On the Legality, Morality, and Effectiveness of Targeted Killing

By Tate Krasner

Predator drones have been used for many targeted killings.

"Targeted killing provides sovereign nations a legal, moral, and potentially effective method for countering the immediate and pressing threat of terrorism"

The outbreak of the Second Intifada in September of 2000 brought about a controversial shift of Israeli strategy in response to unconventional methods employed by Palestinian militants. At the height of the conflict, University of Haifa Professor Daniel Statman stated:

> "The threat of terror has found the West widely unprepared to deal with it. The standard means of waging war are irrelevant to contending with this threat...Hence, to effectively stop terror, a different model must be sought."[1]

The model developed by Israel was the contentious policy of targeted killing. Since the eruption of hostilities, Israeli academics, officials, and policymakers have engaged in extensive debate over the legality, morality, and effectiveness of the practice. While clear answers have yet to emerge, the importance of such dialogue cannot be understated. The sophistication and ubiquity of modern terror organizations have changed the way that sovereign nations wage war. As this paradigm shifts, it is vital to intensely scrutinize new security tactics in order to ensure that they not only achieve their objectives, but that they do so in a manner that is in agreement with existing legal and moral standards. The practices of today, both tacit and official, serve as precedent for future policy around the world.

To begin, targeted killing is not assassination, but rather "an act of killing a prominent person selectively, intentionally, and for political (including religious) purposes."[2] While targeted killing and assassination may share certain characteristics, they differ in two fundamental ways. First, the term assassination

carries with it an intrinsic negative moral connotation as "murder by treacherous means." Second, "assassination usually refers to the killing of senior political officials."[3]

What, then, is targeted killing? For some, such as Professor of International Relations Steven R. David, targeted killing is simply "the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval."[4] Yet, targeted killing includes two key distinctions that separate it from David's generalized definition. First, the target must present a clear, serious, and pressing threat to the safety and security of the public. How direct this threat is can vary. In the case of Israel during the Second Intifada, targets presenting a direct threat included not only immediate threats, such as a suicide bomber or a gunman, but also accomplices, such as a bomb-maker or a driver. Second, "there also must be no reasonable alternative to the targeted killing."[5] Capturing, arresting, or incapacitating a militant is almost always preferable from a legal, moral, and strategic standpoint. These methods align with democratic, civil, and international law and can also provide invaluable intelligence. However, such methods come at a cost, not only to police and military forces, but to civilians as well.

Gary D. Solis of the Georgetown University Law Center provides a comprehensive and effective definition of targeted killing, one which will serve as the primary definition throughout this paper:

> "The intentional killing of a specific civilian who cannot reasonably be apprehended, and who is taking a direct part in hostilities, the targeting done at the direction and authorization of the State in the context of an international or non-international armed conflict."[6]

While current international law does not directly address the subject of targeted killing, it may be argued that the practice is legally justified under the principle of self-defense. It is the foremost duty of the state to protect its citizens, and international law allows sovereign nations the right to defend themselves. Historically, nations have had to defend themselves from other sovereign nations, and, accordingly, international law and law of armed conflict primarily address interstate hostilities. Yet, the number, frequency, and intensity of interstate wars have declined.[7] Instead, conflicts have increasingly tended to be intrastate civil wars, and the emergence of non-state actors, poses new threats to sovereign nations.

The question now is whether traditional legal principles of self-defense apply to nontraditional conflicts. Philosopher Asa Kasher and former Israel Defense Forces (IDF) Military Intelligence Directorate Amos Yadlin argue that sovereign nations still have the right—and duty—to defend themselves from militants:

> "We take the defense of citizens from terror to be not only a prime duty of a democratic state but also, under present circumstances, as the prime duty, since the danger posed by terror is a relatively new one, at least in some major respects, and is of a special nature."[8]

In the conflict between Israel and Palestine, this defense of citizens manifested itself in the policy of targeted killing, a tactic which falls under the category of what Law Professor Amos Guiora has termed "active self-defense."[9] The main advantage of active self-defense is that it stops terrorist attacks before they occur, saving the lives of countless civilians and military personnel. Active self-defense is preventative

and proactive, differing from the reactive nature of traditional ideas of self-defense.

Yet, active self-defense can conflict with the concept of innocent before proven guilty. Even if corroborated evidence points to the guilt of a suspected terrorist, the act of proactively killing that terrorist denies him or her the opportunity of a fair trial. Ethicist Michael L. Gross of the University of Haifa addresses this problem, stating that targeted killing can be viewed either through a paradigm of law enforcement or a paradigm of war. The law enforcement paradigm views the terrorist as a criminal and "demands that states treat terrorists just as they would any heinous criminal, whether an ordinary lawbreaker or war criminal."[10] Under this paradigm, the terrorist would deserve a fair trial and would have to be found guilty of a crime before any punishment—let alone execution—would be administered. The war paradigm, however, views the terrorist as an enemy combatant, meaning that such rules do not apply. These two paradigms are fundamentally incompatible. Through which paradigm, then, should a sovereign state view terrorists? The answer to this question lies within the behavior of the terrorists themselves.

In essence, it can be argued that terrorists act as combatants but they do not share the characteristics of traditional combatants. They do not wear uniforms, they do not serve in the militaries of sovereign states, and they do not abide by international war law. These characteristics have historically been used to ascertain legitimate military targets. By nevertheless being viewed as combatants through the war paradigm, however, terrorists lose the legal privileges provided by the paradigm of law enforcement.

When addressing the morality of targeted killing, terrorists may also be viewed as combatants. As stated earlier, militants and other non-state combatants differ in several ways from traditional combatants. This is true legally, and it is also true morally. Many traditional combatants are conscripts and draftees, and those who are not often fight for causes they believe to be just or morally right. In contrast, the majority of militants willingly join organizations and causes that the rest of the world deems unjust. If traditional combatants who unwillingly participate in combat are considered legitimate combatants despite their relative moral innocence, then certainly a terrorist who willingly chooses to cause harm and suffering should be considered a legitimate target as well.

Furthermore, in conventional wars, combatants are often killed solely due to their affiliations or uniforms rather than their actions or the threat they pose. Consider two scenarios: in the first scenario, a warplane from Country A drops a bomb on a military base belonging to Country B, killing hundreds of soldiers; in the second scenario, a sniper from Country C eliminates a single terrorist who has been proven, through corroborated intelligence, to be involved in a plot to destroy a supermarket. If all human lives are considered equal, then the second scenario, an example of targeted killing, is preferable, not only because it reduces the total number of lives lost, but also because it limits punishment to the sole person responsible for possible harm. Daniel Statman concludes:

> "Hence, targeted killing is the preferable method not only because, on a utilitarian calculation, it saves lives—a very weighty moral consideration—but also because it is more commensurate with a fundamental condition of justified self-defense, namely, that those killed are responsible for the threat posed."[11]

Ideally, not a single person would perish from war. However, targeted killing perhaps represents a positive moral progression on the spectrum of warfare, as it challenges the indiscriminate mass killing that has been a key feature in warfare for thousands of years. Instead, it advances just war theory because of its emphasis on responsibility.

If terrorists are considered combatants, then the same moral rules that apply to traditional warfare must also apply to the war on terror as well. Under such rules, targeted killing simply represents another method of eliminating an enemy combatant who poses a legitimate threat. Thus, Statman contends, as long as one accepts the moral legitimacy associated with conventional war, one must accept the legitimacy of targeted killing.

Lastly, it is important to note that many moral critics of targeted killing actually criticize poor execution of the policy. For example, if faulty intelligence leads to the death of an innocent person in a mission to kill a terrorist, the fault lies in the intelligence, not the policy itself. Such mistakes far too often have tragic consequences, yet it is unfair—and incorrect—to morally evaluate targeted killing based on factors that have no actual correlation to the policy. Instead, as stated above, targeted killing derives its legitimacy from existing moral standards.

If targeted killing is ineffective in achieving its objectives, however, its legality and morality are irrelevant. To determine the efficacy of targeted killing, it is necessary to first identify the objectives of the policy. Amos Guiora states that the "primary objective" of targeted killing "is the prevention of a terrorist act intended to kill innocent civilians."[12] Two questions must be answered. First, does targeted killing prevent acts of terrorism? And second, does targeted killing protect the lives of innocent civilians?

Comprehensive studies have yet to be published that address either question. However, scholars have begun to observe patterns that provide some direction. It can be difficult to evaluate whether an act of targeted killing prevents an act of terrorism. In some cases, it is relatively simple. For instance, if an agent from Country A eliminates a suicide bomber entering a crowded train station, it is obvious that the agent prevented an act of terrorism. However, if an agent from Country B eliminates a bomb-maker in a terrorist organization, it is still fairly clear that an act of terrorism has been prevented, but it is less evident than in the first scenario. It becomes more difficult to gauge the effectiveness of targeted killing as the targets become further removed from the actual act of violence. Eventually, killing a certain member of a terrorist organization—perhaps an informant or a driver—ceases to be effective.

Targeted killing is successful in damaging the militant infrastructure, both directly and indirectly. Directly, targeted killing eliminates key members who provide valuable services to the organization. Indirectly, targeted killing leads to "a sowing of distrust and confusion amongst terrorist organizations regarding the identity of informants without whom the policy could not be implemented."[13]

Many scholars and policymakers have suggested that targeted killing actually leads to more acts of terrorism. In September of 2002, during the Second Intifada, Steven David wrote that "targeted killings have provoked murderous retaliations, eliminated individuals who might have become pragmatic negotiators for peace, diverted the resources of intelligence agencies from existential threats, 'burned' informers."[14] The effectiveness of targeted killing must therefore be evaluated not only by itself, but also alongside its alternatives.

Other scholars have argued the efficacy

of targeted killing by instead focusing on its long-term effectiveness. While there is a consensus that a focused, aggressive campaign against terrorism has the potential to generate dangerous amounts of revenge and backlash, these scholars contend that such a campaign will undoubtedly destabilize—and eventually destroy—the infrastructure of terrorist organizations over time. Daniel Statman states that, "in the long run, there is good reason to believe that such killings will weaken the terror organizations, generate demoralization among their members, [and] force them to restrict their movements."[15] This "life on the run" is strenuous and unsustainable, and it clearly puts terrorist organizations in a disadvantageous position. Therefore, in terms of weakening existing militant infrastructure and inhibiting any expansion, targeted killing seems to be an effective policy in the long run.

The primary objective of targeted killing is not the elimination of terror, however, and it would be both unfair and unrealistic to deem it so; rather, the objective of targeted killing is to prevent pressing and immediate terror threats that put the lives of innocent civilians at risk. The threat of terrorists and other non-state actors has put modern sovereign nations in a precarious situation. Nations must now defend their citizens from combatants who do not adhere to convention. For this reason, it has never been more important that these nations respond to these threats in a conscientious manner, for their current responses will ultimately generate precedents that both state and non-state actors will follow. Irresponsibly responding to such threats has the potential to provide terrorist organizations justification for future atrocities. Therefore, if targeted killing is to be adopted as a legitimate strategy for eliminating terrorist threats that is effective in both the short-term and the long-term, there must be no doubt that

the policy falls under existing legal and moral standards.

Targeted killing derives its legal legitimacy from two factors. The first factor is the target's status as an enemy combatant, which is established though careful and corroborated intelligence. This status consequentially leads to the second factor, which is the state's right, under international law, to self-defense. When these two factors are considered, targeted killing is simply another strategy sovereign states employ in response to potential threats.

Targeted killing derives its moral legitimacy from existing moral rules of war. If terrorists and other non-state actors are considered enemy combatants, then it logically follows that traditional rules of war should be applied to the practice of targeted killing. In this sense, targeted killing is no more repulsive or disconcerting than conventional warfare. Furthermore, because targeted killing limits punishment to those responsible for harm and reduces civilian casualties, it actually represents an advancement of morality from conventional war.

Ultimately, targeted killing will not end terrorism and military. That is a far more complex challenge that depends on the cooperation, creativity, and activism of leaders and citizens across the world. However, as long as it is executed with responsibility and accountability, the policy of targeted killing provides sovereign nations a legal, moral, and potentially effective method for countering the immediate and pressing threat of terrorism.

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