

Just and Unjust Targeted Killings in War

# JUST AND UNJUST TARGETED KILLINGS IN WAR

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JUST AND UNJUST TARGETING KILLINGS IN WAR:

A CRITICAL ANALYSIS OF TARGETED KILLING WITHIN THE JUST WAR TRADITION

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## 1

### Introduction

Is it permissible for a State to select an individual combatant from his collective and be killed? The current justifications for killing in war are not reconcilable with the practice of targeted killing. These justifications contain a concept of broad liability based on a non-individualized, collective form of self-defense. This is contrary to TK, which is a specific form of killing. If TK is used with these accounts, it will make this form of killing exceedingly permissible. Thus, an individualized account of self-defense should be applied to justify TK in combat instead of broad liability based on a non-individualized, collective form of self-defense.

It is the cold winter of 1939, just three months after the outbreak of WWII, and the Soviets just decided to invade their Finnish neighbors with the sole purpose of creating a buffer zone between them and Hitler's *Wehrmacht*.

Simo Häyhä, a hunter and a citizen of the small Finnish republic, volunteers to defend his people. As a huntsman, his only skill is the rifle. The odds are against them. The Soviets have a formidable army and a combat ratio of 1 to 100 in their favor. However, they soon realized that the Finnish's fierce fighting upsets their expected swift road to victory.

Failing to achieve the expected timeline is not as discouraging as reports of how a single Finnish sniper, Häyhä, is killing up to 5 combatants of their own a day, the record being 25. The Soviet's troops soon begin calling him *White Death*.

He is now a legend, inspiring the outnumbered and the outgunned Finnish troops to fight on. The Soviets made it a priority to kill him and sent three snipers of their own to eliminate the threat. This known as an operation of targeted killing.

Häyhä is in the woods, scoping for his next target. The hunter turned sniper takes snow and puts it into his mouth to prevent his breathing from exposing his position. An unexpected target walks into his range. As he raises his rifle and sets his eyes on the cross-hair, a Soviet sniper finally has a clean shot and pulls the trigger.<sup>1</sup>

#### 1.1. The Problem

For many years political theorists and moral philosophers, and legal practitioners have argued and debated the justifications for killing combatants in war. These debates have produced a concept of combat liability that is embedded in the laws of armed conflict (LoAC) and subject to criticism or defense by just war theorists.

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<sup>1</sup> Simo Häyhä survived the assassination attempt to live a long life. He passed away in 2002 at the age of 96.

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Combat liability explains why a combatant is a permissible target. By law, any member of the armed forces of the enemy is a legitimate target of war and may be subject to military lethal force at any time during active hostilities. As Michael Walzer writes, "The first principle of the War Convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured)."<sup>2</sup> Just war theorists, on the other hand, generally justify combat liability on some account of self-defense. "When political or moral theorists talk about war, and specially about just war," Walzer notes, "they commonly begin with the right of individual self-defense."<sup>3</sup> However, there seems to be a default factual underplate that supports the legal rule and its justifications, even if they disagree.

The undergird for combat liability is the fact of membership. Since the target is a member of the enemy's armed forces, he is a permissible target at anytime during active hostilities. This strict form of liability is premised on *collective membership*. The explanation is simple: the enemy is a member of a collective that is engaged in a threatening activity. The collective's hostility is transferred to all its members, which might explain why they are subject to lethal defensive force.

The LoAC locates its liability on the membership to the armed forces of a State while its theoretical underpinnings construct its liability on a membership to a threatening collective. There is nothing neither in the law or in the theoretical accounts of liability that considers what the individual is actually doing, this is, an account of liability that goes beyond the fact of membership. It is a strict form of liability with no room for a proper distribution of lethal defensive harm among combatants. These forms of liability pay little to no attention to the individual roles and personal contributions of specific combatants. Instead it covers them with a membership blanket. There is no need to establish any precise or in fact connection between the combatant's personal actions with that of his collective in order to impose liability. It is a random, non-specific collective-based form of killing. Therefore, the fact of membership is the assumption that every member of an armed collective is either threatening or engaged in harming activity thus liable to be killed.

There is a form of killing that has exposed with much clarity this problem: targeted killing (TK). TK may be defined as "the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."<sup>4</sup> In war, this occurs when a State deliberately selects a specific combatant from all others to be killed. TK

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<sup>2</sup> Walzer, M. 2015. *Just and Unjust War*. Basic Books p. 138.

<sup>3</sup> Ibid. p. 340.

<sup>4</sup> Melzer, Nels. 2008. "Targeted Killing in International Law". OUP. p. 5



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exposes a compromise embedded in the rule of combat liability. This compromise is between self-defense and the collective realities of war. When a person is killed in self-defense, there must be something about the target that compels the victim to use lethal defensive force to deter, stop or mitigate the harm directed at him. This logic, however, is among individuals, not collectives.

Although TK is not new or unprecedented, it puts into question combat liability as it is understood today. The challenge is, however, to make a distinction between the individual and the collective. The heat of war melds collective and individual identity into one with the effect of depersonalizing the target. Nils Melzer notes that in *military hostilities*, “the killing of human beings is understood as an impersonal act motivated by the military necessity of achieving victory over the adversary in an inter-collective confrontation. The killing does not take place between private individuals for personal motives, but between anonymous agents of the opposing parties to an armed conflict. Thus, combatant individuals become ‘legitimate military objectives’, [...]”<sup>5</sup> Combatants, just as military material, become simply military objectives. They become numbers, an abstraction that eludes a deep moral analysis. This is due, in part, to the extreme collectivization of war. As Walzer notes, “War is an intensive collective and collectivizing experience.”<sup>6</sup> So, “[o]nce you are in the army you are a member of a very strong collective of combatants [...]”<sup>7</sup> And, “[p]erhaps there are soldiers who, given the morality of every day life, don’t deserve to be targeted [...]” But, “[i]n the circumstances of war, we cannot make these distinctions.”<sup>8</sup> Melzer writes that this “depersonalization of the involved actors facilitates to suppress the moral dilemma generated by the often massive scale of killing, suffering and destruction occurring in situations of armed conflict.”<sup>9</sup> And adds that, “Most State-sponsored targeted killings fit into neither of these argumentative paradigms and, therefore, leave the underlying moral dilemma unresolved.”<sup>10</sup> The dilemma is this: “targeted killings, by definition, are directed against selected individuals, they constitute the conceptual antithesis of depersonalized, inter-collective warfare [...]”<sup>11</sup> TK is the antithesis of the fact of membership. Under the latter, killing is random and collective-based, and even arbitrary at times, while the former is specific, deliberate, and premeditated. Each of these forms of killings operates under different accounts of self-defense. There are two forms of killing, collective and individualized, that

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<sup>5</sup> Ibid. p. 434-5.

<sup>6</sup> Walzer, M. 2015. *Just and Unjust Wars*. Basic Books. p. 340.

<sup>7</sup> Ibid. p. 342.

<sup>8</sup> Melzer, N. *Supra*. p. 435.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

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have two distinctive justifications. The question is, thus, can the justification given for collective liability based on the fact of membership explain, and legitimize, the individualization of military force against a specific target? The main contention of this work is that it does not.

Collective action is a joint enterprise composed of specific individuals who have different roles and responsibilities. The armed forces are such collectives where combatants in wartime have various duties and particular tasks pursuant their cause for war. If employing military force is justified as self-defense, then killing combatants must be explained under the same doctrine. However, not every combatant killed could be justified as such. Some of them, due to their particular roles and responsibilities, simply do not pass the threshold to be subject to lethal defensive force.<sup>12</sup> As Seth Lazar notes, “Whether through fear, disgust, principle, or ineptitude, many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threats, or to the macro-threat posed by their side (some are a positive hindrance).”<sup>13</sup> And adds that “The causal contributions of many unjust combatants to specific threats will be individually small and unnecessary. One might object that they pose a threat simply by being there, because they draw fire away from their more effective comrades.”<sup>14</sup> Yet, his nominal status makes him a permissible target under law and a compromised killing under the ethics of war.

Under the fact of membership self-defense has a wide scope of applicability to encompass all members of the armed forces of the enemy. The collective realities of war to some degree determine this outcome. To engage militarily with only those targets that surpass a threshold threat will be vertiginous and impractical, thus it is reasonable to view collectives as agents acting in self-defense even if in the process non-labile combatants are wrongfully killed. Noam Zohar argues that, “Where the basic analogy to self-defense does function is on the collective level, justifying defensive war despite its necessary cost in innocent lives.”<sup>15</sup> He asserts that, “an effort to make sense of warfare as though it were an aggregate of individual confrontations can only produce moral vertigo.”<sup>16</sup> Additionally, it could not be expected that such a rule to be followed by political and military leaders. Furthermore, weapons are designed to cause as much damage and death as possible, not to make nuances among specific combatants. Hence, the necessity to make the assumption that

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<sup>12</sup> Lazar, S. 2010 “The Responsibility Dilemma” in *Philosophy & Public Affairs*, Vol. 38, No. 2.

<sup>13</sup> Ibid. p. 190.

<sup>14</sup> Ibid. p. 191.

<sup>15</sup> Zohar, N. 1993. “Collective War and Individualistic Ethics: Against the Conscription of ‘Self-defense’”, in *Political Theory* 21, no. 4, p. 615.

<sup>16</sup> Ibid. p. 619.

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all combatants are either engaging or are have the potential to take on harming activities explains why all members of the enemy are legitimate targets. Collective membership allows States to kill combatants who are not liable to be killed. It is a permission grounded on the collective realities of war. However, TK does not have to operate under these assumptions.

TK is the killing of a specific target, deliberately and intentionally. If a State employs this form of killing, it can no longer claim that making differences among combatants or the nature of their weapons makes it burdensome or impractical. The fact of membership thus loses its practical force, and the collective self-defense doctrine is no longer reasonable and it would go beyond what should be allowed. Under the fact of membership States can kill all enemy combatants specifically, and by name, regardless of what they are actually doing. Their particular activities might not be threatening, yet they are still lawful targets. It would allow the killing of any combatant at anytime. It must be noted that the term combatants might be misleading. Combatant is a general term to designate all members of the armed forces that is in active in military hostilities, but not all combatants have combat duties. With this in mind, the current legal permissions and its theoretical underpinnings would allow, when employing TK, for states to kill non-threatening, non-harming combatants.

The central issue is that the fact of membership is insufficient to justify the targeted killing of specific combatants. The fact of membership is exceedingly broad in its scope if an individualized form of killing is employed. Not *all* combatants of a collective pose nor contribute directly to the armed threat. Although all combatants might be legally permitted targets, not every combatant fulfills the defensive liability conditions to become a legitimate one. This problem, however, is glossed over by the fact of membership.

In all fairness, the rules and their justifications take into account several factors when considering why and how killing in war should be permitted, if at all. These include the causes and the stated goals of the war and how these should be achieved. These factors explain why combat liability is broad and wide in its scope, but these reasons fail to support TK.

The collective notion of armed conflict is so embedded in our thinking that it pervades our moral reasoning. The actual randomness, collectiveness and arbitrariness of killing is quite forceful. War is hell. Pacifists are unwilling to compromise with it. Just war theorists try to limit its violence while Realists do not see it possible or even desirable. However, TK has the potential to make some of the killings less collective, non-random and non-arbitrary without ignoring the fact of war.

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TK can make distinctions among combatants clearer and more precise than ordinary forms of killing do not. Bypassing collective identities as default form of liabilities, TK would require the State to consider what is the target actually doing instead of relying on membership. This requirement will be grounded on narrow, individualized account of self-defense. The target's actions should be of such nature that killing him is necessary and proportional in accordance with his actions related to cause of the war. This restricted use of TK will limit the instances in which innocent combatants are killed, and by extent, make war more just and less violent.

### 1.2. The Claim

My claim is that LoAC and its theoretical underpinnings permits, and wrongfully justifies, the specific selection of innocent combatants to be killed under TK.

First, LoAC provides the legal basis for any State that is active in an armed conflict to kill any enemy combatant at anytime, anywhere. There are some restrictions to this rule. States are not allowed to kill prisoners of war or those who are out of combat due to sickness or injury or have otherwise surrendered. There is no distinction between combatants, not among enemies or allies, aggressor or victim. It is a full blanket permission to kill. The law does not consider who's at fault or who's acting in self-defense. Such moral standings are irrelevant for the law. The reason for these rules is to keep the violence among combatants to prevent the slaughter of civilians. It's a compromise. As a consequence, a State has the legal permission to specifically kill, deliberately and with premeditation, an innocent combatant who is fighting against an unjust aggressor.

Secondly, political theorists and moral philosopher employ JWT to seek justification of combat liability, an explanation of why it is justified to kill enemy combatants that goes beyond the fact of legal validity. However, they fail to justify TK as well. In JWT there are at least three competing models.<sup>17</sup> There is the traditionalist model that has a very similar outcome of that of LoAC.<sup>18</sup> They contend, for different reasons, that combat liability is a principle based on a convention. This convention does not overlap with the doctrine of self-defense. However, it does not mean that it lacks any moral ground. The binding force stems from the necessity to reduce the violence of war, or the principle not to kill the innocent (or non-threatening), or as trade-off among combatants, or simply as a moral fiction to prevent

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<sup>17</sup> Statman, D. 2012. "Can Just War Theory Justify Targeted Killing? Three Possible Models" in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. By Finkelstein, C., Ohlin, J.D., and Altman, A. OUP, pp. 90-111.

<sup>18</sup> Mavrodes, G. 1975. "Conventions and the Morality of War", *Philosophy & Public Affairs*, Vol. 4, No. 2, pp. 117-131; Waldron, J. 2018. "Deep Morality and the Laws of War", in *The Oxford Handbook on the Ethics of War*, ed. by Lazar, S. and Frowe, H. Oxford University Press. pp.; Benbaji, Y. 2008 "A Defense of the War Convention" in *Ethics*, 118, pp. ; Walzer, M. *Supra*. p. 127.

war becoming savagery. On the other hand, there are the collectivist models.<sup>19</sup> These authors argue that collectives do the fighting, so war should be seen as collective self-defense. They also view combat liability as a permission sanctioned by a collective democratic process, or as a form of complicity, since war is cooperative project between combatants to achieve a common goal. Ultimately, there is the individualistic model.<sup>20</sup> These authors generally argue that war is not a separate realm and interpersonal ethics should be applicable. They contend that only combatants fighting for an unjust cause should be liable, not those who are fighting for an unjust aggression.

These models will be contested in their own terms. It may be anticipated that these models fail because they all begin with the premise that war is a collective enterprise. The collective fact of warfare as a foundation, they construe principles of combat liability that makes it dependent on collective membership. The flaw is that the operating principle in place does not explain why a specific target is justified without attributing to the target the collective moral status to which he is a member. For TK to be justified, there must be something about the individual that is independent of the fact of membership.

### 1.3. The Question

These flaws are not fatal, but the question remains: under what conditions, if any, can States employ TK to kill enemy combatants? The simplicity of the question might be misleading due to the general context in which it is being asked. War is a killing enterprise. Why does it matter, a skeptic might ask, if a more precise and surgical form of killing is added to the brute slaughter of combatants?

War does not occur in a vacuum. Some of the most brilliant minds of the western world have dedicated some of their intellectual efforts to the question of war and its justifications.<sup>21</sup> These contributions have been slow, for sure. Nevertheless, slow progress is still progress. Many centuries ago, war was considered an absolute right of a sovereign king that may be waged whenever it was within the interest of the State. In contrast, today's wars can only be justified in narrow cases of self-defense. Also, the international community has the authority to hold those political and military leaders accountable when they do not abide by the laws of war. So, suggesting further restrictions on the permissibility of killing in war

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<sup>19</sup> Fullinwider, R. 1975. "War and Innocence", in *Philosophy & Public Affairs*, Vol. 5, No. 1; Fabre, C. 2012. *Cosmopolitan War*. OUP; Zohar, N. 1994. "Collective War and Individualistic Ethics: Against the Conscripton of "Self-Defense", in *Political Theory*, Vol. 21, No. 4

<sup>20</sup> McMahan, J. 2004. "The Ethics of Killing in War", in *Ethics* 114, pp. 693-753.; Frowe, H. 2014. *Defensive Harm*. OUP.

<sup>21</sup> Cox, R. 2018 "The Ethics of War up to Aquinas" in *The Oxford Handbook of the Ethics of War*, ed. by Lazar, S. and Frowe, H., pp. 99-121. Schwartz, D. 2018. "Late Scholastic Just War Theory", in *The Oxford Handbook of the Ethics of War*, ed. by Lazar, S. and Frowe, H., pp.122-144; Kalmanovitz, P. 2018. "Early Modern Sources of the Regular War Tradition" *The Oxford Handbook of the Ethics of War*, ed. by Lazar, S. and Frowe, H., pp. 145-165. Gallie, W.B. 1978. *Philosophers of Peace and War*. Cambridge University Press.

advances the long historical objective of reducing violence and holding civilian and martial leaders accountable.

What is more, TK can individualize war, a practice that was not possible before.<sup>22</sup> As Jennifer Welsh writes, “Individual rights and responsibilities are at the centre of today’s international and civil conflicts in a way that they have never been before. This process of ‘individualisation’, which challenges the primacy of collective units such as sovereign states or ‘warring parties’,” and contends that this phenomenon “has two main drivers: powerful normative developments related to human rights, which have spawned new kinds of wars and peacekeeping missions and a new class of international crimes; and dramatic technological and strategic developments that both empower individuals as military actors and that enable either the targeting or protection of particular individuals.”<sup>23</sup> These new developments introduce an opportunity to do an in-depth study of the justifications for killing in armed conflict. War casualties tend to be communicated in numbers, an abstraction. If, on the other hand, the killed combatants are personalized it might set in motion a higher threshold for killing in war, which is one of the purposes of this research.

Establishing a high threshold is no easy task. Modern states enjoy the political conditions and the technological sophistication to search and kill specific targets with little to no backlash (Qasem Soleimani, the Iranian general who was targeted by the US is the most recent case).<sup>24</sup> It is politically expedient and economically preferable. Military leaders work under military necessity, not a list of non-permissible targets. The military capacity to name-kill its enemies must be challenged for several reasons.

When a State is in a state of war, much of the restrictive principles of warfare tend to be relaxed under the pressure of military necessity. Political and military leaders are not concerned about the nuances of morality, but on efficient ways to achieve military victory consistent with their interests. Killing, therefore, can be arbitrary and unjustified. This power to decide who dies and who lives should be restricted, and transgressors should be held accountable.

On a theoretical ground, the question of combat liability is not settled. There are several accounts that compete for a final say on the matter. Self-defense accounts used in JWT tend to be wide in its scope since the specifics of interpersonal violence are lost in the

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<sup>22</sup> Welsh, J. 2019. "The Individualisation of War: Defining a Research Programme," *Annals of the Fondazione Luigi Einaudi. An Interdisciplinary Journal of Economics, History and Political Science*, Fondazione Luigi Einaudi, Torino Italy, vol. 531, pages 9-28, June.

<sup>23</sup> *Ibid.* p. 9.

<sup>24</sup> The BBC. July 9, 2020. Qasem Soleimani: US strike on Iran general was unlawful, UN expert says. <https://www.bbc.com/news/world-middle-east-53345885>

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general exchanges of collective warfare. The leading question of this research might narrow the applicability of self-defense and cast light on new ways to think combat liability.

So, this question matters in so far that it attempts to restrict TK to those targets that are liable for reasons specific to the target. Also, it attempts to restrict political violence among states, and establishes further grounds to hold unscrupulous leaders accountable.

It must be noted that this question does not ignore the collective fact of armed conflict. Nor it is the intention to dismiss the idea that collectives are capable of causal responsibility for unjust harm they might cause. Collectives are capable of acting with intent and thus could be causally responsible for an unjustified threat. A collective with such capacity are the armed forces, for example. They have features that could constitute the basis for causal responsibility. Armed collectives have a membership program based on a common set of beliefs, a unified authority, a distinctive decision making process, a chain of command, and a common goal. These characteristics, as Alberto Giubelini and Neil Levy note, will instill the collective with agency, intent and capacity for action.<sup>25</sup> Thus, it could act purposefully and distinctively with intent.

However, the question is not if a collective may be subject of blame or praise, but how can lethal defensive force be properly distributed among members. A collective might be responsible for an unjust harm but it does not necessarily follow that its members should be indiscriminately subject to lethal defensive force. Under the same reasoning, the fact that a specific soldier has committed a war crime does not mean that the collective should be responsible for that crime. It is possible to hold specific individuals accountable, as individuals, for their actions even if they were part of a collective joint-action military operation. It follows, then, that it is also possible to make proper distributions of lethal defensive force among individuals. If such discrimination among combatants is not made individual combatants might be wronged. Thus, allowing the indiscriminate use of lethal force among combatants under TK based solely on collective membership has the potential to produce unjustified killings.

It must be noted that the implication is not that membership is immaterial when considering personal responsibility. Cecile Fabre writes, “To the extent that the collective venture in which they are direct participants is wrongful (in this case, for consisting in a wrongful infringement of the enemy’s right not to be killed), their own individual contribution to it is itself wrongful (in that it is a contribution to a wrongful right

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<sup>25</sup> Giubelini, A., Levy, N. 2018. “What in the World is Collective Responsibility” in *Dialectica*, Vol. 72, No. 2.

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infringement).”<sup>26</sup> However, this is not a sufficient condition for defensive force liability. Personal defense liability requires a narrow analysis to what the target is actually doing. Fabre supports this view when she argues, “To the extent that the account seeks to connect liability to individual agency, it must pay attention to what it is exactly what individuals do. In other words, it cannot regard mere (wrongful) participation in a wrongful venture as a sufficient condition for liability to direct attack. Rather, a contribution must, on its own individual terms, meet a threshold of causal significance in order for its author to be liable.”<sup>27</sup> Larry May also argues that combatants and civilians “should be spared or killed for reasons that have to do with them as individuals, for they are not automatically to be seen as extensions of the State.”<sup>28</sup>

Although it is safe to say that collectives could be agents of harm, it would require a different method to decide on how to distribute harm among its members. The question that follows, thus, is how should defensive liability be distributed among the members of a threatening collective? The normative premise for this question stems from the idea of ‘separateness of persons’ by John Rawls and Robert Nozick, and the view, by Thomas Nagel, that a hostile act is a personal relationship. Nagel argued that, “[the] hostile treatment of any person must be justified in terms of something about that person which makes the treatment appropriate. Hostility is a personal relation, and it must be suited to its target.”<sup>29</sup> McMahan writes, “To say that a person is morally liable to be harmed in a certain way is to say *that his own action* has made it the case that to harm him in that way would not wrong him, or contravene his rights.”<sup>30</sup> Rawls, on the other hand, argues that the respect for an individual implies holding them accountable as free and equal rational beings.<sup>31</sup> Nozick states that, “There are only individuals, different individual people, with their own individual lives.”<sup>32</sup> And “Individuals are inviolable.”<sup>33</sup> Hence, to use individuals as means for a social end “does not sufficiently respect and take account of the fact that he is a separate person.”<sup>34</sup> Thus, since a hostile act is a personal relationship with the threatening target, the defensive force must be tailored to the target’s own actions. There must be something about the individual that makes him accountable and override the targets side-constraint.

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<sup>26</sup> Fabre, Cécile. 2009. “Guns, Food, and Liability to be Attacked in War” in *Ethics*, 120, p. 60.

<sup>27</sup> Fabre, Cécile. 2009. “Guns, Food, and Liability to Attack in War”. *Ethics*, pp. 60-61.

<sup>28</sup> May, L. 2006. *War Crimes and Just War*. OUP. p. 188.

<sup>29</sup> Nagel, T. 1972. “War and Massacre”, *Philosophy & Public Affairs*, Vol. 1, No. 2, p. 132.

<sup>30</sup> McMahan, J. 2008. *Killing in War*. Oxford University Press, p. 11.

<sup>31</sup> Rawls, J. 1999. *A Theory of Justice*. Harvard University Press. pp. 167, 455, 513.

<sup>32</sup> Nozick, R. 1974. *Anarchy, State and Utopia*. p. 33.

<sup>33</sup> Ibid. p. 31.

<sup>34</sup> Ibid. p. 33.



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If this is correct, then collective liability may be seen as a violation of the ‘separation of persons’ doctrine. Combatants might have a common goal, yet they have different roles and obligations, which entail different degrees of responsibilities. Each individual should be considered as such and individualized lethal defensive force should be sensitive to those facts. Thus, even if combatants are normatively interlocked, they are moral boundaries and side-constraints that each individual has and must be respected.

In the literature there is much work on the question of distribution of harm among non-combatants.<sup>35</sup> Some writers argue that their contributions to war although harmful do not surpass the liability threshold for lethal defensive force while others make the point that they do. However, to my knowledge, there is no theory of distribution for combatants. All combatants are considered legitimate and liable targets at all times.<sup>36</sup> Colm McKeogh writes that “the current legal position permits the targeting of all combatants at any time. Combatants need not be engaged in hostilities at the moment they are targeted. They can be legitimately targeted when they pose no immediate threat.”<sup>37</sup> A probable explanation for this is the fact that it is the armed collective doing the fighting, not the civilian collective. Nevertheless, it would not be outrageous to contend that there might be some civilians more liable to defensive harm than some combatants themselves.<sup>38</sup>

So, is it morally required to have a distributive harm principle specific for combatants when employing TK? Will the pursuance of armed conflict be inherently wrong if it lacks such an account? Generally speaking it would not. War is inherently collective, and as such its members pose a unified threat.<sup>39</sup> And in an active armed combat making neat causal distinction among combatants is impractical.<sup>40</sup> However, when a State individualizes the lethal defensive force to one target (TK), an account of why that specific target is killed should be explained by a distributive harm principle based on self-defense. Seth Lazar writes, “If combatants in wartime are to kill without injustice, there must be some explanation of how the best principles of self-defense vitiate the rights to life of their victims. We need an account of how the people they kill are liable to that fate.”<sup>41</sup>

### 1.4. The Argument

That being said, States may employ TK if the target meets a functional-based liability status

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<sup>35</sup> Frowe, H. 2011. “Self-Defence and the Principle of Non-Combatant Immunity”, in *Journal of Moral Philosophy*, 84, 530–546.; Lazar, S. 2014. “Necessity and non-combatant immunity” in *Review of International Studies*, 401, 53-76.; Gade, E. 2010. Defining the Non-Combatant: How do we Determine Who is Worthy of Protection in Violent Conflict?, in *Journal of Military Ethics*, 93, 219–242.

<sup>36</sup> Walzer, M. *Supra*. p. 138.

<sup>37</sup> McKeogh, C. 2002. *Innocent Civilians: The Morality of Killing in War*. p.

<sup>38</sup> More on this view see Fabre, C., *Supra*, Lazar, S. “The Responsibility Dilemma” in *Policy and Philosophy*, and

<sup>39</sup> Walzer, M. 2006. “Terrorism and Just War”,

<sup>40</sup> Zohar, N. *Supra*. p. 165.

<sup>41</sup> Lazar, Seth. 2009 “Responsibility, Risk, and Killing in Self-defense”, in *Ethics*, p. 700.

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based on a self-defense centered on a causality account of liability. For a combatant to meet such status the employing State must have a just cause, the target's collective is pursuing an unjust cause and the target's role and responsibilities further his collective's unjust cause. The target makes himself liable because of his causal contributions to his collective's unjust cause.

This framework places each combatant either in a just cause or an unjust cause position. A just cause, simply put, is an overall objective of war that can be permissibly defended by military force. The operating principle is self-defense. A State claiming self-defense must show that whatever goods or rights under threat must, by necessity, be defended with military force. In contrast, an unjust cause is when the objectives of war do not justify employing military force.

Once each side is indentified in accordance to their claim, an asymmetrical relationship is set. One side is justified in using lethal military force, while the other is not. This is a reflection in some degree to interpersonal self-defense principles in which one side must be liable while the other must be justified in employing lethal force. However, being a member of a collective that is pursuing an unjust cause is not sufficient to be liable, there must be something about the combatant that links him to the unjustified threat that goes beyond the fact of membership or the collective liability.

Not all formal members of a collective contribute to the same degree or to the same harms. Combatants will contribute in accordance to their duties and responsibilities, which will determine if they are liable to lethal defensive force under TK. His or her actions must be of such nature that it invokes by necessity the use of lethal defensive force. So, there must be a strong link between the target's personal actions and the collective's unjust cause and the necessity to employ defensive killing. This link is best explained by a principle of self-defense based on a causality principle.

A self-defense doctrine based on a causality principle seeks to address the gap between membership and the collective. It positions the target's actions up in the tier of primary relevance. Hence, when a target's actions are the immediate cause of an unjustified lethal threat or has a significant role in the chain of causality of an unjustified threat, the target has fulfilled the liability condition.

This does not mean that membership is immaterial. His individual actions are relevant to the extent he is a member of a collective that by joint coordination and resource availability could be a significant threat that by his lone actions might not be. However, what is normatively relevant to establish liability is his actions in relation to the unjust threat posed

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by the collective. So, instead of positing liability on nominal and formal membership, I suggest, instead, a more substantial account: functional-based principle.

This status addresses the deficiencies of the said models by narrowing the scope to combatants who are actually liable to lethal defensive force by their own individual contributions. It is a switch from a formal-strict liability solely based on membership to an agent-specific liability regulated by what the member is actually doing.

### 1.5. The Method

For the functional-based liability to become operational the target must be positioned in a collective pursuing an unjust cause and identify his or her duties and responsibilities that related to pushing forward the unjust cause. There are two leading questions, (1) is the individual combatant a member of a collective who has an unjust cause? If the combatant does belong to an unjust fighting force then it would be followed by a second question: (2) what is the combatant doing and what is the relationship between what he is doing and the unjust cause? The first question will be framed under JWT, and the second question will be under a doctrine of interpersonal self-defense. The overlapping of these two paradigms could be justified for several reasons.

War is a collective effort and its members joint-coordinate their fighting to achieve a common-driven goal. The collective nature of war is an indubitable fact. As a starting point, collectives are seen as agents, which follows that how and why they fight is subject to moral evaluation. JWT is the paradigm best suited to make such an assessment. However, moving forward, the actual judgment if a particular collective has either a just or unjust cause is going to be stated as an assumption since this research's main focus is not why they fight, but on how should they fight. Once the collective's cause has been morally appraised and deemed unjust, then a justification of why a specific target should be subject to lethal defensive force and not, say, the combatant standing next to him.

Collectives are the leading entities in the fight, but their members are the primary agents. Between the members of one collective and the other is an inter-correlation of duties and responsibilities, rights and permissions, which defines each member's position in relation to one another. It is not the collective that defines his rights but is the individual who is the source of those rights, and his actions alone should determine the status of those rights. There must be something about the target in relation to the others that justifiably suspends his claim to his life, a reason that explains why he no longer has his right not to be killed. Thus, a principle of inter-personal self-defense may explain why a State may individually select a

combatant under TK.

### 1.6. Chapter Composition

In chapter 2, *Armed Conflict and Targeted Killing*, I begin by stating and exploring the practice of war as a rule-based activity. Killing is a permission granted by legal convention to the States. So, the question is, what does the law say about this practice and what is its scope and restrictions? And ultimately, is TK a lawful means of warfare? To answer these two questions the legal, institutional framework of armed conflict is presented to understand how states ought to conduct hostilities. The conclusion is that the legal permission to kill in war depends, eventually, on the restrictive requirements of the use of military force: the principles of discrimination, proportionality, and military necessity. It is concluded that TK fits perfectly well with these restrictions. However, there is one concern: the justification for killing seems to depend on the legal fact of membership. The question, thus, is if there a justification of why a particular combatant may be killed that does not solely rest on the fact of legal validity?

In chapter 3, *Targeted Killing and the Problem of Justification*, I explore several models of JWT that seek to explain, and justify, that the reasons why these justifications for killing in war. More specifically I explore three models of JWT: the conventional model, the collective model, and the individualistic model and conclude that these accounts do not have an explanation on how to make the proper nuances among combatants that would justify specifically targeting an individual under the justification of self-defense.

Chapter 4, *Towards A Self-Defense-Based Justification Of Targeted Killing*, I present a self-defense principle that will seek to explain the use and justification of targeted killing in war. The aim is to respond to the deficiencies of the models of JWT discussed in the previous chapter. This principle aspires to explain who is liable, when that person is liable, and, more importantly, why that person is liable to be subject to lethal defensive force. To respond to these questions, I present a simple and clear principle of self-defense based on the concept of causality. The concept can be read as: if the target is the immediate cause of an unjustified lethal threat or has a significant role in the chain of causality of an unjustified threat, the target has fulfilled the liability condition. However, additional conditions are needed for this principle to be operational in armed conflict.

In chapter 5, *Self-defense, Targeted Killing, and Armed Conflict*, I argue that in order for TK to be permissible in war, the defensive causality principle proposed in Chapter 4 should be applied along with a functional-based liability and the basic tenets of JWT. This

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principle will produce further discrimination among combatants making the conditions for the permissible use of TK in armed conflict. The principle of causality functional-base liability will make discrimination of liability to lethal defensive harm among combatants within the same collective. The application of this account in war would produce these conditions, (1) the combatant targeted should be fighting an unjust war; (2) The party making the killing must have a just end as a cause for the war; (3), killing the target must be of significant gain for the just end of the war. The outcome was a fine-grain form of discrimination that distinguishes personally liable from non-labile targets within the same collective.

The question that follows is if non-combatants could be subject to targeted killing. In chapter 6, *Targeting Civilians*, I argue that, since TK is a method that could be employed with a functional-based causal liability account, which makes the proper nuances among members of a collective (a non-combatant is a member of a larger collective: civilian population), it could very be justified if the target meets these requirements: that (1) the party employing TK must have a just cause, (2) the target is aiding or advancing interests of an unjust cause, (3) that by killing the target it will be of significant gain for the just cause of the war, (4) the target is engaged in an activity that will have substantial effects in advancing an unjust cause and (5) the target has the practical knowledge or technical skills or the political power to accomplish the imputed task that advances the unjust cause.

## 2

### ARMED CONFLICT AND TARGETED KILLING

In this chapter, the lawful justification for killing in war is examined with the aim of examining the legality of TK. To accomplish this task the legal, institutional framework of armed conflict is presented to understand how states ought to conduct hostilities. Thereafter a critical view will be presented along the determination if TK is at all justified in war.

#### 2.1. Introduction

“Kill everything that moves”<sup>42</sup>. This short, brief and simple command seems to be the policy directive of Gen. Westmoreland during the Vietnam War because, as Gen. Patton once said, “No bastard ever won a war by dying for his country. He won it by making the other poor dumb bastard die for his country.”<sup>43</sup> Killing is not only the most salient activity in war, but it is arguably the main route to win. Moreover, when the 108,000,000 war casualties of the 20<sup>th</sup> wars are added to these policies and observations, it may induce the reader to believe that armed conflict is an unrestricted all-out slaughter, but actually war is a legally regulated activity.

Killing during an armed conflict is a legal permission recognized among the States. Not all citizens of a State have a license to kill, only those who are members of the armed forces that represent that State. These members not only have a permission to kill enemy combatants, but they also have a permission to destroy all property that is considered a legitimate and valuable military objective. However, this legal permission has its conditions and set restrictions.

The question leading this chapter is if the legal permission to kill in war is consistent with TK. More specifically, does the conditions and restriction on the general license to kill in war have any proscribing effect on TK?

The challenge here is that the LoAC are designed around collectives (armed forces) as agents, not specific individuals. Therefore, the fact that a particular individual has been exacted and separated to be specifically killed might raise some questions. The Lieber Code, for example, states that, "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,

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<sup>42</sup> Turse, Nick. 2013, October 9. For America, Life Was Cheap In Vietnam. <https://www.nytimes.com/2013/10/10/opinion/for-america-life-was-cheap-in-vietnam.html>

<sup>43</sup> Gavin, James M. 1958. *War and Peace in the Space Age*. Harper. p. 58.

who may be slain without trial by any captor [...].”<sup>44</sup> This article has not been incorporated into the LoAC, but it does provide some evidence that since the mid 19<sup>th</sup> century the idea of individualized killing in what is essentially a collective enterprise is intuitively suspect.

This chapter is focused primarily on the lawfulness TK in armed conflict along its underlying justification. The first step is to give a brief historical overview of the rules of armed conflict, which is followed by a discussion and analysis of the legal permission to kill in war.

### 2.2. ARMED CONFLICT AS A RULE-BASED ACTIVITY

There is a famous Latin phrase attributed Cicero, *inter armas silent leges* (in times of war laws are silent).<sup>45</sup> However, a brief overview of the laws of war shows otherwise, this is, the attempt to regulate has been an enterprise since antiquity with slow but consistent milestones through history.<sup>46</sup> Therefore, when states go to war, there are either customs or laws in place that seek to define the permissions, duties and responsibilities of the parties involved. Michael Walzer notes that, “war is a social creation. The rules actually observed or violated in this or that time and place are necessarily a complex product, mediated by cultural and religious norms, social structures, formal and informal bargaining between belligerent powers, and so on.”<sup>47</sup> Stephen Lee also states that, “War may seem to its participants and victims like random violence, but it is not. For all its devastation, war is a socially organized affair, and so it is a normative activity, conduct through rules (some of which are moral) that control and limit the actions of those involved.”<sup>48</sup>

In our time war is a legal and a political institution regulated by positive law and customs. At the domestic level political leaders who decide to go to war have to go through a legal process and, at an international level, there are treaties, customs, and decisions of international courts that intend to regulate acts of war. Ultimately, war is a political decision regulated and restricted by law. As David Kennedy notes, “modern war reflects modern political life. In large measure, our modern politics is legal politics: the terms of engagement are legal, and players are legal institutions, their powers expanded and limited by law.”<sup>49</sup> Therefore, war is a political decision, how to fight the war is a military one and both are regulated and restricted by LoAC.

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<sup>44</sup> General Orders No. 100 : The Lieber Code INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD; [https://avalon.law.yale.edu/19th\\_century/lieber.asp#sec9](https://avalon.law.yale.edu/19th_century/lieber.asp#sec9)

<sup>45</sup> Lee, S. 2012. *War and Ethics*. OUP. p.15.

<sup>46</sup> Cox, R. 2018. “The Ethics of War up to Thomas Aquinas”, in *The Oxford Handbook of the Ethics of War*, ed. Lazar, S. and Frowe, H. OUP, p. 99-121.

<sup>47</sup> Walzer, M. 1977. *Just and Unjust Wars*. p. 43

<sup>48</sup> Lee, S. 2012. *Supra*, p.7.

<sup>49</sup> Kennedy, D. 2009. *Law and War*. Princeton University Press. p. 13.

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The laws of war were not always codified. There was a time when the rules of warfare were based on tradition and customs of the era. It was not until the mid nineteenth century that the West began to realize that clear and humane rules of war were needed. The end result was the codification of traditions and customs of warfare on the one hand (LoAC) such as the principles of distinction, proportionality, and military necessity, and the introduction of humane considerations and principles on the other (International Humanitarian Law or IHL). The former's core content is related to issues specific to military matters while IHL main concern is, as Larry May observes, "treating another person as a fellow human, as a member of the same group, the human race, rather than in any other ways that take account of his or her otherness."<sup>50</sup> There are three main reasons for this realization.

First, compulsory enlistment of military service created mass armies that were constituted mainly by private citizens. War went from limited hostilities among private combat professionals to a wide scale clash of national armies of citizens, which main professions were shoemakers, fishermen, and carpenters, for example; skills that were far from military expertise. So, a clear and accessible codification of rules was needed. As the Oxford Manual of 1880 stated in its preface, codified law must be "worded in a popular form in order to be known to everyone."<sup>51</sup>

Secondly, the improvement and the invention of new weaponry increased the number of victims. The first Geneva Convention was sparked by this particular reason. Henry Dunant, a Swiss businessman, witnessed how 23,000 injured, dying or dead combatants were left unattended in the aftermath of the Battle of Solferino. As a consequence of this horrific experience, he founded the Red Cross and pushed the idea for an independent organization to care for the injured combatants. This first Convention accomplished three main goals. The enshrinement of the principle of humane treatment of the injured, sick, or dead, the legal recognition of those attending them as a neutral party, and, as such, a legal immunity from deliberate attack.

And thirdly, armed conflict was becoming too destructive and thus inconsistent with a civilized society. Accordingly, a set of codified rules was necessary to reduce the savagery of war. As the St. Petersburg Declaration puts it, "the progress of civilization should have the effect of alleviating as much as possible the calamities of war," and to, as the Oxford Manual of 1880 notes, "restrain the destructive force of war."<sup>52</sup>

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<sup>50</sup> May, Larry. 2007. *War Crimes and Just Wars*. Cambridge University Press. p. 67.

<sup>51</sup> Schindler, D. 1988. *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*. Springer Netherlands, p. vii.

<sup>52</sup> Ibid.



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The codification of IHL and LoAC has been a slow, bumpy and lengthy process. It began with the intent to protect non-combatants from direct harm and to minimize unnecessary suffering. Codification reached its peak before WWI and ever since the efforts have been to improve the laws that are in place. For example, before WWI there is the Lieber Code of 1863, which introduced the concept of military necessity and was a blue print for prosecuting war crimes in the aftermath of the American Civil War. The 1864 Geneva Convention gave protection to civilians assisting the injured and the wounded and to treat prisoners of war humanely. The 1899 and 1907 Hague Peace Conference provided specific guidelines on who might be deliberately targeted, what means were permissible and created a tribunal to settle disputes to replace the institution of war. After the terror of WWI the Geneva Protocol on Gas and Bacterial attempted to ban chemical warfare of 1925. After WWII United Nations Charter was founded with an explicit constraint on the use of force among States. Several years later the Geneva Convention of 1949 (and its additional protocol) endeavored to further protect civilians, the sick, the injured and the prisoners of wars. In 1998, the Rome Statue of the International Criminal Court (ICC) is founded as a permanent international court with jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

As a whole, IHL and the LoAC regulate armed conflict. These two bodies of law attempt to balance the interest of the parties of an armed conflict with those of humanity. IHL enshrines the principles of humanity and the LoAC regulates the permissible use of force and the legally permitted means to do so. The former is concerned with the injured, the sick and the prisoners of war while the latter is concerned with banning the wars of aggression and outlawing chemical-biological weapons, for example. Our topic narrows the inquiry to the LoAC: what is the legal permission to kill in war? Who is, from the view of the law, a justified target? The answers to these questions are relevant to the extent that it provides guidance on what States are allowed to do, and consequentially, cast light on the permissibility of TK in war.

### **2.2.1. ARMED CONFLICT AND THE LEGAL PERMISSION TO KILL**

#### ***State Actors, Non-State Actors and Armed Conflict***

A State's permission to kill is conditioned on the fact of an ongoing war. Consequentially, prior to any analysis on the legal permission to kill in war, a legal definition of war and who is legally permitted to wage it is necessary. There is no uniform and clear definition of war in LoAC. However, the law does recognize, on the one hand, the factual conditions that may be

classified as *hostilities* or *armed conflict*, and, on the other, what agents could wage war. Identifying the objective elements of armed conflict and the agents that can wage it is paramount for the proper applicability of the LoAC.

As a general definition of armed conflict, the International Criminal Tribunal of former Yugoslavia (ICTY) concluded that, “an *armed conflict* exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>53</sup> In this definition there are two forms of armed conflicts: international armed conflict and non-international armed conflict.

An international armed conflict is whenever two or more States engage in military action against each other. Art. 2 of the Geneva Convention states that “present Convention shall apply to all cases of declared war or *of any other armed conflict which may arise between two or more of the High Contracting Parties*[...].”<sup>54</sup> Contracting parties are States. In this context ‘military action’ may be a “minor instance of unilateral or mutual armed violence-such as individual border incidents, the capture of a single prisoner or the figurative ‘one shot’ leading to a single wounded.”<sup>55</sup> Any of these scenarios could activate the applicability of the LoAC.<sup>56</sup> It must be noted that in few exceptions non-state actors may become parties to an international armed conflict. These exceptions are when their belligerency status is recognized by an opposing State or when they represent a national liberation movement<sup>57</sup>.

Non-international armed conflict is not defined in the LoAC. Instead, a definition is construed by citing two articles. First, Art. 3 GCI states that “In the case of armed conflict not of an international character occurring in the territory of one High Contracting Parties, [...]”<sup>58</sup> A clear condition to be considered is that it has to occur within the territory of a State. Secondly, Article 1 and 2 of AP II of 1977 provides further conditions by stating that,

1. This Protocol, shall apply to all armed conflicts which are not [of international character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed

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<sup>53</sup> Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction (Prosecutor v. Dusko Tadic) 1995 IT-94-1, par. 70. <https://www.icty.org/x/cases/blaskic/tjug/en/blatj000303e2.htm>

<sup>54</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Art. 2, Application of the Convention. <https://ihl-databases.icrc.org/ihl/WebART/365-570005?OpenDocument>

<sup>55</sup> Melzer, Nils. 2008. *Targeted Killing in International Law*. OUP. p. 251.

<sup>56</sup> H.P. Gasser explains that, “any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States. [...] It is also of no concern whether or not the party attacked resists. [...] As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention” How is the Term “Armed Conflict” Defined in International Humanitarian Law? International Committee of the Red Cross ICRC Opinion Paper, March 2008.

<sup>57</sup> Melzer, Nils. *Supra* p. 248.

<sup>58</sup> Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field. Geneva, 12 August 1949. Commentary Of 2016, Article 3: Conflicts Not Of An International Character. <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>

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forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

As a result of these two articles, non-international armed conflict are “all situations of sufficiently intense or protracted armed violence between identifiable and organized armed groups regardless of where they occur, as long they are not of interstate character.”<sup>59</sup> There is a difference that must be underlined between international and non-international armed conflict (or civil wars) in relation to non-state actors. For non-international armed conflict to be considered as such, the non-state party must control part of the national territory and for the hostilities to be above a certain level of intensity and duration. Art. 1(1) of the Protocol II states that a non-state party must “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>60</sup>

On the issue of intensity and duration, Art. 1(2) states that “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>61</sup> If the State in question has to use military force to address these riots or disturbances, then it would activate the LoAC. As D. Schindler notes, “The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces.”<sup>62</sup>

In conclusion, actors that may be classified as warring parties are States and non-states actors (under certain conditions) and the type of an armed conflict may be either international or non-international. Now, once an armed conflict has been defined and their main actors are recognized, the questions that follow are: is the cause for war lawful? Are the means, the tactics and targets legally permitted? What are the restrictions on the use of military force? In the sections that follow these questions will be discussed.

### ***Lawful use of Military Force***

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<sup>59</sup> Melzer, Nils. *Supra* p. 261.

<sup>60</sup> Art. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts Protocol II, 8 June 1977. <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0>

<sup>61</sup> D. Schindler notes that, “The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, [i.e] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements”.

<sup>62</sup> See, “How is the Term “Armed Conflict” Defined in International Humanitarian Law?” *International Committee of the Red Cross ICRC Opinion Paper*, March 2008, p. 5.

## Just and Unjust Targeted Killings in War

There are three cases in which lawful use of military force is permitted: self-defense or other-defense, enforcement of United Nation Security Council (UNSC) resolutions, and humanitarian interventions.

The primary rule regarding permission to employ military force is based on the inherent right of self-defense held by states. In article 51 of the United Nations Charter states "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, [...]".<sup>63</sup> It must be underlined that self-defense as a cause for war is narrowed to instances of aggression against another State. This limits any potential expansion of the term self-defense that could be construed widely to include, for example, preventive wars -neutralizes a potential threat from materializing thus defending oneself from a future actual threat. In practice, however, we have seen how the 2003 War of Iraq was construed and justified as a preventive war by the Bush Administration despite the objections and non-support of the UNSC.

The second authorization of the use of force has to be approved by the UNSC as regulated in articles 41 and 42 of Chapter VII of the UN Charter.<sup>64</sup> This authorization is analogous to law enforcement. Article 47 (Chapter VII, of the United Nations Charter) states that, "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." Article 41 reads as follows, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." And article 42 states, "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." There are, so far, two main authorizations for the use of military force.

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<sup>63</sup> Art. 51, Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, of the United Nations Charter. <https://legal.un.org/repertory/art51.shtml>

<sup>64</sup> Article 47 Chapter VII, of the United Nations Charter states that, "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." Article 41 reads as follows, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." And article 42 states, "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

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First, the inherent right of self-defense of the States and, secondly, to enforce the Security Councils decisions.

However, there has been some debate if there should be a third authorization of use of force when, for example, there is a flagrant violation of human rights at a domestic level. This is known as humanitarian intervention -this could fall as law enforcement or other-defense.<sup>65</sup> Humanitarian intervention can be defined “as a means to prevent or stop a gross violation of human rights in a state, where such state is either incapable or unwilling to protect its own people, or is actively persecuting them.”<sup>66</sup> In the 1990s, which was the decade of humanitarian interventions, there are cases in which the UNSC authorized these interventions while there are cases in which States went ahead without such authorization.

The main issue here is that there is no legal permission to *unilaterally* use military force to protect human rights. In the *Nicaragua* case, the court ruled that “the use of force could not be the appropriate method to monitor or ensure respect for human rights, that there is no general right of intervention in international law and, therefore, intervention violated international law.”<sup>67</sup> However, a decade later humanitarian interventions have become a customary practice in international law creating an explicit tension with positive law. The law allows the use of force as self-defense against outside aggression. The UN Charter specifically states in Art. 2 (4) that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, [...]” Humanitarian intervention requires violating territorial integrity and/or political independence to stop a gross violation of human rights. Such interventions might be morally justified, or even required, but it does not fit with current international law.

On the other hand, it must be noted that the law does not operate differently because one State is an aggressor and the other is a defender. The legal status of a war -aggression or defensive or humanitarian intervention- does not affect the legal duties, responsibilities and rights of the combatants on the ground. If a State initiates a war of aggression, its combatants will still have the legal permission to kill and will not be prosecuted after the war. This is inconsistent with the domestic legal doctrine of self-defense, which subjects the initial aggressor to criminal liability. So, an illegal war does not have any effects on the legal permission to kill.

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<sup>65</sup> Rodin, D. 2002. *War and Self-Defense*. OUP. p. 106.

<sup>66</sup> Jayakumar, Kirthi. 2012. Humanitarian Intervention: A Legal Analysis. SSRN Electronic Journal. 10.2139/ssrn.2121008. p.1.

<sup>67</sup> ICJ, *Nicaragua v. United States of America*, Military and Paramilitary Activities, Judgement of 27 June 1986.

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In some circumstances the use of force might not be considered as a hostile act - hostile acts could be either offensive or defensive)- this is, it does not reach the threshold in order to be considered as an act of war.<sup>68</sup> There are circumstances -incidents short of war or *jus ad vim*-, like a skirmish along the border that are not sufficient to be considered the initiation of armed conflict.<sup>69</sup> The problem with the threshold is that there is no objective reference to define what exactly is an act of war. To illustrate this point, in 1968, the North Korean military attacked the USS *Pueblo* while it was in international waters. One U.S. member was killed and eighty-two surviving members were held hostage for 11 months. The *USS Pueblo* was a spying ship. Eventually they settled their difference via diplomatic channels. However, was the killing of one combatant and holding over eighty others hostage a hostile act? Could this incident be a sufficient basis for a military response? Maybe. The absence of an objective account leads, ultimately, to the States as holders of the inherent right of self-defense or an agreement by the Security Council to decide what is an act of war.

The lawful use of military force is allowed in cases of self-defense or other-defense, enforcement of UNSC resolutions, and humanitarian interventions. In any of these circumstances, the permission to kill under military force will be permissible under certain conditions. These conditions are discussed in the following sections.

### 2.2.1. LEGAL RESTRICTIONS FOR KILLING IN WAR

The main activity of war is killing. The St. Petersburg declaration stated “That the only legitimate object which States should “endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men;”<sup>70</sup> The word ‘disable’ may be an euphemism for killing. However, the same Declaration states that “this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity;”<sup>71</sup> So, although killing in war is the primary mean to achieve victory, there are three main restriction to this permission: the principle of distinction, the principle of military necessity, and the principle of proportionality.

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<sup>68</sup> Article 49 of Additional Protocol to the Geneva Conventions of 12 August 1949. “Attacks” means acts of violence against the adversary, whether in offence or in defence. Accessed May 2020. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750062?OpenDocument>

<sup>69</sup> Michael Walzer notes that, “the Iraqi case invites us to think about the use of force-short of war; the containment regime of 1991-2003 that the UN endorsed and the United States enforced is only one possible example of this use. Despite the French argument at the UN in 2002 and 2003 that force must always come as a last resort, force short-of-war obviously comes before war itself. The argument about *jus ad bellum* needs to be extended, therefore, to *jus ad vim*.” p. xv

<sup>70</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

<sup>71</sup> Ibid.

### *The Principle of Distinction*

The norm reads in IHL as follows, "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."<sup>72</sup> The principle in codified law states that,

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."<sup>73</sup>

Combatants may not (a) attack a target deliberately intending to kill civilians nor (b) attack a target indiscriminately in a way that makes no effort to distinguish between combatants and civilians.

The principle of distinction binds all active members of an ongoing, active armed conflict to make conscious distinction between legitimate targets and non-legitimate targets which includes persons. The attacker must make the distinction within the enemy population between those individuals that are lawful targets and those individuals that are protected or immune to military force. The conceptual bright-line is combatants and non-combatants.

Combatants are lawful targets at all times. However, there are military members that are excluded due to their specific activities. These exclusions are religious and medical personnel and prisoners of war and *hors de combat*. These targets lack military value since their activity is not linked directly to hostilities. Spiritual counselors, medical professionals, and the injured and sick do not engage, or are incapable of engaging in military hostilities hence they lack the military value that otherwise may authorize the use of force. However, they are protected as long that they do not actively engage in hostilities. Any other military member falls in the combat category and killing him or her does not violate the principle of distinction.

Non-combatants are unlawful targets at all times. They enjoy an immunity status that protects them from direct military attack. However, they might lose such immunity when they actively engage in hostilities. They are subject to attack only when they are engaging in the hostile activity and regain their immunity when they terminate. Killing them when they are no longer actively engaged is unlawful.

The principle of distinction is flexible and sensitive to the realities on the ground since the bright line between combatants and non-combatants might be in some specific instances not very clear. On the one hand, religious and medical and prisoners of war or *hors*

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<sup>72</sup> ICRC, Customary IHL Database, Accessed May, 2020. [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1);

<sup>73</sup> Art. 48 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts Protocol I, 8 June 1977.

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*de combat* are unlawful targets unless they engage in harmful or hostile activities. While on the other, civilians may be lawful targets if they actively engage in hostilities. Their immunity is suspended during the time that they are hostile, and regain their former status when they terminate their hostility. However, despite its flexibility, the principle of distinction has its challenges in non-international armed conflicts. This is due primarily to the type of warfare that is being conducted on the ground.

Non-international armed conflicts are mainly fought between State armed forces and non-state actors. The principle of distinction does not change because one party in the conflict is a non-state entity. Non-state armed forces or the members of an organized armed group within the state have the same responsibility as conventional State actors to make the proper distinctions between military and non-military targets. However, it is more difficult for State armed forces to discriminate between lawful and unlawful targets against non-state targets because the latter are composed primarily of civilians that mix with the general civilian population and use civilian infrastructure. They are civilians who participate directly in hostilities while others supply the non-state actors with armament, lodging, food and information. Where should the line be drawn?

The principle of distinction clearly states what are the lawful targets: combatants and military objectives. However, the law is vague on what is a military objective. Article 52(2) of the 1977 Additional Protocol I provides:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage

The attacker must show that the target makes an effective military contribution and that by killing him would produce a definite military advantage at that particular time. In a war against non-state actors their chain-of-command and specific roles are not as precise and clear as its enemy's counterpart. They do not wear the traditional military uniforms or martial insignias or openly display their weapons, and they tend to blend into the general population. To further illustrate the difficulties, a civilian non-state actor could be transporting and transferring intelligent notes to other civilian non-state actors until it arrives at its final destination. Where in this chain does 'effective contribution' activate the permission to use lethal force against the carrier? How can a 'definite military advantage' be established? Does the target forfeits his immunity when he receives the note and regains it when he delivers the note or is he a legitimate target at some time before receiving the note and after delivering it?



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The law might be vague but it is clear when in doubt. The law clearly states that when it is uncertain if the target is a combat or a civilian, then it should be treated as the latter. Article 50(1) of the 1977 Additional Protocol I provides that, “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” As any other rule, the key words are going to be subject to interpretation. The word doubt is a case in point. What is the standard of proof to dispel the doubt? Is it beyond a reasonable doubt? Is the preponderance of the evidence standard sufficient? Does the attacker have to have clear and convincing evidence? Who makes the final judgment?

These questions expose to some degree the difficulties in applying the principle in the fog of war. However, the murkiness of in-real-time combat should not be an excuse to relax the principle. The requirement to discriminate between lawful and unlawful combatants is binding regardless of the difficulties. Furthermore, the principle of distinction does not operate in isolation; it is further restricted by the regulating principle of military necessity. As Melzer notes, “Lack of protection against direct attack also is not equivalent to an unconditional ‘License to kill’, but merely implies that force may be used against unprotected persons to the extent required by military necessity.”

### *The Principle of Military Necessity*

The principle of military necessity is a permission to use military force to accomplish a legitimate military objective provided that the action is not illegal. The main reason behind this restriction is to prevent needless violence while allowing military leaders the flexibility to accomplish indispensable, vital and critical military objectives. The Lieber code is the first body of law to codify the principle of military necessity, and it is stated as follow,

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.<sup>74</sup>

There are two internal concepts that constitute the operational structure of military necessity. First, there is “measures that are indispensable for securing the ends of war”. The end of war should be understood in military terms, not political. A military purpose is defined in the Saint Petersburg declaration, which states, “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;”<sup>75</sup> A military measure is legitimate if it is necessary to weaken and subdue the enemy. Any action that does not contribute to that end is illegitimate.

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<sup>74</sup> Instructions for the Government of Armies of the United States in the Field Lieber Code. 24 April 1863. Section I : Martial Law -- Military Jurisdiction -- Military Necessity -- Retaliation - Art. 14.

<sup>75</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

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The rule does not explain what measures fall under necessity in concrete terms. It allows some discretion to military commanders to identify indispensable targets that might 'secure the ends of war'. By permitting discretion the rule is sensitive to the realities of war in view of the fact that what is necessary and what is not cannot be determined *ex ante*. However, there are legal rules that prohibit military measures regardless of their compelling necessity since they are inconsistent with the higher principles of humanity. The Lieber Code, for example, states that,

Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.<sup>76</sup>

It is arguable that in selected instances one of these measures could be necessary to defeat the enemy. The killing of enemy civilians might diminish their domestic support for the war. Also torture can be used to gather vital information. And, wanton forms of violence can instill a fear so great that weaken the enemy's military forces resolve to fight. These measures are excluded not because they are unnecessary, but because they are illegal. However, the question remains as to what exactly can be seen as necessary.

This flaw leaves the notion of necessity open to a strong military bias. The first step to hinder a potential bias is to make a strong link between what is necessary to weaken the enemy with the exact purpose of the measure. This will close the gap between measure and objective reducing the potential for discretionary abuse. A guiding reference as to what military necessity is could be in Article 52, which states that, an attack on any legal target must have a definite military advantage. It must be noted that the term *definite* was preferred over 'distinct', 'direct', 'clear', 'immediate', 'obvious', and 'substantial'.<sup>77</sup> It could be reasonably inferred that the drafters of the law wanted a high threshold to what should be considered as military advantageous. Also, the fact that military necessity requires that the target have a *direct* military advantage seems to suggest that the perceived gains cannot be seen as potential or speculative. This requirement would limit subjective elements in judging military advantage by outlawing dimly perceptible or unreasonable long-term gains. Thus, to limit military bias and subjectivity, attacking the target must have a *definite* and *direct* military advantage that is not speculative, vague nor unreasonable.

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<sup>76</sup> Instructions for the Government of Armies of the United States in the Field Lieber Code. 24 April 1863. Section I : Martial Law -- Military Jurisdiction -- Military Necessity -- Retaliation - Art. 16.

<sup>77</sup> Melzer, Nils. *Supra*, p. 292.

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Another question is if 'advantageous' should be assessed in light of the war as a whole or only at the specific instance in which military force is being used. There might be scenarios in which a group of combatants find themselves trapped behind enemy lines and take measures that are not directly linked to the military objective of subduing the enemy, yet such action are necessary for them to survive. To illustrate this point further, imagine the two parties of an armed conflict in advanced stages of peace negotiations. However, they have not stopped fighting. One party, State A, is practically fighting a lost cause. The only reason it fights is because it has no other choice. Their military measures as a whole do not have any impact in weakening the enemy; it has no direct and definite purpose or military gain. Are their actions illegitimate? There are not. It would be absurd to expect combatants to refrain from using military force because it does not contribute to weakening the enemy as a whole. This does not mean that State A is free from the restrictions of military necessity. State A combatants must abide by military necessity which means that their actions must have a military objective that is not illegal and offers at that specific moment a concrete military advantage. If the objective is purely defensive, the measure has to be necessary and legal to that specific end. Therefore, there seems to be two types of military necessity operating in the law. On the one hand, the military measure in questions must offer a definite military advantage in weakening the enemy as a whole, and on the other, it must be necessary to achieve a legitimate and lawful military goal determined by the particular circumstances at that time.

The second concept embedded in military necessity is "lawful action". This requirement is incidentally discussed in the preceding paragraphs but its restrictive role on military force must be underlined. The lawful element prohibits inhumane acts: wanton violence, deliberate attack on civilians, actions that shock the conscience. The objective of these restrictions is to keep hostilities as humane as possible. As stated above, these measures although prohibited by law could very well be conducive to military victory. There might be several reasons for these prohibitions. Civilians are unarmed and unprotected. Killing them will be either wrong or simply inconsequential since they pose no direct threat. Gratuitous form of violence does not make any further contribution to an already subdued enemy. Killing in war is justified as some form of self-defense, but the examples mentioned are cases of murder.

Furthermore, the restriction goes beyond any consideration of humanity; it also has a practical purpose. As the Lieber Code states, 'military necessity does not include any act of

hostility which makes the return to peace unnecessarily difficult'.<sup>78</sup> The end of war is peace. Any action that undermines this possibility should be outlawed.

It could be surmised that the legal restriction on military necessity is twofold. On the one hand it attempts to keep the violence to what is strictly necessary and humane while, on the other, it keeps the chances for peace alive. So, the fact that military force is indispensable to accomplish a military objective does not allow States to disregard humane, legal restrictions to the use of military force. However, the law does not foresee every possible measure that could undermine these objectives.

There could be many ways to weaken the enemy that might escape legal restrictions either because the law is silent on the matter or because the law is too vague or gives too much military discretion. Melzer argues that these scenarios do not weaken the role of military necessity. He notes that, "While positive prohibitions may restrict the extent to which military necessity can justify military action, the absence of a prohibition does not liberate the parties to the conflict from the fundamental constraints imposed by the principle of military necessity."<sup>79</sup> For example, the LoAC allows, absent the legal restrictions, States to kill enemy combatants at all times at any place, as long there is an active, ongoing war. However, military necessity would prohibit the "senseless slaughter of combatants where manifestly there is no military necessity to do so [...]"<sup>80</sup> Jean S. Pictet explains the restrictions on military necessity elegantly,

If we can put a soldier out of action by capturing him, we should not harm him; if we can obtain the same result by wounding him, we must not kill him; if there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.<sup>81</sup>

In summary, military necessity restricts military force to those measures that are necessary, clear and direct that have a definite impact in weakening the enemy's armed forces provided that the measures are humane and does not hinder the possibilities for peace.

So far, under the principle of distinction and the principle of military necessity, the State exercising its permission to kill in war has to show that the target is a combatant that is not otherwise immune from direct military force, and that by killing the enemy's combatants, it makes a clear, direct, and definite contribution to weakening the enemy.<sup>82</sup>

### ***Principle of Proportionality***

The permission to kill in war has another cornerstone principle: the principle of proportionality in attack. This principle requires the "a value judgment as to whether the

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<sup>78</sup> Ibid.

<sup>79</sup> Melzer, Nils. *Supra*, p. 287.

<sup>80</sup> Ibid. p. 288.

<sup>81</sup> Ibid. p. 289.

<sup>82</sup> There are other restrictions on killing in war that have no direct implications of TK.

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harm likely to be caused by the force used in an operation is proportionate in view of the expected military advantage.”<sup>83</sup> The rule is part of customary IHL and it reads as follows,

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.<sup>84</sup>

The principle of proportionality in attack intends to balance the interest in protecting non-permissible targets such as civilians and civilian infrastructure with the anticipated military advantage. It must be noted that the law prohibits intentional attacks on civilians, but allows incidental injury, death and destruction of any protected persons or objects as long as it does not exceed the military value of the target. As regards to persons, the main focus of the principle “is not the damage of harm caused to those persons who are the target of the operation, but the collateral damage inflicted on peaceful bystanders.”<sup>85</sup> Thus, “military objectives may, in principle, be attacked without additional proportionality assessment.”<sup>86</sup>

The reason why positive IHL does not require a separate proportionality assessment with regard to the harm inflicted on persons subject to lawful attack is that this function is already assumed by the principle of distinction, “which presumes that such harm, unless otherwise prohibited by IHL, is justified by the military necessity of defeating the opposing party to the conflict.”<sup>87</sup> However, there is an internal notion of proportionality in military necessity that cannot be mistaken with the principle of proportionality in attack. “The principle of military necessity,” Melzer notes, “requires an assessment as to whether the kind and degree of force used in operation is proportionate to what is reasonably necessary to achieve the legitimate purpose of that operation.”<sup>88</sup> Meanwhile, “the principle of proportionality requires a value judgment as to whether the harm likely to be caused by the force used in an operation is proportionate in view of the expected military advantage.”<sup>89</sup>

The challenge of this principle is how to properly assess the military value of the target to avoid an abuse of discretion. The restriction seems to be deceptively simple: incidental harm to civilians is permissible, as long as it doesn’t exceed the military value of the target. All that is needed, then, is to estimate a value judgment that exceeds the expected civilian casualties. It may allow commanders to take little to no precaution against incidental killings if there is a justification set in place.

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<sup>83</sup> Practice of Rule 14. Proportionality in Attack. Accessed May 2020. [https://ihl-databases.icrc.org/customaryihl/eng/docs/v2\\_rul\\_rule14](https://ihl-databases.icrc.org/customaryihl/eng/docs/v2_rul_rule14)

<sup>84</sup> Rule 14. Proportionality in Attack. Accessed May, 2020. [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14)

<sup>85</sup> Melzer, Nils. *Supra*, p. 403.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* p. 357.

<sup>89</sup> *Ibid.*

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The law, however, provides further restrictions. For instance, military force is limited by the means employed. The rules regarding the means of warfare states that attacks on a military objective must be directed with means “which are not disproportionate in relation to the objective, but are suited to destroying only that objective.”<sup>90</sup> This imposes a responsibility to use discriminate use of force in relation to the means, which is different from discrimination in regards to the target. The purpose is to limit the effects of force to the intended target and prevent any spillover to protected persons and objects. If the commander uses military force that exceeds what is actually necessary to achieve the military objective and the effects causes incidental harm, he might be committing a war crime even if the military objective outweighs the harm caused. The proportionality in attack and the proportionality of means might not justify a military commander burning down a village to kill one sniper when simply destroying the tower would suffice. So, even if the value of the target justifies the amount of incidental harm inflicted, it would be impermissible if the actual force used exceeded what was necessary to achieve the military objective.

The overlapping proportionality in attack with the proportionality of means does not answer the question as to how *value* ought to be assessed. There is no qualitative or quantitative fix threshold that can guide commanders on the ground or judges in a trial to determine what should be or should have been the threshold. An International Criminal Court (ICC) Statute might have some guidance. The referred statute is Art. 8(2) (b)(iv) and it reads as follows,

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

This article sets a ‘clearly excessive’ standard. The ‘clearly’ sets an objective evaluation for a legal analysis of a commander’s order: the latter knew or should have known that the collateral damage was obviously excessive in relation to the military objective to be achieved. It is a judgment that escapes a strict numerical balance and requires, instead, a value judgment. Higher the value of the target, greater collateral damage will be allowed. This standard might not satisfy the skeptics since the rule is still under what a commander considers a high value target at that particular moment in time. Burning down a village to kill one radio operator that is transmitting vital military secrets that could cost the war might be outrageous in civilian terms, but consistent with military logic. So there is no concrete, absolute case that is *a priori* prohibited. “Ultimately,” as Melzer notes,

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<sup>90</sup> Ibid. p. 360.

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“since no single set of objective criteria is likely to lead to satisfactory results in all situations, the requirement of proportionality in attack will always remain a delicate issue to be determined in good faith and on a case-by-case basis.”<sup>91</sup>

Under these principles, a State exercising its permission to kill in war has to show that force is directed at a lawful target that is not otherwise immune from direct military force, and that such an attack makes a clear, direct, and definite contribution to weakening the enemy and that the incidental harm does not exceed the military value of the target.

### 2.1.3. LEGAL COMBAT STATUS

Lawful use of force may only be employed and directed against combatants. Therefore, the question of who is a combatant is of utmost importance when considering the lawful use of military force. Art. 43(2) AP I, states that,

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

The right to participate directly in hostilities is the ground for the legal permission to kill and be killed. As discussed, this permission is restricted to lawful targets that necessarily contribute to a military objective as long its military value exceeds foreseeable incidental collateral damage. These permissions and restrictions are equally distributed to all combatants irrespective of who is the initial aggressor. The Preamble of the Geneva Conventions of 12 August 1949 states that,

"this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."<sup>92</sup>

This legal arrangement is different from other legal permissions to use lethal force. For example, at a domestic level, a law enforcement officer's legal permission to use deadly force is conditioned, *inter alia*, that the force is of last resort against an *unprovoked* lethal threat. Generally, the law does not legitimize the force of aggressors. They are criminally liable for any injury or killing they commit. In contrast, a combatant fighting as an aggressor can kill defending combatants and be immune from criminal prosecution after the war.

How does an individual, then, become a combatant? By becoming a member of the armed forces of a Party to a conflict. The LOAC during hostilities operate under an essential legal fact: the fact of membership. The LOAC recognizes as combatants all members of a State engaged in an ongoing armed conflict. The legal fact of membership is crucial since it is

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<sup>91</sup> Ibid. p. 363.

<sup>92</sup> Preamble of the Additional Protocol I to the Geneva Conventions of 12 August 1949. "Reaffirming ' further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,"

this status that would allow the LOAC to regulate those actions performed by members of the armed forces, combatants, during hostilities. Therefore, the legal permission to kill and be killed is primarily based on membership. There are, however, specific instances when a non-combatant turns combatant. They could be military personnel who are immune due to their non-combat role or civilians that compromise their immunity by becoming hostile. Once they take such action, they forfeit their legal protection of immunity from being killed and are considered combatants while and during the time that they are participating in hostilities. This is a deeply embedded norm and is considered binding if not by law, by custom. Art. 51(3) states that "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."<sup>93</sup> When a civilian takes active participation, he loses the protection against attack only during he is actively engaged in such activities.

The challenge of this rule is to establish the proper contour of "direct part in hostilities." The 1987 *Commentary on the additional protocols* interprets 'direct' as "acts of war, which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target."<sup>94</sup> However, once he ceases to participate, "the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked."<sup>95</sup> These targets escape the membership liability that formal combatants have.

Now, combatants that have formal liability status based on membership are legitimate targets at all times unless they become *hors de combat*, surrender, or become prisoners of war. Art. 41 section (1) and (2), titled, *Safeguard of an enemy hors de combat*, establishes that "A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack."<sup>96</sup> A person is 'hors de combat' if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.<sup>97</sup>

The idea that a combatant might be a legitimate target at all times during hostilities seems to be consistent with today's literature on the topic. Andrew Altman observes, for example, that "[t]here is no [...] requirement on operations aimed at killing the enemy in

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<sup>93</sup> Article 513 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

<sup>94</sup> Commentary on the Additional Protocols. 1987, p. 619

<sup>95</sup> Ibid.

<sup>96</sup> Article 411 and 2 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

<sup>97</sup> Ibid.



wartime: a legitimate can be permissibly be killed, even if capture would be costless. Only if and when the enemy surrenders, it is forbidden to intentionally kill him."<sup>98</sup> Michael Walzer states more or less the same rule: "The first principle of the War Convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured)."<sup>99</sup> According to Yoram Dinstein, a renown legal scholar on the laws of armed conflict, states that "[a] combatant, under the laws of war, falls into two categories: (1) members of a belligerent party, *even if their specific task is not linked to active hostilities*; (2) any other persons who take an active part in the hostilities."<sup>100</sup> Colm McKeogh observes that "the current legal position permits the targeting of all combatants at any time. Combatants need not be engaged in hostilities at the moment they are targeted. They can be legitimately targeted when they pose no immediate threat."<sup>101</sup>

### 2.2. THE LEGAL STATUS OF TK IN WAR

For TK to be justifiably used in war the legal modalities of distinction, military necessity, and proportionality must be met. The State that employs TK must do so during an international or non-international armed conflict in which the target is a combatant and killing him is military advantageous and that the collateral damage does not exceed the expected military advantage.

The requirement of an active armed conflict is important since it decides the type of protection that the target ought to have. For example, if the State is responding to a mass unorganized form of violence, then the applicable paradigm is law-enforcement. Also, in a liberal State the target under law-enforcement has procedural and substantial rights that must be respected before depriving him of his right to life. If, on the other hand, the State is engaged in an armed conflict, then the target could have the protections provided by LoAC as a non-combatant. Therefore, if a State is engaged in a military armed conflict, then the use of TK has to be restricted by the principle of distinction, the principle of military necessity, and the principle of proportionality in attack.

The principle of distinction is probably the most important restriction on TK since the deliberate attack on non-combatants is absolutely prohibited. When a State employs TK, it has to make all the precautionary measures from the identification of the target to the substantial intelligence reports so that the person targeted is a lawful objective.

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<sup>98</sup> Altman, A. 2012. "Introduction", in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. by Finkelstein C., Ohlin J.D., Altman, A. OUP. p. 6.

<sup>99</sup> Walzer, M. *supra*, p. 138.

<sup>100</sup> Dinstein, Yoram. 2004. *The conduct of hostilities under the law of international armed conflict*. Cambridge University Press. p. Italics added.

<sup>101</sup> McKeogh, C. 2002. *Innocent Civilians: The Morality of Killing in War*. p.

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Military necessity has two elements: restrictive and permissive. The permissive allows the States to select specific combatants, as long the specific killing is necessary to achieve the submission of the enemy. The restrictive element requires that the killing fall within the limits of legality. For instance, not only does the target has to be legally permitted target, a combatant, but also the killing must be executed by lawful means.

Proportionality in attack requires that the collateral damage of protected persons and objects does not exceed the value of the target. A high value target will allow more collateral damage than a low value target.

All of these four requirements must overlap for TK to be lawful. However, there is a lingering question that the law cannot answer, this is, is there a justification of why a particular combatant may be killed that does not solely rest on the fact of legal validity? For example, there are some instances in which a State has the legal authority to kill a person, but it is conditioned on the fact of criminal liability or self-defense. In cases of the death penalty the individual has procedural and substantive rights that bars the State from arbitrarily taking his life. In the cases of policing, the State may use lethal force in cases of self-defensive when the individual is a threat to the police and others. The common element in both of these cases is the fact that the individual *qua* individual has done something that makes him personally liable. This is what is lacking in LoAC: the individual sole liability is the legal fact of membership. So, are there any explanations of why killing the specific individual is justified beyond the formal requirement of legal validity? The next chapter's discussion will be centered precisely on that question. JWT has several answers based on three distinct models: the traditional model, the collective model, and individualistic model.

### 2.3. Summary

In this chapter, we began to discuss, briefly, the rules that make war an institution. We explored the permission to kill in war, its scope and limitations along with its regulating principles. It was concluded that what is lacking in LoAC is a more individualized form of justification for self-defense. The individual's sole liability is the legal fact of membership. Thus it pushes the conversation forward by asking this questions: Are there any explanations of why killing the a specific individual is justified beyond the formal requirement of legal validity? In the next chapter several models of JWT are presented to search for this answer.

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## Targeted Killing and the Problem of Justification

Targeted killing (TK) is a specific, individualized form of killing. In war, the killing is random, anonymous, and based on a collective liability. The current models that seek to justify killing in war depend on certain factual and normative conceptual underpinning that collectivizes and thus ignores individual nuances among combatants. I contend that since TK is a specific form of killing, the normative conditions substantially change. This change of circumstances urges us to ask new questions. By pointing to the problem of TK's justification, I hope to set the ground for a fresh look at how TK could be permissible in war.

Can the just war tradition justify the use of targeting killing in war? It does not. The reason does not lie primarily in any of the models that will be discussed, but on the practice of TK itself. The models may be consistent and coherent with a traditional form of warfare. However, when TK is overlapped with their particular combat liability accounts it fails to justify it.

In the following subsections three models of JWT will be presented, explained and applied to the practice of TK. Just war theorists are consistently occupied in revising, amending and defending conventional rules of engagement that spring from principles of morality in order to fit the complexity of collective warfare. The outcome has been the construction of several models. Each model has an *in bello* liability account that intends to explain why enemy combatants may be justifiably killed. The first account is the traditionalist model. The traditionalist's models defend the *status quo* of the LoAC. The second paradigm, the collectivist model, views armed conflict between armed collectives, thus defensive use of force must be seen under this light. And the third account, the individualistic model, argues that the collective nature of warfare is irrelevant to the justification for killing in war thus interpersonal morality should account for any justification of killing in war.

Each of these accounts might have their strengths and virtues, but also have their flaws. The claim of the incompatibility with TK, however, goes beyond these critiques. It goes deeper. TK is a precise non-random, non-collective individualize form of killing. It challenges these models by escaping the dispositive fact of armed conflict: its collective arrangement. The collective fact of war strains the regulatory principles of force almost to the breaking point. It allows the killing of individuals that otherwise would have been impermissible. TK simplifies the question from what is the general justification for killing in war to the question whether is it permissible to kill a single combatant.

## Just and Unjust Targeted Killings in War

Although the just war tradition will be the main paradigm in which TK will be examined, other theories will be briefly considered. These are Realism and Pacifism. What may be anticipated of these two doctrines is their skepticism regarding moral principles' efficiency in determining the moral behavior of States. Realism does not believe that war should be conditioned or restricted by principles of justice while Pacifism argues, mainly, that such principles are intractable to the realities of war. The latter will, *ex ante*, exclude TK by rejecting war altogether, while the former will, or has the potential, to employ TK for non-defensive purposes.

### 3.1. Realism

Realism defends the premise that the primary end of political action is the pursuit of power. However, to obtain and maximize power is not an end in itself. It is not power for power's sake. It has an instrumental value that serves the specific function of securing and satisfying the self-interest of the State, such as, economic self-sufficiency, territorial integrity and political autonomy.

Realist also resists the ideal of applying moral principles to the relationship between States. They do not reject the general principles of a particular morality or defend a nihilistic outlook. Instead, they are skeptical that a moral code could be applicable in the international arena. As Hans Morgenthau, a classical realist, notes, "The Realist defense of the autonomy of the political sphere against its subversion by other modes of thought does not imply disregard for the existence and importance of these other modes of thought."<sup>102</sup> So, why the skepticism?

One argument against the application of morality in international relations is that there is no superior power to enforce a moral code. Thomas Hobbes asserts that without a presiding government to legislate codes of conduct, no morality or justice can exist: "Where there is no common Power, there is no Law: where no Law, no Injustice, if there be no Power erected, or not great enough for our security; every man will and may lawfully rely on his own strength and art, for caution against all other men."<sup>103</sup> Succinctly put, since there is no superior power to enforce moral rules, an appeal to principles of justice is of no consequence. During the Peloponnesian War, for example, the leaders of the island of Melos were given a choice to either submit to the Athenian Empire or die. The Melians responded by stating that "you should not destroy what is our common protection, the privilege of being allowed in

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<sup>102</sup> Hobbes, T. 1651. *Leviathan*.

<sup>103</sup> Morgenthau, Hans. 2011. "A Realist Theory of International Politics" in *Security Studies: A Reader*, edited by Christopher W., and Meng Lai, Yew. Taylor and Francis. p. 123.

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danger to invoke what is *fair and right*....".<sup>104</sup> The Athenians responded by arguing that the strong take what they can while the weak concede. And they added that,

“it is not as if we were the first to make this law, or to act upon it when made; we found it existing before us, and will leave it to exist forever after us; all we do is to make use of it, knowing that you and everybody else having the same power as we have would do the same as we do.”<sup>105</sup>

The principles of fairness and a system of rights are overridden by power. Power will not concede without a fight thus States are forced to be skeptical of morality. Instead, self-dependent on might is what makes right.

However, the rejection of morality is also based, in some instances, on moral grounds. Applying abstract moral principles will produce more harm than a policy solely based on national self-interest.<sup>106</sup> Thus, it is wrong. This strand of Realism does not completely reject morality, but stress that it should not be *decisive* in foreign policy, and much less in war, since it is intractable to the facts and ultimately dangerous.<sup>107</sup>

Ultimately, moral principles should not condition political action when deliberating war. This is because fighting solely for just causes or engaging in utopian enterprises would produce long and extreme wars. There has been some argument, for example, that Woodrow Wilson’s idealism during WWI – “a war to end all wars” and to “make a world safe for democracy”- is partially to blame for WWII and its extreme violence because he introduced moral reasoning as a rationale for war.<sup>108</sup> Robert L. Holmes observes that “Such righteous intransigence, it was thought, prolong the war to the point where the European balance of power was destroyed in the seeds of World War II were sown.”<sup>109</sup> Isaiah Berlin noted, for example, that the American understanding of WWII was apocalyptic and considered themselves as saviors of the world while Winston Churchill described the Axis powers as the powers of darkness.<sup>110</sup> When the fight is predicated on high ideals of virtue and morality and the enemy is seen as evil, then “to settle for anything less than unconditional surrender is to compromise with the devil.”<sup>111</sup> Wilson should have advanced, according to the Realist, a pragmatic rationale based on national self-interest. If that would have been the case, then maybe humiliation and resentment would have been avoided and Hitler’s rhetoric would have fallen on deaf ears preventing WWII.

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<sup>104</sup> Thucydides. History Of The Peloponnesian War, Chapter xviI. Sixteenth Year of the War - The Melian Conference - Fate of Melos. Accessed April 2021.

<https://www.mtholyoke.edu/acad/intrel/melian.htm>

<sup>105</sup> Ibid.

<sup>106</sup> Coates, A.J. 1997. *The Ethics of War*. Manchester University Press. p. 17-39.

<sup>107</sup> Ibid.

<sup>108</sup> Holmes, R. 1989. *On War and Morality*. Princeton University Press. p. 60.

<sup>109</sup> Ibid. p. 62.

<sup>110</sup> Coates, A.J. *Supra*, p. 47.

<sup>111</sup> Holmes, R. *Supra*. p. 62.

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It is for this reason, they argue, that morality only applies to individuals, not States. States, in the international realm, have only one objective: self-interest. To pursue the latter nothing is off the table. This is consistent with the Westphalia doctrine of sovereignty, that is, states have their own reasons to go to war and they have a legal right to do so.

However, if the reason to wage war (*ad bellum*) is consistent with a just cause, it does not follow that hostilities (*in bello*) should have moral restrictions as well. Realists believe that having moral rules on how to conduct hostilities are limitations that would make combat too burdensome, even conducing to defeat. Thus, war should be a space with no rules, and if any limitation ought to be implemented, it should be military necessity. Walzer synthesizes this view when he notes that,

"War is a world apart, where life itself is at stake, where human nature is reduced to its elemental forms, where self-interest and necessity prevail. Here men and women do what they must to save themselves and their communities, and morality and law have no place. *Inter arma silent leges*: in time of war the law is silent."<sup>112</sup>

If war must be free from moral evaluation, how should TK be justified under a realist doctrine? Under a Realist doctrine TK would be justified for sole instrumental value in obtaining, defending and expand power, economic security and political autonomy. TK ought to be justified only as self-defense and these goods, as David Rodin has argued, are probably not legitimate reasons to take someone's life.<sup>113</sup>

It is reasonable to conclude that under a Realist rationale TK would be used beyond defensive purposes. An example is preventive killing (PK). PK is when a threat has not yet materialized but there are other factors that strongly suggest that target will be an actual threat if capable of posing as such. An example of PK is Israel's assassination program. Israel has for many years assassinated Iranian nuclear scientists with a specific objective of delaying its nuclear program. It could be argued that PK is defensive in nature, and that is probably correct. However, TK is conditioned on actual threat, not a hypothetical one.

Realism would employ TK in an unjustified permissive way. It would utilize this form of killing for non-defensive purposes if it advances the State's self-interest and it could potentially lead to retaliations that certainly would go beyond defensive reasons. And, if during peace Realist is ready to use TK for non-defensive purposes, there is no expectation that in actual war they constrain its use in a discriminative manner. Thus, articulating a Realist justification for TK will restricted solely on defensive purposes will be of no consequence.

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<sup>112</sup> Walzer, M. 2015. *supra*, p. 3.

<sup>113</sup> Rodin, D. 2002. *War and Self-defense*. OUP.

### 3.2. Pacifism

Pacifism is a doctrine that contends that wars are unjustified. This doctrine breaks in three main branches: absolute pacifism, conditional pacifism, and contingent pacifism.

Absolute pacifism is against violence as a means to achieve any goal, no matter its merits or justness of the cause. The basic principle operating under this premise is non-violence which holds that an individual, or a group of individuals, do not have the right to exercise violence against another. Violence is seen as an intrinsic evil and it corrupts those who resort to it and morally taints any the expected goal. The repudiation of violence as an instrument for any end entails the rejection of war. Thus, the answer if TK is justified is a categorical no.

Conditional pacifism and contingent pacifism, on the other hand, do acknowledge that some wars might have a just cause or be worth fighting, but engaging in the fight would be unjustified for several reasons.

Conditional pacifism argues that war is justified, if and only if, it can be conducted without civilian casualties or killing the innocent. This is an agent-centered restriction based on the right of individuals not to be harmed or killed unless they have forfeited that protection. In war the only individuals that have forfeited such a right are the combatants since they are engaged in threatening activity. To fulfill this requirement, all military force has to be directed exclusively to military targets. This is a condition that modern wars cannot meet. Military weapons are highly destructive and modern wars are mainly fought in urban areas where civilians are more vulnerable. To illustrate this point, there are three ongoing wars that are fought in urban areas that have caused a high civilian casualty rate: the Syrian Civil War, the Yemen Civil War and the Israeli-Palestinian War of 2021.<sup>114</sup> All three wars have a relative high civilian casualty rate compared to the killing of combatants. As Robert Holmes puts it, a war “obviously cannot be just if one is unjustified in entering upon it in the first place, but neither can it be just, however just the cause and right intention, if it utilizes indefensible means.”<sup>115</sup>

In today’s war most of the casualties are civilians. The Syrian Civil War has over two hundred thousand casualties, and the Yemen Civil War has over ten thousand, while the Falkland War of 1982 between Great Britain and Argentina had only three civilian casualties.

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<sup>114</sup> Watson Institute For International And Public Affairs, Brown University. “The Cost of War”, Accessed, April, 2021. <https://watson.brown.edu/costsofwar/costs/human>

<sup>115</sup> Holmes, R. 1989. *On War and Morality*. Princeton University Press. pp. 146-182.

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These are cases that would certainly be rejected by conditional pacifists and it would follow that TK would be *ex ante* illegitimate.

Contingent pacifism has a lower bar. The proponents of contingent pacifist argue that war is justified if the evils prevented are outweigh by the good obtained. This is considered as proportionality-based pacifism. Innocence is a value to considered among others; killing the innocent does not make the war inherently impermissible unless this evil surpasses any benefit obtained by engaging in war. Bertrand Russell calls this relative pacifism and briefly identifies World War II as a case in point.<sup>116</sup> David Rodin, nevertheless, argues that the defeat of Nazism probably brought more harm than it prevented.<sup>117</sup>

Rodin does not only consider the harm caused by the Nazi government, which killed over 17 million people between 1933 and 1945 and subjected many others to a morally repugnant form of existence. He also notes that the war itself cost of 55 million lives in addition to the 40 million persons that became homeless and displaced, plus an incalculable destruction to the world's cultural and material wealth and a post war Soviet Union's brutal dominion over Eastern Europe. "This was an horrific price to pay for stopping Nazi Germany. It is certainly not obvious that on strict consequentialist grounds it was a prize worth paying."<sup>118</sup> Richard Norman reasons more or less the same line. The defeat of Nazism might have been a compelling reason to engage in war but "we should remember that the purpose for which Britain declared war on Germany was not the defeat of Nazism as a political system, and that most of those who fought against it did so in complete ignorance of the concentration camps and the other distinctive features of Nazism."<sup>119</sup> With that in mind, he notes that

"This should remind us that what the war did produce, as its direct consequence, was the division of Europe into two military power blocs, posing the danger of an even more destructive war, a nuclear war which would destroy European civilizations and perhaps even eliminate the human race altogether. If we then consider the possibility that Nazism could have been overthrown in other ways, without war, as Spanish fascism was eventually overcome, we may seriously wonder whether the achievements of the Second World War were as positive as they are usually thought to have been."<sup>120</sup>

That being said, if WWII is considered a war fighting for and yet its overall good does not outweigh the evil caused, then it is hard to imagine any other war that could be justified. Consequentially, it precludes any questions regarding the justification of TK.

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<sup>116</sup> Russell, B. 1943. "The Future of Pacifism", in *The American Scholar*, 131, 7–13.

<sup>117</sup> Rodin, D. 2002. *Supra*, p. 11.

<sup>118</sup> *Ibid.*

<sup>119</sup> The occasion for Britain's entry into the war was the commitment to the independence of Poland, and it is at least debatable whether in 1945 this had been fully achieved.

<sup>120</sup> Norman, R. 1995. *Ethics, Killing, and War*. Cambridge University Press. p. 2009.



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Realists and pacifist share one thing in common: the skepticism that morality could properly function in armed conflict. Nonetheless, their particular conclusions are radically different. The realists believe that war should be fought with no moral restrictions while the pacifist believe that war ought to be abolished. Both realism and pacifism leave political and military of the hook by not making the proper distinctions between just and unjust wars.<sup>121</sup> These doctrines either allow political leaders to be free from personal accountability or permit the destruction of institutions and communities that are an integral part of people's private and public life. There is a tradition, however, that provides a middles ground: the just war tradition.

The just war tradition shares with realism the acknowledgement that war is part of the human condition and are inevitable and it shares with pacifism the primacy of peace over war. Just war theories are an effort to balance these two views. There are also differences. Against Realism's moral skepticism, just war theorists argue,

“There is no reason, [...] why a moral theory or system should be incapable of recognizing the distinctive requirement of international relations and war. [The just war tradition] brings within the boundaries of moral acceptability forms of behaviour that the realist may have assumed to be beyond the reach of morality.”<sup>122</sup>

Against Pacifism's anti-war stance, just war theorists argue that, “[Pacifism] lacks [a] morality of power that would enable it to recognize the legal and moral instrumentality of war. Its studied neglect of any distinction between ‘force’ and ‘violence’, and its indiscriminate application of the latter term to every use of coercive force, preclude such recognition.”<sup>123</sup> Wars are inevitable, but they need to be justified.

### 3.3. Just War Tradition

This effort by just war theorists is premised on the conviction that war should be subjected to moral principles and to moral evaluation. Thus the limitation of the violence and destruction is not only a possibility but also a duty. Walzer states that, “War is distinguishable from murder and massacre only when restrictions are established on the reach of battle.”<sup>124</sup> As Steven P. Lee observes,

“War is a human institution, and as such is inherently normative, an activity bounded by rules. War is not a natural catastrophe such as an earthquake, but a human creation. But these

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<sup>121</sup> Ibid. p. 210.

<sup>122</sup> Coates, A.J. *Supra*, p. 103-4.

<sup>123</sup> Ibid. p. 77-93.

<sup>124</sup> Walzer, M. *supra*, p. 42.

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limits are not necessarily moral limits. Morality adds its own restraints to the use of violence of war, partly in an effort to make war less destructive.”<sup>125</sup>

The just war tradition asks a deceptively simple question: “How can force serve just ends?” This inquiry has two dimensions. First, is the recourse to war justified (*jus ad bellum*)? And secondly, are the means to accomplish the war’s end just (*jus in bello*)? Each of these two questions has their particular criterion.

*Jus ad bellum*, for example, requires that war be declared by legitimate authority, that war has a just cause, be fought with rightful intention, be proportional between the good and the harm it might cause, be of last resort, and has a reasonable chance of success. For the purposes of this chapter what is relevant is the question of *just cause*. A just cause “is a *justifying* reason, that is, a reason for an action, such as going to war, that morality justifies (or helps to justify) it.”<sup>126</sup> The main reason to engage in armed conflict should be self-defense. Other reasons such as punishment or honor should not be a justified cause for war. Focusing on this criterion does not override the other requirements of *jus ad bellum*. Armed conflict still has to be proportional, an exhaustion of all other means to defuse the tension, a reasonable chances of success and so on. Focusing solely on the just cause is warranted by the its direct connection to combat liability in *jus in bello* which then throws light on the permissibility of TK.<sup>127</sup>

The question of *jus in bello*, on the other hand, has two main principles. First is the principle of discrimination which states that all military force must be directed at military targets and grants, on the other hand, civilian immunity. Secondly, there is the question of proportionality. The concern in this chapter is with the principle of discrimination. What explains, and thus justifies, the killing of combatants. Why are combatants subject to lethal military force if they have a right not to be killed? In contemporary just war literature there are numerous accounts that seek to answer this question. In the following sections these accounts will be presented and explained in their best light followed by a critical analysis of why these accounts fail to justify TK.

### 3.3.1. Targeted Killing and the Conventional-based liability

#### *Conventional-based liability accounts*

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<sup>125</sup> Lee, S. 2012. *Ethics and War*. Cambridge University Press. p. 29.

<sup>126</sup> Ibid. p. 73.

<sup>127</sup> What are the reasons that justify employing military force? The answer has a direct role in justifying killing in war. Whatever the reasons given, they must be strong enough to override the right not to be killed.

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The rule pertaining the permissibility to kill in war is a conventional in character. The rule departs from ordinary morality to the extent that it allows certain acts to be inconsistent with the latter. The justification for such departure lies mostly on consequential grounds: it reduces the overall violence of war by constructing a bright line rule that all parties could easily follow.

The conventional based-liability model resembles the underlying rationale of LoAC. Both take into account the practical considerations regarding the realities of war, the similar goal of reducing violence, and the dependence on membership. These accounts, however, go further than policy and practical considerations. They argue and provide a moral rationale of why the rule is, all things considered, the right rule.

George Mavrodes argues that the moral basis of the convention justifies the morality of killing in war.<sup>128</sup> His main argument is that distinction between civilians and combatants should not be based on the concept of moral *innocence* – civilians as innocent and combatant as *criminals*. This distinction does not give an honest portrait of the realities of war. If such is the distinction, then civilians and combatants will be liable since they will be civilians more responsible and threatening than some combatants. This will lead to total war. Instead, focusing military force on combatants and granting immunity to civilians, it will be a less destructive war. And the latter ought to be the main reason for such distinction: limiting armed conflict to a specific class will reduce the destruction of war.

He begins by arguing that the immunity of civilians is convention-based rule with moral support. More specifically, Mavrodes argues that, “The immunity of noncombatants is best thought of as a convention-dependent obligation related to a convention which substitutes for warfare a certain form of limited combat.”<sup>129</sup> Armed conflicts could be total wars, this is, making no distinction between combatants and the civilian population. Such an indiscriminate form of killing is certainly wrong since non-hostile civilians that pose no threat are being killed. Therefore, a limited form of combat could be devise in order to find a resolution to our dispute without having to incur in self-annihilation. We could have, for example, a war based on single combat. Each side selects their best fighter, and who wins this fight, wins the war.<sup>130</sup>

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<sup>128</sup> Mavrodes, G. 1975. “Conventions and the Morality of War”, *Philosophy & Public Affairs*, Vol. 4, No. 2, pp. 117-131

<sup>129</sup> *Ibid.* p. 129.

<sup>130</sup> Mavrodes mentions that such fights probably did occur in practice, but notes that full out wars occurred regardless. He notes that, “While the prospect may seem attractive it may also strike us as hopelessly utopian, hardly to be given a serious thought. There seems to be some evidence, however, that exactly this substitution was actually attempted in ancient times. Ancient literature contains at least two references to such attempts. One is in the Bible, I Samuel 17, the combat between David and Goliath. The other is in the Iliad, book 3, where it is proposed to settle the seige of Troy in the very beginning by single combat between Menelaus and Paris. It may be significant that neither of these attempts appears to have been successful. The single combats were followed by bloodier and more general fighting. Perhaps this substitute for warfare is too cheap; it cannot be made practical, and nations just will not consent in the end to abide by this convention.” Mavrodes, G. 1975. *supra*, p. 125.

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Such an alternative, argues Mavrodes, is simply utopian.<sup>131</sup> Also we could devise conventions that are less arbitrary than the one we have in place. The problem is, however, a practical one. As Mavrodes argues,

It does not follow, however, that we now have a duty to act in conformity with this other possible convention. For the results of acting in conformity with a preferable convention which is not widely observed may be much worse than the results of acting in conformity with a less desirable convention which is widely observed.<sup>132</sup>

Some conventions are morally binding because they expected to produce morally desirable outcomes. The distinction between combatants and civilians is one of these conventions.

Jeremy Waldron also defends the liability principle as a convention.<sup>133</sup> His main argument is that the war convention is not a convention in a classical sense, this is, rules regarding in which side of the road should we drive. The latter convention is based on a social coordination to set operational norms that have no basis in non-conventional principles.<sup>134</sup> If drivers decide to drive on the right instead of the left it would not produce any moral problem. The norm to drive on the right side of the road, for example, does not spring from an independent moral norm. We do not drive on the right side of the road because we ought to do so, but because we have agreed that in order to prevent unnecessary harm, we should. If we decide to drive on the left instead of the right then we would have to change the laws but nothing more.

The same could not be said about the conventional liability rule. Waldron notes that, “The basic normative force of the rule is deontological: *Thou shalt not kill*. The wrongness of killing civilians is established independently of the goal mitigating the horrors of warfare: killing civilians is murder.”<sup>135</sup> If one side decides to kill civilians that side is committing murder.<sup>136</sup> If we strip the convention from its imposing duty, that is, to discriminate between combatants and non-combatants, the independent rule that prohibits the unjustified killing of another person still stands with its binding force. The violation of the convention on one side does not permit a violation by the other party (unlike traffic laws, if the incoming vehicle is driving on the right, I should, then, right on the left. This brief violation of the rule does violate any moral principle). The impermissibility is not purely based on the convention but on a

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<sup>131</sup> Mavrodes, G. 1975. *supra*, p. 125

<sup>132</sup> Ibid. p. 127.

<sup>133</sup> Waldron, J. 2018. “Deep Morality and the Laws of War”, in *The Oxford Handbook on the Ethics of War*, ed. by Lazar, S. and Frowe, H. Oxford University Press. pp. 85

<sup>134</sup> Ibid.

<sup>135</sup> Ibid. p. 89.

<sup>136</sup> Ibid. p. 88

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nonconventional rule. The moral basis for killing combatants might be conventional and arbitrary, but it is still a *deadly serious* convention.<sup>137</sup>

Yitzhak Benbaji also defends the conventional rule of combat liability. Benbaji's justification for killing in war differs from Mavrode's and Waldron's in that he uses a contract theory. He notes that "The basic idea is simple: rights can be lost if their holders freely subject themselves to a procedurally fair and mutually beneficial norm (convention) that commands it."<sup>138</sup> More extensively, he argues that, "they [combatants] lose their title to life (in war) by virtue of their (very indirect) consent, just like boxers who, by agreeing on certain fair rules, lose their right not to be attacked by each other."<sup>139</sup> Benbaji seems to suggest that the conventional permission to kill in war is a tradeoff. In order to have a fair fight and certain collective rights, (i.e., *hors de combat*, prisoner of war status, receive medical treatment, immunity from criminal prosecution, etc.) combatants consent to be killed.

Michael Walzer also considers the rules of war a matter of convention, "The historical specifications of the principle are," he notes, "conventional in character, and the war rights and obligations of soldiers follow from the conventions and not (directly) from the principle, whatever its force."<sup>140</sup> Walzer begins his defense of combat liability with a moral description of war. He notes that, "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 reference to the means they adopt."<sup>141</sup> These two sorts of judgment, he writes, "are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."<sup>142</sup> Lee calls this the separation thesis (ST).<sup>143</sup> This separation makes it possible to make different moral judgments. For example, *jus ad bellum* is conceived as the "king's business - a matter of state policy, not of individual volition, except when the individual is the king."<sup>144</sup> With this move, Walzer rids the combatant from any wrongdoing in going to war. The moral status of the war is not transmitted to the combatant.

He portrays a combatant that has no say in the decisional process of going to war. Political leaders, through the power of the state, "decree that an army of a certain size be

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<sup>137</sup> Ibid. p. 88.

<sup>138</sup> Benbaji, Y. 2008, *supra*, p. 487.

<sup>139</sup> Ibid.

<sup>140</sup> Walzer, M. *Supra*, p. 43.

<sup>141</sup> p. 21.

<sup>142</sup> Ibid.

<sup>143</sup> Lee, S. *Supra*, p. 227.

<sup>144</sup> Walzer, M. *Supra*, p. 39.

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raised, and it sets out to find the necessary men, using all the techniques of coercion and persuasion at its disposal".<sup>145</sup> With this maneuver political leaders send citizens "to war under constraint or as a matter of conscience."<sup>146</sup> They become, thus, by extent "political instruments, they obey orders, and the practice of war is shaped at a higher level".<sup>147</sup> This makes them or might have made them, into unwilling fighters.<sup>148</sup>

This reality, notes Walzer, works both ways, which makes them *moral equals*. He observes that, "the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments."<sup>149</sup> They are, in the end, "trapped in a war they didn't make. I find in them my moral equals."<sup>150</sup> This moral equality of combatants is a necessary convention, "Without the equal right to kill," he notes, "war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement."<sup>151</sup>

However, Walzer does not completely void the combatant of individual agency. Obligated or willingly, they have to fight within a narrow set of rules, "their will is independent and effective only within a limited sphere."<sup>152</sup> This narrow scope is limited to their particular actions in *jus in bello* even if they do not participate in the said decisional process. When discussing the rules of war, for example, we hold combatants to certain standards, "even though they fight unwillingly".<sup>153</sup> He portrays the combatant as an agent that has been coerced into fighting, "[i]t is the success of coercion that makes war ugly."<sup>154</sup> This coercion is what makes the combatant innocent (in the relevant moral sense) of the unjust cause of the war.

The question that follows is, if the combatant has no say in the decision to go to war, how does he become liable to be killed? Walzer would respond that the combatant has become liable because "he has been made into a dangerous man." This happens for two reasons.

First, by threatening the lives of others, they have forfeited their right not to be killed. Secondly, they have joined the armed forces, which has turned him into a dangerous man.

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<sup>145</sup> Ibid. p. 28.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid. p. 29.

<sup>148</sup> Ibid. p. 35.

<sup>149</sup> Ibid. p. 36.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid. p. 41.

<sup>152</sup> Ibid. p. 38-39.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid. p. 35.

“He has joined the army because he thinks that his country must be defended, or he has been conscripted. [...] He can be personally attacked only because he already is a fighter. He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man.”<sup>155</sup> “Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime.”<sup>156</sup> The fact that combatants do the fighting, “though they can rarely be said to have chosen to fight, [they] lose the rights they are supposedly defending. They gain war rights as combatants as potential prisoners, but they can now be attacked and killed at will by their enemies.”<sup>157</sup> Thus, the combatant is a permissible target because he has become a lethal threat, a dangerous man. This makes him *ipso facto* a legitimate target that could be attacked at any time. We could call this threat liability.

### ***3.3.1.2. Objections to the Conventional-based model***

These conventional-base accounts of liability have their forceful pull, yet in light of TK they become less persuasive. Mavrode consequentialist argument will allow killing combatants on either side that might be actually innocent. His main premise is that innocence is not a viable base for the discriminative use of force between civilians and combatants because innocence is a status that could be shared across class lines. If such a distinction is logically followed, then military force would be directed against civilians and combatants alike and this scenario, ultimately, is an undesirable outcome. Granted. However, by making a whole collective and its members liable because it is less destructive do not make sense with TK. TK has the capacity to discriminate further. It could be used against specific individuals within the collective based on a non-conventional rule closer to a moral principle. But under Mavrode account, all members will be liable. Hence, this account is inconsistent with TK.

The same claim can be held against Waldron. His account is based on a moral principle: *shall not kill*. Unfortunately, he does not explain any further why combatants are exempt from this protection. He does recognize that killing combatants and not civilians is arbitrary but it is a convention that must be taken seriously since doing otherwise will entail committing actual murder. Conversely, the same might be said about combatants. Combatants are persons that share with civilians the same assumption: a moral right to life. Any act contrary to that right must be justified. TK specificity in targeting combatants forces

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<sup>155</sup> Ibid. p. 145.

<sup>156</sup> Ibid. p. 136.

<sup>157</sup> Ibid.

the State pulling the trigger to make such a justification, otherwise it would be murder, too. Regrettably Waldron does not provide such an account.

Benbaji's account, on the other hand, depends heavily on an analogy and a concept of consent that does ground a permission to kill. He argued that "[combatants] lose their title to life (in war) by virtue of their (very indirect) consent, just like boxers who, by agreeing on certain fair rules, lose their right not to be attacked by each other."<sup>158</sup> There are several problems with this approach. First, boxers are not combatants. There is an assumption that boxers are willing fighters and they have to explicitly consent.<sup>159</sup> What is more, in a boxing match neither fighter is considered as an aggressor. The same cannot be said about combatants. This analogy circumspect the moral reality of war. To illustrate this point imagine a boxer that leaps out of the ring to forcefully bring an innocent pedestrian back into the boxing arena. This scenario seems more consistent with the moral reality of war.

There is a more substantial problem with the boxing analogy: boxers do not nor are permitted to consent to kill one another. Furthermore, there is a relevant difference between consenting to be killed and accepting the risk of death.<sup>160</sup> Combatants, when they assume their status as fighters, do not concede their right not to be killed. They might, if they fight willingly, accept that there is a substantial danger of being killed. For example, if a citizen enters the police force, it would be odd to think that he is granting *permission* to be killed.<sup>161</sup> McMahan uses this analogy, "A person who voluntarily walks through a dangerous neighborhood late at night assumes and accepts a risk of being mugged; but he does not consent to be mugged in the sense of waving his right not to be mugged or giving people permission to mug him."<sup>162</sup> He has, by his volition, assume the risk of being killed but has not forfeited his claim not to be killed. The same rationale should be applied to war. A just combat fights to defend his life and that of his countrymen from an unjustified attack. He might acknowledge that this is a risk to his life. But it is risk he is willing to take in order to draw enemy fire away from his civilian counterpart.

However, accepting such a risk could be seen as a partial consent. As Lazar argues, "The purpose of having armed forces, and the expressed intention of many who serve in them, is to protect its civilian population from the predations of war. This means both

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<sup>158</sup> Benbaji, Y. 2008 "A Defense of the War Convention" in *Ethics*, 118 p. 487.

<sup>159</sup> Barry, C. and Christie, L. 2018. "The Moral Equality of Combatants", in the *Handbook of the Ethics of War*, ed. by Lazar, S. and Frowe, H. p. 349.

<sup>160</sup> McMahan, J. 2009. *Killing in War*. OUP. pp. 51-58.

<sup>161</sup> McMahan, J. 2009. *Supra*, p. 52.

<sup>162</sup> *Ibid*.



countering threats and drawing fire away from them.”<sup>163</sup> As a consequence, he continues, “Their decision to do so constitutes a *limited waiver* of the right not to be harmed by the unjust combatants [...]”<sup>164</sup> I would have to disagree. I see no necessity to consent, fully or partially, to be subject to aggression to avoid the aggressor from killing the innocent. If this is correct, then the just combatant is mitigating the unjust combatant moral responsibility the wrongs that they are committing. A just combatant shares the same moral status as the (just) civilians: they are non-responsible for the unprovoked aggression. The only difference is that the former has the means to defend and protect themselves and their civilian population. This fact (the capacity to defend against aggression) does not seem sufficient to grant partial permission to be attacked. The reason the armed forces of one country attack the armed forces of another is that this is the initial obstacle to physically imposing their political will (or, to put it more simply, they are the collective with the guns). So, to claim that by defending his life, he has consented to be killed simply does not seem right. As Helen Frowe notes,

It would be very odd if those posing an unjust threat got to decide amongst themselves who was liable to be killed to avert that threat, making it impermissible for the victim to aim defense of force at some group members rather than others. Liability to defense harm doesn't seem like something we can allocate by agreement.<sup>165</sup>

Walzer's account main weakness is the theoretical move of separating the *jus ad bellum* from the *jus in bello*. His claim is that these two pillars of just war theory are logically independent. A consequence of this separation is the moral equality of combatants, this is, combatants on both sides of an armed conflict share the same rights, duties and responsibilities that include the right to kill. This right to kill is symmetrical. This might be coherent, and probably necessary, but when discussing what overrides the right not to be killed, this separation makes certain killings impermissible.

Overriding the right *not* to be killed is conditioned, *inter alia*, on an asymmetrical relationship between the parties involved. To illustrate this point, an aggressor does not have the same defensive rights than a victim. There is an unequal moral status among the two that is manifested in their particular rights at that particular moment. Extrapolating this rationale to armed conflict, political leaders that initiate an unjust war are responsible for the aggression, but the combatants that engage in hostilities are by necessity aggressors. Consequentially, combatants fighting for an unjust cause are unjust combatants, and those fending off the aggression are just combatants.

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<sup>163</sup> Lazar, S. 2015. *Sparing Civilians*. OUP. pp. 126-7

<sup>164</sup> Ibid. Added italics

<sup>165</sup> Frowe, H. 2014. *Defensive Killing*. OUP. p. 169.

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TK exposes the potential unjust killings under such separation. It would allow the unjust side to employ TK against specific just combatants that are exercising their defensive rights. Walzer addresses this point by arguing that what makes combatants liable is that fact that they have joined the military and *ipso facto* have become dangerous men. This is factually correct. However, joining the military and becoming a trained individual in military affairs does not entail a license to kill. There is nothing peculiar about such a status that erases aggressor/victim distinction. It would be incomprehensible for an unjust combatant to justify the killing of a just combatant as an exercise of his defensive rights. Thus, the moral equality of combatants, as an explanation of why it is justified to kill in war is inconsistent with TK.

The conventional-based rule has three problems concerning the use of TK. On the one hand, the moral equality of combatants does not make the moral distinctions necessary to permissibly kill a combatant individually. Secondly, it is unreasonable to assume that defending just combatants have consented to unprovoked aggression and thus are permissible targets to be killed. And thirdly, conventional rules might be a necessary evil to curb the violence of war, but TK is a precise and personal form of killing that requires a non-conventional norm for its justification. For these reasons, I believe, that conventional-based liability fails to provide the basis to permissibly use TK in war.

### 3.3.2. Targeting killing and the Collective-base model

#### *Collective-base model accounts*

The collective-based model argues, mainly, that collectives are the primary agents of armed conflict thus their particular rights are collective in nature. It differentiates itself from the previous model in that it considers collectives as moral entities with their own agency. As with the prior model, this view has several authors suggesting different justification for killing in war.

The main argument for this model is based on the *domestic analogy*. This analogy offers a moral equivalence between the individual and the collective or the State as holder of rights. Lee explains that this analogy “is an analogy between states and individuals, and the analogical argument based on it is that because states are like individuals and individuals have a moral right to use force to protect themselves against attack, states do as well.”<sup>166</sup> The reason why this method has gain wide spread support is because its enormous intuitive

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<sup>166</sup> Ibid. p. 69.

legitimacy from the analogy of self-defense.<sup>167</sup> This method began arguably with Hugo Grotius, who states that, “What has been said by us up to this point, the right to defend oneself and one’s possessions may also be applicable also to public war, if the difference in conditions be taken into account.”<sup>168</sup> Cécile Fabre describes it as the “claim that just as an individual has a right to defend herself against a lethal threat by killing her attacker, states have a right to defend their territorial integrity and sovereignty from other aggressive states.”<sup>169</sup> Walzer argues that if “states actually do possess rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals.” And adds that every “reference to aggression is the international equivalent of armed robbery or murder, and every comparison of home and country or of personal liberty and political independence, relies upon what is called the domestic analogy.”<sup>170</sup> However, as we will see in the upcoming arguments, there are several variants of this analogy.

The idea of collective self-defense begins by viewing collectives as agents. War, their defenders argue, is between states that send the armed forces to do the fighting as their representatives.<sup>171</sup> They do not treat this as a theoretical assumption, but as a fact: war is an intensive collective and collectivizing *experience*.<sup>172</sup> The armed forces are groups composed of individuals that represent their State with uniforms and visible insignias. It is these groups, with its tanks, fighter jets, navy ships, and machine guns, the source of the threat. It follows, they contend, that the same way an individual has the permission to deter or stop an ongoing threat to his life (or others) in self-defense, collectives, thus, also have the same permission. The question is, then, if individual self-defense could be properly applied among collectives.

Robert Fullinwider begins his argument by simply stating that “a direct and immediate agent of a threat” is a permissible target of self-defense.<sup>173</sup> There might be, for example, other agents involved in the planning or in the instigation that has prompted the threat to materialize, but such a casual relationship does not suffice for these agents to become liable.<sup>174</sup> The instigators (political leaders) might be subject to punishment and retribution, but they are not liable for lethal defensive forces since they are not a direct and immediate agent of the threat. Self-defense is the moral basis for killing in war. This basis, he argues, “is the moral relevance

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<sup>167</sup> Rodin, D. *supra*, p. 107.

<sup>168</sup> Neff, S. Ed.. 2012. *Hugo Grotius on the Law of War and Peace: Student Edition*. Cambridge: Cambridge University Press. p. 89.

<sup>169</sup> Fabre, C. 2012. *Cosmopolitan War*. OUP. p. 54.

<sup>170</sup> Walzer, p. 58.

<sup>171</sup> Zohar, N. 1994. “Collective War and Individualistic Ethics: Against the Conscription of “Self-Defense”, in *Political Theory*, Vol. 21, No. 4, p. 619.

<sup>172</sup> Walzer, M. 2015. *Supra*. p. 240.

<sup>173</sup> Fullinwider, R. 1975. “War and Innocence”, in *Philosophy & Public Affairs*, Vol. 5, No. 1, p. 92.

<sup>174</sup> *Ibid.* p. 93.

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of the distinction in war between combatants and noncombatants.”<sup>175</sup> The fact that combatants are the source of the threat, and in war the threat stems from a nation’s armed forces, they, the combatants, are liable to be killed. Fullinwider notes, in his own words, that nations stand as individuals do in the context of self-defense. Thus, the armed forces, as collectives, “with their arms, ammunition, war machines and facilities, are the legitimate targets of intentional destruction”, are the permissible targets of self-defense.

Noam Zohar, on the other hand, argues that in war it “is a collective that defends itself against attack from another collective rather than simply many individuals protecting their lives in a set of individual confrontations.”<sup>176</sup> He acknowledges that among combatants there might be innocent combatants but the alternative, that is, identify those who are liable to be killed, could produce moral vertigo.<sup>177</sup> This reality of war might make the conventional permission to kill in war morally arbitrary. He disagrees. The convention might permit the killing of innocent combatants, he argues, but this does not mean that the permission to kill in war is morally arbitrary.<sup>178</sup> Instead, he argues, collective self-defense is a compromise between two valid visions of morality: collective and individualistic. More specifically, he notes that, “It is only when the individual and collective perspectives are recognized as distinctly valid aspects of our ethical view that we can appreciate the moral force of the war convention, without a dubious conscription into moral service of individual self-defense.”<sup>179</sup>

He eschews the radical distinction between collective and individualistic morality. He notes that,

If the individual and the collective are both taken seriously as facets of human existence, then this dual reality properly yields a dual morality. Humans relate to each other as individuals, and these relations are governed by individual morality. Humans also (exist, and therefore) relate to each other as collectives, and these relations are governed by collective morality. In fact, these two modes of relating are coextensive, producing conflicts between equally valid moral demands.<sup>180</sup>

The point that Zohar is trying to make is that the “imperative of collective self-defense is not some alien intrusion tragically compelling us to compromise our moral standards.”<sup>181</sup> Rather, he argues, “[...]what is involved is a conflict between opposing moral imperatives.”<sup>182</sup> These two moral perspectives are what sustain the moral basis for the permission to kill combatants, regardless of their individual moral status, as collective self-defense.

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<sup>175</sup> Ibid.

<sup>176</sup> Zohar, N. 1994. “Collective War and Individualistic Ethics: Against the Conscription of “Self-Defense”, in *Political Theory*, Vol. 21, No. 4, p. 615.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid. p. 619.

<sup>180</sup> Ibid. p. 618.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

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The question that follows is, how does this compromise –between individual and collective ethics- translate? Zohar would answer that such compromise would guide us to regard some members of the enemy society solely as individuals (civilian immunity) while subsuming others under their collective identity as "the enemy people" (combat liability)<sup>183</sup> However, he continues, "The key factor is participation: combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retains their exclusive status as individuals."<sup>184</sup>

Christopher Kutz argument, on the other hand, seems to be predicated on a duality of collective action. On the one end, as citizens we *will* by a democratic process the state for war, while on the other, we become responsible to do the fighting, also as citizens. However, the collective that decides to go to war is distinct from the collective that does the war. The former grants permission to kill, as their representatives, the other members of the other collective who are also doing the fighting.<sup>185</sup> Kutz argues that,

The fact that my nation is at war, not me, does not absolve me of responsibility towards my enemy, but it does create a normatively distinct relation between us, one structured through a set of rules specific to our interrelationship as individual members of warring nations in confrontation with one another. [...] Specifically, the logic of collective action can make appropriate a limited scope for an essentially political permission to do violence, because when I do violence, I do it as a member of one group towards another. The privilege to kill as part of a collective is not a moral permission attaching to the individual soldier.<sup>186</sup>

This argument is peculiar in the sense that the author does not seek a non-conventional norm or a principle of self-defense to justify the killing in war. Instead, he implicitly rejects the idea when he states that the permission to kill is not a moral permission attached to the individual combatant. The question is, then, what is the source for the permission to kill in war? According to Kutz, the permissibility of killing is a political permission. If as citizens we decide to go to war, such a decision is binding. The citizen would have a duty to fight.

The idea seems to be that in war the relationship is among states, not individuals hence the permissibility to kill derives from the state not the individual. He cites Rousseau on this matter, "War is not then a relationship between one man and another, but a relationship

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<sup>183</sup> Ibid.

<sup>184</sup> Zohar concludes that "As long as we maintain-against this-the critical distinction captured and fostered by the war convention we preserve the dual character of our moral vision. Recognizing the collective perspective, the convention allows that some innocent lives can be destroyed in war-within the circumscribed scope of collective confrontation. But condoning the killing of innocents outside this scope amounts to a total abandonment of the individual perspective, whereas remaining true to our dual human reality requires continuing to abhor murder-even in the midst of war." p. 619

<sup>185</sup> Kutz, C. 2005. "The Difference Uniforms Make: Collective Violence in Criminal Law and War" in *Philosophy & Public Affairs*, 33, no. 2, p. 171.

<sup>186</sup> Ibid. p. 173.

between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders.”<sup>187</sup>

Saba Bazargan argues for a form of combat liability based on the doctrine of complicity. More specifically, he argues in favor of a liability-based account of just war in which unjust combatants are collectively liable for the threats posed by other combatants on their side.<sup>188</sup> He defines the “Complicity Principle”, as when “a participant in a cooperative project who does her part in furtherance of a cooperative act but whose participation fails to contribute causally to that cooperative act can nonetheless bear complicitous liability.”<sup>189</sup> The outcome is a “collective liability in which participating in certain sorts of cooperative projects makes each participant, regardless of how much she contributes, partially liable for what others foreseeably do in furtherance of the group’s goals.”<sup>190</sup> And the virtue of this approach, he notes, is that “A more general strength of the proposed collectivized liability-based account is that it treats wars the way they are actually fought: as a fundamentally cooperative activity.”<sup>191</sup> Now, since she willingly took on this function, “we can ascribe to her inclusive authorship of the function’s end— i.e., the cooperative act that the participants in the cooperative project commit together. And this ascription of inclusive authorship provides a basis for holding her accountable for the cooperative act, if the cooperative act is wrongful.”<sup>192</sup> When the Complicity Principle is applied in war, he notes that,

“Combatants who do their part in a war—that is, combatants who (effectively or not) act in accordance with roles designed to further the cooperative act of achieving the war’s aims— can be complicitously liable for that cooperative act, since such combatants are inclusive authors of that cooperative act. Combatants can bear complicitous liability even if they are ineffective since what grounds their complicitous liability is not their causal contribution to the cooperative act, but the functional relation of their role to that act.”<sup>193</sup>

### **3.3.2.1. *Objections Collective-base model accounts***

There are two main issues with this model. First, it fails to offer an asymmetry among collectives. Either side is allowed to employ military force regardless of the moral status of their claim. Secondly, the collectivization of liability allows for the killing of combatants whom individually might not be liable.

Fullinwider’s account is an example of the domestic analogy. The armed forces of a State are the source of a direct and immediate agent of a threat, thus they are subject to lethal

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<sup>187</sup> Ibid. p. 162.

<sup>188</sup> Bazargan, S. 2013. “Complicitous Liability in War” in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 165, No. 1, pp. 177-195.

<sup>189</sup> Ibid. p. 188.

<sup>190</sup> Ibid. p. 179

<sup>191</sup> Ibid.

<sup>192</sup> Ibid. p. 188.

<sup>193</sup> Ibid.

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defensive force under the self-defense principle. However, the extrapolation from individual self-defense to collective-defense is not a perfect transition. There are some holes when they overlap. The self-defense principle is based on an asymmetrical relationship: victim/aggressor. This distinction is absent in Fullinwider's account. First, there is no account of the moral status of any side of an armed conflict. Secondly, if TK is used, under this account, any side may use TK against any target, as long as his collective is an agent of a threat. A collective aggressor that invades another State may use TK against any combatant since he is a member of the armed forces that represent a direct and immediate threat. There is no moral distinction among collectives, which is a precondition to use lethal defensive force. The self-defense principle as a basis will fail to have any explanatory force.

Kutz's account has a basic flaw. His view is centered on the permission to kill in war, but ignores the question of liability, this is, why can one combatant kill another. His basis for the permission to use lethal force is based on a 'political permission' that is granted to a collective and not to an individual. The absence of any rationale of why it is allowed to kill enemy combatants makes this account incomplete. On the other hand, the bulk of the 'political permission' rests on democratic legitimacy. Participating in a decisional process and binding oneself with the outcome might be morally required. However, there are limitations to what can actually be done. Individual Rights limit the democratic-collective will. The permission to use lethal defensive force against an individual must be predicated on a fact that overrides his right not to be killed, i.e., he is posing as an unjustified threat and killing him is the only way to stop or deter such a threat. TK, thus, cannot be predicated solely on a political permission sanctioned by a democratic process.

Zohar's view is problematic since it collectivizes liability on a fact insufficient to ground defensive accountability. This fact is participation, he notes that "The key factor is participation: combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retains their exclusive status as individuals." The same with the critique to the fact of membership, participation falls short of granting an aggressor, for example, the right to kill a defending combatant. Volunteering, and thus providing a tacit consent to be sent and participate in an armed conflict does not strip that person his right not to be killed, unless he is an aggressor. Such distinctions are absent in his account of liability.

These accounts mostly have the same deficiencies as conventional-based liability: both sides of an ongoing armed conflict are assumed to share the same moral status failing to make the proper distinction between just and unjust combatants. One of the main conditions of self-defense is that the relationship among the agents has to be asymmetrical, this is, there

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must be something about the target that 'tips the scales' against him.<sup>194</sup> This condition is undermined when the victim and the aggressor are in equal footing. Both conventionalism and collective self-defense could be seen as a form of a Hobbesian form of self-defense.<sup>195</sup> For TK to be permissibly employed as self-defense, there must be an asymmetrical relationship among the combatants.

Furthermore, the symmetrical relation among collectives is questionable. The idea that no single individual or group of individuals could be ultimately responsible for the unjust cause of the war is not very convincing. Christian Barry and Lars Christie point out that "A major weakness of the collectivist defense of Equality, especially as Walzer formulates it, is its categorical nature. It is simply impossible to claim that combatants can never be held responsible for the cause they are fighting for."<sup>196</sup> This is interesting, they note, since Walzer discusses General Eisenhower's refusal to accept a visit from a captured German general before he was sent to captivity.<sup>197</sup> General Eisenhower's refusal is based not on the German's violation of the rules of war, but on his willingness to fight an unjust war.<sup>198</sup> Walzer quotes Eisenhower's Memoir,

The tradition that all professional soldiers are comrades in arms has . . . persisted to this day. For me, World War II was far too personal a thing to entertain such feelings. Daily as it progressed there grew within me the conviction that, as never before . . . the forces that stood for human good and men's rights were . . . confronted by a completely evil conspiracy with which no compromise could be tolerated.<sup>199</sup>

There is also the case of General's Sherman speech (1864) to the City of Atlanta during the American Civil War in which he states that,

I know that a few individuals cannot resist a torrent of error and passion, such as swept the ***South into rebellion***, but you can point out, so that we may know those who desire a government, and those who insist on war and its desolation.<sup>200</sup>

What these two quotes show is that moral distinctions among combatants do occur. In Gen. Eisenhower's case, he holds an individual responsible. In contrast, General Sherman holds a collective responsible ("*the only way the people of Atlanta can hope once more to live in peace and quiet at home, is to stop the war*, which can only be done by admitting that it began in error and is perpetuated in pride."<sup>201</sup>). However, it must be noted, even if just combatants target unjust combatants, there might be a problem of killing non-labile unjust combatants.

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<sup>194</sup> Rodin, D. *Supra*. p. 50.

<sup>195</sup> Sreedhar, Susanne. 2008. "Defending the Hobbesian Right of Self-Defense", *Political Theory*, Vol. 36, No. 6, pp. 781-802.

<sup>196</sup> Barry, C. and Christie, L. 2018. "The Moral Equality of Combatants", in the *Handbook of the Ethics of War*, ed. by Lazar, S. and Frowe, H. p. 339.

<sup>197</sup> *Ibid*. p. 346.

<sup>198</sup> *Ibid*.

<sup>199</sup> Walzer, M. 2015, *Supra*, p. 37.

<sup>200</sup> Letter of William T. Sherman to James M. Calhoun, E.E. Rawson, and S.C. Wells, September 12, 1864; Accessed May 2020. <https://cwnc.omeka.chass.ncsu.edu/items/show/23>; [Bold and italic letters by author].

<sup>201</sup> *Ibid*.



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Not all unjust combatants are contributing to the unjust cause of their war, but according to the moral equality of combatants, they are still liable.

There have been some attempts from the collectivist authors to address the problem that the moral equality of combatant doctrine produces when individualizing liability. Zohar understands the problem when he states that, "even if we suppose the enemy state guilty of aggression- [...] many (or even most) of the enemy soldiers as individuals cannot necessarily be saddled with the blame for that aggression."<sup>202</sup> He notes that "The enemy soldiers are not all murderous aggressors; judged as individual persons, only some of them can be killed [...]."<sup>203</sup> With this line of reasoning, he is forced to ask, "if [...] the enemy soldiers are mostly innocent, can there be any justification for killing them?" He answers that "Only viewing it as a collective aggressor can sanction the very killing of combatants, despite the impossibility of determining their individual guilt or innocence, for in fact, we cannot act against the enemy as a collective without killing particular persons."<sup>204</sup> He comes to this conclusion out of the necessity of circumstances. He observes that,

For defensive war, as for private self-defense, the moral sanction relies on crucial tipping of the scales. But whereas in self-defense this requires a minimal measure of individual guilt, in warfare the issue is and must be weighed on the great collective scale. Trying to make sense of warfare as though it were an aggregate of individual confrontations can only produce moral vertigo.<sup>205</sup>

There is no moral equality among combatants. Sure enough, this might be a way to justify wars that need to be fought, but it does not change the moral reality of war: non-liable targets are being killed. McMahan comments on Zohar's argument, stating that "His explanation of how they can nevertheless be permissible to kill a morally innocent and just combat it appeals to the idea that he presents himself in war not in his individual but in his collective identity. It is in his capacity as an agent of the guilty collective that he becomes a legitimate target."<sup>206</sup> If this is correct, he continues, "[...] by the same logic it seems that the just combatant, both as an individual and as an agent of the collective, retains his immunity to attack and therefore it is not a legitimate target."<sup>207</sup> If one side of the armed conflict is morally responsible for the unjust threat, then by the same token, the other side is non-responsible, thus non-liable to be killed. Thus, such a separation makes claim of defensive killing with TK unpersuasive.

Ultimately, Bazargan attempts to address the issue that the moral equality of

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<sup>202</sup> Zohar, N. *Supra*. p. 607.

<sup>203</sup> *Ibid.* p. 615.

<sup>204</sup> *Ibid.* p. 616.

<sup>205</sup> *Ibid.* p. 615.

<sup>206</sup> McMahan, J. 2009. *The Ethics of Killing in War*. OUP. pp. 80-1.

<sup>207</sup> *Ibid.*

combatants present.<sup>208</sup> To accomplish this, he argues in favor of a concept based on complicity. As it might be recalled, he argues in favor of a liability-based account in which unjust combatants are collectively liable for the threats posed by other combatants on their side. The authoritative norm here is the Complicity Principle, defined as when "a participant in a cooperative project who does her part in furtherance of a cooperative act but whose participation fails to contribute causally to that cooperative act can nonetheless bear complicitous liability."<sup>209</sup> This is a problematic assumption for the use of TK. If those individuals that do not contribute to the harmful, unjust activities of the collective are liable because other collective members are responsible for such a threat, then killing the former would not be self-defense. It could be murder. There is no contribution to the victim's security the killing of an individual who is not contributing to the threat. This is an example of the dangers of collectivizing liability.

An additional problem with Bazargan's principle is that it renders a legitimate institution like the armed forces analogous to a criminal organization. As Lazar notes, "You cannot be liable to be killed for joining a morally justified institution, just because you knew, when you joined, that there was a risk that your comrades would end up violating other people's rights."<sup>210</sup> Furthermore, he argues that "Complicity is irrelevant to the ethics of killing in war. You cannot be liable to be harmed defensively unless you have yourself done something that contributed to a threat that could be avoided by harming you."<sup>211</sup>

As we have seen, collective self-defense fails to make the fine-grain moral distinctions necessary that could make TK permissible. These nuances might be overlooked to make a workable theory of collective self-defense, and this might be necessary when the factual reality of war makes it so, but they fall short when trying to justify TK. In the end, as Walzer notes, "This is, after all, one of the reasons that we hate war: It is a coercively collectivizing enterprise; a tyrannical enterprise; *it overrides individuality, and it makes the kind of attention that we would like to pay to each person's moral standing impossible*; it is universally oppressive."<sup>212</sup> There is, however, a model that does not make this separation but they err in not making a deeper discrimination among combatants themselves.

### 3.3.2. Targeted Killing and the Individualistic Model

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<sup>208</sup> Bazargan, S. 2013. "Complicitous Liability in War" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 165, No. 1, pp. 177-195.

<sup>209</sup> Ibid. p. 188.

<sup>210</sup> Lazar, S. 2015. *Supra*. p. 132.

<sup>211</sup> Ibid.

<sup>212</sup> Walzer, M. 2006. "Response to McMahan's Paper" in *Philosophia*, 34, p. 43. Italics added.

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The problems justifying killing in war mentioned in the last two sections have been keenly observed by Individualists who argue that war is not, ultimately, a different moral realm. As Daniel Stateman points out, "Individualism might concede that the threats that typically trigger a right to wage war (the threat to the territorial integrity or to sovereignty) are almost necessarily posed by collective, but insist that the moral basis for the killing in war is blind to this collective aspect and recognizes, [...], only individuals."<sup>213</sup> They claim that the same moral rules that apply in ordinary morality, also apply in war. For the Individualists, "The difference between war and all the forms of conflict is a difference only of degree, and thus the moral principles that govern killing in lesser forms of conflict govern killing in war as well. A state of war makes no difference other than to make the application of the relevant principles more complicated and difficult."<sup>214</sup> Therefore, the same justification for killing in personal self-defense applies to killing in war. However, the Individualistic account does not go deep enough as their critique might suggest.

They begin their critique of the separation thesis defended by Walzer and conventionalism. For the Individualist, the separation of *ad bellum* is unjustified. The idea that aggressors have the same rights as the defenders of the aggression is absurd. There is no equal moral footing, they would argue, between a robber and the police. The robber cannot claim that he shot the police in self-defense. The same logic applies to war. If state A invades state B, it would be odd for combatants of the latter to explain to combatants of the former that they are killing in self-defense. The Individualists argue that the unjust cause of the war necessarily follows the combatants to battle, making them unjust combatants. McMahan notes that, "Just combatants, in taking up arms in a just cause do nothing to lose their right not to be attacked or killed or to make themselves morally liable to attack."<sup>215</sup> And adds that "Merely posing a threat to the unjust combatants who have attacked them is, as we have seen, not enough to make them liable. So in fighting against just combatants, unjust combatants would be attacking and killing the innocent".<sup>216</sup>

There is, therefore, a moral distinction between combatants. This is the correct moral reality of war. The virtue of this view is that it approximates ordinary morality to the rules of war. However, when employing targeting killing, it is not close enough. The reason for this is that McMahan does the same form of strict collective liability as to the authors that he criticizes.

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<sup>213</sup> Statman, D. 2012. "Can Just War Theory Justify Targeted Killing" in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. by Finkelstein, C., Ohlin, J.D. and Altman, Andrew. OUP. p. 95.

<sup>214</sup> McMahan, J. 2009, *Supra*, p. 156.

<sup>215</sup> McMahan, J. 2006. *Supra*, p. 27.

<sup>216</sup> *Ibid*.

### 3.3.3. Objections to the Individualistic model

McMahan argues that a person is liable to defensive harm if he is morally responsible for an objective unjustified threat.<sup>217</sup> In war, there is only one *side* that can be, objectively, morally responsible for an unjustified threat: unjust combatants. He does not make all combatants liable regardless of which side of the war he is, only the unjust side. He concludes that the just combatant's permissibility to kill unjust combatants is based on the notion that since "the overwhelming majority of unjust combatants [are] Partially Excused Threats then just combatants are entitled to act on the *presumption* [...]"<sup>218</sup> This presumption does not individualize war as intended but instead reduces the scope of liability only to one collective, the aggressors. Walzer notes on McMahan's method, "So McMahan does in fact recognize the collectivizing impact of war, but he limits this to the divisional level, whereas "traditional" theorists accept collectivization at the level of the army as a whole."<sup>219</sup>

He does not escape the collectivization of war. This, in turn, makes the moral responsibility requirement depend on the assumption that all combatants on the unjust side liable to be killed. Using self-defense as a justification in war, either as collective or individualized as proposed by McMahan, can be misleading. It wrongly portrays the view that if a side of a war is unjust, then at the individual level all unjust combatants must also be unjust. As Lazar notes, out of "fear, disgust principle of lack of opportunity or ineptitude many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threat or to the macro-threat posed by their side."<sup>220</sup> Many other combatants play only a facilitating and minor role that ultimately merely contributes to the actual harming activity of the armed forces.<sup>221</sup> For example, not all military personnel carry a gun ready to kill. The latter depends on cooks, medics, machinists and maintenance specialists, and among other non-threatening technicians.<sup>222</sup> There are also combatants who, although are ready to fight if called, are behind enemy lines.<sup>223</sup> Some combatants are returning from their tour of combat or others who play an ostensibly restraining role, such as Judge Advocate Generals.<sup>224</sup> In their individual capacity, these combatants are not threatening and having the bad luck of being on the wrong side of a war in which they had no role in deciding to fight can not make them liable to be killed in self-defense. Collectivizing responsibility does not

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<sup>217</sup> McMahan, J. 2009. *Supra*. p. 35.

<sup>218</sup> *Ibid*. p. 187. Italics added.

<sup>219</sup> Walzer, M. 2006. *Supra*, p. 44.

<sup>220</sup> Lazar, S. *Supra*. p. 12.

<sup>221</sup> *Ibid*.

<sup>222</sup> *Ibid*.

<sup>223</sup> *Ibid*.

<sup>224</sup> *Ibid*. 13.

permit making the actual nuances necessary among combatants to impose actual liability for the combatant's actions.

McMahan foresees that his arguments could be interpreted as collectivizing moral responsibility (as Walzer was able to single out). He notes that "claiming that just combatants are entitled to presume that all unjust combatants are Partially Excused Threats [is] not "collectivizing" the moral status of unjust combatants. No individual combatant gets his moral status merely from membership in a collective."<sup>225</sup> Moreover, he continues,

If an unjust combatant [...] treatment is worse than what his actual status demands, then he has probably been treated unjustly. But the just combatant who has treated him this way has acted with subjective justification, and the responsibility for his objective error almost certainly lies more with the unjust combatant than with the just combatant.<sup>226</sup>

The just combatant's moral responsibility, he argues, "is not with determining the moral status of individual adversaries on the battlefield. To require the latter would be to require the impossible; hence they must be guided by *broad presumptions*."<sup>227</sup> On one occasion, he notes, that "reasonable agents in war have to act on the basis of presumptions that are as well grounded as possible in the circumstances. And there is occasionally good reason to presume that one group of unjust combatants bears a greater degree of liability than another."<sup>228</sup>

This is revealing since he acknowledges that single individuals could be unjustly killed: "It can sometimes be known that certain soldiers on the unjust side are both morally innocent and almost certain do not to make any significant contribution to their side's unjust war."<sup>229</sup> And requiring making such distinctions is highly impractical. However, I agree with McMahan on the point of making necessary moral assumptions during a war. As Statman observes, "It is because most soldiers are below the threshold of responsibility required to make them liable to attack that we need a collective perspective to explain how killing them might be permissible."<sup>230</sup> There are epistemic limitations during armed conflict, and war is what Rodin calls, 'morality *in extremis*'.<sup>231</sup> He notes, "In war and interpersonal violence we find humans at our most fearful, most vulnerable, and also most destructive. Because of this the issues they raise are among the most intense, difficult, disturbing and yet characteristically human of all moral problems."<sup>232</sup> So, the collectivization of responsibility is a necessary moral assumption to make war morally feasible.

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<sup>225</sup> McMahan, J. 2009 *Supra*, p. 188.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> McMahan, J. 2006. p. 35.

<sup>229</sup> McMahan, J. 2018. *Supra*, p. 419.

<sup>230</sup> Statman, D. *Supra*, p. 97.

<sup>231</sup> Rodin, D. *Supra*, p. 1.

<sup>232</sup> Ibid.

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McMahan did try to address the questions of targeted killing and its permissibility.<sup>233</sup> His discussion is narrowed to the question of targeting terrorists. His argument here is relevant to the extent that he compares the terrorist to an unjust combatant. He argues that "The targeted killing of a person who is in fact a terrorist is morally—though not legally—*quite similar* to the killing of an "unjust combatant."<sup>234</sup> He notes that,

He is where he is, doing what he does day after day, in order to contribute to his State's unjust war. Much the same is true of the terrorist: he is committed to and guided by the aim of killing innocent people. Both he and the unjust combatant have acted in ways that have raised the objective probability that people who are not liable to be killed [...]. The main difference between a terrorist who is preparing for his mission or awaiting orders and a sleeping unjust combatant is that the latter keeps about him the visible indicators of his commitment to attack his adversaries, such as his uniform and weapons, while the terrorist seeks to conceal his intentions, preparations, weapons, and identity as a terrorist.<sup>235</sup>

The error here is to make an equivalence between a combatant and a terrorist which leads to an erroneous outcome. The terrorist is an active member who volunteered to kill civilians and, most likely, do it again. It is questionable to assume that combatants are wholly volunteered fighters. In additions, they do not choose which war to fight whereas terrorist takes up on arms enthusiastically for a cause. The terrorist is not a random target. A terrorist is a civilian who is committed to killing innocent citizens, and he is probably planning his next attacks. He is a target because he has the potential to do what he is doing and, with reasonable information and known background facts, makes him a legitimate target.

Moreover, as Daniel Statman notes, "If TK is justified it is because the members of such (terrorist) organizations do not fight in the open -in the *battlefield*- as in regular (old) wars, but act out of hidden shelters, in a way that often makes TK, especially by drones, the only way to fight against them."<sup>236</sup> This factual scenario makes him a legitimate target of defensive force. The terrorist does not have to be in a group. He could be part of a collective, but such a fact would only provide additional information that is not ultimately decisive. It would not determine his liability as the fact of membership does to combatants, for example. Such a fact is irrelevant when killing him in self-defense. Therefore, the reference point that grounds liability is not on what side of the conflict he belongs, but on his actual actions. McMahan's justification of killing in war does not make the moral distinctions among unjust combatants (i.e., the presumption) thus this model fails to justify TK.

### 3.4. Summary

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<sup>233</sup> McMahan, J. 2015. "Target Killing: Murder, Combat or Law-enforcement", in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. by Finkelstein, C., Ohlin, J.D. and Altman, Andrew. OUP. pp. 135-155.

<sup>234</sup> Ibid. p. 139. Italics added

<sup>235</sup> Ibid.

<sup>236</sup> Statman, D. *Supra*. p. 94.

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I have contended that the reasons why these justifications for killing in war fail to support targeted killing are because they all share an unsaid premise, the fact of membership. Conventionalism, for example, makes distinctions based on an agreement. Only those wearing a uniform or visible insignia or carrying their weapons openly are permissible targets because they are distinguishable *members* of the armed forces. On the other hand, the collective argument states that since war is a joint enterprise among individuals, defensive force is permitted only to *members* of a collective that is actively engaged in armed conflict. The Individualist argues that the only *members* of the unjust side are liable targets (despite its rejection of the moral collectivization of war). These accounts do not have an explanation on how to make the proper nuances among combatants that would justify specifically targeting an individual under the justification of self-defense. In the next chapter, a doctrine of self-defense will be developed to address these challenges.

4

## **TOWARDS A SELF-DEFENSE-BASED JUSTIFICATION OF TARGETED KILLING**

In this chapter, I present a self-defense principle that will seek to explain the use and justification of targeted killing in war. As it was argued in the preceding chapters, the current justifications for killing in war stay short in providing a satisfying answer to the question of who is liable to be specifically killed by targeted killing. To respond to these deficiencies, an individualized doctrine of self-defense principle that will be tested in different scenarios to weigh its strength before moving forward. This principle aspires to explain who is liable, when that person is liable, and, more importantly, why that person is liable to be subject to lethal defensive force. To respond to these questions, I present a simple and clear principle of self-defense based on the concept of causality. The concept can be read as: if the target is the immediate cause of an unjustified lethal threat or has a significant role in the chain of causality of an unjustified threat, the target has fulfilled the liability condition.

### **4.1. Introduction**

In the second chapter TK is defined as an individualized form of killing. This individualized feature is unique when employed in war. As it was argued, killing in war is a non-individualized, collectivized form of killing based on the fact of membership (LoAC) and/or collective liability (JWT). If a specific individual is going to be selected from a collective among all others, then there must be something about the individual that makes him liable to lethal force beyond the fact of membership. It is for this reason that a doctrine of individualized self-defense is needed to justify killing when employing TK.

The primary concept in this chapter is that of liability. There are three models of self-defense with different grounds for liability. These are culpability, moral responsibility, and causality. The challenge is finding a workable principle suited for armed conflict. Culpable and moral responsibility liability might explain, and justify, the use of force in times of peace, but they are inadequate to support TK in war.<sup>237</sup> The liability condition here defended, thus, is that of causality.

To support causality as a principle of liability, the first step will be to briefly overview the inadequacies of collective self-defense discussed in the last chapter in regards to TK. The second step is to define self-defense with its constitutive parts of necessity, proportionality, and liability.<sup>238</sup> The third step is the presentation of the culpability and moral responsibility liability principle. The objective here is to explain why these fail to support TK in war. The fourth step is to define and defend the causality principle in which TK may be grounded. This section will be followed by objections made to causality as a liability condition for self-

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<sup>237</sup> This claim will be defended below.

<sup>238</sup> The aim in this section is to simply make an exposition of these concepts and not problematize them.



defense and, finally, the proper responses to these objections. And as a final step, explain why causality for the use of TK in war is the best principle. There are, nevertheless, several things that should be preliminary said.

First, the three self-defense principles here presented are specifically for the use of force against individual threats, and not, against a collective. This is consistent with the methodology of this investigation. Since TK is a specific form of killing, it is only proper to employ a doctrine based on individual of self-defense for its justification. Secondly, the primary target that these principles will be tested on will be an innocent threat or an innocent aggressor. There seems to be no considerable disagreement when the target is a culpable aggressor: an individual who is knowingly and willingly deliberately attempting to kill the victim. The contention among the different authors begins when the subject of lethal force is directed at an innocent person.<sup>239</sup> Thirdly, the narrow question if an innocent threat or aggressor can be a legitimate target of defensive force is consistent with the question of this research. The concern of the use of TK is not if a culpable aggressor is a permissible target, but if, in the context of war, innocent combatants (an unjust combatant can be a culpable aggressor but also could be an innocent unjust threat or an innocent unjust aggressor) may be legitimate targets under TK.

### 4.2. COLLECTIVE SELF-DEFENSE

In the last chapter all three models of JWT ground their liability in some collective form. This is due to the fact that collectives are the main agents of war. So, if a collective is culpable or morally responsible or engaging in threatening activity, then intuitively each member of that collective shares the same status. This *tickle-down* liability might function well in the ordinary military engagements of war, but it is unfair when it comes to the exceptional use of TK.

More specifically, the reason why these justifications for killing in war fail to support TK is because they all share an unsaid premise, the fact of membership. Membership alone does not say much about an individual's liability. This is correct even in criminal enterprises. Each individual is responsible according to his or her degree of contribution. And, if an individual's defensive liability depends on the nature and scope of his threat, then it is

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<sup>239</sup> Thomson, J.J. 1991. "Self-defense" in *Philosophy and Public Affairs*, Vol. 20, No. 4; Otsuka, M. 1994. "Killing the Innocent in Self-defense" in *Philosophy and Public Affairs*, Vol. 23, No. 1, pp. 74-94; Quong, J. 2009. "Killing in Self-defense" in *Ethics*, Vol. 113, No. 3, 507-537; Kaufman, W. 2010. "Self-defense, Innocent Aggressors and the Duty of Martyrdom" in *Pacific Philosophical Quarterly*, pp. ;Frowe, H. 2014 *Defensive Killing*. OUP. pp. 46-70.; Davis, N. 1984. "Abortion and Self-defense" in *Philosophy and Public Affairs*, Vol. 13, No. 4, pp. 175-207; Alexander, L. A. 1987. "Justification and Innocent Aggressors" in *Wayne Law Review*, Vol. 334, p.; Fletcher, G. P. 1973. "Proportionality and the psychotic aggressor: vignette in comparative criminal theory" in *Israel Law Review*, 83; McMahan, J. 1994. "Self-Defense and the Problem of the Innocent Attacker," in *Ethics* 104, no. 2, pp. 252-290; Ryan, C. 1983. "Self-defense, Pacifism and the Possibility of Killing" in *Ethics*, 93, pp. 508-24.

possible that a member's personal contribution are so minor that killing him might wrong him. However, these specific intricacies are wiped by collective liability and the fact of membership. For instance, conventionalism grounds liability on an agreement. States agree that only those wearing a uniform or visible insignia or carrying their weapons openly are permissible targets because they are distinguishable *members* of the armed forces. This is reflected in the LoAC. On the other hand, the collective argument states that since war is a joint-collective enterprise among its members, defensive force then is permitted towards those *members* of that collective that is actively engaged in armed conflict. The Individualist argues that the only *members* of the unjust side are liable targets. Thus, membership is a lethal status since it makes the individual an instantaneously a permissible target.

Furthermore, these accounts do not have an explanation on how to make the proper nuances among combatants that would justify specifically targeting an individual. Self-defense requires an *asymmetry* between the two sides engaged. This entails that one side is permitted and justified in using lethal defensive force against the other person without wronging him. This asymmetry is what justifies one side in using lethal defensive force when he or she is under a lethal threat. Thus, it is a necessary moral condition to justify self-defense.

The moral reality of war, however, does not have a simple bright-line asymmetry. Simply dividing the war between just and unjust collectives is not enough. This division, although in the right direction, leaves a *gap* between the combatant and its collective's cause for war. An unjust combatant's mere status does not entail that he is actually engaged in harming activities or pursuing an unjust end thus he does not fulfill the asymmetry condition. The gap between his status and the collective's harming or unjust end is filled with an assumption that he is. However, in order for TK to be justified as self-defense the asymmetry condition must be met; a condition that the collective accounts fail to satisfy. It is for this reason that is necessary an additional justification specifically for TK.

### SELF-DEFENSE

Self-defense is an "action taken to prevent or reduce harm to oneself (or one's property) threatened by another."<sup>240</sup> Self-defense is a constant activity that we perform in our daily lives. When citizens, for example, lock their doors at night or secure their lockers at the gym or put a password on their smart phones, they are engaged, in one form or another, in defensive action. Individuals, unconsciously or not, are consistently in a defensive mode.

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<sup>240</sup> Coons, C. Webber, M. 2016. "Ethics of Self-defense: The Current Debate" in *The Ethics of Self-defense*, ed. by Coons, C. Webber, M. OUP. p. 1.

Nevertheless, there seems to be no relevant issue with these actions. Defensive action becomes normative challenging when it is used to either mitigate or prevent a threat to one's life or property that could result in serious bodily harm or death against another individual.

The doctrine of self-defensive force, however, has an internal structure that limits the scope of permissible force directed at a target: necessity, proportionality, and liability. These concepts are essential in explaining self-defense, and must overlap for defensive force to be permissible. A person might have employed lethal defensive force necessarily and proportionally at a specific target, but the action, as a whole, could be impermissible since the target was non-labile. For example, to deter a murderer from killing Victim, the latter may grab a bystander as a shield causing his death. Was Victim's action necessary? Yes. Was it proportional? A life for a life seems proportional. Was the bystander liable to be used as a shield? She was not. For this reason, not only the concepts mentioned must be fulfilled, but also such requirements must overlap with a moral explanation of why the force is permitted. In the following sections these concepts will be examined and discussed. This examination will be followed in the same manner by the concept of causality as liability embodied in a self-defense principle in order to explain why a person could be permissibly killed.

### **4.2.1. NECESSITY, PROPORTIONALITY, AND LIABILITY**

A theory of self-defense has a conceptual core: necessity, proportionality, and liability. Their precise function is to regulate the use of force in a context of self-defense. Some authors consider such limitations as imposed by justice.<sup>241</sup> They cannot establish the permissibility of killing on their own, because a further explanation is needed as of why it is justified to direct lethal defensive force to a specific individual. The bystander scenario just mentioned is a case in point. The principles of justice also require an explanation of why a specific person is a permissible target. So, the concept of liability has the bulk of the weight in justifying lethal defensive force.

The other two concepts, however, are not totally inconsequential. They have a restrictive purpose internal to self-defense: they provide a basic formula to evaluate if the force used did not exceed what is proportional and necessary in defending one-self from unjustified harm.

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<sup>241</sup> Rodin, D. 2002. *War and Self-defense*. OUP. p. 42.

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Although they overlap and must be simultaneously fulfilled, both necessity and proportionality have distinct theoretical elements and are logically independent.<sup>242</sup> Also, both concepts could be easily confused. The fact that the force is proportional does not make it necessary, or the fact that force is necessary does not make proportional. In the incoming sections, an attempt will be made to present these concepts with clarity and precision with the objective of furthering an understanding their scope and limitations of self-defense.

### **a.1.Necessity requirement**

Necessity is when the victim finds as indispensable the use of force to repel, deter, mitigate, or stop a threat or an aggression. The term ‘indispensable’ establishes that the use of force has to be of last resort, that is, that they were not any other less violent or non-violent means of which the victim could have defended himself. The failure to fulfill this requirement could wrong the target. As Helen Frowe notes, “Absent any other justification for harming a person who is unnecessarily harmed in self-defense suffers a harm to which she is not liable, and is therefore wronged by the infliction of this harm.”<sup>243</sup> This is true even if the target meets the rest of the requirements of proportionality and liability.<sup>244</sup>

The basis for the concept of necessity is “the liberty to perform defensive action [that] is grounded in the fact that it is intended to protect a good or value. But general considerations of value will require us to choose the least costly course to the defense; [...]. This in turn requires us to inflict a harm only if it is necessary.”<sup>245</sup> Rodin notes that, “It is the requirement that one might only take a harmful measure to protect one’s legitimate right if there is no less costly course of action available that would achieve the same results.”<sup>246</sup> For example, Murderer who has a knife corners Victim and threatens to kill him. Victim has two options to repel Murder’s aggression, (1) he could use his own gun and kill Murderer, (2) or he could shoot Murder’s hand where he holds the knife thus incapacitate him from harming Victim. Under the necessity requirement, option (1) would be illegitimate. Using lethal force could not be justified due to the fact that there were less violent means to repel a lethal threat. This is not to say that Victim will always have to choose a lesser harm option if objectively available. His actions will be considered under what is reasonable under the circumstances.

Furthermore, necessity is not the same as imminence. An imminent threat is when the potential victim reasonably believes that he is about to be attacked. Imminence is itself a

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<sup>242</sup> Coons, C. Webber, M. 2016. “Ethics of Self-defense: The Current Debate” in *The Ethics of Self-defense*, ed. by Coons, C. Webber, M. OUP. pp. 5-7; Rodin, D. 2002. *supra*; Uniacke, Suzanne. 1994. *Permissible Killing: The Self-Defence Justification of Homicide*. Cambridge University Press. . pp. 33-4.

<sup>243</sup> Frowe, H. 2014. *Defensive Killing*. OUP. p. 89.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.* 40-1.

<sup>246</sup> Rodin, D. *Supra*, p. 40.

requirement and conceptually derivative from necessity.<sup>247</sup> A victim does not know with certainty if defensive force is necessary until the infliction of harm is imminent.<sup>248</sup> This is important since it conditions the timely use of permissible force. For example, a pre-emptive strike could be mistaken for self-defense, but it is actually preventive killing. Killing the person after the threat has subsided is not self-defense either. It could be an act of vengeance or a form of punishment. As George Fletcher observes, “A pre-emptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late. Legitimate self-defense must be in neither too soon nor too late.”<sup>249</sup>

It must also be noted that the principle of necessity requires that the use of force be of last resort. All other means to deter or stop a threat should be exhausted. This takes us to an internal condition of necessity, this is, the obligation to retreat from an attacker if by doing so the victim avoids harm.<sup>250</sup> As Rodin observes, “A corollary of the requirement of necessity is that there is a general duty to retreat from an aggressor if it is possible to avoid harm in this way.”<sup>251</sup> For example, if Pedestrian is walking down the sidewalk and headed in his direction is a car of which Driver has lost control, Pedestrian could (1) use his gun to kill the driver which will stop the vehicle, or (2) he could take a step aside (retreat) and let the car continue its course. This scenario demonstrates that killing Driver is unjustified. Because, although Pedestrian needs to kill Driver to not be killed, there were non-violent means to avert the threat, hence killing Driver was not necessary. The necessity requirement, therefore, answers the question if the use of force is (or was) indispensable, that is, if less violent or a non-violent means is (or was) absent when using defensive force. This makes the duty to retreat, as well as imminence, the “component[s] and corollary requirement[s] of necessity.”<sup>252</sup>

### ***a.2. Proportionality requirement***

The proportionality requirement conditions that the force used is not disproportionate to the threatened harm. As Rodin clearly states, “proportionality requires us to balance the harmful effects of the defensive action against the good to be achieved.”<sup>253</sup> If Jealous is going to scratch Owner’s car, it might be permitted for Owner to push Jealous to prevent him from damaging his car. Owner’s actions meet the proportionality requirement. However, if to prevent Jealous from scratching his car he were to kill him, these actions would not meet the

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<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Fletcher, G. 1998. *Basic Concepts of Criminal Law*. OUP. p. 133-4.

<sup>250</sup> Rodin, D. *Supra*.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

proportionality requirement. His actions would be judged disproportionate and correctly so.

Proportionality is not a permission to use equal force. It would be a mistake, as Christian Coons states, “to take the proportionality requirement as demanding that the defensive force must be simply equal or less than the threat itself.”<sup>254</sup> Rodin makes the same assertion, “we should note that proportionality does not demand equivalence between the harm avoided and the harm inflicted.”<sup>255</sup> Proportionality is not design to legitimize force with equal force. To illustrate this further, “if you are about to kill me with a knife and all I have to defend myself with is a gun or a bazooka then my use of it is proportionate even though a bazooka is a far more forceful of a weapon than a knife.”<sup>256</sup>

It also must be noted that proportionality has an internal criterion of appraisal. This internal appraisal requirement regulates the amount of force needed to preserve a valued good, which is different from the assessment to use defensive force. It requires, thus, a comparative appraisal between the good and value defended and the harm inflicted. The question of appraisal brings to the proportionality requirement an independent theory of value. What value or good is sufficient to fulfill the proportionality requirement when using lethal force? The answer is fact sensitive. A life for a life, for example, seems to be a general rule of thumb if it is strictly necessary to kill one person to save another. However, a life for a life is not dispositive. It would require further explanation as of why one life is chosen over the other. However, when what is being threatened is a limb or rape or property against a life, then such appraisal becomes controversial. To address this issue, Rodin states that, “Any principle of proportionality must rest at base upon a very fundamental appraisals of intrinsic value and worth.”<sup>257</sup>

To establish clarity on the question of appraisal it should be noted “that there is a deep moral distinction between serious attacks against the person, on the one hand, and attacks against property rights, on the other, such that one may rightfully kill in the first case, but not in the second.”<sup>258</sup> However, what if what is at stake is serious bodily harm such as losing a limb or going blind? Is lethal defensive force justified in such cases? In some instances lethal force might be justified when defending oneself from mutilation if the outcome is severe disfigurement or life incapacitation of some essential bodily function that would significantly impair personal freedom.

Hugo Grotius claims that if a serious bodily harm could result in death because of

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<sup>254</sup> Coons, C. *Supra*, p.3.

<sup>255</sup> Rodin, D. *Supra*, p. 46.

<sup>256</sup> *Ibid.* p. 42.

<sup>257</sup> *Ibid.* p. 46.

<sup>258</sup> *Ibid.* p. 43.

excessive bleeding, then lethal defense is permitted.<sup>259</sup> Rape is also an offense that could be defended with lethal defensive force. The offender does not intend to kill the victim, the potential transmission of a sexually transmitted disease like AIDS or a non-consented pregnancy, and the psychological harm could be a likely consistent injury throughout the victim's life. For example, let us see the next case,

**Captive:** Captor is holding Young Woman against her will by intentionally drugging her consistently, not because he wants to kill her, but because he intends to use her as a sex slave. Young Woman is aware of Captor's intentions, but is unable to escape or seek help. One day, the pills intended to drug Young Woman are ineffective. The only way she could escape is by killing Captor, who holds the keys to the locks.

Now, Young Woman is permitted to use lethal force against Captor because that is what is needed to escape and regain her freedom. Certainly there is not an equivalency between of liberty and life. However, due to other factors involved, it would be odd to conclude that Young Woman wronged Captor by using disproportionate force to escape enslavement and from rape. Thus, a military invasion with non-lethal means may be responded with defensive lethal force.

There might be other reasons why using lethal force might be justified when defending liberty. Rodin explains, "that it is conceivable that it might be proportionate to defend one's liberty with lethal force, for to deprive a person of liberty in certain contexts is to deprive them of a meaningful life."<sup>260</sup> John Locke could be of help here. Rodin cites Locke arguing that,

[Locke] argues that there is a general right to use lethal force against any person who will get you in his power by the use or threat or force. It is, he says, 'lawful for a man to *kill a thief*, who has not in the least hurt him not declared any design upon his life any further than by the use of force, so to get him in his power.' The reason is that, 'let his presence be what it will, I have no reason to suppose that he who will take away my liberty, would not when he had me in his power take away everything else', and 'to be free from such force is the only security of my preservation.'<sup>261</sup>

Also Kant's rationale for the permission for defensive force lies on the attacker's attempt in "...*the discounting of my agency*. The aggressor would use me (take my life) for his purposes. This is what I resist and claim moral title to refuse...it is not the fact of death but the death as a means to the aggressor's purposes that gives moral title to resistance and self-defense."<sup>262</sup>

Property rights, on the other hand, seem too difficult to equate with the value of life. The same might be said in the case of war. Can a State defend territorial integrity with lethal

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<sup>259</sup> Uniacke, S. *Supra*. p. 85.

<sup>260</sup> Rodin, D. *Supra*. p. 47.

<sup>261</sup> *Ibid*. p. 135.

<sup>262</sup> Quoted in Frowe, H. 2014. *Defensive Force*. OUP. p. 109-10. Italics added.

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defensive force if there is no lethal threat to anyone? Can a State defend itself against a bloodless invasion? Maybe not. The reason for this might be that when your property has been damaged or destroyed there is the possibility of restitution or redress that is absent with the lost of a limb or the lost of life. An analogous scenario could occur in the international arena among states. First, let's evaluate the next case,

**Groceries:** Head of Family comes home with the month's groceries. When he turns his back to open the garage, Food Thief leaps from the bush and puts all the bags in his cart. Head of Family, surprised, kills Food Thief before he could escape.

In this last case I do not think that defensive force is justified according to the proportionality principle. Losing a month's worth of groceries is unfortunate, but such a loss does not rise to the level of requiring the use of lethal force. The same may be said in the case of an aggressor state invading an unpopulated territory of another state. However, the defense of property rights with lethal force might be permitted in some specific circumstances. If the food threatens to be stolen is the only food available to be stored in a bunker because of an imminent nuclear attack, lethal force might be proportional. There is also the case if what is being destroyed or damaged is an oxygen tank or some other life supporting machine, the owner might use lethal force. Likewise, if the territory in question is of vital importance for the livelihood of a particular state and is under its just control and jurisdiction, then military force might be proportional in its defense.

That being said, both necessity and proportionality are necessary requirements for self-defense. Consequentially, TK, when employed in war, must meet these standards. TK must be proportional to the threat posed by the specific individual and killing him is necessary to repel, deter, mitigate, or stop a threat or the aggression that he specifically poses. However, these sole requirements might not be sufficient.<sup>263</sup> The person at whom lethal force is being directed must be justified, that is, the target must be liable.

### ***a.3. Liability Requirement***

Liability is probably the most important element of self-defense when it comes to the use of TK in war. As we saw in the last chapter (it must be reiterated), the models were inadequate to justify the use of TK. These model's liability accounts are not suited for individualized killings. Collective self-defense might be suited for the traditional means of warfare and in many cases such an approach is consistent with the realities of collective of armed conflict. They might not be inherently flawed. However, TK is not a traditional means of warfare and

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<sup>263</sup> Rodin, D. *Supra*. p. 42.



as a consequence it challenges the established accounts of liability. Thus, what is needed is a specific account of liability based on an individualized doctrine of self-defense that best suits TK in armed conflict.

Liability requirement establishes the conditions in which a specific individual might be subject to defensive force. A person is liable to be harmed only if harming him will serve some further purpose.<sup>264</sup> However, as it stands it could produce undesirable results. The next case can illustrate this point,

**Jogger:** Jogger is in Central Park making his morning run and suddenly a javelin is headed in his direction, to avoid being killed, he uses Bystander as a shield.<sup>265</sup>

Accordingly, to the definition of liability, Jogger will be permitted in grabbing Bystander because using him as a shield will serve for some further purpose. For this reason liability has to be supplemented with a moral theory. McMahan, acutely aware of this, adds to the definition of liability that, “At least part of what it means to say that a person is liable to attack is that he would not be wronged by being attacked, and would not have no justified complaint about being attacked.”<sup>266</sup> Not to be wronged entails a substantial reason for making an exception to the protection not to be killed. Therefore, there must be something about the target that makes him liable. A reason that does not rest solely on his instrumental value or his threatening activity.

Here liability has to be distinguished from desert. Liability is instrumental whereas desert is not.<sup>267</sup> As McMahan notes, “desert is commonly understood, a person can deserve to be harmed, and there can be reasons to harm him, even if harming will not prevent or rectify any other harm.”<sup>268</sup> If a person deserves to be harmed, there is a moral reason for harming him that is independent of the further consequences of harming him.<sup>269</sup>

There are two constitutive elements of the liability requirement. First, the target should not be wronged when he is subject to defensive harm.<sup>270</sup> There must be a substantial reason for which the target would not have a justified complaint against his assailant. Secondly, the person killed has to have the purpose of furthering a goal. The killing must be a means to a specific end, i.e., prevent unjustified harm.<sup>271</sup> Accordingly, in armed conflict, when employing TK, a combatant must not be wronged and the killing must be instrumental

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<sup>264</sup> McMahan, J. 2009. *Killing in War*. OUP. p. 8.

<sup>265</sup> Acquired this hypothetical case from Otsuka, M. *Infra*.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*.

<sup>268</sup> McMahan, J. 2016. “The Limits of Self-defense” in *The Ethics of Self-defense* ed. by Coons, C. and Weber, M. OUP. p. 192.

<sup>269</sup> McMahan, 2009. p. 8.

<sup>270</sup> *Ibid*.

<sup>271</sup> *Ibid*.

in preventing an unjustified wrong.

In the literature, there are two views regarding the specifics of how it would be permissible to achieve a set goal: narrow liability and broad liability.<sup>272</sup>

According to the broad account of liability, once a person is liable to defensive harm, she may be proportionately harmed to avert any unjust threat, not just the particular threat for which she is responsible.<sup>273</sup> Narrow liability, on the other hand, holds that a person can be liable only to the defensive harm that averts the particular threat for which she is responsible.<sup>274</sup> To illustrate these two forms of liability, let us see the next case,

**Lookout:** Bank Robber threatened the bank-tellers and the clients that if the bank's money and their belongings are not given to him, he will kill them all. Suddenly, a shoot-out with an Off Duty police officer ensues. The only way for Off Duty to stop Bank Robber is to shoot Look-Out who is on the second floor and would fall on Bank Robber.<sup>275</sup>

If we are going to proceed with broad liability, shooting Look-Out is permissible because, as an accomplice of the ongoing bank robbery, he is morally responsible for an unjust threat, and that the harm we inflict upon him is proportionate to the threat for which she is responsible. On the contrary, if we use narrow liability, killing Look-Out would not be permissible because it would not avert the particular threat for which she is responsible. Bank Robber is the agent posing lethal-threat, not Look-Out.

As we could see, self-defense has numerous moving parts, either internal or external that must overlap to make killing in self-defense a coherent doctrine. These concepts, although necessary, do not answer the questions regarding the permissibility of killing the threat. Just posing as a threat would not be sufficient. It is too mechanical. Liability must have an underlying theory that supports it. There are several models that seek to support an account of liability: causality, responsibility and culpability. Each of these has their particular explanations as of why using lethal defensive force as self-defense is justified.

### 4.3. *Culpability account*

Kimberly Kessler Ferzan defines culpability as “when an aggressor acts purposefully, knowingly, or recklessly (and without justification or excuse), any of these states should suffice for altering the culpable aggressor's status vis-à-vis the defender such that the

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<sup>272</sup> Frowe, H. 2014. *Defensive Killing*. OUP. p. 188.

<sup>273</sup> Ibid. p. 189.

<sup>274</sup> Ibid.

defender does not wrong the culpable aggressor by killing him.”<sup>276</sup> And adds that, “In all cases of culpability, the aggressor has clearly altered his moral standing vis-à-vis the defender. The aggressor intends to violate the defender’s rights. Because this is something he is not permitted to do, his culpability renders him liable to defensive force.”<sup>277</sup> The moral asymmetry between aggressor and defender stands on the fact that aggressor intends to violate the latter’s right knowingly, purposefully, and recklessly. This alone will not do. If such is the case, then innocent aggressors and innocent threats will be non-labile thus subjecting victim to surrender to her death.

The Driver scenario, for example, is a case in point. If Driver loses control of his vehicle and heads towards Pedestrian, and the latter has a gun with which she can stop Driver, this defensive act will be impermissible. Driver has not acted with intention or sheer recklessness. As a matter of fact, he checks his vehicle daily to insure that his vehicle does not have any mechanical issues. If we transfer this logic to armed conflict, very few, if any, wars can be fought in self-defense. Members on an unjust collective may be fraught with innocent aggressors and innocent threats. Key members might be non-labile since they are not culpable, this is, acting in a knowing or purposefully or recklessly manner. Such an account will severely restrict what would otherwise be legitimate lethal defensive force. Hence, a culpable account of self-defense is not suited to target single and specific targets in armed conflict.

### ***4.4. Moral Responsibility Account***

Michael Otsuka account of self-defense argues that the intentional or foreseeable killing in self-defense of an innocent person is unjustifiable.<sup>278</sup> There are two innocent persons that are his primary concern, innocent threat, and innocent aggressor. An innocent threat is a person "whose mere movements qua physical object or mere presence constitutes a threat to our life."<sup>279</sup> Her non-responsibility is because her endangering presence or movements are involuntary, non-intentional, and the outcome of circumstances is entirely beyond her control.<sup>280</sup> On the other hand, "An Innocent Aggressor is a person who poses a danger to your life because she is acting from an intention to kill you. She remains innocent, however, since

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<sup>276</sup> Ferzan, K.K. 2012. "Culpable Aggression: The Basis for Moral Liability to Defensive Killing" in *Ohio State Journal of Criminal Law*, vol. 9, no. 2 2012, p. 684

<sup>277</sup> Ibid, p. 685.

<sup>278</sup> Ibid, p. 74.

<sup>279</sup> Ibid, p. 75.

<sup>280</sup> Ibid.

she is not responsible for her behavior because, rather than proceeding from her character, it is explained by other factors completely beyond her control."<sup>281</sup>

Otsuka's argument stands on the notion of a "bystander", defined as "someone who does not herself endanger your life and who is not responsible for whatever it is that does endanger your life."<sup>282</sup> Killing an innocent threat is, in his view, the same wrong as killing an innocent bystander. He argues that "killing a Bystander is, other things equal, morally on a par with killing a Threat and that it is impermissible to kill a Bystander and hence impermissible to kill a Threat, and the killing of an Aggressor is morally on a par with the killing of a Threat and hence also impermissible."<sup>283</sup>

His argument has two premises. The first premise, which he calls the 'Inviolability of a Bystander Thesis', states "it is impermissible to kill a Bystander to prevent oneself from being killed."<sup>284</sup> His second premise, the 'Moral Equivalence thesis' states that the "killing of a Threat and the killing of a Bystander are, other things equal, on a par as far as permissibility is concerned."<sup>285</sup>

The question is, then, what does Bystander and Threat share that makes them equally immune from defensive killing? Otsuka response is that they both share an essential and morally relevant property, that is, a "lack of responsible lethal agency."<sup>286</sup> The actions of the body are independent of the "person." What is relevant is the person, not the body. He argues that "no sound moral rationale has yet been advanced for the principle that the unavoidable insertion of one's body into a lethal sequence of events strips one of one's moral immunity from being killed."<sup>287</sup>

This view might be mistaken. The person's innocence is of equal value of the victim's innocence thus they both have an equal immunity from being killed. The use of defensive force is not against the person's agency but to repel the other's corporeal actions. When permissible defensive force is directed against an aggressor or a threat it is not because they are non-innocent but because it is the only way to stop an unjust lethal threat. The person will maintain his or her innocence. Defensive force is against an action, not his agency. The notion of agency has little relevance to determine permissibility to use lethal defensive force. Inquiring what is the agent's agency might be essential to ascribe punishment, fault,

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<sup>281</sup> Ibid. p. 74.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid. p. 76.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid. p. 84.

<sup>287</sup> Ibid. p. 85.

culpability, excuse, or the degree of harm that the person might be liable, but it is not decisive as to whether or not a victim under an unjustified threat could use lethal defensive force.

However, someone could object that although Bystanders and Innocent Threats have in common the fact of non-intentionality Innocent Aggressor, on the other hand, does not. Otsuka response is that the intention to kill does not come from the aggressor's agency hence Innocent Aggressor is not responsible. The example that Otsuka uses is that of "someone who is pursuing you with a meat cleaver because she is moved by an uncharacteristic and overwhelming rage that has been induced by a powerful mind-altering drug that someone has slipped into her morning coffee."<sup>288</sup> With this case the line of reasoning seems clear, non-agency equals non-intention that in turn causes lack of responsibility, hence agent retains immunity from being killed.

However, there might be cases in which the innocent might be killed, that is when they are blameless, yet "are morally responsible for trying to kill you."<sup>289</sup> He argues that, "the presence or absence of harmful agency is morally relevant only in cases involving those who are functioning as morally responsible agents."<sup>290</sup> These are individuals who are innocent of blame but are responsible because their agency is not impaired. He argues that,

When one is in possession of rational control over such a dangerous activity as the shooting of a gun at somebody, it is not unfair that if the person one endangers happens to be innocent, one is by virtue of engaging in such dangerous activity stripped of one's moral immunity from being killed. A responsible agent takes a gamble by placing this moral immunity on the line when she engages in such avoidable risky activity.<sup>291</sup>

I find this argument, as a whole, unpersuasive. Why should it be relevant or decisive to the victim the distinction between being blameless and blameworthy if ultimately the threat is unjustified? Such a distinction does not have any impact on the victim's permission to use lethal defensive force against an unjust attack. I believe that Otsuka's theory of self-defense demands too much. As Kaufman notes, "According to some prominent philosophers, considerations of moral theory require us to [...] hold that there is no moral basis for killing an innocent person, even in necessary self-defense. It follows that there is a duty of martyrdom when faced with an Innocent Aggressor."<sup>292</sup> "[M]orality" he states, "does not require martyrdom."<sup>293</sup> I agree with Kaufman. To argue that morality requires the passive acceptance to be unjustifiably killed because the threatening or attacking agent does not have a murderous intent seems to go beyond what is intuitively required.

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<sup>288</sup> Ibid. p. 74-5.

<sup>289</sup> Ibid. p. 75.

<sup>290</sup> Ibid. p. 90.

<sup>291</sup> Ibid. p. 91.

<sup>292</sup> Kaufman, W. 2010. "Self-defense, Innocent Aggressors and the Duty of Martyrdom" in *Pacific Philosophical Quarterly*, p. 78.

<sup>293</sup> Ibid. p. 94.

### 4.5. CAUSALITY AS LIABILITY AS A PRINCIPLE OF SELF-DEFENSE

As we could see, self-defense has numerous moving parts, either internal or external, that must overlap to make killing in self-defense a coherent doctrine. These concepts, although necessary, do not answer the questions regarding the permissibility of killing the threat. Just posing as a threat would not be sufficient. For example, if two individuals are in a boat that is struggling to stay afloat and for either of them to survive, one has to be thrown into the water to certain death, then we have a case in which both individuals are threatening, not just one. In such a scenario, we would have a potential case of self-preservation, not self-defense. It is a situation that Richard Norman calls “a forced choice between lives.”<sup>294</sup> The boat case suggests that there should be a moral asymmetry among the agents in cases of alleged self-defense. Norman describes the asymmetry requirement as the distinctive feature of self-defense. He notes that, “In contrast to such cases, what seems to be distinctive of self-defense situations is not just the forced choice between lives, but the *asymmetry* of the situation.”<sup>295</sup> As Rodin observes, we “must address the question of why the defender is justified in killing an aggressor and not vice versa. We may call this the problem of explaining the moral asymmetry.”<sup>296</sup>

That being said, the question that follows is, what is it about the recipient of the lethal defensive force that would make him liable to be killed, thus establishing the necessary asymmetry? What should be the morally relevant factor, along with the fact that he posing as a threat, makes him a permissible target of lethal defensive force and ultimately ‘tips the scales’? The first factor to examine is the nature of the threat. Is the threat justified or unjustified? The second factor is if the target is the immediate cause of the threat. That being said, a person is liable to lethal defensive harm if he is the immediate cause of an unjustified threat to the victim's life. Thus, responsibility for posing for an immediate cause of an unjust threat will be the basis for the moral asymmetry between the victim and the target. With these elements, along with what has been discussed in the previous sections, causality as self-defense will be defined as follows,

***Principle of Self-Defense:*** If the target is the immediate cause of an unjustified lethal threat or has a significant role in the chain of causality (liability clause), and the Victim does not have any non-violent and less-violent means to avert or stop the said threat (necessity clause), and the use of force is proportional to the good defended (proportionality clause), Victim is justified in using self-defense (PS-D).

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<sup>294</sup> Norman, R. 1995. *Ethics, Killing and War*. CUP. p. 121.

<sup>295</sup> Ibid. p. 122.

<sup>296</sup> Rodin, D. *Supra*. p. 50.

### *Causality as Liability*

The central core of causality as liability has three requirements that can be stated as follows. First, the cause of the threat ought to be unjust. An unjustified threat is understood as the potential wrongful killing of the victim by the person causing the threat. Second, the target is a direct cause or is a significant link in the chain of causality. Lastly, by killing the threat, the victim will reasonably believe that the threat would cease or mitigate.

The first requirement that the threat ought to be unjustified is the bedrock for the asymmetry relationship between the agents involved. One of the agents must have not provoked, neither deliberately nor negligently nor by omission, the threat to his life. There might be some scenarios, however, in which the victim, by using disproportionate or unnecessary force, turns permissible force into an unjust threat rendering him liable to defensive force. In criminal law theory, this is understood as the 'excessive force exception' or the 'withdrawal exception'.<sup>297</sup> The excessive force exception is when an attacker who initiated the events is permitted to use defensive against the initial victim. In the state of Louisiana, the instructions to the jury regarding the 'excessive exception' is expressed as follow, "notwithstanding that one is the original aggressor, he nevertheless uses force or violence in defense of his person if the person originally attacked uses excessive force against him or force beyond what is reasonable required under the circumstances."<sup>298</sup> The same instructions state, regarding the question of the 'withdrawal exception,' that if the initial aggressor "withdrew from the conflict; and that his withdraw was in good faith; and that he withdrew in a manner that puts his adversary on notice that he wished to withdraw and discontinue the conflict" but the victim continued with attacking the initial aggressor, the latter could claim self-defense.<sup>299</sup>

The second requirement that the target should be the cause of the threat goes to the heart of the matter. It narrows defensive force specifically to the danger that is causing the lethal threat to the victim's life. This link, between the victim and the threat, is the initial basis to constitute a potential asymmetrical relationship among them. Thomas Nagel argued that, "[the] hostile treatment of any person must be justified in terms of something about that person which makes the treatment appropriate. Hostility is a personal relation, and it must be suited to its target."<sup>300</sup> However, causal responsibility is not a clear-cut explanation for the

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<sup>297</sup> University of Minnesota Libraries Publishing. Criminal Law. Accessed June 15, 2020. <https://open.lib.umn.edu/criminallaw/chapter/5-2-self-defense/>

<sup>298</sup> State v. Belgard, 410 So. 2d 720 - La: Supreme Court 1982

<sup>299</sup> Ibid.

<sup>300</sup> Nagel, T. 1972. "War and Massacre", *Philosophy & Public Affairs*, Vol. 1, No. 2, p. 132.

permissible use of force. The difficulty stems from the fact that there could be degrees of responsibility that could be below the threshold of liability.<sup>301</sup>

There is not a clear answer of what should be the degree of causal responsibility of the target that would render him liable. However, to prevent suggesting sophisticated metrics of causality and causing confusion in already convoluted scenario, this condition should be adjusted to the third and last requirement, which is that the victim believes that by *only* using lethal defensive force against the target, the threat to his life would cease or mitigate (this could be considered as the epistemic condition). This last requirement answers the question of the level of causal responsibility for the unjustified threat. If the target is believed to be causally responsible and by directing lethal defensive force against him, the threat ceases or mitigates, then the question is answered by the latter fact. This epistemic condition solely requires that the victim reasonably believes that the lethal force employed would stop the threat or mitigate the threat or give him a fighting chance. It does not require the cessation of the threat as a fact. In war, this element does not necessarily change much. Actually it might be more stringent since the target is selected with some anticipation. What should be reasonable will be discussed in the next chapter but what can be anticipated is what ought to be reasonable will have a higher threshold than in a spontaneous one-on-one scenario..

This subjective belief of an imminent threat brings to the fore the epistemic responsibility condition. This condition is not related to causality as the other two and it is not necessary for the *internal* operation to the principle. It is nevertheless relevant. If the victim (or the state) does not have such a requirement (reasonableness), it would allow fear or vengeance or pressure to dictate, and probably justify the killing of another person. However, the requirement of cessation as a fact would demand too much. The victim should judge the threat as reasonable as a person in such a condition could. Such an evaluation should be void of recklessness or negligence in properly adjudicating the facts at hand. Justice Oliver Wendell Holmes noted that, “detached reflections cannot be demanded in the presence of an uplifted knife.”<sup>302</sup> Rodin also notes that, “it must be recognized that these restrictions operate in less than ideal circumstances for deliberation. Judgments about necessity, imminence and proportionality must be such as to be capable of being made by frightening victims facing situations of extreme stress and danger. [...] The standards of necessity and proportionality must thus be interpreted with a degree of latitude an allowance for reasonable error.”<sup>303</sup>

Self-defense based on causal liability distinguishes itself from other accounts in that it

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<sup>301</sup> Frowe, H. and Renzo, M. 2020, “Introduction: Symposium on Causation in War.” in J Appl. Philos. pp. 1-5.

<sup>302</sup> Cited in Rodin, D. *Supra*, p. 42.

<sup>303</sup> Rodin, D. *Supra*.



does not condition the use of lethal defensive force to a system of rights or moral concepts such as guilt, culpability, or innocence.<sup>304</sup> On the other hand, this principle of self-defense is similar in some respects to those presented by Judith Jarvis Thomson, Suzanne Uniacke, and G.E.M. Anscombe. Thomson elaborates an objective rights theory with a notion of forfeiture, "it is not because they will otherwise kill you, that you may proceed; it is because of the entirely impersonal fact that they will *otherwise violate your rights that they not kill you* that you may proceed."<sup>305</sup> Uniacke argues that the "permissibility of homicide in self-defense is grounded in the fact that the act is one of resisting, repelling, or warding off an unjust immediate threat. The positive right to use lethal force in self-defense, and in defense of others, does not derive from culpability on the part of the aggressor, nor from the fact that an unjust aggressor can be said to have forfeited right to life."<sup>306</sup> Anscombe notes that "What is required, for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or - the commonest case - should be unjustly attacking him. Then he can attack them with a view to stopping them [...]"<sup>307</sup>

That being said, it must be noted that causal responsibility is a minimal moral condition: it does not consider the target's moral agency as decisive when employing lethal defensive force. More specifically, it does not consider the target's blameworthiness, culpability or moral innocence. A person's causal link to a threat might not be his fault or his intention, but neither is necessary to qualify the moral status of a threat. The relevant normative factor is the latter, what is the moral status of the threat, this is, is the threat justified or unjustified. The aggressor's intentions or faults do not play a role in deciding its status.<sup>308</sup>

In the following sections I will test this principle in cases involving innocent threats, innocent aggressors and bystanders and try to explain why intent or fault might not have dispositive role in justifying self-defense. This testing is important since the asymmetry between just and unjust combatant is not enough. There might be unjust combatants whom for several reasons might be acting with ignorance of the unjust aim of their cause. So, they might be innocent but they are nevertheless aggressors or threats. As it was argued in the last chapter, collectivizing liability solely on the basis of membership is not sufficient to employ TK against unjust members. Not all unjust combatants are contributing to the unjust cause or

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<sup>304</sup> Responsibility is employed in the causality principle is mainly descriptive. It has no moral evaluative function.

<sup>305</sup> Thomson, J.J. 1991. "Self-defense" in *Philosophy and Public Affairs*, Vol. 20, No. 4. p. 308.

<sup>306</sup> Uniacke, S. *Supra*, p. 177.

<sup>307</sup> Anscombe, G.E.M. 1961. "War and Murder" in *Ethics, Religion and Politics*, p. 53.

<sup>308</sup> Thomson, J.J. *Supra*. pp.

their specific contributions do not pass the threshold to be liable. Further discrimination beyond the collective's moral status is needed to justify TK.

### 4.5. INNOCENT AGGRESSORS, INNOCENT THREATS AND BYSTANDERS

The principle of causality will be tested against innocent threats, innocent aggressors, and innocent bystanders. Answering if an innocent individual could be subject to lethal defensive force is quite challenging, and correctly so. An innocent person has a general protection not to be killed. However, in certain circumstances, and as an exception, an innocent person might be justifiably killed. As Whitley Kaufmann notes, "It is apparently a feature of every legal system around the world that self-defense is permitted against not only malicious attackers but against innocent attackers as well."<sup>309</sup> What could explain this exception? A plausible answer is that the victim of an innocent threat might have compelling reasons that override the protection that innocence provides. In this section, these reasons will be explored by testing their strength against the killing of an innocent person. The conclusion is that an individual under threat has agent-relevant permission to choose his life above the person who is causing an unjustified threat and that the moral innocence of the threat does not impose a duty to submit to an unjust lethal force.

In the following cases innocence will be understood as free of fault or moral responsibility and understood as not harming.<sup>310311</sup> As Nancy Davis notes,

It has been claimed that it is not the moral innocence of an attacker that is relevant to the question of whether or not we can claim justification in killing another person to preserve our own life. What matters is what has been termed causal or technical innocence: attackers are not technically innocent when their actions, behavior, or (in some instances) mere movements qua physical objects, or mere presence constitutes a threat to another person's life.<sup>312</sup>

#### *Innocent Aggressor*

An innocent aggressor is an attacker who has intent to kill the victim, but such intent is not due to his agency.<sup>313</sup> The lack of agency might be manifested under different conditions. It might be a case of an insane person, a person who goes on a blind rage or someone who is simply brainwashed. In war, combatants might fall under the latter. Heavy state propaganda can turn independent thinking men into amoral killing machines. Such a person is acting without moral agency since it has been high-jacked by extreme indoctrination. His actions, morally speaking, do not make him morally culpable so he retains his moral innocence. G.P.

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<sup>309</sup> Kaufmann, W. p. 79.

<sup>310</sup> Thomson, J.J. *Supra*, p. fn. 1.

<sup>311</sup> Anscombe, G.E.M. *Mr. Truman's Degree*, p. 67.

<sup>312</sup> Nancy, D. 1984. "Abortion and Self-defense" in *Philosophy and Public Affairs*, Vol. 13., No. 3., p. 188.

<sup>313</sup> Otsuka, J. *Infra*.

Fletcher notes that, “The problem of the psychotic aggressor is whether one may, as a matter of right, kill a faultless, insane assailant, to save oneself or another from death, rape, or serious bodily harm.”<sup>314</sup> Is it justified for the victim (or the state) to kill a morally innocent person? Laurence A. Alexander gives as an example,

You find yourself on an elevator between floors with a person who is psychotic and homicidal. He draws a knife and approaches you menacingly. You pull out the snub-nosed .38 that you carry for self-defense and shoot him, reasonably believing that you must shoot him when and where you do to avert death or serious injury. He dies from the wound.<sup>315</sup>

Again, is the victim (or the state) justified in using lethal defensive force against the innocent aggressor? We could begin by evaluating if the preliminary conditions of necessity and proportionality conditions are met. These two requirements will be met if the use of force is necessary because there are no non-violent or less violent means to deter the threat, and it is proportional to the good defended. The latter requirement is fulfilled because what is defended is a life. The question of necessity is present since there is no lesser or non-violent means to confront the threat. Trapped in an elevator with a homicidal individual under a psychotic episode leaves the victim with no choice but to act in self-defense. In war, there is so much at stake for either side that it might be analogous to being trap in a zero/sum game like in an elevator. Then, how is the innocent aggressor liable to lethal defensive force? He is, according to the causality principle, the immediate cause of an unjustified lethal threat. The victim has done nothing that would make her a legitimate target of lethal force and has no moral duty to surrender his life to the psychotic aggressor. The same might said of the innocent aggressor unjust combatant. There is no relevant distinction that could lead to a different conclusion.

### ***Innocent Threat***

If we change the innocent aggressor to an innocent threat, the line of reasoning will not go any different. An innocent threat is a non-attacker with no intention to kill who nevertheless is posing a lethal threat to the victim's life.<sup>316</sup> Robert Nozick defines innocent threat as “someone who innocently is a casual agent in a process such that he would be an aggressor had he chosen to become such an agent.”<sup>317</sup> There are many innocent unjust combatants who are not aggressors but their potential in becoming one is real possibility. Pilots and drivers that bring troops and resources to and from the front lines are not aggressors, they are not

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<sup>314</sup> Fletcher, G. P. 1973. “Proportionality and the psychotic aggressor: vignette in comparative criminal theory” in *Israel Law Review*, 83, p. 370.

<sup>315</sup> Alexander, L. A. 1987. “Justification and Innocent Aggressors” in *Wayne Law Review*, Vol. 334, p. 1177.

<sup>316</sup> Otsuka, J. *Infra*.

<sup>317</sup> Nozick, R. 2013. *Anarchy, State and Utopia*. Basic Books. p. 34.

actually engaged but their particular activities of aiding and abetting is threatening. Nozick asks, “if someone picks up a third party and throws him at you down at the bottom of a deep well the third-party is innocent and a threat [...]. Even though the falling person will survive his fall onto you, may you use your ray gun to disintegrate the falling body before it crushes and kills you?”<sup>318</sup>

Nozick leaves this as an open question,<sup>319</sup> but if we were to answer the victim at the bottom of the well may permissibly use his ray gun. Being trapped in a deep well where there is no mobility to avoid being crushed puts the victim in a situation of necessity. The questions of proportionality and of liability are also met. The falling person is the immediate cause of an unjustified threat to the victim and killing him is proportional to the threat he is posing. And finally, there is no factor that could compel for the victim to simply allow the innocent threat to crush him to death. The same may be said of an invading army. Thousands of enemy troops are begin to cross the border and each combatant has a specific function. While will do the fighting, other will assist in the fighting. Their assistance might not make them aggressors, yet their threatening activity does make them liable under the causality principle since they have a significant role in the chain of causality.

### ***Innocent Bystander***

A bystander, on the other hand, has no *causal* link to the actual threat to the victim's life.<sup>320</sup> A bystander is innocent in the sense that they are neither aggressing nor threatening the victim. In armed conflict a civilian is the equivalent of an innocent bystander. There are several explanations of why killing a bystander (or a civilian) is wrong. According to the causality principle, the bystander is not an unjust cause threat to your life. On the other hand, if a victim decides to grab bystander to shield himself from a bullet or initiates a process that would foreseeably kill a bystander, the victim would be using the bystander as a means. Using a person for one's ends is depriving that person the proper dignity of which he or she is entitled.<sup>321</sup>

There are several critiques to the causality principle. Rodin argues that “the difficulty with this proposal is that the notion of causal responsibility has insufficient moral substance to ground the distinction we require.”<sup>322</sup> To illustrate this point, he notes, as an example, the “Innocent Bystander who blocks my route of escape is properly described as casually

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<sup>318</sup> Ibid.

<sup>319</sup> Ibid. pp. 34-5.

<sup>320</sup> Otsuka, J. 2009. *Infra*, p. 508.

<sup>321</sup> Rodin, D. *Supra*. p. 82.

<sup>322</sup> Ibid.

responsible for the threat to my life. He is a cause in the sense that he is an enabling condition of the threat.”<sup>323</sup> This is not correct. The fact is that Innocent Bystander is not the immediate threat (he is not *conditio sine qua non*) and killing him would not stop the threat. Rodin further asks “why should the fact that someone is a direct cause of a threat to my life make them an appropriate object of a defense of actions whereas the fact that they are in enabling condition does not?”<sup>324</sup> I do not understand how Innocent Bystander is enabling the threat to the victim’s life. If Innocent Bystander is unaware that the victim is in danger and at the same time his actions are not unjustified, then it will be difficult to argue that Bystander is *enabling*, if by that we mean to give the authority or the means for the murderer to achieve the killing of the victim. However, if Bystander becomes aware of the ongoing threat to victim and decides not to move (without incurring in any harm to herself), it would change her moral status from innocent bystander to innocent aggressor.<sup>325</sup>

### 4.6. TARGETED KILLING AS SELF-DEFENSE IN ARMED CONFLICT

Could TK be employed under the causality liability principle of self-defense? Yes. It can. I do not see any problem the selection of an individual who is the immediate cause (narrow liability) of an unjustified lethal threat or has a significant role in the chain of causality (broad liability) and the Victim does not have any non-violent and less-violent means to avert or stop the said threat (necessity clause), and the use of force is proportional to the good defended (proportionality clause), Victim is justified in using self-defense.

In section 3.2. of the last chapter, a definition of TK was presented along with a discussion of its internal concepts: 'lethal force,' 'prior selection,' 'deliberate intent,' and 'lack of custody.'<sup>326</sup> The definition was presented as,

[T]he use of lethal force attributable to a subject of international law with the intent, premeditation, and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.<sup>327</sup>

I do not see any inconsistency between the principle of self-defense that I have proposed and the TK with exception to the concept of 'prior selection' and the fact the entity who is carrying out the killing is the State.

The question of prior selection raises some issues with the concept of necessity and imminence. If the State has the time to select an individual to be deliberately killed previous any actual or ongoing threat, it would be difficult to claim that it was self-defense. Melzer

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<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> It must be noted that what it is not permitted is killing Innocent Bystander. Some harm is permitted if it is necessary to save Victim’s life. If such is the case Innocent Bystander is entitled for compensation.

<sup>326</sup> Melzer, N. 2008. *Targeted Killing in International Law*. OUP. pp. 437-8.

<sup>327</sup> Ibid. p. 5.

observes that “targeted killings constitute *premeditated* deprivations of life that can only rarely be justified with unprovoked, absolute and immediate necessity within the strict meaning of self-defence and defence of others.”<sup>328</sup> McMahan acknowledges this by noting that there is a “feature of targeted killing that would appear to make it difficult to justify on the grounds of liability. This is that targeted killing is *preventive* [...]”<sup>329</sup>

Another issue that could arise between targeted killing and self-defense is the fact that it is the State who is carrying out the killings. State killing has always been controversial, i.e., the death penalty. This form of killing, however, is punitive killing and requires a different kind of justification. Self-defense is a different matter. What generally justifies lethal defensive force against another person is to defend a life or the lives of others. The State is an abstract entity. It could hardly be argued that the 'State' is protecting itself against harm. There must be something else that justifies the state use of lethal defensive force. The State has a responsibility to protect and provide security to its citizens.<sup>330</sup> This responsibility emanates from the permission that its individual citizens have in employing lethal defensive force against an unjustified threat.<sup>331</sup> The State's permission to kill is constrained by exceptions. As Melzer notes, “Exceptions are subject to the rule of law and strictly confined to situations of individual self-defence or defence of others, military hostilities and, in some societies, capital punishment. Each of these exceptions relies on a different argumentative paradigm to solve or, at least, suppress the moral dilemma generated by the intentional deprivation of human life.”<sup>332</sup>

However, the analysis of TK in this research is in the context of armed conflict. The concept of necessity and imminence and State use of violence could be understood differently. During war, there is an ongoing threat that is imminent or actual. The enemy state has expressed its intention to initiate hostilities either by firing shots or by a formal declaration of war. Therefore, imminence is an active condition as long there is a positive intent of hostilities by at least one side of the belligerents. The enemy's members are actively planning and/or engaging in inflicting harm and killing until the cessation of hostilities. Until the latter occurs, it is reasonable to assume that the threat is imminent, actual and ongoing.

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<sup>328</sup> Ibid. p. 435. Italics added.

<sup>329</sup> McMahan, J. 2012. “Targeted Killing: Combat, Murder or Law Enforcement” in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. by Finkelstein, C, Ohlin, J.D. Altman, A. p. 138.

<sup>330</sup> Rodin, D. 2002. *War and Self-defense*. OUP. p. 123.

<sup>331</sup> Ibid.

<sup>332</sup> Melzer, N. *Supra*, p. 434.

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On the other hand, the State, under the *jus ad bellum* doctrine, it has the permission to use lethal force in self-defense against its security threats. Also, at the *in bello* level, as it was discussed, a combatant, at all times during hostilities is a legitimate target. As Melzer notes,

[I]n *military hostilities*, the killing of human beings is understood as an impersonal act motivated by the military necessity of achieving victory over the adversary in an inter-collective confrontation. The killing does not take place between private individuals for personal motives, but between anonymous agents of the opposing parties to an armed conflict. Thus, combatant individuals become 'legitimate military objectives', and incidental civilian deaths are rationalized as 'collateral damage'.<sup>333</sup>

Melzer does not ignore the fact that "targeted killings, by definition, are directed against selected individuals," and states that "they constitute the conceptual antithesis of depersonalized, inter-collective warfare and often come dangerously close to the denial of quarter."<sup>334</sup> And concludes that, "Most State-sponsored targeted killings [do not] fit into [armed conflict] paradigms and, therefore, leave the underlying moral dilemma unresolved."<sup>335</sup>

In order to tackle Melzer's observations, the question that follows is how does causal liability as self-defense could be employed in war. This is a question that would be answered in the next chapter, but it can be anticipated that such an answer depends on a two-step analysis. First, what is the moral status of the threat of the collective of which he is a member, and secondly, what is the relationship of the target with that threat. If there is a causal link between the unjustified threat and the target's individual actions, he might be liable to be killed in self-defense.

### 4.8. SUMMARY

In this chapter, I argued for a principle of self-defense that is based on a notion of causality. The first step in this process was to dispute the notion that culpability or innocence should play a relevant role in the actual act of self-defense. The fact the threat or the aggressor is innocent should not be a condition that forfeits a victims claim to act in self-defense. In the alternative I presented a principle of self-defense based on a notion of causality and examined its viability on different cases. For causality to be sufficient, it has to meet two necessary conditions. First, the target should be the cause of the lethal threat or have a significant role in the chain of causality. What the 'significant role' clause means is that by killing the target the threat or aggression ceases. Second, the threat or aggression ought to be unjust which means

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<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

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that the victim has done nothing wrong to be subject to lethal force and that if killed, he or she will be wronged. It was also concluded that an individual under threat has agent-relevant permission to choose his life above the person who is causing an unjustified threat and that the moral innocence of the threat does not impose a duty to submit to an unjust lethal force. In the next chapter, I will test further this principle with the use of targeted killing in war.



## 5

### SELF-DEFENSE BASED TARGETED KILLING IN WAR

In this chapter I argue that in order for TK to be permissible in war, the defensive causality principle proposed in Chapter 4 should be applied. The application of this account in war would produce these conditions, (1) the combatant targeted should be fighting an unjust war; (2) The party making the killing must have a just end as a cause for the war; (3), killing the target must be of significant gain for the just end of the war. However, it is justified to kill a combatant, irrespective of his side on the war, if he is bound to commit a moral wrong that is inconsistent with the purpose of the moral restraints that all belligerent parties ought to adhere.

#### 5. Introduction

So far an attempt has been made to put into question the justifications for TK in war and to find the proper self-defense doctrine that could be the basis for its use in armed conflict. The main issues with these justification are the fact of membership and the collectivization of liability. Although these two concepts have theoretical differences, they nevertheless have the same effect: impose a form of strict liability on all combatants. As it was said, this might not be a problem in conventional/traditional forms of armed conflict, but it becomes problematic when TK is used.

The reason why the three models of JWT failed to justify TK is due to the individualized form of TK. TK is an individualized form of killing in which the thick-grain of discrimination between combatants and non-combatants is not simply enough. A fine-grain discrimination among combatants is needed for TK to be justified. This is, a form of discrimination that considers the combatant's particular role in a functional sense and not simply in formal terms, i.e., the formality of membership or collective liability. Collective liability, the separation thesis, and the moral equality of combatants are concepts that do not allow for a fine-grain discrimination among combatants within a collective. The same problem is detected with the fact of membership. Although the fact of membership might be a necessary theoretical move to justify killing in war and reduce its violence, it fails to justify TK. The idea that a combatant becomes a permissible target because he is a member of a collective is flawed because it ignores anything about the individual *qua* individual. There is no fine-grain discrimination. This approach is inconsistent with TK. TK is a personal form of killing that requires an additional relevant set of facts beyond a membership status. This lack of discrimination, thus, allows a warring State to employ TK on a questionable foundation.

TK might question the coherence between this form of killing and these accounts, but it does not follow that they are inherently flawed. These accounts probably have solid

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foundations for what they are designed to justify: collective warfare. However, collective liability does not transition well as a basis for TK. As a consequence, what is required is an additional/separate account that could justify TK that is also consistent with JWT.

On the other hand, since TK is an individualized form of killing, three individualistic doctrines of self-defense were presented to seek which was best suited for TK in armed conflict. The condition was that a correct account had to explain why an innocent aggressor and an innocent threat are justified targets of lethal defensive force. This requirement is justified due to the possibility that some unjust enemy combatants are morally innocent for the aggression and threat that they are posing. So, which of the three best explains employing lethal defensive force against such targets? Culpability, it was argued, is highly restrictive since it requires the target to act purposefully, knowingly, or recklessly. Many unjust combatants may believe that their cause and actions are morally correct. This will prohibit what would otherwise be legitimate lethal defensive force against an unjustified threat. The moral responsibility account, on the other hand, requires the target to have 'responsible lethal agency' in order to be liable. Lacking the latter will make an innocent aggressor and an innocent threat unjustified targets. Under such an account lethal unjustified threats in armed conflict would be impermissible targets. Causality, it was concluded, was the best account to justify TK in armed conflict since it permitted the use of defensive force against innocent aggressors and innocent threats since it required the target to be an unjustified threat with no further requirements of culpability or guilty or responsible lethal agency. For these reasons the traditional structure of JWT along with the causality principle of self-defense presented in the last chapter are the basis for a separate account for TK in armed conflict.

In this chapter the goal is to overlap JWT with the principle of causality to structure a more compelling account for the use of TK in armed conflict. This project will require several steps. First, the JWT requirements will produce these conditions, (1) the combatant targeted should be fighting an unjust war; (2) The party making the killing must have a just end as a cause for the war; (3), killing the target must contribute to the just end of the war. However, it is justified to kill a combatant, irrespective of his side on the war, if he is bound to commit a great harm or killing that is inconsistent with the purpose of the normative restraints that all belligerent parties ought to adhere. This latter form of killing, ultimately, should have a just end even if the side performing TK has an unjust end. This account differs from the traditional and the collective model in that it reflects the moral reality of war by identifying the proper asymmetry among collectives. Secondly, the principle of causality argues that for self-defense to be justified, the target must be an immediate cause of an

unjustified lethal threat or has a significant role in the chain of causality of an unjustified threat. This principle will be aided by a functional base liability that will link the target's specific role to the collective unjust ends. This differs from the individualist model to the extent that it provides a fine-grain discrimination between unjust combatants.

### 5.1. Killing Combatants

#### *The Randomness of Killing*

In war, killing combatants is done randomly. Projectiles and missiles are launched unto a combatant setting with no intention of making fine-grain distinctions among individual combatants. The intent is quite the opposite. No discrimination is needed if the goal is to kill as many combatants as possible. And, according to the LoAC, there is nothing wrong with this practice.

However, the introduction of TK into a war setting casts doubt upon the common-sense approach of the indiscriminate killing of combatants. This suspicion is because the killing is no longer random but specific, not indiscriminate but discriminate, not anonymous but by name. This brings us to the question of what is the difference between killing a person randomly and killing that same person by name? And more specifically, why should this difference have any relevance in war?

Every individual has a claim not to be harmed. There are very few situations that could override this protection. One of these situations is when the victim finds himself in the need to use defensive lethal force against an unjustified threat to his life. In war the unjustified lethal threat is presented in form of a collective. All defensive force, by necessity, must be directed at the members of that collective. Now, the normative force of the protection against lethal harm is somewhat weaker in a collective setting than it is in a individualized setting. Weakening this protection is mainly influenced by practical purposes. As it was argued in the third chapter, making fine distinctions of liability among combatants during an active and ongoing war is impractical. Thus, collective liability, for compelling reasons, seem to be the proper and correct approach to the question of collective killing.

It was also argued that many combatants might not be liable at an individual level. If this is correct, then many combatants are killed unjustifiably under collective liability. So, what justifies this form of killing? Necessary evil. The lesser-evil argument is when killing a non-labile target is necessary to prevent a greater wrong.<sup>336</sup> Directing all military violence towards combatants prevents an unnecessary bloodshed and destruction. Armed conflict is a

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<sup>336</sup> McMahan, J. 2012. "Targeted Killing: Murder, Combat or Law Enforcement" in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. by Finkelstein, C., Ohlin, J.D. and Altman, A. OUP. p. 137.

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complex and a massive undertaking that has many moving parts, and not all are devoted to harming activities. It would not be unusual for a combatant to be actually disengaged or reluctant to -or his role is unrelated to- perform any harming activity. However, it could also be possible that a combatant's actions are so minor in contribution that they are below the threshold of liability. However, since he is a member of a collective that is either engaged or has the express intention to engage in harming activity it is not unreasonable to assume that he is also harming. This presumption is because it is not possible to know the status of all the moving parts of a shifting collective that is bent on killing its enemy. Thus, killing combatants by random lethal force could be deemed a necessary evil.

The randomness of killing is not a non-methodical employment of military force. It is specific in so far it selects military targets and grant immunity to civilians and non-combatant personal. In this sense it is discriminative. More precisely, it is a thick form of discrimination. The randomness, therefore, is specific to the combatants killed. It is a non-specific, non-individualized, and anonymous form of killing. It is a fact that bars fine-grain discrimination among combatants. This fact forces some authors to find inventive ways to justify random killing in war by either throwing a massive blanket of strict liability to all members in an armed conflict or solely on one side, the unjust side. The factual reality of war does not give much room to think otherwise. First, it is epistemically challenging to identify solely those targets that are actually harming and engaged in an unjust cause. In the midst of the fog of war, how can it be discerned that a specific target fulfills the conditions of liability? Any effort will, as Zohar states, induce the combat with moral vertigo. Then there is the weapon technology. Weapons are designed to kill in bulk, that is, massively. The weapons to kill in war are not designed to narrow destruction, but to multiply it.<sup>337</sup> Weapons are not sensitive to the moral status of the target. They do not detonate solely on liable targets. They do not make such distinctions, only the person pulling the trigger does. These two reasons, epistemic limitations and the weapons technology might explain why killing in war random non-liable combatants is a necessary evil.

The lesser evil argument, however, does not seem to transition as smoothly from explaining the random killing of a member of a hostile collective to the intentional and deliberate killing a specific individual by name. It is difficult to justify the killing of an individual combatant when there is no account of what the combatant is actually doing. The fact of membership depends on the presumption that the target is a contributor to the

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<sup>337</sup> The laws of war are designed, *inter alias*, to limit the violence and destruction of war. However, within the margin of permissible violence, destruction is practically unrestrictive.

imminent or predictable unjustified threat that calls for self-defense, which, in turn, suffices to pull the trigger. Whatever action or intent is attributed to the collective is extended by the formal status of membership to the combatant without any further or deeper analysis of the target's personal actions. So, once you obliterate this presumption by pulling the target from the collective, as a single individual, such a formal status is no longer sufficient.

This problem is further exposed when TK is employed. The same reasons that might explain random killing (i.e., the fog of war, weapons technology, epistemic limitations) in war do not seem to justify killing a single individual deliberately and by choice. The forceful normative account of non-targeted, random killing loses its sway when the target is individualized. It is more challenging to justify the killing a member from a collective based on a presumption than it is to kill an individual based on his own personal actions. There must be something about the target that goes beyond the fact of membership. There should be an account that justifies selecting a collective member among all others. This selection should not be taken lightly. It has *deadly* serious implications. Thus, if there is a way to identify a single combatant among all others, *then there must be something about that individual and the threat that his collective is presenting that makes him liable to be killed*. More specifically, there must be a link between a threat of the collective and the individual actions of the individual that makes him liable to be killed. So the difference between killing an individual randomly and by name is its normative threshold. A single individual has a stronger protection than a member of a collective. And the collective nature of warfare should not ignore this difference.

### ***Causal Liability in War***

The link between the target's particular actions and his collective's unjust cause could be accomplished with the concept causality that was outlined in the last chapter. Self-defense with causality as liability states that the target must be an immediate cause of an unjustified lethal threat or has a significant role in the chain of causality of an unjustified threat that by killing the target the danger either is eliminated or mitigated or gives the victim a fighting chance. There are additional conditions that the target must meet in the context of armed conflict to be consistent with the causal liability principle.

In war, combatants have different roles.<sup>338</sup> Some combatants actually fight while others simply concern themselves with logistics or with non-threatening activities.<sup>339</sup> Under the current LoAC all of these combatants are legitimate military targets. The diversity of

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<sup>338</sup> Walzer, M. 1977. *Just and Unjust Wars*. Basic Books. pp. 145-6.

<sup>339</sup> Lazar, S. 2015. *Sparing Civilians*. OUP. pp. 12-13.

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roles entails a range of degrees in personal causal responsibility to the collective's cause for the war. It is the degree in personal causal responsibility that will determine a combatant's liability under TK. Thus, if TK is employed, then the combatant's causal responsibility is what must ground the basis for the justification of TK.

Along with the principle of causality there are other conditions that should be met to make a combatant liable with TK. These new conditions are not new features of self-defense but requirements that allow some level of consistency between defensive force with the basic tenets of JWT. These criteria are mainly three. First, the combatant targeted should be fighting an unjust war. Secondly, the party making the killing must have a just end as a cause for the war. And finally, killing the target contributes to the just cause of the war. These conditions are not unique or exceptional. They do differ, however, from two of the JWT models discussed, the traditional and the collective. These models do not divide collectives between aggressors and defenders, thus unjust and just combatants. Both collective have equal standing. As a consequence these accounts would allow the use of TK by both sides of a war thus undermining a basic condition of self-defense, the asymmetry requirement. An aggressor/unjust combatant should not have a right to use lethal defensive force. These conditions, thus, set the ground as an initial step towards a fine-grain discrimination among combatants. However, these conditions are not restrictive. It might be justified to kill a combatant, irrespective of his side on the war if he is bound to commit a wrong that is inconsistent with the purpose of the normative restraints that all belligerent parties ought to adhere regardless of the cause of their side.

### ***a. The Target should be fighting an Unjust War***

The first criterion is that the combatant targeted should be fighting an unjust war. The initial condition that makes the target liable is the fact that he is fighting for an unjust end. He might be blameless at a personal level or is materially innocent yet his actions are presumed to be conducive to achieving an outcome that is objectively unjust. This makes his membership status relevant to the extent that it allows a defender to consider the target an unjust threat. So, personalizing lethal defensive force to a target must be preceded by additional information. Information that would cast light on further relevant facts of his doings that could make the case for causal liability. This supplementary step is necessary for a fine-discrimination approach.

A second reason of why the status of unjust combatant is not sufficient to be personally killed is because such a status could be the cause of sheer luck and the justified threats of a just combatant could be accidental. Civilians enter military ranks, either by

conscription or voluntary, not knowing or choosing what wars to fight. Many American citizens, for example, who volunteered to fight the Taliban in Afghanistan after the terrorist attacks of September 11, were shipped to fight the Iraqi War. They volunteered to fight for a just cause and ended fighting an unjust war.

This brings us to a specific question, does the status of volunteer or conscripted combatant should have a role in determining the liability to lethal defensive force? It should not.

The difference between a volunteer and a conscripted combatant is the fact that the volunteer is consenting to, and is intentionally fighting, in armed conflict while the conscripted combatant, in virtue of legal penalties, is compelled to fight. It follows, then, that the combatant who has volunteered to fight an unjust war should be more responsible for causing unjust killings than the conscripted combatant that has been forced to fight. If this is correct, does the question of degrees of responsibility relevant when imposing liability? It does not.

There is a difference between being responsible *for* an unjust killing and being liable *to* lethal defensive force. A person might be responsible yet lack liability. Responsibility for a wrongful act is a matter of desert while liability is subject to a specific treatment pursuant a certain goal. To further this distinction between liability and desert, it is useful to make reference the concepts of instrumental and non-instrumental.

McMahan notes that, "Desert is non-instrumental. If the person deserves to be harmed there is a moral reason for harming him that is independent of the consequences of harming him. Giving him what he deserves is an end and itself."<sup>340</sup> Desert is primarily used to impose punishment.

In contrast, liability is instrumental. "A person is liable to be harmed" notes McMahan, "only if harming him will serve some further purpose."<sup>341</sup> For example, "if it will prevent him from unjustly harming someone, deter him him from further wrongdoing or compensate the victim of his prior wrongdoing."<sup>342</sup> Liability, then, exists in relation to some goal that can be achieved by harming a person. Harming the target must be consequential to some end. Defensive force, for instance, serves the goal in preventing the harmful actions of the attacker. A person may be responsible for an

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<sup>340</sup> McMahan, J. 2009. *Killing in War*. OUP. p. 8.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

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unjustified lethal threat but attacking him will not contribute in stopping that threat. Liability, meanwhile, conditions the use of force to achieving a goal, and in the case of self-defense, the goal is to stop the source of the unjustified threat.

In armed conflict the normative framework is self-defense, not punishment. The use of lethal military force in an active armed conflict should be directed to the targets that are liable to prevent or stop or deter them from engaging in hostilities. The use of force for purposes of punishment is not justified. So, the question is not who is more deserving of punishment, the volunteer or the conscripted, but who is liable to lethal defensive force.

That being said, the status of conscripted or volunteer combatant, is irrelevant to the question of liability. If the target, volunteer or conscripted or otherwise, is posing as an unjustified threat, he is liable to lethal defensive force. Furthermore, if the latter is correct, being a volunteer or conscript does not say much about individual *qua* individual in regards to the nature of the threat. So, it is not the fact that he belongs to a collective that poses as an unjustified threat that should account for his liability, but what is he doing as an individual in relation to his collective wrongful threat that should be considered.

### **b. *The Party employing TK must have a Just End***

The second condition is that the party who is employing targeted killing has to have a just end as a cause for the war and have not provoked the defending collective into arms. There are two reasons for this requirement. First, it is possible that two belligerent parties have unjust ends. For example, two colonizing States are fighting to have power over a territory that belongs justly to a third State. If two robbers unaware of each other's plan arrive at the same bank at the same time and find themselves at a defensive stance to illegally seize the bank's goods it would not be convincing if one robber is claiming self-defense against the other. The reason employing lethal defensive force against a target is to deter or mitigate a wrongful threat and not to achieve an unjust goal. This logic should also apply at a collective level. The reason why defensive force is directed against unjust combatants is due to the fact that they have a collective undertaking that aspires to accomplish an unjust end. Thus, the collective that decides to kill an individual member of the enemy must do so pursuant a just cause.

The second reason is that there is the possibility of a State creating the conditions by deception to trick an unsuspecting State into arms to justify the subsequent force as an act of self-defense. This ruse is known in criminal law theory as *Actio Libera in Causa*. As Susan



Dimmock notes, “These are instances in which the law allows a general exculpatory defence (a justification or an excuse), but denies that defence to defendants who have culpably created the justifying or excusing conditions.”<sup>343</sup> A person who deliberately inserts a mind-altering drug into the drink of an unsuspecting victim that subsequently has a murderous rage could not claim self-defense. As Dimmock notes,

This is often reflected in legal doctrines that explicitly bar the defence to those who have acted as the first aggressor; persons who start an altercation with another, in order to provoke an attack to which they will have to respond self-defensively, cannot then escape liability by appealing to self defence as a justification. Likewise, if persons provoke others into attacking them, they will then be barred from appealing to self-defence to justify their conduct.<sup>344</sup>

In war, the proper equivalent of the said doctrine is a false flag. If a State wants to attack his enemy but does not want to be the initial aggressor or liable for war crimes, it could induce the innocent State to commit a hostile act or portray it as being responsible for one thus the inducing State fights an alleged defensive war. For example, let’s look at the *Gleitwitz* incident, a plan of a much bigger scheme known as Operation Himmler in which German nationals pose as Polish military personnel attacked a German radio station (among other targets) to justify the German invasion of Poland in September of 1939. The German State cannot claim that its subsequent defensive actions are justified since they have wrongfully provoked or falsely accused Poland of aggression for which it is not responsible. It follows that any mission of targeted killing performed by the German State will be unjustified. The intentional provocation by trickery followed by the selection of a named combatant to be killed, wrongs the target not once but twice.

However, a just cause could turn into an unjust cause. In self-defense if the initial victim uses lethal force against a non-lethal threat then it could be permissible for the initiator of events to employ defensive force in self-defense. The swap of status from just to unjust cause could also occur in the case in which the initial victim decides not only to kill the aggressor but also to kill the aggressor’s family as revenge. In such scenarios the victim becomes the aggressor and lethal force against him is justified. The same rationale could be applied in war. For instance, if State A fighting a defensive war against State B and ultimately accomplishes its goal but after defeating the enemy it begins an offensive to

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<sup>343</sup> Dimmock, S. 2013 “Actio Libera in Causa” in *Criminal Law and Philosophy*, Vol 7, No. 3. p. .Leo Katz elaborates a little further, Provoking an attack to use one’s right of self-defense is a particular instance of a phenomenon sometimes described as contriving to create the condition of your own defense. German criminal law calls this the problem of the *actio libera in causa* [...]. What is being referred to are cases in which someone deliberately, or maybe even just recklessly, creates situations in which he then finds a need to commit an act that would ordinarily be considered justified or excused by reason of necessity, or duress, or insanity, or lack of a voluntary act, or innumerable other potential defenses, but inasmuch as he deliberately contrived to create the situation, or just impermissibly risked its coming about, he no longer seems entitled to invoke those defenses. Katz, L. 2012. “The Strategic Use of Self-defense” in *Targeted Killings: Law and Morality in an Asymmetrical*, ed. by Finkelstein, C., Ohlin, J.D. and Altman, A. OUP. p. 468.

<sup>344</sup> Dimmock, S. *Supra*.

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enslave State's A population, then State B's combatants become permissible targets since they are now pursuing an unjust cause. Thus, a just collective that had an initial permission to use TK against unjust combatants now find itself without such permission.

This challenge extends to the fact that defensive wars could vary, for example, preventive and pre-emptive wars. The question is, thus, does a preventive or a pre-emptive war have any role in determining the legitimacy of TK?

Having a just cause for war is one of the requirements for the legitimate use of TK in armed conflict. Preventive wars are very likely to be unjust while pre-emptive wars might have a just cause. Thus, if the war is either preventive or pre-emptive, it will have a role in determining the legitimacy of TK.

Modern wars are justified solely as self-defense and these wars, preventive or pre-emptive, are essentially offensive. Preventive wars are motivated by the *potentiality* of a future attack. There is no empirical certainty, just speculated possibility. No matter how credible a future threat might be, preventing the alleged threat from materializing is an act of aggression. If wars are justified solely as self-defense, then preventive wars should be deemed unjust. Since preventive wars are unjust, TKs are thus prohibited.

Pre-emptive wars, on the other hand, are an offensive war that anticipates an *imminent* attack. The basis for a pre-emptive attack is the certainty of a coming threat, a danger that has been set in motion. While a preventive attack responds to a threat that has yet to materialize, a pre-emptive war reacts to a developing threat in real-time that has yet to strike. Would it had been justified for Ukraine to pre-emptively strike the Russian military that was amassing at its border? Can a State justifiably defend itself against an imminent threat? If imminent military aggression requires a defensive military response, then it is a war of necessity, a defensive war, thus justified.

That being said, it is more likely that in pre-emptive wars TK might be justified since it has a just cause.

A question that might arise is if the notion of preventive or pre-emptive killing could be justified during an ongoing war. The core of these concepts remains the same. For example, in the case of preventive killing, the attack is based on the potentiality of the target to become an actual threat while in pre-emptive killing the alleged threat is imminent; it has been set in motion but has yet to materialize.

These concepts do not seem to fit within the self-defense framework during an active armed conflict. When hostilities have begun, all combatants are considered legitimate targets. As such, the threat is not probable or imminent, but ongoing. Therefore, it will be

inconsistent with the empirical realities at hand to claim that TK was based on a preventive or pre-emptive paradigm.

### *c. The killing must contribute to the just cause of the war*

Along with these two criteria - the target must be fighting an unjust war and, the side employing TK must have a just end that has not been provoked by deception- killing the target must contribute to the just end of the war. 'Contribution' means that the target has a causal role in fighting for the unjust end and killing him will rupture that link to the unjust end. For instance, the crippling of the air defenses of the enemy might be vital thus killing single pilots or some other person whose technical knowledge is crucial for the pursuance of war could be legitimate. If, however, these pilots main mission are non-lethal, i.e., provide humanitarian aid or assist in logistics that are intended to accomplish non-combat, non-hostile missions then they could be impermissible targets under self-defense.

The reason for this is to prevent TK from being used for reasons other than self-defense. Consider the case in which state A decides to kill the son (who happens to be a combatant) of one of the state B leaders who had no significant practical/technical knowledge in warfare or who's death would not impair state B fighting capabilities, for the sole purpose to send a "message". This should be unjustified under self-defense. Kant argued that "No State shall allow itself such hostilities in wartime as would make mutual trust in a future period impossible" and to illustrate this point he mentions the use or employment of assassins (assassination is not conceptually far from targeted killing).<sup>345</sup> The fact that State A is killing an individual combat to send a message (or as revenge for grievances from the past or for some personal vendetta) and not because doing so would advance the just cause of the war seems to be unjustified under the logic of self-defense: it does not meet the requirement of necessity or proportionality nor of liability.

### ***TK and Universal Liability***

A final condition that could justify TK is when the combatant, irrespective of his side on the war, is bound to commit a wrong that is inconsistent with the purpose of the moral restraints that all belligerent parties ought to adhere to. In war, the possibility of evil is ever-present. It should be within the interest of all parties (and for humanity generally speaking) involved to prevent a moral catastrophe such as genocide or the use of weapons that could deliberately obliterate the distinction between combatants and civilians. A case might be the deployment or creation of weapons of mass destruction that might surpass not only the context of the

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<sup>345</sup> Kant, I. 1795. *Perpetual Peace: A Philosophical Sketch*.

battlefield but also non-hostile context (neighboring neutral States) and negatively affect future generations, i.e., a nuclear winter. A nuclear winter, for example, is an event that “would carry nuclear war to many nations that no one intended to attack, including the poorest and most vulnerable” or “[w]ith nuclear winter, a massive nuclear attack, even in the absence of retaliatory strikes, is likely to boomerang and, through climatic effects, destroy the aggressor nation, along with many others.”<sup>346</sup> The prevention of these wrongs should be of universal interest thus it would be permissible for both sides of an armed conflict to employ TK against specific individuals who are engaged in these wrongs.

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These conditions are to bypass the fact of membership and set the foundation for a more substantial account of liability based on what the target is actually doing. This is called the functional-based status.

### ***Functional-Based Membership Status***

Under the said conditions not all formal members of the unjust collective will be liable to be killed under targeted killing. This outcome is inconsistent with the formal liability imposed by the LOAC (the *in bello* rules states that all combatants, irrespective of the origins of their side of the war, are liable to be killed) and the presumption that grounds the fact of membership, this is, that all members are assumed to be engaged in harmful activity.

As we might recall from chapter 2, in order to be liable the target must fulfill strict requirements. In Article 4, section 2, of the Geneva Convention Relative to the Prisoners of War, regulates such requirements and states that in order to be considered a member of the armed forces of a Party to the conflict, the individual must fulfill the following conditions, (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.<sup>347</sup> Jens David Ohlin observes that,

“Determining membership is based on the fact that the individuals in the military wear uniforms, display fixed emblems, and carry their arms openly; this in turn signals to the world that the individual is part of the fighting force.[...] His status as a combatant is established simply by virtue of his joining the military organization, regardless of whether he actually fires his weapon and kills an enemy soldier”<sup>348</sup>

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<sup>346</sup> Sagan, C., & Turco, R. P. 1993. “Nuclear Winter in the Post-Cold War Era”, in *Journal of Peace Research*, 304, 369–373.

<sup>347</sup> International Committee of the Red Cross ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War Fourth Geneva Convention*, 12 August 1949, 75 UNTS 287, Accessed 2 April 2020. <https://www.refworld.org/docid/3ae6b36d2.html>.

<sup>348</sup> Ohlin, J. 2012. *Supra*, p. 73.

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This is a formal-based liability in which the present-day condition in which killing in war is conducted. The stated requirements in the last section force the reevaluation of this formal membership principle. The proposition is not to eschew the membership status. The membership status does not lack significance concerning liability; it just falls short as a sole reference when employing targeted killing. Formal-based status is relevant to the extent that the potential target is positioned in a particular context that provides the initial basis for liability. More specifically, he is a member of the armed forces that by cooperative joint coordination and resource availability could be a significant threat that by his lone actions might not be. The target has become of interest because of the fact of membership. This, although necessary, is not sufficient. Instead, what is normatively relevant to establish liability are his actions in relation to the unjust threat posed by the collective. So, instead of positing liability on nominal and formal membership when employing targeted killing, the suggestion is, instead, a more substantial account on a functional-based principle. As Ohlin notes, a functional-based principle,

[R]elies on the status of the concept of membership but cashes out that standard by references to what the individual is actually doing –not necessarily at each discrete moment in time, but rather from the broader perspective of a longer time period: taking orders from commanders, engaging in military operations at the behest of commanders, etc.<sup>349</sup>

This principle will help in determining the targets individual relationship to the threat and hence his personal liability. However, simply changing the status of the target from formal to functional is not sufficient since it stays short in providing an explanation of why that specific individual is a permissible target. Although targeted killing, as a method of killing is more suited for a functional-based liability, the latter is not decisive in determining individual liability. This functional base principle would then require an sustaining account that justifies killing an individual in self-defense. The question that follows is if the requirements that constitute the functional-based liability are consistent with the *in bello* principles of discrimination proportionality and military necessity that ultimately regulate the use of force during armed conflict.

### ***The Principle of Discrimination, of Proportionality and of Military Necessity***

As it was discussed in the second chapter, *in bello* have three basic rules: the principle of discrimination, the principle of proportionality, and the principle of military necessity. The discrimination principle states that the belligerent parties have to use discriminative force between military and civilian targets. The use of lethal force cannot be indiscriminate. The

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<sup>349</sup> *Ibid.*, p. 82

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rationale of this principle is based on the presumption that all combatants are engaged in harming activities. In contrast, non-combatants are not, so the force is permitted on defensive grounds. Killing non-combatants have non-defensive purposes. Therefore, a State that employs such force must take all the precautionary steps to ensure that the targets are military in nature and, on the other hand, do not deliberately nor negligently attack civilian targets.

The precise, surgical method of targeted killing with the functional-based liability fits perfectly with the principle of discrimination. Targeted killing does not randomly blast its targets based on the fact of membership. Instead, it discriminates by necessity. The deliberate selection of one individual, among others, is a form of discrimination in itself. The distinction among combatants based on functional-based liability has a more substantial ground than the distinction between combatants and non-combatants based on the formal fact of membership and meets the principle of discrimination with a higher degree of precision than any other method. This is fine-grain discrimination. The fact that the killing is narrowed to a single military threat, a combatant, it neatly meets the discriminative principle to a finer degree. This is not to say that thick-discrimination is outdated. Thick and fine-grain discrimination should overlap and complement each other. Thick-discrimination narrows the pool of permissible targets whereas fine-grain discrimination increases the chances of targeting the correct military objective.

On the other hand, the proportionality principle states that the force used should be proportionate between the harm caused and the good achieved. The harm caused is not the damage inflicted on the military interest of the enemy but on its civilian infrastructure and civilian lives. The harm caused to civilians should not be disproportionate in relation to the military objective. The practice of targeted killing and the functional-based liability also fulfills this principle. A major concern in today's armed conflict is collateral damage. Military weaponry is so destructive that it hardly keeps a clear distinction between military and civilians targets. However, the clear-cut methodology of targeted killing with a functional-based liability could substantially reduce collateral damage and, in some cases, even to zero. If the target is a valuable asset of the enemy and killing him would impair the enemy's fighting effort, then specifically targeting him with a precise form of killing would neatly meet the requirement of proportionality.

However, it must be noted that targeted killing does not fit into the logic of killing more the better. It can hardly be argued that TK fits into that strategy. For this reason, the harm caused to a single combatant is conditioned on the good caused versus the harm done. Not only the combatant has to be a threat, but also killing him has to cause a good. For

example, if a State kills a high-ranking officer just because they had the chance and not because they sought to advance any military objective, then the killing is beyond the principle of causality and the functional-based liability. The killing did not have any defensive purposes, so it was an objective lacking military necessity. It was permitted solely on the ground of the fact of membership.

The principle of military necessity requires that the infliction of a particular harm advance a specific military goal. This principle is different from the military necessity of *ad bellum*, which requires that military action, as a last resort, is necessary to fend off a military threat. All actions must be necessary to achieve a specific goal consistent with the overall aim: self-defense against an unjust aggressor. Therefore, TK and the functional-based liability must be consistent with a military goal that advances the overall defensive strategy. Other forms of killing, such as honor killings or revenge killings or punitive killings or opportunistic killings performed by TK, do not meet the requirement of military necessity.

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The question that follows is if non-combatants could be subject to targeted killing. A preliminary answer is that, since this method of killing could be employed with a functional-based causal liability account, which makes the proper nuances among members of a collective (a non-combatant is a member of a larger collective, civilian population), there is no *prima facie* objection. This answer will be explored further in the next section with two test cases.

### 5.3. Summary

For TK to be permissible in war, functional-based liability principle should be applied along with the basic tenets of JWT. However, it was necessary an additional account to make link between what a combatant is actually doing and the objective of the collective of which he is member. The causality principle was then positioned to fill this gap. The outcome was a fine-grain form of discrimination that distinguishes personally liable from non-labile targets within the same collective.





## 6

### Killing Non-combatants

The question in this chapter is if non-combatants could be subject to targeted killing. I argue that, if TK is a method that could be employed with a functional-based causal liability account, which makes the proper nuances among members of a collective it might function as well within the collective of civilians. To justify killing civilians as self-defense, the target must meet these requirements: (1) the party employing TK must have a just cause, (2) the target is aiding or advancing interests of an unjust cause, (3) that by killing the target it will be of significant gain for the just cause of the war, (4) the target is engaged in an activity that will have substantial effects in advancing an unjust cause and (5) the target has the practical knowledge or technical skills or the political power to accomplish the imputed task that advances the unjust cause.

#### 6.1. Introduction

Is it permissible to employ TK against non-combatants? Killing non-combatants is strictly prohibited. The norms of war have traditionally considered civilians as non-combatants, thus immune from intentional attack. As a result, this rule as cemented itself as the guiding principle of *jus in bello* enshrined in the discriminative principle. However, what is the basis to spare non-combatants from deliberate military force? What is the morally relevant feature that non-combatants have that make them immune from deliberate military attacks? I will briefly discuss some of the main arguments in favor of the non-combatant immunity and provide a concise response of why some these arguments are found wanting. This will be followed by stating arguably the strongest basis for civilian immunity and conclude on whether or not the functional-based causal liability account falls short or justifies overriding the said immunity.

#### 6.2. Non-combatant Immunity

Let us begin with the claim that non-combatants are immune from attack because they are innocent.<sup>350</sup> They are innocent because they have done no wrong, and they neither merit attack as a punishment nor have they, by their wrongdoing, waived their right to be treated as a person.<sup>351</sup> This explains one of the most compelling principles of justice, "that human life is treated as an end in itself and never as a means [...] and that an innocent person may not be killed no matter how advantageous it would be for his fellow human beings."<sup>352</sup> This argument, however, runs into difficulty when it seems to imply that combatants may be killed because they are guilty. If liability is the innocent/guilty distinction, then politicians should be the primary targets in war. The politicians are the ones who initiate the unjust war, and it

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<sup>351</sup> McKeogh, C. 2002. *Innocent Civilians*. Palgrave p. 6.

<sup>352</sup> Ibid.

follows that they should carry the burden of the guilt. On the other hand, in contemporary warfare, combatants, conscripts or professionals, are acting under orders. They do not decide on the war to fight or how to fight it (they can disobey an order if its clearly illegal). Also, if the innocent/guilt distinction is what accounts for the immunity, then the principle of discrimination will have no use since combatants and civilians could meet the designated threshold of responsibility, which would culminate in a total war. Also, modern wars are justified as self-defense not as punitive. Killing combatants based on guilt is a punitive form of killing that is beyond the scope of defensive killing. Therefore, the claim that innocence is the basis for non-combatant immunity seems to fail.

A second argument is that non-combatants enjoy immunity because they are not fighting thus do not contribute to any harm.<sup>353</sup> It is difficult to justify killing an individual who poses no lethal threat. His status is similar to that of an innocent bystander and killing bystanders would go against our basic intuitive approach to self-defense. Since non-combatants do not kill or pose a lethal threat, they themselves, under logic of self-defense, may not be killed.

However, this claim also fails to explain why non-combatants ought to be immune from deliberate killing since there are non-combatants who might contribute to the war effort to a higher degree than combatants themselves. Modern wars take hold of the whole economy (it must be noted that social activities also contribute to the war effort, i.e., propaganda and indoctrination) as part of the military effort to win a war. There are cases in which civilians conduct economic activities that have more impact on the war then individual combatants. Although a munitions factory worker is not technically fighting, he provides the means for fighting. There are many combatants that do little to no fighting yet can be killed at any time because of their status as belligerents. Since there are civilians that contribute more to the fight then actual combatants, it is unpersuasive to argue that non-fighting is the basis for non-combatant immunity.

Another argument is that they are defenseless. This is an intuitive response. We initially reject the idea that defenseless individuals could be subject to lethal defensive force. The wrongness of killing civilians is their open vulnerability. As Lazar notes, “defenselessness can most fruitfully be understood in terms of vulnerability: one is defenseless to the extent that one is unable to diminish one’s vulnerability.”<sup>354</sup> This is not necessarily correct. Non-combatants could be armed and defend themselves from attack.

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<sup>353</sup> Ibid. p.

<sup>354</sup> Lazar, S. *Supra*, p. 102.

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They are not targets because they are not actively engaged. Having a weapon is not sufficient to lose the immunity unless the civilian target is participating in direct hostilities. So, it is not that they are defenseless, instead it is because they are not engaged in the ongoing aggression. Otherwise, it would follow that if we ought not to attack defenseless people, then we should attack combatants only when they can defend themselves.<sup>355</sup> Surprise attacks or ambush tactics, for example, would be prohibited. It is not that non-combatants are unarmed and unable to defend themselves, which makes them immune, but simply the fact that they are not liable. Ultimately, what makes 'defenseless' a potential relevant feature of immunity is when the target is non-labile.<sup>356</sup> If the target is defenseless, but he is liable, his vulnerability would not be a constraint in the use of defensive force against him. For example, if to stop a hired assassin from killing the victim he has to kill the person who hired the assassin, who happens to be drinking a cup of tea in pajamas, then the defenselessness of the latter would not be a relevant feature that would constrain acting in self-defense.<sup>357</sup> That being said, there might be civilians who are liable which defenselessness has no power of constraint on lethal defensive force.

A further suggestion is that killing non-combatants is unnecessary for military victory. This claim is questionable since what is necessary to win a war cannot be predetermined. Wars are highly unpredictable and the outcome is not always as expected, i.e., the Vietnam War and the War of Iraq are cases in point. What is needed to win a war cannot be foreseen so to claim that killing non-combatants is unnecessary is a calculation that is not known with certainty. This ambivalence makes this rule unsuited to grant immunity. Actually, the same argument could be offered when killing combatants. It is reasonable to believe that in some instances killing combatants would be pointless thus only some and not all combatants are permissible targets. This rule will weaken the discriminative principle since it will be based on a calculation of what is needed to win a war thus combatants and non-combatants alike could be permissible targets. As a result, this suggestion fails because it is unknown with a degree of certainty if killing non-combatants is necessary to win a war.

However, if it was known with certainty that killing non-combatants would win the war it is still unjustified. Civilians are analogous to bystanders. As it was discussed in the last chapter, bystanders are agents that are not materially linked to the threat to the victim. Many civilians could also fall in the same category: their actions do not contribute to the material

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<sup>355</sup> Ibid. p. 9.

<sup>356</sup> Lazar, S. *Supra*, p. 106.

<sup>357</sup> This act of defensive force would be consistent with the causality principle since the target is a substantial link to the unjustified threat and killing him would deter the said threat from running its full course.

threat against the enemy. Killing bystander is prohibited because they are not the cause of an unjustified threat. Killing them would be using them as means instead of ends and exploit their status instead of eliminating an unjust threat. Therefore, killing them to achieve victory is unjustified even if it is necessary to win the war.

### *Three Overlapping Reasons for Immunity*

However, there are three compelling reasons that, when compounded together, will strengthen the principle of immunity. First, there is the means/ends argument that was just briefly discussed. The fact that a civilian is a defenseless bystander who has no material link to the unjust threat would render his killing unjust. Airstrikes against the civilian population do not have any defensive purposes other than reap terror. The killing of a bystander is exploitative, of which the target could properly claim that he is being used.

A second argument in favor of non-combatant immunity is that it reduces the casualties of war. This view might have a moral basis if the reduction of violence and destruction is an objective of the morality of war. The reason to grant immunity is not that non-combatants are a morally distinctive class from that of combatants. Instead, it is based on the morally driven concern to reduce the damage and destruction of life caused by war. All destruction should be limited to what is strictly necessary for defensive purposes. As it was said, destruction for destruction's sake or killing indiscriminately does not have any defensive purposes.

Another reason to grant immunity to non-combatants is that after the war, there is peace. After the destruction of infrastructure and the disruption of civilian institutions, it is necessary not only to set the terms of peace but also to rebuild. A way to accomplish this is to keep the fight 'professional', that is, to maintain the violence within the margin of the rules of war. Non-necessary violence against civilians could engender a disposition of revenge and a lack of commitment to peace in virtue of avenging past wrongs. Besides, some studies suggest that targeting civilians might not have the desired outcome of demoralizing their commitment to the war but would instead reinforce it.<sup>358</sup>

Thus, the fact (1) that many civilians do not materially contribute to the threat and (2) that by providing immunity the overall destruction of war could be substantially reduced and ultimately (3) it will facilitate the transition to peace are reasons that when considered in their totality could serve as a basis for non-combatant immunity.

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<sup>358</sup> Lazar, S. 2015. *Sparing Civilians*. OUP. pp. 35-54.

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It could be objected that such an arrangement does not meet ordinary morality. It could be argued that there are many civilians more guilty and responsible for an unjustified aggressive war than many combatants who are forced into the ranks by heavy propaganda or conscription. The fact is that it is difficult to overlap ordinary morality with the morality of war. For many, war has its separate rules since it has particular features of its own. Our efforts can only hope for an approximation. However, the conventional nature of the rules does not lack a moral basis. As it has been said, after the war, there is peace, and every political community needs civilians to rebuild and restore and maintain the institutions that meet its societal needs. Also, the division between non-combatants/combatants provides a clear rule on how to act in a war. It will result in a reduction in violence and destruction. The strength of the rule is based on the good consequences of the principle and not the strict compliance with ordinary morality.

Nonetheless, I do think that the functional-based causal liability account could make the aspired approximation with ordinary morality. To overlap the morality of war and ordinary morality, it would be necessary to lift the veil of formal immunity and consider the civilian's actual doings and evaluate if his personal actions render him liable to lethal defensive force. In the next section, I would explore this suggestion further.

### ***Overriding the Non-combatant Immunity***

It is possible, however, that killing specific non-combatants would not be inconsistent with the purpose of the immunity if certain conditions were met. In such a case, for example, the civilian target should not have the standing to claim that he is being used or his death is advantageous to the killer's interest, or that his killing substantially contributes to the destruction of war or compromises the chances of peace.

To override non-combatant immunity during armed conflict five conditions should be met. These conditions are that (1) the party employing TK must have a just cause, (2) the target is aiding or advancing interests of an unjust cause, (3) that by killing the target it will be of significant gain for the just cause of the war, (4) the target is engaged in an activity that will have substantial effects in advancing an unjust cause and (5) the target has the practical knowledge or technical skills or the political power to accomplish the imputed task that advances the unjust cause.

These conditions constitute the functional-base account for non-combatants. What should be a noticeable distinction between the functional-based account discussed for combatants with its counterpart for non-combatants is that in the latter requires a higher

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threshold than in the former. One reason for this is that the combatant, due to the fact of membership, has a presumption that his activities are threatening while a civilian, on the other hand, does not, thus a higher standard is required. It is a question of causal proximity. Also, it is not solely that his activities are causally linked to the unjust threat but that by breaching that link, the advancement of the unjust cause will be noticeably impaired.

This higher standard is to avoid eroding the discriminative principle. The main justification for killing civilians should be strictly defensive. There might be some civilians engaged in activities that contribute to the unjust cause of an ongoing war, but not all activities are threatening enough to justify killing their causers. So, the justification should go beyond the mere link between the civilian and the unjust cause. What should be considered is if the rupture of the link will have a negative impact on the advancement of the unjust cause.

To begin analyzing each of these conditions there must be a general approach on how to construct the initial stages of discrimination among the civilian population, this is, a general rule that would divide those who are potentially liable among those who are not. As a start, it was said that some civilians do make contributions at a higher degree than some combatants and, secondly, in today's modern wars all the State's economic and social resources are in some form also contributing to the war effort, i.e., from the collection of taxes to working in the military driven industries, from the religious pulpit to the classrooms (this is known as the *home front*) contributions are made. The question is, then, how could we make the proper divide between those who make a material contribution to the war effort among those who do not. Michael Walzer, who follows G.E.M. Anscombe, offers kind of a spectrum on how to answer this question. Walzer notes that,

The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us. When it is militarily necessary, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. The former are assimilated to the class of soldiers—partially assimilated, I should say, because these are not armed men, ready to fight, and so they can be attacked only in their factory (not in their homes), when they are actually engaged in activities threatening and harmful to their enemies.<sup>359</sup>

So, the 'home front' division should be between civilians who contribute to what combatants need to fight and civilians who produce what is required in order to live. However, not all civilians who provide what combatants need to fight would be liable. For example, a simple

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<sup>359</sup> Walzer, M. p. 146. Walzer adds that The latter, even if they process nothing but army rations, are not similarly engaged. They are like workers manufacturing medical supplies, or clothing, or anything else that would be needed, in one form or another, in peacetime as well as war. An army, to be sure, has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. Those men and women who supply its belly are doing nothing peculiarly warlike. Hence their immunity from attack: they are assimilated to the rest of the civilian population. We call them innocent people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights. Ibid.

machine operator that pushes buttons to activate or shut down a machine or an inventory inspector that ensures quality and quantity of production do not seem cases of permissible defensive force. Killing them would not impair the collective aggression of the enemy. It would be sufficient to destroy the inventory by a satellite-guided missile during non-working hours or direct a cyber attack to disrupt production. There must be something about the individual that makes him not just a simple threat. His actions should be uniquely linked to the unjustified threat by his own technical/skills and that by killing him, it would have a substantial impairment furthering the aggression.

### 6.3. Three Case Studies of Targeted Killing Civilians

#### *Political Leader*

Political Leader, the dictator of State A, has launched his armed forces into an unjust war. State B, which is defending itself from the aggression is winning the war. At this point, State B offers cessation of hostilities if Political Leader surrenders and accepts the terms of defeat. Political Leader does not accept. State B has two options, they can continue with the conventional means, which would cause the loss of thousands of human lives in a full out invasion or kill Political Leader.<sup>360</sup>

The Political Leader case meets the conditions to subject him to targeted killing if State B decides to target him. First, State B has a just cause and the target is fighting an unjust war, and by killing the target it will be of significant gain for the just cause of the war. Political Leaders role has a substantial effect in advancing an unjust cause and he has either the practical knowledge or technical skills or the political power that if terminated, will adversely affect the unjust cause. Also, his actions are uniquely linked to the unjustified threat that by its termination it would have a substantial impairment furthering the aggression.

#### *The Scientist*

Scientist, a private contractor employed by State A that is currently pursuing an unjust war, is about to finish the production of a lethal weapon that will be decisive in turning the tide in favor of the unjust case. State B has an intelligence report of this weapon. What they lack is the precise location of the weapon. They have several conflicting reports of where the weapon is, but if they attack one location it will alert State A not only that State B knows of their secret weapon but their plan to destroy it. Time is running out. What they know with certainty is the location of Scientist. Having no other choice, State B decides to send a team to kill Scientist, a private contractor.<sup>361</sup>

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<sup>360</sup> Aloyo, E. 2013. "Just assassinations", in *International Theory*, 53, 347-381. Miller, S. 2011. "The Ethics of Assassination and Targeted Killing", in *Annual Review of Law and Ethics*, 19, 309-322.

<sup>361</sup> Meisels, T. 2014. "Assassination: Targeting Nuclear Scientists" in *Law and Philosophy*, 332, 207-234.; Maher, R. 2019. "The covert campaign against Iran's nuclear program: Implications for the theory and practice of counter proliferation" in *Journal of Strategic Studies* 0:0, pages 1-27; <https://www.nytimes.com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html>

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Is it permissible for State B to employ targeted killing against Scientist, a private contractor? Yes. The Scientist case meets the conditions to subject him to targeted killing if State B decides to target him. First, State B has a just cause and the target is contributing with his technical knowledge an unjust war, and by killing the private contractor it will be of significant gain for the just cause of the war by keeping the tide in their favor. If Scientist succeeds, it will have a substantial effect in advancing an unjust cause thus his killing will adversely affect the unjust cause. Also, his actions are uniquely linked to the unjustified threat due to his specialized knowledge that by its termination it would have a substantial impairment furthering the aggression.

### ***Legal Advisor***

Legal Advisor has written some legal memos regarding the alleged constitutionality of torture. With his memos, State A, who is fighting an unjust cause, makes a case to its citizens that the torture of the prisoners of war is legal thus permissible. State B is losing the war because the torture of its captured combatants is undermining their efforts. In response, State B decides to kill Legal Advisor.<sup>362</sup>

The killing of Legal Advisor is impermissible. None of the conditions are met. Only two of the five conditions are fulfilled. Although State B is fighting an unjust war and his efforts are contributing to an unjust cause, killing him would not impair the fighting capabilities of the unjust army. Stopping Legal Advisor from writing legal documents would hardly have any significant impact on the just side's war effort. His contribution is too weak to activate any defensive measures against the target. Killing Legal Advisor will be unjust.

### ***The Engineer***

Engineer is leading a team of experts to develop for the first time the Atomic Bomb. He has all the resources at his disposal and can conclude in any minute. State B, who is fighting a just war, has this project as a number one priority in order to force State A to a speedy surrender. State A does not know where the production site is located but does know where he spends his nights. State A sends a team to kill him.<sup>363</sup>

Can State A employ targeted killing against Engineer? Yes. Engineer is a permissible target. While his side of the war is fighting for a just cause against an unjust aggressor, his actions would clearly be unjust. Deploying an atomic bomb would not make a distinction between combatants and non-combatants and the principle of discrimination would be obliterated. It would be employing unjust means that uses the non-combatant status of the enemy's civilian population as an instrument to expedite an early surrender. Since his technical knowledge is

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<sup>362</sup> This case is based on the case of John Yoo, a legal advisor better known for authoring the legal memos sanctioning torture during the Bush Administration.

<sup>363</sup> This case is inspired by the Manhattan Project.



being used to achieve this project and by killing him the said bomb would not come to production, killing Engineer is permissible.

### **6.4. Summary**

As we could see, the functional-base account could also make the necessary nuances for targeted killing to be correctly employed as a defensive tactic against noncombatants. In all the positive cases, there was something about the target that linked him to an unjustified threat and that by killing him that threat was either significantly impaired or ceased. Although these cases technically violated their targets' formal immunity, the conditions that grant the latter were not contravened. Neither of the positive targets could claim that they were used or exploited, nor their killing contributed to the massive destruction of war or compromised the chances for peace.

## 7. Conclusion

This investigation began with a simple question: what is the justification for killing in war and does this account support the use of TK in armed conflict. What made the question specifically relevant was the normative challenge brought forward by the particular features of TK: an individualized, selective and specific form of killing which is notably distinct from the random, collective, non-individualized form of killing that is traditionally practiced in armed conflict. Permissibly killing a random member of collective has different normative grounds than killing a combatant individually. The normative inconsistency between these two forms of killing required either a different account that would permit both forms of killing, or a complimentary account that could overlap with an existing doctrine.

The first step was to explore and analyze the practice of killing in armed conflict by examining the LoAC. It was concluded that the lawful permission of killing in armed conflict depended heavily on the legal fact of membership, which, in turn, did not offer any convincing reasons why killing a specific combatant by TK is justified.

A second move was to seek within JWT for a possible justification. After careful reading and analysis it was established that the models examined lacked a proper explanation for killing specific individuals. This was due, in part, to the regulating fact of its theorization: collective nature of armed conflict. The outcome was a form of collective liability that did not consider nuances among combatants. These models have their virtues, and flaws, but they fail to explain why a specific individual could be permissibly killed.

For this reason it was necessary to exit of JWT and find a doctrine of individualized self-defense that could permit the use of TK in armed conflict. Several models of individualized principles of self-defense were critically viewed with the aim of finding an account best suited for war. The outcome was that causality as liability is well suited for the permissible use of TK in war. It allows the permissible killing of targets that culpability and moral responsibility accounts would have deemed unjustified. However, additional paradigms are necessary to accommodate this principle to the realities of armed conflict.

To allow, thus, the States to employ TK in war, two additional steps were taken. First, the causality principle had to fit with the basic tenants of JWT. These are that (1) the combatant targeted should be fighting an unjust war; (2) The party making the killing must have a just end as a cause for the war; (3), killing the target must be of significant gain for the just end of the war. And since the principle considers the target's specific actions in relation to the unjust cause, a supplemental account was introduced to fill that gap: the functional

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base liability which examines what the target is actually doing beyond the formal status of his membership. The outcome was a fine-grain form of discrimination that distinguishes the personally liable from non-labile collectivized targets within the same collective.

On the other hand, since this account is based on what the target is actually doing and relation to the unjust cause, it was argued that some non-combatants might be permissible targets as well. First, the functional-base account is capable of making the necessary nuances among non-combatants for targeted killing. This account allows for TK to be correctly employed as a defensive tactic. To illustrate this point, several cases were presented. In the positive cases, there was something about the target that linked him to an unjustified threat and that by killing him that threat was either significantly impaired or ceased. While these cases violated their targets' formal immunity (lawful protection), the underlying reasons that grant the latter were not contravened. It was concluded that neither of the positive targets could claim that they were used or exploited, nor their killing was unnecessary or gratuitous or compromised the chances for peace.

The conclusions of this research may be used for questions regarding the justice after the war (or *jus post bellum*). The suggestion is that the International Criminal Court (ICC) should, in a fact-finding procedure, investigate all killings conducted under TK during armed conflict, and if any unjustified killings are suspected, the case for formal prosecution should be presented.

There are three ways in which the ICC may obtain jurisdiction over war crime allegations. First, there's the State Party referral (SPR). This occurs when a State Party refers the crimes to the ICC. Also, the ICC may also obtain jurisdiction by a referral from the United Nations Security Council (UNSC). All permanent members of the UNSC must vote the resolution unanimously. If a permanent member of the UNSC vetoes the resolution, the ICC does not obtain jurisdiction. And, finally, the ICC may obtain jurisdiction by *Proprio Motu*. Under this final option, the ICC prosecutor may initiate, by its own initiative, a preliminary examination of the alleged crimes. The preliminary examination is a four steps process that, once completed, requires the approval of judges to open a formal investigation.

A vital step for the ICC to have jurisdiction under either of these options is to establish personal and subject matter jurisdiction. On the requirement of personal jurisdiction, the ICC can only investigate and prosecute "natural persons" (they must be over the age of 18). Consequentially, entities such as governments, corporations, political parties, or rebel movements, do not fall under this rule. However, its individual members may be subject to investigation. Additionally, subject matter jurisdiction is when the crime committed falls

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under the ICC's authority to investigate, prosecute, and convict. The alleged offense must be either a war crime, a crime against humanity, or genocide, as defined in the Rome Statute. Failure to establish these conditions, the case cannot proceed at the ICC.

That being said, if a case of TK does not meet the functional-based account's defensive conditions (it could be a war crime which will fall under subject matter jurisdiction), those who are responsible under causal liability should be held accountable (personal jurisdiction). Furthermore, the guilty State should compensate the victim's estate for any harm caused by the wrongful death of their family member.

Several facts of the law would have to change. For one, the legal norm that recognizes hostilities' rights to all combatants regardless of the origin of their war should have no binding force when investigating TK cases. This minor change would only be applicable in cases involving targeted killing. So, to hold a suspect criminally liable the independent thesis and, by extent, the equality of combatants should not be applicable in cases regarding targeted killing.

This is not a lofty proposition, at least institutionally. As it was said above, the ICC or the UNSC may, under their own initiative, set *ad hoc* committees to conduct a preliminary fact-finding report that could serve as a basis to ask the ICC to initiate a full investigation with the potential of, and if justice requires, charging suspected war criminal.

A probable objection is that changes in the LOAC could have undesirable consequences. The legal norms of war rely mostly on self-application with a minimal overlapping consensus. This is an effort that expands hundred of years. Any changes, no matter how minor, could undermine its appeal and jeopardize its stability. A possible response is that the proposed changes in the law are not substantial. Instead, they are minor modifications. They intend to hold specific individuals accountable for specific actions that might be traced back to its perpetrator. This small change in the laws of war does not suggest the overhaul of a well-established legal body.



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