

## COMMENTS ON TAMAR MEISELS' "TARGETED KILLING WITH DRONES? OLD ARGUMENTS, NEW TECHNOLOGIES"

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### Aleksandar Pavlović

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In her apologetic approach to drones and targeted killings of terrorists, Tamar Meisels claims that "targeted killing is our best shot at combating terrorism at the lowest cost to human life." In my view, this perspective is heavily limited as it rests on a simplistic identification of combating terrorism with killing terrorists. *Mutatis mutandis*, it assumes that there is this thing, namely terrorism, represented by a certain – finite – number of terrorists. Hence, the faster and more precise we are in killing them, the faster we will defeat terrorism, once we *kill'em all*.

Insofar as one subscribes to such framework and measures the efficiency of anti-terrorism by the number of dead terrorists or, more precisely, the ratio between killed terrorists, civilians and "our guys", the use of drones, indeed, appears to be comparatively more successful and efficient than its more traditional and technologically less advanced counterparts. Hence, Meisels sees practically no faults in drones apart from a single observation – "their psychological impact". In her words, "drones that hover above for lengthy periods of time enable better informed moral decisions but what about the psychological collateral harms they inflict, as the costs of increased precision is offloaded onto surrounding civilians 'Living under Drones'" Her concern notwithstanding, Meisels still believes that such damage is a small price to pay: "Nevertheless, psychological harm to civilians, just like any other collateral damage in war, has to be balanced alongside, and as against, other considerations such as military objectives and the costs of alternative weapons."

However, what such view fails to account for is a more broad and long-term effect of such "psychological impact". It is rather clear that those brought up under the sound and fury of drones will not be ardent followers of those that send it, but rather of those at the receiving end. Hence, "the psychological impact" of drones is not limited simply to unpleasant feelings it evokes in civilians on the territory where they are used. More so, such impact is bound to be far deeper, reaching into the hearts and minds of those civilians and bringing them closer to the causes that spur terrorist enterprises. The effect is thus to be precisely the opposite of the intended one – devices employed to kill 1 terrorist are likely to recruit 10 or 100 more in his place.

The opponents of this view could perhaps refute it as speculative. Yet, our historical present speaks strongly in its favor. In the past decade and a half, we have witnessed the employment of the most sophisticated and brutal military machinery and killing devices against terrorism that the world has ever seen. *Good states* – as Meisels calls them – have thrown at them everything they have. And, yet, the terrorists managed not only to survive, but to rise in numbers, acquire a sizable territory in the Middle East and to exponentially spread the number of their attacks throughout the World, including the most advanced Western countries. And that is, because, of course, there is no predefined, limited number of terrorists. Here, as I believe, lies the ultimate limitation of Meisels’ argumentation – it is futile to discuss the effectiveness of killing machines without asking broader questions about the causes, sentiments, reasons, mechanisms, etc. behind terrorism. For terrorism is not going to be defeated by the *kill'em all* approach. In the Greek myth, Hercules once faced the Lernaean Hydra, a multi-headed monster that, each time he would cut her head off, regrew a couple of more in its place. That is, in my view, the ultimate “psychological impact” of drones and killing machines. It took Hercules some time and efforts to understand that, ultimately, his mighty sword is not only inefficient, but altogether counterproductive.

### **Carlo Burelli**

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Many will feel uncomfortable with Tamar Meisels’s conclusion that killing terrorists with drones is permissible. Yet, there is little to criticize in this paper, because the most contentious parts of the argument are presupposed and understandably fall outside its scope. I will briefly sum up the argument, and then suggest two minor internal objections and a way to address its assumptions.

The paper aims to establish that targeted killing with drones is morally permissible in principle. Assuming that a state of legitimate war exists against terrorist organizations, targeted killing can be justified because it helps restricting their operational capacity by assassinating and intimidating charismatic leaders and operatives or forcing them into hiding. Targeted killing is not only useful, but also permissible because in war there is no legal requirement to capture combatants, because it does not kill at random, and because it reduces collateral damage. Thus, targeted killing appears justifiable according to traditionalist just war theory. Drones are only slightly different because they allow for (almost) riskless war, and because their buzzing causes psychological collateral damage on civilians. Yet these reasons are not strong enough to overcome the moral advantages of minimizing collateral damage to civilians.

While the author is right in criticizing those who think that drones should never be employed, we must be cautious about optimistic considerations that ‘they are inherently a-symmetrical weapons favoring states, both morally and strategically’ (Meisels, 2017: 15). Perhaps a distinction needs to be made between highly advanced US and Israeli military drones, and airborne improvised explosive devices. The low cost, low operational skill requirement, off-the-shelves availability make airborne I.E.D. an ideal weapon for terrorists. This seems to be the opinion of the Pentagon,

which sent technical specialists to Iraq, Syria and Afghanistan to protect US and local troops from ISIS drones (Schmitt, 2017). Meisels thinks drones are going to be ineffective unless ‘state-level air superiority’ is achieved (Meisels, 2017: 15), but J. D. Johnson, a retired general who previously commanded the threat-defeat agency, thinks that terrorist drones constitute a very real danger: ‘these things are really small and hard to detect, and if they swarm in groups, they can overload our ability to knock them all down’ (Schmitt 2017). Due to their efficiency, there is also room to challenge the author’s conviction that drones are weapons that only favor those ‘moral states’, who wish to minimize collateral damage. While it is true that drones allow for precision strikes, the lower construction and operational costs and human risks could potentially allow swarms of drones to inflict efficient destruction on a mass scale.

Another important point to clarify is that Meisels’ paper defends the permissibility of drones only in principle. Following Walzer (2016), she agrees that there are problems due to an excessive and unscrutinized employment of drones. The use of drones needs to satisfy the three conditions of *ius in bello* to be warranted. It needs to ‘discriminate’ between civilian and military operatives, it needs to be ‘proportional’ to the military advantage achieved, and it needs to be ‘necessary’, i.e. the least harmful means feasible to an end (Lazar 2017). These conditions are required because harming others is considered intrinsically bad, and therefore it is only allowed when it can be justified by positive reasons that count in its favor – either some greater good achieved or some graver evil averted (Lazar 2012). The same standard should be used to assess drone operations: drones should not inappropriately target civilian lives, their use should be proportional, and intended to avoid bigger harms terrorists may commit. Indeed, it is hard to see how drones fare worse than missiles or manned bombers on all these three standards. Drones in fact let operators monitor the target for ‘lengthy periods before deciding whether, when, and where to strike’ (McMahan 2013: ix). While these capacities allow operators to take a more morally informed decision, they do not ensure that they select the ‘morally right’ option. Only when the right decision is indeed to strike, we could conclude that drones’ ‘employment is not only ethically permissible, but is, in fact, ethically obligatory’ (Strawser 2010: 344), insofar as it minimizes unnecessary casualties. Meisels is right in remarking that when this is not the case, ‘humans are at fault, not the machines they employ’ (Meisels 2017: 17). This concession certainly makes her claim more plausible, but perhaps less sharp than it could be. Restricting the argument to the permissibility in principle makes its conclusion ultimately contextual.

Finally, a brief suggestion regarding the assumptions. The argument assumes a traditionalist account of just war, which allows for killing enemy combatants in circumstances that far outstrip self-defense. It further concedes that a legitimate state of war against terrorist organizations exists and that terrorists count as military or paramilitary combatants. Meisels’s paper could not have reasonably defended all these assumptions, but it might have made them more explicit. Particularly, it might have been helpful to refer to the author’s own definition of terrorism as “intentional random murder of defenseless non-combatants, with the intent of instilling fear of mortal danger amidst a civilian population as a strategy designed to advance political ends” (Meisels 2009: 348). On this basis, it would have been relatively easy to suggest that terrorism constitutes a rightful ground for war as a case of national defense, and that terrorists count as military combatants.

Overall, Meisels's conclusion, that killing terrorists with drones is permissible, seems sound. There is no easy way to reject just the use of drones without challenging the use of other weapons, or even some general assumptions of traditionalist just war theory. At best, it defends a convincing argument, at worst, an invitation to radically challenge its assumptions.

### **Aleksandar Fatić**

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Your general argument is that the use of drones does not pose particular moral controversies which do not apply to the use of other weapons, such as long-range artillery or high-flying military jets, where the operators also work in a relatively 'risk-less' environment when fighting a technologically inferior adversary. You further argue that the use of drones is in fact less morally challenging than the use of more basic weapons, because drones are not suitable for terrorist use, they are highly selective and particularly well adapted to scrupulous use by 'good states'.

How does this type of argument apply to the moral psychology of war, specifically to the ethics and mindset of specific soldiers who operate drones? While it may be true that a pilot flying at a high altitude and releasing guided missiles is not really at any kind of direct risk from an adversary equipped with anti-aircraft cannons with limited range, the pilot still has to be able to fly the plane, to operate the missiles, he or she has to be there, experience the environment. The same, even more, is the case with the operators of long range artillery pieces: they hear the noise, the firing, smell the explosives, they have an experience of war, even from a relatively long distance. However, drone operators have no experience of war at all: they drive to work in the morning, stop by to buy a burger, operate drones from an office-like environment, and then drive back home for supper and to watch their favorite soap opera. There is a very tangible sense in which this is not a 'normal' situation for a soldier, and this casts all kinds of moral issues: how does one judge one's actions, and how are one's actions judged by others, if one is not really a soldier, but a bureaucrat with relatively limited skills, operating a drone from an office? How does that impact the values of the military profession? Perhaps most importantly, what kind of soldiers will we get if the armies start relying on drones progressively (and they are on the way to do so)? Does this mean that anyone could be a drone operator, even those people who could never withstand the rigors of the battlefield? How can we count on their integrity, toughness and firmness of moral values? And in what sense do they share the military ethos, or do they undermine it?

### **Predrag Krstić**

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Thank you for the inspiring lecture. I believe that you have convincingly shown that all objections regarding the use of drones are groundless if we seriously take into account the profits they provide and – if we accept this kind of budgeting. I

will focus here only on one argument, because it presents a unique opportunity to confront views. Namely, when you consider the claim according to which “riskless warfare is a bad one in itself, either because it makes one’s opponent non-threatening and therefore non-liable to attack in self-defense, or else because it is dishonorable, unfair, and lacking in military valor” (23), you rightly observe that such claims usually exclude the historical dimension which would reveal that hurling, flying cannon, long range missiles, and even aerial bombardment by manned aircrafts, must have also seemed like terrifying remote control weapons at the time they appeared. This is the case because throughout history we had various degrees of “asymmetrical warfare, distant engagement, the loss of old-fashioned military virtues and defenseless targets facing a faceless death.” (23) If I reconstruct the position correctly, this type of critique of riskless warfare basically holds that the main advantage of Unmanned Aerial Vehicles, namely the risk-free combat, is in fact the weakest point of the pro-UAV argument. To a lesser degree, this type of reasoning can also be found in Walzer: he worries about the easiness of killing enemies without risking our soldiers, about the dangerous temptation of riskless warfare that relaxes the targeting rules and actually increases general unfocused warfare (Walzer 2016), or, as you wittily summarize: “zero risk warfare encourages trigger happiness” (24). It seems that your answer here is also quite sufficient: using drone capacity to focus on the goal as narrowly, humanely and technically as possible, trying to hit the enemy target and preferably none else, and any other use of drones is clearly unacceptable, as is any other use of a sling shot, or a bow and arrow. Therefore, complaints about misuse and over-use of drones, intentionally or negligently terrorizing populations, should be aimed at specific policies and policy makers, rather than at the technology (25).

However, Aleksandar Fatić has a different position: the use of drones fails to satisfy any of the four conditions for the justified use of military – the drone operator needs no courage whatsoever; in riskless and costless drone attacks there is no willingness to make sacrifices for the cause soldiers fight for; there are no questions of justice, but only a technological task for the drone operator, like a computer game where there is no immediate awareness of justice or injustice as a factor of decision-making; finally, to conduct offensive military operations by the drones, one needs no virtues, no humility, and one does not have a sense of oneself as a part of the military moral community (Fatić 2017: 352-353). In response to similar objections, you refer to B. J. Strawser and Danny Statman (Statman 2015) and point out that, morally, drones have the capacity to minimize casualties among civilians and combatants, and financially, they are relatively cost-effective for states to produce and deploy in a relationship that is inhabited for the implementation of similar missions, freeing up shared resources for welfare expenditures (25). Therefore, according to Strawser’s argument, it is necessary to employ UAVs as opposed to exposing soldiers to unnecessary risk, that is, “in certain contexts UAV employment is not only ethically permissible, but is, in fact, ethically obligatory.” (Strawser 2010: 344). Do you think we are dealing here with a different understanding of morals? Fatić insists on the applied military ethics - which is corrupted by the corporatization of warfare. Do you find such account of the moral cost of deploying drones wrong? Or inappropriate? Or just obsolete?

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Tamar Meisles analyzes the use of drones in targeted killing as a strategy to fight terrorist organizations.

The author points out with clear argumentation the many advantages that the targeted killing can offer during a war. Indeed, the implementation of increasingly sophisticated technological instruments brought new hope as well as addressed the need to spare civilian innocent lives. So targeted killing in general, and the drone warfare in particular “offer – according to the author – the possibility of careful compliance with the laws of war, to those who wish to comply”.

Meisles focuses on the targeted killing of a member of a terrorist organization and makes explicit several presuppositions of her argumentation. More specifically, she defines the targeted killing of a terrorist as an act of war and preventive defense. She also clarifies that the targeted killing of a terrorist is different in kind from the political assassination because, she says, “Terrorists are targeted for what they do – not for the causes they serve”. However, she also admits, “terrorists are unquestionably combatants”.

I would like to focus on this aspect of Meisles’ paper because, in my opinion, this definition of ‘terrorist’ is not trouble-free. Indeed, a combatant is part of a conflict, somebody who fights under a particular “flag” and, therefore, by definition, the reasons that push the combatant to fight are deeply relevant (from a legal point of view). For instance, if a driver kills ten pedestrians because he (or she) is driving under the influence of psychoactive substances, likely he (or she) will be charged with vehicular manslaughter. On the contrary, if he (or she) declares that the he (or she) is fighting for the ISIL, immediately the legal definition of the crime will change. So, terrorists are targeted because they are terrorists, not only because of what they do, but also because they are doing that to serve a cause. Indeed, they are terrorists exactly in order to do what they do (massacres of innocent people) because they serve a (fanatic, extremist, hateful) cause. Thus, the cause they serve is relevant, more precisely, the fact that a mass murderer acts because he or she is serving a cause is a necessary (but not sufficient) condition for considering that mass murder a terrorist attack (and not simply the terrible effect of a psychopathic behavior). Unfortunately, exactly for this reason, in some borderline cases, the distinction between a political assassination and the assassination of a terrorist can be unclear. Indeed, in history many politicians started their career in organizations considered terrorist organizations.

This is, of course, not a good reason to stop fighting terrorists, but it is better to avoid to play their game. In addition, indeed, Meisles’ words “Terrorists are targeted for what they do – not for the causes they serve” suggest the correct way to deal with terrorists that operate in a national territory. That is: stop thinking of them as combatants and start thinking at them just as criminals. If we consider them combatants, automatically we acknowledge that they serve a cause and indirectly we acknowledge their actions as something different from a mass murder, in this way we start using their code, their categories. Red Brigades were not

at war with Italy, Cosa Nostra is not at war with Italy: can as considered be both are criminal organizations that caused severe damage to the State. However, this is not a good reason to adopt targeted killing. Terrorists are, of course, a special kind of criminals and their reasons for actions are particularly relevant to qualify their crimes. They can be terribly well-organized and well-armed, or they can be crazy people infatuated with a despairing ideology, they can be even pawns of a foreign State. However, when they act as individuals in a national context, they should be judged according to the norms of the state legal system i.e. as criminals. Even the worst of criminals has the right to be tried in accordance with the law. Therefore, targeted killing is a short cut apparently reasonable, but that could lead us to a wrong direction, it leads us to play the game of the terrorist organization, it leads us to accept them as opponents, as combatants exactly in accordance with the categories of the terrorist organization. Targeted killing should not be an option if we really want to fight for the defense of the values we share, that include the Rule of Law (Nader 2015).

Meisels affirms that killing a terrorist “is a legitimate and desirable military objective”. I think that a State that is a victim of frequent terroristic attacks by a complex and unfortunately widely supported terrorist organization, cannot hope to solve its problems through targeted killing. The only desirable objective is to find a way to contrast this organization through the intelligence, to monitor the social impact of the organization and to obtain the consent of the local population. This goal is unreachable if that State relies only on a dehumanizing (even if apparently effective) technological instrument (Galtung 1989).

In conclusion, exactly like Meisels, I think that drones could help us in fighting terrorism. It is, for instance, advisable that their capacity of surveillance (of specific individuals and in accordance with precise procedural norms) be exploited, maybe in the future we will be able to use them to capture terrorists or other sorts of criminals. However, the use of drones for targeted murders means exactly to betray the values the drones and the armies of western countries are supposed to protect.

### **Marjan Ivković**

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My question concerns one of Tamar Meisels’ key arguments in her recent paper: Meisels argues that the broader context of the contemporary military strategy of targeted killing with drones practiced by the United States and Israel – namely, the ‘war on terror’ – can be defined as essentially only a slight variation of the conventional war (i.e. war between sovereign states). On the grounds of this argument, Meisels further claims that the war on terror should be subject to the same legal regulations and normative constraints that are today applied to conventional warfare (the Geneva Convention, the ‘just war theory’, etc.). When applied to the concrete issue of targeted killing with drones, this logic implies that some of the most problematic aspects of drone strikes – the quite substantial number of civilian casualties – can be justified as ‘collateral damage’, a term used within conventional war theory to justify civilian casualties on the grounds that a particular course of action that caused civilian deaths was ‘essential for accomplishing a given mission’.

In my view, there is one crucial problem with this line of normative reasoning: the normative equating of the ‘war on terror’ with conventional warfare. Namely, concepts such as ‘collateral damage’, which rest on an ultimately utilitarian, or ‘instrumentalist’ justification, make sense within theories of conventional warfare precisely because modern conventional wars (leaving aside pre-modern examples such as the Thirty Years’ War) are *temporally limited phenomena* (they last a few years, or maybe even a decade, but they are essentially *short* and *intense*). Because of their short and intense nature, one can argue that conventional wars must tolerate phenomena such as ‘collateral damage’, for two reasons: first, if the actions that bring about ‘collateral damage’ are strategically essential missions, they contribute to a particular conventional war’s being *even shorter*, i.e. they contribute to its imminent ending; and, second: it can reasonably be expected that instances of ‘collateral damage’ in a given conventional war will be *few*, limited in number – in other words, they can be treated as an inevitable ‘aberration’ from standard warfare.

However, the ‘war on terror’ is, in my view, a categorially different phenomenon from conventional warfare. As we are approaching its 20<sup>th</sup> anniversary, it seems quite clear that this ‘war’ cannot be treated as a ‘limited’ phenomenon in temporal terms – that is, as a ‘war’ within which there is any clear understanding, let alone realistic prospect, of what it means to ‘win’ it, or ‘bring it to completion’. When reflecting on the two decades of the war on terror and the ‘progress’ achieved so far, I believe we can reasonably conclude that its internal logic renders it a temporally ‘open’ phenomenon – we can hypothetically envisage a ‘victory’, but there is no clear prospect of the latter in the empirical world, or any clear understanding of the best possible ‘strategy’ for winning it. In that respect, the concept of ‘collateral damage’ is fundamentally undermined in its normative logic, i.e. it is rendered meaningless: namely, both the premise that collateral damage is justifiable because the operations that produce it are essential for a swift and decisive ‘victory’ in war, and the premise that instances of collateral damage will be ‘few’, limited in number, are no longer tenable in the context of the ‘war on terror’. On the contrary, we can reasonably assume that no single military action (drone strike, for example) will be ‘essential’ for winning the war, and that the instances of ‘collateral damage’ will, as time goes by, become innumerable – in other words, they will become a *regularity*; their normative feature of being essentially an ‘aberration’ will no longer exist. For these reasons, I contend that the concept of ‘collateral damage’ cannot be used to justify civilian casualties of drone strikes and, more broadly, that drone strikes cannot be justified as ‘essential’ to winning the ‘war on terror’, as the latter cannot be defined as a ‘war’ in any conventional sense of the term.

### **Petar Bojanić**

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My question and preliminary comment on Tamar Meisels’ text in a certain way follow in the vein of Marjan Ivković’s comments. First, I would offer two suggestions from Michael Walzer’s work that might potentially help in reconstructing and strengthening Tamar Meisels’ argument for the use of drones. The first can



be found at the end of Walzer's "Targeted Killing and Drone Warfare" from 2013 (*Dissent*) where he brings up something "very simple:" "Imagine a world, which we will soon be living in, where everybody has drones." The second suggestion, in a new way perfectly maximalist, refers to Walzer's intention that drones become something more than they are or could be – for all to have them and for them to become "the only game in town" or a "powerful illusion." Specifically, that something useful could truly be done with them and that they have the "possibility of winning wars or defeating insurgencies from the air" (Walzer 2016: 18).

If we accept that in our cities or countries there are persons or perhaps small groups that will not participate in "democratic" or "patriotic games," who are therefore ready to randomly destroy already constituted groups or portions of a city – Meisels mentions "unlawful or irregular combatants" (Meisels 2017: 6, 26–27), and a hundred years ago, Husserl spoke of a kind of "pseudo-citizen" – and if they were all named with a quasi-Kantian phrase "unjust enemies," then a right to war against them would be infinite ("*jus belli contra hostem injustum est infinitum*"; Kant 2016: 1372), the "illusion of victory," of which Walzer speaks, would be entirely trivial and negligible. If "a drone strike against X would not be an assassination, or an extrajudicial execution, or a deprivation of life without due process of law, as prohibited by the Fifth Amendment" (Nagel 2016), then the collection of these actions in continuity could represent the unconditional condition for the improvement of common life in the city, in cities, in the world at large. Introducing the "unjust enemy," and Kant speaks about my (or our) "right to his goods, person and life; to use them as means to my ends," is an introduction into an entirely different understanding of war and victory in war. Kant's defensive instrument (let us call it Kant's even though he borrows it from other jurists), which in places and certain contexts looks truly terrifying, can be reconstructed and recognized in various pseudo legal institutions such as *herem*, *homo sacer* or piracy. The single phrase and status of "unjust enemy" implies the open right to be pursued, recognized, and destroyed. It seems to me that the origin of Walzer's first suggestion is at this point: the problem is not that everyone has a toy that flies over the city, but that everyone has the right to use them in a specific way, to dole out justice and kill. Since the city is filled with weapons available, for example in America, to everyone (an equally worrisome fact), my attention would rather be directed above all to the clear manifestation of one who disposes of drones and completely transparently performs certain actions. I would advocate, for example, that only certain states – for example the member states of the Security Council of the UN – be allowed the right to use drones and conduct with them certain controlled and transparent actions. Further, all actions conducted would have to be announced and would have to have even the thinnest veil of secrecy removed. Transparency of action would reduce random victims. The one conducting violence must be manifestly responsible for it. Otherwise, drone actions have a religious character (conducted by one who appears no longer); citizens are hostages, targets of unjust enemies, forced to suffer violence for which centers of power have not taken responsibility. Most importantly, however, citizens have a reduced right to public gathering or grouping in city space. Would this transparency in conducting drone action maintain their efficiency?

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Jeremy Waldron has recently claimed: ‘There is something about the targeting of named individuals that ought to give us pause, particularly if it is adopted as a regular practice’ (Waldron 2016: 297-298). In a similar vein, but with regard to drones, Micheal Walzer has argued: ‘[...] targeted killing with drones? Here the old argument, though it still makes sense, leaves me uneasy’ (Walzer 2016: 12). In her challenging paper ‘Targeted Killing with Drones? Old Arguments, New Technologies’, Tamar Meisels invites us to overcome this uneasiness felt by Waldron in regard to targeted killing and by Walzer in regard to drones targeting terrorists. Her main point is that the most common objections against targeting terrorists, notably with drones, are unsuccessful. ‘Judged under a wartime regime, there is nothing wrong, and in fact much that is right, about targeting individual terrorists’ (8). Furthermore, drones ‘have this capacity to refine, rather than dull our moral sensibilities’ (17). Briefly, according to Meisels there is nothing wrong with the targeted killing of terrorists, and to accomplish this task the use of drones is permissible if not strongly recommended. In the following, I will not address all of the arguments advanced by Meisels to support her position. Rather, I will focus on two problematic questions of her paper, the first one about targeting terrorists *per se*, while the second one concerning drones. If my objections were sound, then those in line with Waldron and Walzer would have some reasons not to overcome their uneasiness with both the targeted killing of terrorists and drones.

My first objection addresses the normative framework that Meisels employs to assess the targeted killing of terrorists. Meisels claims: ‘the *armed-conflict* model’ is ‘the only relevant framework for assessing our governments’ anti-terrorism strategies’ (3). She then gives the impression that no strong justification is needed to support this claim. One could simply rely either on legal authorities – ‘I follow the American and Israeli Supreme Courts’ (4), or on self-validating claims – ‘terrorists are unquestionably combatants’ (4). Nonetheless, the first justification is too narrow, since ‘legal justifications [...] may be designed simply to block or answer particular legal objections, leaving broader ethical issues untouched’ (Waldron 2016: 299). Complementarily, the second justification fails in that the status of terrorists is highly disputed rather than unquestioned. As a matter of fact, there are two theoretical reasons leading us not to treat terrorists as combatants, thereby questioning the applicability of the *armed-conflict* model. First, the combatant status confers some rights that clearly do not apply to terrorists. For example, combatants are ‘guaranteed immunity from legal prosecution for acts [...] that would ordinarily be criminal’; ‘they are also granted legal rights to [...] release at the end of the war if they are captured’ (McMahan 2012: 144). Terrorists, though, cannot have either the former or the latter right. Second, ‘combatants have a legal duty not to conduct intentional attacks against civilians’ (McMahan 2012: 144), while terrorists, because of what they are, carry out intentional attacks precisely against civilians. In short, terrorists do not quite seem combatants. In light of this, one can now understand why Meisels ends up defining terrorists as ‘irregular’ (4) or ‘unlawful combatants’ (6). Yet this categorization is objectionable too. Besides its unclearness, I am also

concerned with the consequences that its adoption by the administration of both Bush and Obama has brought about so far: either the killing of several individuals, or their indefinite imprisonment matched with the denial of any right, even those against torture. If these consequences are not simply the effect of the misuse of the category ‘irregular’ or ‘unlawful combatant’, but rather the aims that this category is supposed to fulfill (Kenneth 2004), then there are strong reasons to oppose its use (Waldron 2012).

The appropriateness of the *armed-conflict* model for the assessment of the targeted killing of terrorists is also questionable for both moral and strategic reasons. Strategically, the killing of terrorists as a tactic of first rather than last resort prevents us from discovering information about other terrorists or planned terrorist operations (McMahan 2012: 149). Morally, if applied within liberal democracies against those citizens engaged in terrorist activities, the *armed-conflict* model would create the puzzling situation in which different groups of citizens acting through the same means in order to accomplish the same aim, e.g. the destabilization of the state through attacks against civilians, are treated differently. For example, in Italy the members of the Red Brigades would be treated as criminals, while the members of the IS as combatants. However, this different treatment would be unjustifiable on the grounds that it differentiates citizens because of the different original nationality of the group to which they belong, rather than their actions (I am assuming that the terrorists of the IS are citizens of the attacked state). A non-discriminating position would then argue for the extension of the *armed-conflict* model, in order to capture the members of the Red Brigades too. This proposal, though, would reduce the jurisdiction of the criminal law vis à vis the laws of war, and could be coherently further broadened (e.g. why not treating Mafia members as terrorists?), thereby weakening those constitutional guarantees protecting citizens from the executive power.

If these considerations are sound, then the use of the *armed-conflict* model needs further justification compared to that provided by Meisels, notably if it is to provide the normative framework on which the legitimacy of targeting terrorists is built. Also, for the reasons advanced, absent further justifications, the *law-enforcement* rather than the *armed-conflict* model should be the default option in dealing with terrorists; police rather than military action is to be preferred.

My second objection refers to drones. Meisels claims that ‘running an effective drone program requires [...] state-level air superiority’, therefore drones ‘are a weapon of states, particularly good states aspiring to distinguish combatants from civilians’ (14-16). I find this claim incomplete. A more accurate version of it would be rephrased as follows: since drones require state-level air superiority, they can only be used by *powerful* states aspiring to distinguish combatants from civilians. Moreover, when employed beyond borders, drones can be used exclusively against those terrorists hiding themselves in *weak* states, i.e. states whose sovereign powers are not effective, either internally or externally. In other words, drones are meaningful only within an international system in which the sovereignty of those weak states not violating human rights is formally rather than substantively recognized and respected by the international community. Hence, besides refining rather than dulling our moral sensibilities, drones also confirm rather than challenge the current

international imbalances of power. This is certainly not a sufficient reason to oppose their use. Yet it gives a sense to our uneasiness with drones and also provides a basis for advocating the establishment of an international drone accountability regime (e.g. Buchanan, Keohane 2015).

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Reading “Targeted Killing with Drones? Old Arguments, New Technologies”, I cannot but share Michael Walzer’s uneasiness regarding drone warfare. But I also am uneasy with the very key premise on which Tamar Meisels bases her argumentation, that is, that the struggle against terrorism is a war.

Meisels fully endorses the American and Israeli Courts’ claim that counter-terrorism measures are framed in a context of armed conflict. There is an ongoing war between some States and some terrorist groups and, in this belligerent framework, “terrorists are unquestionably combatants” (2) and are given a paramilitary status. If we accept this premise, her argumentation stands, and even seems the logical development of the arguments. But, shouldn’t we take a step back to reflect on this premise?

Despite the fact that there are many insightful criticisms against the conceptualisation of ‘war against terrorism’ (Burke 2003; Lakoff 2006; Hafetz internet), Meisels accepts this idea. Why is the terrorism/counter-terrorism struggle considered as a war in this text? What are Meisels’ arguments to consider it as a war? As she claims, she follows the Supreme Courts of the United States of America and of the State of Israel, and that authority is what sustains her axiomatic premise of terrorism/counter-terrorism as a war.

Does this struggle have the common traits of a traditional war? Meisels (3) claims that “terrorists defy all conventional rules that confine combat to the battlefield”. So, how do the traditional privileges of belligerency apply to this different warfare scenario? Would they not need to be revised after careful assessment? Even accepting that this struggle is a war, is it not dangerous to apply old arguments to new belligerent situations?

As terrorists defy all conventional rules, they are not considered as soldiers, but as “unlawful combatants” (3). They are always combatants, day and night. So, I wonder, are they susceptible to being killed at home, with their family, because they are never off duty? Meisels (2) adopts the terminology used by former Israeli Supreme Court Justice Aharon Barak: terrorists are “a type of unprotected civilians who are not unengaged in hostilities”. This way of conceptualizing a terrorist is highly problematic. What is not being unengaged? What is being (un)engaged in hostilities? Is having and supporting certain political ideas not being unengaged? Is having personal ties with terrorists not being unengaged? If so, is the family of the terrorists considered also terrorists, as they may be seen as not unengaged in their relatives’ activities – or as they may be, even inadvertently, enabling the terrorists?

To be considered as a civilian, as a non-terrorist, one has to distinctly disengage oneself from hostilities. How does one do that? How far does the accusation of being engaged in hostilities go? Judith Butler reflects on this issue in several

of her texts (2004, internet a). Butler is concerned about the dangers of the black and white framework that this belligerent stance about the so called ‘war on terror’ generates. Accusations of supporting terrorism are easily made (Butler, internet a), and are encouraged by claims such as George W. Bush’s famous sentence: ‘You are either with us, or with the terrorists’. After the 2015 Paris attacks, Butler (internet a) wrote: “Those commentators that seek to distinguish among sorts of Muslim communities and political views are considered to be guilty of pursuing ‘nuances’. Apparently, the enemy has to be comprehensive and singular to be vanquished, and the difference between Muslim and jihadist and ISIL becomes more difficult to discern in public discourse”.

In *Precarious Life*, Butler is concerned about the post-9/11 ‘heightened vulnerability and aggression’(xi), and she advocates responses that do not rely on violence. She criticises the Bush Administration for its resort to violence and its erosion of civil rights, as well as the media for its dehumanization of the Other, which makes their lives ‘unknowable’ and their deaths ‘ungrievable’. I wonder, do drones not contribute, more than other means of targeted killing, to this dehumanization of the Other?

According to Meisels, “In the context of war, it is somehow puzzling even to consider a judicial option – capture and trial of terrorists – as a first and preferable (albeit often impractical) option”. Thus, it is clear: killing is the best first resort. Would then Meisels endorse a counter-terrorist death squad such as the GAL (Grupos Antiterroristas de Liberación/Anti-Terrorist Liberation Groups), that operated in Spain in 1983-1987 and was formed by Spanish officials who targeted and killed members of ETA, and other not unengaged civilians (terrorists?) related to those?

Spanish citizens know very well that these measures only escalated the violence. Is declaring a war on terror the preferable solution to terrorism? Can we not think about other types of measures that do not involve war and targeted killing, with drones or not? Butler (2004) offers another way of looking at conflict that does not escalate violence. She advocates the necessity to examine the causes of conflicts and to address them and invites us to face our exposure to violence and our complicity to it. What is a community that is built on the basis of violence? Also, she warns of the dangers posed by the suspension of law to protect national security, as her analysis of Guantanamo Bay shows. Her ethical proposal is to respond to the demand from the Other, recognizing us as vulnerable and precarious beings whose lives are intertwined with one another. In her more recent book, she argues that an ethics of cohabitation must be constructed, as it is “not from a pervasive love for humanity or a pure desire for peace that we strive to live together. We live together because we have no choice” (Butler 2015: 122). Also, she argues that “I suppose it is first important to honor the obligation to affirm the life of another even if I am overwhelmed with hostility. This is the basic precept of an ethics of nonviolence, in my view” (Butler, internet b). Drones, and more broadly targeted killing, go against this vision of deescalating conflict that I share with Butler.

These are some of the questions that the reading of this paper has raised – questions that, I believe, should be addressed before accepting the idea of killing human beings as a first and preferable resort.

### **Srđan Prodanović**

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While I agree with Tamar Meisels' general claim that drones are a new reality of warfare that cannot be wished away or ignored, I nevertheless think that this new technology also creates *new* kinds of problems that are often overlooked. First, I am concerned whether modern democracies currently have the capacity to adequately control the rules of drone attacks. Namely, the way in which drones are deployed hinders the public debate on this new technology. Drone strikes are usually fragmented events unevenly distributed in time, which makes the public assessment of this type of warfare much harder (compared to more conventional forms of military intervention). For example, it is reasonable to suppose that in democratic societies there will be some sort of public backlash if the media reports that its army had a large number of civilian casualties in one conventional air strike. However, could we suppose that this will still be the case if the same number of civilian casualties were killed in 30 drone attacks conducted *over the period* of six months? In that sense, given this "extreme deployability" of drones over a long period of time, how do we address the issue of tracking efficiency and reporting on collateral damage to the public?

Second, I would like to question the technological optimism of Tamar's paper. Namely, she claims that drones "...are precision weapons, offering the possibility of careful compliance with the laws of war, to those who wish to comply" (15). However, the superior precision of this new technology seems to depend on imprecisions in defining the legitimate targets for drone strikes. Take for example the Justice Department's definition of imminent threat which says that the United States does not require to have a clear evidence that a specific attack on the US will take place in the immediate future (Friedersdorf, Internet). The same goes for the definition of legitimate targets for UAV; all military-age males near terrorists are, in the eyes of the Justice Department, combatants (Balko, Internet). Both terms play a crucial role in estimating the precision of every drone strike. However, with this type of deliberately contradictory and vague definitions of imminence and combatants, one could make almost any weapon into a "precision weapon"?

### **Jovica Pavlović**

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In her paper "Targeted Killing with Drones? Old Arguments, New Technologies" Meisels offers the following claim to justify targeted killings conducted through the use of drones as the most efficient and just method of eliminating terrorists: "Targeted killing aims at its victims narrowly and attempts to avoid collateral deaths. Ordinary citizens remain, so far as possible, immune from attack... targeted killing does not take aim at protected civilians who are unengaged in military activity... unlike political assassination, targeting terrorists does not require a complex political evaluation of the victims' cause, determining who is and who is not a political enemy." (Meisels 2017). If we agree with the presumption that 'drones are here to stay' regardless of the moral/academic debates which they stimulate (an undeniable fact which must be taken into consideration) and if we accept the claim that

targeted killing is legitimate under international law if we assume that states are in constant war against terrorist organizations (which gives them the right of extrajudicial elimination of militants), the claim that targeted killings via drones will reduce civilian casualties to the greatest possible extent, being that the technology involved in such operations involves the most accurate weapons available, can still be challenged.

Although at face value it seems that more accurate weapons minimize unwanted civilian casualties, such an assumption fails to consider the potential changes that targeted killings may cause in terrorists' strategic behavior. As drones make hiding in remote areas harder and more dangerous than before, terrorists are more likely to start taking civilians and whole towns as hostages in order to use them as human shields against potential aerial attacks. This could lead to a potential territorialization of terrorist activity, a sort of behavior that is already well exemplified by ISIS, where male citizens of occupied towns become mobilized and militarized against their will, while the proximity of women and children that reside in such towns makes it harder for drones to eliminate terrorists without killing civilians. In the long run, such territorial strategies, which seem to be a logical response by terrorist organizations facing the threat of drones, may lead to more towns and villages being occupied by terrorists, which is likely to lead to a greater civilian death toll.

### **Adriana Zaharijević**

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I come from the anti-militarist tradition of thought, the one which is often rejected on the basis of its un-realism. I emphasize this in order to point to the argument which states that wars are in themselves a necessary occurrence and that, by being realistic about their inevitability, we need to strive to offer the strongest ethical prescriptions about how they ought to be waged. Such realism is present in both your and Walzer's articles, if they differ in all other significant points. If Walzer's paper is primarily against the use of drones, his realism comes to the fore in the conclusion he offers: I am thinking of his call for the establishment of moral rules by the first country to use drones on a large scale, the US, his call to proclaim and observe a code for this kind of warfare (Walzer 2016: 21). In your text, the realism of drone warfare is very strongly asserted ("First and most obviously: regardless of academic debate, drones are here to stay"). In addition, in countering Walzer's apocalyptic argument that we may imagine the world where everybody has drones, you point to the fact that drones "are inherently a-symmetrical weapons favouring states, both morally and strategically", emphasizing that this is actually one of their main advantages.

Such war-related realism does not only justify the endless circle of production of new asymmetries and concomitant mushrooming of ever new terrorist groups, but is, in its essential asymmetry, fated to remain forever irregular, i.e. unregulatable. The strongest state that uses them, may devise, according to Walzer's injunction and your own statements, certain forms of legal arguments which would either curtail or enhance the use of drones. Such legal arguments would concern themselves with what James Whitman defined as *jus victoriae* (Whitman 2014). However, it seems

to me that any claim to morality of this radically new *jus victoriae* needs to also entail a certain moral imperialism. You say: “Such asymmetry may seem unfair... [but in actual fact it is not because] drones are useful to the ‘good guys’”. This “unfairness” is not only related to the fact that there is no pitched battle anymore, or any kind of symmetrical chance of winning and losing. Drones entail a certain kind of superiority of those that use them, or as you say, they “are essentially weapons of powerful states”, only to proceed that “this type of asymmetry or *double standard* – enabling law abiding states to fight safely against terrorists who cannot respond in kind – is a good thing” [emphasis mine]. I am not, of course, taking sides with the terrorists. What I want to stress here are the costs of war-related realism. Does being *real* about war has to include acceptance of certain normative imperialism, which then becomes an integral part of our ethical prescriptions?

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## “TARGETED KILLING WITH DRONES? OLD ARGUMENTS, NEW TECHNOLOGIES”:

Responses to A. Pavlović, C. Burelli, A. Fatić, P. Krstić, O. Loddo, M. Ivković,  
P. Bojanić, D. Pala, M. Abadía, S. Prodanović, J. Pavlović, and A. Zaharijević

### **Tamar Meisels**

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I greatly appreciate the helpful comments and suggestions offered by all the respondents, and the interest they have shown in my short lecture on Targeted Killing and Drones. There seems to be considerable agreement with parts of my argument, and also some overlap between the commentators on various points on which they disagree with me. I thank the respondents for the opportunity to further develop some of the arguments I made briefly in my lecture, and to correct others. In the following, I will reply to what I take to be the major points of disagreement, grouped together by topic. I apologize in advance if I have missed something, or responded insufficiently to any of the finer points of these critiques.

### **Undue Optimism**

I want to begin with what I take to be the most problematic aspect of my original paper, what Srđan Prodanović politely dubbed my “technological optimism”. The opening comment pertinently elaborates on this point when Carlo Burelli questions my comment that drones “...are inherently a-symmetrical weapons favoring states, both morally and strategically”. I plead guilty to the charge of excessive optimism. I will try to redeem myself by clarifying and modifying my original argument in precisely the way Burelli helpfully suggests.

In my paper, I was responding to Michael Walzer’s warning to “imagine a world, in which we will soon be living, where everybody has drones.” (Walzer 2016: 18) I argued there that given the expense and complexity of running an effective drone program, drones offer a built-in advantage to powerful states who are capable of operating such large-scale schemes. I also suggested that this asymmetry favors law abiding states who can (and should) use their superior military capabilities to comply with the rules about distinction and proportionality. I was too quick in assuming that terrorists will have a hard time using drones effectively in skies in which they do not maintain state-level air superiority and against adversaries who employ sophisticated anti-aircraft defenses. The asymmetry I pointed to may have been overstated, though I strongly suspect that powerful states will maintain their advantage in this new type of warfare.

Notwithstanding, there is a growing concern among military experts, as well as scholars, that smaller, less sophisticated off-the-shelf drones that are rapidly becoming readily available, may be used by terrorist organizations to carry out indiscriminate attacks. Burelli cites J. D. Johnson, a retired general who previously commanded the threat-defeat agency, who believes that terrorist drones constitute a very real danger: pointing out that, “these things are really small and hard to detect, and if they swarm in groups, they can overload our ability to knock them all down” (Schmitt 2017, in Burelli’s comments).

As Burelli suggests, my argument would be improved by acknowledging this concern, without losing its central force. He is quite right to point out that a distinction needs to be drawn between highly advanced US and Israeli military drones, and airborne improvised explosive devices. The low cost, low operational skill requirement, off-the-shelves availability make airborne I.E.D. an ideal weapon for terrorists. This seems to be the opinion of the Pentagon, which sent technical specialists to Iraq, Syria and Afghanistan to protect US and local troops from ISIS drones (Burelli, citing from Schmitt 2017). Burelli is also right that I was wrong to assume that “drones are going to be ineffective unless ‘state-level air superiority’ is achieved” (Meisels 2017: 15).

Nevertheless, my basic point about asymmetry remains: while terrorist drones may not be ineffective, the asymmetry in capabilities that I pointed to will probably remain. While perhaps not ineffective, terrorist drones are probably going to be less efficient than a massive drone program run by a super power like the United States, or a regional super power such as Israel. Moreover, as terrorist capabilities improve (if they do improve), so undoubtedly will the technology of detecting them and shooting them down.

I do not want to belabor this point both because I am not an expert on the emerging technology, and because I have already strayed irresponsibly into the realm of predictions. More importantly, I cannot figure out how imagining what may come to pass when everyone has drones affects the ethical debate over targeted killing with drones in the present. Terrorists will do what they can, with whatever means at their disposal, totally irrespective of what we do or do not do with drones.

To recap: at present, drones favor states that wish to minimize collateral damage and should be used to that effect. I acknowledge that “lower construction and operational costs and human risks could potentially allow swarms of drones to inflict efficient destruction on a mass scale” (Burelli), but I deny this has any normative bearing on what we ought to do in our struggle with terrorism. Terrorists may soon be able to harness drone technology effectively to their fiendish purposes of carrying out indiscriminate murderous attacks. I cannot predict the extent to which we might be capable of refining our anti-aircraft defenses to contend with this threat. I fail to see the connection between these warnings and our ethical questions about if and how to use drones right now. ISIS is not likely to refrain from drone technology if only we would do the same.

## Targeted Killing

Burelli further points out regarding my argument that “the most contentious parts ... are presupposed and understandably fall outside its scope”. He correctly observes

that I defend targeted killing in principle, rather than necessarily supporting any possible or actual policy. I also have no objection to Buchanan and Keohane's proposal for a regime of accountability, mentioned by Davide Pala, or to the call for transparency raised by Petar Bojanić, though I have no idea how practicable any of those suggestions are.

## The Status of the Conflict

First and foremost, among the many objections to my principled argument, however – for Burelli and Pala, Marjan Ivković, Olimpia Loddo, and Mónica Cano Abadía – is my adoption of the armed conflict model as the framework for discussing TK and drones. All are absolutely right to question this premise, because it has far reaching ramifications: The rules about deliberate killing are starkly different in armed conflict than they are in peacetime. In war, members of the military are permitted to kill, maim and capture. They enjoy a privileged status which renders them immune from prosecution for such acts that would normally count as murder, criminal-assault; kidnapping, and so on. No proportionality restriction applies to killing enemy combatants during wartime, so long as there is any military advantage to doing so (Walzer 1977: 138–147; Hurka 2005)<sup>1</sup> and “[t]here is no ‘last resort’ requirement on operations aimed at killing the enemy in war: a legitimate target can be permissibly killed, even if capture would be costless.” (Altman 2010: 6).<sup>2</sup> Armies are also entitled to cause levels of collateral damage that would be intolerable in a domestic peacetime setting (Marjan Ivković is deeply concerned about the legitimacy of applying this wartime license to TK).

These privileges of belligerency hold only in wartime. And here lies the trouble with targeted killing, emphasized strongly by many of the commentators, as well a variety of scholars: it may be defensible as a wartime tactic, but not as a peacetime measure. Killing belligerents in the course of war is common practice; but drawing up kill lists in a domestic peacetime setting is not.

Which set of rules apply when states fight terrorists? This question has been hotly debated by lawyers and philosophers (Blum and Heymann 2010: 155–165).<sup>3</sup> Does a state of war exist between Israel or the United States and various terrorist organizations, as the political and military leaders, as well as the Supreme Court judges, of these states assert?

I'm not going to repeat the long list of Israeli and American political, military and legal authorities that adopt this normative standpoint.<sup>4</sup> Several of the

1 That this is the unanimous view within traditional JWT is conceded even by McMahan 2009: 18, 22–23, 29–30, who criticizes this view.

2 See also Gross 2010: 106.

3 Determining the appropriate framework for discussion – laws of war vs. domestic peacetime rules, is raised and discussed by nearly all of the contributors to: *Targeted Killing – Law and Morality in an Asymmetrical World*, E.g.: Altman 2010: 5–8, Maxwell 2010: 36–8, Ohlin 2010: 60–61, McMahan 2010: 135–155, throughout. Finkelstein 2010: 156–83.

4 E. g. Former President Barack Obama, Speech at the National Defense University <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

commentators already criticized me for relying too heavily on the rulings of the American and Israeli courts. I only note that the Israeli Court is a world leader in legal discussions of these timely issues, and its judges are unusually familiar with the real-world experience of terrorist threats.<sup>5</sup> Justice Barak's ruling on Targeted Killing has been described as "probably the most comprehensive judicial decision ever rendered addressing the legal framework of the "war on terrorism" (Blum and Heymann 2010: 156). Other scholars simply assume various aspects of the Israeli high court decision as the current legal standard (e. g. Maxwell 2010: 44).

Of course, one need not accept the interpretation of the Israeli (or the American) court regarding the applicability of the laws of armed conflict to counter terrorism. Pala cites Jeremy Waldron in agreement, arguing that "legal justifications [...] may be designed simply to block or answer particular legal objections, leaving broader ethical issues untouched" (Waldron 2016: 299). The Israeli court itself notes a number of alternative interpretations that have been raised in the legal literature, including some that involve a mixture of different legal regimes.

Some scholars have pointed out that the laws of war, traditionally applicable to old fashioned wars between states, are not a perfect fit for dealing with asymmetrical struggles with terrorists, and accordingly inappropriate for assessing our governments' response to terrorism.<sup>6</sup> Similarly, Marjan Ivković argues in his comments that a crucial problem with my line of reasoning is "the normative equating of the 'war on terror' with conventional warfare.....", pointing out that wars are temporally limited phenomena while terrorism seems open ended. In another useful comment, Olimpia Loddo describes terrorism as a crime, rather than an act of war. Terrorists, Loddo argues, are "a special kind of criminal".

Terrorism has also been described in the literature as a 'super-crime', a grave and deadly criminal activity incorporating some characteristics of warfare, but crime nonetheless.<sup>7</sup> Consequently, Palo continues the criticism of my normative framework stating that, "absent further justifications, the *law-enforcement* rather than

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HCI 769/02 Public Committee Against Torture in Israel v. Government of Israel (*Targeted Killings* Case) [2005] (Par. 16) [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf)

HCI 7015/02 Ajuri V. IDF Commander

[http://www.hamoked.org/files/2010/110\\_eng.pdf](http://www.hamoked.org/files/2010/110_eng.pdf)

Benjamin Netanyahu's address to the United States Congress, September 20<sup>th</sup>, 2001, in Netanyahu, *Fighting Terrorism* 2001: xxiv: "Victory over terrorism is not, at its most fundamental level, a matter of law enforcement or intelligence..."

Maxwell 2010: 37–38; Daskal and Vladeck 2014: 120; [www.cfr.org](http://www.cfr.org) accessed August 5, 2015. For further discussion of the US's *non-international* armed conflict model and the applicability of Protocol 2, see the Blum and Heymann 2010: 157 and Maxwell 2010: 40–41, 49–50.

5 As Justice Barak described himself and his colleagues in the *Beit Sourik* judgment (on the security fence), "We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terrorism...." HCI 2056/04, *Beit Sourik Village Council vs. The Government of Israel*, paragraph 86, [http://elyon1.court.gov.il/Files\\_ENG/04/560/020/A28/04020560.A28.pdf](http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf) (cited in HCI 769/02, Paragraph 63).

6 E.g. in Finkelstein 2010, and Meyer 2010. See also Fletcher 2003: 3–9.

7 The term "super-crime" comes from Fletcher 2006: 894, 900.

the *armed-conflict* model should be the default option in dealing with terrorists; police rather than military action is to be preferred.” On this understanding, Terrorism ought, by and large, to be handled in keeping with law enforcement procedures, albeit subject to adjustments required by the specifics of the situation.<sup>8</sup>

From this criminal law perspective, targeted killing is often criticized as grossly violating the basic rights of the accused, deviating inexcusably from the most minimal standards of “due process” required of any well-functioning liberal state (Altman 2010: 5–6). Loddo comments that: “Targeted killing should not be an option if we really want to fight for the defense of the values we share, that include the Rule of Law (Nader 2015, in Loddo)”. By contrast, some advocates of the Laws of Armed Conflict (LOAC) framework retort by stressing the real-world inadequacy of domestic law enforcement measures in combating terrorists operating overseas, and emphasizing states’ unquestionable responsibility to protect their own citizens (Altman 2010: 6).

It seems to me that the most powerful objection to the law enforcement framework is not legal or philosophical, nor even practical. It is the common-sense observation that terrorists clearly operate within the military, rather than the civilian-criminal, sphere. Terrorists, like other irregular forces, confront a state, or states, against which they conduct their attacks. Their goals are political, and they strive to attain them by killing members of the states and regimes they oppose (Benjamin Netanyahu 2001: 7–8).<sup>9</sup> “Thus [Andrew Altman writes], Al Qaeda attacks the United States for its support of Israel and the Saudi regime, seeking to drive America out of the Middle East.” (Altman 2010: 7–8).

Moreover, there may be far less distinction between interstate wars and war against terrorist organizations than first meets the eye. As Altman points out, “terrorist organizations are often supported by friendly governments that provide resources such as money, forged documents, weaponry, training camps, and safe haven.” (Altman 2010: 8)<sup>10</sup> Israel’s Prime Minister, Benjamin Netanyahu, made this very point in his 2001 address to Congress, little more than a week after 9/11. Consequently, “Victory over terrorism is not, at its most fundamental level, a matter of law enforcement or intelligence”. (Netanyahu 2001: xxiv) It is a war against terrorists and their supporting states.

To repeat: my argument is confined to assessing the relative merit of targeted killing as a wartime tactic. Judged as an act of war, targeted killing is a particularly limited and fastidious form of combat, and as such often morally preferable to alternative modes of belligerency commonly employed during wartime.

Even this limited point, however, holds only within the armed conflict model -- as Burelli, Ivković Pala, Loddo, and Abadía, quite rightly observe -- as well as on the further assumption that the targets are in fact combatants, and as such legitimate wartime objectives. It is to this related point of contention that I now turn. The best way to address Davide Pala’s and Mónica Cano Abadía’s misgivings

8 See Altman’s summary of this approach in his introduction to *Targeted Killing*, Altman 2010: 5–6.

9 See also Altman 2010: 7.

10 Benjamin Netanyahu’s address to the United States Congress, September 20<sup>th</sup>, 2001, in Netanyahu 2001: xiii.

regarding my attribution of “unlawful combatant” status to terrorists, as well as the normative consequences I derive from this label, is to draw on some of my previous work on this issue.

## Combatants – Lawful and Unlawful

The routine way of determining those who may and may not be killed in war is to distinguish between combatants (i.e. uniformed soldiers as well as irregular belligerents) on the one side, and unarmed civilians on the other. Clearly, the combatant/non-combatant distinction, which renders immunity to the latter, cannot facilitate arguments against targeting terrorists. As Walzer has pointed out recently:

Military leaders are obviously legitimate targets in wartime. A sniper sent to a forward position to try to kill a visiting colonel or general is engaged in targeted killing, but no one will accuse him of acting extra-judicially and therefore wrongly.... Individuals who plan, or organize, or recruit for, or participate in a terrorist attack are all of them legitimate targets. (Walzer 2013)

In the Israeli case, typical Palestinian targets have included: Ibrahim Bani Odeh, a well-known bomb maker; Fatah leader Hussein Abayyat; Yahiya Ayyash, the famous “engineer”, assassinated in Gaza in 1996; Tanzim leader Raed Karmi; Mahmoud Abu Hanoud, a high-ranking Hamas commander assassinated in November 2001; Hamas leader Salah Shhada assassinated by Israel in July 2002.

By their own admission, these and other terrorists are not civilians: they are the instigators, organizers, recruiters, commanders and operatives of an armed struggle. Terrorists controversially regard themselves as “freedom fighters” or guerrilla warriors, but never claim to be unengaged in combat. On the contrary: terrorist leaders and the organizations they represent are always proud to publicly accept responsibility (as opposed to guilt) for the atrocities they plan and execute -- bin-Laden or “card carrying” members of Hamas, to cite extreme examples.

Like all belligerents, terrorists are legitimate wartime targets. Aside from the obviously warlike character of the activity in which they are engaged, and for which they are pursued, they themselves do not deny the military nature of their deeds; indeed, they take pride in it. More often than not, they bear militaristic titles of command, as do various “military commanders” of Hamas. Al-Awlaki is reported to have held the rank of “regional commander” within Al-Qaeda. At times, terrorists wear military-style uniforms or identifying dress (as Yasser Arafat often did) though they remain irregulars, unprotected by the rules of war. On no account can they be considered civilian criminals, nor do they sincerely profess to this status.

## Location

Monica Abadia has asked me if “They [terrorists] are always combatants, day and night. So, I wonder, are they susceptible to being killed at home, with their family, because they are never off duty?”

This is an excellent question because, in fact, targeted killings are often carried out in civilian settings (e. g. at the terrorists’ desks, in their cars, or even in their beds) and this in fact distinguishes these killings from conventional combat. While

soldiers may be killed anywhere at their base or in a military vehicle, they may not be killed in civilian locations, e.g., when on leave, back home, or vacationing with their families. Why is it legitimate to kill an enemy officer in his office or on the way to it but totally illegitimate to kill him in a hotel? How does the change in location serve to provide immunity to an otherwise legitimate wartime target? And should such immunizing rules apply to irregular combatants who do not abide by them?

The limitation on targeting combatants in civilian settings is the product of convention, though one with a morally significant rationale, that of limiting the cycle of violence in wartime to the battlefield and its immediate vicinity (Statman 2003: 196). Assassinating terrorists in non-military settings admittedly defies such conventions. Terrorists are often assassinated in their homes, or hideaways. Sheik Ahmed Yassin was assassinated on his way out of a mosque.

The rule about location is based on the morally worthy aspiration to separate the battlefield from the home-front, protecting civilians and their surroundings, limiting the harm, and the destruction of war (Statman 2003: 196). These legal protections are largely artificial, though they have some very good utilitarian justifications: Protected locations safeguard civilians. Conventions of this kind, however, require mutuality.

Terrorists who do not maintain conventional rules, specifically those rules that confine fighting to the battlefield and uphold civilian immunity, are un-entitled to their protection. Moreover, in the case of terrorism, it is doubtful whether there even is a front line or conventional battlefield to be considered. When a soldier relinquishes an opportunity to shoot his opponent while the latter is relaxing behind enemy lines, he retains the realistic prospect of confronting him or his indistinguishable comrades, in a more conventional context when the battle resumes. Terrorist leaders and operatives ‘on the run’, however, do not ordinarily expose themselves to such risks. Unlike the soldier who may honorably spare his enemy when engaged in non-belligerent activity only to confront him again on tomorrow’s battlefield, the opportunity to combat terrorism on the conventional front line will, by definition, never arise at all. By fighting among civilians, terrorists create intolerable battle situations intentionally designed to render the separation between civilians and military settings impossible to maintain. The very existence of a battlefield setting as distinct from the home-front depends on both sides adhering to this distinction. Otherwise, as Statman notes, “the side adhering to them would simply be yielding to the side that refuses to follow them” (Statman 2003: 196).

So, my answer to Ms. Abadia’s pertinent question is yes. Terrorists are legitimate targets for military attack whether they are targeted by name or by deed, at all times and places, subject only to necessity and proportionality.

The traditional conventions of war, those agreed on at The Hague and Geneva conventions, explicitly accord equal rights and obligations to all uniformed soldiers as well as to those members of resistance movements who assume the risks of overt combat and abide by the laws of war. They do not clearly apply to members of organizations who habitually abstain from the legal requirements to fight overtly and follow the laws of war. Consequently, Israel and the US assume, terrorists are never immune from attack, not even in their homes or in their beds. Like soldiers, they may be killed during armed conflict at any time, whether armed or unarmed,



whether posing a grievous threat or idly standing by.<sup>11</sup> Unlike soldiers, however, they may also be killed in purely civilian settings. Aside from their unprotected legal status, the moral rationale for this license concerns the lack of reciprocal rule keeping. Irregulars do not expose themselves to conventional risks, nor do they themselves uphold any conventions concerning the appropriate contexts for combat.

### Direct Participation:

If one adopts the terminology of the Israeli court whereby terrorists are “civilians who are not unengaged in hostilities”, Abadia asks:

“What is not being unengaged? What is being (un)engaged in hostilities? Is having and supporting certain political ideas not being unengaged? Is having personal ties with terrorists not being unengaged? If so, is the family of the terrorists considered also terrorists, as they may be seen as not unengaged in their relatives’ activities – or as they may be, even inadvertently, enabling the terrorists?”

Determining who is a direct participant in hostilities is analogous to identifying legitimate targets, which is admittedly no easy task (Altman 2012: 28–29). Undeniably, both Israel and the US take a wide view of what is meant by “direct participant”, but this cannot be a limitless view either.<sup>12</sup> The class of “direct participant” can properly only include active members of terrorist organizations who pose a continuous threat. Israel’s Supreme Court ruling was clear on this point:

a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. (HCJ 769/02 [Dec. 11 2005]. Paragraph 39)<sup>13</sup>

Consequently, the Israeli court recognized that “there is no escaping going case by case”, calling for a careful evaluation of each and every potential target (HCJ 769/02, *ibid*, Paragraph 34).

Speaking at the National Defense University, Former President Obama made a similar point, stating that “America does not take strikes to punish individuals; we act against terrorists who pose a continuous and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”

11 On the license to kill enemy combatants, see Walzer 1977, Fletcher 2003: 107, 139–142; Statman 2003: 195, Dershowitz 2004.

12 The criteria for direct participation are extremely controversial. See ICRC 2008: 997. Available at: <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>

The interpretation of “direct participation” has been a serious issue of contention with regard to Israel and the United States’ policy on targeted killing. See e. g.: Eichensehr 2007: 1873–1881.

<http://www.yalelawjournal.org/comment/on-target-the-israeli-supreme-court-and-the-expansion-of-targeted-killings>

13 See also the court’s lengthy discussion of direct participation in Paragraph 34–40. [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

Abadía continues: “To be considered as a civilian, as a non-terrorist, one has to distinctly disengage oneself from hostilities. How does one do that?” The answer is simple: Civilians do not have to do anything at all to disengage themselves from combat! The default position of both international law and just war theory is civilian status. This mantle of protection can only be lost by voluntarily opting to engage continuously in blatantly threatening combat activity.

### Efficiency:

In his opening comments, Aleksandar Pavlović argues that by arguing that TK is our best shot at combating terrorism at the lowest cost to civilians, I am adopting a “simplistic identification of combating terrorism with killing terrorists...” The right way to combat terrorism in the long run, Pavlović suggests, is by “asking broader questions about the causes, sentiments, reasons, mechanisms etc. behind terrorism”, rather than antagonizing the hearts and minds of innocent men and women around the world, e.g. by exposing them to the long term psychological effects of living under drones. Terrorists are not some finite number of enemies who can just be killed off one by one; In fact we are, by our own actions, creating new terrorists, Pavlović argues. Not dissimilarly, Olimpia Loddo contends that we “cannot hope to solve its problems through targeted killing. The only desirable objective is to find a way to contrast this organization through the intelligence... and to obtain the consent of the local population”. In keeping with this line of thought, Monica Abadía recommends non-violence; and finally, Adriana Zaharijević advocates an anti-militarist tradition of thought.

Following Judith Butler, Abadía warns against the escalation of violence, and urges us to find alternative measures that do not involve war and targeted killing, with drones or otherwise. Perhaps we ought to fight terrorism by responding to the demands of the other, “recognizing us as vulnerable and precarious beings whose lives are intertwined with one another” (Butler in Abadía), whatever that means... Perhaps we could try to confront Islamist extremism, suicide terrorism, mass murderous organizations, genocidal threats, by adopting “an ethics of cohabitation”, or by honoring “the obligation to affirm the life of another even if I am overwhelmed with hostility.” (Butler, in Abadía’s comments).

I have argued that combatting terrorism is a form of warfare, and that in war, it is better to kill combatants by the most accurate and “surgical” means available, sparing civilians whenever possible. I never suggested that killing people – combatants or civilians – is preferable to non-militaristic alternatives. Targeted killing (any killing) remains indefensible as against realistic prospects of negotiating international disagreements. From any just war perspective, targeting one’s opponents does not fare well as “an alternative to negotiating with them or respecting their human rights or allowing them to take part in national politics.” (Waldron 2015: 6) Where civilized diplomacy and a peaceful resolution of hostilities are feasible, targeted killing is a nonstarter.

If the terrorism of Al Qaeda, the Taliban, ISIS, or Hamas, can be overcome peacefully – by “compromise, negotiation, the addressing of grievances, and so on” (Waldron 2015: 34) – this is a *jus ad bellum* argument against resorting to war as a

last resort. It is not an argument against targeted killing (or drone warfare) specifically, any more than it is an argument against bullets or bayonets. The debate over targeted killing - for or against - is primarily a *jus in bello* issue (or else it is a *jus ad vim* issue),<sup>14</sup> that begins after the decision to resort to force has already been made. Once the fighting begins, targeted killing is an option to be considered in comparison with other available measures within the military's tool kit.

I have argued that targeted killing does well in comparison with other forms of combat in terms of achieving legitimate military goals, as well as complying with the requirements of distinction and proportionality. My argument is insufficient to counter all the good moral reasons for pacifism, or the questionable practical wisdom of relying on Judith Butler for an effective counter terrorism strategy.

### **Military Valor:**

Aleksandar Fatić's arguments against the use of drones are very well represented in these comments by Predrag Krstić, who focuses in depth on one single point: drone operators "do not exhibit courage, willingness to make sacrifices for their cause; there are no questions of justice, but only a technological task... like a computer game where there is no immediate awareness of justice or injustice as a factor of decision-making; finally...one needs no virtues, no humility, and one does not have a sense of oneself as a part of the military moral community (Fatić 2017: 352–353)".

As Krstić points out, I already addressed this point towards the end of my lecture, as he notes, with reference to Strawser and Statman. I stand by what I say there, with only a couple further comments in response to Krstić.

First, I have not seen any conclusive hard evidence to the effect that drone operators regard their task as a-moral (lacking in questions of justice) or with a computer game, "joystick" mentality, though this is sometimes argued by philosophers. Given the tremendous attention that TK with drones is given in the American press, universities, and even in film, it would in fact be incredible to find that drone operators do not view their mission as involving issues of justice. But I cannot speak for drone operators.

Second, Krstić asks me if I "think we are dealing here with a different understanding of morals? Fatić insists on the applied military ethics ...." (Krstić). I respond hesitantly by suggesting that Fatić's may be more of a virtue ethics approach to war, whereas I am addressing the use of drones from an International Law of Armed Conflict and a conventional Just War Theory perspective, both of which are largely influenced by utilitarian considerations alongside duty based principles of human rights and human dignity.

Finally, while many of the commentators have challenged me for rejecting "soft power" options, I remain adamant in my belief that war on terrorism is unavoidable. At the same time, while I am no pacifist, (or anti-militarist like Adriana Zaharijević), I do believe that war is a terrible business. As such, there can be no justification for enhancing its "hellishness" (in Walzer's words) by reverting to weapons that might increase civilian or military casualties just in order to live up to some

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14 For *jus ad vim*, the just use of force short of war, see Walzer 2006: xv-xvi.

medieval fairy-tale code of valour, courage, humility or what not. It is precisely because war is not a game, that we should adopt the measures that kill most economically, if kill we must.

### Just & Unjust Enemies:

I have reserved one of the deepest insights for last. In his insightful comment, Petar Bojanić suggests that my use of the terms “unlawful combatants” and “irregulars”, alongside familiar labels such as “terrorists”, “criminals”, “enemy combatants”, “unjust aggressors”, etc. bear affinity to Kant’s notion of an “unjust enemy” who may be pursued indefinitely, globally and even preemptively. If so, Bojanić suggests, we need not worry about the temporally unlimited framework of the war on terror, emphasized by Marjan Ivković in his comment about the temporal limits of conventional warfare as apposed to “the war on terror.” A war against a Kantian unjust enemy is indeed different from conventional warfare in this sense that it is neither time bound nor in any way limited. It is instead (as I understand Bojanić’s use of it) total and indefinite.

I am not entirely sure how to respond to this comment, or if I have understood it fully. It has indeed been argued (though not by me), that terrorists are a sort of international outlaws, “enemies of mankind” – *hostis humani generis* – a term once reserved for sea pirates, to be destroyed wherever they are found. (Leiser 1986: 155–156) I think this captures an important point about the evil that is terrorism and the legitimacy of combatting it, and the importance of international cooperation and legislation aimed at rooting out terrorism, just like piracy, wherever it raises its ugly head. I do not think we are entitled to fight terrorism by unlimited measures.

I have argued that assassinating avowed terrorists in the course of an armed conflict as a preventive, rather than a punitive, measure is a legitimate act of self-defense. I also defended the view that terrorists are unlawful combatants. But to say that targeting terrorists is a legitimate wartime practice is not to say that any feasible case of TK is necessarily justified, that it should be practiced in a wholesale fashion, or that in the war on terror anything goes.

I’d like to conclude with a quote from former Israeli Supreme Court Justice Aharon Barak’s decision on targeted killing. While the court justified the practice of TK in principle, (as well as denying terrorists lawful combatant status if captured) they also called for a very careful case by case evaluation of any such operations. In a series of other rulings, the Israeli court has been adamant that captured terrorists reserve their right to humane treatment.<sup>15</sup> “Unjust enemies”, “unlawful”, “irregular combatants”, “criminals”, or just lacking in combatant status, captured terrorists reserve their right not to be subjected to grievous physical pain and pressure, to receive proper care and treatment, to be kept in a humane environment, and to avoid false imprisonment, or endless concealed incarceration. Consequently, while the lawless status of irregular combatants ought to be legally distinguished from their lawful counterparts, this distinction will not necessarily

15 E. g. HCJ 5100/94 The Public Committee Against Torture in Israel vs. The State of Israel et al. [http://www.hamoked.org/files/2012/115029\\_eng.pdf](http://www.hamoked.org/files/2012/115029_eng.pdf)

bear the precise significance that some self-interested state leaders wish to accord to it, nor should it always supply them with the licenses they seek to acquire.

After concluding that terrorists are unlawful combatants, or civilians engaged in hostilities, Justice Barak adds a passage which I think should always be taken into account when considering measures for combating terrorism. Requiring that each proposed case of assassination be considered with the utmost care and decided on a case by case basis, Justice Barak concludes: “Needless to say, unlawful combatants are not beyond the law. They are not ‘outlaws’. God created them as well in His image; their dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law”.<sup>16</sup>

Tel Aviv, January 2018

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