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TARGETED KILLING: MODERN SOLUTION OR MODERN PROBLEM?

By

PAUL SIKKEMA

Under the Direction of Andrew Altman

ABSTRACT

Modern warfare in general, and targeted killing (TK) in particular, challenge conventional legal paradigms. While some contend that targeted killing is a clear violation of law, others argue that it is the law that should adapt to its modern context. In this thesis, I argue in favor of the latter. I will first explain the two dominant paradigms through which one can interpret TK: law enforcement versus armed conflict, going on to argue that an armed conflict paradigm can be legitimately invoked. In sections IV and V, I examine the rights and status of targeted individuals in modern conflict. I will then explore Jeremy Waldron's objection to TK—that its potential for abuse outweighs its utility. I conclude by arguing that TK, like all warfare, is justified only by the unacceptability of its alternative, and that the justification of all warfare abides under the same pragmatic presumption.

Index words: Targeted killing, Jus in bello, Jus ad bellum, Applied ethics

TARGETED KILLING: MODERN SOLUTION OR MODERN PROBLEM?

By

PAUL SIKKEMA

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Master of Arts

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2014

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I Introduction

The law that governs armed conflict today was written to apply to war as it used to be. It evolved in a time when nation fought against nation, and when political boundaries and uniforms gave scope and shape to conflict. When the laws of war are applied in this context, they fulfill their function, but the conflict in which we are engaged today differs significantly from this paradigm. With the 21st Century has come the rise of the non-state actor in global conflict—a development that has already drastically changed the face of combat. This new entity challenges the categories and norms defined by the Geneva Conventions, and today we are left either to force new concepts into an outdated paradigm or to frantically amend international law. While it may be unreasonable to demand rapid innovation to a body of law that has roots stretching centuries deep, I nevertheless maintain that this is the only acceptable course of action: Innovation in the law of armed conflict must reflect the change in the realities of war today.

The controversy generated by the novelties in modern warfare comes sharply into focus with regard to the issue of targeted killing (TK). Many argue that existing legal rules should be applied in a straightforward manner, which would render TK an illegitimate tactic.[1] Others contend that modern developments in warfare and the rise of the non-state organization as a threat to national security present challenges that existing law is inadequate to address.[2] The focus of this thesis will be the legal and ethical implications of this tactic as it is executed in a modern context. In section II I will explain the two dominant paradigms through which one can

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[1] UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum : Study on targeted killings*, 28 May 2010, A/HRC/14/24/Add.6, available at: http://www.refworld.org/docid/4c0767ff2.html [accessed 14 September 2013] (Hereafter referred to as: HRC, *Study on targeted killings*).

[2] Geoffrey Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict," *Vanderbilt Journal of Transnational Law* 40, no. 2 (2007).

interpret TK: law enforcement versus armed conflict. If we seek to target individuals pursuant to some supposed legal or moral guilt, then we necessarily invoke a law enforcement paradigm and cannot avoid its demand for due process. If TK can be justified, it must be done through appeal to armed conflict—that is to say, to the idea that the context in which TK is carried out constitutes, not the normal law enforcement setting of peacetime, but rather one of armed conflict, in which the less stringent humanitarian norms of war apply. In section III I explore the definition of armed conflict in the Geneva Convention and its application to modern warfare, concluding that it is reasonable to apply the norms and rights of armed conflict to the situations in which TK is used: those situations are properly categorized as forms of armed conflict to which the Geneva Conventions apply, and so we must determine the rights afforded to potential victims of drone strikes. In section IV I examine the implications for TK of international human rights law. This discussion will center around the relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL). Furthermore, because modern conflict has cast the conventional civilian/combatant dichotomy into question, a critique of international law with regard to these categories is developed in section V. Lastly, I examine Jeremy Waldron's objection to TK—that its potential for abuse outweighs its utility.[3] I reply that, while he succeeds in showing that government must target with extreme caution, he fails in rejecting targeted killing *per se*. I conclude by arguing that TK, like all warfare, is justified only by the unacceptability of its alternative. This is admittedly a pragmatic approach, but the justification of all armed conflict and the law governing it operate on the same pragmatic assumption.

[3] Jeremy Waldron, "Justifying Targeted Killing with a Neutral Principle?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Jens David Ohlin Claire Finkelstein, and Andrew Altman(Oxford: Oxford University Press, 2012).

"Terrorism" and "targeted killing" are nebulous terms that warrant specification. The definition of the former is easily stretched for rhetorical and political purposes. "Terrorism" can connote anything from acts that are morally distasteful to genuine moral atrocities, such as Timothy McVeigh's Oklahoma City bombing or the 9/11 attacks. "Targeted killing," is similarly broad. While it is generally used to refer to the killing of identified members of terrorist organizations by drones, there is no reason to confine the concept to use only when used against members of terrorist organizations or only by drones. For the purposes of this thesis, I will borrow the definition used by Andrew Altman in his introduction to *Targeted Killings: Law and Morality in an Asymmetrical World*. Terrorism is "those acts undertaken with the intent (and realistic possibility) of killing in a single episode of violence a number of civilians for the purpose of advancing certain political goals by intimidating (a certain segment of) the population."[4] A terrorist would be a member of an organization that plans such acts. Targeted killing is "the intentional killing by a state of an individual identified in advance and not in the state's custody."[5] Notably, there is nothing in this definition that specifies that targeted killing must be accomplished by drones. My argument and the arguments of the source material are made primarily in reference to targeted killing by drones, though, strictly speaking, any justification of targeted killing as defined must apply to targeted killing by other means as well.

II Two Paradigms of Analysis

Traditionally, there are two modes of evaluating targeted killing. We may view them as the models of either law enforcement or war. In war, enemy combatants may be killed without appeal to any sort of due process. As far as the Laws of Armed Conflict are concerned, to the

[4] Ibid.
[5] Ibid.

extent that individuals are enemy combatants, lethal force can legally be applied. Viewing targeted killing in terms of law enforcement, on the other hand, invokes an entirely different set of assumptions. In law enforcement, any "target" is suspected of some sort of legal guilt.[6] Determining this guilt requires due process. Failure to provide this process to a "target" (i.e., simply killing them) is a moral atrocity that cannot stand.

Under the armed conflict paradigm, enemy combatants are targeted solely in virtue of their status as enemy combatants.[7] Whether by an infantryman aiming a rifle or a pilot firing a missile, the enemy is justifiably targeted inasmuch as he is wearing a uniform and operating under a command structure of an enemy force. Granted, there are further qualifications for targeting a uniformed combatant (it is illegal to target and kill the wounded, POWs, hors de combat, etc.). Nevertheless, when combatants are targeted in armed conflict, there is no need to justify the application of force on a case-by-case basis. In theory, declaring war against an enemy in the first place is justified by *jus ad bellum* considerations. But any subsequent application of force to that enemy is legally justifiable regardless of whether the war itself is justified: all that is required is that a state of armed conflict exists and the targeted individual is a member of or directly and significantly contributes to the enemy military threat. Thus, it is not the conduct of the targeted individual that makes him a permissible target, but rather his status as a member of the enemy force.

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[6] Michael L. Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?," *Journal of Applied Philosophy* 23, no. 3 (2006).
[7] Geoffrey Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict," *International Humanitarian Legal Studies*, (2010). p 30.

Arguing in favor of the war paradigm, Daniel Statman points out that theories of just war endorse the use of targeted killing.[8] Killing the enemy is obviously accepted in war, and targeted killing is merely another tactic used pursuant to that end. The fact that the enemy might hide among a civilian population does not suddenly strip a military force of its right to seek and eliminate the threat that the enemy poses. As Statman claims,

> Opponents of TK are shocked by the apparent ease by which countries like the United States or Israel "execute" people with nothing remotely close to due process, and with no need to establish imminent danger or individual responsibility. From the perspective of domestic law-enforcement, this is indeed shocking. But from the perspective of war it is not shocking at all. This is precisely what war is about—killing enemy combatants with no due process and with hardly any constraints whatsoever.[9]

But there is something troublesome about the very notion of targeting that Statman fails to address. Targeting a specific person—naming a name—is not done without imputing guilt to the target.[10] Part of our justification of targeting terrorists is the presumption that the target is responsible for the killing of innocent civilians or some other moral atrocity. One can hardly avoid the intuitive assumption that we target individuals (terrorists) on account of their conduct. Terrorism is illegal and terrorists are criminals. If targeted killing is seen in this light, the elimination of the targets would be seen as moral retribution or the pursuit of justice rather than merely attacking the enemy in the conventional context. This presumption of moral guilt would force us to embrace the law-enforcement paradigm again, making the elimination of the guilty via TK an unacceptable course of action.[11] Due process is needed to determine whether or not our moral or legal accusations are warranted. Only after this may we presume to take

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[8] Daniel Statman, "Can Just War Theory Justify Targeted Killing? Three Possible Models," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Jens David Ohlin Claire Finkelstein, and Andrew Altman(Oxford: Oxford University Press, 2012).
[9] Ibid.
[10] Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?." *supra* note 6.
[11] Ibid. p 328

justificatory action against them. Thus, Statman's appeal to the war paradigm in justifying targeted killing fails inasmuch as the act of targeting itself seems to require due process.

This problem could potentially be solved by positing unequal moral status of combatants.[12] It is at least somewhat intuitive that a terrorist organization maintains a different moral status than a nation's armed forces. Whereas the latter is dedicated to the protection of its land and people, the former is dedicated to harming or killing civilians. So where is the injustice in presupposing moral guilt of a member of a terrorist organization, especially if such membership is voluntary? The problem is that this proposal is very much open to abuse. It would effectively pronounce all members of terrorist organizations guilty of whatever crimes or atrocities that we attribute to the organization, thus making every member a permissible target. Our entire system of justice is based on the premise that guilt cannot be placed upon anyone except for what he has personally done and cannot be presumed but must be proven on the basis of due process. Proving this guilt requires due process. Simply declaring an individual or group of individuals "guilty" flouts a principle upon which our very justice system is built—a very dangerous proposition, indeed.

Any defense of targeted killing as conceived in terms of the war paradigm ultimately fails if it cannot succeed in showing that targeting does not require the imputation of moral or legal guilt to the target. Such imputation requires due process, thus precluding the option of simply killing the target. So the defender of targeted killing must frame the act of targeting in a morally neutral manner.

Making the case for justifiable TK requires the acceptance of three premises. First, the context in which targeting is carried out can be characterized as armed conflict. Second, persons having the status of combatants in an armed conflict possess a more limited set of rights than

[12] This is the approach taken by Jeff McMahan in "The Ethics of Killing in War," *Ethics* 114 (2004): 693-733

persons who do not have that status, especially with regard to the right against arbitrary deprivation of life. Third, the people targeted have the status of combatants in an armed conflict. As argued above, limitation of rights must not be justified by appeal to the morally or legally reprehensible conduct of the targets—i.e., to the fact that they are criminals—but rather by appeal to their status as combatants.

III International Law Analysis: Conflict

Justifying targeted killing hinges on the applicability of the armed conflict paradigm. Making the case for this applicability requires that we address the question whether it is coherent from a legal standpoint to hold that a state can declare war on a non-state organization. Defenders of the law enforcement paradigm answer negatively. After all, organized crime is not a modern development. Gangs, cartels, and the like have existed for centuries, and never before has a government had legal license to eliminate them with lethal military force.[13] Thus, a defense of targeted killing must distinguish cases of organized crime that have been left to law enforcement from the non-state organizations that are targeted today. In other words, what is it about the non-state organizations that we face today that warrants the stronger hand of armed force?

Geoffrey Corn offers an answer to this question by appeal to Common Articles Two and Three of the Geneva Conventions.[14] These articles provide a triggering mechanism for the application of laws of armed conflict. Article Two states "The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of

[13] Rosa Ehrenreich Brooks, "War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism," *University of Pennsylvania Law Review* 153, (2004). p 717
[14] Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict."

the High Contracting Parties."[15] The law of war is thus applicable in a strict sense to international war, that is, a military conflict involving two or more nations. Article Three extends the laws of war to cases of armed conflict "not of an international character" which occur "in the territory of one of the High Contracting Parties."[16] The wording of this article broadens the application of humanitarian norms to conflict beyond the conventional war of nation versus nation. This is a necessary and obvious step, as it would be puzzling for combatants to be bound by norms in conventional war and yet retain license for any inhumane tactics in a civil war, coup, or other such non-international conflict.

However, the expanded definition of Article Three remains ambiguous with regard to its application to certain contemporary forms of armed conflict. On an initial reading, Articles Two and Three seem to cover all possible forms of conflict: Article Two applies to conflict international in character, and Article Three applies to conflict not international in character. However, as Article Three was conceived and has since been interpreted, it does not apply to *all* armed conflict that is not international in character. The Article itself was likely inspired by the civil wars that raged prior to WWII in Spain and Russia.[17] Thus the Article includes the qualification that it applies to non-international conflict "occurring in the territory of one of the High Contracting Parties."[18] This qualification defined the interpretation of the Article prior to

[15] Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]
[16] Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]
[17] Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict." p. 13
[18] Third Geneva Convention

September 11 in such a way that it came to be understood as regulating only internal or intrastate conflict. [19]

Unfortunately, contemporary armed conflict may fall outside of the scope of either of the two Articles. In the case of the War on Terror, the United States is clearly not at war with a state, but neither is the conflict necessarily restricted by a single national boundary. Terrorist organizations are not concerned with any one particular state, and can move from country to country easily. Thus, the tandem application of the law-triggering articles leaves a regulatory gap perhaps unforeseen by 20th Century international lawyers. Whether or not the laws of war apply to cross-border military operations against non-state actors is a question that must be answered.

This regulatory gap was exploited by the Bush administration in its defense of the treatment of al Qaeda detainees. The administration claimed that the failure of the War on Terror to fall into the scope of either Article Two or Three prevented detainees from enjoying the full protection of rights offered by the Geneva Conventions.[20] This stance was challenged in *Hamdan v Rumsfeld*, bringing the problem of the regulatory gap to the fore.[21] Justice Stevens strangely interpreted Articles Two and Three as having a seamless application, stating "the term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."[22]By ignoring the qualification in Article Three that the conflict occur "in the territory of one of the High Contracting Parties," [23] Justice Stevens circumvented the problem of the

[19] Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict." p. 13
[20] Human Rights Watch**,** *U.S. Officials Misstate Geneva Convention Requirements*, Jan. 28, 2002, http://www.hrw.org/news/2002/01/28/us-officials-misstate-geneva-convention-requirements
[21] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006
[22] Ibid. at 2795
[23] Third Geneva Convention

regulatory gap and held that the legal requirement of humane treatment of detainees applied to those captured in the War on Terror.

While the decision in *Hamdan* largely ignored the standard interpretation of the law-triggering conditions articulated in the second and third Articles, it did reflect a growing concern that all armed conflict, regardless of its nature, should be governed by the Geneva Conventions.[24] This concern grew stronger soon after the decision in *Hamdan* when the world witnessed several weeks of combat between the Israeli Defense Forces and Hezbollah.[25] The fact that this conflict did not clearly fall into the law-triggering categories established by the Geneva Conventions did not deter the expectation that such conflict nevertheless remained under their jurisdiction. Thus, Corn argues for the implementation of a third category of law-triggering conflict, to which the Conventions would apply, what he calls "trans-national conflict."[26] He sees this as a necessary legal innovation that explicitly clears up any possible existing confusion with regard to whether certain forms of contemporary conflict, such as exemplified by the War on Terror, trigger the application of the Geneva Conventions.

The underlying rationale that drives his proposal is the presumption that, to the extent that it is possible, laws of war should guide the policy and tactics of all uses of military force. The fact that trans-national conflict was not anticipated prior to the attacks on September 11 does not preclude the applicability of moral norms on such combat. Regardless of character of the combat—whether international, intranational, or trans-national—combatants remain under the legal and moral obligation of the laws of war. As Corn argues, this is the very purpose of laws of

[24] Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict." p. 32
[25] Ibid
[26] Ibid at 33

war. Thus, it is the de facto existence of armed conflict that triggers the norms of the Geneva Conventions.[27]

The position that de facto existence of armed conflict is a sufficient condition for the application of the laws of war is intuitively pleasing, but carries with it crucial implications. Its effect is double-edged. In the first place, ambiguity with regard to the nature of a conflict—i.e., whether or not it fits within the traditional Article 2/3 paradigm—is no longer an acceptable premise for ambiguity with regard to applicability of the law of war. Thus, one is prevented from arguing, as the Bush administration did, that failure of conflict to be characterized as either international or intranational allows legal wiggle room with regard to the treatment of detainees. As Kenneth Roth, Executive Director of Human Rights Watch put it, "The U.S. government cannot choose to wage war in Afghanistan with guns, bombs and soldiers and then assert the laws of war do not apply."[28] It is the de facto existence of conflict—the guns, bombs and soldiers—that define armed conflict and invoke its norms. In this way, Corn's "de facto" standard of applicability prevents against exploitation of possible regulatory gaps in the laws of war, which certainly counts as a step forward in the protection of human rights.

On the other hand, inasmuch as contemporary conflict defies traditional categories and requires us to put new forms of armed combat under the jurisdiction of the laws of war, we are concomitantly compelled to acknowledge that the combatants must be treated as permissible targets of lethal force. That is to say, we cannot put participants in conflict under the protections of the laws of war without simultaneously exposing them to the more limited form of the right against arbitrary deprivation of life that is inherent in warfare.

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[27] Ibid
[28] Human Rights Watch. *Supra* note 18

Amnesty International condemned a missile strike by the United States against al Qaeda in Yemen in 2002 by highlighting the seeming impropriety of using military force against a non-state organization. In their words, "Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a nonstate actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions. . . . Accordingly, the proper standards applicable to this situation were law enforcement standards."[29] Amnesty International sought to utilize the regulatory gap in a manner opposite the Bush administration. Because the conflict in question was unlike any to which the Geneva Conventions had applied before, they could not be justifiably applied at all, thus precluding any hope of invoking an armed conflict paradigm.

Corn, however, argues convincingly that the evolving character of conflict requires legal innovation. By avoiding either innovative interpretations of armed-conflict standards or innovations in the standards themselves, we risk outgrowing the relevance of the laws that govern conflict.[30] It is more in the spirit of the Geneva Conventions themselves to argue that armed conflict norms apply to any de facto conflict, rather than reserve such norms for interstate violence and armed rebellion wholly internal to a state. Whatever reasons may exist for denying that certain contemporary forms of military conflict count as "armed conflict" under international law, the mere desire to avoid categorical novelty should not be among them. Not only is it coherent to treat contemporary trans-state conflict as calling for an armed-conflict paradigm, it may be incoherent not to do so.

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[29] Amnesty Int'l Yemen: The Rule of Law Sidelined in the Name of Security, (2003) at 23

[30] Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict." p 329

At this point, the reader may notice a circularity in the argument. If de facto conflict is all that is needed to invoke an armed-conflict paradigm through which we determine an action's permissibility, then any use of military force at any time, under the condition that the force itself complies with demands of the laws of war, calls into play the armed-conflict paradigm. In other words, firing a missile in Yemen and killing al Qaeda operatives produced the de facto conflict that brings into play the armed-conflict paradigm that would justify the missile strike. This circular justification is obviously problematic.

In order to make sense of this seemingly confusing situation, jus ad bellum and jus in bello must be differentiated. Whether targeted killing is a justifiable tactic of warfare (jus in bello) is one concern, but whether or not the war in which it is used is itself justifiable (jus ad bellum) is a very different one. Those who denounce targeted killing in the more particular manner as an immoral tactic of warfare must first grant that the context in which it is used is that of an armed conflict. However, if one argues that the armed-conflict paradigm is inappropriate in the first place, then it is not targeted killing as a tactic that is in question, but whether resorting to the use of military force in any capacity is warranted. This is a much broader argument, but not an argument against targeted killing per se.

Proponents of the law enforcement paradigm, then, inasmuch as they object to the use of military force, ground their objections in jus ad bellum concerns. That is, the circumstances in which targeted killing is carried out do not warrant a military response. In such circumstances, all military action including targeted killing is unjustifiable. A moral justification of targeted killing, then, first requires a fulfillment of jus ad bellum demands. Without first arguing that military force can be used at all, targeted killing as a tactic of warfare has no hope of moral vindication.

The strength of Corn's argument is his emphasis on an adaptable definition of conflict. If we insist on maintaining the authority of outdated legal categories, such as the Common Article 2/3 law triggering paradigm, then we run the risk of legal sclerosis.[31] Rather than insulate ourselves from the evolution of conflict, we should be quick to recognize that the rise of the non-state organization and its trans-state method of warfare violates old categories in such a way that warrants their revision. Furthermore, such innovation is necessary to retain the relevance of the laws of war, and thus their status as a recognized authority. Loss of this authority would lead to an unregulated battlefield, which would certainly signify a political and moral regression.[32]

So, with regard to the jus ad bellum issue, whatever reasons proponents of the law enforcement paradigm might give for denying the legal status of armed conflict to military conflicts involving non-state organizations that operate across borders, the mere fact that those forms of conflict do not fit neatly into the Article 2/3 paradigm—i.e., that they are different than conventional conflict—should not be among them.

Additionally, terrorist organizations typically operate in locations where law enforcement is severely debilitated or virtually non-existent, while planning acts of violence on innocent people in other states, and a military response might be the only viable method for the protection of citizens of a threatened state.[33]The fact that a state would have to defend itself against an organization rather than another state does not nullify the moral right to self-defense guaranteed by Article 51 of the UN Charter.[34] The morally salient feature of self-defense is that a state is

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[31] Ibid.
[32] Ibid.
[33] Mark Maxwell, "Rebutting the Civilian Presumption: Playing Whack-a-Mole without a Mallet?," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Jens David Ohlin Claire Finkelstein, and Andrew Altman(Oxford: Oxford University Press, 2012).
[34] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, http://www.un.org/en/documents/charter/chapter7.shtml [accessed 13 October, 2013]

being attacked. It would be morally arbitrary to say that a state can only defend itself against other states but not against non-state organizations, especially considering the large-scale violence that the latter can produce. The fact that international law does not explicitly express this speaks only to the fact that the rise of non-state threats to national security is a recent development.

In conclusion, the invocation of the armed conflict paradigm is defensible. While current forms of conflict certainly present new military and legal challenges, a blanket denial that the conflicts should be regulated by the laws of armed will have a negative impact on hard-won efforts to use international law for the purpose of regulating the use of military force. Thus, it is incumbent upon us to recognize and adapt to the evolving contours of conflict.

IV International Law Analysis: Rights

There are two bodies of norms that dictate the scope of individual rights: International Human Rights Law (IHRL) and International Humanitarian Law (IHL). While these two separate bodies of law have some overlapping norms, they are far from identical, and the relationship between the two of them can be difficult to discern. They both seek to protect the lives, health, and dignity of individuals, but do so in different ways.

International Human Rights Law specifies a set of liberties and entitlements that we seek to guarantee to individuals merely in virtue of their humanity. These norms are expressed in various treaties and conventions and are viewed as an ethical minimum that applies for all and for all time. The most pertinent provision of human rights law with regard to the issue of targeted killing is the right against arbitrary deprivation of life. Pursuant to this right, a state would be barred from killing an individual in the absence of due process, regardless of any supposed

criminal guilt of which he or she may be accused. As previously mentioned, targeted individuals outside of the context of armed conflict must be afforded due process. Their protection against arbitrary deprivation of life is firmly established in almost every body of IHRL.[35]

The question discussed in the previous section—whether contemporary conflict, the war on terror in particular, qualifies as legitimate armed conflict—becomes increasingly pertinent with regard to the application of the demands of IHRL and IHL. International Humanitarian Law applies only within the context of armed conflict. Its demands are laid out in the body of the Geneva Conventions and in customary international law and are instituted for the limitation of superfluous violence and suffering in war to the furthest extent possible. Thus, like IHRL, its interest is protecting the liberties and dignity to which humans are entitled, albeit in the more limited sense due to its wartime application.

As I have already argued, defending targeted killing under a law enforcement paradigm is all but impossible. Lethal force is only permissible under law enforcement when the life of the enforcement official, or an innocent third party, is in immediate danger. Any resort to lethal force must fulfill the demands of proportionality and necessity.[36] Proportionality requires that an officer himself, or an innocent party, must be in imminent danger of being killed before applying lethal force. Necessity requires that killing is the absolute last resort of the officer. If it is possible to arrest or subdue a threat without killing, it is a moral and legal requirement that the officer do so. If killing does become necessary, the law enforcement officer must satisfy a burden of proof to justify the action. Thus, proportionality and necessity are moral demands that aid in providing safeguards against unnecessary death and human suffering.

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[35] CCPR, art. 4; American Convention of Human Rights, art. 27; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15; Arab Charter on Human Rights, art. 4, para. 2
[36] HRC, *Study on targeted killing*, para. 32

Targeted killing cannot fulfill these demands. By making the elimination of the target the very purpose of the mission, there is no consideration of a less harmful method of dealing with the threat that terrorists pose. Thus, targeted killing disregards the question of necessity from the start.[37] Furthermore, the question of proportionality is also ignored. By instituting a policy of targeted killing, the state makes a tacit assumption that killing terrorists is the only way to mitigate whatever threat that they pose.[38] In this way, targeted killing cannot meet the requirements of proportionality and necessity imposed by human rights law under the law enforcement paradigm.

However, if targeted killing can be justifiably held to be carried out within the context of armed conflict, the right against deprivation of life is substantially weakened. It would be absurd to demand a soldier to prove that every bullet fired is a necessary and proportionate response to an individualized threat against him. In war, it is acceptable for a state to adopt a "shoot-to-kill" policy against an enemy, despite the violation of human rights that such a policy would pose in peacetime.

The justification for taking another human life in armed conflict requires the satisfaction of both jus ad bellum and jus in bello demands. First, jus ad bellum concerns the justification of the resort to use of military force. Fulfilling this demand requires, inter alia, the necessity of armed conflict—i.e., that no less violent means of neutralizing the threat exists. The necessity demand of jus ad bellum is analogous to the necessity demand in law enforcement. Just as it is required of an officer to subdue a threat by the least violent means, only resorting to lethal force

[37] Ibid, para. 33
[38] Ibid

when absolutely necessary, so a state cannot declare war unless less violent political means are determined inadequate to respond to the security threat.

In my last section, I discussed the unique challenges posed by the novelty of certain forms of contemporary conflict, involving non-state organizations in a trans-state scope. My goal in that section was to highlight the evolution of armed conflict itself and the need for legal categories to evolve alongside it in order to maintain relevance and authority. With regard to jus ad bellum, I established only that discussing a justification of a declaration of war should not be precluded merely because "state versus non-state organization" does not exist as a category of conflict in the Geneva Conventions. Outdated legal categories should evolve to maintain relevance to modern circumstances. However, I risk irrelevance myself if I neglect to further address the question of whether the armed conflict in which targeted killing is being used, i.e., the war on terror, satisfies jus ad bellum demands.

A proper answer to this question would require extensive discussion on the severity of the threat posed by terrorists and viable alternatives to war. I am hesitant to delve into the subject for a number of reasons. First, the severity of the threat posed by terrorist organizations is likely only known to a handful of government officials. It is reasonable to assume that civilians (and philosophers) do not know the magnitude of the terrorist organizations that we fight. We do not know the depth or breadth of their influence, the scope of their network, or the potential for harm that they wield. Such knowledge would likely require a security clearance and job title that is out of reach for most. Furthermore, extensive knowledge of viable alternatives to war that states can utilize against terrorist organizations requires a level of expertise in international political affairs that I simply do not have. Is there a way that we can ward off the threat of terrorism that does not involve resorting to war? If there is, we are certainly under a moral obligation to pursue any

alternative that is more humane. However, I am inclined to believe that those who have decided that declaring war is the best defense against terrorism understand the inherent moral obligation to avoid war if possible. Critics of targeted killing cannot stop at mere condemnation of the act—they need to provide a viable alternative.[39] Indeed, it is the very lack of alternative that satisfies the necessity demand of jus ad bellum.

In the end, whether a state is justified in resorting to war or whether there is a viable alternative that it must pursue is a political and moral question that demands a political and moral answer. From a philosophical standpoint, all that can be definitively stated is that a state is under a moral obligation to avoid resort to armed conflict if possible. This is neither profound nor particularly interesting, but there remain interesting questions to be answered moving forward. So, I will continue my line of reasoning under the assumption that the armed conflict in which targeted killing is used is justified.[40] If it is not, then targeted killing is obviously unacceptable; but if it is, then we may address further questions.

While fulfillment of jus ad bellum allows for targeting enemy combatants, this does not license unlimited means of combat. Targeted killing must also fulfill the demands of jus in bello. It is important to note that tactics of warfare must fulfill jus in bello whether or not the conflict in which they are used satisfies jus ad bellum. However, in pursuit of a defense of targeted killing, it is my goal to show that the contemporary conflict in which it is used is itself legitimate (jus ad bellum) *and* that the tactic is defensible as a means of combat (jus in bello). The latter requires a fuller explanation of the relationship between IHL and IHRL.

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[39] Steven R. David, "Israel's Policy of Targeted Killing," *Ethics and International Affairs* 17, no. 1 (2003).
[40] This is the same assumption made by Statman in his chapter, "Can Just War Theory Justify Targeted Killing?" *Supra,* p 95: "I suggest we bypass this issue by assuming, for the sake of argument, that in terms of *jus ad bellum*, the countries using TK are justified in their initial decision to go to war, or to use lethal force, as they are responding to unjust threats against them."

If a state is justified in declaring war on a non-state organization, how are we to balance the demands of IHRL and IHL? Again, of primary concern is the protection of the right against arbitrary deprivation of life, as stated in Article Six of the International Covenant on Civil and Political Rights (ICCPR).[41] This Covenant, however, is a body of IHRL. A natural way to avoid the question altogether is to point out that IHL is the body of law that applies during a time of war. The demands of IHRL, then, are irrelevant to policies and tactics in the context of armed conflict. On such a view, the *lex specialis* of IHL fully supplants IHRL.[42]

However, this interpretation of the relationship between IHRL and IHL runs contrary to the accepted jurisprudence of the International Court of Justice (ICJ). According to the ICJ, "[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[43] The demands of IHRL do not simply disappear in a time of war, but the standards may be relaxed to the extent necessary to carry out military operations. Thus, a more standard interpretive approach is to reevaluate IHRL demands during wartime through a lens of the *lex specialis* of IHL.[44] This view of complementary application is becoming dominant as warfare moves further away from the paradigmatic state-versus-state context.[45]

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[41] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 20 September 2013]
[42] Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict."
[43] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996. (Hereafter referred to as ICJ Adv. Opinion)
[44] Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict."
[45] Ibid

The right against arbitrary deprivation of life remains intact even during armed conflict; however, the complementary application of IHL in such times reevaluates what counts as "arbitrary":

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[46]

Any policy of targeted killing that is implemented during armed conflict satisfies the demands of human rights by ensuring compliance with IHL. While execution without a trial is an unacceptable instance of arbitrary deprivation of life during peacetime, targeted individuals in time of war are not guaranteed due process. Such killing is not arbitrary inasmuch as the targeted individual is an enemy combatant and thus subject to the inherent violence of war.

The complementary relationship between IHRL and IHL expresses a key moral reality that affects our legal and moral understanding of combat: The act of engaging in armed conflict is itself a moral concession. The fact that the less stringent demands of IHL make certain actions justifiable in wartime that would otherwise be unacceptable shows that, even though human rights must be protected, these are not moral absolutes.

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[46] ICJ Adv. Opinion, para. 25

As awful or painful as war may be, it remains recognized as an unavoidable reality that requires a modified (smaller) set of protections and entitlements for those who engage in it.

Moral reasoning in matters of war is perpetually drawn between two opposing poles: the pragmatic concern of military necessity and the moral concern for human rights. Giving full sway to the former results in unregulated violence and cruelty while full deference to the latter makes war an impossibility, precluding the state's ability to defend itself. The role of IHL is to strike an appropriate balance between the two, permitting a limited degree of violence and human suffering while guaranteeing respect for humanity to the greatest extent possible. Obviously, this is not a morally ideal state of affairs in the sense that a world without war would clearly be more humane, but in a world in which war is a reality, respecting the limitations of IHL while recognizing the legality of some violence is the best that can be done. There is no debate that the violence inflicted by targeted killing is indeed awful and that such violence would not exist in an ideal world, but it remains necessary to evaluate TK by the same rule and measure that apply to other forms of combat. Thus, TK is a justifiable tactic if it meets the demands of IHL.

V International Law Analysis: Status

The most serious challenge to the demands of IHL that targeted killing must overcome is the fulfillment of the principle of distinction. Distinction is the principle that prohibits the intentional killing of civilians by the military, requiring commanders to avoid civilian casualties to the greatest extent possible. Crucially, this principle does not prohibit the unintentional killing

of civilians. Again, tension arises between the dual moral forces of war: military necessity versus humanity. While it is permissible for a military to engage in operations that result in civilian casualties, these casualties must be limited to the greatest extent possible consistent with achieving the military objective at hand.

According to Corn, "[D]eliberate targeting of enemy personnel is permitted by the LOAC based not on a manifestation of actual threat, but instead on a presumption of necessity derived from the determination of status as —'enemy'."[47] The use of the word "status" here is telling, as this is the operative concept that draws the line between justifiable and unjustifiable targeting, and thus between arbitrary and non-arbitrary deprivation of life.

For this reason, distinction comes to the fore in the targeted killing debate, as it is unclear what side of the line of distinction between civilian and combatant to put a terrorist. The heart of the issue is that non-uniformed, non-state actors and organizations do not neatly fit into the categories laid out by the Geneva Convention. In the conventional war context in which the Geneva Conventions were written, combatants were easily identified by uniforms or insignia. Those who wear a uniform or insignia are entitled to certain rights but are also subject to being killed by an opposing military force. Those who do not are civilians who enjoy a broad set of entitlements, most importantly that they may not be intentionally killed.

Again, while these laws were entirely appropriate and necessary after the carnage that the first half of the 20th Century brought upon the world, they were ill-suited to govern the conflict that dominated the second half of the century and remain ill-suited today. If your wearing a uniform or insignia entitles an enemy force to kill you, it is an obvious option for an insurgent force to remain in civilian garb. By doing so, the combatant status of those non-uniformed

[47] Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict." p 30

members becomes highly controversial. The Geneva conventions sought to mitigate the problems caused by a rise in guerilla and insurgent forces after World War II by introducing Protocol I and II in 1977. According to Article 44 of Protocol I,

> . . . combatants are obliged to distinguish themselves from the civilian population while they are engaged in attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) During each military engagement, and
> (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack

This legislation does broaden the conception of a combatant so as to include non-traditional combatants that had begun to appear. By broadening the definition, international law recognized that combatants are no longer *only* those who wear uniforms. As long as an aggressing force or individual carries his arms openly during or preceding a military engagement, that person holds combatant status. This is surely an improvement in some sense, but, as Gross points out, "These regulations tend to obscure rather than sharpen combatant status. . . . Protocol I extends combatant status to militants, insurgents and guerillas. What, then, of terrorists?"[48]

As important as the legal innovations introduced in 1977 were to address evolving realities in war, they are nevertheless inadequate to fully clarify the legal status of modern terrorists. Those fighting in a non-uniformed, non-state organization are free to choose whichever status suits their purposes. They can pick up a weapon and fight as combatants, but as soon as they put the weapon down and return home they instantly become civilians and enjoy the

[48] Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?" *supra* note 6, 329

protections thereof.[49] The Geneva conventions only recognize "combatant" or "civilian" statuses, but today it seems that this is a false dichotomy, or at least an unfair one. Members of terrorist organizations are either combatants who are war criminals or civilians who are ordinary criminals. In either case, a criminal has a right to due process.[50] So, if we frame them as criminals, we are not entitled to fight back using the weapons and tactics of war. Again, imputing moral or legal guilt cannot do any justificatory work in our application of lethal force.

One plausible solution to this legal quandary would be to further broaden the definition of a combatant. It is intuitively unacceptable that a member of a terrorist organization should enjoy a legal safe haven, being subject only to an inadequate and debilitated territorial law enforcement, while devising terrorist agenda. But, if we adhere strictly to the legal framework that we have inherited, it seems all but impossible to avoid reversion into the law enforcement paradigm. If this paradigm cannot be avoided, then the right to due process of potential victims of targeted killing cannot be denied.

Any shift in our legal framework that could possibly allow for targeted killing will necessarily be a fundamental, and thus likely controversial, shift in legal categories. But I nevertheless argue that such an innovation in law is required to keep pace with the change of character of armed conflict. The classical understanding of separation of civilian and combatant must remain open to revision. The legal standing of a member of a terrorist organization must be called into question.

The first step towards realizing the necessary innovation in the legal understanding of a member of a terrorist organization is noting that terrorists are qualitatively separate from both civilians and traditional combatants in philosophically pertinent ways. As long as we feel obliged

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[49] Ibid.
[50] Ibid.

to place them neatly into one category or the other, we will find ourselves led to unsatisfactory conclusions.

First, members of terrorist organizations are not civilians. Civilians have a presumed innocence and thus immunity from the violence of conflict (generally speaking), though perhaps using "innocence" here is misleading. By "innocence" I do not mean moral or legal innocence. If I meant it in this way, then I could only distinguish terrorists by claiming that they are morally or legally guilty of some violation of domestic or international law. This would obviously mean a reversion to the law enforcement paradigm, requiring due process. Rather, civilians are innocent insofar as they abstain from conflict. They do not contribute to a war-making cause, and they do no harm to anyone.

Innocence in this latter sense does not apply to terrorists. By becoming a member of such a group, a person actively supports a violent cause. The killing of a confirmed terrorist may be controversial in that it is arguably the killing of a civilian, but few would argue that the victim was an "innocent" civilian. Membership of a terrorist organization does not necessarily lead to the conclusion that the member *should* be killed—i.e., that justice demands it—but membership is surely sufficient for the individual to lose civilian status.[51] Similarly, merely joining the military and putting on a uniform in no way imputes moral or legal guilt. It is never the case that a uniformed service member *should* be killed (again, as a matter of justice) merely in virtue of membership, but such membership is sufficient for the loss of civilian status.

Now it may appear as if I am equating members of terrorist organizations with combatants, but there is a further distinction to be made. Terrorists are not combatants in the classical sense of the term. The term "combatant" traditionally refers to a uniformed service

[51] Jens David Ohlin, "Targeting Co-Belligerents," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Jens David Ohlin Claire Finkelstein, and Andrew Altman(Oxford: Oxford University Press, 2012).

member operating under a chain-of-command. These are the sorts of combatants that were around in World War II when the laws of war that govern conflict today were written. Crucial to this interpretation of combatant is that uniformed service members are primarily defensive in nature. When conflict or a threat to security arises, they submit themselves to the violence of war to the extent that is necessary to defend those they have been sworn (or contracted, rather) to defend.

Terrorists do not share this defensive quality with traditional combatants. They join a cause that is not only violent in nature, but offensive in nature. They are not interested in defending the truly innocent civilians of the region in which they fight, but rather seek shelter among those civilians in order to carry out violence among other truly innocent civilians. So, whereas a traditional combatant is only a threat and subject to the violence of conflict when actively engaged (as Protocol I stipulates), terrorists remain a threat regardless of their engagement in conflict at any given time. If the purpose of the organization is to carry out violent acts against innocents, their very existence can be interpreted as aggression, regardless of the success of their endeavors. In contrast, the mere existence of, say, the Canadian army does not pose a threat to innocent civilians. Thus, members of terrorist organizations are distinguishable from the classic understanding of a combatant. In many ways, their exploitation of status laws, combined with their targeting of civilians and devious methods of doing so, make them much more dangerous than the typical combatant that current law would readily identify. And if this is the case, then the way in which we define a combatant, even the non-traditional combatant that Protocol I addresses, is inadequate to capture the full extent of then the meaning it is intended to encompass.

It is important to note that a terrorist acting individually cannot constitute a threat worthy of the invocation of self-defense by a nation. Rather, it is the organization as a whole that poses the threat to which a state may respond with force.[52] An organization will retain something like a command structure and infrastructure necessary to coordinate its efforts and attacks, which further likens it to a military force.[53] If a terrorist is merely a civilian without connection to a more powerful and dangerous organization, then no principle of IHL would permit the targeted killing of that person.[54] However, if the person can be linked to the operations of a terrorist organization, then targeted killing becomes a justifiable course of action.

Linking the individual to the organization becomes a tricky matter as we attempt to formalize the link. Legal options for linking apply explicitly to either conventional combat or criminal action—neither of which map neatly onto the issue of terrorism. Principles used to link individuals to organizations in an armed conflict context include direct participation in armed conflict, co-belligerency, or military membership.[55] If any of these indeed apply to terrorists, it would not be without a liberal interpretation. Direct participation has a temporal limitation wherein the individual can only be targeted for that time in which he is actively engaged in combat. Co-belligerency and military membership only apply to states and traditional military members (those who wear uniforms and insignia). Complicity and conspiracy are concepts in criminal law that link individuals to more dangerous organizations, but it is difficult to imagine how we might utilize these concepts without invoking a law-enforcement paradigm. Again, traditional legal categories are inadequate to address the concerns and realities of modern

[52] Ibid.
[53] Ibid. at 81
[54] Ibid at 64
[55] Ibid at 65

combat. Liberal interpretation or new legislation is needed to maintain the applicability and authority of law.

I argue that our understanding of a "combatant" should be expanded so that membership in a terrorist organization is a sufficient condition for that individual to lose civilian immunities. A member of a terrorist organization can be safely assumed to be either actively engaged in violence or planning future violence. If terrorist organizations cease to do either, they cease to be terrorist organizations. It is not the case that mere membership makes one guilty of war or domestic crimes, but rather that such membership undoubtedly exhibits one's willingness and intention to engage in conflict, to which counter-engaging is an entirely rational and acceptable response. Thus, membership is a justifiable linking principle by which a state may equate the targeting of an individual to an act of armed conflict against an organization that poses a legitimate threat.[56]

It could be argued that using membership as a linking principle is far too "status" oriented and thus violates the temporal limitation included in Additional Protocol I. This Protocol was written to clarify when the law may consider an individual who is not part of a conventional uniformed military to nevertheless be considered a combatant. A crucial component of this legislation was the temporal limitation that only allowed fighting these combatants "for such time"[57] as they are directly participating in hostilities. In such cases, combatant status is conferred in virtue of the person's conduct—participating in hostilities.

It is important in this context to maintain the moral barrier between conduct and status. During war, uniformed military members are targetable in virtue of their status, but no such status applies to civilians whose direct participation in conflict may be quite limited. Inasmuch as

[56] Ibid at 81
[57] Additional Protocol I, art. 51(3)

terrorists are not uniformed military members, targeting them cannot be status-based, as Additional Protocol I stipulates. This is a difficult hurdle to clear for the defense of targeted killing.

But, as Jens David Ohlin points out, the dividing line between status and conduct is not as clear-cut as we may wish it to be.[58] One could take a hardline approach and assert that conduct-based targeting only allows for targeting such individuals who personally display a direct and imminent threat of violence, perhaps only those with a finger on a button or trigger. This would set the moral bar high, but would render a state's military defense all but impotent. Finding such imminent threats and responding to them in time is impracticably difficult. A less stringent standard would plausibly admit membership in a terrorist organization as an instance of conduct which warrants military response. It is the conduct of the individual, the choice to join the organization and to actively participate in the planning and execution of its agenda, that nullifies civilian immunity. Members of organizations are able to join and quit as they will, which preserves the temporal limitation that Additional Protocol I emphasizes.[59]

However, because of the asymmetric nature of conflict with terrorist organizations, they have utilized the strategy of blending in with a civilian population. Just as they are not conventional combatants, so will we not be able to engage in conflict with them in the conventional manner.

Targeted killing is arguably the most effective strategy for counter-engagement. Steven David outlines a few of the major advantages of targeted killing in the context of the Israeli-Palestinian conflict. He explains that it is nearly impossible for Israelis to defend each of the thousands of potential targets of Palestinian terrorists (airports, stadiums, government buildings,

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[58] Ohlin, "Targeting Co-Belligerents." *Supra* note 39. p. 86
[59] Ibid at 82

etc.). “In such situations, the best response to terrorism is to eliminate the threat before it can be launched. One of the most successful means of eliminating terrorists before they can strike is targeted killing.”[60] He points out that terrorist organizations are built around a few charismatic leaders and those few people with the technical skills needed to create whatever devices they use to carry out their plan. By eliminating these few key people, the organization suffers a substantial loss that is not easily replaced. Furthermore, Israeli forces often inform a particular member of a terrorist organization that he is being targeted. This will cause the member to turn himself in or flee—in either case, the threat he poses is diminished.[61] The effectiveness of targeted killing is also emphasized by Charles Dunlap when he points out the movement of Al-Qaeda to Yemen from Central Asia: “The reason is not because an allied ground operation drove them out, and not because some clever ‘hearts and minds’ campaign made them feel unwelcome in the Hindu Kush, but rather because of the persisting application . . . of air strikes from Remotely-Piloted Aircraft.”[62] The emphasis on the importance of targeted air strikes lies in stark contrast with the ineffectiveness of conventional ground tactics. That is to say, if we plan to counter-engage the terrorists, the most effective way to do so is with targeted air strikes.

As I mentioned before, targeted killing must not be conceived in a way that imputes moral or legal guilt. If targeted killing must be used as a tactic of warfare, it cannot be viewed as killing for vengeance or retribution. This is not an impossibility. If we are willing to concede that membership in a terrorist organization is a sufficient condition for combatant status and acknowledge that the most viable option for combating this threat is with targeted killing, then it

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[60] David, "Israel's Policy of Targeted Killing." *supra* note 39.
[61] Ibid.
[62] Dunlap, Charles James, Does Lawfare Need an Apologia? (September 10, 2010). Case Western Reserve Journal of International Law, 130

is not a stretch to conclude that targeted killing must be an acceptable tactic of warfare as it is carried out today.

"Naming names" is no longer a matter of imputing guilt to an individual. Rather, as Gross puts it, "Naming names . . . establishes affiliation in the same way uniforms do."[63] The act of targeting merely serves the purpose that wearing a uniform traditionally serves. So, whereas in conventional warfare those who wear a uniform may be subject to lethal force by an opposing military, so today those who are identified via sources of intelligence as combatants (as I argue the term "combatant" should be understood) may be targeted.

This view of targeting also distinguishes targeted killing from assassination. David points out that "philosophical and political norms against assassination have been even more influential than written law."[64] But he goes on to argue that "war—or armed conflict—is a legal license to kill whether it is targeted killing or more traditional combat."[65] The brute fact of the matter is that, if we can hope to engage a non-uniformed, non-state enemy force, we cannot go about it in a conventional manner. "Insofar as Israel and other states make war on terrorism, traditional norms of combat will have to change."[66] If we yet seek to oppose targeted killing as a viable tactic, "critics of this approach need to provide an alternative."[67]

VI The Waldron Objection

Jeremy Waldron argues that accepting a principle that permits targeted killing (which he calls "N_1") is a dangerous tool in the legal toolbox of any political leader. He says, "We should

[63] Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?" *supra* note 6, 330
[64] Steven R. David, "Israel's Policy of Targeted Killing" *supra* note 39, 112
[65] Ibid at 113
[66] Ibid at 116
[67] Ibid at 125

consider whether we are comfortable with N_1 in the hands of Al Qaeda or Hamas or some state that sponsors activities of the kind those organizations engage in."[68] He argues that a principle like N_1 cannot be interpreted neutrally—or at least, that believing that it can be interpreted neutrally is misguided. Realistically, if N_1 is a viable and accepted principle, then it will be exploited by those who seek to use it for morally questionable purposes. They can be abused not only by terrorist groups and tyrannical governments, but also by some democratic governments. He goes on to cite several examples of morally unacceptable uses of power by democratic governments in the 20th Century.[69]

Waldron's view is that we should instinctively shy away from any principle that allows for deliberate killing, especially when there is no due process. This is the default position from which we start and against which any proposed principle such as N_1 must make a strong counterpoint. In this vein, he argues that the principles of just war—such as the principle of distinction, or N_0 —have only come about because centuries of armed conflict have proven our default position to be unviable. Principles like distinction have come about in response to the inevitability of war. If we must make war, let us at least do so in the most civil possible manner. So, the principles that guide our war-making are moral concessions that are valid in light of the sociological fact of human violence and conflict. Viewed in this light, any attempt to separate a guiding principle from the historical context in which it was developed is highly problematic. Simply imposing a new moral principle of war, N_1, is a dangerous proposition by virtue of its lack of historical backing (at least compared to the long-observed principle of distinction).[70]

My first objection to Waldron's argument is that it is possible for any guiding principle of warfare to be abused by an ill-intentioned political actor. The mere fact that one could potentially

[68] Waldron.
[69] Ibid.
[70] Ibid. at 128

abuse a norm or law does not necessarily lead to the conclusion that such a law must be rejected. It is *possible* to abuse social assistance programs, but that does not mean that we should therefore reject them. Perhaps that is a bad example, for it may be morally acceptable to abuse a law that is meant to actively help people whereas it might not be acceptable to abuse a law that permits the killing of certain people. However, killing in self-defense is a principle that allows for the taking of a life. Should we abandon this principle because of its potential abuse?

Waldron responds to this point directly. His counterargument is that, yes, the principle of self-defense is just as open to abuse as any other legal principle, but that is the reason we implant a mechanism for ensuring the appropriate application of the principle for every case in which it is utilized. "In a well-functioning legal system, *every single action using deadly force on this ground* is subject to intense, immediate and sustained investigation by the police, and charges are brought in a great many such cases where there is serious doubt whether the criteria for self-defense have been properly applied."[71]

Waldron's acceptance of self-defense rests on the grounds that there is a mechanism for reviewing its application. While it may be subject to abuse, such abuse is very likely to be substantially mitigated by our law enforcement and legal procedure. My objection to Waldron's argument is his tacit presumption that no such mechanism for review is applied to targeted killing. Methods for reviewing the process of targeted killing do not exist in as robust a form as the method for reviewing use of lethal force for self-defense in domestic law. However, it is at least conceivable that, just as the invocation self-defense can be used to justify killing if certain criteria are met in a criminal court, so could instances of targeted killing be required to meet standard international criteria. The fact that no such standard criteria exists explicitly in international law today should not lead us to conclude that permitting targeted killing is the first

[71] Ibid. at 120

step down a slippery slope. Indeed, it is already the task of the Human Rights Committee to investigate and report violations of human rights. If targeted killing were not performed in accordance with high standards of identification, the issue would no doubt be raised by that Committee and others more directly affected. Accepted standards must be open to careful scrutiny.

Furthermore, killing in self-defense and targeted killing alike are *morally* defensible whether or not there exists a legal process to investigate and scrutinize their application—a process of review is not a necessary condition of their moral acceptability. If there existed a state in which no process of investigation into instances of killing in self-defense has yet been instituted, it would be absurd to assert that, because of the lack of such processes, people in that state no longer have the right to defend themselves with lethal means, if necessary. In the same way, the lack of a formal process of review for the use of targeted killing, while problematic, is not ultimately condemning of the tactic. Just as one who kills in self-defense is morally justified whether or not there exists a process to scrutinize its application, so targeted killing can be justified even though its application is not (yet) formally scrutinized. Although, in any case, a formal review process is certainly desirable.

My second objection to Waldron's analysis is his refusal to acknowledge the changing character of war. Waldron argues that a principle such as N_0 (principle of distinction) comes to be acknowledged as a guiding principle due to the unviability of its alternative, absolute abstention from killing, which is sociologically apparent.[72] So, armed conflict is accepted as an inevitable reality which we must do our best to humanize. This is all well and good, but if he rests his understanding of guiding moral principles of war on historical realities, then would it

[72] Ibid. at 127

not follow that changes in the character of war could lead to changes in accepted moral principles?

The principles that guide warfare today are those that we have inherited from a tradition of war dating back to the Greeks in which war is carried on out a battlefield by uniformed soldiers. In this context, the guiding principles of armed conflict work well, but the character of the armed conflict has fundamentally changed. The enemy is not necessarily found on a battlefield, but rather among the civilian population. So, if the enemy is to be fought at all, the classic "battlefield" paradigm must be modified, and the principles that guided conflict in that context should remain open to revision.

Innovations in legal paradigms and norms keeping pace with innovations in warfare are a recurring theme on every level of analysis. While such legal evolution is necessary, the potential for a moral misstep is at its greatest. Waldron's objection should always loom above the head of both the legislator and military commander. The acceptance by many of targeted killing as a tactic of modern warfare signals a fundamental change in warfare itself—one which should not be lost on those who engage in it.

As Rosa Ehrenreich Brooks points out, we are entering an age of "war everywhere."[73] As she argues, declaring war against a non-state entity, while perhaps not itself a morally flawed proposition, is fraught with potential for abuse.[74] The line between civilian and combatant is blurred and must be redrawn. The geographical scope of the battlefield, being no longer limited by national boundaries, becomes nebulous at best and requires moral redefinition. As we recast the guiding principles of war for a new age, we must be careful to do so with preserving humanity—the limitation of human suffering—as a guiding principle. While a certain degree of

[73] Brooks, "War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism."
[74] Ibid.

armed conflict is justified for a nation to protect itself against the threat posed by non-state organization, there remains the potential for abuse, drawing our lines too broadly, and giving license for military action, in certain places and against certain people, where there ought not to be any. Waldron's objection may not warrant an absolute cessation of targeted killing, but it certainly offers a stern and necessary counterpoint to its advocates.

VII Conclusion

I have argued that armed conflict between a state and a non-state organization is legitimate armed conflict, worthy of regulation by the Geneva Conventions. Because non-state organizations are capable of inflicting great violence on the population of other states, potential victim states retain the moral right of self-defense against them. The inadequacy of law enforcement in the regions in which these organizations operate leaves the state with no other option but military action, which fulfills the necessity requirement of jus ad bellum. Once engaged in armed conflict, the right against arbitrary deprivation of life for participants in the conflict is reinterpreted through the lens of IHL. Thus, targeted killing does not violate human rights if the individuals targeted can be classified as combatants in armed conflict. This is not a conceptual stretch, considering the fact that non-uniformed personnel can be considered combatants for such time as they remain a threat, according to Additional Protocol I. Membership in a terrorist organization is sufficient to assume that a person is willing to actively engage in violence against others when the established criteria, as well as the methods by which we establish that criteria, are confirmed. As long as a person remains a member, that person poses a threat of violence against which a state is entitled to defend itself.

The defense of targeted killing is challenged chiefly on two fronts. There is a jus ad bellum concern of necessity that asks whether armed conflict generally, and targeted killing specifically, are truly necessary for national security. If the threat to national security could be mitigated by less violent means, then resorting to war would be an unacceptable course of action. This point has interesting implications for the threat of a global area of conflict. Namely, as long as lack of law enforcement lends to the justification of targeted killing in some regions, targeted killing would be unjustifiable in regions wherein no such lack exists. That is to say, terrorists cannot be targeted in regions in which arrest is a truly viable option.

The other front of challenge to targeted killing is the jus in bello requirement of distinction. Members of terrorist organizations are not military personnel, so arguing that they nevertheless retain a combatant status is a conceptual hurdle that targeted killing must clear. I have argued that membership in the non-state organization that poses a threat is sufficient for the loss of the protections of civilian status. Thus, membership links the individual to the organization that bears the threat against which the warring state defends itself. While this linking principle is conceptually satisfying, it depends heavily upon sources of intelligence in order to establish membership. Defining criteria by which we identify and confirm members of terrorist organizations is a task saturated with moral implications. While this is troubling enough, the issue is compounded when the established criteria, as well as the methods by which criteria is confirmed or denied in each case of targeting, are shielded from public scrutiny. Making such information public would inevitably give distinct advantage to terrorists, so it remains confidential.

It is this secrecy that many understandably find disagreeable, if not unacceptable. The answer to this issue lies in a moral analysis liberty versus security—a debate too complex for the

scope of this thesis. However, while accountability to the public is a democratic ideal that should be maximized to the greatest viable degree, it should simultaneously be recognized that security could demand the confidentiality of certain knowledge, such as the means by which a state identifies and targets terrorists. At the very least, we can conclude that the moral education of military officers and federal agents is of paramount importance for respecting moral obligations in times and places in which nobody is looking.

In the end, targeted killing is an innovative tactic of warfare that can be justifiably used against an equally innovative enemy. However, while it may be justifiable in principle, its implementation must be scrutinized at every level. For all my argument, I have only managed to move the debate over to a new set of questions. What standard do we appeal to when we declare an individual as a terrorist? How sure must we be? What if we are wrong? It seems that Waldron's objection still looms above—we must move forward with utmost care that the tactics and principles we establish are not unduly prone to abuse by future political and military leaders. But to deny our ability to adapt tactics and legislation to the existing realities of armed conflict is unacceptable from a practical, as well as moral, standpoint.

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