

Targeting Terrorists Abroad: Ethical Considerations for Employing Remotely Piloted Aircraft

by

Lieutenant Colonel Richard S. Taylor
United States Army



United States Army War College
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Lieutenant Colonel Richard S. Taylor
United States Army

Professor William G. Braun, III
Strategic Studies Institute
Project Adviser

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Abstract

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If targeted killing is removed as an option and arrest is precluded, the remaining alternative—letting the terrorist continue to kill innocent civilians—is surely the least attractive moral option.

—COL Peter M. Cullen¹

When COL Peter M. Cullen penned the above epigraph, the U.S. was engaged in an unacknowledged campaign of lethally targeting individual terrorists by means of Armed Remotely Piloted Aircraft (hereinafter “ARPA”). Some six years later, the U.S. has acknowledged² the use of lethal force in counterterrorism operations “Outside the US and Areas of Active Hostilities”³ and indicated its intent to continue lethally targeting certain terrorists where they are found.⁴ A key component of the U.S. program is the use of ARPAs, commonly referred to as ‘drones’, to launch missile strikes against terrorists located in sovereign states with which the U.S. is not at war. The wording of the U.S. policy implies these strikes may be launched regardless of whether the state in which the terrorist is located is consulted or authorizes the attacks. The legal and ethical norms surrounding these attacks are highly complex and “less than fully settled.”⁵

In an effort to bring some transparency and clarity to the U.S. application of lethal force in non-domestic counterterrorism operations, President Obama directed the release of an unclassified whitepaper that outlined “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.”⁶ Released in May 2013, the whitepaper provided a synopsis of the standards and procedures used by Administration officials to determine whether a specific terrorist located in a third country not at war with the U.S. constituted a legitimate target⁷ for a lethal ARPA strike. While the whitepaper did

provide some clarification, it also highlighted the main ethical schism in the debate surrounding the U.S. use of ARPA's to lethally target individual terrorists. That is, whether the individual terrorist should be treated as a criminal who is afforded arrest and due process under law enforcement rules; combatant under the laws of war who can be killed based on status alone (so long as he or she is not hors de combat); or, non-state actor threat to be addressed under international customary and/or convention based right of Inter-state self-defense.

To many, the U.S. policy indicated a bold—and oft argued uninformed—shift away from the international normative legal framework that had helped keep the peace largely intact since the end of WWII.⁸ Some argue the U.S. policy impermissibly conflates the three traditionally separate legal paradigms of: International Humanitarian Law (the law pertaining to war), Human Rights Law (the law pertaining to peacetime law enforcement), and the law of aggression and Inter-state self-defense. The language of the U.S. policy signals the government's intent to choose, as a matter of policy, which paradigm to apply based on prevailing circumstances and legal constraints.

While the carefully articulated language implies a preference to use lethal force only under circumstances which would trigger the Inter-state self-defense paradigm—and then only if arrest⁹ under the peacetime law enforcement paradigm or capture under either the Inter-state self-defense or law of war paradigm is not feasible—it leaves open the option to employ lethal force under the more permissive law of war standard if prevailing circumstances and legal conditions permit. This concept is not new to international relations. Governments have always—deliberately, intuitively, or otherwise—balanced decisions to go to war, against decisions to undertake limited

attacks in self-defense, against decisions to take law enforcement actions. U.S. military actions against the Barbary pirates and Poncho Villa are two prime examples in U.S. history where law enforcement would not work, war was too drastic a measure, and the U.S. military was sent under the peacetime rules (customary law) of Inter-state self-defense to protect U.S. persons and property.¹⁰ What is new is that the standards and procedures for making such decisions have been consolidated into a single policy document to deal with a single policy issue.

Because of the newness of the policy and the many nuanced limitations on the use of force contained within the policy, it is important that ethicists begin to create a body of moral considerations to inform, define, and compliment the nascent U.S. policy. Much like just war moral theory informs the law of war legal paradigm, a cannon of ethical considerations to aid government and military officials to make morally commendable decisions when presented with uncertain situations should similarly inform the emergent U.S. policy. Military officials are expertly knowledgeable in the laws of war but much less so in the areas of self-defense and law enforcement. As military officials will be required to advise civilian officials on the proper use of military force under the policy, the gap in expert knowledge may pose a significant hazard to the decision-making process.

The purpose of this article is to begin the process of building such a cannon. Advocating the formation of an ethical cannon to inform U.S. policy implies the policy is lawful under prevailing international and U.S. domestic legal frameworks.¹¹ The first section of this article provides context, offering an overview of the U.S. policy, the rationale behind its adoption, and a synopsis of the many critiques of the policy. The

second section outlines the fundamentals of an ethical canon framework to be consulted when weighing decisions of whether a terrorist(s) should constitute a legitimate target for a lethal ARPA strike under the U.S. policy. In conclusion, the article suggests that lethally targeting certain terrorists by means of ARPA strikes under the current U.S. policy may be morally commendable in some circumstances, but that such strikes require heightened ethical scrutiny to ensure the act is morally just under the circumstances; and, the explanatory power of the proffered justification will fully resonate with a very skeptical global audience.

Framing the U.S. Policy Debate

The Presidential Policy Guidance

On May 22, 2013, President Obama signed a classified Presidential Policy Guidance document that outlined the U.S. policy and standards for conducting lethal ARPA strikes against terrorists in states which may or may not be consulted or authorize the attacks and with which the U.S. is not at war. The following day, the White House released an unclassified whitepaper entitled, “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.”¹² This whitepaper outlines the U.S. policy for conducting operations—to include lethal ARPA strikes—against terrorists located outside the U.S. and outside areas of active hostilities, including those states which did not authorize the attacks and with which the U.S. is not at war.¹³ The policy reads in part,

. . . The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives. The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect . . . Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting

a terrorist suspect in a civilian court or a military commission. . . . *Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force.¹⁴

Importantly, the policy implicitly recognizes certain realities about the limitations of law enforcement tools in the international arena; and, the historical precedence of using military forces to perform quasi-law enforcement missions—hostage rescue, counterterrorism, and Inter-state self-defense—outside U.S. borders. International cooperation between state law enforcement agencies is a daily reality. The level of cooperation, however, varies significantly from state to state. So too does the level of fidelity in each state’s criminal justice system. In well-functioning, non-corrupt systems, cooperating governments may be able to undertake multi-national law enforcement operations to stop a terror attack before it occurs. However, conducting counterterror operations in these types of states is rarely the problem. The U.S. policy, consequently, is specifically aimed at eliminating terrorist threats located inside states that are unwilling or unable to prevent terror attacks emanating from within their sovereign territory. Under these types of circumstances, U.S. military forces traditionally have been the national policy makers’ tool of choice to protect U.S. persons and property abroad.¹⁵ Moreover, there should be no misconception; the U.S. does not need to be at war with Al Qaeda or any other entity before it can use its military forces in the context of Inter-state self-defense.¹⁶

The Contemporary Security Environment: Contextualizing U.S. Policy

Combatting the modern form of terrorism, often referred to as transnational terrorism because of its wide reach, poses significant ethical—and legal—challenges for

the state. Professor Asa Kasher and Major General Amos Yadlin, Israeli Defense Forces, consider fighting terrorism to be “significantly different from both military missions of fighting armies and law enforcement missions of fighting criminals.”¹⁷ There are no clashes between professionalized armies on defined battlefields and police officers involved in extra-territorial counterterror operations cannot assume the support of the local citizenry, as those citizens are not party to the same “social contract” as the officer.¹⁸ Moreover, the very reason for the existence of a terrorist organization is to kill and terrorize a citizenry through the use, or fear, of violence.¹⁹ Their adherents are “often morally motivated—indeed highly motivated and strongly convinced of the rectitude of their action.”²⁰ The mere continued existence of a terrorist organization indicates it’s continued intent to pursue violent attacks in furtherance of its objectives.²¹

“Transnational terrorism is arguably the greatest security challenge facing our world today.”²² While not all terrorist organizations are directly associated with al Qaeda, they largely emulate al Qaeda’s core “ideology of global violence and methodology of suicide attacks.”²³ Terror organizations are not, in general, constrained by the same values, mores, or motivating factors of states or other entities.²⁴ Their avowed purpose is to kill²⁵ and they are constrained only through their inability to obtain and then deploy weapons of greater destructive force.²⁶

Since 2003, terrorist organizations have dispersed and become increasingly elusive.²⁷ Outside of Iraq and Afghanistan, individual adherents of the al Qaeda ideology do not live or kill on spatially defined, traditional battlefields. There is growing evidence some live in the well-functioning democracies of Europe and the U.S..²⁸ Other terrorists live in functioning states around the globe. And still others, perhaps the majority, choose

to reside in failed or failing states, where they can exist beyond the reach of traditional law enforcement tools. These terrorists operate worldwide often in close proximity to innocent civilians. Their direct participation in terrorist attacks may be fleeting yet devastating as witnessed in Boston, London, Madrid, and New York City. Proactively combatting this threat is, and will remain, exceptionally difficult.

“Strenuous counterterrorism efforts will remain a fact of our national life for the foreseeable future.”²⁹ Terrorist attacks worldwide show “few signs of ebbing.”³⁰ According to a recent article in *The Economist*, “al-Qaeda and its jihadist allies have staged an extraordinary comeback. The terrorist network now holds sway over more territory and is recruiting more fighters than at any time in its 25-year history.”³¹ This assessment is echoed by numerous other studies.³² Al Qaeda and its affiliated groups continue to seek weapons of mass destruction in the form of biological, chemical, nuclear, and radiological materials.³³ They also continue to recruit westerners to carry out attacks and maintain the capability and desire to attack the west.³⁴ As a result of the enduring terrorist threat, the U.S. must continue to apply all elements of national power to prevent future attacks.³⁵

The U.S. Approach to Security

The U.S. policy complements the gradual government shift towards a ‘whole of government’ layered approach to national security.³⁶ In very general terms this evolving approach to securing the U.S. homeland employs various elements of national power to focus threat identification and removal efforts along multiple concentric rings first outside the country, then along the approaches, and finally inside the U.S.³⁷ As part of this effort, U.S agencies (e.g. Department of Justice, Central Intelligence Agency, Department of Defense, Department of State, etc.) engage the various security

apparatuses, law enforcement agencies, intelligence agencies, and military forces of allied, partner, and other cooperating states to identify and remove potential threats before they reach the U.S. homeland or conduct an attack in the cooperating state.³⁸

The U.S. policy leverages the whole of government layered defense concept, including the contemplated use of law enforcement officers, other government covert operators, and military members to effectuate policy objectives. The U.S. policy preference is to employ traditional law enforcement rules and tools to bring terrorists to justice.³⁹ In many—if not most—cases, the U.S. will be limited to the law enforcement paradigm.⁴⁰ However, the U.S. still considers itself at war with Al Qaeda and its associated forces.⁴¹ The lawful conduct of war is pursued under the more permissive—in terms of applying lethal force—International Humanitarian Law (IHL) paradigm. Additionally, the U.S. always retains the right to act in self-defense under Article 51 of the U.N. Charter⁴² and customary international law⁴³ against states and non-state actors that pose an imminent threat to U.S. citizens, territory, or form of government.

As noted, the U.S. military will, no doubt, continue to play a critical role within the scope of the U.S. policy for some time to come. The U.S. policy contemplates arrest or capture, prosecution in courts or military tribunals, and ARPA strikes under conditions where arrest or capture is not possible. The policy is designed to accommodate an appropriate response—across the law enforcement, self-defense, and law of war paradigms—to terrorist threats while at the same time remaining compliant with U.S. domestic and international law. In some instances, U.S. military members—special operations forces—may be called upon to undertake cooperative counterterrorism operations in third party states to effectuate the arrest of terrorists under law

enforcement rules.⁴⁴ At other times, military members may be required to capture or, as a last option, deploy ARPAs to lethally attack terrorists. Some of these operations will be conducted under the laws of war; some will be carried out under the rubric of Interstate self-defense as articulated in Article 51 of the United Nations Charter and/or customary international law.⁴⁵ How these three paradigms coalesce within the current U.S. policy is discussed next.

Critiques of the U.S. Policy

A recent Pew Research Global Attitudes Project poll found increasing global opposition to U.S. 'drone' strikes.⁴⁶ Critiques of the U.S. policy raise concerns about the legality and morality of U.S. actions. Both concerns impact on the question of whether a terrorist should be lethally targeted under the U.S. policy.

Legal criticisms of the U.S. policy raise concerns about the improper conflation of the three distinct legal paradigms and the perceived diminution of international legal protections. The U.S. policy is seen as a "blurring and expansion of the boundaries of the applicable legal frameworks – human rights law [law enforcement], the laws of war, and the law applicable to the use of Inter-state force [self-defense]."⁴⁷ Many critiques argue this conflation is simply an expedient means for the U.S. government to circumvent the fundamental protections afforded criminal suspects under national and international legal frameworks.

From a human rights law—law enforcement—perspective, combatting terrorism is a law enforcement problem that should be addressed using law enforcement rules.⁴⁸ In general terms, acceptable law enforcement practices should provide the suspect an opportunity to test any evidence of wrongdoing before an unbiased authority prior to being held accountable. Additionally, lethal force should only be employed in cases

where the “offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”⁴⁹ The U.S. policy is seen by many to undermine these basic human rights.⁵⁰ For example, the European Parliament, after conducting studies and holding hearings on the use of armed ‘drones’, recently passed a resolution “to oppose and ban the practice” of what they termed “extrajudicial targeted killings.”⁵¹

Critiques of the U.S. policy also claim it diminishes recognized international norms within the existing law of war and law of Inter-state force paradigms.⁵² In broad terms, these critiques question whether U.S. policy adequately protects the targeted individual’s right to life, innocent civilians from unjustified harm, and the aggressed state’s sovereign right of non-intervention. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, has expressed concern that the U.S. has not defined “the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.”⁵³ While these comments were made prior to the release of the whitepaper outlining the current U.S. policy, they continue to hold true in terms of specifics. The actual policy standards and resultant killings remain largely “cloaked in secrecy.”⁵⁴

The U.S. policy has also sparked a lively ethical debate along the same basic lines. Commentators express concerns that the U.S. policy will reduce traditional moral norms that inform the use of force by states, thereby undermining protections afforded civilians, causing a reduction in martial virtues among military members, and increasing

support of terrorism by populations in areas frequently targeted by ARPA strikes. Their critiques raise concerns that the justifications being offered for lethal targeting are incompatible with accepted moral norms; that innocent civilians are being unjustly harmed; and that U.S. actions are unjustifiably eroding the traditionally accepted threshold for the Inter-state use of force.⁵⁵

There is little doubt the use of 'drones' has made it "easier to kill targets, with fewer political risks to the targeting State."⁵⁶ Domestic political risk is minimized when the state's service members are not placed in harms way.⁵⁷ International political risk is likewise limited when intrusions on another state's sovereignty are restricted in scope and nature as can be done with ARPAs. As political risk is minimized through the increased use of ARPAs, concerns are being raised that the moral threshold for resorting to armed force will continue to precipitously decline in the future.⁵⁸

At the same time, critiques raise concerns that remote operators will be unable to "cultivate or exercise [the] martial virtue" necessary to propagate an ethically sound military culture.⁵⁹ "Riskless warfare," it is argued, "threatens to undermine the moral justification for killing in war even in its application to just combatants."⁶⁰ It can be argued that 'riskless warfare' and the inability to develop virtue through martial combat works to undermine the moral underpinnings of military institutions that rely on remotely controlled devices. The critiques argue the potential moral risk to the U.S. military should not be underestimated. When thresholds of martial virtue erode, combatants are more likely to violate the legal standards and moral codes that inform and define those standards.

Another area of ethical concern is that the targeted ARPA strikes are producing more terrorists than they eliminate and turning populations against the U.S.. According to former Pakistani Minister of State Shahzad Waseem, “The killing is creating more anger and resulting in the recruitment of more people to pursue revenge.”⁶¹ ARPA strikes not only kill, they are also widely seen as a fear weapon, much like the German V1 and V2 flying bombs of WWII. People living in the areas where ARPAs are used change their daily habits to avoid being out when ARPAs are overhead.⁶² They live in constant fear of the next strike. Journalist David Rohde, who survived seven months in Taliban captivity, witnessed first-hand the dialectic of American ‘drone warfare’. Mr. Rohde recognized the efficacy of ARPA strikes as an effective means of eliminating key terrorists. However, he states, these strikes also “provoke intense anger” and weaken “public support” for America.⁶³ From a utilitarian perspective, it is important U.S. actions do more good than harm over the long term.

A fourth area of concern rests with protecting the targeted individual’s right to life. Intentional killing is wrong, but virtually all people “recognize certain exceptions—that is, we concede that there can be instances in which killing is permissible.”⁶⁴ These exceptional circumstances include justifiable self-defense, defense of others, and war.⁶⁵ Regardless of paradigm—war, law enforcement, or self-defense—people judge the justness of intentional killing based on their perceptions of the intent and conduct of the actors. Justification and liability are key moral determinatives.

In general, intentional killing is viewed as justifiable only when it is undertaken in response to an unjust threat of potentially equal—death or serious bodily injury—harm. Intentionally aggressing another makes the initial aggressor liable to attack in self-

defense. In the jus ad bellum tradition, states may wage a 'just' war only in response to an 'unjust' aggression; or, the imminent threat thereof.⁶⁶ The initial aggressor as such assumes a level of liability for his unjust actions and may then be subjected to a just application of force in self-defense. In the jus in bello tradition, individuals are treated differently based on status or conduct. Combatants and civilians directly participating in hostilities pose a threat to opposing forces that makes them liable to attack. Therefore they may be justly targeted when and where located.⁶⁷ Protected persons—civilians and combatants hors de combat—may not be targeted, as they pose no threat to the Soldier. Police officers may apply lethal force only in response to a threat of deadly force or serious bodily harm when less extreme measures are insufficient to neutralize the threat.⁶⁸ Likewise, individuals may use lethal force in self-defense against an unjust threat of deadly force or serious bodily harm when less extreme measures are insufficient to neutralize the threat. The more attenuated the threat in space and time the more difficult it is for people to view the protective application of lethal force as being morally justified. Intentional killings that do not fit within these exceptional circumstances are held out as unjustifiable deprivations of a person's right to life. People judging the morality of such killings, will judge negatively the responsible party.

Finally, the single greatest ethical concern is for the protection of innocent, non-threatening civilians. Many critiques question whether the U.S. policy is sufficiently limiting in nature to ensure actions in conformance with accepted moral norms. All three paradigms require some level of distinction, necessity, and proportionality. That is, the need to act must be born of necessity; actors must be able to distinguish between innocent civilians and those that pose a threat of harm; and, when acting to protect

against an unjust harm, one cannot simply harm innocents with complete moral impunity to prevent harm to one's self or others. There are limits to collateral harm that are paradigm dependent. For example, under the war paradigm, the principle of proportionality stands for the proposition that collateral civilian casualties are an acceptable by-product of war so long as the incidental loss of life is not excessive relative to the anticipated concrete and direct military advantage to be gained from the action.⁶⁹ While a similar proposition exists in both the law enforcement and self-defense paradigms the dimensions are more restrictive.

Need for Ethical Framework Specific to Lethal ARPA Strikes

The contemporary form of Al Qaeda influenced transnational terrorism poses a significant threat to U.S. persons, as well as those of other states. This threat is serious. Adherents of the Al Qaeda brand of ideology are ruthless and do not abide by the ideals of humanity and respect for human dignity. By all accounts, the threat posed by terror organizations is not likely to diminish in the near future and combatting it is hindered by the lack of a coherent, workable framework. The traditional paradigms of law enforcement, law of war, and Inter-state self-defense were designed to handle issues within each discrete area of concern. But, they were not designed to address the threats posed to national and international peace and security by the modern terror organization.

The U.S. policy was crafted to bridge the three discrete paradigms in an effort to bring unity of action against terror organizations. The language hybridizes certain aspects of all three traditional paradigms into a set of very specific policy requirements. Clearly, and one assumes intentionally, the U.S. policy elevates the concept of humanity (capture before kill) to a condition precedent to action under the policy.⁷⁰ The

U.S. policy also aligns the concept of necessity more closely to the peacetime standard of self-defense, requiring liability (of the terrorist to attack by the government) and justification (of the government to attack the terrorist) as conditions precedent to action. Finally, the U.S. policy significantly constricts the permissibility of foreseeable but unintentional civilian casualties (proportionality). While generally consistent with the legal and moral requirements of Inter-state self-defense and law enforcement the U.S. policy turns the law of war and its informing moral paradigm somewhat on its head.

For these reasons, it is important at this early point in the life of the policy to begin to build a set of ethical considerations specific to the policy to help inform and define its material aspects. Clearly, military members will be involved in advising on the policy and in executing operations under the policy. These military officials are expertly knowledgeable in the laws of war and steeped in the just war moral tradition. Their training, however, does not generally extend to peacetime law enforcement rules or the moral considerations for the use of force outside of war. This shortcoming poses a significant hazard to the decision-making process—and the capacity of senior military officials to adequately provide military advise—required under the policy. Of great concern, the express requirements of the policy may take on a completely different meaning to military officials whose experience is largely formed by war and whose education is largely informed by International Humanitarian Law and the just war moral theory. Consequently, it is important to build a cannon of ethical considerations to help inform and define who constitutes a legitimate target for a lethal ARPA strike under the nascent U.S. policy.

Moral Considerations for Determining a Legitimate Target

This section offers some thoughts on what such an ethical cannon might look like. The moral considerations outlined here focus on the specific question of who should constitute a legitimate target for a lethal ARPA strike under the U.S. policy. The framework builds around the three core requirements of the nascent U.S. policy—humanity, liability, and justification. The U.S. policy requires officials determine in advance that arrest, capture, or other lesser means to prevent the attack are not feasible (humanity); that the terrorist has undertaken acts that pose a threat to U.S. persons (liability); and, that lethal force is imminently required—based on trusted, verified information—to protect those U.S. persons (justification).⁷¹ Because the U.S. policy sets the concepts of humanity, liability, and justification as conditions precedent to action, it would be incongruous to argue the laws of war or just war moral theory apply in their traditionally accepted forms for any actions taken pursuant to the policy.

As such, while the ethical framework proposed here relies heavily on the just war moral theory as a starting point, it deliberately de-emphasizes those just war tenets at odds with humanity, liability, and justification. For example, this proposed framework does not countenance the idea that terrorists located ‘outside the U.S. and outside areas of active hostilities’ can be targeted by a lethal ARPA strike based solely on affiliation—or status—as a member of a terrorist organization.⁷² Rather, it follows the express language of the policy to conclude that for such a strike to be morally commendable, an assessment should be made that the terrorist is liable to lethal attack based on his/her own conduct, the state has sufficient justification to exercise lethal force, and the considerations of humanity have been fully explored and support lethal targeting.

The proposed framework draws heavily from extant sources, such as the just war theory, and will appear familiar to those learned in this area. In fact, many of the traditionally accepted moral tenets remain highly salient, albeit in a slightly altered form. Application of this framework to operations previously determined lawful under prevailing domestic and international laws, should ensure the government applies lethal force only in a morally commendable cases that are consistent with the original intent of the policy.

Adherence to Law

The first ethical consideration must be whether the proposed strike complies with U.S. domestic and international law. The U.S. as an entity in the international system has a moral—and legal—duty to uphold its international responsibilities under the UN Charter and other international instruments. The U.S. government has a similar moral duty to abide its own laws. While this proposition seems straight forward, it is not. Various U.S. interpretations of certain key provisions of International Humanitarian Law and Human Rights Law diverge from interpretations forwarded by other states and a number of international bodies. A sound ethical review conducted after the legal review should act to narrow the distance between the divergent interpretations or provide, in the alternative, a thoughtfully crafted moral justification for the strike should it proceed.

It is important to keep in mind that legal considerations dictate what *can* be done while moral considerations help shape what *should* be done. The idea behind completing an ethical review after the operation has been deemed legal is to avoid pursuing national interests as a Melian—“the strong do what they can and the weak suffer what they must”—proposition.⁷³ Might should not make right in American foreign policy. It is not part of Americans’ subscribed national values or beliefs to trample on the

weak. Emma Lazarus' famous sonnet, "The New Colossus," (inscribed on the base of the Statue of Liberty) eloquently captures this American ideal when it states in part, "Give me your tired, your poor, Your huddled masses yearning to breathe free."⁷⁴ More importantly, trampling on the weak is not a proposition the U.S. wants to foster within the international system considering all great powers eventually ebb and all aspiring powers eventually flex their might. As such, ensuring U.S. policies and actions are legally and morally commendable is in our long-term national interest of maintaining a favorable world order based on adherence to rule of law ideals.

Legitimate Authority

Only an appropriate sovereign authority should make the decision to launch a lethal ARPA strike under the U.S. policy. This concept derives from the just war moral theory and it remains fully relevant to actions under the U.S. policy. Traditionally, 'Legitimate Authority' required the decision to go to war be taken by "that person or body of persons generally recognized, by virtue of position in the social framework to possess authority to make such a declaration."⁷⁵ The moral sensibility of this requirement stemmed from the notion that the sovereign authority was in the best position to weigh the costs and benefits of going to war.

The decision to launch a lethal ARPA strike under the U.S. policy is no less significant than the decision to go to war.⁷⁶ In fact, launching an ARPA into the sovereign airspace of another state, with the intent of attacking a target resident within that state, constitutes an act of aggression—act of war—under international law. The actual attack simply aggravates the initial aggression. While this act of aggression may be legally justified under the rules of Inter-state self-defense or viewed as a de minimis violation of sovereignty by the international community, the moral basis for ensuring

such a serious decision is only taken by an appropriate sovereign authority remains fully intact. In a democratic society, this ethical consideration should also act to ensure the official who makes the decision is held accountable to the citizens. Through this check on power, the deciding official's values, beliefs, and morals should remain relatively consistent with those of the citizenry.

Independent Oversight

To ensure accountability, the President should appoint an independent high-level civilian official to review all lethal ARPA strikes after they have been completed. This official should be independent of the government officials who authorize the attacks and the military ARPA operators and commanders who carry out the strikes. The purpose of this review is to ensure the attacks comply with all the legal requirements and conform to the intent of the policy.

Adherence to Intent of Policy

The intent of a public policy should be morally commendable; and, all actions taken in accordance with a policy should be aligned with the original, morally commendable, intent. A morally commendable public policy should effectively address a legitimate public need in a manner consistent with the enduring beliefs, values, laws, and ethics of the community⁷⁷ with the least expenditure of time, life, and money."⁷⁸ At the national level, public policy should also forward national interests.

When considering action under the U.S. policy, officials must first question whether the policy is the right tool to use (i.e. was it intended to apply to the situation under consideration) and then whether the actions proposed are consistent with the original intent. There are a number of limiting features in the language of the U.S. policy. For example, it only applies to terrorists who pose a continuing, imminent threat to U.S.

persons. Two other significant limiting features are the requirements to determine arrest or capture is not feasible and that no lesser reasonable alternatives exist to remove the threat. In essence, morally commendable action under the policy is severely limited by the necessity to act only in self-defense after ruling out arrest or capture.

Just Cause

Actions taken pursuant to the U.S. policy should constitute a 'just cause.' That is, the basis for the use of force must be morally just. It is uncontroverted that the single greatest duty of a state is the protection of its population, territory, and political sovereignty.⁷⁹ However, this duty does not give states carte blanche justification to pursue aggressive polices. States must still act lawfully within the international arena, which means they can only respond to aggression in self-defense. In the context of states protecting their interests through the use of force Cicero states, "the only excuse for going to war is that we may live in peace unharmed."⁸⁰

Only a slight rephrasing of Cicero's quote, 'the only reason for using force against another, is that we may live in peace unharmed,' provides a sound starting point for defining the moral expanse of 'just cause' under the U.S. policy. Conceptually, terrorism will never be 'defeated' as most people understand the term. Victory, as an historically understood ideal—with ticker-tape parades, peace agreements, and a complete cessation of hostilities—is not achievable in terms of countering terrorism. Rather, the objective of the state should be to ensure its citizens can go about their daily activities unmolested by the fear or harm of terrorism.⁸¹

Informed by this standard, a 'just cause' should limit state action under the policy to those situations in which the presumption against lethal force is overridden by considerations of self-defense.⁸² Considerations in this analysis should include, "the

defence of the innocent against armed attack, the recovery of persons or property wrongly taken, or the punishment of evil.”⁸³ There is also good reason to consider the deterrent effect such strikes may have on acts of future terrorism, as part of the ‘just cause’ calculation.⁸⁴ For example, Michael Walzer has opined that ‘preventive force’ may be justified when “dealing with a brutal regime that has acted aggressively or murderously in the past and gives us reason to think that it might do so again.”⁸⁵ Just causes within the scope of this policy would not include animosity, retribution, revenge, vengeance, or an intention to skirt the criminal justice system.

Liability of Terrorist to Attack

Under the U.S. policy, terrorists should only become liable to attack when they cease to be ‘innocent’. ‘Innocent’ in this usage is a term of art applied to people who have “done nothing, and are doing nothing, that entails the loss of their rights,” specifically, in this case, the right not to be lethally attacked.⁸⁶ Individuals become liable to harm when their activities unjustly pose a threat of harm to others. They become liable to lethal attack when their activities pose an unjust, imminent threat of death or serious bodily harm to others. Under the U.S. policy, terrorists become liable to lethal attack when their actions pose a continuing, imminent threat to U.S. persons. Consequently, prior to launching an attack under the U.S. policy, officials must be able to articulate what actions the targeted individual undertook to make him liable to lethal attack.

Proving liability is difficult, especially in counterinsurgency and counterterrorism operations.⁸⁷ The U.S. policy states that lethal force will only be used against targets that pose a “continuing, imminent threat to U.S. persons.”⁸⁸ The quantum of evidence required to reach this conclusion is not further specified. However, a morally

appropriate standard should at a minimum include a quantum of evidence from which a reasonable person knowing the facts and circumstances at hand would conclude that; 1) the targeted individual is an “operational combatant seeking to do harm;”⁸⁹ “part of the operational terror chain;”⁹⁰ or, “actively involved in acts of terrorism;”⁹¹ 2) the targeted person will pose a continuing threat of attack to U.S. persons until removed; 3) the activity of the targeted person poses an imminent threat of attack to U.S. persons; 4) no lesser means than lethal force are available or sufficient to remove the threat.

Liability of Third Party State to Violations of Sovereignty

States too can become liable to uses of force within their sovereign territory through their actions or lack thereof. Within the international community, states are possessed of rights and expected to abide certain defined duties and obligations to other states. The principle of non-intervention in states’ sovereign rights—“territorial integrity and political sovereignty”⁹²—is considered the heart of modern Inter-state relations.⁹³ State’s, in short, are expected to respect one another’s sovereign rights.⁹⁴ As Jeff McMahon aptly points out in his book *Killing in War*, rights “may be overridden by other morally significant considerations” such as protecting a stronger right or preventing a greater harm.⁹⁵ As such, a state may become liable to attack in self-defense if it is an unjust aggressor.⁹⁶ Or, a state may become liable to uses of force by another state in self-defense when the first state is “unwilling or unable to stop armed attacks” from being launched from within its territory against the territory or citizens of another state.⁹⁷ Under these circumstances, an aggrieved state would be morally justified to use lethal force in self-defense, so long as the force used was necessary and proportional. The key moral consideration is to ensure the U.S. duty to protect its citizens outweighs the other state’s sovereign right of non-intervention.

Last Resort

A lethal ARPA strike should not be employed when reasonable, non-lethal means exist to subdue or eliminate the threat short of deadly force. Last resort is a traditional just war concept of the *jus ad bellum*. It stands for the proposition that before unleashing the unpredictable horrors of war, statesmen consider, and undertake when feasible, reasonable lesser means of achieving their objectives. The concept of last resort remains applicable to lethal ARPA strikes for two important reasons. First, it ensures the right to life of the target has been fully weighed against the duty of the state to act. Second, a lethal ARPA strike into another state may be considered an act of aggression—an act of war—by other states in the international system. Before embarking on a course that endangers life, states owe an obligation to all those at risk to fully explore less drastic options.

Probability of Success

Before authorizing a lethal ARPA strike under the U.S. policy, officials must determine the strike has a high probability of success. In traditional just war terms measuring the probability of success is a consequentialist exercise in weighing the costs and benefits to the state of going to war.⁹⁸ Traditionally, success or failure in war could be defined with a certain level of definitiveness, the occupation of land or the defeat of an adversary. Success or failure could also be predicted with some certainty based on conventional force comparisons. However, in counterterrorism operations the definition of success is arguably more elusive, as is the prospect of accurately weighing the costs and benefits of a lethal ARPA strike.

Defining success is critical in counterterrorism operations, especially when the use of lethal force is contemplated. Is success for a lethal ARPA strike defined as the

elimination of a single terrorist? If so, based on a cost-benefits analysis the probability of success is very high for the majority of lethal ARPA strikes. However, if the definition of success is broadened to include requirements such as, not alienating the population living in proximity to the strike area, not alienating the state whose sovereignty was transgressed, or not potentially diluting international norms of state conduct, success takes a very different form.

From a moral perspective, calculating the probability of success for a lethal ARPA strike requires application of more than the traditional consequentialist, cost-benefits analysis. Officials may need to question whether the operation will do more good than harm (Utilitarian Approach); whether it equitably balances the rights of stakeholders (Rights Approach); or whether it bests serves the needs of the U.S.—or even the international—community (Common Good Approach).⁹⁹ Depending on the circumstances, there may be other ethical lenses applicable to the assessment.

Expected Harm

The expected harm of launching a lethal ARPA strike should be balanced against “the value or importance of achieving the just cause” for which the strike is being waged.¹⁰⁰ The strike, if it is being justly pursued, “should bring about more good than harm.”¹⁰¹ This is a classic utilitarian approach to evaluating options and it remains a valid ethical consideration when determining whether to launch a lethal ARPA strike.

Valuating the anticipated harm—and good—of a lethal ARPA strike under the U.S. policy is extremely difficult. Traditionally, anticipated harms could be calculated using primarily tangible categories, such as casualties, economic losses, and war expenditures. In the modern fight against terrorism, however, calculating the anticipated harms of a lethal ARPA strike requires assessing many intangibles, such as how the

strike will affect key stakeholders' ideology, public opinion, terror organizations' recruitment efforts, etc. Like counterinsurgency, combating terrorism cannot be accomplished solely by kinetic means.¹⁰² Significant non-military efforts must focus on changing the attitudes of the terrorists and their sympathizers. Where non-military efforts, such as economic, educational, or employment efforts are likely to be effective in diminishing terror oriented ideology, constraints on the use of an ARPA strike should be seriously considered.

Necessity

Necessity is a moral pillar common to all three traditional paradigms and should remain a pillar of any ethical framework pertaining to the use of lethal ARPA strikes under the U.S. policy. In the just war tradition, a morally permissible attack is one that “is necessary to compel the submission of the enemy with the least expenditure of time, life, and money.”¹⁰³ In law enforcement, necessity stands for the proposition that lethal force will only be used when no other means exist to prevent a loss of life or serious bodily harm.¹⁰⁴ Finally, in Inter-state self-defense, necessity limits the use of lethal force to only those situations necessary to prevent an imminent, unjust attack on the population, territory, or government of a state. Taking into consideration the express language of the policy and these normative standards, a morally just use of lethal force under the policy should, at a minimum, be born of an articulable necessity to remove a continuing, imminent unjust threat to U.S. persons, “with the least expenditure of time, life, and money”¹⁰⁵ in circumstances where lesser means are infeasible or insufficient.

Necessity under the U.S. policy would limit lethal strikes to imminent threats of “operational combatant[s] seeking to do harm” to U.S. persons.¹⁰⁶ This would include those terrorists “directly involved” in conducting attacks, including but not limited to

those preparing the means of attack; planning the attack; or carrying the supplies for an attack.¹⁰⁷ It would not however, countenance attacks on those “indirectly involved” such as those providing funding, calling for attacks (free speech), or supplying the food stuffs all humans require for subsistence.¹⁰⁸

The ethical parameters of necessity are specifically designed to place significant constraints on government action. The questions that should be asked to confirm the necessity of employing lethal force are myriad; as such the following represent only a small example. Officials, for instance, should consider the possibility of a peaceful resolution (e.g. capture or arrest), the nature of the possible harm, the U.S. objective(s) to be achieved, and the likelihood of an ARPA strike effectuating an effective intervention. Officials should also question whether the course of action improves the odds of protecting innocents; whether other courses of action might reasonably eliminate or negate the threat posed by the terrorist, whether “the action is really helping to defend” U.S. persons,¹⁰⁹ whether the action will really save the lives of U.S. persons,¹¹⁰ whether the contemplated force is necessary to the mission at hand, and whether an “alternative act or activity (including refraining from any act or activity, respectively) would expose the lives or well-being of the citizens of the state, including its combatants, to greater danger.”¹¹¹

Distinction

The principle of distinction is another pillar common to all three traditional paradigms. It too should remain a pillar of consideration under any ethical framework pertaining to the use of lethal ARPA strikes under the U.S. policy. In the just war paradigm, distinction stands for the proposition that innocent civilians are never liable to attack unless or until they are found to be directly participating in hostilities.¹¹² In the

Inter-state self-defense and law enforcement paradigms, actions in self-defense are limited in scope to liable actors. All three traditional paradigms are designed to protect innocent, i.e. non-labile, civilians from harm.

Distinction lies at the very heart of the protections afforded by all three paradigms. There are times, however, when civilians may become, through their own conduct, liable to attack. In law of war parlance these civilians are labeled as 'civilians directly participating in hostilities'. The "relevant distinction" between innocent civilians and civilians directly participating in hostilities is often quite indistinct. Those who carry arms openly or through other conduct indicate they are directly participating in hostilities are easily distinguished. Participation in hostilities becomes more difficult to distinguish as the continuum moves from those civilians openly carrying arms, to civilians participating in covert operations, to those who participate in the production or preparation of terror materials, to those who supply the terrorists' basic needs. At the lower end of the continuum, Michael Walzer draws the line of distinction between "those who make what soldiers need to fight and those who make what they need to live, like all the rest of us."¹³ The latter are immune from attack while the former may be attacked for such time as they actively participate in hostilities. In the law enforcement paradigm, civilians would only become liable to a use of force if they interfered with officers in the official performance of their duties. In similar fashion, civilians would have to exhibit some level of direct threat to a state before they could be subjected to a use of force in an Inter-state self-defense scenario. In other words, morality requires the protection of innocent civilians up to the point at which the civilian becomes liable to a use of force through their own unjust threatening conduct.

Proportionality

The principle of proportionality is the third pillar common to all three traditional paradigms. It too remains fundamental to any ethical framework pertaining to the use of lethal ARPA strikes under the U.S. policy. The general intent of the rule is to reduce foreseeable but unintended harm to innocent individuals. The concept of proportionality differs substantially between the three paradigms. In just war theory, proportionality weighs “the mischief done” (“harm to individuals” and “injury to the permanent interests of mankind”) against the “contribution that mischief makes to the end of victory.”¹¹⁴ Proportionality in a wartime context focuses on avoiding harm to the person and property of innocent civilians not the combatant. Proportionality under war rules is relatively permissive.

The concept of proportionality is much more restrictive in the areas of law enforcement and Inter-state self-defense.¹¹⁵ In Inter-state self-defense, proportionality limits the use of force to that which is reasonably necessary in scope and duration to quell the threat. It values the life and property of both the threat and innocent bystanders. However, it recognizes the possibility of collateral harm to innocents (in proportion to the harm avoided). In the law enforcement context, proportionality is best described as a force continuum. Its purpose is to prevent undue force being applied against the threat (it is assumed no force will be applied against innocent civilians). Proportionality under the law enforcement paradigm is the most restrictive.

For lethal ARPA strikes undertaken pursuant to the U.S. policy, considerations of proportionality should be assessed along a sliding scale. Currently, few, if any, attacks under the U.S. policy should be considered as true wartime missions to which the law of war and just war frameworks would apply. Gaining and maintaining popular support is

critical to the long-term goal of reducing terrorism. The ability of the U.S. government to impede avenues of funding, recruitment, and popular support to terror activities is directly related to how affected populations perceive U.S. actions. Employing excessive force or causing significant collateral damage during a mission may be counterproductive to the long-term strategy of weaning individuals away from the lure of direct or indirect support to terrorism.

For this reason, the less permissive proportionality constructs of Inter-state self-defense or law enforcement should be considered as the normative moral standards for most attacks carried out under the U.S. policy. Under these two standards, attacks may only be launched against liable individuals. Proportionality restrictions diminish based on the type of threat the liable individual poses.¹¹⁶ As Jeff McMahon explains, a fully “Culpable Threat” is a person who poses a threat of wrongful harm to others and [has] neither justification, permission, nor excuse.”¹¹⁷ Because these individuals pose a “Culpable Threat” they are “fully liable to necessary and proportionate defensive action.”¹¹⁸ Under this construct, it may be reasonable “to inflict a significantly greater harm on a Culpable Threat” to prevent that threat from “inflicting a lesser harm on an innocent victim.”¹¹⁹ Restrictions on proportionality are “thought to be particularly weak in the case of lethal threats.”¹²⁰ Following this line of analysis, lethal ARPA strikes pursuant to the U.S. policy may be considered morally just when the target can be proven to be a fully “Culpable Threat” in the process of launching an imminent lethal attack.

Additionally, when assessing proportionality under the U.S. policy, considerations of collateral damage should not be thought of as a simple balancing of necessity and foreseeable but unintended harm in the traditional sense. The value of the U.S. policy

lies in its preventive nature. It is designed to eliminate the terrorist threat, using either non-lethal or lethal means, before the terrorist strikes. “Since the prevention of [an] imminent threat is not as clear, the bar of collateral damage” in these cases must be “much higher.”¹²¹ In actions against terrorists not in the throws of an attack, proportionality considerations may dictate canceling or postponing the operation until more favorable circumstances exist. Alternatively, the U.S. could warn civilians in the area of an imminent ARPA strike and provide them time to leave the area. This, of course, has the downside of tipping-off the terrorist.

Humanity

The U.S. policy, intentionally or otherwise, sets the principle of humanity as a condition precedent to lethal attacks taken under the policy. It is, as such, a critical moral consideration when determining who may constitute a legitimate target for a lethal ARPA strike under the U.S. policy. The moral principle of humanity can be broadly interpreted as protecting human dignity and preventing or alleviating human suffering.¹²² The eminent Swiss jurist, Jean Pictet, interpreted humanity within the law of war construct to mean that “capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.”¹²³ His conceptualization of humanity captures the essence of the moral ideal both in and out of conflict.

The moral concept of humanity should stand as a reminder that “no human being is excluded from moral concern.”¹²⁴ When states must use lethal force to protect their citizens, humanity requires consideration be given to the natural rights—life, liberty, and

the pursuit of happiness—of others who may be harmed by the attack. It should be remembered that the “duty of protecting human dignity is not only a source of obligation to fight against terror, but also a source of constraint on what the state does within the framework of its fight against terror.”¹²⁵

Conclusion

The “situation of armed conflict does not provide a ‘license to kill’ . . . On the contrary, the destruction of basic values, such as life, health, or property . . . remains prohibited in principle . . . but can be exceptionally justified.”¹²⁶ This quote by Fritz Kalshoven stands as a stark reminder that intentional killing is an ‘exceptionally justified’ deviation from morally acceptable conduct, even in the extremes of war. The Presidential Policy Guidance sets in place sound standards and procedures to ensure that U.S. decisions to employ lethal force under the policy comply with international and U.S. domestic laws. However, as with any law or policy, there will always be times when guidance is inadequate to the occasion, and choices among competing lawful options are not clear. This is especially true when one must consider whether taking a life or harming another person is justified. In these instances, decisions require heightened ethical scrutiny to ensure the contemplated act is morally just under the prevailing circumstances and the explanatory power of the proffered justification fully resonates. Building a complimentary ethical cannon to the U.S. policy ensures the intricacies of the policy are fully understood by Administration officials and military advisors/operators so they can make the best decisions under the most trying of circumstances.

Endnotes

¹ Peter M. Cullen, “The Role of Targeted Killing in the Campaign Against Terror,” *Joint Forces Quarterly* 48 (2008): 25.

² See generally, Barack Obama, Remarks by the President at the National Defense University, May 23, 2013; <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed December 7, 2014).

³ Barack Obama, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostility* (Washington DC: Whitehouse, May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (accessed November 18, 2014).

⁴ “If you threaten America, you will find no safe haven.” Barack Obama, Statement by President on ISIL, September 10, 2014; <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> (accessed December 7, 2014).

⁵ For an excellent discussion on the modern fault lines in the concept of military attacks, see Michael N. Schmitt, “Fault Lines in the Attack,” *Testing the Boundaries of International Humanitarian Law*, ed. Susan Breau and Agnieszka Jachec-Neale (London: British Institute of International and Comparative Law, 2006), 277.

⁶ Barack Obama, *U.S. Policy Standards*.

⁷ Under the U.S. policy, the phrase ‘legitimate target’ is defined as a “target that poses a continuing, imminent threat to U.S. persons.” Per the policy guidance, attacks on legitimate targets are to be constrained by expressly delineated considerations of humanity, distinction, necessity, and proportionality. More importantly, each of these terms derives from a rich history of customary law, conventional law, and accepted moral norms that inform each terms’ meaning within the specific context of application—i.e. law enforcement, law of war, or Inter-state self-defense. Consequently, when the government claims to act under one of the three specific paradigms, the considerations of humanity, distinction, necessity, and proportionality, where applicable, also assume the qualities associated with their historic meaning within each specific paradigm.

⁸ The policy is not as bold or heretical a shift as some critiques claim. Ample examples of states, especially the U.S., employing military forces externally to protect the persons and property of their citizens exist in history. See generally, Hays Parks, “Memorandum of Law: Executive Order 12333 and Assassination,” *The Army Lawyer* (December 1989): 7; Michael N. Schmitt, “Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework,” *Naval Law Review* 56, (2008).

⁹ It is the opinion of the author that the policy is worded such that arrest under a law enforcement paradigm must also be considered and excluded along the continuum of reasonable alternatives to lethal attack prior to a determination to employ lethal force. The wording, “or otherwise taken into custody” and “[an] assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons” would seem to support this reading.

¹⁰ Hays Parks, "Memorandum of Law," 7.

¹¹ Debating the legality of the U.S. policy is not the purpose of this article. For an excellent article on the subject, see Michael N. Schmitt, "Responding to Transnational Terrorism."

¹² Barack Obama, *U.S. Policy Standards*.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ See generally, Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," *The Army Lawyer* (December 1989): 7; Schmitt, "Responding to Transnational Terrorism Under the Jus Ad Bellum."

¹⁶ By asserting it is at war with al Qaeda, the U.S. gains the ability to argue it's targeting combatants under the more permissive standards of International Humanitarian Law (i.e. the law of war). In general, under the law of war enemy combatants may be lethally targeted when and where they are found, so long as they are not hors de combat, and the attack meets the distinction and proportionality requirements of the law.

¹⁷ Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4, no. 1 (2005): 7.

¹⁸ Kasher and Yadlin, "Military Ethics of Fighting Terror," 7.

¹⁹ See generally, Schmitt, "Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework," 18-20.

²⁰ Jeff McMahon, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 209.

²¹ Schmitt, "Responding to Transnational Terrorism Under the Jus Ad Bellum," 18.

²² S. Brock Blomberg, Ricardo Fernholz, and John-Clark Levin, "Terrorism and the Invisible Hook," *Southern Economic Journal* 79, no. 4 (Apr 2013): 849-863.

²³ "al Qaeda has weakened but the al Qaeda family is grown in strength, size and influence. About 30-40 threat groups in Asia, Africa, Middle East and in the Caucasus are emulating al Qaeda ideology of global violence and methodology of suicide attacks." Rohan Gunaratna, "Terrorist Threat in 2014," *UNISCI Discussion Papers* 34, (January 2014): 97-101.

²⁴ See generally, Schmitt, "Responding to Transnational Terrorism Under the Jus Ad Bellum," 18-19; William J. Perry, *Proliferation: Threat and Response* (Washington DC: U.S. Department of Defense, April 1996), <http://fas.org/irp/threat/prolif96/transnational.html> (accessed 7 Oct 14); Peter Bergen et al., *Jihadist Terrorism: A Threat Assessment*, (Bipartisan Policy Center September 2013), 11, http://bipartisanpolicy.org/sites/default/files/Jihadist%20Terrorism-A%20Threat%20Assesment_0.pdf (accessed October 8, 2014).

²⁵ “While the various al Qaeda spinoffs are primarily focused on regional conflicts, they hate the United States and will not forego opportunities to strike at the U.S. homeland.” Thomas Kean et al., *Today’s Rising Terrorist Threat and the Danger to the United States: Reflections on the Tenth Anniversary of The 9/11 Commission Report* (New York: Annenberg Public Policy Center, July 22, 2014), 7 <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/%20BPC%209-11%20Commission.pdf> (accessed December 7, 2014).

²⁶ See Rolf Mowatt-Larssen, “Al Qaeda Weapons of Mass Destruction Threat: Hype or Reality?” (Belfer Center for Science and International Affairs, January 2010), 5, <http://belfercenter.ksg.harvard.edu/files/al-qaeda-wmd-threat.pdf> (accessed October 17, 2014); Rachel Oswald, “Despite WMD Fears, Terrorists Still Focused on Conventional Attacks,” *Global Security Newswire Online*, April 17, 2013, <http://www.nti.org/gsn/article/despite-wmd-fears-terrorists-still-focused-conventional-attacks/> (accessed October 17, 2014); “Al- Qaeda and some of its affiliate organizations aspire to acquire and employ chemical, biological, radiological and nuclear (CBRN) materials. They are most likely seeking low- level CBR agents, such as ricin, botulinum toxin, radiological dispersal devices, and toxic industrial chemicals like cyanide and chlorine as low cost alternatives.” LTG Michael T. Flynn, “Annual Threat Assessment,” Statement Before the Senate Armed Services Committee United States Senate, (February 11, 2014), http://www.dia.mil/Portals/27/Documents/News/2014_DIA_SFR_SASC_ATA_FINAL.pdf (accessed December 7, 2014).

²⁷ “Al Qaeda associates—some small, some worryingly large—now have a presence in more theaters of operation than they did half a decade ago, operating today in at least 16 countries.” Kean et al., *Today’s Rising Terrorist Threat*.

²⁸ See generally, Kean et al., *Today’s Rising Terrorist Threat*; Flynn, “Annual Threat Assessment,” Gunaratna, “Terrorist Threat in 2014.”

²⁹ Thomas Kean et al., *Today’s Rising Terrorist Threat and the Danger to the United States: Reflections on the Tenth Anniversary of The 9/11 Commission Report*, (Public Policy Center, Jul 22, 2014), 7. <http://bipartisanpolicy.org/sites/default/files/%20BPC%209-11%20Commission.pdf>

³⁰ Gunaratna, “Terrorist Threat in 2014.”

³¹ Anonymous, The New Face of Terror, *The Economist*, 408, no. 8855 (September 28, 2013): 11.

³² “Al Qaeda-affiliated groups are gaining strength throughout the greater Middle East.” Kean et al., *Today’s Rising Terrorist Threat*; See generally, Gunaratna, “Terrorist Threat in 2014;” Bergen, *Jihadist Terrorism*; Charles Hagel, *2014 Quadrennial Defense Review*, (Washington DC: Department of Defense, March 2014).

³³ Hagel, *2014 Quadrennial Defense Review*, 8.

³⁴ *Ibid.*, 8.

³⁵ “The Western Hemisphere Defense Policy, the Strategy to Combat Transnational Organized Crime, the National Strategy for Counterterrorism, the National Strategy for Global Supply Chain Security and other regional and functional strategies articulate a range of defense, diplomatic, law enforcement, and capacity-building activities that the United States pursues with

its neighbors to build an integrated, mutually-supportive concept of security.” Leon E. Panetta, *Strategy for Homeland Defense and Defense Support of Civil Authorities* (Washington DC: Department of Defense, February, 2013), 2; “. . . an active, layered defense conceptually divides the world into three regions (Forward, Approaches, and the Homeland)” Robert M. Gates, *Department of Defense Homeland Defense and Civil Support Joint Operating Concept: Version 2.0*, (Washington DC: U.S. Department of Defense, October 1, 2007), ES-3.

³⁶ Leon Panetta, *Strategy for Homeland Defense*, 2.

³⁷ *Ibid.*, 2.

³⁸ *Ibid.*

³⁹ Barack Obama, *U.S. Policy Standards*.

⁴⁰ *Ibid.*

⁴¹ The US is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces.” Harold Koh, Legal Adviser, Department of State, “The Obama Administration and International Law,” Keynote Address at the Annual Meeting of the American Society of International Law, Washington DC, March 25, 2010.

⁴² United Nations Charter, Article 51.

⁴³ U.S. Department of the Army, *International and Operational Law Handbook* (Charlottesville, VA: The U.S. Army Judge Advocate General’s Legal Center and School, 2009), D-7.

⁴⁴ In these cases, U.S. special operations forces provide technical assistance to the host state’s law enforcement agency. The state law enforcement agency is in the lead and the intent of the operation is to arrest the individual.

⁴⁵ The application of lethal force under the United Nations Code of Conduct for Law Enforcement Officials is considered permissible only in cases where the “offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.” United Nations General Assembly, *Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169 (December 17, 1979), Article 3, commentary c. <http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforLawEnfOfficials-E.pdf> (accessed November 19, 2014); “Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill. Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations General Assembly, Human Rights Council (May 28, 2010), 5, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (accessed December 7, 2014).

⁴⁶ Pew Research, Global Attitudes Project, *Global Opposition to U.S. Surveillance and Drones, but Limited Harm to America’s Image*, July 14, 2014, <http://www.pewglobal.org/2014/07/14/global-opposition-to-u-s-surveillance-and-drones-but-limited-harm-to-americas-image/> (accessed 1 Oct 2014).

⁴⁷ Alston, *Report of the Special Rapporteur*, 3.

⁴⁸ See generally, Mary Ellen O'Connell, "Seductive Drones: Learning from a Decade of Lethal Operations," *Journal of Law, Information and Science Online*, (2011), DOI: 10.5778/JLIS.2011.21.OConnell.1, EAP 8, <http://ssrn.com/abstract=1912635> (accessed November 19, 2014).

⁴⁹ United Nations General Assembly, *Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169 (December 17, 1979), Article 3, commentary c. <http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforLawEnfOfficials-E.pdf> (accessed November 19, 2014).

⁵⁰ See generally, United Nations, *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), Article 6, Article 7, Article 9, and Article 10, (December 19, 1966), <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (accessed November 19, 2014).

⁵¹ European Parliament, Resolution on the use of armed drones (2014/2567(RSP)), February 25, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0172> (accessed December 7, 2014).

⁵² See generally, Dr. Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, (Brussels: European Union, 2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET\(2013\)410220_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf) (accessed November 19, 2014); O'Connell, "Seductive Drones"; John P. Abazaid (GEN, Ret.) and Rosa Brooks, *Recommendation and Report of the Task Force on US Drone Policy* (Washington, DC: The Stimson Center, 2014), 10-14, http://www.stimson.org/images/uploads/research-pdfs/task_force_report_FINAL_WEB_062414.pdf (accessed November 18, 2014); Micah Zenko, *Reforming U.S. Drone Strike Policies*, (New York: Council on Foreign Relations, 2013), <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736> (accessed November 18, 2014); Micah Zenko and Sarah Kreps, *Limiting Armed Drone Proliferation*, (New York: Council on Foreign Relations, 2014), <http://www.cfr.org/drones/limiting-armed-drone-proliferation/p33127> (accessed November 18, 2014); Bradley Jay Strawser, ed., *Killing by Remote Control* (New York: Oxford University Press, 2013); Gabriella Blum and Philip B. Heymann, *Laws, Outlaws, and Terrorists: Lesson from the War on Terrorism* (Cambridge, MA: The MIT Press, 2010).

⁵³ Philip Alston, *Report of the Special Rapporteur*, 8.

⁵⁴ *Ibid.*, 5.

⁵⁵ Other critiques cite concerns over moral accountability, psychological impacts on the innocent civilians co-located with the strikes, the creation of additional terrorists, and the diminution of rule of law ideals. See generally, Abazaid (GEN, Ret.) and Brooks, *Recommendation and Report of the Task Force on US Drone Policy*, 10-14; Zenko, *Reforming U.S. Drone Strike Policies*; Zenko and Kreps, *Limiting Armed Drone Proliferation*; Strawser, ed., *Killing by Remote Control*; Blum and Heymann, *Laws, Outlaws, and Terrorists*, 161-185.

⁵⁶ Philip Alston, *Report of the Special Rapporteur*, 3.

⁵⁷ Because “the political risks of deploying them [APRAs], versus deploying live troops, are much less, they can be used more wantonly.” Rob Eshman, “The Torah of Drones: Examining the complex morality of drone warfare,” *Jewish Journal*, November 6, 2013, http://www.jewishjournal.com/cover_story/article/the_torah_of_drones_examining_the_complex_morality_of_drone_warfare (accessed November 30, 2014).

⁵⁸ Micah Zenko, *Reforming U.S. Drone Strike Policies*, 10.

⁵⁹ Robert Sparrow, “War Without Virtue,” in *Killing by Remote Control* (New York: Oxford University Press, 2013), 85-86.

⁶⁰ Strawser, ed., *Killing by Remote Control*, xi, citing, Paul W. Kahn, “The Paradox of Riskless Warfare,” *Philosophy and Public Policy Quarterly* 22 (2002), 3.

⁶¹ Eshman, “The Torah of Drones.”

⁶² Taylor Owen, “Drones don’t just kill. Their psychological effects are creating enemies,” *The Globe and Mail Online*, March 14, 2013, <http://www.theglobeandmail.com/globe-debate/drones-dont-just-kill-their-psychological-effects-are-creating-enemies/article9707992/> (accessed November 30, 2014).

⁶³ David Rohde, “The drone war,” *Reuters Magazine Online*, January 17, 2012, <http://www.reuters.com/article/2012/01/17/davos-reutersmagazine-dronewar-idAFL1E8CHCXX20120117> (accessed November 30, 2014).

⁶⁴ Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life*, (New York: Oxford University Press, 2002), vii.

⁶⁵ *Ibid.*, vii.

⁶⁶ “We don’t want to fight until we are threatened, because only then can we rightly fight.” Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Examples* (New York: Basic Books, 2006), 80; “Nothing but aggression can justify war.” Walzer, *Just and Unjust Wars*, 62.

⁶⁷ Soldiers “are subject to attack at any time (unless they are wounded or captured).” Walzer, *Just and Unjust Wars*, 138. Civilians directly participating in hostilities may be attacked for so long as they are directly participating in hostilities. See generally, Richard S. Taylor, “The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities,” *The Army Lawyer*, June 2010.

⁶⁸ United Nations General Assembly, *Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169 (December 17, 1979), Article 3, commentary c, <http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforlawEnfOfficials-E.pdf> (accessed November 19, 2014).

⁶⁹ It is very difficult to ascertain whether the U.S. is conducting strikes in Pakistan, Yemen, and Somalia (and perhaps other areas) under a law of war or Inter-state self-defense justification due to the lack of U.S. government transparency. Criticisms seem more focused on how the policy is being applied in these situations rather than on the merits of the policy.

⁷⁰ It is impossible to assess whether the U.S. government is adhering to this self-imposed requirement due to the lack of transparency in the targeting process. It would be advisable for the government to release, after the fact, its justification for using lethal force under the policy.

⁷¹ Barack Obama, *U.S. Policy Standards*.

⁷² The Whitepaper only addresses targeting by way of ARPA's those terrorists located "outside the U.S. and outside areas of active hostilities." It does not apply to individuals located within the U.S.. It is the opinion of the author that the U.S. policy cannot be unconstitutionally applied within the U.S..

⁷³ "The strong do what they can and the weak suffer what they must." Robert B. Strassler, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War*, (New York: Free Press, 2008), 352.

⁷⁴ Emma Lazarus, *The New Colossus*, (November 2, 1883), <http://www.nps.gov/stli/historyculture/colossus.htm>. Lazarus' sonnet, writes Paul Auster, "reinvented the [Statue of Liberty's] purpose, turning Liberty into a welcoming mother, a symbol of hope to the outcasts and downtrodden of the world." Paul Auster, "NYC = USA", *Collected Prose: Autobiographical Writings, True Stories, Critical Essays, Prefaces, and Collaborations with Artists* (New York: Picador, 2005), 508.

⁷⁵ John Mark Mattox, *St. Augustine and the Theory of Just War* (MPG Books: Bodmin, Cornwall, Great Britain, 2006), 9.

⁷⁶ For this reason I recommend the decision be withheld to the President.

⁷⁷ In general, individuals enjoy certain inalienable rights "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." George Mason, "The Virginia Declaration of Rights," *Constitution Society*, http://www.constitution.org/bcp/virg_dor.htm#001 (accessed October 28, 2014.)

⁷⁸ Walzer, *Just and Unjust Wars*, 144.

⁷⁹ "...if the state doesn't defend the common life that does exist, its own defense may have no moral justification." *Ibid*, 54.

⁸⁰ John Mark Mattox, *St. Augustine*, 17.

⁸¹ "... that people are getting back to their normal lives. This is the meaning of victory, in this case." Major General Amos Yadlin, "Ethical Dilemmas in Fighting Terrorism," *Jerusalem Center for Public Affairs* (November 25, 2004), <http://www.jcpa.org/brief/brief004-8.htm> (accessed November 27, 2014).

⁸² Anticipated harm must be "of such magnitude that the presumption against war is overridden." John Mark Mattox, *St. Augustine*, 9.

⁸³ *Ibid.*, 9.

⁸⁴ "The broader question is whether lethally targeting a terrorist(s) deters others from joining terror organizations and/or perpetrating attacks. By taking regular action against terrorists, a

message is sent to other potential terrorists that the state will not tolerate such acts. There are sound moral grounds for believing the prevention of future terrorism and death will best serve the community and bring more good than harm.” Yadlin, “Ethical Dilemmas in Fighting Terrorism.”

⁸⁵ Walzer, *Just and Unjust Wars*, xv.

⁸⁶ *Ibid.*, 146.

⁸⁷ One of the most contested areas of the law of war concerns distinguishing civilians directly participating in hostilities from those who do not and then determining when civilians directly participating in hostilities are liable to attack. See, Richard S. Taylor, “The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities,” *The Army Lawyer*, June 2010.

⁸⁸ Barack Obama, *U.S. Policy Standards*.

⁸⁹ Eshman, “The Torah of Drones.”

⁹⁰ Yadlin, “Ethical Dilemmas in Fighting Terrorism.”

⁹¹ Blum and Heymann, *Laws, Outlaws, and Terrorists*, 75.

⁹² Walzer, *Just and Unjust Wars*, 53.

⁹³ United Nations Charter, Article 2, paragraph 4.

⁹⁴ In international law, every “violation of the territorial integrity or political sovereignty of an independent state is called aggression.” Walzer, *Just and Unjust Wars*, 52.

⁹⁵ McMahon, *Killing in War*, 9.

⁹⁶ Walzer, *Just and Unjust Wars*, 52.

⁹⁷ Philip Alston, *Report of the Special Rapporteur*, 11-12, citing ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US)* [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); “In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective.” Oscar Schachter, “The Right of States to Use Armed Force,” *Michigan Law Review* 82, no.1620 (April-May1984): 1633-34.

⁹⁸ “The thrust of the reasonable success principle emphasizes that human life and economic resources should not be wasted in what would obviously be an uneven match.” Alexander Moseley, “Just War Theory,” *Internet Encyclopedia of Philosophy Online*, <http://www.iep.utm.edu/justwar/#H3> (accessed December 3, 2014).

⁹⁹ For a framework on ethical thinking see, Manuel Velasquez et al., “A Framework for Thinking Ethically,” May 2009, <http://scu.edu/ethics/practicing/decision/framework.html> (accessed November 19, 2014).

¹⁰⁰ McMahon, *Killing in War*, 5.

¹⁰¹ Eric A. Heinze and Brent J. Steele, eds., *Ethics, Authority, and War: Non-State Actors and the Just War Tradition* (New York: Palgrave MacMillian, 2009), 5.

¹⁰² Condoleeza Rice, *U.S. Government Counterinsurgency Guide* (Washington, DC: U.S. Department of State, January 2009), 14.

¹⁰³ Walzer, *Just and Unjust Wars*, 144.

¹⁰⁴ Philip Alston, *Report of the Special Rapporteur*, 11.

¹⁰⁵ Walzer, *Just and Unjust Wars*, 144.

¹⁰⁶ Eshman, "The Torah of Drones."

¹⁰⁷ Yadlin, "Ethical Dilemmas in Fighting Terrorism."

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Kasher and Yadlin, "Military Ethics of Fighting Terror," 11.

¹¹² Civilians "can never be the objects or targets" of intentional attack. See, Walzer, *Just and Unjust Wars*, 151; McMahon, *Killing in War*, 204.

¹¹³ Walzer, *Just and Unjust Wars*, 146.

¹¹⁴ Ibid., 129.

¹¹⁵ In the law of war and just war moral frameworks, Soldiers are, in general, expected to place themselves at greater risk in order to protect civilians from harm. See generally, Ibid., 156.

¹¹⁶ McMahon, *Killing in War*, 159-173.

¹¹⁷ Ibid., 159.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Yadlin, "Ethical Dilemmas in Fighting Terrorism."

¹²² International Federation of Red Cross and Red Crescent Societies, "Humanity," <http://www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/humanity/> (accessed December 5, 2014).

¹²³ Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers: Dordrecht, The Netherlands, 1985), 62.

¹²⁴ Kasher and Yadlin, "Military Ethics of Fighting Terror," 9.

¹²⁵ *Ibid.*, 9.

¹²⁶ Fritz Kalshoven, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity," *American Society of International Legal Procedure* 86, no. 39 (1992): 41.