

The Morality of Targeted Killing

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I. Introduction

The deliberate killing of another human being is a deeply immoral act. Targeted killings are deliberate killings, so any discussion must start with the strongest moral presumption against those acts. However, the prohibition has some exceptions: killing in war, self-defense, and law enforcement of various kinds.¹ This paper examines whether targeted killing (which is a species of assassination) can be one of those exceptions. I anticipate my conclusions:

- 1) Targeted killing in peacetime is prohibited except when necessary to avert a major humanitarian catastrophe such as genocide or war;
- 2) Targeted killing in a conventional war is permissible only in combat (not necessarily limited to the battlefield);
- 3) Targeted killing of a political leader in war is permissible if the leader is a link in the chain of agency of an unjust war *and* he is personally culpable;

¹ This essay is about the morality of targeted killing, not about its lawfulness under international or domestic law.

- 4) Targeted killing of terrorists in a context close to peacetime is prohibited except to prevent imminent loss of innocent lives;
- 5) Targeted killing of terrorists in a theater of war is subject to the rules in 2).
- 6) Despite all of the above, targeted killing should be *legally* prohibited in a liberal democracy.

First, some definitions are in order (these are conventional stipulations for expository purposes; no substantive issue turns on them.) I define *assassination* as *the extrajudicial intentional killing of a named person for a public purpose*. The two main forms of assassination are *tyrannicide*, which I define as any assassination *not* sanctioned by the state, and *targeted killing*, which I define as any assassination sanctioned by the state. In turn, either of these forms of assassination can occur in peacetime or in wartime. I subdivide targeted killing into targeted killing in wartime, and targeted killing of terrorists. This paper will examine only one kind of assassination: the extrajudicial intentional killing by the government of a liberal democracy of an identified person for a political purpose ---targeted killing, for short. I will not discuss tyrannicide, nor targeted killings by illiberal regimes.

I intend these definitions as normatively neutral. Thus, for example, the word “assassination” (bad as it sounds) is not intended as a pejorative term. It may or may not be morally justified. The act I examine here is, as indicated, the extrajudicial intentional killing of a person for a public purpose outside combat. This definition calls for some clarification. The word “extrajudicial” excludes from the definition all instances where a person is killed in execution of a lawful sentence (whether this is morally justified or not I will not address.) The word “intentional” means that the assassin *directly* intends to kill the victim. It excludes from the definition all killings that are incidental to combat in war or revolution. Thus, it excludes not only unforeseen deaths, but also foreseen yet unintended deaths.² In a targeted

² The distinction between intended outcomes and unintended yet foreseen outcomes has a crucial role in the morality of war, and is captured by the famous doctrine of double effect. See, inter alia, R. G. Frey, “The Doctrine of Double Effect,” in R.G. Frey and Christopher Heath Wellman ed., *A Companion to Applied Ethics* (Oxford:

killing the victim is named precisely identified: the lethal action is directed at him. The requirement that the victim be named is necessary to distinguish targeted killing from the “anonymous” intentional killing of enemy combatants in war. Killing an enemy soldier in the battlefield is not a targeted killing in our sense. Finally, I use the expression “public purpose” loosely, to exclude private purposes such as revenge or personal gain. A public purpose in this sense is still normatively neutral: it may or may not be morally justified.

I proceed in a somewhat unusual way. I first examine the different forms of targeted killing and make the *prima facie* case for their justification. I first address targeted killing in peacetime, that is, the morality of a liberal government’s targeted killing outside the war context. I then turn to targeted killing in conventional war. The central question here is whether the license to kill in war relaxes the strict rules that govern targeted killing in peacetime. I then focus on targeted killing of terrorists.³ The question here is whether targeting terrorists must be analyzed under the stricter peacetime framework, or under the more permissive wartime framework, or under a mixed framework that borrows from the other two. The conclusions of this first part are *presumptive*. I try to show that there are moral arguments in favor of these admittedly repulsive acts. The next section analyzes *objections* to targeted killings, and examines whether the force of those objections should make us revise our presumptive conclusions. At the very least, these objections show that targeted killings have features that make them especially troublesome even accepting the force of arguments in their favor.

II. Targeted Killing in Peacetime

Blackwell, 2003); Joseph Boyle Jr., “Toward Understanding the Principle of Double Effect,” in P.A. Woodward (ed.), *The Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle* (Notre Dame, IN: Notre Dame University Press, 2001), p. 12; and Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York, Basic Books, 2006), p. 128.

³ I avoid using the term “asymmetrical war” because it prejudices the issue by deciding that the conflict with terrorists is sufficiently close to conventional war.

I start with the general concept of targeted killing, the extrajudicial intentional killing by a liberal government of a person for a public purpose. It will be convenient to start with targeted killing in peacetime, because clarifying that concept will help us analyze targeted killing in wartime. What can possibly justify a targeted killing in peacetime? Everyone agrees that assassination in peacetime is morally vile. In the United States assassination is legally prohibited regardless of purpose or consequences.⁴ In peacetime, the state can use lethal force only in very limited circumstances, mostly in self-defense or to protect persons from deadly threats. Beyond that, a suspected criminal is entitled to due process and may not be killed except in execution of lawful sentence pronounced by a court of law after a finding of guilt by a jury (and this assuming, controversially, that the death penalty is morally justified.) The state's *moral* obligation not to kill a person without due process includes foreigners, even if we think that foreigners are not entirely protected by our constitutional guarantees. Foreigners have a right to life, which is universal. Moreover, a government does not have the political relationship with the foreigner that would give that government the right to use force against him. That a person is committing a crime does not, by itself, confer power on *her own* government to kill her. *A fortiori*, it does not confer power on *another* government to kill her.

However, I would like to make a *prima facie* case for the occasional permissibility of targeted killing in peacetime, leaving for later whether such presumptive case may be defeated by the general objections against targeted killing. Because the default rule is that assassination is deeply immoral, a targeted killing in peacetime can only be justified, if at all, under very stringent conditions. I provisionally suggest the following four conditions, with the caveat, again, that even if these conditions

⁴ See Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), in Dycus, Berney, Banks, & Raven-Hansen, *National Security Law*, 4th ed. (Kluwer 2007), p. 399.

are met, the force of the moral objections to this practice may still convince us that targeted killing in peacetime is never justified.⁵

- 1) The targeted killing will save many lives, including many innocent lives.
- 2) The purpose of the targeted killing is just.
- 3) The target of the killing is morally culpable, a villain.
- 4) There are no non-lethal alternatives available, such as issuing diplomatic threats or capturing the villain.

a. Saving Lives

Targeted killing can only start to make moral sense if it is likely to spare the lives of a significant number of innocent persons.⁶ In general, this happens when the targeted killing avoids a war. Several examples come readily to mind; the most obvious is the morality of killing Hitler *before* World War II: arguably, that act would have spared the world terrible ordeals. Notice that killing Hitler in 1939 would have been a targeted killing in peacetime. If the contemplated target, vile as he may be, is not threatening innocent lives, then he may not be permissibly killed; the default prohibition against murder resurfaces. Let's set up two imaginary examples.

Genocide in Rhodelia: Rhodelia is ruled by Caligula, a vicious dictator who is perpetrating genocide⁷ against his own population. His neighbor, Freeland, is a liberal democracy with the military capability to stop the atrocities. The government of Freeland can do one of three things. It can do nothing; it can invade Rhodelia and fight a predictably successful war of humanitarian intervention; or it can kill Caligula and thus end the genocide. Let us assume that doing nothing is morally problematic,

⁵ In addition to the condition that the author must be a liberal government, which I don't discuss.

⁶ See Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), p. 116.

⁷ I use the word genocide loosely, to denote mass murder.

Especially written for the Conference on Targeted Killings, U. Penn, April 8-11, 2011

since Freeland can stop the massacres at a relatively low cost to itself. Invading Rhodelia to stop the atrocities, while predictably successful, will result in significant collateral deaths of civilians,⁸ deaths of combatants on both sides, and physical destruction. However, sending a special operations team to kill Caligula will end his crimes and restore peace without any of these consequences. What should the government of Freeland do?

Planned Aggression in the Chosen Kingdom: King Vlad, a charismatic absolutist monarch with delusions of grandeur and conquest, rules over The Chosen Kingdom, a militarily powerful nation. Against his advisers' best judgment, Vlad is planning a massive invasion of his neighbors, all liberal democracies, who are dreading the impending catastrophe. The government of Sunland, the most powerful of these democracies, is considering action. It can do three things: do nothing, wait for the aggression and then react; invade preemptively; or send a sniper to kill Vlad and predictably avoid the war. Again, the impending war is likely to have terrible costs in blood and treasure, whether started by the Kingdom or by Sunland's preemptive strike. What should the government of Sunland do?

These examples show why a blanket prohibition of targeted killing in peacetime is, on closer inspection, too quick. Moral considerations may favor targeted killing over war. Targeted killing, a *prima facie* immoral act, may nonetheless *look* more acceptable because it will avoid genocide or war while placing the cost on a culpable person. Many people die in war. Those who bear arms to resist unjust attacks against themselves or others put their lives at risk for a just cause. Every one of those deaths is murder because inflicted by an unjust warrior.⁹ Importantly, war also brings about the incidental deaths of civilians.¹⁰ As is well known, this is a highly problematic aspect of war. One important pacifist objection is that any war, no matter how "clean," will bring about the deaths of

⁸ For expository convenience, in this essay I use the term "civilians" to denote innocent non-combatants.

⁹ As Jeff McMahan has convincingly argued. See McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). I use the word "murder" as meaning prohibited killing.

¹⁰ Throughout the essay I use the word "civilians" to mean innocent non-combatants.

civilians. These persons have not given up their right to life, so starting a war that predictably will kill them is morally problematic, even if the country that initiates it has a just cause.¹¹ Maybe these worries can be addressed by a properly formulated version of the doctrine of double effect, but the worry persists nonetheless, because even if one reluctantly thinks that bringing about those collateral deaths is permissible under the right circumstances, surely achieving the *same* results with no deaths is morally preferable. In the Rhodelia example, killing Caligula will save Caligula's present victims, plus the innocent lives (both just combatants and civilians on both sides) that would be lost should Freeland decide to start a war. It will also avoid the terrible physical destruction that war typically causes. In the Chosen Kingdom example, killing Vlad would have similar effects: it will avoid the terrible losses that the impending war would cause (since Vlad is planning a war of aggression.) The difference between these two peacetime cases is that Caligula is not threatening his neighbors yet killing his own citizens, while Vlad is not killing its own citizens yet threatening its neighbors.

This defense of targeted killing is, paradoxically, a reply to the pacifist. A pacifist may oppose *all* violence, even defensive violence. If so, he will oppose targeted killings for the same reason he opposes war. For this pacifist, there is no such thing as just cause. There is a second kind of pacifist, however. Someone may accept that there may be a just cause for war (such as resisting aggression) but believe that it is not empirically possible to wage any war without killing innocent persons. War is morally prohibited for that reason, since these persons have not waived their right to life. But if so, this pacifist cannot consistently oppose an action that will *prevent* those deaths and will target the culpable person.¹² A targeted killing is precisely the way to prevent a massive war and thus eliminate the pacifist's worries.

¹¹ This view was advanced by Robert Holmes, *On War and Morality*, (Princeton:Princeton University Press, 1989)

¹² As Altman and Wellman put it: "[O]nce one agrees that armed intervention is sometimes permissible, it becomes very difficult to argue consistently that assassination is morally impermissible." *International Justice*, p. 116.

b. Just Cause

However, saving lives, even in large numbers, does not suffice to justify targeted killing in peacetime. The government that orders the killing must do so for a just cause. The “public purpose” that defines targeted killing must be a normatively compelling just purpose in the sense of the just war tradition.¹³ In the hypothetical examples discussed above, killing Caligula is justified because Caligula is committing a crime against humanity; and killing Vlad is justified because he is about to unleash a war of aggression, another major crime. This requirement must be carefully distinguished from the previous one. A government contemplating a targeted killing may aim at saving lives yet lack a just cause for the targeted killing. Suppose that country A has decided to unlawfully attack country B. The leader of country B will predictably resist. On learning this, the government of A, the aggressor, decides to kill the leader of B, on the grounds that doing so will avoid the impending war and save many lives. This targeted killing is murder, notwithstanding the fact that it will save many lives. The reason is that A, as the aggressor, lacks a just cause. To take a real life example: in 1939 Hitler knew, or should have known, that Winston Churchill would fight if Germany invaded Poland. Suppose Hitler would have ordered the killing of Churchill on the grounds that it would have forced Britain to compromise and thus avoid the impending war. This would have been murder because Germany was the aggressor. So while saving lives may be a just cause for a targeted killing, not all targeted killings that save lives pursue a just cause. Determining what causes are just exceeds the confines of this essay. Suffice it to say here that a just cause for war is *only* the defense of persons and liberal institutions against unjustified threats or attacks

¹³ The literature on the just war tradition is extensive. See generally *Alex Bellamy, Just Wars: From Cicero to Iraq* (Cambridge: Polity, 2006)

against them. National glory, economic gain, strategic advantage, redress of non-lethal wrongs, or territorial expansion never constitute just cause.¹⁴

c. Moral Culpability

The target of assassination must be *culpable of having created the threat to, or destruction of, human lives in the first place*. In peacetime, a liberal government intentionally targets someone to avoid a war (either a defensive war or a humanitarian intervention.) In war, combatants and civilians die. As we saw, just combatants and civilians are not culpable. But many combatants (not all) of the unjust side may be non-culpable, yet they are vulnerable to attack. Even if one thinks that not all of them are free of blame for fighting an unjust war, surely they are less culpable than their leader who sends them to fight. Targeting the villain instead of targeting those who fight at his behest places the cost on the morally culpable person. This is ostensibly preferable to an alternative that, we know, will bring about the deaths of many persons who had nothing to do with the critical situation that forced the liberal government to act. Targeted killing, then, performs a double task: it reduces the number of victims to one, and it inflicts lethal force on the morally blameworthy individual.

In the examples presented, imagine that the liberal government knows that by killing the *children* of Caligula or Vlad (or a few randomly chosen civilians, or equally non-culpable targets) it will avert the impending catastrophe. Such action is morally impermissible by straight application of general deontological principles that forbid *using* innocent persons to achieve a morally justified end.¹⁵ The liberal government is not allowed to target someone affiliated with the enemy if that person is not sufficiently culpable (but it may target a sufficiently culpable henchman.) Notice that this condition is distinct from the just cause condition, although they may sometimes overlap. The government may

¹⁴ This account of just cause is proposed by Loren Lomasky & Fernando R. Tesón, *Justice at a Distance* (unpublished manuscript)

¹⁵ This is an extraordinarily difficult problem which I cannot examine here. See F.A. Kamm, *Morality, Mortality* and Judith Thomson, "The Trolley Problem," *Yale Law Journal* vol. 94 (1985) pp 1395-1415.

have a just cause but unjustifiably kill an innocent person to pursue that cause. In the examples above, Freeland's government has a just cause (stopping genocide) yet it is not allowed to target an innocent person in the pursuit of that cause, even if that killing would stop the genocide.¹⁶ Likewise, Sunland's government has a just cause (preventing aggression) but may not target, say, the Queen instead of the King.

The requirement that the target be culpable does *not* derive in a straightforward way from a retributivist justification of lethal force, as some have suggested.¹⁷ Rather, the just warrior is moved by the imperative of saving many lives in the context of a just fight. Any alternative he chooses will impose costs on someone. Given this, it is morally preferable to impose the cost on the person culpable for the lethal threat than on non-culpable persons. We do not tell the victim: "We kill you *because* you deserve it." Rather, we tell him: "I must stop these deaths. I have several ways to do this, but the least costly way *in a moral sense* is to kill you, who are culpable for this predicament. Any alternative action will bring about the deaths of many innocent persons." Still, it is accurate to say that the condition of culpability provides a retributivist *ingredient* in the calculation of proportionality. This is a good thing, because it avoids killing innocent persons and, in a sense, "punishing" them for the misdeeds of another. The paradox is that assassination, a morally repulsive notion, is more in accordance with the liberal traditions of the criminal law because it requires *mens rea*, culpability, on the part of the target of lethal force. This seems preferable to the rather illiberal practice of killing anonymous soldiers who, for all we know, have, if at all, diminished responsibility for the impending or ongoing disaster.

d. Lack of Non-Lethal Alternatives

¹⁶ I leave aside even more extreme circumstances where this prohibition may collapse.

¹⁷ See Stephen David, "Israel's Policy of Targeted Killing," *Ethics & International Affairs*, vol. 17 (2003), p. 111.

These three conditions (saving innocent lives, having a just cause, and targeting a villain) are still insufficient to justify targeted killing in peacetime. In addition, the liberal government must lack non-lethal alternatives to resolve the crisis. In the Rhodelia example, suppose that the government of Freeland can credibly threaten Caligula with major destruction if he does not relent. This threat is preferable to killing Caligula, as are all other diplomatic maneuvers to get Caligula to desist.¹⁸ The same reasoning is available in the Chosen Kingdom hypothetical: if Sunland has non-lethal alternatives to prevent the impending war, then it must use them.

Now why is this so? If part of the reason that makes targeted killing palatable is that the victim is morally blameworthy, then the government who avoids the killing through these diplomatic moves is getting the villain off the hook. Not only killing him will give him his dues, but also will prevent him from ruling despotically and making the lives of everyone around him miserable, not to mention the probability that he will pose a similar threat in the future. In this case, foregoing the targeted killing may be worse in the long run. This is what happened when the Coalition decided not to kill Saddam Hussein in the 1991 Gulf War. Yet these alternatives to killing are preferable because the reasons for two reasons. First, although the target is culpable, the killing deprives the target of due process. Most non-lethal alternatives at least preserve that possibility; and capture ensures it. Second, the prohibition of intentional killing is partly grounded in *agent-relative* reasons (I return to this topic below.) By choosing alternatives to the killing, the governments of Freeland and Sunland avoid *being* killers. They avoid the state of affairs where *they* deliberately kill someone in cold blood. Punishing Caligula or Vlad (the retributivist impulse) is not a reason compelling enough to outweigh the immorality of *them* killing those villains, of getting their hands dirty with the deliberate extrajudicial killing of another human being (I examine this objection to targeted killing below.) We can imagine, however, that some would prefer

¹⁸ Interestingly, Freeland's government's threat must be credible, and this depends on Caligula's not realizing that Freeland's government is threatening him to avoid killing him! Caligula, in other words, must believe that Freeland's government is as callous as he is.

the targeted killing over these alternatives. A strong *retributivist* would insist that the villain get his due. On the opposite end, a strong *consequentialist* would insist that the government weigh costs and benefits and proceed with the killing if, all things considered, would cause more good than the alternatives. These positions are dubious, however. In response to the retributivist, getting people their due may perhaps be a necessary condition for the legitimacy of criminal punishment (outside of war), but it cannot alone justify *extrajudicial* killing. A targeted killing based only on the culpability of the target would amount to vigilantism or revenge. The answer to the consequentialist is well known. The morality of action cannot be determined *only* by their net benefit. There are immoral ways to produce beneficial consequences, and deliberate killing is surely a likely candidate. This does not mean that targeted killing is never permissible, but it does mean that the threshold for permissibility is very high. If the liberal government can avert the humanitarian catastrophe that alone would justify the targeted killing in the first place by resorting to non-lethal alternatives, then it must do so, even if it means the survival of the villain.

A non-lethal alternative to killing the villain is, of course, capturing him and bringing him to justice. This alternative is always preferable to killing. Often, if the special operations team can reach their victim they can apprehend him too. Now, either the villain surrenders or he resists arrest. If he surrenders, then it is morally impermissible to kill him; his captors should bring him to justice. If, on the other hand, the villain resists arrest, then the assassins can permissibly kill him under the rules applicable to resistance to justified arrests. Killing a person, no matter how culpable, without giving him a chance to surrender is morally impermissible. Yet sometimes surrender is not possible. Suppose all the right conditions apply (killing the person will prevent innocent deaths, the government has a just cause, and the victim is morally culpable) but the target is unreachable. The only way to kill him is shooting from afar or using drones or similar devices. In that case the condition is satisfied because the government cannot capture the villain. Yet the condition severely limits the instances of permissible

targeted killing: it is never permitted when the victim can be captured. The question is not so simple, however. Suppose the team can capture the villain but at the cost of the lives of five of its members. Killing the villain would avoid these casualties. It does seem problematic to sacrifice five innocent persons (by our earlier definition of innocence, these are just warriors) just in order to spare the life of the villain. Perhaps one can say that the particular job description of the capturing team contemplates that they will risk their lives for these purposes: they would have given their lives to apprehend the villain and thus avoid the war. One *raison d'être* for these special teams is precisely to risk their lives so that innocents would not be at risk. Like police officers, SWAT teams are supposed to put their lives on the line to protect the public, so perhaps it is appropriate to pay that price for capturing the villain in these kinds of cases. Now let us suppose instead that the villain can be captured but at the cost of the lives of five *civilians*. Here the “job description” rationale does not apply: these are civilians, and killing the villain instead of attempting capture would save them. This puzzle raises the question of collateral deaths in *peacetime*. What is the right way to think about these issues? Are deaths of bystanders during a police raid (regretfully) justified? If the answer is no, then the same is true in the case of capturing the villain, and a targeted killing might be prohibited if it causes these collateral deaths. In peacetime only “clean” killings would avoid the objection.

III. Targeted Killing in Conventional War

Let us now examine whether these strict conditions for the legitimacy of targeted killing apply in wartime. Consider a typical war scenario. Two armies are facing each other. One of them is the aggressor, so it lacks a just cause; the other is resisting aggression, so it has a just cause. Let us stipulate (although this is contested¹⁹) that in a conventional war only the combatants on the side that has a just

¹⁹ The position in the text follows McMahan, *Killing in War*. The classic *locus* for the opposite view, the “moral equality of combatants,” is Michael Walzer, *Just and Unjust Wars*. See also Larry May, “Killing Naked Soldiers: Collective Identification in War,” *Ethics and International Affairs*, Vol. 19, No. 3, 2005, pp. 39-53.

cause have a moral license to kill enemy combatants. Further, all the deaths brought about by just combatants are legitimate only if they comply with the morality of war, including an appropriate version of the doctrine of double effect as reflected largely in the Geneva Conventions, in particular the principle that mandates discriminating between combatants and civilians.²⁰

Can the government on the right side of a war execute a targeted killing? Consider first a targeted killing *in the battlefield*. At first blush, one would think that *naming* the victim does not alter the general permission to kill in combat. However, some authors have emphatically rejected the morality of targeted killing in combat. The oft-quoted Lieber Code reads:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.²¹

The idea is that naming an enemy soldier erases the soldier's innocence. Soldiers are not outlaws; they are fighting for their country. For Lieber, the problem with targeted killing is the *individuation* of the victim. The killing of enemy soldiers should be undifferentiated, anonymous, predicated only on the fact that the enemy is a collective organization that threatens us. Combatants are allowed to fire at soldiers wearing the enemy uniform; indeed, wearing that uniform makes a person automatically vulnerable to being killed. Just combatants fire at enemy soldiers not because who they are individually, but because they are the agents of the enemy. A targeted killing, in contrast, zeroes in on the identity of the victim and treats him as a criminal. Who the person *is* matters, and it is precisely

²⁰ See Geneva Conventions

²¹ Lieber Code [1863], at www.civilwarhome.com/liebercode.htm

this individuation of the killing that makes it impermissible, it is argued, because the killer disrespect his victim as a person.

But this cannot be right. It is not true that soldiers can fire only at unidentified persons. A commander says to a soldier: "There behind the machine-gun is Colonel Sanders, the enemy's battalion commander. With his great skill he is decimating our troops and making our lives miserable, so make sure you take him out." Here the victim is identified by name and individually targeted, yet I take it most people would regard this killing as justified under the standard view of war. Contrary to Lieber's assumption, the just warrior does not kill the enemy commander because he is an outlaw. On the contrary, the commander admires Sanders military prowess. The reason is that Sanders is *taking active participation in combat*. He is an enemy combatant and as such may be permissibly killed, named or unnamed. If this is correct, objections to targeted killing in war cannot rely on the fact that the victim is identified by name. Identification (as opposed to anonymity) is not the trait that makes targeted killing wrong. To the extent that a targeted killing occurs in the battlefield, then it is permissible.

So let us move to targeted killing of an enemy officer who is *not* on the battlefield. The guiding principle is that a **targeted** killing in war is justified only if it is sufficiently close, in a moral sense, to **standard** killing in war. If the killing is instead morally removed from that category, then it will be evaluated under the more restrictive standard of killing in peacetime. Applying this principle, however, is harder than stating it, so some elaboration is in order.

In war, the moral framework for targeted killing is more permissive. The first condition for peacetime, that the targeted killing must save many innocent lives, must be relaxed. In a just war, a necessary condition for the permissibility of a targeted killing is that the assassin should reasonably believe that it *will increase the chances of victory*. For in wartime it is permitted to kill enemy *combatants* for just that reason. Some may object that the rationale for killing enemy soldiers is self-

defense, not a mere increase in the chances of victory. Even if the general rationale for killing in war is self-defense, this does not mean that the just warrior must feel threatened every time he faces an enemy combatant. I take it that those writers who claim self-defense as the proper rationale for war are thinking about the *overall* justification of the war, and not as a reason that applies in every individual case of combat. In other words: the aggressor has forced us to fight in self-defense. That is the reason why we, the just army, are fighting. We are defending ourselves from the aggressor. But that does not mean that in every case where I face the enemy soldier, an agent of the aggressor, I must feel threatened in order for my firing to be justified. The right way to look at this is to say that in a soldier on the right side of a just war may permissibly kill an enemy soldier if that will increase the chances of victory (*a fortiori* he may kill the enemy soldier if his life is threatened.)

Our second condition for targeted killing in peacetime, that the victim must be culpable, disappears altogether for an enemy *combatant*. This should not be surprising, because the rationale is the same for not requiring culpability of the individual enemy soldier as a condition for killing him. The soldier on the right side of a just war is facing an unjustified threat posed by the enemy, and the enemy soldiers are armed agents of the unjust enemy bent on destroying us (now or later.) If this is correct, then it is correct also for the targeted killing of an enemy combatant, as in the Colonel Sanders example above.

However, the concept of combatant is vague. Is it confined to a military officer *in the battlefield*, or does it also include (i) military officers not in the battlefield, or (ii) non-military leaders of the enemy? Consider first enemy soldiers who are not in the battlefield. Again, two situations are possible. Colonel Sanders, the enemy's battalion commander, is not currently in the battlefield but is resting in his military headquarters. Some may object to this killing on the grounds that Sanders is not posing any threat. However, I think most people would say this killing is justified under

the laws of war. The reason is, I believe, that the Colonel is simply restoring his strength to go back to the battlefield and continue his aggression (remember he is fighting for an unjust cause). Sanders and his subordinates are engaged in a continued unlawful fight, so the fact that he is resting now is irrelevant to the general justification for killing unjust enemies in war.²² We can say that Colonel Sanders is in *combat*, although not in the battlefield. Again, Lieber's worry is not applicable here. Colonel Sanders is not killed because he is an outlaw, but because he is a piece in the lethal machinery that the enemy has mounted against us.

The second situation occurs when the enemy combatant is geographically removed from combat altogether –not just from the battlefield, but from any military installation such as a barrack (but not wounded, as different principles apply.) He is in a private setting. Imagine Colonel Sanders is on vacation. Is the liberal government justified in killing him, for example, by a sniper gunshot? Daniel Statman has argued that there is no moral distinction between killing an enemy soldier while he is in his military headquarters and when he is on vacation. In both cases, the person is not participating in active combat, so to make the legitimacy of the killing depend on location is arbitrary. As Statman points out, this is even clearer with respect to high-ranking officers, as they rarely pose an immediate threat.²³

Yet critics are correct that there is a moral difference between killing Colonel Sanders when he is in a combat role and killing him while on vacation. Statman explains this difference by suggesting that the legal prohibition on assassination, which includes targeted killing in war, is purely conventional, not moral.²⁴ Its purpose is to minimize deaths by confining whenever possible the destruction to the

²² See Jeff McMahan, "War as Self-Defense, *Ethics & International Affairs*, vol. 18 (2004), p. 75.

²³ See Daniel Statman, "Targeted Killing," *Theoretical Inquiries in Law Targeted Killing*, vol. 4 (2004) p. 179

²⁴ Cite

theater of operations.²⁵ Calling this obligation conventional, however, is misleading. If the two sides have agreed to refrain from this kind of targeted killing and the enemy has abided by the convention, then by application of standard principles about promises the government is *morally* bound to refrain from killing Colonel Sanders while on vacation, even if Sanders is morally culpable, the government has a just cause, and the killing will save lives. It follows that if the war conventions are in place, and those conventions prohibit killing enemies while on vacation, then killing him is *morally* impermissible on those grounds alone.

Moreover, there are reasons to prohibit targeted killing of enemy combatants removed from the theater of operations, even conceiving the theater of operations quite broadly. This is a close call, but I think, contrary to Statman's claim, that the geographical location matters, for a couple of reasons. First, there is a *general* (not just conventional) obligation to minimize deaths in war where possible. Second, recall that in war the individual culpability of the victim is not required for the permission to kill. If Colonel Sanders is commanding his troops or even resting in the barracks for next day's battle, he is participating in the war machine that threatens us. If he is on vacation he has removed himself from the war machine. Given that he may not be culpable, the default prohibition should re-emerge and targeting him should be prohibited. These two reasons, plus the two general objections I will examine below, tip the balance against targeted killing in this case. The (admittedly tenuous) difference between killing Sanders while he is in the barracks and killing him while he is on vacation is that in the first case he is not *in combat*, broadly conceived. In contrast, while in vacation Sanders has provisionally shed the role of combatant; he is truly acting in his civilian capacity. Given the longstanding conventional prohibition against this kind of targeted killing, and giving the strong presumptive reasons against these kinds of act, I think the scale should be tipped against permissibility.

²⁵ Statman is concerned with the war against terrorism, so by definition the enemy has violated the convention and we are no longer bound by it. Statman, p.

We turn now to the targeted killing in wartime of someone who is *not* a combatant, that is, of someone who is not formally a member of the enemy's military structure. Here the situation changes. Again, there are two cases. The first is the case of the political leader of the enemy. Call it the Khadafy case. As I write these lines, a civil war is raging in Libya, and NATO is intervening on behalf of the rebels. Is NATO justified in killing Khadafy? If we view the Libyan conflict as one where NATO assists justified revolutionaries against a tyrant, then Khadafy is a legitimate target in the war to liberate Libya. The reason is that Khadafy is the commander-in-chief of the enemy forces. He *is* a combatant, even though he may be sitting in his comfortable Tripoli palace while his troops fight the rebels. This is not morally different from the assassination of Hitler *during* World War II, and not very different from killing any enemy combatant war. The leaders are part—indeed, the essential part—of the enemy's military structure. A combatant is a person who is part of the logical chain of agency leading to the unjust threat.²⁶ The political leader is a crucial link in that chain. However, this condition will not suffice. In order to target a political leader he must, in addition, be culpable. Hitler is an enemy combatant because he is the commander-in-chief of the enemy. Because he is removed from the theater of operation, however, being a combatant is not enough. His personal culpability makes him, I believe, a fair target. He is morally culpable of planning and unleashing the war of aggression. On the other hand, killing Hitler's relatives would not be permissible, even if that act would eliminate the threat (because Hitler would collapse, or whatever,) because those persons are not culpable. So targeted killing of a person removed from the theater of war, such as a political leader, is justified if he is part of the war machine *and* he is culpable (the just cause requirement applies throughout.) Contrast this to regular officers, who on my account do not have to be culpable to be fair targets while in combat (including while they are in other military or official installations.)

²⁶ See Jeffrey Murphy, "The Killing of the Innocent," *Retribution, Justice, and Therapy* (Boston: Reidel 1979), pp. 6-9.

The second case involves a high-ranked government official who is not the commander-in-chief and is not otherwise part of the enemy's military structure. Here, as in the previous case, the culpability condition applies. Suppose that a cabinet minister of the Third Reich is an important piece in the war effort. Killing him, the Allies think, will considerably improve chances of victory. Call this the Albert Speer case. Albert Speer, a civilian architect, was the Minister of Armaments during the Third Reich.²⁷ Would the Allies have been justified in killing him? I would think the answer is yes, provided that the stipulated conditions apply (killing him would increase the chances of victory; Speer is culpable; there are no non-lethal alternatives). However, the more removed the official is from the war effort, the less acceptable the killing would be. Speer is a relatively easy case, but what about, say, the German Undersecretary of Public Parks at the time? The weaker the connection with the war, the less probable will be that the killing will comply with the required conditions, and the closer the killing will be to terror killing, i.e., killing someone solely to demoralize the enemy. This is why the culpability condition must hold in the case of a targeted killing of someone who is not part of the enemy's armed forces. If the victim is sufficiently removed from the war effort, then targeting him comes dangerously close to using an innocent person to achieve legitimate war objectives. This case differs importantly from targeting a combatant, because in that case the victim has voluntarily identified himself, by wearing the real or symbolic uniform, as a permitted target. The person who does not belong to the military, does not participate in combat, and is sufficiently removed from the war effort is morally immune to targeted killing, even if the killing will increase the chances of victory.

To summarize our discussion of targeted killing in war:

²⁷ For Speer's own version of his role, see Albert Speer, *Inside the Third Reich* (New York: Simon & Schuster, 1997). For a challenge to Speer's account, see Gitta Sereny, *Albert Speer: His Battle with Truth* (New York: Vintage Books, 1996)

- 1) In war, the condition that the killing should save many lives is relaxed. The necessary condition for a justified killing is that it should increase the chances of victory.
- 2) If the target is a combatant the culpability condition does not hold. If, however, the target is not a combatant, the culpability condition holds.
- 3) Targeting enemy military officers is justified in the situations specified by the war conventions. Thus, killing an enemy military officer while he is in the barracks is justified, while killing him on vacation is not.
- 4) Killing a political leader is justified if that leader can be assimilated to a combatant (if the leader is the enemy's commander-in-chief) *and* he is personally culpable of having created the threat to which the just warrior responds.
- 5) Killing a political official of the enemy who cannot be assimilated to an enemy combatant is subject to the strict conditions that operate in peacetime.
- 6) The other two conditions that apply in peacetime, just cause and lack of non-lethal alternatives, apply in wartime as well.

IV. **Targeted Killing of Terrorists**

Most of the literature on targeted killings has centered on whether the practice is acceptable as a means to combat terrorists.²⁸ There are essentially two camps. Those in the first camp (the law-enforcement view) claim that dealing with terrorism is no different than dealing with crime generally.

²⁸ See, in addition to the works already cited, Michael L. Gross, *Moral Dilemmas in Modern War*, (Cambridge: Cambridge University Press, 2010), pp. 100-121; Tamar Meisels, "Combatants - Lawful and Unlawful," *Law & Philosophy*, vol. 26 (2007); Avery Plaw, *Targeting Terrorists: A Licence to Kill?* (Aldershot: Ashgate, 2008); Seumas Miller, *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy* (Oxford: Blackwell, 2009) pp. 139-151.

The liberal state has at its disposal enough tools to respond to this kind of crime.²⁹ Thus, the government can arrest a terrorist only if it has probable cause. The government may prosecute the terrorist in the regular courts where it must convince a jury of his guilt beyond a reasonable doubt. If convicted, he can be sentenced to the penalties stipulated by the criminal law. True, terrorists pose special, large threats. These can be countered, however, in a number of ways: the penalties can be increased, for example by making terrorist murder punishable by death. The liberal state may invest in the improvement of techniques of crime detection, prevention, and apprehension. Above all, using these standard tools to deal with terrorists preserves the integrity of the liberal system, and especially of its constitutional guarantees. As the Supreme Court of the United States said in the celebrated *Milligan* case:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence.

Those in the first camp, then, take the constitution seriously. They reject the idea that confronting terrorism requires departing from the constitution. They agree that a society should not be a suicide pact, but deny that abiding by the constitution in the face of terrorism would be suicide. Terrorism is

²⁹ See, *inter alia*, David Luban, "Eight Fallacies about Liberty and Security," in Richard Ashby (ed.) *Human Rights in the "War on Terror,"* (Cambridge: Cambridge University Press, 2005), p. 242. The legal position is well analyzed in Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2009)

not akin to foreign invasion, so even if the constitution should be interpreted somewhat differently in war, terrorism is not war.

Those in the second camp (the just-war view) claim that the nature of the terrorist threat is such that the only rational and effective way of confronting it is to use some of the tools of war making.³⁰ It is a mistake, they claim, to think of terrorism as common crime, for two reasons. First, the gravity and extent of the terrorist threat are such that the ordinary tools of the criminal law are insufficient. Terrorists will target innocent persons in large numbers using weapons with indiscriminate destructive power. Second, the terrorist threat is particularly ubiquitous. Terrorist networks usually operate in foreign nations, whose governments sometimes protect and even encourage them. And whether they operate here or abroad, terrorists live normal lives as civilians, thus significantly decreasing the chances of capture. All of these facts became painfully evident on September 11, 2001, and they are equally evident in the daily terrorist attacks that Israel experiences. For these reasons, the liberal state must defend itself by declaring war, as it were, on terrorism. The main consequence of doing this is that the liberal state avoids the strict legal and moral requirements for using lethal force. On this view, the terrorist is an enemy combatant; in fact, he is an *unlawful* enemy combatant, because he is at war with the liberal state without overtly wearing the enemy uniform.

What are the consequences of this debate for targeted killing? If the law-enforcement camp is right, the liberal state is absolutely prohibited from intentionally killing a terrorist, for the same reasons that it may not kill any criminal suspect without due process of law. The police may kill a terrorist under the same rules that apply to the use of lethal force in peacetime: they may kill the terrorist who fires at them or threaten others, and so on. The government may try to arrest the terrorist or obtain his extradition, but it may not dispatch a sniper team to kill him.

³⁰ See the works by Statman, Tamar Meisels, and Seumas Miller, cited above.

The just-war view points out that the terrorists have chosen not to identify themselves as such, thus preventing the laws of war to operate.³¹ The law-enforcement view unduly ignores that the terrorist is, by his own admission, at war. So the dilemma is this: in a conventional war the enemy can either be killed in combat or captured; whereas if one accepts the law-enforcement view the terrorist can only be captured and brought to justice, since he is just another criminal suspect. Moreover, the terrorist claims combatant license to kill others (he regards himself at war with us,) yet claims civilian immunity when the army is looking for him. This seems unacceptable. For the just-war view, targeted killing solves this ambiguity by becoming *the functional equivalent of killing in combat*.

Before taking sides in this debate, I explore the concept of terrorism. Defining terrorism has proven especially daunting. The main reason for this difficulty is that it is not possible to provide a definition that is not derisory. The word “terrorism” has strong negative connotations. No one says “I’m a proud terrorist.” In that sense, the word is even more intractable than the word “assassination”, for which I did attempt a normatively neutral definition. The definitions offered by writers and legal documents differ, but they converge on two factors: the *method* of violence chosen by the terrorist, and his *purposes*.³² Whatever else he does, the terrorist typically targets innocent persons in order to further, actually or symbolically, a political cause.

I will accept the pejorative connotation of the concept and provide a definition that reflects that derision. A terrorist, I stipulate, is someone *outside the context of traditional combat who pursues an unjust political cause by immoral means*. Someone who uses violence in the traditional context is a

³¹ See Michael Gross, *Moral Dilemmas*, pp. 104-109; and Miller, *Terrorism and Counter-Terrorism*, pp. 139-145.

³² Bruce Hoffman’s definition is typical: “Terrorism is ...political violence in an asymmetrical conflict that is designed to induce terror and psychic fear ...through the violent victimization and destruction of noncombatant targets. Bruce Hoffman, *Inside Terrorism*, 2 ed., Columbia University Press, 2006, p. 34.

See also the complex definition offered by Seumas Miller, *Terrorism and Counterterrorism: Ethics and Liberal Democracy* (Oxford: Blackwell, 2009), pp. 53-54.

Legal definitions of terrorism focus on the *method* of terrorism, not its purposes. For a sample, see Dycus et al., *National Security Law*, pp. 465-469.

belligerent, not a terrorist. A belligerent who uses immoral means is a war criminal. If he pursues an unjust cause with moral means he is an unjust belligerent, but not a war criminal. Someone outside the traditional war context who pursues a *just* cause with immoral means may be considered a freedom fighter who is also a criminal,³³ but not a terrorist. Finally, someone outside the war context who pursues an *unjust* cause with *moral* means is a regular criminal (since he commits insurrection and uses unjustified violence,) but not a terrorist. I believe that this definition captures the two elements that explain why terrorism is so wrong. Terrorists are wrong on *two* counts. They are wrong because they use immoral means (they target civilians) *and* because they attempt to further an unjust political cause. The attackers of September 11, 2001, were doubly wrong. They were wrong because they killed civilians. This is enough, of course, to condemn them. However, they were also wrong because they pursued an indefensible political objective: killing infidels or whatever. For consider: a commando attack by the French Maquis during the German occupation of France that blows up a school killing innocent children is, under my definition, a crime. But under my definition the Maquis were not terrorists, because their cause was just. Of course, this is a purely verbal question, but I want to reserve the term terrorist to persons who use violence meeting these two conditions. It clarifies issues better and illuminates the uncertainty of whether “freedom fighters,” i.e., those who fight for a just cause, should be included in the definition.

Here again, reality is not so simple. We must examine the morality of targeted killing of terrorists in two quite different settings. The first is killing a terrorist in a setting that is *sufficiently close to a peacetime setting*. An example would be the United States’ government targeting a known terrorist leader who lives in the United States or in a foreign country not at war –say, Saudi Arabia. The second is killing a terrorist in a setting that is *sufficiently close to a war theater*. An example would be killing a

³³ I don’t want to say here “war criminal” because I don’t want to prejudge the issue whether anti-terrorist action is war.

terrorist in a war zone in Afghanistan. My view is that killing a terrorist in the first case is impermissible; while killing a terrorist in the second case is subject to the permissions and restrictions of killing in war.

a) Targeted killing of terrorists in a peacetime setting

The argument for allowing targeted killing of terrorists in these cases (and, *a fortiori*, in the second case) goes as follows. The problem with terrorists is that they do not wear uniforms and therefore they do not identify themselves as combatants. Terrorists live amongst the general population where they hide while they plan their next attack, in the assurance that the liberal state will not fire indiscriminately. However, if the government *knows* who the terrorists are, it can compile a *list* with their names, thus announcing that these persons are enemy terrorists at war with the state, and therefore vulnerable to targeted killing. Curiously, this method is consistent with Lieber's aversion to assassination. Lieber, let us recall, abhorred declaring a regular enemy soldier an outlaw and target him for assassination. The terrorist, however, is not a lawful enemy combatant but an *unlawful* enemy combatant, because his chosen method, targeting civilians, is immoral. Therefore, it is perfectly appropriate for the state to declare him an outlaw. For the just-war camp this solves the problem of identification. We are at war with terrorists, we know who they are, and just as we can kill enemies in regular war, so we can kill the terrorists in this war.

One difficulty with this approach is that if the named terrorist is an outlaw, then it is hard to explain why the state should not treat him just like it treats any other criminal.³⁴ The state must in principle try to arrest and prosecute him. This problem reveals, I think, a fatal weakness of the just-war view of terrorism. The state cannot repeal the strict constitutional restrictions on state killing by just *declaring* war on terrorists. The reason is that the power of the state to kill is the heaviest weapon in the state's coercive arsenal, and it seems arbitrary to allow the very entity thus constrained to repeal

³⁴ See Gross, *Moral Dilemmas*, p. 107.

the restrictions by a performative statement. The choice of the war paradigm here seems arbitrary. The government might declare war on the Mafia, compile a list of *Mafiosi*, and announce that from now on the government will shoot them on sight. Sexual predators are especially repulsive. Why not allow the government to declare war on known sexual predators, compile a list, and start killing them? The prohibition of intentionally killing persons cannot magically disappear by the government's unilaterally declaring war on the persons it intends to kill.

The just-war camp has a practical rejoinder to this objection. They say that the magnitude of the terrorist threat is such that the tools of the criminal law are simply insufficient. Not only that: the tools of *conventional* war are inadequate. As Statman says, "tanks, jets, and submarines are helpful when confronting other tanks, jets, and submarines, not hijackers carrying knives or terrorists wearing explosive belts."³⁵ The war against terrorists is *sui generis* because the nature of the threat is *sui generis*. Targeted killing, a presumptively immoral method in peacetime and in conventional war, should perhaps be accepted for this kind of conflict. So it is not the political purpose of the terrorists that brings the conflict closer to the war paradigm. It is the nature of the threat. If this is correct, should the Mafia pose a threat of similar magnitude, the government could resort, perhaps, to targeted killing. If a society becomes utterly paralyzed by drug wars, frequent street gun battles and so forth, perhaps the government can permissibly kill named criminals, even though they are not strictly terrorists but persons who kill for personal gain.³⁶

In order to evaluate these arguments, I return to the strict conditions for targeted killing in peacetime. (Again, the following conclusions are presumptive, as the general objections I will examine later may cause us to abandon those conclusions.)

³⁵ Statman, "Targeted Killing," p. 179

³⁶ For the current situation in Mexico, see "Mexico Under Siege: The Drug War at Our Doorstep," *LA Times*, April 4, 2011, at <http://projects.latimes.com/mexico-drug-war/#/its-a-war>.

The first condition for the (presumptive) legitimacy of targeted killing is that the killing must save many innocent lives. How should we understand this condition in the case of terrorism? Terrorists strike, then flee, then regroup and strike again. Sometimes they do not strike again for an extended period. In the imaginary cases examined above (Rhodelia and the Chosen Kingdom), targeted killing in peacetime was justified to stop a mass massacre or avoid a general war. The only situation concerning a terrorist that comes close to these is when the government *knows* that the terrorist is about to strike and there is no other way to stop him. Therefore, I believe the condition should hold, albeit in a relaxed form. The government should use lethal force against a terrorist only when “it is necessary to prevent a greater, imminent harm, or in defense against a reasonably imminent threat to the lives of the targets of the planned terrorist attack.”³⁷ This standard is just about right: it is more permissive than the standards for state killings, including targeted killings, in peacetime, yet not as permissive as the standard for state killings in war.

The other conditions hold as well: the government must be one against whom the terrorist has no justified reason to fight. The government must have a just cause to kill terrorists. If the terrorist has a just cause, for example because the government is a human rights violator and the terrorist seeks restoration of human rights, then the government has no general moral right to kill him. However, even an illegitimate regime of this sort may have a just cause, namely protecting the innocents that the terrorist is about to kill. So in this case this condition merges with the first. The third condition, moral culpability, flows automatically from the first condition, because the terrorist who can permissibly be

³⁷ Phillip B. Heymann and Juliette N. Kayyem, *Protecting Liberty in an Age of Terror* (Cambridge, MA: MIT Press, 2006), p. 66.

killed is about to kill innocents, and is therefore typically culpable.³⁸ The fourth condition also applies: the government may not kill the terrorist without giving him the chance to surrender.

The conclusion, then, is this. The insight that terrorism calls for a *sui generis* response is correct. The law-enforcement view is wrong to claim that targeting terrorists is never justified. The just-war view is wrong to claim that targeting known terrorists is justified as the functional equivalent of killing in war. Although it is a close call, I think that the liberal state may not target terrorists *unless they pose a reasonably imminent threat to innocent lives* in the sense defined above. The moral framework for killing terrorists is close to the one for targeted killing in *peacetime*, but not identical, because the imminent threat in the case of the terrorist need not be as massive as the threat that would justify killing a political leader in peacetime. The permission to kill in conventional war, then, is inapplicable to terrorists outside a war zone. That license should be strictly confined to combat (broadly understood.) Because the license to kill permission is morally problematic even in conventional war, any extension of to situations resembling peacetime must be avoided. The moral prohibition of deliberate killing is too strong to set aside every time that the criminal threat increases. While in a liberal democracy we tend to trust our government, the experience with declared “wars” on terrorists in other societies should give us pause before abandoning the strict prohibition on deliberate killing.³⁹ The liberal government should not be in the business of killing people except in extreme situations such as conventional war. However, because the terrorist scourge is *sui generis*, I think the government may kill a terrorist who poses an immediate threat to innocent lives. Targeted killing of a terrorist would then be the functional equivalent of killing Hitler in 1939, rather than the functional equivalent of killing an enemy combatant in conventional war. Because the terrorist threat is so unique, the standard I suggest is somewhat more

³⁸ I say “typically” because it is conceivable that the person poses a non-culpable threat (i.e., he has been drugged by the terrorists and fitted with an explosive belt).

³⁹ A poignant example is Argentina’s “dirty war” in the 1970s, where the regime targeted and killed thousands of persons that the government called terrorists and “subversives.”

permissive than the standard used to kill common criminals. This hopefully addresses some of the legitimate worries of the just-war camp.⁴⁰

Many people will disagree with this conclusion. Even some who have misgivings about targeted killing make an exception for cases like Osama Bin Laden. The United States government has declared that it has the discretion to capture or kill him anywhere, depending on what is more advantageous.⁴¹ Presumably, the reason for allowing this is that we all know that Bin Laden is guilty of terrible crimes, that he is extremely dangerous, and that he is the leader of a terrorist organization determined to kill innocent persons, and especially Americans. I agree that killing Bin Laden in a combat zone is permissible. But hunting him down and killing him in a peacetime setting such as, say, a European city, would be wrong, however appealing it may sound to us. For consider: someone throws a grenade in a public place in broad daylight while yelling “Death to the infidel!” The grenade kills thirty bystanders and injures many others. The terrorist flees and the police chase him. Surely the police are not entitled to shoot him on sight. The police must attempt to capture him and bring him to justice. How does this person differ from the Bin Laden case? In our example we know that the terrorist is culpable (there are dozens of witnesses); we know that he pursues an unjust political cause; and we know he is extremely dangerous. I cannot see a moral reason to deliberately kill a terrorist, even Bin Laden, without giving him the chance to surrender.⁴² In particular, the killing cannot be validated by the government’s declaration of war against terrorists.

Someone may object that the typical targets are terrorists living overseas. If the government can target those only (and not terrorists in our midst) then it will avoid the feared erosion of liberty in our

⁴⁰ The argument here is strictly confined to targeted killing. It does not address other areas of disagreement between the two camps, such as whether terrorists should be tried by regular courts or military commissions.

⁴¹ On September 9, 2010, President Obama declared that killing or capturing Bin Laden “is still a priority.” See <http://in.reuters.com/article/2010/09/10/idINIndia-51414520100910>

⁴² Of course, many will say that Bin Laden should be given the chance to surrender because he will be more useful in captivity than dead. But my point is that the government has no *right* to kill him, not that it would be a good thing not to kill him.

land. This will not do either. If a person committed a crime in our territory and then fled overseas, the proper way to react is to ask for the extradition of the suspect. If the requested government refuses, then maybe the moral thing to do is to send a team to capture the suspect. But surely our government is not entitled to deliberately kill the suspect in foreign territory. Not only is this behavior a violation of the standard prohibition to kill and of the foreign state's sovereignty, but in addition it is murder according to the local laws. Liberal governments should not be in the business of committing murder in foreign countries. To be sure, there are important differences between how a government treats its citizens and how it treats outsiders. That difference stems from the fiduciary duties that the government has toward its citizens. However, that difference does not translate in the permissibility of murdering outsiders. A terrorist is a particularly heinous criminal. This means that the government should treat him like it treats other heinous criminals, not like sub-human creatures that can be hunted down and eliminated at will.

b) Targeted killing of terrorists in a theater of war (counter-insurgency)

The preceding analysis applies to targeted killing of terrorists in settings that are sufficiently close to a state of general peace. The government of the United States, for example, is not authorized to send a sniper to kill a known terrorist in Paris. But the prohibition does *not* apply to the fight against insurgents in a war theater like current Afghanistan. There, the Western coalition is facing Taliban insurgents who use terrorist methods and have encouraged and protected Al-Qaeda terrorists. This situation is closer to conventional war, and therefore the coalition may kill insurgents because they are morally equivalent to enemy combatants. The Taliban members are terrorists in the sense that they pursue an unjust cause by immoral methods, but they are close enough to enemy combatants to relax the prohibition of targeted killing that applies to peacetime. The restrictions on targeted killing in combat discussed in Section III apply, however. Just as the government may not kill Colonel Sanders

while in vacation, it cannot kill a Taliban member sufficiently removed from the theater of operations.

Also, compiling a list of terrorists in this situation is less objectionable. In fact, the list is the substitute for the uniform and puts the terrorist on notice that he is a fair target.⁴³

The difficulty with this approach is that the line between a peacetime setting and a wartime setting is sometimes difficult to draw. I suggested that killing a terrorist in Paris is impermissible, whereas killing a terrorist insurgent in Afghanistan is permissible. I believe it was permissible for the Colombian government to treat terrorist organizations (or drug cartels) as enemies and target their members individually --as they targeted Pablo Escobar for assassination.⁴⁴ The reason is that that was a war setting, not a peacetime setting. But other cases may not be so clear. Imagine that terrorists perpetrate sporadic attacks on civilians without mounting a full-blown insurrection. Can the government target them for killing? Again, all one can say is this: if the magnitude of the threat is sufficiently generalized to resemble an insurrection where the liberal government has no choice but to employ the armed forces, then the war paradigm will apply and targeted killings are sometimes permitted under the conditions I suggested above. If, however, the threat can still be contained by law enforcement officials, then targeted killings are prohibited. I will say at once that I do not regard the present threat in the United States or in any European country as justifying targeted killings. But I do regard the situation in Afghanistan as justifying the killing of insurgents, by application of the normal rules that apply to insurrections (the right way to look at the situation in Afghanistan is that the western Coalition assists the local government in suppressing an unjust insurrection.⁴⁵)

V. General Objections to Targeted Killings

⁴³ See Gross, *Moral Dilemmas*, pp. 108-109.

⁴⁴ See M. Bowden, *Killing Pablo: The Hunt for the World's Greatest Outlaw* (London: Atlantic Books, 2001)

⁴⁵ I examine the morality of the war in Afghanistan in Fernando R. Tesón, "Enabling Monsters: A Reply to Professor Miller," *Ethics & International Affairs* (forthcoming).

I now turn to the general objections to targeted killings. These objections may make us revise the general conclusions reached above.

I. The Epistemic Objection

In every instance where targeted killing is presumptively permitted, the liberal government must assess whether or not the permissibility conditions exist. In the case of Rhodelia above, the government must be sure that a genocide is afoot, that the target is culpable, and, most important, that the killing will save many innocent lives. This is seldom certain. Perhaps there is no genocide but a revolution with casualties on both sides. Perhaps the leader whose death we are planning has nothing to do with those events. And perhaps killing him will make things worse. Governments do not have a particularly good record of making assessments of this kind. The same epistemic difficulties arise in the case of targeted killing in wartime. Here the government must ascertain even murkier facts: is the enemy's government official in question involved in the war? Is Colonel Sanders really on vacation? Will the targeted killing really increase our chances of victory? And finally, killing a terrorist in a peacetime setting requires ascertaining that he poses an imminent threat to innocents. This is often exceedingly hard to determine. And, as I indicated, making the right determination that the situation is sufficiently close to a war setting will be a daunting task as well. While we should allow for the fact that sometimes the evidence on the ground will be clear to anyone, these epistemic barriers should give us pause before enacting a legal permission of targeted killing.

II. The Objection from Virtue

Why are targeted killings morally repulsive even when they lead to highly beneficial consequences? One reason is the *heightened intentional focus* that characterizes targeted killing. The law assigns varying degrees of blameworthiness for outcomes. The criminal law teaches us that killing

someone in self-defense is (perhaps) not blameworthy at all; killing someone as a result of negligence is somewhat blameworthy; killing someone in a rage of passion is blameworthy; and killing someone for monetary gain is very blameworthy.⁴⁶ When Colonel Sanders is commanding his troops, his unjust threat to us is imminent and proximate. Our soldiers kill him, even naming him, knowing who he is, in a situation that is quite close (though perhaps not identical) to individual self-defense.⁴⁷ The more removed he is from that situation of direct threat, the less defensible the targeted killing will be, because killing him requires *more planning*. In the law of homicide, the more *premeditated* the killing the more blameworthy it will be. Psychologists similarly distinguish between *instrumental* and *reactive* forms of violence.⁴⁸ Instrumental violence is characterized by premeditation, careful planning, self-interested motives, and the like. Reactive violence is associated with heat of passion, urgency to defend oneself or others, and similar situations. The criminal law tracks these distinctions by imposing more severe penalties, generally, to instrumental violence.

Similarly, a targeted killing looks like a form of instrumental violence in the sense that the assassins premeditate the killing, plan carefully the deed, and carry it out in cold blood (the colder the better if it is going to be successful.) In order to kill Colonel Sanders while he sleeps in the barracks, or the insurgent hiding somewhere, the government has to assemble the team of snipers, find out exactly where the target is, make sure he is caught unaware so he cannot frustrate the assassination plans, and so on. This is premeditated killing –certainly more premeditated than killing Sanders in the heat of the battle. For this reason, targeted killing is morally repulsive notwithstanding the good reasons the government may have.

⁴⁶ See Model Penal Code, sections 210.1 to 210.4

⁴⁷ For a criticism of this assimilation, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2003)

⁴⁸ See Reid Fontaine, "Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression," *Psychology, Public Policy, and Law*, vol. 13 (2007) p. 143.

Moral philosophers account for this phenomenon by suggesting that a person has *agent-relative* reasons not to kill. Consider a *prima facie* justified case of targeted killing: killing the political leader of a nation that has perpetrated aggression against us, where the killing will predictably end the war. All of these good consequences are *agent-neutral* reasons to kill. Yet targeted killing involves detailed planning, a sure hand, cunning behavior, and nerves of steel. A morally sensitive person has reasons not to perform this act, and the preparatory acts that evince premeditation, *independently* of the consequences of the act. He agrees that it would be a good thing should the villain *be* killed, but does not want to create the state of affairs where *he* kills (this is not to say that in moral deliberation the agent-relative reasons will always prevail over the agent-neutral reasons, the good consequences.)

Can agent-relative reasons apply to the government? Possibly yes. The idea is that liberal governments should attempt to behave in accordance with values and virtues for which they stand.⁴⁹ This includes rejecting self-help, revenge, and random violence in favor of lawful coercion, coercion under the rule of law. This excludes assassination of any sort. The prohibition on assassination is an expression of the values embedded in the liberal social contract. Targeted killing would perhaps be understandable in the state of nature, but not in civil society, where due process and the rule of law reign supreme. Call this the *political virtue* argument. I think this argument, while not conclusive, has some weight. In considering the morality of targeted killing we must weigh not only the costs and benefits of the individual act, but the possible erosion that the practice may cause to our democratic values and way of life. These considerations may collapse in the face of supreme emergency, but they are certainly relevant.

⁴⁹ I suggested this argument in Fernando R. Tesón, "International Abductions, Low-Intensity Conflicts, and State Sovereignty: A Moral Inquiry," *Columbia Journal of Transnational Law*, vol 31 (1994), pp 584-585. Altman and Wellman, in their excellent book on international justice, take me to task for wrongly conceiving assassination of a tyrant as punishment without due process, as opposed to suppression of a threat. While I was not altogether clear, my emphasis was not so much on the villain's due process, but on the government as assassin. I wrote: "agents of a liberal democracy must conduct themselves in a way that honors the civic virtues for which they stand." *Id.*

An analogous non-consequentialist reason to abhor targeted killing is that it is *treacherous*. A sniper kills the victim from a distance without any notice or possibility of defense. The laws of war prohibit certain acts of treachery, such as feigning surrender or improperly using Red Cross or medical signals. They also prohibit certain kinds of weapons, such as poisonous or biological weapons. Indeed, the license to kill in war is often qualified by the clause that the killing must not be treacherous. Yet pinpointing the exact moral rationale for this prohibition is harder than it seems. Maybe our intuitions are flawed, and our revulsion for treacherous acts is just a hangover from the days when we celebrated chivalrous fighting. War was considered an honorable activity, almost a gentlemen's sport. This honorific aura that war making enjoyed was inconsistent with perfidy. If we discard this quaint view of war, it is unclear what moral consideration can ground the hostility to treacherous fighting that many of us have. Moreover, even if we accept the proposition that treacherous killing is morally impermissible, why is targeted killing treacherous? Why not simply say that just warriors have a right to kill enemies under the doctrine of double effect (which severely limits causing innocent deaths)? This approach would not exclude the use of targeted killing against culpable enemies. It is true that targeted killing involves cunning and covert action, which are in tension with the traditional idea of fighting valiantly, facing our enemy. My point here is that part of the revulsion to targeted killing is the lack of forthrightness that the act involves. If this intuition can be rationally defended, it will partly explain our revulsion against targeted killing.⁵⁰

c. Are the Objections Conclusive?

These objections carry considerable weight. Space prevents me from analyzing in detail how each of those objections affect the *prima facie* case for each of the kinds of targeted killings. However, the fact that governments will often err about the beneficial consequences the targeted killing is

⁵⁰ Perhaps it can be rationally defended: my own intuition is that killing someone with a gun is less objectionable than serving him poisoned food while pretending to be the restaurant's server. But why?

supposed to bring about, and the fact that citizens in a liberal democracy do not want to validate a practice that each of them regards as deeply immoral for a variety of non-consequentialist reasons, strongly point to at least one conclusion: targeted killings should be *legally* prohibited. If a situation that would allow targeted killing arises, then the highest authority in the land should waive the prohibition, whether in peacetime or wartime. The public official so entitled should fully explain to the citizenry his reasons for waiving the prohibition.

VI. **Summary and Conclusions** [forthcoming]