussing the principles of military ethics when fighting terror).
injury, or death, a soldier was rightfully considered a legitimate target.\textsuperscript{82} This type of clarity no longer exists.

Arguably the most complicated dilemma in modern conflict is what degree of involvement is required for an individual to become a legitimate target. However, as Colonel Kemp made clear, targeting an individual as a legitimate target is fundamentally more complicated than mere identification of the individual as a legitimate target.\textsuperscript{83} The decision by non-state actors to use human shields is, then, an extraordinarily significant "x factor" in the legitimate target discussion. It manifests a fundamental change in how combat is conducted on two distinct levels: it is a major violation of international law, and it represents a willingness to expose an otherwise innocent individual to extraordinary danger.

It is, frankly, counterintuitive to what soldiers are taught. While soldiers are, obviously, trained to kill the identified enemy, the emphasis is on the identified threat and the goal is to minimize potential harm to the innocent population of the other side. Human shielding reflects a policy and philosophy whereby innocent individuals (whom the soldier is taught to avoid) are willfully endangered by their "own side" in the name of the cause. Ironically, then, from the perspective of non-state actors, individuals defined as innocent civilians by international law are treated as permissible targets.

However, the state must exercise extreme caution in any unilateral broadening of how the term "legitimate target" is defined. The question, as will be discussed below, is whether an individual poses a threat and what the level or degree of that threat is. There is great danger in applying too liberal a definition to the term "legitimate target." The ramifications would be inevitable: unwarranted targeting of individuals whose actions do not endanger state security. The results from a legal, moral, and effectiveness analysis would be deeply troubling.

Defining an individual as a legitimate target in accordance with international law requires adopting a strict definition of threat; otherwise, individuals only tangentially involved in counterterrorism might be targeted. That said, herein lies the rub: as was made clear in the course of Operation Cast Lead (OCL), Israel unilaterally expanded the definition of legitimate target to include individuals who, prior to OCL, would not have been defined as legitimate targets.\textsuperscript{84} The adoption of this expanded model of legitimate target was based on the theory—adopted from the suicide bomber paradigm—that the firing of 6,000 missiles into Israel from 2005 to

\textsuperscript{82} Law of War Handbook, supra note 38, at 169–70. In that spirit, when visiting the parents of a soldier under my command who had been injured in a suicide bombing, I sought (unsuccessfully) to explain that from the perspective of terrorists, a soldier—whether armed or not—is a legitimate target. I also sought (again, unsuccessfully) to explain to the parents that a terrorist attack can only be directed against innocent civilians (and not soldiers). As I have repeatedly mentioned to colleagues, this effort on my part (which thoroughly failed) also represents a classic example of the rule that "silence is golden."

\textsuperscript{83} For examples of human shielding, see Doretos23, Hamas Using Children as Human Shield, YOUTUBE (Jan. 2, 2009), http://www.youtube.com/watch?v=J08GqXMr3YE (showing Hamas using children as shields); Noah Davis, Pro-Qaddafi Forces Use CNN Video Crew, Reuters Journalists as Human Shields, BUS. INSIDER (Mar. 21, 2011), http://www.businessinsider.com/pro-qaddafi-forces-use-cnn-video-crew-reuters-journalists-as-human-shields-2011-3 (showing pro-Qaddafi forces using journalists and news crews as shields to impede an attack); Jerusalemnews, Hamas—Human Shield Confession, YOUTUBE (Mar. 18, 2008), http://www.youtube.com/watch?v=g0WJX2nt4Y&feature=related (stating that Hamas has used women, children, and the elderly as human shields).

\textsuperscript{84} Guiora, Proportionality "Re-Configured", supra note 29, at 13.
2008 required a sophisticated infrastructure and that individuals involved in its various components were deemed legitimate targets.\textsuperscript{85} That is, both the severity of their actions and the continuous nature of their involvement justified—from Israel’s perspective—defining those involved in distinct aspects of the missile firing infrastructure as legitimate targets.

As discussed below, this unilateral expansiveness implementing a broadened definition of legitimate target implies a significant burden and responsibility for both decision-makers and boots-on-the-ground commanders. While, from an operational perspective, the conclusion that those involved in an infrastructure are legitimate targets is understandable, the discussion cannot end there. The legal and moral implications in applying a broadened definition significantly increase the likelihood of harm to otherwise innocent individuals who cannot be classified as legitimate targets, whether the term is broadly or narrowly defined. There is, however, an important caveat to this “word of caution”: the increasing sophistication of terrorist networks arguably justifies adopting—with great care—a broadened definition of legitimate target.

V. DEFINING THE LEGITIMATE TARGET

The scenario below is intended both to make the discussion more concrete and to place the reader in the decision-maker’s shoes. Furthermore, it is intended to highlight the extraordinary complexity of the decision-making process in determining whether an individual is a legitimate target. To that end, \textit{I suggest the following definition for a legitimate target in the state/non-state actor conflict: An individual who, according to intelligence information received and analyzed from at least two distinct sources (therefore corroborated), intends in the future to either commit or facilitate an act of terrorism that endangers national security.}

In addition to asking whether the individual is or will be involved in an act of significant terrorism, the decision to categorize the target as legitimate requires determining what act the individual must be engaged in when “hit.” This is the “when” question. For pre-emptive self-defense to be lawful, involvement—however defined—must be sufficient to define the target as legitimate. The second part of the analysis is no less important than the first. In analyzing the additional but equally important question, decision-makers and commanders must determine whether the target is actively and presently involved in some level of conduct, including “mere” planning. Re-articulated: is the theory of “continuum”\textsuperscript{86} sufficient without narrowly defining what the individual’s actions must be when authorizing his killing?

There is, obviously, a danger in adopting the continuum theory; if applied to its logical end, it suggests that once the intelligence community defines an individual as a legitimate target his actions thereafter are, largely, irrelevant. This, naturally, raises concerns as to whether, once defined as legitimate, an individual’s status is subject to review and if the operational opportunity presents itself to engage him as a legitimate target regardless of what he is doing at that specific moment. Conversely, to demand that the state target an individual only when specifically engaged in the act for which he was initially deemed legitimate imposes an unrealistic burden. The

\textsuperscript{85} Id. at 11–13.

\textsuperscript{86} The theory of “continuum” consists of viewing legitimacy on a time-line from initial planning to fruition without need for a particular act to occur to justify killing the target defined as legitimate.
test, then, in determining whether an individual is a legitimate target demands assessing the level of his involvement ranging from planning to executing a specific act of terrorism.

In order to ensure that operational counterterrorism be both legal and moral, I propose the following:

(1) A target must have made significant steps directly contributing to a planned act of terrorism.

(2) An individual cannot be a legitimate target unless intelligence indicates involvement in future acts of terrorism. 87

(3) Before a hit is authorized, it must be determined that the individual is still involved and has not proactively disassociated from the original plan.

(4) The individual's contribution to the planned attack must extend beyond mere passive support. 88

(5) Every effort must be made to minimize collateral damage. However, the willful endangerment by the non-state actor of its own civilian population need not be a deterrent from implementing an authorized act of preventive self-defense.

(6) Verbal threats alone are insufficient to categorize an individual as a legitimate target. 89

The following scenario will help illustrate the need for these criteria:

Captain James Smith reported to the Battalion Command Post outside of Kabul, Afghanistan. He was anxious to receive the next mission for India Company. Captain Smith and his men had been actively engaging al Qaeda supported militants over the past 2 weeks. They had successively conducted raid operations against militant compounds near the Afghanistan and Pakistan border. On each occasion, the militants were caught off-guard and therefore had little opportunity to offer resistance.

Captain Smith sat in the Command Post listening to the latest intelligence reports from the Battalion Intelligence Officer. The intelligence reports indicated an unusually large amount of activity from the local civilian population in and around suspected militant strongholds. Captain Smith noted this as the Battalion Commander stepped into the tent to issue the operations order for the next day. India Company was to conduct an early morning raid on a suspected militant compound near the southeastern Afghanistan and Pakistani border. Unmanned aerial vehicles provided imagery that indicated that the militants were consolidating and re-grouping in a large clay and brick enclosed compound at the base of Hill 402.

87. Retribution and revenge for past acts would be violations of international law.

88. Though, as acts of terrorism require distinct contributions by numerous actors, the legitimate target categories extend beyond the planners and executors.

89. However, arrest and interrogation may be justified on the grounds of verbal threats—in accordance with relevant criminal law statutes—depending on operational circumstances.
India Company was to seize the objective by force and consolidate on the compound so that follow-on forces could conduct a thorough search of the compound for weapons caches and any other valuable intelligence. Captain Smith left the Command Post confident about his mission and anxious to brief his subordinates. Captain Smith and his men infiltrated to the objective under the cover of darkness and reached the compound about an hour before their pre-dawn, coordinated attack. As Captain Smith and some of his subordinate leaders were conducting a visible reconnaissance of the compound using their night vision devices, they began to notice a group of women and elderly men starting to walk the perimeter of the compound about an hour before dawn... just when the attack was supposed to launch.

The women and elderly men appeared to be unarmed, but seemed to be walking the perimeter of the compound in a fashion normally associated with sentries walking their post. Captain Smith received a call on the radio from the Battalion Commander asking him to launch the attack as planned, as the follow-on forces were on their way. Captain Smith knew he was at a critical decision point... were these people walking the perimeter of the compound innocent civilians or were they working with the militants and therefore legitimate targets?"
are imminent.\textsuperscript{92}

(3) Long-range threats: threats that \textit{may} reach fruition at an unknown time\textsuperscript{93}

(4) Uncertain threats: threats that invoke general fears of insecurity

Nevertheless, for the criteria model to be truly effective, it must answer the two questions that are at the heart of this Article. By example, the Israeli model is threat based; that is, if an individual has been identified by a source as posing a present or future threat, and this individual’s actions will endanger state security, then he is a legitimate target for a targeted killing.\textsuperscript{94} One of the most important questions in putting together an operational “jigsaw puzzle” is whether the received information is actionable; that is, does the information 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. This effort is essential to counterterrorism measures reflecting enhanced objectivity and minimal subjectivity in the decision-making process. To that end, the intelligence and the source who provided the information both must be subject to rigorous analysis. The charts below articulate guidelines for determining whether the intelligence is sufficiently actionable.\textsuperscript{95}

<table>
<thead>
<tr>
<th>Test</th>
<th>Prong</th>
<th>Definition/Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reliable</td>
<td>Past experiences show the source to be a dependable provider of correct information. The test requires discerning whether the information is useful and accurate, and demands analysis by the case officer regarding whether the source has a personal agenda/grudge with respect to the person identified/targeted.</td>
<td></td>
</tr>
<tr>
<td>Viable</td>
<td>Is it possible that an attack could occur in accordance with the source’s information? That is, the information provided by the source indicates that it is in the realm of the possible and feasible that a terrorist attack could take place.</td>
<td></td>
</tr>
<tr>
<td>Relevant</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>Corroborated</td>
<td>Another source (who meets the reliability test above) confirms the information in whole or part.</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{92} For example, a foreseeable threat would be premised on “valid intelligence that indicates that terrorists will shortly begin bringing explosives onto airplanes in liquid substances.” AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 97 (2009).

\textsuperscript{93} For example, terrorists training with no operational measure specifically planned would be an example of a long-range threat. \textit{Id.}

\textsuperscript{94} HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. 53(4) PD 459 [2005] (President Beinisch, concurring); see also GUIORA, GLOBAL PERSPECTIVES, supra note 5, at 177 (detailing the two elements necessary for the Israeli government to order targeted killings: (1) that the target present a serious threat, and (2) that reliable information clearly implicates him).

Source

- 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 a 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?
  - 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?
  - Key to determining the proper forum for trying suspected terrorists.

Target

- Who is the **“target”** of the source's information?
  - 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 at all times
  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. The financier is 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?

These charts are subject to two important caveats: independent corroboration that the information provided by the source is reliable and verification that alternatives to mitigating the threat are either unavailable or irrelevant. The Israel Supreme Court (sitting as the High Court of Justice) addressed this issue in *The Public Committee Against Torture in Israel vs. The Government of Israel*.

In his seminal decision, President (akin to Chief Justice) Barak wrote the following regarding identification of the legitimate target:

On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home,” and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.

With respect to the protection of innocent civilians, President Barak wrote:

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” (§51(3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted,

96. *See H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. 53(4) PD 459, paras. 39-40, 60-61 [2005] (finding that first “[i]nformation which has been most thoroughly verified is needed regarding the identity” of the civilian and that “no other less harmful means” are available).

97. *Id. para. 39.*
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.

CONCLUSION: MOVING FORWARD

In order to simultaneously broaden and narrow the definition of a legitimate target, the six-point proposed checklist facilitates enhanced operational counterterrorism while seeking to minimize the loss of innocent life. From an operational perspective, the human shielding of otherwise innocent individuals introduces a highly problematic “x factor” in the decision-making process. Under no circumstances are individuals used as human shields legitimate targets. However, if an individual has been correctly identified as a legitimate target and is presently engaged in an act of terrorism, then the two-part test required to define an individual as a legitimate target is met. While the commander is obligated to minimize collateral damage and seek alternatives, the presence of a human shield—in and of itself—does not mitigate the commander’s right to engage the identified legitimate target.

Unlike traditional warfare, the state/non-state conflict requires a rearticulation of international law in order to facilitate lawful operational counterterrorism. The legitimate target discussion is, in many ways, at the core of this debate. As demonstrated in the vignette above, the decision making—in identifying the legitimate target—is extraordinarily complex. However, precisely because these are decisions that must be made, implementation of a rationally based approach predicated on checklists and relying on real-life scenarios (such as the vignette) will significantly contribute to more effective, lawful operational counterterrorism.

While targeting criteria were, unequivocally, more clear-cut a century ago, nation-states do not have the luxury of waiting for international law to catch up with the conflict of today. As the discussion above has highlighted, the legitimate target discussion raises profound questions from operational, legal, and moral perspectives. Operation Cast Lead is the operational manifestation of a broadened legitimate target definition; arguably, it represents the future of operational counterterrorism. If that is the case—unlike the extraordinary, resource-heavy, target-specific killing of Bin Laden—then the proposed six-point checklist suggests a way forward facilitating operational decision making of contemporary commanders engaged in an extraordinarily complex armed conflict with non-state actors beholden to neither international law nor morality.

98. Id. para. 60.