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Extrajudicial Killing as Risk Management

OLIVER KESSLER & WOUTER WERNER*

University of Bielefeld, Germany & VU University, Amsterdam, the Netherlands

This article analyses legal aspects of the ‘war on terror’. It argues that, by making recourse to a semantic of risk, danger and, in particular, precaution, the ‘war on terror’ blurs crucial political and legal categories of public and private, of peace and war, of combatants and civilians, thus redefining the relationship between political responsibility, time and security. As a consequence, the extrajudicial killing of individuals becomes a form of risk management that takes place beyond established mechanisms of accountability.

Keywords  risk • uncertainty • targeted killing • international law • terror

Introduction

On 8 January 2007, the USA carried out at least two airstrikes in southern Somalia. The target was a group of (further unidentified) Islamist fighters, believed to be part of an Al-Qaeda cell. Reportedly, the fighters were tracked by aerial reconnaissance and then attacked by a US gunship launched from a US military base in Djibouti.¹ The Somalia attack constitutes one of the most recent examples of the USA’s ‘targeted killing’ programme, a highly classified initiative aimed at the destruction of an increasingly decentralized and fragmented terrorist network.² Until recently, Israel was one of the few states to openly adopt a policy of targeted killings and to defend it publicly as a sound and lawful practice. After the breakdown of the 2000 peace negotiations and the subsequent Second Intifada, Israel officially declared its intention to kill specific individuals for reasons of security.³ Since the adoption of the policy of targeted killings, it is estimated, some 338

¹ See BBC News (2007a).
² In this article, we will use the term ‘targeted killing’ to refer to ‘the intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval’ (David, 2002: 2).
³ Note, however, that the actual policy of targeted killing dates back further, including, inter alia, the killing of the suspects of the 1972 Munich attacks and killings in the Occupied Territories long before 2000. For an overview, see Zussman & Zussman (2005).
Palestinians have been killed, of which 210 were actually targeted and 128 were bystanders.\(^4\) Israeli attacks have included some high-profile killings – for example, the assassination of Sheik Ahmed Yassin, founder and head of the Islamist organization Hamas.\(^5\) While the USA has maintained a critical stance on the Israeli policy,\(^6\) it has increasingly moved in a similar direction in response to terrorist attacks against US targets since the 1990s. Since 2001, the USA has been engaged in at least 20 officially acknowledged targeted-killing operations in a wide variety of countries, including Somalia, Yemen, Pakistan, the Philippines, Sudan and Iraq.\(^7\)

We argue that these recent policies of targeted killing fit the logic of precaution and risk management that dictates contemporary security policies (Aradau & van Munster, 2007).\(^8\) In particular, the stronger emphasis on the precautionary principle in security policy leads to a stronger emphasis on possible future events in comparison to past and present circumstances. We suggest that this emphasis on the future and the possible can be read as the introduction of a logic of radical uncertainty in legal reasoning. In this way, by making recourse to a semantic of risk, danger and, in particular, precaution, the ‘war on terror’ blurs crucial political and legal categories of public and private, of peace and war, and thereby redefines the relationship between political responsibility, time and security. It allows for an objectification of individuals as ‘mortal risks’, and an invocation of international legal categories to legitimize the targeting of those risky individuals. Targeted killings, then, are a specific form of ‘uncertainty absorption’, literally aimed at the elimination of danger. They are the ultimate consequence of the way in which the fight against terrorism is framed by some governments: as a ‘new kind of war’ against an enemy that is perceived of as an unpredictable, mortal threat rather than as a formally equal combatant or a criminal that can be dealt with via ordinary judicial procedures.

To pursue this claim further, we will argue in three steps. The first section discusses the recent rise of risk within security studies. Here we show how risk allows us to rethink the changing temporal and social conditions of world politics. Risk names both the boundary of what is known and unknown and how the unknown is made known. It characterizes a particular tension between knowledge and time, and thus addresses fundamental questions of responsibility and blame. This section distinguishes between two approaches to risk. The first defines uncertainty as synonymous with risk,

\(^6\) See BBC News (2002).
\(^7\) See Meyer (2006); BBC News (2007b).
\(^8\) However, it should be emphasized that our intentions are more concept-oriented, emphasizing what risk does rather than what it essentially is. In that sense, this contribution focuses on the rationality of risk and uncertainty as specific modern patterns for identifying and processing contingency. The notions of risk and uncertainty thereby allow for a reconstruction of particular modern ‘institutions’ that differ from previous societal frames.
where risk is seen as a special technique subject to instrumental rationality. In this setting, contingency manifests itself either as risk or as danger. The second approach uses risk in juxtaposition to uncertainty, where uncertainty demarcates a particular rationality when convictions and models break down. The second section of the article then discusses some of the dominant (international) legal rationalities that govern the capture and killing of individuals in the fight against terrorism. The capture and killing of individuals, we argue, is governed by (at least) three different rationalities: responsibility for wrongful behaviour, imminent threat and institutionalized danger (or ‘combatant status’). The third section discusses how the framing of the ‘war on terror’ – and specifically policies of targeted killing – echoes structures of governance that bypass these rationalities of responsibility, immediate threat and institutionalized danger. In doing so, the ‘war on terror’ introduces fundamental uncertainty as an element of legal reasoning. The result is that, in the current ‘war on terror’, individuals are killed on the basis of informal determinations of responsibility, unchecked characterizations of imminent threats and disputed status under the laws of war.


The notion of risk has entered security studies in two ways: via Beck’s notion of risk society (Beck, 2002, 2006; Coker, 2002, 2004; Rasmussen, 2001, 2004, 2006) and via Foucault-inspired writing that conceptualizes risk as a particular form of governmentality (Dean, 1999; Ewald, 1993; Aradau & van Munster, 2007). Beck’s original thesis of an approaching risk society is embedded in his theory of modernity (see Beck, 1992: Chapter 1). The overall transformation of society from an industrial to a risk society represents a fundamental break in the basic contours of modernity itself. According to Beck, industrial societies can be characterized by a belief in unlimited possibilities and progress, with a very peculiar focus on wealth accumulation and redistribution. However, unintended consequences of industrial life in the face of ecological, financial and technological risks now threaten the very foundations of societies. For the first time, according to Beck, the risks that societies face are leading those societies to examine both themselves and their own contingent premises. This rise of a reflexive modernity transforms nothing less than the very reality societies face in at least three respects (Beck, 1992: 13): there is a new mode of knowledge production, combined with a higher reliance on scientific knowledge; an abandonment of insurance-based mechanisms in welfare provision; and a redefinition of international co-operation. Whereas foreign policy used to be about external security and the
art of diplomacy, the risks societies today face blur the distinctions between internal and external sovereignty, between crime and war, and between public and private – distinctions that underlie our conceptualization of world politics. Today, states need to cooperate to guarantee even internal security. Therefore, according to Beck, states need to denationalize and transnationalize themselves, build new solidarity structures, and embrace cosmopolitan principles such as respect for the otherness of others and co-existence of national and religious identities.

Contributions inspired by Michel Foucault see risk as a discursive practice, a means for disciplining conduct by imposing a particular truth regime (Rose, 2001: 7). Risk provides a special mode for objectifying individuals as political subjects and thereby for organizing and structuring a particular mode of inclusion and exclusion. This approach unveils the way in which risk is objectified and reproduced in heterogeneous discourses, institutions and bureaucracies. Aradau and van Muster, in particular, have recently related these ideas to terrorist attacks. They focus on the notion of the ‘dispositif’, understood as ‘discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions’ (Aradau & van Munster, 2007: 97; see also de Goede, 2008; Salter, 2008) to analyse how risk structures the relationship between the present and the future and the ways in which this relationship is controlled. In particular, via the precautionary principle, risk introduces four interlinked rationalities: ‘zero risk, worst case scenario, shifting burden of proof and serious and irreversible damage’ (Aradau & van Munster, 2007: 103), resulting in an extensive surveillance system that monitors the population as a whole.

In our discussion, we will not elaborate more deeply on how terrorism impacts on the temporal and spatial conditions of security policy, but instead take this impact as our vantage point in order to reconstruct the ways in which the discourse on risk and uncertainty has affected legal rationalities and structures of political responsibility. That does not mean that we do not acknowledge some very important differences between Beck and Foucault, especially concerning the materiality of risks, power, and the outlook of a possible future. But, these preliminary remarks already highlight two important aspects of a risk approach that both approaches share and from where we start our investigation: First, risk allows us to think about and conceptualize a contingent future (Dannreuther & Lekhi, 2000).9 Risk is not a ‘thing’

9 Risk has already become a dominant theme of inquiry within social theory during recent years (Krimsky & Golding, 1992; Lupton, 1999; Beck, Adam & van Loon, 2000), and this has already had considerable impact on security studies. Alternative concepts of risk from psychology (Slovic, 2000), anthropology (Douglas & Wildavsky, 1982), sociology (Beck, 1992; Luhmann, 1991) and history (Foucault, 1991) lead to the overall insight that assessment, management and identification escape the narrow confines of psychometrics or economics; see also Lupton (1999), Krimsky & Golding (1992), Schwing & Albers (1980), Japp (2000).
independent of human practices or social relations. It is not a property of an objectively given reality, nor is it a psychological law. Rather, risk names the boundary of both what is known and unknown and the particular way in which the ‘unknown’ is made known. Risk combines the future and the present via the characterization of the unknown. Risk names the boundary of what an individual can know, and what lies in his responsibility or is subject to, for example, a ‘higher force’. As such, it is embedded in societal structures, in intersubjectively constituted meaning structures of time, sociality and the world – and thus in particular modern understandings of how the world might be known.

Second, and related to the first point, there is no such thing as ‘the risk’. Risk is inscribed in a very specific semantic field of time, knowledge and responsibility that changes across societies or cultures (Douglas & Wildavsky, 1982). For example, the notions of risk and uncertainty show a very specific ambiguity. As widely discussed in heterodox economics, there is an important difference between treating risk and uncertainty synonymously and treating them as two very distinct realms with different rationalities. The ‘risk as uncertainty’ position – familiar from expected utility theory and mathematical risk analysis – focuses on quantitative relationships and excludes qualitative changes. In this setting, the future can be described in terms of a distinct and exhaustive set of possible states of the world and probability distributions for this set. In this setting, uncertainty manifests itself either as risk or as danger. This is the view on risk we encounter in mainstream game theory and contract theory within economics, where risk is embedded in broader assumptions about instrumental rationality, insurance and an empiricist philosophy of science.

However, the term uncertainty takes on a different meaning when the future cannot be described as a set of probable states of the world, as the very categories change by which the world is structured. In this case, probability assessments include qualitative judgements about ‘what is the case’. Consequently, expectations are not built on the basis of pre-existing models or frames, but include processes of world enclosure, that is, the construction of particular frames and models. In this context, uncertainty is separated from risk and (quantitative) probability measures, as Keynes (1937: 213–214) explains:

> By uncertain knowledge . . . I do not mean merely to distinguish what is known for certain from what is only probable. The game of roulette is not subject, in this sense, to uncertainty; nor is the prospect of a Victory bond being drawn. Or, again, the expectation of life is only slightly uncertain. . . . The sense in which I am using the term is that in which the prospect of a European war is uncertain, or the price of copper and the rate of interest twenty years hence, or the obsolescence of a new invention, or the position of private wealth owners in the social system in 1970. About these matters there is no scientific basis on which to form any calculable probability whatsoever. We simply do not know.
As this quote indicates, uncertainty is defined in opposition to ‘the probable’ – that is, quantitative probability measures. Within the context of expected utility (or any other form of mathematical expectations), the notion of uncertainty refers to indeterminacy or ambiguity arising within the confines of a given model or situation. As the ‘game’ is logically prior to expectations, uncertainty is always structured, in the sense of being bound by the logic of the game under consideration. What Keynes has in mind is ‘unstructured’, genuine or radical uncertainty, where the contours of the situation or model are absent. The formation of expectations or probabilistic assessments or any other sort of ‘logical reasoning’ does not tell us something about the world, but of our engagement with the world. Consequently, this literature focuses on those processes by which uncertainty is absorbed into risk either via functional expertise (Knight, 1921) or by conventions (Keynes, 1937).

Under conditions of uncertainty, therefore, actors cannot calculate instrumental-rational decisions, as ‘qualitative judgements’ in the form of sentiment, confidence or conventions form a crucial part of our reasoning (Keynes, 1936: 216). In this sense, conventions and norms represent a different kind of knowledge and constitute at the same time the limits of a potential applicability of formal reasoning and the insurability of the future: they tell us not simply what to do, but also what situations we are actually in.

In order to understand the ways in which the current fight against terrorism challenges existing legal institutions, it is necessary to redefine the distinction between these two types of uncertainty. In this article, we propose to associate ‘structured’ uncertainty with the indeterminacy and ambiguity that exists in every legal system, but that arises within given confines or existing legal categories and legal distinctions. As long as the basic confines and legal categories are well defined, norms function according to the ‘risk as structured uncertainty’ logic. Primary legal questions circle around which norm is to apply, what evidence to take into considerations, and how to allocate responsibility and guilt. In other words, the common legal vocabulary of norms can be seen as a kind of risk management as long as uncertainty is given in a structured manner and the ontology is well defined. Of course this implies that risk and norms can be seen as regulating the relation between the present and the future (Luhmann, 1991: Chapter 4).

Unstructured uncertainty enters when the structure-forming capacity of legal categories or distinctions breaks down – that is, when the ‘basic rules of the game are changing’ and one needs to actively figure out which game one is actually playing. Here, the recent change from security to risk symbolizes a break from the idea that the legal system would be a system of norms. It points to a stronger focus on the future that has fundamental repercussions for the very understanding of the international legal order itself.

At this point, and in conformity with Beck and Foucault, we just want to highlight that this change in the temporal dimension challenges legal ration-
alities. The image of instance, of high contingency and sheer unpredictability of future attacks, together with the ambiguous nature of the adversaries, changes the temporality of both security politics and international law (Daase & Kessler, 2007). The definition of terrorism as catastrophic and unpredictable violence – that is, an emphasis on genuine uncertainty – pushes the door open for the logic of precaution in the area of counter-terrorism, as identified in recent scholarly writing (Aradau & van Munster, 2007). As has already been noted, this uncertainty legitimizes the introduction of technologies that seek to transform the relationship between present and the future. Examples include self-defence, domestic surveillance of the entire population, tighter control of aviation, collection of personal and biometric data, new military and satellite-aided military technologies (such as drones), and the creation of enormous online databases for police and government departments. Via this new temporality, we suggest that the current ‘war on terror’ challenges legal categories, as the semantics of war is augmented to include private criminals, thus undermining the legal rationalities that regulate the capture and killing of individuals.

Three Legal Rationalities: Responsibility, Imminent Threat and Institutionalized Threat

In this section, we will focus on three legal categories, or rationalities, that guide the capture and killing of deviant or dangerous individuals by states: responsibility, immediate threat and institutionalized threat. The first rationality, responsibility, is traditionally understood as the legal approach par excellence. It not only includes notions such as wrongfulness, attribution, restoration and deterrence, but also connects with some core values of the rule of law – for example, the presumption of innocence or the right to fair trial. The latter two rationalities, immediate and institutionalized threat, operate on different bases. Neither requires the prior determination of responsibility. Rather, they legitimize state action against individuals on the basis of the threat posed by those individuals. At the same time, however, they constitute two radically different forms of regulation: while immediate threats operate on a factual basis, institutionalized threats are based on the status of individuals.

10 On the demise of war as an intersubjective concept, see in particular Joenniemi (2006).
11 Of course, we do not argue that international law does not know situations of radical uncertainty, nor that this is an entirely new phenomenon. However, this article deals solely with uncertainty in the context of targeted killing. A good discussion on risk and uncertainty can be found in O’Malley (2004: Chapter 1).
Non-Innocence as ‘Responsibility’

Under the traditional reading of ‘non-innocence’, states can take action against individuals because they are responsible (guilty, not innocent) for wrongdoing. This notion bears a family resemblance to Ewald’s (1986) understanding of responsibility as a rationality that defines undesired events (including moral injuries) as the result of a disruption of the normal conditions that apply between legal subjects. Thus, the logic of responsibility links unhappy events to past wrongful behaviour of individuals, who need to make ‘reparation’ and pay for their disturbance of normalcy. The aim of such a principle of social organization is the creation of prudent and provident citizens who are able to grasp the relation between freedom, responsibility and social order. Although Ewald’s analysis of responsibility was specifically designed to analyse developments in the context of private law (especially labour law), it is possible to extend his analysis to one of the main legal paradigms in the fight against terrorism: the criminal justice, or law enforcement, paradigm. Under this paradigm, (state) action against individuals is allowed (and sometimes even required) on the basis of their responsibility for criminal acts.12 At the same time, the notion of responsibility provides limits on state action. The idea of responsibility is linked to fundamental notions of criminal procedure, including the nullum crimen sine lege principles. In this sense, the notion of individual responsibility determines the contours of the legal and political accountability of the state simultaneously. Basing state action against international terrorism on the notion of (criminal) responsibility, for example, triggers many aspects of (international) human rights law, including the right to fair trial and protection against the arbitrary taking of life and liberty.

The notion of individual criminal responsibility figures prominently in international conventions in the field of anti-terrorism. Although international law still lacks a generally accepted definition of terrorism, it has managed to define particular types of conduct as ‘terrorist acts’ in a variety of international treaties.13 Generally, these treaties put states under an obligation to criminalize such conduct under domestic law and to establish jurisdiction in certain circumstances.14 In this way, international law establishes

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12 We do not suggest that international criminal law is predicated solely on the characterization of individuals’ actions. Rules by which responsibility or guilt are attributed and ascribed to individuals are not individual ‘attributes’ or reducible to the physical acts performed by those individuals. Rather, attribution is based on legal-internal and systemic criteria that we see changing. We thank an anonymous reviewer for pointing this out.

13 See, for example, UN conventions in the area of counter-terrorism; available at http://www.un.org/terrorism/instruments.html (accessed 11 April 2007).

14 Generally, a distinction is made between grounds on which state parties are obliged to exercise jurisdiction and grounds on which states may exercise jurisdiction; see, for example, Article 6 of the Terrorist Bombing Convention, which distinguishes between measures that states should take and measures that states may take; available at http://www.un.org/terrorism/instruments.html (accessed 11 April 2007).
what might be called ‘indirect individual responsibility’.\textsuperscript{15} It creates not direct responsibility for ‘terrorist acts’, but rather an obligation (and responsibility) for states to incorporate individual criminal responsibility for certain acts within their domestic systems.\textsuperscript{16}

Non-Innocence as Danger

The second understanding of ‘non-innocence’ derives from the Latin \textit{nocentes}, which means ‘those who are harmful’.\textsuperscript{17} Within this meaning of the term, the innocent are those who are \textit{non nocentes}, not harmful or dangerous. State action against \textit{nocentes} is allowed (or even required) for the protection of life, limb and liberty of citizens. Here, state action is not based on individual criminal responsibility, but rather on the need to counter acute danger.

Where state action is based on the second understanding of \textit{nocentes} (harmfulness, dangerousness), the protection against arbitrariness remains intact. However, given the (alleged) need to take action against an acute danger, it is no longer pivotal to establish individual criminal responsibility before action can be taken. Rather, it is required to demonstrate that state action was necessary to pre-empt immediate threats or dangers and proportionate to the threat in question.\textsuperscript{18} International human rights bodies have linked (lethal) state action meant to thwart imminent threats to specific mechanisms of accountability. The accountability requirements have been spelled out most clearly in the jurisprudence of the European Court of Human Rights (ECHR). The ECHR has consistently ruled that state action resulting in the death of individuals should be followed by an independent investigation. Such an investigation should be effective: it should be capable of identifying those responsible and making a determination of whether the force used was justified. The investigation must also be prompt and expeditious, and ‘there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory’.\textsuperscript{19} In similar fashion, the United Nations Basic Principles on the Use of Force and Firearms by Law

\textsuperscript{15} Note, however, that such responsibility is sometimes stretched so as to include membership of an organization pursuing certain prohibited purposes; see, for example, Article 2(3)(c) of the 1997 Terrorist Bombing Convention; available at http://www.un.org/terrorism/instruments.html (accessed 11 April 2007).

\textsuperscript{16} In more exceptional circumstances, international treaties even purport to create direct individual criminal responsibility. For an analysis, see Duffy (2005).

\textsuperscript{17} For an analysis of the term ‘nocentes’, see McMahan (2004).

\textsuperscript{18} The need to demonstrate an acute necessity has been laid down, inter alia, in the jurisprudence of the European Court of Human Rights and the Human Rights Committee; see, for example, Husband of Maria Fanny Suarez de Guerrero v. Colombia, Communication R. 11/45 (5 February 1979); McCann and others v. UK, European Court of Human Rights, Judgment of 27 September 1995, Series A, No 324, at para. 200; Andronicou and Constantinou v. Cyprus, European Court of Human Rights, Judgment of 9 October 1997.

Enforcement Officials,\textsuperscript{20} as well as the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,\textsuperscript{21} demand prompt and independent investigation of extrajudicial killings.

\textit{Institutionalized Threat: The Laws of War}

In times of armed conflict, the requirement of ‘non-innocence’ undergoes a radical transformation. Sure, even in armed conflict, the protection against arbitrary killing and capture remains applicable. However, what counts as ‘arbitrary’ is now determined by means of a \textit{lex specialis}: international humanitarian law (or, in the traditional terminology, the laws of war).\textsuperscript{22} Under this body of law, individuals may be captured, not because they are responsible for wrongful acts, and not even because they constitute an immediate threat, but on account of their status. The defining category in this respect is that of ‘combatant’. In times of armed conflict, combatants may be attacked without prior warning and without the attacker being obliged to search for less-violent solutions first. The vulnerability of combatants is the corollary of their privilege to use force during armed conflict, not a corollary of their guilt or the concrete danger they pose. The laws of war, in other words, operate on a rationality of what might be called ‘institutionalized danger’: individuals are targeted because they are part of an organization (the military) that institutionally represents danger.\textsuperscript{23} This does not mean that combatants cannot escape their vulnerable status altogether. In cases where they are incapacitated (e.g. by wounds or sickness) or when they surrender, they stop being a legitimate object of attack.\textsuperscript{24} Moreover, in any attack, states should limit their action to military targets, are under an obligation to take precautionary measures to spare the civilian population, and are to refrain from indiscriminate and disproportionate attacks.\textsuperscript{25}

\textsuperscript{23} The absence of responsibility for wrongful behaviour as a general guiding principle is also visible in the regime regulating the capture and internment of combatants (prisoners of war). Prisoners of war can be detained without procedure and without individual reason. The primary purpose of such detention, after all, is the prevention of future direct participation in hostilities, not the punishment of such participation in the past. From this, it also follows that, at the end of hostilities, prisoners of war are to be released – unless, of course, the detaining state has legal grounds for prosecuting the individual for acts other than the mere participation in hostilities, in which case the notion of responsibility for wrongful acts kicks in again.
\textsuperscript{24} See, inter alia, Article 41 of the First Additional Protocol to the Geneva Conventions of 12 August 1949; available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions.
\textsuperscript{25} It is beyond the scope of this article to discuss the rules on military targeting in detail. For an overview, see Boivin (2006).
The distinction between targeting and capture based on *nocentes*, on the one hand, and on *status*, on the other, reflects the ideal type of ‘war’ as a separate category, legally cut off from peace and ruled ‘by principles that are, as it were, tailor-made for it’.26 The distinction between war and peace, the different rationalities governing each, and the particular relation between those three rationalities can be regarded as fundamental conventions for dealing with uncertainty in the first sense: they provide the means to address risks when uncertainty and the unknown are given in a structured manner, as the primary focus is either on past or present evidence or on ascribed status. What is needed to process and manage risk is the application of already existing legal norms. Within war as a struggle between formally equal armed forces, it is pivotal that a distinction be made between combatants and civilians. The latter category is defined in a negative way: a civilian is any person that does not count as a combatant.27 While combatants enjoy the privilege of being able to use force and constitute a legitimate object for attack, civilians lack the right to use force, while enjoying immunity from attack. However, in the event that civilians violate their obligation to refrain from using force, they forfeit their protected status for such time as they directly participate in hostilities.28

Given the fundamental importance of the notion, one would expect international humanitarian law to contain elaborate definitions of a ‘combatant’. For international armed conflicts, such definitions are indeed available.29 Without going into the details of who counts as a ‘combatant’ under contemporary humanitarian law, the core of the available definitions can be stated as follows: a combatant: (1) belongs to the armed forces *strictu sensu* of a party to an international armed conflict, while respecting the obligation to distinguish her- or himself from the civilian population; or (2) is a member of another armed group belonging to the international armed conflict, which, as a group, is under responsible command, wears fixed distinctive signs, carries arms openly and respects international humanitarian law; or (3) is a member of another armed group under the responsible command of a party to an international armed conflict, subject to an internal disciplinary system, distinguishing her- or himself from the civilian population, depending on the specific situation.30 To see how the traditional interplay of these legal rationalities is undermined by the ‘war on terror’, the next section first focuses on how legal argumentation is increasingly based on possible future events

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26 Neff (2005: 397).
27 See Article 50 of the First Additional Protocol to the Geneva Conventions.
28 See Article 51(3) of the First Additional Protocol to the Geneva Conventions. See also the discussion later in this article.
29 See Article 4 of the Third Geneva Convention and Article 43 of First Additional Protocol to the Geneva Conventions.
30 For the latter requirement, see especially Article 44(3) of the First Additional Protocol to the Geneva Conventions. The situation is more complex, however, in non-international armed conflicts, since the law of non-international armed conflicts does not mention or define the notion of ‘combatant’; see, for example, Sassoli & Bouvier (1999: 208).
before we, second, discuss the collapse of legal categories themselves in more detail.

Targeted Killings and the Breakdown of Legal Rationalities

It is part of the (self-)image of Western liberal States that the exercise of coercive power in peacetime is linked to the requirements of ‘non-innocence’ as described above. This self-image, however, is difficult to reconcile with the different ways in which such states have sought to regulate the behaviour of individuals who had not yet violated a legal norm and who did not constitute an acute threat. Examples are preventative measures against (alleged) mentally ill persons believed to be dangerous, the jailing of persons for anticipated crimes or pre-trial detention of criminal defendants (O’Malley, 2004; Rose, 2001; Dershowitz, 2006). As was mentioned above, the reliance on prevention (or precaution) is also one of the characteristic features of the current fight against terrorism. The alleged unruliness and unpredictability of contemporary terrorists, in conjunction with their feared capacity to effectuate catastrophic violence, is invoked to justify practices such as profiling, indefinite detention, exclusion of aliens, rendition, etc. (Aradau & van Munster, 2007). In this respect, there is a continuity between earlier attempts at regulating ‘dangerous persons’ and contemporary security governance through risk. The invocation of a vocabulary of precaution and risk paves the way for measures that do not primarily respond to past or present events, but aim to regulate a dangerous and uncertain future. In terms of the preceding section, this constitutes a ‘move away from a concept of immediacy that looks at the relationship between the attacker and the attacked in a specific situation to a concept of immediacy that looks at the threat from the perspective of the state authorities and their powers of prevention’ (Nolte, 2006: 117).31

As we will set out in this section, this move is justified by a particular framing of the fight against terrorism as a war against irresponsible, dangerous groups with an ambiguous enemy status. It should be noted, though, that such characterizations of the enemy as irresponsible, dangerous and beyond established categories are not without precedent. In the colonial wars of the late 19th and early 20th century, for example, the non-European adversary was denied the protection of the laws of war on account of his uncivilized,

31 Note that the same move is also visible in the pleas for a more liberal reading of the right of states to self-defence. The US government, for example, has argued that the Caroline criteria for the anticipatory use of force (‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’) are too restrictive and should be reconsidered in the current fight against terrorism; see White House (2002: 4).
unruly nature. Savage warriors, it was argued, lack restraint in warfare, wage indiscriminate attacks and do not distinguish themselves from the civilian population. As a result, they should not be given the protection of the laws of war, although they remain legitimate targets of attack. In similar fashion, ‘terrorists’ nowadays are portrayed as potentially catastrophic risks, for example, because of their lack of restraint, their unwillingness to reciprocate and the fact that they refuse to distinguish themselves from the civilian population. On these grounds, it is argued, ‘terrorists’ are included in the laws of war as legitimate targets, but lack the protection offered by the same body of law.32

This shift from the present to the future, from norms application to precautionary principles, also has important repercussions on the applicability and function of legal categories for the ways in which states can be held accountable for the use of coercive power. A crucial step in this regard is the framing of the fight against terrorism as part of an armed conflict that justifies measures that are illegal in times of peace. Israel, for example, gradually moved away from the law enforcement model in order to justify its policy of target- ed killings. As Michael Gross has argued, ‘over time, the inherent limitations of sound law enforcement affected Israeli thinking as well. . . . This led Israeli officials to relinquish the claim to law enforcement and argue instead that assassinations are an acceptable means of armed conflict’ (Gross: 2003: 354; see also Gross, 2006). The claim, in other words, moved from law enforcement to self-defence and legitimate methods of warfare. After the 1998 bombings of the US embassies in Kenya and Tanzania, the USA also departed from a purely law enforcement paradigm in the fight against terrorism. Shortly after the 1998 attacks, US President Bill Clinton (1998) argued that there are times ‘when law enforcement and diplomatic tools are not enough’. The move towards the war model was spurred by the 9/11 attacks, inducing the USA to rely on self-defence as the major justification for, inter alia, a policy of targeted killing. Invoking self-defence in order to justify the killing of suspected terrorists abroad, however, raises at least two fundamental sets of legal questions. The first relates to the ius ad bellum. Important questions in this area are whether there is a right of self-defence against attacks by non-state entities and to what extent targeted killings constitute the use of force under Article 2(4) of the UN Charter, or even an armed attack against another state. While such questions are of the utmost importance for a general assessment of the legality and legitimacy of the current fight against terrorism, an in-depth analysis would require a separate article.33 We will not

32 For an excellent account of the structural overlaps between colonial warfare and the current ‘war on terror’, see Mégret (2006: 265–317).

33 Note that in its Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, the International Court of Justice has spoken out against such a right, arguing that only an armed attack by states could trigger the right to self-defence; see International Court of Justice, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories’,
embark on such a mission here. Rather, we will bracket the question of self-
defence and concentrate on the second question, regarding the ius in bello.

International humanitarian law regulates two types of conflicts: interna-
tional and non-international. Neither of the two categories, however, fits the
current ‘war on terror’. Under the prevailing view, international armed con-
flicts are regarded as conflicts between states, while non-international
armed conflicts are supposed to take place within the territory of a state.
Given the non-state and transboundary nature of contemporary terrorist
networks, this poses a difficult situation for international humanitarian
law. Unless one is prepared to deny the applicability of this body of law
altogether, this leaves only two options: either the definition of international
armed conflicts is stretched so as to include non-state violence, or the defini-
tion of non-international armed conflicts is stretched so as to include trans-
boundary use of force. In international practice and scholarly writing, both
positions can be found.

Whichever stretching act is undertaken, however, the results are rather con-
fusing. In both situations, the armed conflict is triggered by individuals (the
‘terrorists’) who do not qualify as combatants under any of the prevailing
definitions: they normally do not belong to the armed forces of a state, nor do
they openly carry arms, wear distinctive signs or distinguish themselves
from the civilian population. Moreover, it is questionable, to say the least,
whether terrorist groups have a strong tendency to respect international
humanitarian law. From this it follows that, if there is a ‘war on terror’, it is
a peculiar war: it constitutes an armed conflict where state forces have the
privilege to use force against those who lack such privilege – a situation that
normally prevails in peacetime, under the law enforcement paradigm. This

imwpframe.htm (accessed 7 April 2007). This opinion, however, has been questioned in scholarly
writing, by states and by a number of dissenting judges. For an overview of relevant literature, see

Common Article 2 of the Geneva Conventions speaks of armed conflicts ‘between two or more of the High
Contracting Parties’. See also the Judgment of the International Criminal Tribunal for the former

See especially the characterisation of such conflicts in Common Article 3 to the Geneva Conventions, as
well as in Article 1 of the Second Additional Protocol to the Geneva Conventions. Both speak of conflicts
occurring ‘in the territory of a High Contracting Party’.

The US and Israeli governments, for example, have defined their fight against terrorism as an international
armed conflict. This interpretation was also adopted by the Israeli Supreme Court in its recent ruling on
the legality of targeted killing (The Public Committee Against Torture in Israel v. The Government of Israel,
Judgment of 14 December 2006, HCJ 769/02). The UN Human Rights Inquiry Commission took a differ-
ent perspective, arguing that if there were indeed an armed conflict between Israel and armed groups in
the Occupied Territories, it would be of a non-international nature (Question of the Violation of Human
Rights in the Occupied Arab Territories, Including Palestine, E/CN.4/2001/121, March 2001). Different posi-
tions can also be found in the literature. For a discussion, see Duffy (2005).

Definitions of ‘combatant’ were discussed earlier; see ‘Three Legal Rationalities: Responsibility, Imminent
Threat and Institutionalized Threat’, above.

Provided, of course, they meet the requirements of ‘combatant’ under international humanitarian law. In
relation to targeted killings carried out by secret services, this is not always beyond doubt.
raises the question of the grounds on which such non-privileged individuals may be targeted. Some governments (notably the USA and Israel) have argued that suspected terrorists count as so-called unlawful combatants. 39 While so far the debate on ‘unlawful combatants’ has mainly focused on questions related to the status of detainees (especially those held at Guantánamo Bay), it should be noted that the attribution of (unlawful) combatant status also affects the legal possibilities to target and kill individuals. In this context, it is not surprising that the Israeli government has attempted to justify its policy of targeted killing by labelling suspected terrorists as ‘unlawful combatants’, who do not enjoy the rights and privileges of ‘legal’ combatants but still constitute legitimate targets for attack. 40 The existence of such a category under international law, however, is disputed. Even the Israeli Supreme Court refused to rely on the notion of ‘unlawful combatant’, notwithstanding its incorporation within Israeli law. 41 Instead, the Court re-emphasized one of the ground rules of contemporary international law: if a person does not count as a combatant, he or she must be regarded as a civilian. However, the rejection of the notion of ‘unlawful combatant’ does not make the ‘war on terror’ look less odd: now, apparently, it is a war of combatants against civilians, organized in armed groups. 42

Civilians may not be the subject of attack ‘unless and for such time as they directly participate in hostilities’. 43 In order to determine the legality of targeted killings, therefore, it is essential to know what should be regarded as ‘direct participation in hostilities’. Under a strict interpretation, ‘direct participation’ requires a sufficient causal relationship between the act of participation and the immediate consequences (Sandoz, Swinarksi & Zimmerman, 1987). In similar fashion, a narrow reading would limit the temporal aspect (‘for such time . . .’): a civilian participates directly in hostilities as long as he or she poses a danger for the adversary (Sandoz, Swinarksi & Zimmerman, 1987: 1453). This narrow interpretation fits well in a traditional armed conflict, where the hostilities are conducted between armed forces and civilian participation is the exception rather than the rule. However, in less traditional cases, a narrow reading might have consequences that several states would find hard to accept. Where states have been confronted with sustained ‘irregular’ armed opposition, they tend to accept a

40 See The Public Committee Against Torture in Israel v. The Government of Israel, Judgment of 14 December 2006, HCJ 769/02, para. 11.
41 See The Public Committee Against Torture in Israel v. The Government of Israel, Judgment of 14 December 2006, HCJ 769/02, para. 28.
42 As noted before, the blurring of these categories is not entirely new to international law; see, for example, Schmitt (1963).
43 See Article 51(3) of the First Additional Protocol to the Geneva Conventions.
broader interpretation of what counts as ‘direct participation in hostilities’. In the context of the Israeli–Palestinian conflict, for example, it has been argued that the relevant test is whether civilians perform the function of combatants (Watkin, 2005: 137–179), whether they fulfil a combatant role\textsuperscript{44} or whether they pose a possible violent threat to state security.\textsuperscript{45} In similar fashion, it has been argued that the temporal element of the participation should be read differently in cases of organized, sustained violence. Civilians who are part of organized armed groups would have to actively disengage themselves from such groups in order to regain their immunity against attack.\textsuperscript{46} Such broad readings of who counts as a civilian directly participating in hostilities fit well with the imagery of terrorists as unpredictable, potentially catastrophic threats. Like the notion of the ‘unlawful combatant’, they deny these individuals the privilege of fighting, while rendering them lawful targets for attack.

**Conclusion: Lethal Force and Political Responsibility**

The previous section has shown how the vocabulary of ‘war’ and prevention challenge traditional legal categories regulating the killing of individuals, and thereby lead to an awkward situation where neither the law of peace nor the law of war adequately regulates the use of lethal force against individuals. In other words, framing the fight against terrorism as a war introduces the logic of radical uncertainty into legal reasoning. As a consequence, legal categories and norms do not work within given confines, where they could function as a form of ‘risk management’, but in a unstructured situation that leaves open the space for political discretion. The ways in which contemporary targeted killings are justified enables states to mobilize the rationalities of institutionalized danger, imminent danger and responsibility for wrongful acts without necessarily accepting the systems of accountability that accompany these rationalities.

The challenge to the traditional rationalities of law follows from the assumption that it is permissible to target suspected terrorists, either because they constitute unlawful combatants or because they count as civilians directly participating in hostilities. Under both interpretations, the suspected terrorist is denied the right to use force, while he remains a lawful target for...
attack. In the determination of the ‘combatant functions’ of civilians, the war paradigm is supplemented with elements that belong to the area of law enforcement. Suspected terrorists are targeted, not because of their formal status as such, but rather because they are believed to be guilty of terrorist attacks in the past and believed to constitute a mortal threat in the future. Thus, both the USA and Israel have defined their policies of targeted killings as just responses to evil acts of terror and as ways to prevent such attacks in the future. In a more systematic fashion, commentators have pleaded for a redefinition of the boundaries between war and law enforcement. Statman (2004: 191), for example, argues that, when it comes to the targeted killing of suspected terrorists,

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.47

Others have more squarely defined the rationale of targeted killing as a proportionate way of achieving revenge and retribution. Thus, David (2002: 17–18) approvingly argues that ‘Israel’s use of targeted killing is a form of state-sanctioned revenge’, and ‘stripped of its utilitarian contributions, is retribution, plain and simple’.

In this way, states borrow the language and moral force of the law enforcement paradigm (‘crime and punishment’), without accepting all the responsibilities that normally come with it. The ‘guilt’ of the suspected terrorist is not formally determined in courts, but based on intelligence information. The ‘threat’ posed by the targeted individual is not proven in court after the fact, nor are targeted killing always followed by independent investigations. The informal determination of guilt and the lack of independent inquiry after the fact are all the more pressing because, in many cases, questions have been raised regarding the legality, necessity and proportionality of targeted killings. At the same time, states borrow the language of the war paradigm without accepting the notion of war as an armed struggle between justi et aequales hostes. It might be true that terrorism itself already disrupts the very distinctions upon which the laws of war are built. Fighting such a phenomenon might indeed require ‘new rules’. Such rules, however, should aim at the preservation of a system where the use of lethal force is regulated and subject to mechanisms of responsibility – not just at the facilitation of killing individuals as a deformedal form of risk management.48

47 See also Gross (2003: 327).
48 In this context, it is interesting to note that the Israeli Supreme Court has sought to link targeted killings to mechanisms of legal and political responsibility. While the Court held that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, it denied a broad licence to kill on the part of states. In an innovative move, the Court combined human rights law and international humanitarian law, stressing, inter alia: (a) the need of a careful assessment of the situation before an attack is carried out; (b) that a civilian taking part in hostilities cannot be attacked if less
* Oliver Kessler is Assistant Professor for International Relations at the University of Bielefeld. Recent publications include ‘From Agents and Structures to Minds and Bodies: On Supervenience, Quantum and the Linguistic Turn’ in *Journal of International Relations and Development*; ‘Space, Boundaries and the Problem of Order: A View from Systems Theory’ (with Jan Helmig) in *Journal of International Political Sociology*; and ‘Knowns and Unknowns in the War on Terror and the Political Construction of Danger’ (with Christopher Daase) in *Security Dialogue*. Wouter Werner is Professor of Public International Law at VU University, Amsterdam. Recent publications include ‘The Never Ending Closure: Constitutionalism and International Law’, in Nicholas Tsagourias, ed., *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) and ‘Responding to the Undesired: State Responsibility, Risk Management and Precaution’, in the *Netherlands Yearbook of International Law*.

References


harmful means can be employed; (c) the need to carry out a thorough and independent investigation and, in appropriate cases, to pay compensation if harm is inflicted upon innocent (sic) civilians; see *The Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 14 December 2006, HCJ 769/02, para. 40.4


