

# Targeted Killing

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*The purpose of this paper is to provide a philosophical defense for targeted killings in the wars against terror. The paper argues that if one accepts the moral legitimacy of the large-scale killing of combatants in conventional (what are soon to be called "old-fashioned") wars, one cannot object — on moral grounds — to the targeted killing of terrorists in wars against terror. If one rejects this legitimacy, one must object to all killing in war, targeted and non-targeted alike, and thus not support the view, which is criticized here, that targeted killings are particularly disturbing from a moral point of view.*

## INTRODUCTION

The threat of terror has found the West widely unprepared to deal with it. The standard means of waging war are irrelevant to contending with this threat; tanks, jets, and submarines are helpful when confronting other tanks, jets, and submarines, not hijackers carrying knives or terrorists wearing explosive belts. The standard means of fighting crime also seem unaccommodating in the face of this threat; the chances of Interpol capturing Bin Laden and his followers and bringing them to justice are remote, as are the chances of the Israeli police arresting and trying the leaders of the Hamas and Islamic Jihad. Hence, to effectively stop terror, a different model must be sought, not the model of conventional war with its machines and tools, nor that of the police and court activities conducted against ordinary criminals.

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Rather, the wars against terror must adopt methods that are less common, or altogether uncommon, in conventional wars. One such method, whose legitimacy I wish to defend here, is that of targeted killings.

In choosing the term "targeted killing" rather than "assassination," I have sought to avoid the negative moral connotation that is almost inherent in the latter. If the argument of this paper is sound, then not all acts of assassination are morally wrong or, alternatively, not all acts of targeted killing are assassinations. Prior to September 11, 2001, Israel was the only country openly employing this tactic in its fight against terror, and it was strongly condemned for doing so by most of the international community, including the U.S. But since the September 11th attacks, the U.S. itself has adopted this policy in its war against Al Qaeda. In November 2002, an American Predator UAV (Unmanned Aerial Vehicle) targeted and killed an Al Qaeda activist in Yemen<sup>1</sup> using a technique similar to that used by the Israeli army against Hamas or Islamic Jihad activists. Furthermore, in December 2002, *The New York Times* reported that "[t]he CIA is authorized to kill individuals described as "terrorist leaders" on a list approved by the White House."<sup>2</sup> However, some commentators continue to believe that there is a moral difference between the Israeli and the American positions, and I will address their argument later on.

The main thesis of this article is that acceptance of the legitimacy of the killing and destruction in a conventional war necessarily entails accepting the legitimacy of targeted killings in the war against terror. In other words, a principled objection to targeted killings necessarily entails a pacifist approach to conventional war. I present this thesis and defend it in Section I. In Section II, I explore the possibility of justifying targeted killings on the basis of retribution, which, I argue, might play a more significant role in this context than usually assumed. Section III rejects a sophisticated philosophical argument against targeted killings, namely, that based on the alleged problematic implications of "named killing" for war ethics. In Section IV, I turn to the effectiveness of targeted killings and, in Section V, analyze the moral status of targeted killings in the context of conventional war. The final section summarizes the conclusions of the discussion regarding the legitimacy of targeted killing.

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1 Walter Pincus, *U.S. Strike Kills Six in Al Qaeda; Missile Fired by Predator Drone; Key Figure in Yemen Among Dead*, Wash. Post, Nov. 5, 2002, at A1.

2 *C.I.A. Expands Authority To Kill Qaeda Leaders*, N.Y. Times, Dec. 15, 2002, at A2.

## I. MORALITY AND WAR

I mentioned at the outset two general models for dealing with threats to vital interests: the war model and the non-war (i.e., criminal law and individual self-defense) model. In war, goes the common wisdom, soldiers of all sides are permitted to kill any soldier of the adversary, unless the latter surrenders or in limited exceptional circumstances. This permission to kill is not contingent on establishing that the soldier being killed poses any significant threat to the other side or, even assuming that he does pose such a threat, that he is morally responsible for doing so. Moreover, under the principle of *jus ad bellum*, states are not required to establish the imperativeness of the interests threatened in order to justify going to war. Usually a violation of territorial sovereignty will be considered a just cause for going to war, a *casus belli*, even if the consequences of that violation for human lives and dignity might be relatively insignificant. Many believe that the British attack on the Falkland Islands was not only legally justified but also morally justified, despite the fact that the Argentinean invasion most likely would not have led to the killing of British citizens or acts of oppression. Thus: (1) states can go to war for the sake of formal sovereignty with no need to show that, beyond that formal sovereignty, any vital interests are in clear and imminent danger, and (2) once they actually do wage war, they can kill any enemy soldier, regardless of the personal danger posed by or responsibility of those being killed. Following McMahan, I shall call this view the "Orthodox View."<sup>3</sup>

Things are, of course, totally different, both morally and legally, in the context of the relations between individuals under criminal law and accepted rules of self-defense. To kill in self-defense, one is required to verify that the perceived attacker poses a clear and imminent danger to one's vital interests and that the attacker bears responsibility for this danger. And, of course, with respect to punishment, it can be imposed only after establishing beyond reasonable doubt that the accused did commit the alleged crime with the required *mens rea*.

It is truly puzzling that most people who endorse the strongest restrictions on killing in self-defense and the most stringent procedures and application of criminal law, often including an objection to capital punishment, subscribe to the Orthodox View with regard to the morality and legality of killing in the context of war. What is puzzling is that not only do they accept this view, but they do so with almost no reservation and with no awareness of

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3 Jeff McMahan, *Innocence, Self-Defense, and Killing in War*, 2 J. Pol. Phil. 193 (1994).

the tension that exists between the blanket license to kill (enemy soldiers) in war and the strict limitations on killing in a non-war context. This seems another instance of the human ability to compartmentalize, a capacity that is probably advantageous from an evolutionary point of view, but still startling whenever we face it. I am referring to the cognitive ability to allocate different judgments to the different "compartments" within which we function: home, work, politics, etc. Thus, people generally fail to notice the moral problem with many instances of killings in war even when they are fierce objectors to the death penalty, because they view the situation of war as different from the non-war context. They see war as constituting a separate sphere with its own set of rules, which are, after all, almost universally accepted. Jurists are especially vulnerable to this kind of thinking, because since international law recognizes the legitimacy of large-scale killing in war (of soldiers), it fosters the line of thought that wars are simply different than regular conflicts between individuals and are governed by different rules.

Let me leave the psychology of these conflicting attitudes to others and focus instead on the relevant normative issues. The contention that war *qua* war is simply "different" and, hence, governed by a different set of rules is merely a sophisticated (albeit more moderate) version of the realist view, according to which "*Inter arma silent leges*" ("In time of war the laws are silent"). We need to understand why this is so, how it is that human life, held so sacred in domestic law, is held in such light regard by the laws of war. Killing in war can be justified only on the basis of the same fundamental principles that guide relations between individuals outside the sphere of war. If these principles fail to provide the justification for killing in war, then the Orthodox View can be maintained only at the cost of inconsistency and with the aid of psychological mechanisms such as compartmentalization and self-deception.

Discussing the tenability of the Orthodox View is far beyond the scope of the present paper. It is, however, crucial to note that most philosophers who have addressed this topic over the last two decades have taken for granted what may be called the unity of our moral and legal thought — i.e., that the same general justifications for killing people in non-war situations must apply to war situations as well. This assumption has led some philosophers to call into question the validity of the Orthodox View and to suggest that some modifications are, in any event, warranted. I will offer two examples of such modifications, one relating to *jus ad bellum*, the other to *jus in bello*.

The first example is in the context of the previously mentioned Falkland Islands War. The common view holds that the Argentinean invasion of the Falkland Islands was a *casus belli*; hence the U.K. was morally and legally

justified in going to war. Yet, according to Richard Norman, the war was unjustified as it was waged for the sake of formal sovereignty alone.<sup>4</sup> Just as in the case of individual self-defense, the mere formal violation of rights (for example, property rights) is not sufficient to justify killing another human being. Violation of territorial sovereignty can justify going to war only if it threatens substantive values such as life, dignity, or the survival of a culture and, of course, when there is no other way of protecting such values. Thus, the common view regarding the conditions that justify going to war tends to be overly lax.

The second example is the stance taken by Jeff McMahan. Arguing against the Orthodox View, he defends what he calls the "Moral View," under which a combatant's moral innocence or guilt is determined, in part, by whether or not he is fighting in a just war. If his war is unjust and if he is not forced to take part in it, he cannot claim a moral right to kill enemy soldiers on the basis of self-defense.<sup>5</sup> This conclusion, which makes a lot of moral sense, runs counter to a widespread convention of *jus in bello*, namely, that all combatants are "morally equal."

These two examples illustrate what happens to the ethics of war once one takes seriously the requirement to square the moral rules concerning war with those regulating relations in non-war situations. If the moral rationale for going to war is self-defense, then the same conditions that govern self-defense on the individual level must do so at the level of nations too, in particular: (1) the rule that what is defended is either one's life or something close to it in value and (2) the rule that the attacker's responsibility is highly relevant in making him the object of killing in self-defense.

With this brief introduction in mind, we can now move to wars against terror.<sup>6</sup> Let me start by asking, What entitles the U.S. to define its campaign against Al Qaeda as war, with the loosening of various moral prohibitions implied by such a definition, rather than as a police enforcement action aimed at bringing a group of criminals to justice? The answer here — as with conventional war — lies in: (a) the gravity of the threat posed by Al Qaeda and (b) the impracticality of coping with this threat by conventional law-enforcing institutions and methods. The threat posed by Al Qaeda to the U.S. is enormous. It is not only a threat to the lives of thousands of people, Americans and others, but also the threat of the terrorizing results of such

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4 Richard Norman, *Ethics, Killing and War* 156-58 (1995).

5 McMahan, *supra* note 3. Cf. Norman, *supra* note 4, at 172-73.

6 I say "wars against terror" rather than "the war against terror" because I see no reason to regard the various actual or potential wars against terror as part of one big war against one defined enemy.

mass killing on the entire country in terms of the economy and the quality of day-to-day life. A war of terror does not mean that all citizens are under actual attack all the time, but that such attacks are frequent enough and devastating enough to make life unbearable. As Hobbes observed, being in a state of war does not mean that there are battles all the time, but, rather, a miserable condition in which

there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that might be imported by sea ... no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.<sup>7</sup>

Clearly enough, condition (a) applies *a fortiori* to the situation to which Israel is subject in what the Palestinians call the *Alaqa Intifada*, whose main characteristic is almost daily attempts at murdering Jews across Israel, in buses, restaurants, nightclubs, universities, wherever possible. If ever there could be a *casus belli* on grounds of self-defense, it is such a terror campaign launched against a country or some other collective. From a moral point of view, the values under threat in such cases are far more important than those involved in cases of a mere formal violation of sovereignty, which, under the common view, justify waging war. To make the point as clear as possible, if the United Kingdom was morally justified in waging war to regain control over the Falkland Islands when there was no threat to the lives of British citizens and no significant threat to their security or economy, then surely the U.S. is morally justified in going to war against Bin Laden to prevent another attack against it, an attack that could cause the loss of many innocent lives and have catastrophic effects on the life of the nation. And if the U.S. is justified in going to war after only one (awful) day of terror, Israel certainly has the right to do so after so many dark days of terror.

The second condition mentioned above for regarding a situation as war rather than as a law-enforcement operation, namely, the impracticality of coping with the threat by means of conventional law-enforcing institutions and methods, is met in the case of the U.S. campaign against Al Qaeda as well as in the case of the Israeli struggle with the Palestinian terror organizations. The proposition that Al Qaeda members could be prevented from carrying

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<sup>7</sup> Thomas Hobbes, *Leviathan* pt. 1, ch. 13, at 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

out further terror attacks by issuing an arrest order to the governments harboring them, is, at best, naïve, and the same is true with regard to the thousands of Palestinians involved in planning and executing murderous actions in Israel. Things might have been different had the Palestinian Authority and its police cooperated with Israel in capturing the criminals and bringing them to justice. But this, of course, is pure wishful thinking. The Palestinian Authority not only refrained from arresting terrorists and, in general, from taking action against terror; it actually supported it in various ways.<sup>8</sup>

If we are to accept that the struggle against Al Qaeda and, likewise, that against the Palestinian armed organizations can be described as war, it follows that just as the U.S. can use lethal means to kill Al Qaeda members, so Israel can do so to kill Hamas or Tanzim members — just like in conventional war. Yet, while in conventional wars, enemy combatants are identified by their uniform and are located in camps, bases, and bunkers separate from the civilian population, in wars of terror, the fighters hide amongst the civilian population, which shelters them and supports them by various means. Hence, the latter wars do not take the conventional form of soldiers from one side of the conflict fighting directly against soldiers from the other side in an open space — in trenches, in the air, or at sea, remote from civilian life. Indeed, they take a rather different form. If we are to continue to adhere to the fundamental idea of just war theory, namely, that wars are fought between combatants only and should avoid targeting non-combatants, we must conclude that in wars against terror, too, the combatants of the terrorized country may direct their weapons only at members and activists in the terror organizations against which they are fighting.

To complete the analogy between conventional wars and wars against terror, we can assume that just as all soldiers (but only soldiers) are legitimate targets in the former, regardless of their individual roles, the threat they pose as individuals, or their personal responsibility in the waging or conducting of the war, so in the latter all members of the relevant terror organizations are legitimate targets and can be killed by the terrorized side on the basis of the latter's right to self-defense. Moreover, members of terrorist organizations bear far greater moral responsibility for their actions than soldiers in conventional wars, because many of the latter are conscripts

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<sup>8</sup> For the deep involvement of the Palestinian Authority in terror, see, e.g., Ronen Bergman, *Authority Given* (2002) (Hebrew).

forced to participate in the war, whereas joining a terror organization is usually a more voluntary act.

The problem, of course, is that terrorists do not come out into the open to fight against the armed forces of the other side, but, rather, hide amongst the civilian population and use the homes of families and friends as bases in planning and executing their attacks. But the fact that civilians are the shield behind which terrorists hide should not be grounds for granting the latter some sort of immunity from attack. If they use their homes as terror bases, they cannot claim that these bases must be regarded as innocent civilian buildings. If soldiers in a conventional war hide in a residential building and shoot through its windows at enemy soldiers, there is no dispute that the latter are justified in using snipers to target and kill the former. Thus, if in a war against terror, terrorists establish their base in a residential area from where they launch murderous attacks (dispatching suicide terrorists or firing artillery), the other side is justified in using snipers, helicopters, and other methods to target and kill the terrorists.

Targeted killing, then, emerges as the most natural manifestation of *jus in bello* in wars on terror, for under *jus in bello*, even if a war is unjust, it should be directed (to as great an extent as possible) only at combatants. This implies that wars against terror should be directed (to as great an extent as possible) only at terrorists. However, unlike enemy soldiers in conventional wars, terrorists are embedded amidst the civilian population and can be hit only (or mainly) in their homes, cars, and so forth. Thus, targeted killing is the most natural application of the principles of *jus in bello* in wars against terror.<sup>9</sup>

The moral legitimacy of targeted killing becomes even clearer when compared to the alternative means of fighting terror — that is, the massive invasion of the community that shelters and supports the terrorists in an attempt to catch or kill the terrorists and destroy their infrastructure. This

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9 Some critics totally deny the fundamental distinction made by just war theory and international law between combatants and non-combatants and, hence, see nothing wrong in principle with acts of terrorism. A notorious example is Ted Honderich, *After the Terror* 151 (2002), who explicitly states that "the Palestinians have exercised a moral right in their terrorism against the Israelis ... those who have killed themselves in the cause of their people have indeed sanctified themselves." Obviously, if indiscriminate killing of children is a legitimate means of achieving political aims, then targeting killing is even more so. Hence, targeted killing cannot be morally objected to on the ground of constituting an illegitimate means of warfare. Views such as Honderich's thus *reduce* the arguments available to opponents of targeted killing. For a critical analysis of his view, see Tamar Meisels, *The Trouble With Terror* (2003) (unpublished manuscript, on file with author).



mode of operation was adopted, for example, by the U.S. and Britain in Afghanistan and by Israel in its "Operation Defensive Shield" carried out after the terrorist Passover massacre in March 2002. While many claim this method to be morally preferable to targeted killing — likely because it bears more of a resemblance to "real" war — I believe the opposite to be true. First, invading a civilian area inevitably leads to the deaths and injury of far more people, mostly innocent people, than careful use of targeted killing. Second, such actions bring death, misery, and destruction to people who are only minimally involved (if at all) in, or responsible for, terror or military attacks, whereas with targeted killing, collateral damage is significantly reduced (though not prevented altogether). Hence, targeted killing is the preferable method not only because, on a utilitarian calculation, it saves lives — a very weighty moral consideration — but also because it is more commensurate with a fundamental condition of justified self-defense, namely, that those killed are responsible for the threat posed. Members of the Hamas in Gaza are far more responsible for the threat of terror to Israel than their non-activist neighbors are; hence it is preferable from a moral standpoint to target the former directly rather than invade Gaza and inevitably cause great injury to the latter and to the general population.

Let me press this last point a bit further. Suppose that Arafat were to call a special meeting of the Palestinian government and formally declare war on Israel by all means available. Suppose further that in the wake of this declaration, Israel were to face a wave of terror identical to that it faced in the months preceding Operation Defensive Shield. Surely no one would question Israel's right to wage war in return, that is, to invade the Gaza Strip and the West Bank and fight against its enemy, though such an operation would claim the lives of many people bearing no, or only minimal, responsibility for the terror wreaked on Israel. How could such an operation be considered morally justified, yet the measure of killing fewer people and only those more active in and responsible for the terror (namely, targeted killing) be less justified or even unjustified?

To conclude, it is my claim that there is a profound inconsistency in, on the one hand, accepting the legitimacy of killing in conventional war but, on the other, making a moral objection to targeted killing in wars against terror. If, as Georg Nolte emphasizes, "the right to life must be protected most strictly,"<sup>10</sup> it is, indeed, understandable that he would have qualms with regard to the killing of terrorist leaders or activists. However, it is then puzzling how

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10 Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 *Theoretical Inquiries L.* 111 (2004).

he can accept large-scale killing in a war of human beings, i.e., soldiers (e.g., in Afghanistan<sup>11</sup>), whose personal responsibility for the waging of the war and whose direct threat to the other side are, at best, uncertain.

## II. TARGETED KILLING AND RETRIBUTION

In a recent article on targeted killing, Steven David argues that the best moral justification for Israel's policy of targeted killing is retribution.<sup>12</sup> The argument is a simple and straightforward one: Those people targeted committed terrible crimes. Evildoers deserve to suffer in response and in a way suited to their crimes. Palestinian terrorists with blood on their hands therefore deserve death, the ultimate punishment for their crimes. Hence, the targeted killing of these terrorists is justified.

One could object to this argument by claiming that acts of retribution can be imposed only by a court of justice, within whose authority it is to punish and only after establishing the relevant facts of the case and the blameworthiness of the defendant. Retribution cannot be imposed by private individuals, nor by governments, but only by legal institutions.

But this objection must be wrong. First, for those who accept the idea of retribution,<sup>13</sup> the legal institution of punishment is the best means of achieving it, but not a necessary condition for its possibility. For retribution to apply, evildoers need to suffer, and this can be imposed by God, by Nature — or by some human being. No doubt there are powerful social and moral reasons for making the courts the only body that administers retribution in society, but these reasons bear no relevance on the justification of retribution per se, which, in principle, can be achieved outside the courtroom too. In the case of terrorists, the problem that arises is that retribution through the legal system is not an option with regard to most of them, because the countries that harbor them hardly ever bring them to trial within their territories, nor

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11 *Id.* at [9-10], where Nolte concedes that "Taliban and Al Qaeda fighters could be killed by U.S. and other troops in Afghanistan as long as the United States was exercising its right of self-defence against organized and identified resistance in Afghanistan." Yet that this was a case of exercising the right of self-defense is exactly what needs to be established, and in any case, it does not imply that each individual Taliban fighter was a legitimate target.

12 Steven R. David, *Israel's Policy of Targeted Killing*, 17 *J. Ethics & Int'l Aff.* 111 (2003).

13 Needless to say, not everybody does. *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. Rev.* 1623 (1992).

do they extradite them to be tried in a foreign domestic or international court. Since in such cases, retribution through the legal system is unfeasible, and if we take seriously the idea that evildoers deserve punishment, the inevitable conclusion is that retribution can, or must,<sup>14</sup> be imposed by some other entity, such as the army of the injured country.

Second, the role of courts in establishing the facts of the matter and the blameworthiness of the alleged criminal seems less significant in the context of terrorists because many of them are only too happy to admit their participation in the relevant crimes or their active membership and roles in the relevant organizations.

In conventional wars, when the enemy upholds the conventions of war, retribution is irrelevant with regard to individual soldiers, and hence self-defense provides the only framework for justifying killing them. In wars against terror, retribution offers a justificatory framework that complements and bolsters the self-defense justification. Thus, killing enemy combatants in wars on terror — namely, activists in the terror organizations — is, if anything, more, and not less, justified than killing enemy combatants in conventional wars.

In the next section, I discuss a philosophical argument against targeted killing developed by Michael Gross.<sup>15</sup> After showing that it is unconvincing, I turn, in Section IV, to questions of effectiveness.

### III. THE ARGUMENT AGAINST "NAMED KILLING"

According to Michael Gross, the blanket license to kill soldiers in conventional war, even though they might be innocent both materially and morally, is deeply puzzling. The only way to justify this (albeit vaguely) is by considering soldiers on both sides not as individuals, but as agents of their respective polities. Judged as individuals, most soldiers would be

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14 I wish to take a neutral stance between the "hard" and "soft" views of retributivism. Under the former view, we have a moral duty to impose upon evildoers what they deserve, while under the latter, we are merely allowed to do so. For the purpose of the present argument, the weaker version is sufficient, because my central aim is to show that targeted killing is morally acceptable, not that it is morally mandatory.

15 Michael Gross, *Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy*, 51 *Pol. Stud.* 350 (2003); Michael Gross, *Assassination: Killing in the Shadow of Self-Defense, in War and Virtual War: The Challenges to Communities* (J. Irwin ed., forthcoming 2004 [hereinafter Gross, *Assassination*]).

morally exempt from being killed by the enemy, but judged as agents of a collective, they would lose this immunity and become (morally) legitimate targets. For this reason, anonymity is so imperative to justifying killing enemy soldiers in war: the license to kill soldiers from the other side rests precisely on the fact that their personal merits or demerits are ignored, that they are seen merely as the enemy. The problem with targeted killing is that it does not meet this condition, thereby undermining *the very justification for killing in war*. This violation of the anonymity condition in targeted killing is termed by Gross "named killing."

This is an original argument against targeted killing, albeit, in my opinion, an unsuccessful one, in two aspects.<sup>16</sup> To begin with, the argument sets out with a very permissive moral premise (i.e., that all soldiers can (morally) be killed in war, regardless of their individual innocence or blameworthiness) and ends with a very restrictive conclusion (i.e., that even soldiers who are definitely not innocent (either morally or materially) are illegitimate targets for killing). This move seems odd, if not paradoxical. The source of the problem lies in the collectivist solution to the problem of killing in war. If the ordinary notion of self-defense fails to provide justification for most killings in war, then the conclusion must be that these killings are morally unjustified and, hence, war in general is morally unjustified. It is of no help to *choose* to relate to the people killed in war as agents of a collective rather than as individuals, as their moral dignity is not contingent on how anybody arbitrarily chooses to relate to them.

My second point concerns Gross' proposition that regarding soldiers merely as agents of their polities requires a veiling of their individual identities, a veil supposedly lifted by named killing. Yet, targeting perpetrators of terror is not killing them by *name*, but by *role*. To kill by name is to kill somebody simply because he is who he is, regardless of any contingent features he possesses or actions he has committed. This type of killing is, indeed, deeply problematic from a moral point of view. But targeting soldiers in war is not of this kind. It is connected to the special role the targets play in the war or, more precisely, to the special threat they pose to the other side. In other words, even if soldiers are only agents of some collective, some agents might be more important than others in carrying out the policy or ideology of that collective. Targeting such agents rather than others expresses no "personal" grievance against them, but simply recognition of their special excellence in executing their role as agents.

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<sup>16</sup> For a wider criticism of Gross's position, see my *The Morality of Assassination: A Reply to Gross*, 51 Pol. Stud. 852 (2003).

What emerges from these two points of criticism is a view that is opposite to that propounded by Gross, one that must be credited to Richard Norman.<sup>17</sup> Under Norman's view, what is wrong with killing human beings is the failure to respect them as individuals, "and the killing even of combatants in war is most often a depersonalized killing which reduces individual human beings to the status of 'the enemy'."<sup>18</sup> In line with this view, it seems to me that far from being "morally abhorrent," as Gross seems to believe, targeted killing expresses the appropriate respect for human life during wartime. With targeted killings, human beings are killed not simply because they are "the enemy," but because they bear special responsibility or play a special role in the enemy's aggression. This is particularly true in wars against terrorism, where those targeted are usually personally responsible for atrocities committed against the lives of innocent civilians.

#### IV. THE EFFECTIVENESS ARGUMENT AGAINST TARGETED KILLING

A further argument against killing in war is that even if the killing is role-based and not name-based, it can be said to violate a fundamental condition of *jus in bello*, namely, that of effectiveness. Killing in self-defense is justified only if — among other conditions — it achieves its primary objective, which is defense. If the killing increases the threat and danger to the side carrying it out, it is unjustified from both a moral and pragmatic perspective. Many argue that this is precisely the problem with targeted killing. Its cost is too high, it is argued, as it is usually followed by waves of terrorist attacks and it tends to escalate the conflict; moreover, in general, targeted killing does not succeed in deterring potential terrorists who, in any event, are willing to sacrifice their lives for what they regard as a sacred cause.

Note that this argument is not necessarily founded on strictly utilitarian premises. From a utilitarian point of view, we can conceive of a situation in which killing in self-defense decreases the overall utility rather than increasing it, for example, when one has to kill five culpable attackers in order to save one's life. The justification for killing in self-defense rests on notions such as responsibility, blame, desert, and rights, not on the notion of utility. But nonetheless, the justification for acts carried out in self-defense is contingent, *inter alia*, on the effectiveness of those acts. If A wants to

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<sup>17</sup> Norman, *supra* note 4, at 159-206.

<sup>18</sup> *Id.* at 188.

prevent *B* from doing *X* to her but shooting *B* will not accomplish that goal, then shooting *B* cannot be justified on grounds of self-defense. In other words, effectiveness is a constraint on the right to self-defense in general and on the right to use targeted killing for self-defense in particular. Does targeted killing meet this condition? Let me make the following comments in response.

First, in the war against terror, just as in the war against the mafia, what counts are the long-term results, not the immediate ones. In the short run, acts of revenge might follow the killing of terrorists, but in the long run, there is good reason to believe that such killings will weaken the terror organizations, generate demoralization among their members, force them to restrict their movements, and so on. The personal charisma and professional skills of the leaders and key figures of certain organizations are crucial to the success of their organizations, something that is especially true with regard to terror organizations that operate underground with no clear institutional structure. It is reasonable to assume that killing such individuals will gradually make it more difficult for the terror machinery to function.<sup>19</sup>

Second, there is some room for skepticism about the assessments regarding the ineffectiveness of targeted killing when one compares them with similar assessments made vis-à-vis the use of other measures, which have proved to be false or, at least, questionable. I refer to the general claim made repeatedly that terror cannot be fought by military means and, more particularly, to the widespread view that a massive military operation in the West Bank would fail to reduce terror directed against Israeli civilians. Yet, the fact is that Operation Defensive Shield significantly weakened the ability of the Palestinian terror organizations to carry out murderous attacks. Though the war against Palestinian terror is far from over and though dozens of Israelis have been murdered since the invasion of the Palestinian cities in the Operation, the situation is much better at the time this article goes to press than it was in March 2002, when Israel was facing two to three terrorist attacks a day, resulting in the deaths of more than a hundred Israelis in one month. In retrospect, it seems that many of the predictions about the ineffectiveness of the measures taken against terror during that time were premature.

Third, while I do not deny the importance of effectiveness as a justificatory condition for self-defense, I think that wars against terror should not be subject to a much stricter application of this condition than conventional

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<sup>19</sup> My view on this point concurs with that taken by Steven David in the article mentioned in *supra* note 12.

wars. In the latter, there is only a general requirement that there be "a reasonable hope of success,"<sup>20</sup> with no need to establish the effectiveness of every military action taken during wartime, even though such actions bring about the deaths of hundreds, even thousands, of human beings. In retrospect, it is sometimes possible to determine that some actions were of little or no effect, while others were essential for victory, yet rarely will we hear condemnation of these ineffective actions on moral grounds. If, as claimed above, wars against terror follow the same moral logic as that of conventional wars, one cannot require that the effectiveness of every action carried out in the former be established beyond any reasonable doubt for it to be granted moral license.

Unfortunately, recent history provides us with examples of conventional wars with dubious effectiveness that have, nonetheless, been accepted as legitimate, even *post factum*. Georg Nolte, for example, who strongly objects to the method of targeted killing, seems to think that the American-British war in (or against) Afghanistan was morally justified.<sup>21</sup> But to judge by the murderous actions of Al Qaeda that took place after that war, especially in Bali and Mombassa, Al Qaeda is still alive and kicking and still poses an enormous threat to the free world. Accepting the legitimacy of the Afghanistan war in spite of its very limited effectiveness (if any) in destroying the Al Qaeda organization is not consistent with endorsement of a strict condition of effectiveness regarding each instance of targeted killing.

If my argument up to this point has been successful, targeted killing is a legitimate method in the fight against terror. Yet curiously, while some accept this conclusion with respect to the struggle against Al Qaeda, they reject it with respect to the Israeli struggle against the Hamas and Islamic Jihad. Such a distinction was made by *The Washington Post* after the American targeted killing of an Al Qaeda activist in Yemen, arguing that what makes the Al Qaeda case unique is that the organization lacks affiliation to any national cause, has no leaders to speak of, and does not seek any political compromise or accommodation.<sup>22</sup> I will address briefly each of these considerations. First, the nature of the cause underlying the aggressive group or "affiliated" therewith is, in itself, morally irrelevant, just as it is irrelevant in individual cases of self-defense. The cause might be national, as in the case of the Tanzim organization, religious, as in the case of Al Qaeda, national and religious, as in the case of the Hamas, or of some other nature altogether,

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20 See, e.g., Norman, *supra* note 4, at 118.

21 Nolte, *supra* note 10, sec. 6.3.1.

22 *A Strike in Yemen*, Editorial, Wash. Post, Nov. 6, 2002, at A20 (referred to and defended by Gross, *Assassination*, *supra* note 15).

such as social justice. Similarly in individual self-defense, the threat might originate in greed, sexual desire, racial hatred, or a host of other problematic motivations. What is relevant for questions of self-defense is not the cause of the aggression but its gravity and immediacy, as well as the responsibility of the aggressor. In these respects, no real difference exists between Al Qaeda and the Hamas.

Second, that Al Qaeda has no apparent leaders also bears no moral significance in and of itself. The relevant issue is not whether the leaders are military or political, but whether or not they can be persuaded to stop terror by diplomatic, non-violent methods. Which brings us to the third issue, namely, the claim that Al Qaeda, allegedly unlike the Hamas, does not seek compromise or accommodation. The issue of compromise and accommodation is always tricky in the context of self-defense, because most aggressors would be only too happy to compromise with their victims rather than use violence to achieve their goals. The robber would gladly relinquish part of his loot if he could be spared the need to use his gun, and the sexual attacker would usually refrain from using violence against his victim if she were to agree to voluntary sexual relations. Similarly, aggressive countries certainly would be happy to compromise on some part of their demands, say, ten percent of the disputed territory, if they could get the remaining ninety percent without opposition. I would expect that even Bin Laden would be willing to enter into some kind of dialogue with the U.S. if the U.S. were to stop all support for Israel and to take measures to reduce American presence and influence in Muslim countries, for example. The Hamas would also undoubtedly be willing to make some compromises if Israel were to withdraw to the pre-1967 borders, grant a right of return to all Palestinian refugees, and agree to forego the Jewish nature of the State of Israel.

In all these cases, the question is not whether the aggressor's demands could be accommodated without the use of force, but whether such accommodation would be morally acceptable — and the answer seems to be in the negative. Yielding to the Hamas in order to prevent their murderous attacks is no more acceptable than yielding to Bin Laden. Hence in both cases, the victims of the aggression have the right to kill their aggressors in self-defense.

## **V. TARGETED KILLING IN CONVENTIONAL WARS**

The argument developed thus far, especially my critical discussion of Gross, seems to lead to the conclusion that targeted killing is morally acceptable not



only in wars against terror but also in conventional wars. This conclusion might seem hard to swallow, as targeted killing, or assassination, as it is referred to in the latter context, is often considered illegitimate.<sup>23</sup> Some clarification is in order regarding the possible uses of the notion of targeted killing in conventional wars.

Let us begin with the example of attacks aimed at killing or injuring particular individuals, such as an enemy chief-of-staff or commander of a brigade, by targeting their offices or their (military) vehicles. Gross might object to such attacks as prohibited cases of named killing, but I doubt whether many scholars or jurists would join him in this view. Attacks on enemy headquarters are very common in all wars, and if the senior officers are known to be present, such actions are even more welcome. Indeed, once the argument from named killing is rejected, it is hard to reject such targeting of military leaders, carried out by jets, artillery, or special task forces.

But let us now consider a slightly different case, where the enemy chief-of-staff is not targeted while riding in his armed car or while sitting in his headquarters, but while on a family vacation with his family. A sniper manages to get close enough to the hotel they are staying at and shoots the chief-of-staff, or a soldier dressed as a waiter poisons him while he is eating dinner. Is such killing morally acceptable? While we do feel some initial revulsion toward it (especially if it is *our* chief-of-staff who has been targeted), it is not easy to explain why killing an enemy officer in a hotel would not be morally legitimate, but killing him on the way to his office or in his office would be. The problem is that it is morally justified for *Q* to kill *P* in self-defense only because *P* poses a serious threat to *Q* that cannot be neutralized in any other way. But if this is the case, why should *P*'s location be relevant to the question of whether or not he can justifiably be killed? It would be relevant if self-defense were allowed only in cases of a direct and imminent threat. But in war, much broader, blanket license to kill the enemy is granted: soldiers and officers can be killed while asleep, while doing office work, or while out on maneuvers. There is most decidedly no requirement to refrain from shooting at enemy soldiers until ascertaining that they are about to strike and hence must be stopped. With respect to high-ranking officers, this point is even clearer, as they can rarely be said to pose any immediate danger. If a chief-of-staff is targeted while in his

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23 As Gross points out, American military regulations often ban assassination as a measure, by its very nature conceived of as an act of treachery or perfidy. See the references he mentions in his *Fighting by Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy*, *supra* note 15.

office, the justification for this killing will not rest on the need to prevent any immediate danger emanating from him, but, rather, on the general aim to weaken the enemy. But if so, then — to return to our original question — why would it be legitimate to kill him at his office, but not at his home or in a hotel on a family vacation?

From a moral standpoint, the distinction does, indeed, appear shaky. A change in one's location (from office to home or from headquarters to a hotel) cannot provide moral immunity from attack to a person who might otherwise be killed in self-defense, assuming — I emphasize again — that the permission to kill him does not rest on his posing an immediate threat. This, however, does not mean that the distinction is of no moral significance. Many rules of war are no more than mere conventions that contribute to reducing the killing, the harm, and the destruction of war. Such conventions help to confine wars to bearable limits and to prevent them from deteriorating into total chaos. In this vein, a rule against targeting officers or soldiers at home or on vacation can be seen as a convention aimed at the reduction of pain and death and at enabling the civilian population to conduct more or less normal lives without fear of bullets and bombs in residential areas (even if directed at soldiers only).

Needless to say, like all conventions, the moral force of this convention is contingent on its being followed by all sides. Hence if one side violates the convention, the other is no longer committed to adhering to it. In this regard, rules based on a convention differ from rules founded on strict moral grounds, which are obligatory regardless of what the other side does. Since the killing of children is subject to such a strict moral prohibition, it is forbidden even if the enemy takes such a horrendous course of action. But killing officers in their homes (during war) is not, in itself, morally worse than killing them in their headquarters; therefore, if one of the sides violates this convention, it loses its moral force.

This discussion of targeted killing in conventional wars helps to reinforce the conclusions reached earlier about targeted killing in wars against terror. My claim was that from a moral perspective, terrorists cannot claim immunity to being targeted. To this one might respond by claiming that even if a prohibition against targeted killing is not intrinsically valid, it might still be a useful convention and, as such, ought to be followed. Conventions, however, require mutuality; otherwise the side adhering to them would simply be yielding to the side that refuses to follow them. Since groups like Al Qaeda, the Tanzim, and the Hamas have no regard whatsoever for the conventions of war, the party fighting against them is released from these conventions too, though not from strict moral rules of conduct.

## SUMMARY AND CONCLUSIONS

The purpose of this paper is to provide a philosophical defense of targeted killing in wars against terror. It argues that if one accepts the moral legitimacy of the large-scale killing of combatants in conventional wars, one cannot object on moral grounds to the targeted killing of members of terrorist organizations in wars against terror. If one rejects this legitimacy, one must object to all killing in war, targeted and non-targeted alike, and thus not support the view, which is criticized here, that targeted killing is particularly disturbing from a moral point of view.

Defining a conflict as war, with the moral license to kill entailed thereby, is not an arbitrary decision. It has to do with the gravity of the threat to the vital interests of a given community and the absence of any other option for this community to defend itself against this threat. Under this understanding, certain conventional wars, such as the Falkland Islands War, do not justify the above license to kill, whereas certain unconventional wars, such as that waged against Al Qaeda, do. Moreover, the perception of a conflict as war and the legitimacy of using lethal measures in that conflict do not depend on the nature of the aggressor's motivation, be it national, religious, or otherwise, unless that motivation happens to affect the severity of the threat or the availability of non-war methods for coping with it.

Regarding the effectiveness of targeted killing in wars against terror, here, too, we can draw an analogy to conventional wars. Fighting armies do their best to choose effective measures, i.e., measures that will contribute to the defeat of their enemy. But very rarely will they be criticized, prospectively or retrospectively, on the grounds that ineffective actions caused the unnecessary deaths of enemy soldiers. Applied to targeted killing, this means that its effectiveness should concern us morally no more than the effectiveness of methods used or actions taken in conventional wars. At any rate, in most cases and in the long run, there is no convincing evidence that targeted killing is an ineffective means in fighting terror.

Finally, objectors to targeted killing (and to other anti-terrorism methods) often warn of overestimating the danger posed by terror and of hastening to use violent solutions instead of seeking a peacefully diplomatic solution. They urge the attacked country or collective to "understand" the roots of terror, implying that once these roots are understood and dealt with in a peaceful and constructive manner, the terror will vanish with no need for war. There is something to be said for these warnings. Yet, just as there is a danger of overestimating threats of terror, there is also a danger of underestimating them. Just as there is a danger of overlooking possible peaceful solutions

and rushing to use force, there is also a danger of over-delaying the use of force due to false hopes for peaceful avenues. The atrocities in the former Yugoslavia in the 1990s provide us with a painful reminder of the toll in innocent lives that hesitation to use force to counter aggression can take.<sup>24</sup> The argument developed in this paper contends that with organizations such as Al Qaeda and the Hamas, the danger of over-delaying the use of force is more alarming than the prospect of missing out on peaceful solutions. Those who hold the opposite view and are more optimistic about human nature than I am are, of course, to be respected. But — one last time — I think their view applies, *a fortiori*, to conventional wars too.

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24 See, for example, Jonathan Glover, *Humanity: A Moral History of the 20th Century* at ch. 16, at 133-40 (2001), who argues that "the UN would have been more effective from the start if it had come closer to wielding Leviathan's power." *Id.* at 140.