

Just War, the Ethics of Exceptions, and the Fight against Terrorism

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Introduction

It is with great pleasure that I take part in this panel, which takes Barry Cooper's recent book on terrorism, totalitarian ideology, and religion¹ [1] as its point of departure. Professor Cooper's analysis is original, yet remarkably fitting with the facts at hand. Drawing on the language and perspectives of Eric Voegelin, Cooper manages to understand the religious aspects of modern terrorism without falling victim to simplistic explanations, meaningless stereotypes that conflate Islamist terrorism with Islam or religion *per se*, or other forms of secular misunderstandings of the spiritual and pathological elements of religious extremism.

My aim in the following is not to express any disagreement with Professor Cooper's lucid analysis, but to ask what this momentous clash with the pneumopathology of Islamist terrorism forces us to do, morally speaking. We are obliged, as a matter of self-defense, to counter terrorism forcefully, if necessary with military might. But do the threats represented by terrorism and other forms of fundamentalist and totalitarian ideologies legitimate *any* sort of response? Are we now in the realm of "supreme emergencies", as Michael Walzer once put it, where the laws of war are more of a hindrance than a help to us, and where we need to set aside our ordinary moral scruples and re-write the rules?

The problem of exceptions

Let me start on a more pedestrian note than the hard questions of war and peace:

1 [1] Barry Cooper, *New Political Religions, or an Analysis of Modern Terrorism* (Columbia : University of Missouri Press, 2004).

Exceptions to rules are, morally speaking, dangerous. We all know that. Once one opens up for exceptions, one often has no way of stopping since the signal has already been sent that the original rule is not absolute (the well-known slippery-slope problem).² [2] That is why, for instance, bringing up children is so hard. As an adult you know that lying is sometimes (albeit only rarely) permissible, possibly even required in a few cases, but you really do not want to institutionalize such an exception in front of your children, because you also know that reverence for truth and general obedience to the do-not-lie rule are such important constituents of a good social order and indeed of a good life. Most of the time, "just this once" does not work as a good pedagogical or moral tool. An excuse for doing it once more has, after all, already been implied by the first time's exception. (My children have picked up on this long ago. Whenever they ask me for something they know they should not have, they will always preface it by saying "oh, just this once" or "just one more time" or "please, please, please for the very last time", when what they actually mean, of course, is "a million more times, please, dad." They *know* that if the floodgates ♦ if not of hell, at least of fun and play ♦ have been opened, it is a real challenge to close them again.)

Back to the world of life-and-death dilemmas: The brutal encounter with the extreme cases of totalitarianism and murderous terrorism challenges our adherence to rules. If we fight a party that in no way respects the rules, could it be that our own scruples about breaking the accepted rules and laws of the game can work to our disadvantage? We can ask this question with two different problems in mind: first, the *ius ad bellum* problem of whether we may rightly initiate military action outside the normally respected boundaries of international law; and second, the *ius in bello* problem of whether we may use means of war normally prohibited by international law and humanitarian concerns. I will concentrate on the latter in my remarks, but hold that the conclusion to my paper is generally applicable to the former question as well.

Non-combatants and the war against terror

Using violence against civilians in wartime must always, from the point of view of military ethics, come under the general category of exceptions. In short, civilians ♦ or more broadly non-combatants, since

² [2] This problem has been interestingly analyzed in relation to armed force by Anne Julie Semb in "The New Practice of UN-Authorized Interventions: A Slippery Slope of Forcible Interference?", *Journal of Peace Research*, vol. 37, no. 4, 2000, pp. 469-488.

prisoners of war should also be subsumed under this heading ♦ are as a rule not to be made intended targets in war. While the rules and restrictions of *ius in bello* also concern themselves with many other issues of warfare, including the protection of combatants, infrastructure, and the environment, the protection of non-combatants lies at the heart of the doctrine known as *ius in bello*, going back to concerns first raised in an organized form in the High and Late Middle Ages, not least among knightly orders wanting to preserve virtue and high-mindedness in the midst of armed combat.³ [3]

In confronting terrorism, we are also confronting actors who do not respect the distinction between combatants and non-combatants, and who themselves exploit the protection given non-combatants by mixing in with civilian crowds and donning civilian garb. It is therefore tempting to conclude that we must set aside many of our own scruples in confronting such a threat, if we are effectively to target the terrorists and set an example to would-be terrorists around the world. Asa Kasher and Amos Yadlin have argued that the time has indeed come for the Israel Defense Forces (IDF) ♦ certainly on the front-line in the war on terror ♦ to take that step now and legitimize a kind of targeting of civilian areas that in normal cases would have been outlawed by the laws of war and by general standards of military honor.⁴ [4] The IDF's battle against terrorism is of course not representative of all actions the west (broadly understood) performs against Islamist terrorists, but it is an important case in point, since the struggle between Israel and the Palestinians is a core issue in Al Qaeda's and other terrorist organization's stated rationale for their actions, and since the US and Israel are close allies engaged in the same overall battle for democracy and security. The relatively widespread

3 [3] See James Turner Johnson, *Ideology, Reason, and the Limitation of War* (Princeton: Princeton University Press, 1975) and *Just War Tradition and the Restraint of War* (Princeton: Princeton University Press, 1981) for a good overview of the introduction of *ius in bello* concerns into just war theory. For an interesting and different analysis of the symbolism and self-understanding of medieval military orders, see Eric Voegelin, *History of Political Ideas*, vol. 3, *The Middle Ages to Aquinas*, ed. Peter von Sivers, p. 72 ff. (Columbia: University of Missouri Press, 199/).

4 [4] See Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective", *Journal of Military Ethics*, vol. 4, no. 1, 2005, pp. 3-32; see also comments from other authors in that same issue of *Journal of Military Ethics*, as well as Andreas Hed Larsen, *New War; What Rules Apply?* (Master's Thesis; Oslo : University of Oslo , 2005), and Henrik Syse, "The Importance of Protecting Non-Combatants", *Pacem*, vol. 8, no. 1, 2005, pp. 49-55. (This paper is partly based on, and incorporates materials from, the latter article.)

use of cluster munitions by the US and its allies in Afghanistan and Iraq also raises very similar issues to the targeting of civilian areas by the IDF.

Before we accept Kasher and Yadlin's argument that civilians who are not one's own citizens, and who are mixed in with the suspected terrorists, may be made targets of attack, we should remind ourselves that there are several weighty reasons why non-combatants should not be targeted intentionally; and why they, even when they are the *unintended* victims of armed attack, should be shielded as far as possible. Let us list those important, yet common-sense reasons

1. Non-combatants are not capable of defending themselves against attack.
2. Non-combatants pose no immediate lethal threat to the attacker.
3. Attacking them raises the general level of violence and hatred in the conflict, making the chances of violence being used against non-combatants on one's own side much higher.
4. Using violence against non-combatants brutalizes your own fighting forces and results in a military morale and an atmosphere that are conducive neither to sound military discipline nor to a successful integration into civil society of one's soldiers after the cessation of conflict.

This list can also be explained by reference to the three most famous traditions of ethics within Western moral philosophy:

1. The deontological (duty-ethical) argument: It is wrong *per se* to use violence against those who cannot defend themselves, and who pose no immediate threat.
2. The consequentialist argument: Using violence against non-combatants raises the general level of violence and hatred to such an extent that your own troops and civilians are put in more danger, not less.
3. The virtue-ethical argument: By using violence against non-combatants we shape a kind of soldier that we do not wish to identify ourselves with ♦ "this is simply the kind of thing we will not do, or the kind of persons we want to be".

In the special case of prisoners of war ♦ made topical by the recent heated exchanges over the prisoners in Abu Ghraib and Guantanamo ♦ it is important to add that prisoners of war are not being held prisoner because they have done anything criminal; they are simply combatants who are made non-combatants. We keep them locked up so that they cannot return to their combatant status for as

long as the fighting lasts. If they are suspected also of committing war crimes or crimes of terrorism ♦ i.e., of being "irregular fighters" or simple criminals, as is the case with many detainees in Guantanamo ♦ and they cannot reasonably be tried through their own criminal system once the war is over, one may of course take out charges against them and, as soon as possible, bring them before a civil or military court. The recent attempts ♦ since 9/11 ♦ at creating a special category of "illegal combatants" who can be kept locked up and isolated just as POWs, but without the protection normally accorded POWs, and with no real chance of getting a swift trial or a verdict or even a court decision as to whether they are legally speaking POWs or not, seem to fall in a legal no-man's land. This is, of course, one important attempt at confronting the dangers of terrorism outside of the previously accepted legal and moral norms, and it is being defended by reference to the extraordinary nature of our current challenges.

This brings us back to our general point about exceptions ♦ indeed, we are confronted with one of the crucial points that we need to remind ourselves of in this debate: The rules of war were made exactly for the extreme circumstances of war. The *ius in bello* rules worked out by the chivalric writers or by Vitoria or Grotius or Dunant or the 20th-century authors of our current four Geneva Conventions were not rules designed to fit the everyday, relatively undramatic world of peace and diplomacy, only to be set aside when things *really* get tough. Neither were they meant to be abandoned in cases where the other side starts using tactics outside the borders of military ethics and international law, or where one or more parties to the fighting are not states. They were made as general, normally exceptionless rules protecting soldiers and civilians on both sides, even in wars of extreme drama and brutality. As I will return to below, we need to ask why they should not be applicable ♦ or why they need to be changed ♦ now. After all, we do not expect the police to abandon their codes of conduct because they are faced with hard-nosed criminals who care little for those codes. Most police officers would insist that the fight against crime should not force us into ourselves becoming criminals, even if we have to perform actions well outside the boundaries of everyday morality. This is the crucial question we have to ask even in the war on terror ♦ how can we avoid becoming, in the eyes of the world or even in substance, war criminals because of the way in which we pursue that war?

Civilians and "double effect"

Asa Kasher and Amos Yadlin have argued that the fight against Palestinian terrorists does call for new rules because of the exceptional character of the conflict Israel in particular and the western world in

general is engaged in. It has been argued that one may, under such exceptional circumstances, admit the possibility of attacking and destroying purely civilian targets when there are suspected terrorists lodged within them, and when one's own population and one's own soldiers are being threatened by those terrorists. In this case, it is not the civilians (say, in an apartment building) who are being intentionally attacked, according to the argument; they are merely bystanders who happen to be in the way. Even if there are many of them, their deaths are legitimized by the fact that one or more of one's own citizens may be saved in this way. This argument uses what is known in just-war terminology as double-effect reasoning, the idea being that the intended effect is surely not to kill the civilians ♦ their deaths are merely the foreseen, but unintended *side-effect* of one's actions. As long as the side-effect is unavoidable and can be allowed according to a proportionality calculus, the action is not to be counted as immoral or as a war crime.

I take it for granted, however, that the actions debated by Kasher and Yadlin ♦ and indeed so hotly debated and contested in Israeli society and the world press for several years ♦ constitute actions that normally should *not* be performed, even according to double-effect reasoning (otherwise the plea for special and amended rules would not have been made). They are made legitimate, ethically speaking, by the exigencies of the situation. It is the *proportionality* calculus that is thereby being changed. If 50 or 100 Palestinian civilians lose their lives so that one suicide bomber can be killed, and the attack against these civilians is so direct that there is no reasonable way they can escape from it, it is doubtful that this would be allowable under normal military circumstances, even if the civilians are not the intentional target of the attack. Asa Kasher and Amos Yadlin have argued that it *is* allowable to do this in a war against terrorists, because we cannot let terrorists get away with hiding among civilians and thereby get *de facto* immunity ♦ and since the terrorist may in turn, and in the long run, kill even more civilians than the ones that lose their lives now. Even if the ethical criterion of proportionality seems to be violated in each particular circumstance of this kind, the general fight against the tactic of terrorism requires it and renders it proportional, since we are fighting an especially lethal tactic which cannot be allowed to go unpunished or unchecked, and which endangers the lives of our own civilians. The most viable alternative to letting civilians pay such a heavy price, namely, to let one's own soldiers accept more risks to themselves for the sake of protecting enemy civilians, is dismissed by Kasher and Yadlin by reference to the special obligations that political and military leaders have to protect their own citizens (including soldiers).

Now, if such an attack, killing a large amount of civilians, could definitely end (or at least seriously hinder) the scourge of terrorism, or if there were no other ways *whatsoever* of increasing one's security against terrorist attacks, one could possibly accept such an argument based on a utilitarian calculus ♦ it would be what Michael Walzer has called, quoting Winston Churchill, a "supreme emergency".⁵ [5] But as it stands in the present debate, I am in much doubt. *Morally* speaking, one is indeed crossing an important ethical boundary ♦ even if one accepts (as I do) double-effect reasoning ♦ by discounting the value of Palestinian civilian lives so dramatically vis-♦-vis the lives of one's own civilians. *Prudentially* speaking, one is eliciting a set of reactions among the civilian population on the Palestinian side so angry, so hateful, and so extreme, that one prepares the ground for more, not less terrorism.

Generally, I believe it is true that even to save one's own citizens, there are things one should not do. I take it for granted that writers like Kasher and Yadlin, and the Israeli leadership, believe the same, since they would hardly be willing to negotiate with hostage takers to free a civilian Israeli kidnapped in, say, Iraq , even if that would be *guaranteed* to save the life of that one civilian. One cannot, after all, make compromises with hard-nosed hostage takers. Possibly one should be equally careful with making compromises vis-♦-vis one's most important ethical standards. Putting strict limits of proportionality on one's use of double-effect reasoning in attacks that seriously harm or kill civilians should certainly be counted among those important ethical standards.

This leads us from the limited case of Israel to the more general case of the war against terror. I take it for granted that all readers of this paper sympathize with the cause of the IDF's fight against suicide bombers or the United States ' and their allies' struggle against international terrorism. I also assume that military force is required as one of several means available to us in this struggle. But this does not take away our duty to ask, first, how the actions of the US and its allies in the war against terror are being viewed by those at the receiving end (meaning the countless civilians in the affected areas, and not the Islamist terrorists); and, second (more principally and deontologically) whether there are actions in war that should be avoided in all cases, short of supreme emergencies where no other option exists in order to save our civilization and way of life?

⁵ [5] See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), ch. 16.

These questions also bring us uncomfortably close to the topic of Professor Cooper's book. He shows us the way in which murderous Islamist terrorists live in a dream world and not least how they immanentize religious eschatology in a way that legitimizes acts of extreme brutality with no regard for the realities ♦ moral, legal, or physical ♦ of the actual world we inhabit. Such forces cannot be negotiated with, because there is nothing to negotiate about short of the annihilation of one party or the other. There are only two courses of action: the effective destruction of the terrorist cells, or their total marginalization in their own societies, so that they cannot operate effectively and indeed are met with heavy resistance from those people whom they profess to champion and protect. I venture the claim that in this fight, so laden with high stakes and existential tension, it becomes an always present temptation for us, for the *anti*-terrorists, to create a "dream world" of our own, in order to legitimize to ourselves, our fellow citizens, and the world the sort of measures taken. An ideologically driven quest for more widespread democracy and political and financial stability, fuelled by the horror and brutality of one's enemy, makes it possible to insist that battles otherwise far outside the realm of political and moral feasibility have to be fought, and that measures have to be taken that would otherwise have been unthinkable. If these measures do not succeed, or paradoxically (or maybe not so paradoxically) create *more* fertile ground for terrorism by engendering intense mistrust and opposition, they can still be legitimized because of the enormity and exceptionality of the situation one finds oneself in. (Thus, the Vietnam War with its excessive use of violence and extremely slim hope of success could be carried on for years by reference to the enormity of the danger which the Domino effect represented.) In the end, rational and moral discourse about the steps taken becomes impossible. If you argue against the steps taken in the war against terror, you are easily accused of being not "for us" but "against us". If you point to the adverse effects of the means chosen, and the enormous costs associated with them, you do not understand the enormity of the task. If you point out that the measures taken do not actually hurt the main terrorists, you can easily be hushed by reference to the *global* war against terror which must be fought and won. In short, the fight against the brutal, inhuman terrorists who conjure up a dream world as an excuse (or pretext) for murdering thousands of innocents easily invites, even if on a different scale, a similar kind of "world creation" from their opponents ♦ us ♦ where exceptions to the rules come to be justified ideologically rather than by reference to political and military realities, and where a reasoned, careful moral discussion about means and ends is looked on with suspicion.

I do not wish these remarks to be taken as a blanket condemnation of the United States ' actions in the war on terror. Quite the opposite, the war against the Taliban in Afghanistan was obviously

necessary and justified, and the brutality of Saddam Hussein's regime in Iraq makes it reasonable to ask whether there, in the long run, existed any real alternative to military action. Still, the way in which reality becomes secondary (cf. the rosy reports of the White House from the war-torn battlefields of Iraq), great destruction is visited on civilians, accepted rules of international law are violated, and arguments are fitted to the occasion, force us to ask whether we ourselves fall victim to the dream world of the terrorists and in the end make ourselves less, not more, secure in the face of murderous terrorism.

Conclusion

I will not make specific pronouncements on the extremely hard cases facing the Israel Defense Forces or Israeli society at large, which I have taken as my point of departure in this paper. I admit that the nervousness and desperation experienced in a country under constant danger from suicide attacks inevitably lead to a feeling that extreme measures are needed. Nonetheless, one should remember ♦ in that case as well as in Iraq, Afghanistan and elsewhere ♦ that the basic reasons mentioned above for protecting non-combatants are every bit as forceful in a war against terror as in any other violent conflict. All the serious drawbacks associated with large-scale destruction and death among non-combatants are as real in the current situation as they have always been.

This is not in any way (of course) meant to legitimize suicide attacks or other terrorist actions, nor to claim that the Israelis or the US and their allies are being more brutal than their opponents ♦ which is obviously not true. But it is a call to Western political and military leaders to act according to those rules of armed conflict that we expect all civilized democracies to respect. I fear that we have gone too far in the post-9/11 world in viewing it as a world where exceptions come into play because the rules have been challenged so dramatically. I admit that we are fighting an enemy that respects no rules ♦ that indeed, as Barry Copper puts it, suffers from a serious pathology of the spirit ♦ and our own rules have to change to meet that fact. In terms of smartness and cunning and gathering of intelligence and infiltration of the enemy, we are clearly faced with unique challenges and have to use military force in a different way from what we are used to. In terms of everyday measures to protect civilians, we also have to devise new rules ♦ some of them cumbersome and time-consuming, certainly, but most of them relevant and necessary. But is it time we change the ethics? Is it true that the threat we face is of such a kind that breaking the most basic rules of armed combat ♦ everything from the *ad bellum* questions of the war in Iraq, to the *in bello* questions of counter-insurgency and counter-terrorist

warfare in Israel and the treatment of prisoners in Guantanamo, Afghanistan, or Abu Ghraib ♦ is the right thing to do, and will serve us in the long run?

My fear is the following: In order to show decisiveness and swiftness of action, and thus impress our own citizens as well as our enemies, we too easily opt for solutions that fail along all three lines of the ethical spectrum; deontological, consequentialist, and virtue-ethical. Since we know that terrorists do not respect rules nor accept compromise, we seem to believe that circumscribed and scrupulous use of military power against them will be self-defeating. But thereby we lose the "moral high ground", at our own peril.⁶ [6] The tragedy for the Western world today is indeed that the moral advantage has been all but lost in many parts of the Muslim world, with no real gain in security.⁷ [7] While anti-Americanism, or for that matter anti-Israeli sentiments (or downright anti-Semitism), are serious and dangerous challenges that we must confront and address, the dramatic turn in world opinion over the last three and a half years cannot be explained in those terms alone. They are a reaction to what has been seen as serious rule-breaking on the part of the very nations that claimed to hold the moral high ground ♦ the nations that most of us would be (and remain) prepared to support for that very reason.

Acting ethically is not the same as being weak. Being utterly scrupulous about hitting civilian targets is not the same as fighting inefficiently. In some cases it will admittedly mean that one will be less able to take out all the targets one most wishes to hit ♦ possibly including some hide-outs of suspected terrorists or suicide bombers. But that is not the same as letting our moral scruples be turned into the other side's advantage. We are simply not allowing ourselves onto the dangerous slippery slope of exceptions, and we are telling the world clearly why, in terms understandable to all, and in line with the most recognizable features of our Judaeo-Christian ethics.

There *may*, of course, be times when we need to say "just this once". But then we have to be sure that the normal rules do not apply, and that breaking them will lead to increased security, especially for non-combatants, and will heighten the chances of peaceful co-existence and an end to the

⁶ [6] This argument against militarism and over-reliance on armed force in the war against terror has been well made by conservative commentators Stefan Halper and Jonathan Clarke in *America Alone* (Cambridge: Cambridge University Press, 2004).

⁷ [7] I do not thereby claim that we have made no gains in security, but these have not come about as a result of the contested parts of the war on terror referred to here.

violence. I doubt whether discounting the lives of civilians, or more generally putting oneself above international law, in the fight against terror is a good way of getting to those worthy goals.
