

Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?

MICHAEL L. GROSS

ABSTRACT During the current round of fighting in the Middle East, Israel has provoked considerable controversy as it turned to targeted killings or assassination to battle militants. While assassination has met with disfavour among traditional observers, commentators have, more recently, sought to justify targeted killings with an appeal to both self-defence and law enforcement. While each paradigm allows the use of lethal force, they are fundamentally incompatible, the former stipulating moral innocence and the latter demanding the presumption of criminal guilt. Putting aside the paradigm of law enforcement which demands due process and forbids extra-judicial execution, the only possible avenue for justifying named killings lies in self-defence. While named killings might be defensible on the grounds that there are no other ways to disable combatants when they fight without uniforms, the costs, including the cost of targeted killing emerging as an acceptable convention in its own right, should be sufficient to view the practice with a good deal of caution.

Key Words: civilian immunity; Israeli-Palestinian conflict; self-defence; terrorism; violence.

Since the resumption of fighting between Israel and the Palestinians in 2000, Israel's policy of targeted killings has met with considerable controversy. At first blush this is odd, as targeted killings seem to reflect nothing more than the inevitable death of combatants during armed conflict. Why then all the fuss, particularly as the targets are terrorists?

Paradoxically, targeting terrorists, that is, those who egregiously violate humanitarian law and wantonly murder civilians, complicates the conceptual framework that justifies killing during war and distinguishes it from murder. As observers evaluate the merits of targeted killing and assassination, they find it difficult to categorize the actors and their actions clearly. Are targets of assassination ordinary soldiers, war criminals or illegal combatants? Do perpetrators of assassination seek retribution, deterrence, interdiction or pre-emption? Are targeted killings acts of self-defence or extra-judicial execution?

Answering these questions depends upon which of the two paradigms that justify lethal force — war or law enforcement — we choose to analyze targeted killing. The conventions of war permit combatants to use lethal force against enemy soldiers with relatively few restrictions. Law enforcement, on the other hand, permits police officers to employ lethal force against suspected criminals but remains tightly circumscribed. Police officers may kill in self-defence in unusually threatening and dangerous circumstances, but they may not otherwise harm a criminal in the absence of due process.

Once we focus upon the criminal dimension of terrorism, the paradigm shifts from war to law enforcement and with it to the restriction that the latter places upon using lethal force. Which paradigm, if either, applies? The very fact that we ask this and other questions suggests that targeted killings pose special problems that set the practice apart from 'ordinary' killing during wartime.

What, exactly, is a targeted killing or assassination? By most accounts, targeted killings consist of, first, compiling lists of certain individuals who comprise specific threats and second, killing them when the opportunity presents itself during armed conflict. I will therefore refer to assassination and targeted killings as 'named killing'. The targets are usually terrorists, that is, those who operate at the behest of known terrorist organizations. Few suggest targeting or naming ordinary combatants. Nevertheless, named killings do not occur in any context other than war. Most often, these are non-conventional wars that do not necessarily signify an armed conflict between two or more nation states but, instead, comprise hostilities between state and sub-state actors. Are named killings justified?

Answering this question largely depends upon how one views the status of terrorists, the nature of the reigning paradigm, and the conditions that belligerents must meet before undertaking a named killing. At one extreme, many human rights groups maintain that terrorists do not enjoy combatant status. 'Armed Palestinians are not combatants according to any known legal definition', writes Yael Stein, of B'tselem, The Israeli Information Center for Human Rights in the Occupied Territories: 'They are civilians — which is the only legal alternative — and can only be attacked for as long as they actively participate in hostilities'.¹ Stein's remarks highlight the problem of shifting identity that plagues the definition of combatant. It seems that terrorists maintain two statuses. On the battlefield, they are something like combatants; off the battlefield and at the time they are targeted they are something like civilians or some other form of noncombatant. I will return to this issue later. For now, it is important to see where the noncombatant paradigm leads. Noncombatants are, generally, innocent of any wrongdoing. The conventions of war and the laws of armed conflict protect them from unnecessary harm or murder, and prohibit belligerents from killing or otherwise harming noncombatants unless necessary and unavoidable to achieve important military goals. These conditions are inherent in the idea of collateral damage and the double effect.² However, collateral damage only pertains to harm that befalls *innocent* noncombatants. Terrorists, however ambiguous their status, assume something like combatant status when they take up arms and fight. It stands to reason that they remain non-innocent once they have left the battlefield. From any informed perspective, they are not, as some human rights advocates seem to suggest, civilians who occasionally and only marginally contribute to armed struggle. On the contrary, they maintain their hostile status off the battlefield as they prepare for battle, lay plans, tend to their weapons and maintain their fighting capability. At the same time, there is good cause to suspect that terrorists are guilty of war crimes and criminal activity.

The criminal behaviour of terrorists may then lead officials to invoke the law enforcement paradigm. This demands that states treat terrorists just as they would any heinous criminal, whether an ordinary lawbreaker or war criminal. Law enforcement entails arrest, trial and sentencing, and only permits law enforcement officers to use lethal force when either their lives or the lives of bystanders are in immediate

danger.³ Noncombatant status, however, does not preclude the death penalty in those nations that permit execution, but does demand due process in spite of the difficulties this may entail. Without due process, named killings are nothing but extrajudicial execution and murder. This has led some observers, myself included, to suggest that any party practicing named killing must preserve due process either by maintaining judicial review or by conducting trials *in absentia*.⁴ However, as Tamar Meisels points out, neither process is easy to implement with any degree of judicial consistency.⁵

In contrast, the war paradigm carries none of these difficulties or conditions. Combatants are vulnerable regardless of the threat they pose. While they may be shot on sight, combatants nevertheless retain certain rights once they have laid down their arms. Because soldiers are morally innocent, that is, permitted to kill under carefully defined conditions but not guilty of any crime, they may suffer capture and incarceration but only as long as hostilities endure. Once armed conflict ends, prisoners of war no longer pose a material threat and, having committed no crime, are free to return home. Execution or continued imprisonment is not appropriate for combatants unless they have violated the conditions under which they are permitted to harm others either by torturing other combatants, killing them by forbidden means or wantonly taking the lives of noncombatants. In all other cases, soldiers may kill during armed conflict when it is necessary, proportionate and consistent with the demands of utility. These are the common principles of just war and the conventional laws of armed conflict. Necessity allows nations to exercise armed force only when no other means are feasible to stave off armed aggression. Utility demands that belligerents do not cause more harm than the good they hope to achieve while proportionality limits *excessive* harm so that even important or necessary goals may not be secured at any cost. In most cases, the cost is measured by harm to noncombatants; proportionality rarely pertains to soldiers. Unless nations face a 'supreme emergency' that is, an otherwise unavoidable genocidal threat, there are no grounds for violating the laws of armed conflict.⁶ In spite of what human rights activists and indeed, some advocates of named killing maintain, it may make sense to view terrorists as combatants *cum* war criminals. This compels one, however, to extend them the rights and protections both combatants and war criminals enjoy, including protection from named killing.

The Prohibition of Named Killings

International law does not ban assassination unequivocally, but instead prohibits 'perfidy' or those acts that abuse the protections that the laws of armed conflict guarantee. Common examples of perfidy include attacking from under the protection of a white flag or harming combatants who lay down their arms. These protections are integral to modern warfare and underlie the conventions of surrender. Without them, war would end only in extermination or the proverbial fight to the death. Assassination is perfidious only insofar as it abuses these or similar protections. This may happen when one adversary assassinates another under the guise of safe passage or kills another by employing traitors. While it remains difficult to target terrorists without assistance from local collaborators and traitors, few commentators see this as a serious impediment to named killings and remain convinced, it seems, that armed forces

may use informers to track down terrorists just as police do to apprehend criminals. Convincing or not, it is important to see how this argument reverts to the logic of law enforcement, for only the target's suspected *criminal* behaviour justifies recourse to informers and collaborators. The paradigm of conventional war, on the other hand, forbids an appeal to criminal behaviour to justify collaboration. Ascriptions of criminality violate the fundamental assumption that soldiers are innocent, while collaboration can undermine the war convention with treachery.

The utter absence of criminal culpability among combatants led early commentators to forbid named killings during armed conflict in the strongest terms:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority (Lieber Code, paragraph 148).

While Lieber's prohibition did not make its way into the Geneva Conventions, its spirit lingers on in many military manuals.⁷ As written, it is an odd prohibition. The objection to named killing cannot be that enemy soldiers are simply slain without trial, for that is the way of war. Rather, it is the presumption that underlies assassination, namely that specific enemy soldiers are, in some way, guilty of outlawry that rankles Lieber. Named killing places certain soldiers outside the laws regulating human behaviour and armed conflict. Lieber reserves his wrath for the proclamation and the murder that follow. There are no grounds for tagging specific soldiers for murder.

The logic behind Lieber's consternation turns on the innocence of enemy soldiers. Killing only in self-defence, all combatants enjoy the presumption of innocence. Soldiers are not criminals; they do not commit murder in the course of ordinary warfare nor can they be tried or incarcerated for their activities. At best, they are agents of the states whose interests they fight to defend. Even in the worst of cases, when these states are blatant aggressors, soldiers retain a measure of innocence on the assumption that many may have been conscripted or, however misguided, believe in the justice of their cause. Innocence, in this case, is not material. No one is suggesting that soldiers do not represent material threats to others. On the contrary, any uniformed soldier is vulnerable. Their innocence, however, is moral. Soldiers may kill in the service of their state and are therefore innocent of any wrongdoing, a sweeping authorization that international law and all nations endorse.⁸ Once we name soldiers for killing, however, we upset this innocence with precisely the argument that Lieber presents. Naming names assigns guilt and, as Lieber suggests, proclaims soldiers outlaws. In doing so, named killing places war itself beyond convention. If one side can declare another's soldiers outside the law, then others are free to follow suit. The war convention disintegrates, and armed conflict is no longer amenable to Lieber's effort to regulate war by the force of enlightened principles of reason. Named killings, in other words, attack the Enlightenment project at its base. Does modern day terror alter this conclusion?

Permitting Named Killings in Times of Terror

Agreeing that the conventions of war prohibit named killing in principle, Daniel Statman argues that the prohibition no longer matters when one side employs terror:

With targeted killings, human beings are killed not simply because they are ‘the enemy’, but because they bear special responsibility or play a special role in the enemy’s aggression. This is particularly true in wars against terrorism, where those targeted are usually personally responsible for atrocities committed against the lives of innocent civilians.⁹

Statman defeats Lieber’s argument but only at the price of imputing criminal responsibility. Lieber forbids combatants from naming other soldiers as outlaws solely because they are enemy soldiers, a presumption that is central to the laws of armed conflict. Statman circumvents Lieber’s concerns when he declares that certain combatants are ‘personally responsible for atrocities’ and therefore subject to special denunciation. This claim is not controversial. Parties to an armed conflict (and, indeed, any nation) may always charge specific combatants with war crimes if they egregiously violate the conventions of war. In doing so, however, the reigning paradigm returns to law enforcement and, with it, the requirement of due process that governs the prosecution of any war criminal.¹⁰ Inevitably, the desire to contain terrorists by targeted killings poses an intractable dilemma for international law. As ordinary combatants, terrorists are as vulnerable as any other is; as criminals, however, they gain special protections that make it *more* difficult to harm or kill them. Finding a solution will require us to abandon one paradigm or the other.

Interestingly, Israel went through a paradigm shift of its own since the beginning of the current round of fighting. Initially, officials appealed to law enforcement as they considered terrorists on par with suspected, dangerous criminals. While they preferred to arrest and try terrorists, operational difficulties often made arrest difficult and dangerous. With their lives threatened, law enforcement officers (in this case, special forces soldiers) were free to open fire and kill those they ostensibly came to arrest. In this vein, Israel made it clear that its armed forces would only employ lethal force when terrorists either threatened the lives of arresting soldiers or were caught planting a ‘ticking bomb’ thereby compelling troops to use lethal force to prevent harm to others. The law enforcement paradigm permits lethal force in both cases. However, when it became clear that this *modus operandi* did not match the facts on the ground, officials abandoned this line of thinking and invoked self-defence.¹¹

An appeal to self-defence is potentially more promising than law enforcement and both Statman and Tamar Meisels turn in this direction to justify named killings. Inasmuch as the Israeli-Palestinian conflict is an armed conflict, considerations of self-defence are obvious. Self-defence does not require that combatants be ‘caught in the act’ or present a material threat before they can kill one another. Self-defence also allows states to consider pre-emptive actions and weigh the merits of inflicting harm to achieve a credible deterrent. Some observers broaden the war paradigm to permit retribution or punishment, a throwback to Roman theories of just war.¹² Each of these motives for killing or causing harm is foreign to law enforcement but consistent with the laws of armed conflict. For this reason, it seems more reasonable to abandon the paradigm of law enforcement and consider named killings solely from the perspective of war and self-defence.

Named Killings, War and Self-Defence

The first casualty of any attempt to link named killings with self-defence and war must be the assumption of guilt or criminal responsibility. Guilt invokes the law enforcement paradigm and therefore any attempt to justify named killings without running afoul of due process must succeed without imputing criminal responsibility. Terrorists, for the purposes of naming and killing them, must be on par with ordinary soldiers. The argument will be symmetrical. If it is permissible to target and kill terrorists, it is equally permissible to attack ordinary combatants in the same manner. There is no room, as Meisels hopes, for a policy that eschews 'positively endorsing assassination in written law' but approves of 'silent acquiescence' in the face of named killings. Why acquiesce silently if it is possible to outline a cogent argument for named killing? To do so, however, one must look beyond the criminality of terror.

Lieber assumed it was impossible to make the argument for targeted killings without giving way to the charge of outlawry. Given the conditions of warfare in his day and, indeed, in most of the modern period he was probably right. Soldiers wore uniforms and insignia, and were easy to identify. Naming names added nothing to their vulnerability nor did it render any person a more legitimate target. On the contrary, it only presupposed an element of moral culpability that Lieber found loathsome. Naming names would also have profound implications for the everyday conduct of war, placing political leaders and other traditional non-combatants at risk while threatening the hierarchy necessary to wage war without anarchy. Beyond obscuring the distinction between combatant and noncombatant, named killing also undermines the relative peace characterizing civilian centers of population by threatening to bring the battlefield home and upsetting the equanimity that civilians (usually those on the stronger side) attempt to preserve as their nations wage war.¹³

Warfare, however, has changed considerably since World War II, and now blurs the line between combatants and noncombatants in a way that many theorists and jurists hoped to avoid. These changes were the inevitable outcome of post-WWII guerrilla wars of liberation and the fight many emerging nations waged against 'colonial, alien and racist' regimes. These 'CAR' conflicts dominated warfare in the post-war period and threatened to overwhelm the Geneva conventions. In response, the international community amended the existing laws of armed conflict by ratifying Protocol I and II in 1977. Although neither Israel nor the US accepted these changes, some observers now claim that the Protocols carry the force of customary international law.¹⁴ Extending the safeguards of the 1949 conventions to the myriad of new actors emerging in the post-war period, the Protocols also provide additional protection to residents of occupied nations who were hitherto unprotected victims of non-international armed conflict.

The Protocols also offer protection to insurgents. Recognizing that guerrillas do not always wear uniforms or identifying insignia, Protocol I dramatically relaxes the requirements necessary to maintain combatant status:

. . . combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so

distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack . . . (Protocol I, Article 44).

These regulations tend to obscure rather than sharpen combatant status. On one hand, combatants must serve in a hierarchically structured armed force that supervises compliance with international and humanitarian law (Article 43). The sponsoring authorities may be conventional nation-states, guerrilla organizations or militias. On the other hand, combatants need not wear uniforms nor carry their arms openly at all times. Protocol I extends combatant status to militants, insurgents and guerrillas. What, then, of terrorists?

Terrorists, and the organizations they serve in, do not observe humanitarian law. While this alone might be sufficient to deny them combatant status, it is not always easy to identify terrorists solely based on organizational affiliation. Some groups practice nothing but terror; others are mixed. Among the latter, some militants participate in terror while others do not. Those that do not, retain the protection of combatants and enjoy POW status if captured. There is no consensus, however, about the status of those who belong to an organization that does not meet the minimal standards set by Protocol I. Characterizing terrorists as ‘unprivileged’ or ‘illegal’ combatants, some observers argue that they do not enjoy the rights of ordinary combatants (such as POW status or repatriation following the cessation of hostilities).¹⁵ But the idea of ‘illegal’ combatant remains murky. Neither the Geneva Conventions nor the Protocols recognize the term ‘illegal combatant’. One is either a legal combatant or a civilian. War criminals are a subset of the former, ordinary criminals a subset of the latter. As either type of criminal, terrorists are subject to arrest, trial and punishment for the crimes they commit.¹⁶ Terrorism should not warrant named killing but demand, instead, due process. Nevertheless, the danger of shifting status and the inability to identify combatants in the absence of clear insignia may overwhelm the law enforcement paradigm and justify named killing in self-defence.

Justifying Named Killings

Soldiers are vulnerable solely because they are members of their nation’s armed services. Their vulnerability has nothing to do with the threat they pose personally. Instead, they are part of a collective, organizational threat that waxes and wanes during warfare. As adversaries judge the threat their enemies pose, they formulate their military strategy and tactics accordingly. The war convention assumes a clear, consistent and fixed definition of combatant. Ordinarily, a uniform or insignia is the sole indication of organizational affiliation. Without one or the other, it is impossible to determine an actor’s status, his or her degree of vulnerability, or the rights and protections individuals enjoy as either combatants or noncombatants. Un-uniformed combatants, however, can change status almost at will and, as a result, enjoy a unique advantage during a guerrilla war or insurgency. On the battlefield and bearing their arms openly, they are combatants. Off the battlefield, they hide their arms and seemingly revert to

noncombatant status. Without uniforms or insignia, it is impossible to identify un-uniformed militants as combatants. They not only melt in with those around them but suddenly seem to acquire their status as well. In practice and in principle, these fighters become civilians. Their fluid and amorphous status lies at the heart of the argument that Stein and other fierce opponents of named killings make: lacking firm status as combatants, guerrillas, militants, terrorists and others without uniforms must be civilians.

While the framers of Protocol I do not address this problem directly, they are often acutely aware of the severe difficulties that allowing combatants to eschew uniforms presents. The subject of spies, for example, is particularly vexing. By definition, uniformed soldiers cannot be spies. Without uniforms, however, anyone might be a spy thereby making it difficult to protect a bona fide but un-uniformed combatant from charges of spying or sabotage.¹⁷ Lack of uniforms therefore, makes it difficult to determine affiliation and jeopardizes the rights of both combatants and noncombatants, most often the latter. As the distinction between combatants and noncombatants blurs, belligerents must assume either that many un-uniformed combatants are actually non-combatants and avoid harming them, or as more likely will be the case, assume that most noncombatants are, in fact, un-uniformed combatants, and, as they do so, inflict excessive harm. Either option undermines the laws of armed conflict.

In spite of the ease in which un-uniformed guerrillas seemingly shed and shift their status, it cannot be that they are no longer combatants simply because they leave the scene of a battle and discard, as it were, the only earmarks of combatant status. Once a combatant, by whatever criteria and including the lax conditions of Protocol I, guerrillas, militants and insurgents remain combatants whether on the battlefield or off. They never leave the armed forces that are party to the conflict. As such, the problem is primarily one of properly identifying combatants in the absence of uniforms or other markings. Here is where 'naming' is useful: if one cannot determine organizational affiliation by uniforms or insignia, it is reasonable, indeed imperative, to turn to alternative methods. Naming does not imply guilt or impute 'special responsibility' as Statman claims, but establishes affiliation in the same way that uniforms do. Naming combatants is considerably more difficult than recognizing them by uniform and so demands careful intelligence to allow an adversary to assemble a list of individuals affiliated with their enemy's armed forces. Armed with this list and a reasonable method of ascertaining a person's identity, it is then possible to establish combatant status. At that point, a named, un-uniformed combatant is as vulnerable as one in uniform; both may suffer harm as adversaries defend themselves.

Named Killings and Moral Responsibility

Although the logic of named killing does not preclude the prosecution of terrorists on charges of war crimes, the requirement to 'cleanse' terrorists of moral and criminal responsibility in order to kill them outright and by name during armed conflict remains odd, a vestige of those theories of just war and military practice that assume the moral equality and shared innocence of all soldiers. Perhaps it is more reasonable to think that some combatants are unjust, and that those espousing an unjust cause and/or fighting by unjust means merit a response *more* severe than do those combatants who are just. Rather than ignore the moral responsibility of terrorists and their supporters,

their moral non-innocence justifies stronger and harsher measures than one would normally inflict on an adversary. Perhaps targeted killings are an appropriate response to terrorism precisely because terrorists deserve to suffer harm in a way that just combatants do not.

Jeff McMahan, who does not discuss targeted killings, sets the stage for this argument as he discusses the limits of permissible harm that one may cause when facing a threat. In the context of traditional just war theory, a just and proportionate response hinges upon the magnitude of an emerging threat and the costs and benefits of responding in one way or another. An acceptable response is necessary, cost-effective and one that avoids excessive non-combatant casualties; it does not vary relative to an adversary's moral responsibility. Echoing Statman and Meisels' concern for the 'special responsibility' or 'culpability' that terrorists bear, McMahan suggests, however, that we carefully weigh a belligerent's moral responsibility and respond more harshly to those combatants who are unjust.¹⁸ Unfortunately, assessments of moral responsibility often lead in conflicting directions.

Agents incur moral responsibility insofar as they knowingly support an unjust war and/or wage war by means they know to be unjust. This places moral responsibility along a continuum. At the weak end are those who lend little support to an unjust war and/or grasp little in the way of its injustice. At the strong end are those who actively support an unjust war fully aware (or, at least, capable of becoming fully aware) that it defies the demands of justice. In between, might be common soldiers who fight what they honestly, although mistakenly, believe is the good fight. Different levels of moral responsibility demand different responses so, to use McMahan's example from the first Gulf War, the Iraqi Republican Guards, an elite, volunteer force loyal to a regime waging an unjust war of aggression, merit the full brunt of a harsh military response while uneducated and poorly armed conscripts deserve some of the same care and consideration just combatants sometimes offer civilians to minimize the harm they suffer.¹⁹

In which category do terrorists belong? Placing them in company of the Republican Guards, that is, at the strong end of moral responsibility, suggests that terrorists and those who support them are vulnerable to *greater* harm — from collateral damage or assassination, for example — than one may otherwise inflict on an enemy. Targeted killings are then a proportionate rather than excessive response to terror, a conclusion that Statman and Meisels support. Yet moral responsibility may also cut in the opposite direction. Coerced and indoctrinated, poor and uneducated, some suicide bombers may only reach relatively low levels of moral responsibility, certainly lower than many other combatants may reach.²⁰ At the same time, there are good reasons to conclude that some terrorists, particularly Palestinians and other parties to CAR conflicts, pursue a just cause (in spite of their unjust means) as they fight an occupying power. If moral responsibility considers just cause (and it is at the centre of McMahan's argument) then these terrorists are less unjust in some important ways than other kinds of unjust combatants (such as those waging a relentless war of aggression). These two factors — diminished moral responsibility and a just cause — then place some terrorists and those who support them at the weaker end of the responsibility scale and among those whose actions warrant *lesser* harms than are otherwise allowed.

Although the idea of moral responsibility is intuitively appealing, it can, in this case, lead to conflicting conclusions that reinforce Lieber's insistence that it be left aside.

Rather than fall back on the presumption of guilt or responsibility to justify named killings or, alternatively, to dismiss its importance altogether, it is perhaps more accurate to say that we must ‘bracket’ rather than ignore moral non-innocence during war. In response, some might argue that ignoring the heinousness of terror inures us to the threat that terrorism poses. Terrorists, one might claim, present a special kind of threat the severity of which might be lost if we bracket their non-innocence. But this is not so. Independent of whatever moral responsibility we may ascribe to them (and which makes them culpable as war criminals), terrorists pose grave material threats to civilian populations. But, then again, so do bomber pilots. For the purpose of assessing a threat and targeting it accordingly, it is not necessary to consider that terrorists are acting unlawfully or immorally while bomber pilots fight within the bounds of conventional war. In either case, a belligerent sizes up the threat it faces and then considers how best to defend itself. In spite of the very great temptation to attribute criminal behaviour or moral responsibility to some belligerents, neither innocence nor non-innocence adds to or detracts from the magnitude of the threat a nation faces. Setting aside moral responsibility, however, still leaves us to assess named killings as an expedient response to an armed threat. As such, named killing can be a legitimate form of self-defence if it can meet the demands of necessity, utility and proportionality.

Named Killing: An Effective and Proportionate Response?

Accepting named killing as a legitimate form of warfare does not preclude a careful assessment of necessity, civilian costs and military benefits. Are named killings necessary to forestall the threat a nation faces from armed insurgents? Are they effective? Do they limit or exacerbate harm to civilians? There is no easy way to answer these questions because criteria are so elusive. Both Statman and Meisels argue that a ‘reasonable hope of success’ is sufficient to justify named killings.²¹ Certainly this is true, but what does it mean? More importantly, what of the cost? Given sufficient firepower, one can always find a tactic that offers a ‘reasonable hope of success’.

I have argued at length that named killings carry costs not typically associated with ordinary killing during wartime.²² The legitimacy of naming to determine affiliation does not allay these costs, many of which are inseparable from the process of identification. Un-uniformed militants are difficult to identify without extensive intelligence that comes largely from a well-watered network of collaborators and traitors. Unlike police informers, collaborators are neither of the same ilk as those they inform on, nor concerned citizens anxious to rid their neighbourhood of criminal elements. Instead, many collaborators are ordinary citizens responding to threats of imprisonment and torture, or offers of money, medical care or travel permits from occupation authorities. Others turn to collaboration to exact revenge and settle scores. It is not a healthy situation for any society, and while Palestinians struggle to come to grips with the collaborators among them and the relative ease in which outsiders infiltrate their community, Israel has proved adept at exploiting this social malady to compile lists of un-uniformed combatants. These costs are far from trivial and may explain, at least in part, the vicious response that often follows named killings fuelled by collaboration.

Other costs arise as troops carry out named killings and bystanders are killed as un-uniformed combatants are ‘liquidated’. Between September 29, 2000 and January

15, 2006 Israeli troops successfully targeted 204 named combatants while killing 115 civilians.²³ Are these casualties excessive or reasonable? For some, these numbers may represent reasonable levels of collateral damage, particularly as Israel makes considerable efforts to limit civilian casualties. Moreover, it may only be that isolated missions, rather than Israel's policy in general, cause disproportionate casualties.²⁴ Nevertheless, claims of proportionality are pointless if strikes are ineffective and bring additional costs and casualties.

Are named killings effective? Do they enhance security, disable the enemy and improve the prospects for eventually ending armed conflict? Critics charge that assassinations only incite further attacks and often slide from interdiction to retaliation, retribution and revenge. Proponents argue that the situation has improved. Here, too, firm criteria are lacking. Statman, for example, describes how in January 2004, 'the situation is much better . . . than it was in March 2002, when Israel was facing two to three terrorist attacks a day, resulting in the deaths of more than a hundred Israelis in one month'.²⁵ While March 2002 was, indeed, a watershed that prompted sweeping military action in the West Bank to root out terrorists, it is not obvious that the situation two years later was much better. Named killings were a fixture of the fighting since November 2000 and it is not clear if and how they reduced the threat of terror.²⁶ In the 18 months following Israel's reinvasion of the West Bank in the summer of 2002, the number of Israelis killed by terrorists within the Green Line has held steady at about fifty in each six-month period.²⁷ Subsequently, however, the situation improved (as measured by casualties), a fact some attribute to the separation fence. I do not intend to settle the issue here, but only point out that assessments of efficacy require some criteria beyond a 'reasonable hope'. These include civilian security, economic well-being, international standing, and progress toward peace. By these measures, some may find it difficult to see how the situation in Israel improved during the period prior to Arafat's death in November 2004. There is also growing evidence that named killings only *increase* the incidence of terror bombings. Although preventive arrests can dramatically decrease the number of suicide bombings, named killings draw significant numbers of new recruits that replenish the 'terror stock', that is, the cadre of men and women willing to undertake suicide bombings. The result is a greater number of terror attacks.²⁸ While one may appeal to the long-term hope that named killings will forestall terror in spite of its high short-term costs, there are no clear indications that they were or will be effective in this way.

The Future of Named Killing

While the consequences of named killings should mitigate against the practice, it is conceivable that some belligerents — perhaps those on the battlefields of Iraq and Pakistan — may overcome its high cost. Should named killings become an established norm of armed conflict, however, one major consequence may be that uniforms will continue to lose their significance. They certainly would not protect anyone deemed a sufficiently serious threat from a named killing. While it is difficult, in other words, to depart from the war convention and justify named killings without raising the otherwise insurmountable difficulty that non-uniformed combatants pose, it is quite likely that this link will soon be forgotten. Named killings will simply offer another avenue

for waging war. The costs might be high, but this will only tend to limit naming to those extreme situations and overwhelming threats that cannot be met by other means. This is acceptable if nations manage to resist the temptation to impute guilt to their adversaries. Otherwise, Lieber is right, the war convention will disintegrate amidst charges of mutual outlawry, and the modest protection it affords to combatants will vanish. With this caveat in mind, named killings will form part of conventional war but must have little to do with the war on terror, *per se*, or with international law enforcement.

If this is the correct way of looking at named killings, one cannot preclude any side form adopting similar tactics when the benefits justify the costs. No one should be surprised, then, if Palestinians or similarly situated parties to a CAR conflict decide to pursue named killing and, for example, target young pilots whether in the field or at home on leave. Based solely on the threat they pose to civilians, bomber pilots are not necessarily any less menacing than terrorists are. Should Palestinian militants or other insurgents ever achieve the means to respond in kind, Israel and other conventional powers might then find cause to desist and restore the convention that forbids named killing. Bomber pilots, after all, are considerably more expensive to train than suicide bombers. Unfortunately, once this particular genie is out of the bottle, it might not be that easy to get it back inside again.

Michael L. Gross, Department of International Relations, The University of Haifa, Mount Carmel, Haifa 31905, Israel. mgross@poli.haifa.ac.il

NOTES

- 1 Yael Stein, 'By any name illegal and immoral: Response to 'Israel's policy of targeted killing' by Steven David', *Ethics & International Affairs* 17, 1 (2003): 127–140.
- 2 Michael L. Gross, 'Killing civilians intentionally: Double effect, reprisal and necessity in the Middle East', *Political Science Quarterly* 120, 4 (2005): 555–579.
- 3 See *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana Cuba, 27 August to 7 September 1990, reprinted in Nigel S. Rodley, *The Treatment of Prisoner's Under International Law* (Oxford: Clarendon Press, 1999), pp. 440–444.
- 4 Michael L. Gross, 'Fighting by other means in the Mideast: A critical analysis of Israel's assassination policy', *Political Studies* 51 (2003): 350–68; Gad Barzilai, 'Islands of silence: democracies kill?', *Annual Meeting of the Law and Society Association*, Budapest, 2001, p. 10, cited in Tamar Meisels, 'Targeting terror', *Social Theory and Practice* 30, 3 (2004): 297–396.
- 5 The difficulties of maintaining due process are not insignificant and would affect the ability to preserve due process whether the suspect was a terrorist or war criminal (See Meisels, pp. 305–6). Nevertheless, every effort is made to maintain due process in the latter case insofar as the nature of military tribunals allow. See, Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (Washington: Congressional Research Service, The Library of Congress, 2001).
- 6 The grounds for supreme emergency remain contentious. See A. J. Coates, *The Ethics of War* (Manchester University Press: Manchester, 1997), pp. 234–272; Brian Orend, 'Just and lawful conduct in war: reflections on Michael Walzer', *Law and Philosophy* 20 (2000).
- 7 See Leslie C. Green, *The Contemporary Law of Armed Conflict, Second Edition* (Manchester: Manchester University Press, 2000), p. 144, n. 148.
- 8 The moral equality of soldiers, long a lynchpin of just war theory and the law of armed conflict, has recently been questioned. See Jeff McMahan, 'The ethics of killing in war', *Ethics* 114 (2004): 693–733; David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), pp. 165–173.
- 9 Daniel Statman, 'Targeted killing', *Theoretical Inquiries in Law* 5 (2004): 191. Meisels writes, 'I assume here further that there is little disagreement among Western liberals concerning the immorality of terrorists

and their abhorrent deeds. Nor is there usually any doubt as to the culpability of the pursued targets (Meisels op. cit., p. 298).

- 10 Green op. cit., pp. 286–316.
- 11 Gross, 'Fighting by other means' op. cit., pp. 352–4.
- 12 Steven R. David, 'Israel's policy of targeted killing', *Journal of Ethics and International Affairs* 17, 1 (2003): 111–118.
- 13 Statman op. cit., p. 196.
- 14 Gregory M. Travalio, 'Terrorism, international law and the use of military force', *Wisconsin International Law Journal* 18, 1 (1999): 145–191.
- 15 See, Human Rights Watch. *Background Paper on the Geneva Conventions and Persons Held by US Forces*, January 29, http://www.hrw.org/backgroundunder/usa/pow_bck.htm#P49_10180; Elsea op. cit., p. 2.
- 16 If the logic of named killing requires that we classify terrorists as combatants, any crimes attributable to their actions are war crimes. This includes terror no less than any other grave breach of humanitarian law. Terror, as a recent UN report defines it, is 'any action intended to cause death or serious bodily harm to civilians or noncombatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or international organization to do or abstain from doing any act (see, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change (December 1, 2004): 49. (<http://www.unis.unvienna.org/documents/unis/A59565.pdf>)).
Putting aside the political context, terrorism is certainly consistent with crimes against humanity as the London Charter defines them, namely, 'murder, extermination, deportation and other inhumane acts committed against any civilian population'.
- 17 *Commentary*, Article 46, 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, paragraph 1776.
- 18 McMahan op. cit., p. 727.
- 19 McMahan op. cit., p. 725.
- 20 Observers disagree about the profile of suicide bombers. Rubin describes bombers as often unmarried, religious and unemployed. Pedahzur, Perliger and Weinberg conclude that suicide bombers draw from 'a society with excessive regulation and where the socioeconomic development of people is impeded and aspirations are stifled by an oppressive discipline'. Pape, on the other hand, suggests that suicide bombers are 'not mainly poor, uneducated, immature religious zealots or social losers. Instead . . . they resemble the kind of politically conscious individual who might join a grass roots movement more than they do wayward adolescents or religious fanatics'. Clearly, moral responsibility will vary subject to these conflicting profiles. (See, Elizabeth Rubin, 'The most wanted Palestinian'. *The New York Times Magazine* (June 30 (2002): 26–31, 42, 51–5; Ami Pedahzur, Arie Perliger and Leonard Weinberg, 'Altruism and fatalism: The characteristics of Palestinian suicide terrorists', *Deviant Behaviour* 24 (2003): 421; Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005), p. 216.
- 21 Statman op. cit., p. 193.
- 22 Gross, 'Fighting by other means' op. cit.; Michael L. Gross, 'Assassination: killing in the shadow of self-defense' in J. Irwin (ed.) *War and Virtual War: The Challenges to Communities* (Amsterdam: Rodopi, 2004), pp. 99–116.
- 23 Figures are compiled from B'tselem, Israeli Information Center for Human Rights in the Occupied Territories, (http://www.btselem.org/english/statistics/Palestinians_killed_during_the_course_of_an_assasination.asp).
- 24 For example, one of the most widely condemned missions took place on July 23, 2002 as 15 civilians died in a strike killing Salah Shehadeh, the head of the Hamas military wing (See, International Policy Institute for Counter-Terrorism, *Casualties & Incidents Database — Targeted Killing* (www.ict.org.il/)).
- 25 Statman, op. cit., p. 192.
- 26 Yael Stein, *Position Paper: Israel's Assassination Policy: Extra-judicial Executions*, B'tselem, Israeli Information Center for Human Rights in the Occupied Territories, 2001, http://www.btselem.org/Download/200101_Extrajudicial_Killings_Eng.doc
- 27 B'tselem, *Israeli Civilians killed by Palestinians within the Green line*, www.btselem.org.il.
- 28 Edward Kaplan et al., 'What happened to suicide bombings in Israel? Insights from a terror stock model', *Studies in Conflict and Terrorism* 28, 3 (2005): 225–235.