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LAWRENCE A. ALEXANDER

Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider

In a recent article¹ Robert Fullinwider argued that the distinction between combatants and noncombatants is morally relevant (in a sense unrelated to the existence of a specific convention among nations)² to the question of who among the enemy may be intentionally killed by a nation acting in self-defense. He concedes that the distinction is not based on the relative moral guilt or innocence of the two groups in connection with the prosecution of the war, recognizing that many combatants might be morally innocent (for example, reluctant conscripts) and many noncombatants morally guilty (for example, the governmental officials who launched the war). Moreover, he admits that guilt or innocence is relevant to the question of who should be punished by the defending nation. However, says Fullinwider, punishment of the guilty is not the only justification for intentional killing in war. Under the Principle of Self-Defense, innocent combatants, but not innocent noncombatants, may also justifiably be killed.

I do not intend to deny the widely held view that morally innocent persons may be intentionally killed in self-defense (although I believe a case can be made against it).³ Rather, I intend to show that the

1. Robert K. Fullinwider, "War and Innocence," *Philosophy & Public Affairs* 5, no. 1 (Fall 1975): 90.

2. See George I. Mavrodes, "Conventions and the Morality of War," *Philosophy & Public Affairs* 4, no. 2 (Winter 1975): 121, 126.

3. The formulation I shall give of the principle that allows the killing of innocent persons in self-defense can, for example, logically be extended to cover acts of terrorism, atomic bombings of cities, etc. See text and notes at fnn. 6 and 7 below.

permissibility of killing innocents in self-defense does not, as Fullinwider maintains, justify the moral distinction between combatants and noncombatants.

The heart of Fullinwider's argument is the following passage:

. . . Suppose Smith, through heavy gambling losses, is in debt to the mob for \$100,000. The mobsters propose to Smith that if he will kill Jones (a crusading district attorney, say), they will forgive his debt. Unable to pay the debt, and knowing what will happen to him if he fails to pay it, Smith seeks out Jones and begins firing. Or, suppose the mobsters kidnap Smith's children and threaten to kill them unless he kills Jones. Driven by the threat, Smith seeks out Jones and begins firing.

None of this background information alters the situation from the point of view of self-defense. Whatever prompted Smith to fire at Jones, the justification for Jones' killing Smith lies solely in the fact that Smith was the direct and immediate agent of a threat against Jones' life. From the point of view of self-defense, this fact justifies Jones in killing Smith—and *only* Smith.

Again . . . suppose the mobsters were parked across the street to observe Smith. After killing Smith, Jones could not turn his gun on them (assuming they were unarmed). No matter how causally implicated . . . the mobsters were in Smith's assault on Jones, in the situation it was only Smith who was the agent of immediate threat to Jones; . . . the mobsters were not posing a direct and immediate danger. From the point of view of justifiably killing in self-defense, they are not justifiably liable to be killed by Jones; they are immune.⁴

Fullinwider is correct that *after* killing Smith, Jones may not invoke the Principle of Self-Defense to then turn and kill the mobsters. *The threat to his life has been removed.* At most the mobsters may be punished for their guilt in instigating the attempted murder.

However, Fullinwider's hypothetical is inapposite when we are discussing whether noncombatants along with combatants may be killed in an on-going war. Surely no one has contended that after surrender, the point analogous to the killing of Smith by Jones, innocent non-

4. Fullinwider, "War and Innocence," pp. 92–93.

combatants may still be killed in self-defense. (Indeed, no one has contended as much for innocent combatants either.) Fullinwider has constructed a straw man.

Let us amend Fullinwider's hypothetical to make it relevant to the issue he is addressing. Suppose the situation is the same except that Jones has not yet killed Smith. May Jones invoke the Principle of Self-Defense to kill the mobsters instead of Smith if by doing so he will cause Smith to relent? Of course he may. If the mobsters had a gun trained on Smith and had ordered him to kill Jones, and he were about to comply, Jones not only could, but should, kill the mobsters rather than Smith if killing them would be no riskier than killing Smith and would remove the threat to Jones by removing Smith's motive for killing him. Jones should kill the mobsters in such a situation even if the mobsters could not kill Jones directly (say, because the range of their guns was sufficient to reach Smith but not Jones, who carried a longer-range gun). From the standpoint of the Principle of Self-Defense, both the mobsters and Smith are necessary causes of the danger to Jones because killing either the mobsters or Smith removes the danger. Jones should, therefore, kill the ones who are morally guilty, not the one who is morally innocent. Such an interpretation of the Principle of Self-Defense is consistent with its application in the law,⁵ and any interpretation that permitted only the killing of Smith would be morally perverse.

Indeed, it would be morally perverse to limit Jones' right of self-defense to the killing of Smith, even where the mobsters have not threatened Smith's life. Suppose the chief mobster has merely offered Smith money. The mobster, unarmed, is across the street from Smith and Jones, so that if Jones kills the mobster, Smith will realize that he will not get paid for killing Jones. Jones should be able to kill the mobster instead of Smith if the mobster is morally as guilty or guiltier than Smith (who might have been driven to the wall financially).

5. Although I have found no cases directly on point, the interpretation follows logically from a combination of the two legal principles of self-defense and defense of others. Because Smith is otherwise justifiably subject to being killed by Jones in self-defense if the mobsters are not killed first (thus removing Smith's motive for threatening Jones), Jones' killing the mobsters is a defense of Smith's life and hence legally justifiable (assuming the requirements in the text at fnn. 6 and 7 below are otherwise met).

What I propose as the correct formulation of the Principle of Self-Defense is that *X* (a person or persons) may be killed in self-defense, regardless of *X*'s moral innocence, if the defender perceives (reasonably) that: (1) there exists the requisite threshold level of danger or greater; (2) killing *X* will reduce that danger;⁶ (3) more desirable courses of action,⁷ such as killing fewer or guiltier persons, or not

6. It should be noted that condition (2) of the formulation does not specify how killing *X* will reduce the danger. Suppose *A* is threatened by *B* and so kills *C*, an innocent party, in order to frighten *B* or cause *C* to fall on *B* and remove *B*'s threat. A libertarian, who believes it wrong generally for one to appropriate other persons' bodies or products in order to make himself better off than he would be had the other persons not existed, would object to such a use of the Principle of Self-Defense. However, an egalitarian, who would not object to appropriating other persons' bodies or products, would have difficulty in distinguishing this use of the Principle of Self-Defense from other uses involving the killing of innocent persons.

7. "More desirable courses of action" is often construed to mean those courses of action not involving major sacrifices of the defender's rights. For example:

. . . The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat, even though he can do so safely, before using deadly force upon an assailant whom [sic] he reasonably believes will kill him or do him serious bodily harm. A strong minority, however, taking what might be regarded as a more civilized view, holds that he must retreat ("retreat to the wall," it is sometimes said), before using deadly force, if he can do so in safety. But even in those jurisdictions which require retreat, the defender need not retreat unless he knows he can do so in complete safety; and he need not retreat from his home or place of business, except perhaps when the assailant is a co-occupant of those premises. [La Fave & Scott, *Criminal Law* (1972), pp. 395-396]

However, one might reasonably ask why there should not be an absolute duty of retreat when *X* (the one to be killed in self-defense) is morally innocent. Indeed, why should our rights not be constrained generally so that we might avoid having to take one innocent life in order to save another?

It should be noted also that if an innocent person, *A*, attempts to exercise his right to kill another innocent person, *B*, in self-defense, *A*'s action presumably gives rise to a right in *B* to kill *A* in self-defense. Cf. Robert Nozick, *Anarchy, State, and Utopia* (1974), pp. 34-35. Moreover, third parties apparently may intervene on behalf of either. Would not a cogent moral position attempt to eliminate the possibility of such situations, perhaps by positing rigorous duties to avoid sacrificing innocent lives and, where that fails, by considering such factors as the relative worth of the persons, or their ages, or their value to others? On the problem of the innocent aggressor and the related problem of proportionality between threat (innocent and non-innocent) and defensive response, see Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in

killing at all, will not eliminate condition (1); and (4) more desirable courses of action will not reduce the danger as much as killing X.

In war, many noncombatants, guilty and innocent, are threats to the defending nation. Many of them are greater threats than many combatants. A combatant at a camp miles behind the lines is often less a threat than a noncombatant delivering arms and ammunition to combatants at the front. Indeed, the combatants at the front individually will quite likely be less of a threat than the noncombatant supplier. In such a case the Principle of Self-Defense would demand that the noncombatant be killed in preference to the combatants, especially if he is no less guilty than they. Consider, also, two alternative courses of action in fighting a hypothetical unjust aggressor: (1) killing millions of enemy soldiers, most of whom are morally innocent (indeed, many are children); or (2) killing a handful of noncombatant enemy leaders, all of whom are morally innocent because of insanity. If either course would end the war, the latter would have to be preferred. Similarly, if one madman is about to deliver bombs to a thousand other madmen, who in turn will throw them, the Principle of Self-Defense demands that we end the danger by killing the former if we are going to be forced to kill in self-defense in any event.

Fullinwider's error could have resulted from assuming that one whose activity or existence is a remote cause (in terms of space, time, or intervening mechanisms or acts) of a threat to another's life is immune from being killed in self-defense, even though he is a necessary or sufficient cause of that threat. In the domestic context, causal remoteness will usually mean that the threat is insufficient to permit killing in self-defense. For in the domestic context, the more remote the cause of the threat, the more likely it is that factors such as the intervention of the police will prevent the harm from occurring, thus obviating the need to kill the cause of the threat. In the context of international warfare, remoteness, although relevant to the degree of

Comparative Criminal Theory," *Israel Law Review* 8 (1973): 367. See also English, "Abortion and the Concept of a Person," *Canadian Journal of Philosophy* 5, no. 2 (October 1975): 233, 237-239.

In any event, these problems do not affect my disagreement with Fullinwider (who obviously believes that defenders may stand and fight innocent aggressor combatants) nor my general formulation of the Principle of Self-Defense.

the threat, is less significant, for there is less reason to assume that other factors short of killing will intervene and prevent the threat's materializing.

Although causal remoteness is relevant to the questions of whether a threat exists and whether a person is a necessary or sufficient cause of it, it is irrelevant to the right of self-defense once the threat, the necessary or sufficient causal relation, and the lack of superior alternatives to remove the threat are posited. Moreover, even if causal remoteness were the source of immunity from being killed in self-defense, it would not be the source of an immunity for noncombatants vis-à-vis combatants. As the example of the noncombatant front-line supplier and the rear guard combatants illustrates, some combatants are at any time more remote threats than some noncombatants. Fullinwider could, of course, respond that killing rear guard combatants is not consistent with the Principle of Self-Defense, or, what amounts to the same thing, that only front-line combatants are truly combatants. I do not take him to be making such a claim, which would be an indictment of widely accepted norms of warfare.

There is one other possible source of Fullinwider's error. He may hold the view that one is immune from being killed in self-defense if any further choice of a human agent is necessary for the harm to materialize.⁸ This view, he might believe, leads to the conclusion that only those who are sufficiently likely themselves to pull triggers (the infantry, but not the top generals, the ordnance personnel) or release bombs (the bombardiers, but not the pilots or navigators) may be killed. Although this view would not necessarily result in a distinction between combatants and noncombatants, because the likelihood of being killed in the future by one who is presently a noncombatant may exceed both the threshold required for self-defense and also the likelihood of being killed by particular combatants, it deserves a short comment. One cannot hold the view forbidding intervention before the last choice necessary for the harm as an absolute and at the same time accept the Principle of Self-Defense. Most acts sanctioned by the

8. The view appears to be closely akin to the principle, held by many, that it is wrong to prevent acts, harmless in themselves, merely because they make it more likely in the future that someone will choose to do, and succeed in doing, something immoral or illegal. See, for example, Nozick, *Anarchy, State, and Utopia*, pp. 126–130.

Principle of Self-Defense occur at a point when at least one choice still remains before someone is actually harmed—that is, they occur when the aggressor can still choose to cease his aggression. The fact that further choices are necessary to bring about the harm affects the likelihood of that harm's materializing; and the greater the number of choices required, the less likely it is that the harm will result. Under the Principle of Self-Defense, however, only the likelihood of harm, not the number of choices required to bring it about, is directly relevant.

In some of the hypotheticals I have used, only one choice is required for the harm to result. The mobsters, if they are out of range of Smith's hearing, cannot through any choice affect, in the short run, the likelihood of Smith's killing Jones. Only Smith can.

In other hypotheticals, more than once choice is required. Either the noncombatant munitions supplier or the combatants could through their choices reduce or eliminate the danger. Both must choose to aid the war effort to create the danger.

Whether one or more choices is required, however, is morally irrelevant (so long as the threshold probability of danger has been reached) and in any event is irrelevant to the combatant-noncombatant distinction. Suppose the noncombatant supplier is driving a truck full of munitions under the watchful eyes of his armed countrymen. If he attempts to turn the truck around, he will be stopped, and someone else will drive it. At that point only the choices of those whose hands are on the triggers, not the choice of the supplier, can be considered necessary or sufficient to bring about the harm to the defending nation. The supplier is in a situation analogous to that of a pilot of a bomber which also carries a bombardier. Once the bomber is over the target, no further choice *by the pilot* (at least no choice which would not lead to his death anyway) is necessary or sufficient to cause the bombing to commence. No one who accepts the Principle of Self-Defense could argue that the plane may not be shot down because the bombardier still has a choice to make and might decide not to release the bombs. And I cannot imagine that anyone would argue that the Principle of Self-Defense permits killing *only* the bombardier, not the pilot, where the most effective means of preventing the bombing is shooting down the plane (which, let us suppose, presents a far

greater risk of death to the pilot than to the bombardier). But if the pilot, normally thought of as a combatant, may be killed in self-defense, so may the supplier, a noncombatant, perhaps by bombing the truck in order to blow up the munitions.

Finally, if noncombatants (say, children) were involuntarily harnessed with bombs and pushed down a slippery slope towards the troops of the defending nation, the bombs to be released automatically once the children were halfway down the slope, *no* further choice would be necessary to bring about the threatened harm. If the bombs could not be safely shot and detonated once they were released, self-defense would permit shooting the bombs before they were released and blowing up them and their noncombatant carriers, just as it would permit such an act if the carriers were morally innocent conscripted soldiers.

It is apparent, therefore, that neither the number of choices required to bring about the harm nor combatant-noncombatant status is morally relevant to the right to kill in self-defense.

In summary, punishment requires guilt, but guilt, even relative guilt, does not mark the distinction between combatants and non-combatants. On the other hand, the right to kill in self-defense requires only that the person killed be a necessary or sufficient cause of a danger, not that he be morally guilty. Again, however, being a cause of danger does not mark the distinction between combatants and non-combatants. Moreover, noncombatants are not necessarily more remote causes of danger than are combatants; nor is the danger non-combatants pose necessarily more dependent upon further choices than is the danger posed by combatants. Finally, neither causal remoteness nor the necessity of further choices is *per se* relevant to the Principle of Self-Defense. I conclude, therefore, that the intentional killing of innocent noncombatants is not necessarily immoral if one accepts the Principle of Self-Defense.⁹

9. For an excellent treatment of some of the issues discussed in this article, see Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry," in Richard Wasserstrom, ed., *War and Morality* (Belmont, Calif., 1970).