

## Recommendation Report

### Review Committee for the Drones & Targeted Killing Shared Framework

TO: Global Board Committee on Strategy, Budget, and Performance  
FR: Ken Zimmerman (SMC, USP), Faisal Bari (Pakistan), Wendy Patten (OSI-DC), David Cole (Open Society Fellow, Georgetown University Law Center Professor), Lisa Magarrell (USP), Johanna Chao Kreilick (Strategy Unit), Matthew Craig (Office of the President)  
DT: January 13, 2013

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#### Background

The first years of the Obama presidency saw a rapid increase in the United States' use of drones in targeted killing operations. The number of strikes peaked in Pakistan in 2010 and in Yemen in 2012, and the numbers in both countries remain far higher than anything seen during the Bush administration. President Obama also began to use drones in Somalia, decreasing the United States' reliance on more traditional means of warfare. While accurate numbers are difficult to obtain, U.S. drones reportedly have killed more than 4,000 people, including a substantial number of civilians.

The authority that the U.S. government claims for such operations and the secrecy that surrounds the scope and exercise of that authority have proved controversial. The United States apparently interprets the laws of war to impose no strict geographic limits on its ability to carry out lethal operations away from hot battlefields against al Qaeda and "associated forces." And while the United States sometimes invokes a self-defense rationale for targeting, it has adopted an expansive interpretation of "imminence" that permits it to kill individuals who are not engaged in any ongoing or immediate attacks on the United States.

Drones are a particularly tempting weapon because they can be used with far more secrecy than other weapons platforms, and their autonomous nature drastically lowers the costs (both political and human) of a decision to use lethal force. Because drones make it so easy to kill, there has been a dramatic increase in resort to this tool for fighting terrorism. Drones may well be the new face of war. Yet, their use in specific instances is disputed, and the practices of the United States threaten to create a precedent that will further increase the likelihood that states resort to force to solve their problems.

At the same time, there has been resistance to the United States' use of drones, and it has already resulted in some improvement in U.S. practices. Transparency has increased, and the Obama administration has proposed a set of rules that, if properly implemented, would impose important limits on targeted killing.

In this context, Rachel Reid of the Regional Policy Initiative (RPI) presented a proposal for a shared framework on drones and targeted killing.<sup>1</sup> The review committee<sup>2</sup> evaluated this proposal against the shared framework criteria set forth by the Global Board. Though the committee believes

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<sup>1</sup> See Appendix A.

<sup>2</sup> Ken Zimmerman, Faisal Bari, Wendy Patten, and David Cole made up the review committee. Lisa Magarrell, manager for USP's National Security and Human Rights Campaign, assisted Ken throughout this process and participated in discussions and consultations on his behalf.

more work should be done to refine a goal for this shared framework and to continue to deepen our insights, we found this project to be particularly timely in light of the impending drawdown from Afghanistan, which may create important opportunities for challenging the scope of the United States' "war on terror" paradigm. **We find that all criteria are met and recommend that the Global Board Committee approve a strategy charrette on drones and targeted killing for the spring of 2014.** This report outlines the refined proposal for a drones and targeted killing shared framework, evaluates this proposal against the shared framework criteria, and describes several recommendations for work on this topic within a shared framework formulation.

### **The proposed shared framework**

The original proposal for a shared framework on drones and targeted killing identified three key objectives: limiting the scope and frequency of drone strikes; expanding the policy discussion around the issue beyond the United States; and setting precedents that protect human rights and the rule of law. The proposal argued that the rapid expansion of the use of drones "warrants an examination of whether supplementary law or regulation might be necessary to rein in" lethal drones strikes. A central goal of the original proposal was the establishment of a new global norm on armed drones.

Robust Souk discussions and offline conversations probed the idea of a new global norm and ultimately resulted in a reorientation of the proposal that was embraced by nominator Rachel Reid and RPI colleagues. Participants in these discussions wanted to emphasize the established set of norms that already exists, while recognizing that the application of these norms is contested ground, especially outside of traditional battlefields. Alternate means to achieve the proposal's key objectives were raised on the Souk and captured through the review committee's consultations and discussions.<sup>3</sup> It became clear that a shared framework should explore strategies that go beyond demands for compliance with existing law and should respond to strategic, tactical, political, and normative concerns. Further discussion with nominators and stakeholders helped to clarify both the goal and potential means of the shared framework.

The overarching *goal* of the work is to stop the unlawful, secret, and unaccountable use of lethal drones, in the first instance by the United States, but ultimately by other states as well. While drone proliferation is a growing concern, many years will pass before other countries have the infrastructure necessary for a long-distance, lethal drone program such as the one the United States currently has. For this reason, the goal of a shared framework should be focused on changing U.S. policy with an eye to setting appropriate precedent for other states to follow. This latter aspect may generate a complementary goal of articulating a clear vision for drone programs of the future, informed not only by legal norms but also by the changing nature of conflict, sensible policies on drone manufacture, oversight, and trade, and the risk that drones destabilize regions marked by fragile relations.

The *means* by which we affect U.S. policy need to be both domestic and global. Principal streams of work include: (1) generating critiques of the U.S. drone program from diverse and credible voices, including international legal experts; former members of the military, intelligence, and

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<sup>3</sup> In November and December 2013, review committee members met with nominators Rachel Reid and Chris Rogers (RPI), Amrit Singh and Jonathan Horowitz (Justice Initiative), Leslie Gross-Davis (USP), and Sarah Pray (OSI-DC). We also consulted with external actors, including Rosa Brooks (USP Board, Georgetown University Law Center), Sarah Cleveland (Columbia Human Rights Institute), Andrea Prasow (Human Rights Watch), Letta Tayler (Human Rights Watch), and Micah Zenko (Council on Foreign Relations).

diplomatic communities; and individuals from affected regions; (2) advocacy in other states and international fora with the aim of encouraging states and international organizations to promote more appropriate targeting policies; and (3) promoting redress, reporting, and investigations, as a way to raise awareness of the costs of using drones for counterterrorism away from traditional battlefields. Described in greater detail below, each of these areas of work responds to the considerations driving Souk discussion and the original proposal.

## Evaluation and recommendation

We find that the work outlined above meets the criteria for a shared framework<sup>4</sup> and recommend that the Global Board Committee on Strategy, Budget, and Performance approve this shared framework for a strategy charrette.

First, the concept presents a *timely, high-priority opportunity*. Civil society efforts to change U.S. targeted killing policy have experienced modest success. The policy has become increasingly transparent, and the number of strikes has fallen dramatically. The fruits of sustained criticism were most recently seen in a May 2013 presidential address on targeted killing and a fact sheet summarizing new policies, both of which outlined somewhat narrowed standards for lethal operations outside areas of active hostilities. For example, stated policies limit drone strikes to situations where there is a “near certainty” that no civilians will be killed, a standard more demanding than that found in the laws of war.<sup>5</sup> More recently, reports of Human Rights Watch, Amnesty International, and two UN Special Rapporteurs in October 2013 drew significant public attention and may have had some traction within the government as well.

There remain significant questions about the details of U.S. policies and procedures, and whether its stated policies align with practice and are consistent with legal obligations. We believe there are opportunities for greater change over the next several years. In particular, significant opportunities for advocacy exist around (1) the drawdown in Afghanistan at the end of 2014, which will raise questions about the legal foundation undergirding the U.S. government’s claimed targeting authority; (2) the end of the Obama administration, which may spur efforts to institutionalize targeting policies that protect President Obama’s legacy and withstand shifting political winds; and (3) increasing actions taken by other states, particularly in Europe, to acquire weaponized drones, which may create opportunities for civil society mobilization and will make other states more relevant in global debates. Current debates in the United States and Europe on mass surveillance may also offer opportunities for a broader dialogue on the rule of law and accountability for covert actions governments take in the name of national security. All of these opportunities exist within the four-year time frame envisioned for shared frameworks.

Second, the proposed approach will allow OSF to leverage a *distinctive role* on the issue by taking advantage of both our global presence and our ability to engage across professional communities and constituencies. U.S. human rights organizations and think tanks dominate the debate among civil society groups. While European civil society has begun to address drone-related issues and there are

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<sup>4</sup> See Appendix B.

<sup>5</sup> The laws of war generally require that states minimize collateral damage when using force, but do not demand a “near certainty” that no civilians will be killed. In other respects, however, the U.S. policy appears more lenient than international law would require. Thus, international law recognizes the right of a state to act in self-defense against an imminent attack where it is truly a last resort, but the United States, by expanding the definition of an “imminent” threat, has often employed targeted killing against individuals who are not engaged in any immediate or impending attack on the United States.

active organizations in Pakistan, critiques of U.S. targeted killing policies have failed to rise to the level of the global opposition to Guantanamo or U.S. interrogation practices. In addition, much of the progressive criticism comes from the human rights community and has not been complemented by strong criticism from strategic and foreign policy voices.<sup>6</sup> This shared framework will seek to understand and respond to the reasons why broader opposition to lethal drones has not taken hold.

OSF has the unique advantage of being able to draw upon a global network of foundations, programs, and grantees to expand to a global level what has been largely an American-dominated conversation. This same network enables us to pursue a strategy that encompasses a variety of perspectives, from human rights to foreign policy, and draws upon a range of tools, including advocacy, research, convening, and public communication. There are few organizations positioned to develop such a holistic strategy to rein in U.S. targeted killings.

Third, the holistic nature of the proposed strategy represents a distinctive *insight* and *reconceptualization* of the problem of drones and targeted killing. Many critics of the United States question the legality of its targeted killing practices. But drones present distinct challenges that raise strategic, tactical, and normative issues that go beyond the strictly legal. Drones facilitate covert lethal actions, allowing the United States to evade the costs and the public scrutiny that often check the use of force abroad. By removing the lives of Americans from the equation, and at least theoretically reducing collateral damage through pinpoint strikes, drones make it too easy to kill. As a result, drones may facilitate the use of force in situations where it would have been previously unimaginable. Before drones, for example, had the United States believed that a U.S. citizen in Yemen was working with al Qaeda, it is unlikely that it would have dispatched troops or dropped a bomb to kill him. But the United States used a drone to kill Anwar al-Awlaki under those conditions, only admitting that it had done so a year and a half later. This shared framework would recognize the important questions regarding the legality of targeted killing generally while also addressing the unique challenges posed by armed drones.

By framing the unlawful, secret, and unaccountable use of lethal drones as a global concern, we believe that we can avoid the implications of letting the United States alone define the terms of the debate. We recognize that a globalized debate does not mean that human rights automatically take center stage. However, our proposed approach does allow for a greater possibility of integrating the perspectives of states that are currently forming their own position on lethal drones and states and individuals who are harmed by the use of drones, either now or in the future.

While finding the proposed shared framework meets all relevant criteria, we recognize that it is not without risks. It may be difficult to make a project focused on changing U.S. policy a priority for programs and foundations outside the United States. We believe, however, the United States' role as a precedent-setter should make it possible to appeal to outside voices. Furthermore, given OSF's preexisting work on drones and targeted killing, we must be conscious of the value that a shared framework can add and avoid a structure that merely coordinates ongoing activities with additional transaction costs. The guidelines in the following section should help minimize such a risk.

## **Guidelines for our recommendation**

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<sup>6</sup> These observations are supported by the findings of a mapping project undertaken in October 2013 by Presidential Fellow Matthew Craig. The mapping project involved general consultations within OSF, including USP, RPI, JI, OSEPI, and OSI-DC; a select number of external consultations; and research into more than 60 organizations doing work on drones and targeted killing across the globe.

Our recommendation is based on our understanding that the shared framework would entail three general streams of work:

1. Generating critiques from diverse and credible voices

To date, the United States has responded to the drumbeat of criticism over its drone program with positive, albeit modest, steps toward greater transparency and increased alignment between its policies and relevant international law. More pressure is still needed. While human rights organizations, often with OSF support, have plans to continue their work, the efforts of these groups alone are insufficient. At times human rights organizations disagree on strategy and substance, and there are limits to how much the U.S. government will bend to the collective demands of the human rights community. Moreover, there are reasons to oppose U.S. targeting policies unrelated to their questionable consistency with international law.

Thus, a shared framework on drones and targeted killings should strive to generate critiques from other voices that the U.S. government will find credible, including international experts on the laws of war; former members of the military, intelligence, and diplomatic communities; individuals from affected regions and the Global South generally; and other constituencies. Their critiques may come in the form of joint statements, the recommendations of a blue ribbon commission, or testimony before Congress, among others. The engagement of retired military generals and admirals, for instance, played a critical role in the torture debate; a similar effort could be effective on this issue as well.

By engaging a diverse set of voices, we can advance strategic and foreign policy considerations that are likely to have as much or more traction within government circles as human rights concerns. Already, former defense and national security officials, including Dennis Blair and Stanley McChrystal, have questioned whether drones have become counterproductive because of the resentment they stir up in targeted countries. Yet the most vocal critics of the U.S. drone program remain human rights advocates, focused on legal claims. We believe that more can be done to develop an informed, nuanced, and forceful opposition to drones that goes beyond legal considerations.

While recognizing the need to tailor critiques to public and governmental interests, we emphasize that the U.S. government should not remain unchallenged in setting the terms of the conversation on drones. In particular, we should question the government's assertions regarding the threat posed by terrorist groups, which the United States has used to justify a host of abusive counterterrorism policies. Efforts that simply argue that drones are not the proper response to terrorism miss the opportunity to counter government claims about the nature and immediacy of the threat, which provide the foundation for the entire counterterrorism architecture.

In addition, we caution against framing the problem of drones as primarily concerned with civilian casualties. Focusing on innocent victims has been a useful entry point, much as the innocence of some death row inmates has made a difference in U.S. death penalty debates. Yet, while harm to civilians may galvanize sectors of the public, an approach that focuses too heavily on this issue entails a number of risks. First, it allows the government to claim that critics suffer from incomplete information, and that the numbers of civilian casualties have been exaggerated. Second, drones pose, at least in theory and possibly in practice, far lower risk to civilians than any other use of force, rendering civilian harm a problematic basis for critique. Third, there are issues with drones that go beyond civilian casualties, and a movement built around civilian concerns will crumble if the number of civilian deaths

turns out to be lower than some have claimed. Messages about accountability, foreign relations, and proliferation and precedent setting may be more effective in the long term.

Key questions for consideration in a strategy charrette:

- What messages are most effective in challenging U.S. drone policies?
- What types of individuals are the best spokespeople for these messages? How do we mobilize and engage new constituencies?
- Is there additional knowledge that needs to be generated to back up legal, strategic, or foreign policy-based arguments?

2. Advocacy to encourage states and international organizations to promote restrained targeting policies

Many have expressed the belief that the United States will not significantly alter its stance on drones until pushed to do so by key allies and other international actors. In the rendition context, the changed policies of European states—driven by civil society and press reporting, a Council of Europe investigation, and litigation before various U.S. and European courts—were an important factor in forcing the United States to reduce reliance on this tactic. No similar dynamic has been seen in the targeted killing context, and U.S. allies have remained largely silent on the issue. At the same time, many states have long been uncomfortable with the U.S. global war theory and would presumably prefer tighter limits on the use of drones away from traditional battlefields.

The shared framework should find ways to encourage other states, regional organizations, and international organizations to vocalize an alternate vision for the proper use of drones. Some of this work might parallel that of the first work stream, while other aspects may involve issue campaigns, policy development, litigation, behind-the-scenes advocacy, and research. In addition to direct pressure on U.S. policies, other states and international organizations, such as NATO, the African Union, or the European Union, should also be pushed to examine their own policies and how these may make them complicit in questionable U.S. practices.

We must be cognizant of the risk that the states most likely to engage on this issue may be the very ones that would like more leeway to use drones than we would consider appropriate. Nevertheless, states and international institutions have an interest in preventing diffusion of the U.S. targeted killing model, particularly to already unstable areas. Precedent-setting concerns may well provide a banner under which others can engage with the U.S. government.

Key questions for consideration in a strategy charrette:

- Which targets present the best opportunities for success? Possibilities include the United Nations, Council of the European Union, Council of Europe, Global South Summit, African Union, ASEAN, NATO, League of Arab States, and various national governments.
- What form might advocacy take? How much do these efforts relate to the activities under the first work stream?

3. Promoting redress, reporting, and investigations

Drones have become an important counterterrorism tool, in part because of the perceived low

cost of their use. Secrecy facilitates the avoidance of many of the political costs traditionally associated with a decision to use force in another country. By pushing the United States to subject its decisions to public scrutiny and to account for its mistakes and errors, and by generating greater transparency elsewhere to discourage the complicity of other states or entities, we can limit some of the important ways in which drones inappropriately lower barriers to the use of lethal force.

In December 2013, for example, the United States launched a drone strike in Yemen that reportedly hit a wedding party. The U.S. government initially said nothing about the strike, but after receiving substantial criticism, it has now indicated that an inquiry has been launched into the circumstances and results of the strike. Such inquiries ideally should follow all strikes, but this is one of the first instances in which such an inquiry has been acknowledged.

Key questions for consideration in a strategy charrette:

- How is this work distinct from the ongoing efforts of human rights organization (*e.g.*, investigations, reporting, FOIA)? How is it distinct from the work that OSF programs already are pursuing individually (*e.g.*, JI's fall 2014 report on drone strikes in Yemen)? In short, what value is added by pursuing such work through a shared framework?
- What does a global strategy focused on greater reporting and transparency look like? Can OSF help to pilot scalable accountability mechanisms in specific contexts?

## **Conclusion**

Drones may well be the face of war for the foreseeable future. The challenges they pose to global peace and stability have begun to emerge, prompting some, but not enough, criticism, and some, but not enough, reform. The review committee believes that the time to act to shape the future use of drones is now. By drawing upon our global network of networks, OSF can make a distinctive contribution to reining in U.S. targeted killing, ensuring that it conforms with legal and ethical norms, and limiting the damage that the United States' precedent-setting conduct will otherwise do to global norms of peace and war.

## Appendix A: Original Proposal for a Shared Framework on Drones and Targeted Killings

Nominator: Rachel Reid (RPI)

### What? (200 words or less)

1. *The opportunity:* What is the opportunity this concept represents (one sentence)?

To develop an international norm on targeted killing operations and the use of weaponized drones.

2. *Goals and strategies:* What is this concept trying to achieve? What are some of the initial strategies you envision for getting there?

Drones are changing the nature of warfare, creating an urgent need for a global debate about their use. By greatly facilitating targeted killings beyond traditional battlefields, drones are lowering the threshold for the use of lethal force. Existing international law governs any such use of lethal force, but the rapid expansion in use and proliferation of the technology is already changing the norms on state responses to terrorism and other threats, which warrants an examination of whether supplementary law or regulation might be necessary to rein in this expanding practice/the expanding use of lethal drone strikes. A key objective would be reducing the frequency and scope of U.S. and other states' lethal targeting operations, internationalizing the policy discussion, and setting precedents that protect human rights and the rule of law. Initial strategies could include the founding a multi-disciplinary expert body to propose legal and policy solutions, or initiating a broad-based campaign similar to the Cluster Munitions Campaign or the International Campaign to Ban Landmines aimed at the creation of a new international agreement.

### Why? (300 words or less)

1. *OSF Value:* Why should OSF work on this? What is our distinctive advantage(s) on this issue?

Drones and targeted killing have complex, far-reaching legal, policy, humanitarian, human rights, and political implications for the entire world. The Open Society Foundations contain a wealth of diverse talent, authority and expertise, in many parts of the world, which could form the basis of a global initiative to develop a new norm on drones and targeted killing. OSF's broad range of geographic and thematic programs, as well as its deep connections with grantees and partners in affected and concerned countries would enable it to engage in the kind of global, multi-faceted collaboration that is necessary to address this challenge. OSF's credibility among governments, inter-governmental organizations, and civil society, as well as its capacity to support a large, complex, international initiative of this scale make it uniquely placed to lead the way on this issue.

2. *Why Now?* What is the importance of this effort to the world now (one sentence)?

There is a small window within which US practice can be challenged and restrained. Just as pressing is the need to create an international discussion on the use of drones and targeted killings, before other states start following US practice, and current targeted killing practice becomes the new normal in global counter-terrorism responses.

3. *Why Shared Framework?* How does your concept lend itself to a shared framework formulation? In other words, what is the added value of addressing this issue by using a shared framework approach?

Collaboration within OSF (Justice Initiatives, Open Society Institute-DC, National Security and Human Rights Campaign, Regional Policy Initiative, Foundation Open Society Institute Pakistan, and the Arab Regional Office) has already led to a broad agenda for advocacy in the U.S., which focuses on transparency, rule of law and civilian protection. But our collaboration only began in July 2012, and is still very new in this area as this work. A shared framework would enable us to conceptualize our joint work in a fundamentally novel way beyond a coordinated approach; it would allow us to internationalize, move the conversation beyond the U.S., and deepen that engagement across the Foundation complex by inviting broader participation from other parts of OSF that have not yet thought about this issue. We would also hope to include and amplify the views and voices of our civil society partners in those countries most affected by lethal targeting operations, as well as those countries where armed drones are manufactured, bought, sold and deployed. It would also take advantage of existing work already engaged in by different elements of OSF, including documentation of civilian harm by the Regional Policy Initiative in Pakistan, similar documentation by the Justice Initiative in Yemen, and U.S. government-targeted advocacy to be led by OSI-DC. Particularly at this early stage, work on this issue would also benefit greatly from inviting engagement and cooperation on from across the Foundation, taking full advantage of the diverse tools and capacities at OSF's disposal, from documentation and litigation, to coalition building and advocacy at national, regional, and international levels.

**How?** (200 words or less)

1. *Internal and External Actors Engaged:* What are some internal OSF entities (programs, offices, instruments/tools) and external actors you envision would be relevant to the concept strategy and why?

Targeted killings, drone strikes, and proliferation directly or indirectly affect many countries and regions, and have substantial legal, policy, and human rights implications. A significant number of OSF entities would be relevant to the concept strategy, including, at a minimum, Justice Initiative, Open Society Institute-DC, National Security and Human Rights Campaign, Regional Policy Initiative, Foundation Open Society Institute Pakistan, Open Society Afghanistan, the Arab Regional Office, and the Africa Regional Office. The most relevant external actors would be experts in international law and security, arms control, terrorism, and military technology, civil society in affected countries, the ICRC, UN, and other human rights organizations.

2. *Outstanding Questions?* What are some issues or questions to which further attention could help inform this concept/process?

A global norm could take many different forms, from reinforcing or strengthening interpretations of international law relating to targeted killings, to legal and technological transparency measures, to operational standards on targeting and civilian protection – these and many other policy and legal responses could be discussed in the souk as the first step of a collaborative campaign. Should a global norm be a reinforcement of existing international law or is new international law or regulation necessary to supplement existing law? Are drones different, or should the practice of targeted killings be the focus, regardless of the weapon used? Can rapidly developing technology be subject to effective

regulation? The diversity and complexity of the issues and values at stake, including international law, government transparency, and civilian protection, would benefit from a broad and deliberative process to best identify achievable solutions.

**Results?** (200 words or less)

1. If this effort moves forward, what would success look like at the end of four years? Describe specific results or products that might be achieved.

One of two outcomes: a new global norm would be established to address the serious risks posed by the expanding use of targeted killing and proliferation of armed drones. This norm could take various forms, a new international treaty regime, trade regulations, national laws and policies that codify and reflect conformity with the global norm. Alternatively, if it was felt that existing laws were sufficient, a campaign might be created to push states to sign on to a statement of principles, or create an enforcement mechanism such as a targeted killings oversight body.

2. Risk Analysis/External Challenges: What might prevent this effort from working in the way you foresee?

The most significant risk in moving forward with this effort is that those involved cannot come to consensus on the best way forward with respect to the process to formulate a new global norm, or on the substance of such a norm. Relevant actors, states, and civil society organizations may have different assessments of the most critical challenges posed by drones and targeted killing, and as a result still have differing views of the best means of addressing such challenges. For example, there is disagreement as to whether a new norm or law is required or the problem should be addressed through the reinforcement of existing legal norms. There is also disagreement over whether drones should be treated differently than other weapons platforms. There are also concerns that the technology is moving too fast, particularly when compared to the speed with which international agreements can be reached.

## Appendix B: Shared Framework Criteria

Global Board discussions in 2013 helped to clarify what types of initiatives should be pursued through a shared framework. At their September meeting, Global Board members probed the question of what makes shared frameworks different from other forms of collaboration that already take place across the network.

The criteria that emerged from these discussions are as follows:

- 1) Does the proposed concept present a timely, high-priority *opportunity* to have a real world impact? What is the specific opportunity? Why the urgency of now?
- 2) Does the proposed approach allow OSF to leverage a *distinctive role* on the issue? What is OSF's value-add? How do we fill a gap?
- 3) Does the concept reflect a distinctive *insight*?
- 4) How does participation by individual programs or foundation in the shared framework process enable entities to *reconceptualize the problem and the solution* in a fundamentally different way than they would if they were working alone or in simpler collaborations?