

Anna Goppel
Killing Terrorists

Ideen & Argumente



Herausgegeben von
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Killing Terrorists

A Moral and Legal Analysis

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List of abbreviations

ACHPR	African Charter on Human and People's Rights, 27 June 1981
ACHR	American Convention on Human Rights, 22 November 1969
AI	Amnesty International
API	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
APII	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
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
CCPR	International Covenant on Civil and Political Rights, 16 December 1966
CIA	Central Intelligence Agency
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950
ECtHR	European Court of Human Rights
ETA	Euskadi Ta Askatasuna
Fatah	Harakat al-Tahrir al-Watani al-Filastini
GA	General Assembly
GAL	Grupos Antiterroristas de Liberación
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
GCIII	Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949
GCIV	Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949
Hamas	Harakat al-Muqawama al-Islamiyya
HCJ	Israeli High Court of Justice
HCIV	Hague Convention respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907
HRC	Human Rights Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defence Forces
ILC	International Law Commission
IRA	Irish Republican Army
KGB	Komitet Gosudarstvennoi Bezopasnosti
Mossad	HaMossad leModi'in uleTafkidim Meyuhadim
NATO	North Atlantic Treaty Organization
OAS	Organization of American States

XII — List of abbreviations

PFLP	Popular Front for the Liberation of Palestine
PLO	Palestine Liberation Organization
RAF	Rote Armee Fraktion
SECED	Servicio Central de Documentación
SC	Security Council
UDHR	Universal Declaration of Human Rights, 10 December 1948

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Introduction

The first country to publicly acknowledge the use of targeted killings and openly defend it was Israel, making headlines not least because of the decision on this matter by the Israeli High Court of Justice in December 2006.¹ Israel is joined by the United States of America; under the Barack Obama administration, the United States now publicly admits to the use of targeted killings in its global fight against Al Qaeda and other groups regarded as Al Qaeda affiliates, a strategy that had been implemented under the administration of George W. Bush. Since its most recent incorporation of the practice as a basic element of its counter-strategies, in the beginning of the second Intifada in 2000, until the end of 2011, Israel is reported to have killed more than 420 people (bystanders as well as targeted persons) in the course of targeted killings.² The United States of America is reported to have killed 2,486–3,188 individuals (bystanders as well as targeted persons) in Pakistan between 2004 and June 2012. Reportedly 317–921 people (bystanders as well as targeted persons) died of US targeted operations in Yemen in the period between 2002 and June 2012.³

Israel and the United States may be the only states that have publicly admitted to the use of targeted killings, but they are not the only states to make targeted killings part of their counter-terrorist strategies. Today, as in the past, these and other states have applied targeted killings in their fight against alleged terrorists. Provided the use of targeted killings has become public, states have been criticized for their conduct by politicians, in media statements, in the scholarly literature, and, though only in the case of Israel, in court. Targeted killings, however, have been defended equally forcefully. This lack of consensus as to whether states may resort to it is only one reason that demands a thorough assessment of the practice. It demands an analysis of the arguments with which the practice has been defended or attacked as well as of the principles and regulations governing state use of lethal force, on the grounds on which it may be accepted or condemned. The urgency of such an analysis is even more due to the nature of the practice itself, its disturbing consequences, which concern the existence of individual human beings as such, the personal integrity of those ordering, planning, and carrying out the killings, and the political credibility of states engaging in the practice. The analysis is all the more crucial because the public, without having comprehensively discussed and analysed the practice, appears to be increasingly comfortable with its

¹ HCJ, *Public Committee against Torture v. Government of Israel*.

² For the statistics, see fn. 26 in chapter 2.

³ <http://www.thebureauinvestigates.com/category/projects/drones/>, retrieved 20 June 2012. The website also includes figures on US drone strikes in Somalia.

application. Cases of targeted killings of alleged terrorists are reported in the press, but they generally do not trigger intense public discussion or criticism. And this is despite an absence of agreement on the justifiability of the practice.

In response to this need for discussion, this book seeks to provide a careful analysis of whether states are justified in targeting and killing terrorists and, if they are, under what circumstances. Drawing from the political reactions to the practice and the scholarly controversy surrounding it, it explores ongoing debates and addresses the central legal and moral questions in arguments about the justifiability of targeted killing of terrorists. As such, it discusses whether targeted killing of terrorists can be justified and concludes that both morality and international law limit justification of the practice to situations which typically do not occur in practice.

Both criticism and defence of the targeted killing of terrorists focus on law and morality, as separate categories or intertwined. This reflects the different lenses through which the practice can be reasonably analysed if the analysis seeks to formulate and enforce limits to state practices. It could of course be assessed from other perspectives, such as with a view to its economic consequences, which could very well impact a moral and legal assessment. Nevertheless, outside of the scope of law and morality these perspectives are a matter of political considerations and the question of prudence. These considerations should, under certain circumstances, prevent states from reverting to targeted killing, but would neither permit crossing boundaries set by international law nor exempt states from blame for morally wrong conduct. On this ground, additional perspectives outside the framework of law and philosophy will not be addressed in this book.

Targeted killing of terrorists can then be addressed from either a legal or a moral perspective. Furthermore, with regard to a legal assessment, the practice could be looked at from a national legal or an international legal perspective. All of these approaches are possible and theoretically defensible. This book chooses to address the issue from both a legal and a moral perspective, and with regard to the legal analysis, to focus on international law. The focus on international law makes sense in light of the fundamental role international law plays in state use of violence, its addressees, as well as the relevance of violence more generally in international relations to the practice of targeted killing.

The necessity and the use of an approach combining the international legal and moral perspective do not require much justification. For a book seeking to respond to actual debates about targeted killing of terrorists, the approach is required by the form of those debates themselves, which often draw on both areas. Moreover, a moral discussion alone ignores unequivocally accepted and fundamental regulations at the heart of international law, which, as such, have strong justifying power in public debates as well as in political decision-making. An

international legal approach alone would fail in the face of (intuitively) powerful arguments formulated in legal as well as moral debates that identify characteristics of terrorism and the fight against it and demand new interpretations of existing legal regulations or altered international legal rules. Moreover, legal arguments alone lack the means to counter the claim that certain actions are justified in terms of morality despite being recognized as breaching legal rules. Nor can they meaningfully respond to claims that certain legal interpretations correspond to morality, seeking to ascribe a more comprehensive justification to these interpretations. These few arguments highlight some of the benefits of approaching the justifiability of targeted killing of terrorists from both a legal and a moral perspective. The need for this approach and the resulting benefits become more explicit as the book progresses, revealing the way in which the two lines of analysis intertwine, gain from, and support each other.

Discussing existing as well as additional, conceivable approaches to justify targeted killing of terrorists, I argue that certain forms and cases of the practice can theoretically be justified, both morally and legally. Both a moral and a legal justification, however, is limited to targeted killings in situations that can be considered wars, or in legal terms, armed conflicts. Even during warfare justification of targeted killing of terrorists is far more limited than often claimed by advocates of the practice. Moreover these justifications are restricted to rather theoretical circumstances not normally reflected in actual cases of targeted killing of terrorists. In peacetime, I argue, state use of lethal force is legally as well as morally only justified in light of imminent harm. This renders targeted killing, which by definition is not carried out in reaction to imminent harm, unjustifiable, both from an international legal and a moral perspective. This is particularly important in relation to my argument that conflicts with terrorists typically do not constitute either wars or armed conflicts, even if this is theoretically possible. This includes those conflicts that triggered the current use of, and discussions about, the targeted killing of terrorists. In practice, moral arguments could possibly provide an exception to the above conclusion if abstaining from an act of targeted killing would lead to horrendous consequences. On a theoretical level, however, such justification should not be formulated.

In terms of the structure of this book, the legal and philosophical arguments are developed separately. This is necessary in order to develop the international legal and moral assessments of targeted killing of terrorists and to do justice to the different approaches to legal and moral justification put forward in public and scholarly discussions. Together with additional steps necessary for the final analysis this requires the following tasks: first, laying the analytical groundwork, defining the terms involved, and grounding the issue in practice; second, addressing the international legal justifiability of the practice; and third, apprao-

ching the argument from a philosophical perspective. Final remarks relating the legal assessment to its moral counterpart will highlight the univocal judgment on targeted killing of terrorists and the unanimity with which this is expressed by international law and morality.

More specifically, in the *Groundwork*, I establish a working definition of targeted killing of terrorist for the purposes of this book. This frames the focus of discussion and allows a distinction between different forms and cases of the practice (chapter 1). Accounting for the literal meaning of the term ‘targeted killing’, as well as its current usage, and contrasting it to closely related forms of violence, I first develop an understanding of targeted killing that reflects the distinctive characteristics of the practice. A definition of the term ‘terrorist’, reflecting the core characteristics of the term and capturing incidents widely accepted as terrorism, makes it possible not only to provide the relevant regulations and principles governing targeted killing in general, but also to apply them to targeted killings of terrorists and draw conclusions regarding their justification. The distinction between different forms and cases of the practice, as intrinsic to its definition, allows for the classification of the findings of this book, and renders their consequences intelligible in relation to various practically imaginable forms and cases of targeted killing of terrorists.

A review of actual cases of targeted killings of alleged terrorists (chapter 2) then illustrates the current and past relevance of the issue under discussion, as well as the circumstances under which it is most passionately debated. This also reflects upon the practical relevance of the different forms and cases the practice takes, providing a useful background against which to assess the justifying relevance of the individual conclusions developed in the course of the book. Furthermore, the overview provides the basis for identifying those effects and implications of targeted killing of terrorists that are crucial for providing a practically relevant discussion of its justifiability.

Based on these distinctions I establish the moral and legal requirements for a justification of the practice, providing for a differentiated framework with regard to which the practice can be assessed. The structure of the legal and moral argument is, in this, inspired by existing justifications of targeted killing of terrorists, and thus allows for an adequate reply to the ongoing debate.

The assessment of the *international legal justification* starts with an analysis of the compatibility of targeted killing of terrorists with the right to life (chapter 3), which, owing to the structure of the right to life, requires distinguishing the right to life during peacetime from that during armed conflicts. The analysis of the latter explains the relevance of the right to life during times of armed conflicts and relates the human rights debate to the laws of war. As such, it elucidates the

importance which the analysis of the compatibility of targeted killings of terrorists with the laws of war has in an assessment of the practice in terms of human rights.

Following the structure of the laws of war, the assessment of the compatibility of targeted killing of terrorists with this area of international law distinguishes between its compatibility with *jus in bello* (international humanitarian law) and *jus ad bellum*. This distinction is reflected in the questions of whether targeted killings of terrorists can be considered legal acts of warfare (chapter 4) and of whether they can be justified as acts of national self-defence (chapter 5).

Arguments that present the targeted killings of terrorists as legal acts of warfare often confuse different concepts within international humanitarian law. Even if they do not, they require a range of specific classifications and interpretations of the fight against terrorism, the terrorists themselves, and the applicable international legal regulations in order to reach the intended conclusion. A look at some prevailing arguments of this type reflects the practical relevance of the different arguments and allows for the identification of issues crucial to analysis. Following from this, it is appropriate to approach the justifiability of targeted killing of terrorists in a way that corresponds to the structure of international humanitarian law, or, in other words, to distinguish between acts of warfare in international armed conflicts, non-international armed conflicts, occupied territory, and the fight against terrorism as a ‘new’ type of armed conflict. The legal assessment of targeted killing of terrorists in terms of the right to life, as specified by international humanitarian law, plays a role, too, in analysing the argument of whether the practice can constitute an act of national self-defence, completing the legal assessment.

The discussion of the moral justification of targeted killing of terrorists mirrors the legal analysis, in that it distinguishes between peacetime and wartime reasoning. It explores different justifications of targeted killing of terrorists, yielding an explanation of the limits to state use of lethal force, which then provides the basis for assessing targeted killings of terrorists. The choice of approaches and the need for addressing them follow from the development of the argument itself, but they also reflect the defences of targeted killings put forth in public and scholarly statements.

In detail, the first chapter of this part of the book explores the justifying relevance of the wartime reasoning to targeted killing of terrorists (chapter 6). In peacetime, a philosophical assessment of the justifiability of targeted killing of terrorists requires a critical engagement with the argument that revenge or punishment justifies the practice (chapter 7), as well as an assessment of defences of the practice based on consequentialist moral theory (chapter 8) and, ultimately, an analysis of right-based accounts of justification. The concept of *Feindstrafrecht* (criminal law for enemies) accepts the existence of rights as a reference point for

the justification of the use of lethal force, yet defends too radical an idea of full and absolute forfeiture of rights (chapter 9). Hence, like the first two approaches, it fails to offer a convincing justification for targeted killing of terrorists. Nevertheless, it puts forth an idea, that of forfeiture of the right to life, which, in a plausible, strictly regulated, and moderate formulation, helps to explain acceptable state uses of defensive lethal force, other-defence carried out by the state. Although individual self-defence or the corresponding concept of other-defence have not been used to justify targeted killings, a closer look at the concepts makes plausible the rights-based limits to state use of lethal force, seizing upon normative suggestions that evolved in the antecedent approaches to morally justify targeted killing of terrorists (chapter 10). As such, it also serves as a basis to approach conceivable arguments pointing beyond such a deontological account of justified killings. The last chapter addresses such arguments and allows for a final assessment of the moral justifiability of targeted killing of terrorists (chapter 11).

I will close with some *concluding remarks* that relate the legal assessment to its philosophical counterpart. They will highlight the congruity of the moral and legal assessments and the discrepancy between these assessments and the current use of targeted killings of terrorists.

Since March 2009, when I submitted my PhD thesis, which forms the basis of this book, there have been several political and scholarly developments that have had impact on the matters under discussion here. Foremost are the frequency with which the United States has resorted to targeted killing as well as its public acknowledgment of the practice. Another is the apparently growing public acceptance of the practice. Moreover, scholarly discussion about specific cases of targeted killing and the practice in general have, of course, continued to evolve. I have attempted to account for these developments, both practical developments and the progression of the scholarly debates, in revising and updating my doctoral thesis. Among those scholarly works published after I had finished my thesis for submission, I have considered and discussed, with regard to new developments as far as possible, those that appeared between 2009 and 2011. While I was unfortunately unable to include them, several articles and books were published in 2012 that would have merited attention, including the book edited by Claire Finkelstein, Jens David Ohlin and Andrew Altman *Targeted Killings. Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press). I look forward, of course, to engaging with these works in future publications.



Part I: **Groundwork**

