Targeted Killing in Morality and Law

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Apology: this document is more a set of notes than a polished paper. Please do not circulate it beyond the conference until I have had time to revise and complete it.

Targeted killing, as I will use the term here, is one type of assassination. The paradigm instance of assassination, as traditionally understood, is the extrajudicial killing of a political leader. The term "targeted killing" is more recent and is widely used to refer specifically to the killing of suspected terrorists by agents of a state. My concern here is with targeted killing in this sense rather than with the broader category of assassination.

We should distinguish two questions. One is whether targeted killing can ever be morally permissible. The other is whether targeted killing ought to be legally permitted in domestic and international law.

These two questions are complexly interrelated. But one can think about each in isolation from the other.

The legal problem of targeted killing arises from the fact that we have two distinct and quite different sets of conventional norms by which anti-terrorist action might be governed: the norms governing the conduct of war and those governing law enforcement, or police action. Some writers have sought to assimilate anti-terrorist action to war. They might have argued that the potential victims of terrorism are fighting a defensive *war against terrorists* – if, that is, political commentators in the US had not preempted them by instead introducing the fatuous term "war on terror." Some of those who think that anti-terrorism comes within the scope of the war convention regard terrorists as combatants. Others, including members of the Bush administration, claim that they are "*unlawful* combatants," a category manipulated so that it permits the assignment to terrorists, or suspected terrorists, the liabilities of combatants while withholding from them the rights and privileges conferred by combatant status.

Other writers argue that anti-terrorist action is law enforcement and thus comes within the scope of the norms governing police action. They argue that terrorists are civilians engaged in an egregious form of criminal

activity. Like other suspected criminals, terrorists, or terrorist suspects, may not be hunted down and killed but must be arrested and brought to trial. Partisans of the assimilation of anti-terrorist action to war might argue that the idea that terrorists must be arrested and tried implies that the goal of anti-terrorist action is punishment, whereas it is in fact *defense*, which is the proper aim of just war. But this objection fails to take account of the fact that one aim – and in my view the central aim – of punishment is social defense, that is, the protection of innocent people from threats posed by the criminal action of others. Unlike the war convention, however, the norms of law enforcement insist that social defense be constrained by a requirement of arrest, the presumption of innocence, and a requirement that action that is simultaneously punitive and defensive not be taken unless the victim has been proven beyond reasonable doubt to have made himself liable to it.

It is undeniable that some terrorists are combatants. For there are members of regular military organizations who engage in terrorism as a means of achieving their aims in war. This is true, for example, of those who bombed cities during the Second World War with the intention of killing their civilian inhabitants. But we have a special legal category for such individuals: they are war criminals. (Late in his life, McNamara asked, in an interview, "Was there a rule that said you shouldn't bomb, kill, shouldn't burn to death 100,000 civilians in a night? [General Curtis] LeMay said that if we'd lost the war, we'd all have been prosecuted as war criminals. And I think he's right. He, and I'd say I, were behaving as war criminals.") I will not discuss combatants who become war criminals by engaging in terrorism; rather, in what follows I will use "terrorist" to refer only to those who engage in terrorism outside of any role within a regular military organization.

The position of those who claim that terrorists have some form of combatant status within the war convention is doubtfully coherent. The war convention is indeed conventional. It is a set of conventions designed to serve certain purposes – primarily the reduction of violence and harm in war through the insulation of ordinary civilian life from the destructive and disruptive effects of war. Combatant status is a legal artifact that has a crucial role in the achievement of this purpose. The granting of combatant status involves a tacit bargain. Those to whom it is granted are thereby guaranteed immunity from legal prosecution even if the war in which they fight is unjust and illegal. And they are also granted legal rights to humane treatment and release at the end of the war if they are captured. In exchange for these rights and immunities, they are required to observe certain constraints on the

conduct of war. They are required, in particular, not to conduct intentional attacks against civilians. Combatant status is conditional on reciprocity: one is entitled to the benefits only if one restricts one's action in the required ways. Combatants who intentionally kill civilians forfeit some of the privileges and immunities conferred by combatant status (though they do not forfeit combatant status altogether, since even war criminals retain the legal right to kill enemy combatants until they are arrested – that is, they retain their immunity to punishment for killing enemy combatants).

Terrorists, however, subvert the central purpose of the war convention in at least two ways. First, and most obviously, they intentionally attack civilians. It is their aim to expose ordinary civilian life to the violence characteristic of war. Second, those terrorists who are not already uniformed members of a regular military force in wartime carry out their missions clothed as civilians, thereby eroding the ability of those who would uphold the war convention to distinguish between those who are threatening and those who are not. It is, in short, the essence of terrorism to do precisely what the war convention has been designed to prevent. And combatant status is, in effect, a reward offered as an incentive not to do precisely what terrorists do. It would be pointless to grant the rewards for refraining from engaging in terrorism to terrorists themselves.

Targeted killing is *preventive* killing

Targeted killing is a form of collective defense. But it is also preventive defense. If a terrorist is killed while attempting to commit a terrorist act – for example, while approaching a gathering of civilians with explosives strapped to his body – this is not an instance of targeted killing but a case of third party defense of others, or "other-defense," against an attacker whom it is not reasonable to try to stop by other means, such as nonlethal incapacitation and arrest. Since targeted killing involves the killing of suspected terrorists at a time when they are not engaged in terrorism, it may seem that it cannot be justified on the ground that its victims are liable to *defensive* killing. (Some have concluded that targeted killing is best seen as retributive punishment for those who cannot be arrested and convicted for their past crimes.[1])

But the targeted killing of an actual terrorist can be justified on grounds of liability in the same way that the killing of a sleeping unjust combatant can be justified. The unjust combatant is engaged in a continuous effort to inflict who on his adversaries. Perhaps those (and they are many) who claim that the reason it is wrong to attack noncombatants in war is that they are

defenseless should also believe that one must wake the unjust combatant before it can be permissible to kill him. But the more sensible view is that he is engaged in the activity of posing a threat even while he is temporarily asleep, just as I am engaged in the process of writing this paper even while I pause to make tea. Similarly, a terrorist who has planned a terrorist action and is preparing for it poses a threat – that is, has through his continuing intentional action significantly raised the probability that innocent people will be killed by him – and is morally liable to defensive action to avert that threat. The main difference between a sleeping terrorist and a sleeping unjust combatants is that the latter keeps about him the visible symbols of his commitment to attack his adversaries, such as his uniform and weapons, while the terrorist seeks to conceal his intentions and preparations.

The grounds for liability to targeted killing are even stronger, of course, if the person targeted has engaged in terrorist action in the past.

Individual planning and preparation for future terrorist action are not necessary conditions of liability to targeted killing. It may be sufficient if a person is an active member of an organization that engages in terrorism (or, more specifically, of the branch of that organization that engages in terrorism). This is because active membership involves commitment of the will and raises the objective risk of wrongful harm to innocent people.

Suppose, then, that a person who is nominally a civilian has engaged in terrorist action in the past, is an active member of an organization committed to the use of terrorist tactics, and is planning and preparing for further terrorist action in the future, though it is not known exactly when that action will come: it might be in a matter of weeks, or months, or longer. Suppose that this person lives among people who shelter and protect him; hence it is not possible to capture him without engaging in battle. But targeted killing is possible, and in a way that will not involve the harming of any innocent bystanders as a side effect. Suppose that if this person is not killed, innocent people will remain at a high risk of being killed by him, but that if he is killed, that will significantly reduce the probability that innocent people will be killed. In these conditions, this person is liable to killed in defense of the people he threatens, even if their identities are unknown and perhaps even undetermined at the time he is killed. He has no right not to be killed and thus would not be wronged by being killed. Killing him would be an act of other-defense that would be discriminate, necessary, and proportionate. This amounts to a strong liability-based justification for killing. Killing him would

be permissible in the absence of other considerations capable of outweighing the conditions of justification.

Prevention denies the victim the opportunity to change his mind

Some argue that preventive killing denies people the opportunity to choose of their own free will not to engage in wrongdoing. That may be right but it is comparatively insignificant. It is unjust to force innocent people to bear a significant risk of being wrongfully killed in order that a person who has formed an intention to kill innocent people should have a chance to change his mind.

The claim that the victims of targeted killing have a right to trial

Neither terrorists nor murderers have a *moral* right to a trial. When they engage in terrorism or murder, they lose such rights. In domestic criminal law, we *grant* a *legal* right to trial to all, even actual murderers, as a means of avoiding punishing the innocent. One reason to reject targeted killing in law and to insist instead that anti-terrorist action be constrained by a requirement of arrest is to ensure, similarly, that innocent people do not become the victims of targeted killing.

The risks of misidentification are considerable even in domestic anti-terrorist action, as was shown when British police killed a Brazilian man whom they mistook for a terrorist shortly after the terrorist bombings in London in 2005. But the risks of misidentification are exacerbated when anti-terrorist action has to be conducted in foreign countries, and especially when it has to be carried out without the cooperation of the government of the country in which it is conducted. In 1973, for example, agents of Mossad, the Israeli intelligence and counter-terrorism agency, killed an innocent Moroccan waiter in Norway in the mistaken belief that he was the leader of the Palestinian "Black September" terrorist group that had massacred Israeli athletes at the 1972 Munich Olympics. This case provoked an international scandal, but in general the incentives to exercise reasonable care in identifying and attacking foreign terrorists are weaker than those for exercising care in domestic police work or anti-terrorist action. Governments will naturally take greater precautions to avoid killing their own citizens by mistake.

Two types of mistake

(1) The person is not a terrorist.

(2) Even if he is a terrorist, no good will result from killing him.

There is no liability in either case, since on the understanding of liability I accept, a person cannot be liable to be harmed if harming him will be ineffective in preventing or correcting the wrong for which he is responsible. But an act of harming is worse when the victim is not even potentially liable, as is true if a person is killed who is not in fact a terrorist.

Only in 1 is the person morally innocent. In 2 there may be no ground for complaint, since the terrorist is himself responsible for our being forced in conditions of uncertainty that he has created to give priority to the interests of the innocent people whom his action apparently threatens.

The risk of killing innocent bystanders as a side effect

There are also the risks involved in trying to killing terrorists as they live and move among innocent people. There is a moral risk of causing disproportionate harm to innocent bystanders as a side effect of targeted killing.

But in general there are similar risks involved in trying to incapacitate or kill them when they are actually engaged in a terrorist mission.

The risk of abuse by just anti-terrorist agents

Even if the permission extends only to those who are genuinely trying to defend innocent people against potential terrorists, they will be tempted to take opportunities to kill people who may pose a threat but in whose case there is insufficient evidence that they pose a threat to justify killing them.

Abuse by unjust agents

If the in-principle permissibility of targeted killing is recognized, those who pursue unjust aims will kill innocent people they claim are legitimate targets of targeted killing. This is perhaps the most important objection to any form of legal recognition of targeted killing. (The defense of this objection is the subject of Jeremy Waldron's paper for the conference.)

Intervening agency

It may be tempting to argue that, whatever may be true about law, our adversaries cannot make it impermissible for us to engage in otherwise permissible action simply because that action would provoke them to act impermissibly. One might say that if our justified use of targeted killing would prompt unjust regimes to engage in the unjustified use of targeted killing, their unjustified use is not attributable to our action and thus cannot make our action disproportionate or otherwise impermissible.

I think this view of the significance of intervening agency is mistaken.

To the extent that the responsive action of unjust agents is predictable, we may have to regard it just the way we would regard a natural event that our action would trigger. If our action would precipitate an avalanche that would kill a certain number of people, that clearly counts against our action's being proportionate. Similarly, if our action would prompt evil people to kill the same number of people, either intentionally or as a side effect of responsive action, that too counts in the same way against our action's being proportionate.

Consider a simplified example. Suppose there are two equally important military targets but we can attack only one of them. If we attack one, we will kill a certain number of innocent people who are being used as innocent shields. If we attack the other military target, we will kill slightly *fewer* innocent people who are *not* being used as innocent shields but who are present through no one's fault. If in assessing the permissibility of our own action we ought to discount the harms that our action will prompt our adversaries to cause, it seems that we ought attack the first target, killing more innocent people. It seems, however, that we ought instead to do what will kill fewer innocent people – that is, that we ought to attack the second military target.

Waldron's argument

Waldron argues that a principle permitting targeted killing cannot be a neutral principle because it would be intolerable to have a permission to engage in targeted killing available to our adversaries. A norm permitting targeted killing would not be exploited only by nice people. If it is a norm, it is a norm for everyone.

This kind of argument is, I think, decisive in the case of torture. Torture ought never to be permitted in law, even though on occasion it can be morally permissible, because the temptation to use it when it is not in fact justified is very great, while the occasions on which its use would actually be justified are very few. Here is a passage I published a couple of years ago in which I advanced a form of argument similar to Waldron's against any form of legal permission to practice torture:

> If we grant any legal permission to use torture, particularly one that attempts to capture the complex conditions of moral justification, it will be exploited by those whose aims are

> unjust and either abused or interpreted overly generously even by those whose aims are just. Throughout human history, torture has been very extensively employed, but the proportion of cases in which the use appears to have been morally justified seems almost negligible. … It therefore seems that anything that makes it easier for governments to use torture is almost certain to have terrible effects quite generally, and in particular to result in far more violations of human rights than would otherwise occur. Any legal permission to use torture, however restricted, would make it easier for governments to use torture, and would therefore have terrible effects overall, including more extensive violations of fundamental human rights. The legal prohibition of torture must therefore be absolute. … We cannot proceed with torture the way we have with nuclear weapons – that is, by permitting it to ourselves while denying it to others by means of security guarantees, economic rewards, and other measures designed to make abstention in the interests of all. If we permit ourselves to use torture, we thereby forfeit any ability we might otherwise have to prevent its use by others. … Our only hope of being able to impose legal and other constraints on the use of torture in the service of unjust ends by vicious and cruel regimes is to deny the option to ourselves as well, even in cases in which we believe it would be permissible. ("Torture in Principle and in Practice")

There are, however, some reasons to suspect that targeted killing is different from torture in certain relevant respects. Torture is rarely effective for defensive purposes, but targeted killing may often be quite effective in preventing terrorist action and could have significant deterrent efficacy.

It may well be, however, that the viability of targeted killing as an option for people attempting to prevent wrongful terrorist attacks depends on the current asymmetry in capacity between Western democratic societies and authoritarian regimes that practice terrorism – the asymmetry that is referred to in the phrase "asymmetrical conflict." If al Qaeda, Hamas, and other terrorist groups had cruise missiles they could fire through a window of the White House, we would have to abandon a neutral norm that permitted

targeted killing. Otherwise prominent opponents of unjust rulers or illegitimate regimes would have to live in hiding all the time, sleeping in a different place every night, as Julius Caesar did when Sulla sought to have him killed.

One problem for Waldron's argument is that a similar objection applies even to the alternative to targeted killing – namely, capturing terrorists and prosecuting them. Repressive regimes can produce a simulacrum of this procedure that involves seizing their opponents, subjecting them to a sham or rigged trial, and then executing them, claiming that justice has been done. (It is perhaps important to note that this would not be as serious a problem for the US if it did not have the practice of capital punishment. If the US did not permit execution, it could seek to arrest prosecute, and punish terrorists without setting a precedent to which other regimes could appeal to justify executions.)

One could respond to this problem by insisting that the norms requiring arrest and trial must set standards of fairness and openness for trails. There would have to be transparency and public disclosure of the evidence against the suspect. This would require that the US not have secret military tribunals or trials that grant fewer rights to defendants than it would demand that its adversaries grant to US citizens in trials conducted by the US's adversaries.

But if one claims that there can be a neutral norm of arrest and trial provided that certain constraints are imposed on what counts as acceptable forms of arrest, trial, and punishment, then a parallel claim might be made on behalf of a neutral norm of targeted killing. Perhaps there could be a neutral norm that permits targeted killing provided that it set high standards of post facto justification, with requirements for disclosure of evidence, an explanation of why arrest was not possible, and so on.

Perhaps, in other words, targeted killing is more like killing in self-defense than Waldron concedes. There is ample scope for abuse of the justification of self-defense in domestic criminal law. If a woman has a husband with a known record of spousal abuse, she may be able to provoke him to hit her and then murder him in their home, then make a successful plea of self-defense at trial. We acknowledge this risk but seek to minimize the scope for abuse without prohibiting a justification of self-defense for homicide.

Would acceptance of targeted killing have the effects Waldron fears?

Waldron has at least two worries. One is that targeted killing will be used by unjust regimes against innocent people as well as by regimes opposing wrongful terrorism. The other is that acceptance of targeted killing will erode the distinction between combatants and noncombatants as it functions in the war convention.

The convention of noncombatant immunity has evolved over a long period of time, has a variety of supporting rationales (it limits the violence of war, protects the rights of the innocent…), and is generally believed, though perhaps mistakenly, to have deep foundations in basic, nonconventional morality, so that many believe that to violate it is to be guilty of murder. Would the legal acceptance of targeted killing undermine this convention?

It is at least worth considering whether there could be a firewall between targeted killing against terrorists in peacetime and killing civilians in war. Even if it may be difficult to apply in some contexts, most people recognize the distinction between terrorists and ordinary civilians. Although many people assume that "civilian" and "noncombatant" are synonymous, they are not. In traditional just war theory, a "noncombatant" is defined as a person who does not pose a threat to others, just as "combatant" is defined as someone who does. (This is the basis of the claim that all combatants are liable to attack while no noncombatants are.) A civilian, by contrast, is someone who is not a member of military organization, including, perhaps, the police force. Terrorists, therefore, can be civilians without being noncombatants in the sense deemed relevant by traditional just war theory, for they *do* pose a threat to others.

Targeted killing is quite unlike intentionally killing civilians in war. Intentionally killing civilians in war would be terrorism, the killing of the innocent to induce fear and coerce compliance. But targeted killing could be defined for statutory purposes as counter-terrorism, in a way that would exclude its use as a form of terrorism.

Even the war convention permits the intentional killing of civilians – *if* they attack combatants, or other civilians. If civilians kill combatants in war, they become legitimate targets, though they do not necessarily acquire combatant status, as they may lack the privileges conferred by that status. (Of course, if civilians kill civilians outside of war, they are criminals.)

Different legal norms

In basic morality there is no distinction between police action and just war: both are governed by the same principles. Just war is, in effect, a form of police action. But in law we have distinct sets of norms for these two forms of action.

Terrorists are not combatants. But they are different from ordinary criminals. Their goals are political and they are supported by a network of others who share those goals and a commitment to terrorist means of achieving them. They seek to kill a large number of innocent people, chosen at random from among a certain population. Because terrorists are thus intermediate between combatants and ordinary criminals, neither the conventional norms of war nor the norms of police action are well suited to the governance of anti-terrorist action. New norms intermediate between those governing war and those governing police action are necessary in law.

These norms might permit targeted killing under certain stringent constraints.

(1) For targeted killing, there must be a requirement of public accountability, a demand for the presentation of evidence that the person killed posed a threat of wrongful harm, that attempting to capture him would have been less effective or significantly riskier, etc.

(2) Perhaps a further requirement that the person identified for targeted killing be outside the political jurisdiction or effective political control of the anti-terrorist agents and in an area in which the political authorities and the local population would not cooperate in capturing him.

(3) New status when captured. Prisoner of war status requires release at the termination of hostilities. This makes little sense as a norm that all sides could agree to when terrorists have no hierarchical structure of command and hence no method of guaranteeing that they will honor a declared end of hostilities. In the past, soldiers acted only collectively and were under a command that could effectively order them to stop fighting. They were glad to obey. But most terrorists act as individuals outside any command structure that can guarantee their obedience. They make it impossible for there to be anything like a traditional end of hostilities or to trust that they will not resume terrorist action if released.

A couple of straggling thoughts

An objection to targeted killing

Making targeted killing legal would discourage efforts at capture. Whenever the risks to anti-terrorist agents from an attempt to capture a terrorist suspect would exceed those of attempting to kill him, there would be a strong temptation to treat targeted killing as the option of first resort. This would be a perverse incentive, given that the reason for having a requirement of arrest is to protect innocent people who might otherwise be killed when mistaken for terrorists.

Better for terrorists if we treat them as criminals, yet they declare war and demand combatant rights

Those who say that they are *at war* with the US (bin Laden's declaration in late 1990s) cannot complain if they become victims of targeted killing. They can complain only when they are captured and *not* treated as prisoners of war. This gives us a reason *not* to take the additional risks involved in trying to capture them. If they say that they are at war and if they demand prisoner of war privileges when captured, then targeted killing does not mistreat them, according to the norms they cite. They become prisoners of war only when they surrender or are captured when incapacitated and thus are hors de combat. Otherwise we have an incentive not to capture them, except perhaps to interrogate them, which we can lawfully do only within the legal constraints governing the questioning of prisoners of war. [Check provisions for lawful interrogation.] If the prospects of successful acquisition of relevant information using only permitted methods of questioning are low, then it serves our interests to kill them rather than to capture them. If targeted killing and capture are both legal options, and capture offers no greater benefits while targeted killing involves fewer risks, it would be foolish to try to capture them rather than killing them.

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[1] Steven R. David, "Israel's Policy of Targeted Killing," *Ethics and International Affairs* 17 (2003).