

Targeted and Non-targeted Killing

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After some historical remarks about former examples of Targeted killing the paper asks about the paradigm in which targeted killing could fit: punishment, police action, war of which the latter one seems to be the most promising. In this context, the problem of Immunity of non-combatants and who is to be counted as such becomes relevant.

The killing of Osama bin Laden was only the most spectacular of a series of similar actions as they were practiced by, for instance, the USA, Israel, Russia, and Britain in the last years. The reactions differ from condemnation to relief to (at least) sympathy. Church authorities and moral theologians (at least in the German language area) were remarkably silent as can be observed of the subject of terrorism in general and related problems, such as that of torture.¹ One reason may be that the traditional deontological prohibition of killing, according to which you are never allowed to kill an innocent person directly, is of little help here, because it is a matter of debate whether bin Laden is to be regarded as innocent or non-innocent in those circumstances. My main aim is to propose a possible solution to the problem of what paradigm targeted killing is to be classified under; the paradigm of war seems to be the most promising one. I point out that the problem of targeted killing is not totally new. The ethical problems associated with earlier examples are, in some respects, similar, and in other respects different from those of today.

¹ Cf., however, Katharina Klöcker, *Zur Moral der Terrorbekämpfung. Eine theologisch-ethische Kritik* (Mainz: Matthias Grünewald, 2009), and Jeremy Waldron, 'What Can Christian Teaching Add to the Debate about Torture?', in Jeremy Waldron, *Torture, Terror and Trade-offs. Philosophy for the White House* (Oxford: Oxford University Press 2010), pp. 261-275. On page 261, Waldron remarks: 'Those of us who were actively engaged in the debate listened for – yearned for and strained to hear – a contribution by the churches, and our impression (as least as late as 2006) was that interventions by church leaders were late and hesitant, at best.' Also, cf. Bernhard Koch, 'Ein Beigeschmack von Selbstjustiz. Lässt sich das gezielte Töten von Terroristen rechtfertigen?', *Herder Korrespondenz* 65 (2011), pp. 352-356; Elisabeth Strüwer, *Zum Zusammenspiel von humanitärem Völkerrecht und den Menschenrechten am Beispiel des Targeted Killing* (Frankfurt/Main: Peter Lang, 2010); Dirk Ansoerge (Ed.) *Der Nahostkonflikt. Politische, religiöse und theologische Dimensionen* (Stuttgart: Kohlhammer, 2010).

Former Examples of Targeted Killing

In Germany (and Switzerland), there were debates regarding the 'finalen Rettungsschuss' (the final and fatal shot fired by the police to save lives)² and the shooting down of a civilian plane (changed into a weapon) first permitted by the 'Luftsicherheitsgesetz' and later forbidden by the German Federal Constitutional Court.³ In the first case, hostages are endangered and the captor could be regarded as guilty. However, this kind of killing is not an execution but a police action. In the second case, the passengers are also taken hostages, but the question is whether or not they may be killed together with their captors in order to save the many lives of the people on the ground. Last but not least one may remember the conviction of the GDR-'Mauerschützen' who killed those trying to escape from the territory of the GDR; their victims were guilty according to GDR-law, but not to international law, and they did not endanger other lives. Therefore, the action of the 'Mauerschützen' was clearly wrong.

The Old Testament

History, of course, can tell us of even more examples of targeted killings as, for instance, political murders of rivals for power or succession. However, in this context, we are not interested in killings which are most definitely to be condemned, but in cases of killing where the moral judgment is, at least, doubtful, the first examples of which I take from the Bible. The Greek Old Testament offers the prominent example of Judith cutting off the head of Holofernes: 'Twice she struck at his neck with all her might, and cut off his head.' (Judith 13:8) Unlike the first mentioned examples the killing here is done by the weaker part and upon private initiative. Two other examples can be found in the Book of Judges. Ehud contends to have a secret message to King Eglon of Moab:

Ehud went up to him; he was sitting in his private room upstairs, where it was cool. Ehud said to him 'I have a message from God for you, O king.' The latter immediately rose from his seat. Then Ehud, reaching with his left hand, drew the dagger he was carrying on his right thigh and thrust it into the king's belly. The hilt too went in after the blade, and the fat closed over the blade, since Ehud did not pull the dagger out of his belly again. (Judges 3:20)

Ehud, like Judith, acts on his own initiative; he is one of the charismatic judges,⁴ who wants to liberate Israel from an oppressor. The other figure is, again, a woman; Jael kills Sisera, the military commander of Jabin, king of Canaan:

But Jael the wife of Heber took a tent-peg and picked up a mallet; she crept up softly to him and drove the peg into his temple right through to the ground. He was lying fast asleep, worn out; and so he died (Judges 4:21).

The victim in these biblical examples is always an enemy of Israel. Holofernes besieges Betulia; Eglon has subjugated Israel. Sisera is already beaten, but his killing means a

² Cf. Anton Georg Schuster, *Finaler Rettungsschuß?* (Frankfurt am Main: Peter Lang, 1996).

³ Cf. Werner Wolbert. *Du sollst nicht töten. Systematische Überlegungen zum Tötungsverbot* (Freiburg i.Ue.: Academic Press/Freiburg i.Br.: Herder, 2008).

⁴ Cf. Max Weber, *Die drei reinen Typen der legitimen Herrschaft*, in Max Weber, *Soziologie. Universalgeschichtliche Analysen* (Stuttgart: Kröner, 1973), pp. 151-166.

humiliation of King Jabin and may deter him from further attacks (Judges 4:22). Those killings, however, could not be justified by traditional rules of just war, because the victim (at least in the first two cases) is, at that moment, not a combatant and is, in this technical sense, not guilty. The problem may be illustrated by a remarkable counterexample mentioned by Cicero: the Roman Consul Fabricius.⁵ During the war against King Pyrrhus a deserter offers to poison his commander. Fabricius does not accept the offer and sends him back to Pyrrhus. Fabricius is then praised for his honesty by the Roman Senate. Ambrose praises Fabricius for preferring honesty to victory: 'Non in victoria honestatem ponebat, sed ipsam, nisi honestate quaesitam, victoriam turpem pronuntiabat.' Fabricius acts 'honestly' by sticking to the rules of the game. From a teleological point of view, however, one could ask whether or not the preventing or ending of a war or a siege at the price of only one human life (especially that of the person responsible) should be preferred to the death of many lives.⁶ The moral-theological tradition would, probably, have justified those killings assuming there was a special permission given by God as a moral legislator, which was assumed, traditionally, only in cases of war and capital punishment.⁷ Unlike the examples mentioned so far, the targeted killings of today are practiced by subjects of international law, normally states, but possibly also non-state-actors, as in the following case from history.

The Assassins

The Assassins, a Shiite sect whose followers lived in nearly inaccessible fortresses in today's Syria and Iran, may serve as an interesting example from the Islamic world.⁸ They are the predecessors of the (absolutely peaceful) Ismaelites (under Aga Khan). Shiites and their imams were often victims of the Sunni caliphs. The Assassins turned the tables by killing Sunni rulers and scholars for their part. Here we find, in contrast to the biblical singular cases, a common practice intended to spread a climate of terror, the method of which is remarkable. They did not choose a safe method of killing, such as from a distance by an arrow or by poison. Instead, they killed their victims using a dagger. Hence they were certain (and wanted to be certain) of being caught and condemned to death and, thus, die as martyrs.⁹ Unlike the suicide attackers of today they killed rulers and persons of influence, not people uninvolved in the oppression of their fellow believers. Nevertheless, the terrorists of today, though normally Sunnites, got some of their inspiration from the assassins for their non-targeted killings.¹⁰ Bernard Lewis speaks of a 'sleeping tradition' awakened by today terrorists. What they have in common with the Assassins is the spreading of terror (among the Sunni rulers and also

⁵ Cicero, *De officiis* III 22, 86s; cf. I 13, 40; III 3, 16, and Ambrosius, *de officiis ministrorum* III 15,91.

⁶ One could be reminded of the words of Cajaphas: 'that it is expedient for you that one man should die for the people, and that the whole nation should not perish' (John 11:50, 18:14); cf. Werner Wolbert, *Vom Nutzen der Gerechtigkeit. Zur Diskussion um Utilitarismus und teleologische Theorie* (Freiburg i.Ue.: Academic Press/Freiburg i.Br.: Herder, 1992), pp. 119-138. For a different position, cf. John Taurek, 'Should the numbers count?', *Philosophy and Public Affairs*, 6 (1977), pp. 293-316.

⁷ I do not know of those considerations. The Book of Judges was not the focus of later theological attention, and Judith is more popular as a typos for Mary.

⁸ Cf. Bernard Lewis, *The Assassins. A Radical Sect in Islam* (London: Weidenfeld & Nicholson, 1967).

⁹ Different from the case of Ehud, who was alone with the king (Judges 3:19).

¹⁰ Cf. Faisal Devji, *Landscapes of the Jihad* (Ithaka, New York: Cornell University Press, 2005).

the Crusaders) as well as their yearning for the pleasures of paradise. The Assassins were indoctrinated in that way and, probably, also put on drugs. Their acts of killing had a quasi-sacramental quality and their daggers were quasi consecrated.¹¹ In spite of their terrorizing potential, in the end their activities were a failure. The nightmare ended with the conquest of their fortresses by the Mongolians. The attitude of the Crusaders, by the way, was ambivalent. In spite of their fear of the Assassins, they admired their unconditional loyalty to their master. Such ambivalence is often typical for the appreciation of acts of killing.¹² At first, the Assassins stood for faith and sacrifice, later for murder, as it is signified by the verbs derived from their name (*assassinate*, *assassiner*, *assassinare*), which denote the killing (murder) of an important person for political or religious reasons, in a devious manner. The use of the verb already implies a negative ethical evaluation. Like Muslim terrorists of today, the Assassins used to kill out of a religious motivation and in order to seek martyrdom; in their case, however, they could try to justify their actions as the killings of guilty persons.¹³

Unlike the biblical examples, those killings did not happen in the context of war. Or could their actions be regarded as another kind of war? But it might be more convincing to regard them as examples of 'extrajudicial execution', as the targeted killings of today are sometimes qualified. In that case, the actions of the Assassins would perhaps be, in some way, more similar to the killings by state agents of today than to the killings done by today's terrorists. That leads us to the question of the paradigm under which those killing can be categorized and, possibly, justified. Needless to say, the qualification of the victims as guilty or innocent is dependent upon the respective paradigm.¹⁴

Which Paradigm?

Speaking of extrajudicial execution, extrajudicial killing, or extrajudicial punishment presupposes the paradigm of criminal law.¹⁵ There is, however, one grave difficulty for putting targeted killing under that heading: the targeted person has no possibility of defending him or herself in a courtroom. Therefore President Obama's statement about the killing of Osama bin Laden – 'Justice has been done' – has to be received with caution; the victim did not have the possibilities of a defendant. Legal or moral guilt of people like bin Laden is arguably not a sufficient justification for capital punishment; the defendant must be found guilty in a trial according to the law of evidence. At least, however, targeted killings of today are practiced not by individuals but by executive bodies of the

¹¹ Lewis, p. 127.

¹² Cf. Chris Hedges, *War Is a Force that Gives Us Meaning* (New York: Anchor, 2002).

¹³ Cf. Hermann Lübbe about the 'Triumph der Gesinnung über die Urteilskraft' (Hermann Lübbe, *Politischer Moralismus. Der Triumph der Gesinnung über die Urteilskraft* (Berlin: Siedler, 1987).

¹⁴ Here could be mentioned also the targeted killings by French Anarchists in the 19th century; cf. Barbara Tuchman, *The Proud Tower. A Portrait of the World Before the War 1890-1914* (New York: Macmillan, 1966), pp. 63-113.

¹⁵ Cf. Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2009), pp. 3-5. According to Melzer, there are several characteristics of targeted killing: use of lethal force, intent, deliberation and premeditation to kill, targeting of individually selected persons, lack of physical custody, attributability to a subject of international law.

state, hence by subjects of international law, which might be legitimized to punish terrorists. But the persons to be punished are not in their custody (as in the case of capital punishment).

Other possible paradigms, apart from criminal law (law enforcement), are self-defence, war (hostilities), and international deployment of police. Unlike self-defence (and capital punishment), the danger coming from the person wanted is not immediate. In the situation of self-defence, error is practically excluded ('guilt' consists in the immediate threat coming from the attacker). However, errors have occurred in several cases of targeted killing. In the case of self-defence, an immediate threat for one's life is eliminated; targeted killing, however, tries to prevent future threats, but may also generate new threats.

The paradigm of war (hostilities) seems to be more promising,¹⁶ because war allows killing of adversaries without trial. A soldier who kills an enemy combatant acts legally and will not be punished. The decisive question is whether the possible objects of targeted killings can be counted as combatants. Unlike soldiers, however, the 'candidates' of targeted killing do not have the possibility of surrender. In categorizing those people as 'unlawful combatants', the US government uses the paradigm of war. But as the paradigm of punishment shows, even persons acting unlawfully have not lost all their rights as citizens or human beings. Another objection against the paradigm of war is that war is fought between states bound by rules of international law, which recognize each other as warring parties and potential partners after a peace treaty.¹⁷ But there are other kinds of war different from the typical wars fought in Europe after the Westphalian peace. Herfried Münkler refers to the wars of devastation as they were fought by nomadic people, such as the Mongolians.¹⁸ Like the terrorists of today the Mongolians wanted to create a climate of terror. A common feature between this kind of war and the terrorism of today (and other forms of war; for instance, guerrilla wars) is their asymmetric character. The Nomads did not fight face-to-face like the knights, but relied on their horses and on bow and arrow, a method against which the knights had no recipe. In a war without common rules there are also no common criteria for distinguishing guilty persons from innocents which, on the one hand, are supposed to limit the harms caused by every war, but, on the other hand, may also entice a more frequent use of those means of solving quarrels. The consent regarding the rules is shaken where one party does not stick to the rules or uses weapons which the other side does not have or regards as impermissible (as the crossbow was for the knights).¹⁹ The "war on terrorism", likewise, does not know common rules.

¹⁶ Cf. Melzer, p 34, about the Supreme Court of Israel: 'the Court presumes without further explanation that targeted killing constitutes a method of warfare and, consequently, limits its analysis to IHL regulating the conduct of hostilities.'

¹⁷ Klöcker, p. 34.

¹⁸ Herfried Münkler, *Der Wandel des Krieges: von der Symmetrie zur Asymmetrie* (Weilerswist: Velbrück, 2006), pp. 148-150.

¹⁹ Cf. James T. Johnson, 'Historical Roots and Sources of the Just War Tradition in Western Culture', in *Just War and Jihad. Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, edited by John Kelsay and James T. Johnson (New York: Greenwood Press, 1991), pp. 3-30, at p. 4; James T. Johnson, *The Quest for Peace* (Princeton: Princeton University Press, 1987), pp. 133-172.

According to the paradigm of International Law Enforcement, targeted killing by state agents would be a kind of police action. The police have to maintain public tranquility and law and order, as well as to detect, prevent, and combat crime. By enforcing the law, the state exercises power or authority over individuals, normally within the limits of its own territory. But it might be exercised extraterritorially in certain circumstances; for instance, in the protection of wounded, sick, shipwrecked or in fighting pirates on the high sea. In those and other circumstances a state would claim jurisdiction outside its territory. But this might imply a violation of the sovereignty of another state or, if the state consents or tolerates the action, giving up part of its sovereignty and, possibly, losing the trust of its citizens, especially when they do not know why a fellow-citizen has become a target. Transparency in the choice of targets, on the other hand, may be an obstacle for the success of the operation. Finally, killing would be allowed only where the suspect tries to escape the arrest or attacks the enforcers of law. This was asserted by the US in the case of Osama Bin Laden, but did, undoubtedly, not happen in other cases where an arrest was, probably, not an option.

But does the impossibility of apprehending persons whose arrest would normally be permitted entail that their killing becomes lawful especially when they do not pose an immediate threat?²⁰ Preventive or pre-emptive actions can be justified only within the paradigm of war. But there is still one feature of the practice of targeted killing which seems not to fit to the paradigm of war. The targets are individual persons posing a certain threat. No soldier, however, is killed as an individual (as in the case of capital punishment: an individual person due to a particular deed). He (or she) is killed because his affiliation is indicated by the uniform. In this sense, killing in war could be classified as non-targeted killing in a certain sense: the soldier is not killed because he is *nomen nescio*.²¹ Having taken off his uniform, the individual is no longer acting as combatant, but as a civilian. He may go home after the end of the war. The fight of guerrillas and terrorists, however, goes on. They can always change their role; something that is called the revolving door effect in order to characterize the mere exterior change of roles.²² For those reasons, Michael Gross interprets targeted killing as 'an adaptation of the war convention that permits soldiers to kill one another in the absence of uniforms'.²³ Choosing somebody as object of targeted killing means symbolically putting a uniform on him: 'names on a list serve the same function as a uniform: they determine affiliation.'²⁴ But there may be ethical reservations to modify the traditional distinction between combatants and civilians in that way. Therefore, we have to reflect on the origin

²⁰ Cf. Melzer, pp. 58-60. In that case the operation changes into war as in the case of Pompeius in ancient Rome, who fought a war against the pirates.

²¹ Rarely were there ever attempts to kill military commanders, as Nelson was killed by the French in the battle of Trafalgar, or the Japanese admiral Yamamoto by the Americans (cf. Michael L. Gross, *Moral Dilemmas of Modern War*. Cambridge: Cambridge University Press 2010, p. 104).

²² The Supreme Court of Israel stated (14 December, 2006; cf. Melzer, *Targeted Killing*, p. 33): 'Members of a terrorist organization whose function is to commit a chain of hostile acts also remain civilians [like those participating in hostilities on a merely sporadic basis], but lose their protection for as long as they assume that function, and may therefore be directly attacked even between specific hostile acts.'

²³ Gross, p. 107.

²⁴ *Ibid.*

of the distinction between combatants and non-combatants and the prohibition to kill civilians.

Innocents and Non-Innocents

One conception of war presupposes the symmetry-thesis according to which the same rights and duties apply for both sides in the *ius in bello* or the independence-thesis according to which the *ius in bello* is independent from the *ius ad bellum*.²⁵ In this sense, Michael Walzer states:

The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with the reference to the means they adopt. (...) The two sorts of judgment are logically independent. (...) But this independence, (...) is nevertheless puzzling.²⁶

This has something to do with Walzer's deontological understanding of the *ius in bello* which he exempts from any weighing up of values, except in extreme cases when acting with 'dirty hands' is allowed, as in the case of the obliterate bombing of German cities during the first phase of the Second World War.²⁷ Now, as the title 'Just and Unjust Warriors'²⁸ (alluding to Walzer's *Just and Unjust Wars*) may indicate, there has been a shift in the debate from *ius ad bellum* to *ius in bello*, namely the possibility that some combatants (though not *innocentes*, because they do harm) could be counted as innocents, and, vice versa, some non-combatants (supporting an unjust war in some way) could be counted as non-innocents. We could find some reasons for such a revision by looking back on two different sources for the tradition of non-combatant immunity: the Augustinian-Thomsonian tradition, which understands 'innocent' in the subjective sense, and the ethos of the knights, later embraced by the church in the *Pax Dei* movement, which understands 'innocent' in the objective sense of non-combatant. Gradually, this category included 'all sorts of secular persons who were noncombatants by virtue of their not being knights (...) or not being physically able to bear arms'.²⁹ Vitoria is said to have combined these two branches:

²⁵ For the difference, cf. David Rodin, 'The Moral Inequality of Soldiers. Why *ius in bello* Asymmetry is Half Right', in *Just and Unjust Warriors*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, [2008] 2010), pp. 44-68, at p. 44.

²⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Harmondsworth: Penguin, 1977), p. 20.

²⁷ Cf. Michael Walzer. 'Political Action. The Problem of Dirty Hands', *Philosophy and Public Affairs* 2 (1973), pp. 160-180. This was condemned, however, by G. E. M. Anscombe, 'War and Murder', in G. E. M. Anscombe, *Collected Papers III. Ethics, Religion and Politics* (Oxford: Oxford University Press, 1981), pp. 51-61; cf. also John C. Ford, 'The Morality of Obliteration Bombing', *Theological Studies* 5 (1944) 261-309. Her deontological position is also expressed in her statement on pacifism: 'Pacifism teaches people to make no distinction between the shedding of any human blood. And in this way pacifism has corrupted enormous numbers of people who will not act according to its tenets ... seeing no way of avoiding wickedness, they set no limits to it.' ('War and Murder', p. 57)

²⁸ David Rodin and Henry Shue (Eds.), *Just and Unjust Warriors* (Oxford: Oxford University Press, [2008] 2010).

²⁹ Johnson, *Quest for Peace*, p. 81.

At this time an identification of moral innocence and material noncombatency could be made, because those persons whom custom had designed as immune could also be typed as those among an enemy population whose innocence might be presumed.³⁰

There can, however, be no presumption of innocence when civilians take part in hostilities. The question is, then, whether in the light of altered circumstances the principle of noncombatency should be re-examined:

Instead of enshrining this relative and expeditious norm with an absoluteness that does not and never intended to possess, it may be recognized for what it is: a juridical determination that has its roots in customary development and expression and that in a past age was easily identifiable with an accepted ethical norm.³¹

The identification of moral innocence and material noncombatency makes sense within the framework of the traditional *ius in bello* which, according to Gregory Reichberg presupposes a system of equal sovereign states, who may fight wars at their own discretion.³² Since the guilt in this system will be rarely only on one side, the suspension of the question of guilt seems to suggest itself.

War is different from penal law. The Lieber Code says: 'The law of war does not allow proclaiming an individual belonging to the hostile army an outlaw, who may be slain without trial by any captor.'³³ Within this paradigm of *regular war*, war is comparable to a duel, by which two persons agree to solve a dispute.³⁴ The opponents (enemies) are not criminalized. Paradoxically, the uniform grants soldiers a presumption of innocence (in the subjective sense).

Regular war is to be distinguished from *just war* in the tradition of Aquinas.³⁵ The respective criteria condemn private feuds whose arbitration is within the competence of the superior authority which, however, does not exist between two kingdoms or two *res publicae*. War replaces a trial and can only be fought as a reaction to injustice, as an act of

³⁰ Richard S. Hartigan, 'Noncombatant Immunity: Reflections on Its Origins and Present Status', *The Review of Politics*, 29 (1967), pp. 204-220, at p. 218.

³¹ Hartigan, p. 218.

³² That was the presupposition of Klöcker; cf. note 17.

³³ Quoted from Gross, p. 100. For Lieber's considerations on irregular wars, cf. Courtney S. Campbell, *Moral Responsibility and Irregular War*, in Cross, *Crescent and Sword. The Justification and Limitation of War in Western and Islamic Tradition*, edited by John Kelsay and James T. Johnson (New York: Greenwood, 1990), pp. 103-128. For a 'contractual utilitarian view' of *ius in bello*, cf. Richard B. Brandt, 'Utilitarianism and the Rules of War', in Richard B. Brandt., *Morality, Utilitarianism and Rights* (Cambridge: Cambridge University Press 1995), pp. 336-353.

³⁴ This analogy does, however, no longer apply, when technological superiority is decisive for victory.

³⁵ Cf. Gregory Reichberg, 'Just War and Regular War. Competing Paradigms', in *Just and Unjust Warriors*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, [2008] 2010), pp. 193-213; cf. Gerhard Beestermöller, *Thomas von Aquin und der gerechte Krieg* (Köln: Bachem, 1990), p. 155: 'Das typisch neuzeitliche Problem stellt sich in der mittelalterlichen Ordnung nicht, daß nämlich keineswegs entschieden ist, wer im Recht oder Unrecht ist, weil es keinen übergeordneten Richter mehr gibt. Es kann zumindest in der politischen Theologie der Summa ausgeschlossen werden, daß jemand objektiv einen ungerechten Krieg führt, aber subjektiv schuldlos ist.'

iustitia vindicativa. It is then at least doubtful whether the combatants of both sides have equal rights.³⁶ After the outlawing of offensive war in the last century both paradigms no longer seem to apply in the pure sense.

In reading recent contributions on this question one gets the impression that the arguments for revising the symmetry thesis do not lack plausibility, but that the consequences seem to be counterintuitive. Jeff McMahan may serve as an example.³⁷ His basic criterion is the 'liability to attack'. A person is

morally liable to attack in war by virtue of being morally responsible for a wrong that is sufficiently serious to constitute a just cause for war, or by being morally responsible for an unjust threat in the context of war.³⁸

According to this criterion, the responsibility of civilians (e.g. politicians or people participating in a rally supporting the unjust war) is often greater than the responsibility of the combatants.³⁹ McMahan, however, also lists pragmatic reasons for a symmetrical *ius in bello*: Insight into the (in-) justice of one's own cause is limited. Punishment could delay surrender and lengthen the war. Victor's justice can be partial. Therefore McMahan resumes:

With all this complexity and epistemic uncertainty, it may not be possible, in many cases, to distinguish cleanly between just and unjust combatants. In such a situation, the legal equality of combatants seems to be the necessary and inevitable default position.⁴⁰

And about prisoners of war:

In the long term, it would be better for all, and more just, to uphold a neutral legal rule that guarantees to all prisoners of war as many of the protections that are owed to captured just

³⁶ Cf. Thomas Aquinas, *S Th* q 40 a 1: 'Ut scilicet illi, qui impugnantur, propter aliquam culpam impugnationem mereantur.' Thomas quotes Augustine: 'Justa bella solent definiri, quae ulciscuntur injurias.'

³⁷ I refer to Jeff McMahan, 'The Morality of War and the Law of War', in *Just and Unjust Warriors*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, [2008] 2010), pp. 19-43; cf. also Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009) and Bernhard Koch, 'Neuere Diskussionen um das *ius in bello* in ethischer Perspektive', in *Gerechter Krieg – gerechter Frieden. Religionen und friedensethische Legitimation in aktuellen militärischen Konflikten*, edited by Ines-J. Werkner (Wiesbaden: VS Verlag für Sozialwissenschaften, 2009), pp. 109-131; Jeremy Waldron, 'Civilians, Terrorists, and Deadly Serious Conventions', in Jeremy Waldron, *Torture, Terror and Trade-offs. Philosophy for the White House* (Oxford: Oxford University Press, 2010), pp. 80-110; Uwe Steinhoff, *Zur Ethik des Krieges und des Terrorismus* (Stuttgart: Kohlhammer, 2011), pp. 65-109, and the contributions in *Ethics* 114:4 (2004)..

³⁸ McMahan, 'The Morality of War', p. 22.

³⁹ Cf. Walzer: 'when combatants fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude.' (quoted in McMahan, 'The Morality of War', p. 24.)

⁴⁰ McMahan, 'The Morality of War', p. 32

combatants as a matter of moral right as it is reasonable to expect that unjust combatants could grant them.⁴¹

But do those pragmatic reasons apply to the war on terror, which can never be a kind of regular war? There is no fictitious consent to be presupposed to certain rules of the game. It seems that reasoning on the war on terror has to orient itself on the just war paradigm. One might object that sometimes the terrorists of the one side are the other side's freedom fighters and that would be a reason to suspend judgments about guilt and innocence. But we do not need such a judgment in the moral sense. The actual threat coming from the respective person(s) is a sufficient criterion, especially in the case of terror groups as Boko Haram or Al Qaida (ISIS is clearly fighting a war) causing terrible harm. They could indeed be regarded as soldiers without uniform, even when they do not fight. So long as they have not ended their war, they cannot claim the rights of immunity of a civilian person. The question remains whether the rules for the treatment of prisoners of war apply to this kind of soldiers?

There is a difference between ordinary combatants, who may go home when the war is over, and war criminals. Michael Gross regards terrorists like other war criminals as 'combatants first and criminals second':⁴² 'When they pose a deadly threat, they are subject to lethal force; when they have laid down their arms, they face arrest, trial and incarceration.'⁴³ That means that when terrorists have become prisoners, or the threat is removed, war is over and law enforcement has to be practiced. However, justice in this case, should not been done without taking into consideration justified concerns of the defendants, and the social evils or the deficiencies that gave rise to terrorist activities.

Conclusion

Gross' proposal offers a possible solution for the problem of the fitting paradigm and the adaptation of the distinction of combatants and non-combatants in the context of terrorism. There may also be serious arguments against this proposal but, in any case, it will sharpen the debate. The proposal, however, offers only a first step for the ethical evaluation of operations against terrorists and does not offer orientation for individual cases. Regarding the usefulness of the practice as a whole for Israel, Gross is rather sceptical; he believes that only in Iraq was the security significantly improved by those measures. Some serious problems, listed by Gross, are possible errors, notwithstanding thorough intelligence efforts;⁴⁴ the dependency for the latter on local collaborators, a practice that may poison the atmosphere of a local community; the (sometimes considerable) collateral damage by the drones (the 'targeting' is not as precise as one

⁴¹ *Ibid.* This statement is not to be understood simply as the argument of the lesser evil. McMahan distinguishes between 'morality of war' and 'law of war' (*ibid.*, p. 35). The demands of the first are 'categorical', those of the second 'conventional'. For criticism of this 'two tiered morality', see Henry Shue, 'Do we need a "Morality of War"?' in *Just and Unjust Warriors*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, [2008] 2010), pp. 87-111, at pp. 88-91.

⁴² Gross, p. 107; *cf.* also p. 47.

⁴³ *Ibid.*

⁴⁴ In the case of Osama bin Laden, President Obama decided for himself that the probability was 50 per cent.

would like and may create terror for a whole region like Waziristan); and the violation of the sovereignty of a foreign country. I would like to add two other problems: the sheer amount of targeted killings in the last years and the problem of the agents which are for the most part not members of the military, but personnel of secret services not bound by any ethical code or code of honour.

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