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The Ethics of the Strong against the Tactics of the Weak: A Response to Kasher and Yadlin's 'Military Ethics of Fighting Terror'

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Any attempt to codify acceptable standards of behaviour in the so-called 'War against Terror' is surely to be welcomed. Asa Kasher and Amos Yadlin are to be thanked for applying their immense expertise and advancing debate on this subject in a methodical and clearly comprehensible fashion. However, while there is much to praise in what they do, I could not but feel a certain unease at some of the ideas in their paper on the 'Military Ethics of Fighting Terror.' It is not that the arguments do not make sense; given the assumptions on which they appear to be based, they are quite logical. But the authors start from rather debatable assumptions about the nature of terrorism and how to tackle it. I worry in particular that the principles they espouse give too much leeway for the use of lethal force, and would in practice be counter-productive. In critiquing Kasher and Yadlin's model, I will first note six points which I feel summarise its weaknesses. I will then analyse these in detail.

1. Kasher and Yadlin exaggerate the threat of terrorism, *at least as it pertains to countries other than Israel*.
2. The authors pay little attention to the political nature of terrorism, and discuss it primarily as a problem of military counter-measures.
3. The theory relies too heavily on a presumption of good intelligence.
4. Excessive attention is given to force protection.
5. While there is a great deal of truth to the principle of giving priority to the lives of citizens, this principle is not an absolute and in some cases governments actually owe greater obligations to non-citizens than to citizens.

'In the twenty-first century, political effect deserves recognition as a fundamental principle of war.' (Thomas M. Kane)[1]

[1] Thomas M. Kane, 'Building thrones: Political effect as an emerging principle of war,' *Comparative Strategy,* vol. 24, no. 5, Dec. 2005, p. 431.

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6. The ethical framework being proposed lacks universality. It is ultimately an ethic of the strong.

The Scale and Threat of Terrorism

We are for the most part, I suspect, 'soft deontologists.' That is to say that we tend to believe in absolute moral rules, but when faced with a situation where obedience of the rules will lead to extremely negative consequences, we are likely to flex our principles somewhat. In other words, when consequences become too grave, consequentialist logic takes over from deontological logic. The question is at what point people draw the line. Given the specific situation in which they find themselves, Israelis such as Kasher and Yadlin may perhaps be forgiven for drawing it somewhat lower than do others. For them, terrorism is indeed very possibly an 'existential' threat, both individually and as regards the existence of their state. But for most people in the Western world, despite the hyperbolic language often associated with terrorism, it is a matter of really very minor importance. The assertion that 'terror has taken a new shape' is also highly debatable. In nearly every Western country terrorism peaked in the mid-1980s and has declined in incidence ever since.[2]

Kasher and Yadlin maintain that terrorism cannot be fought within the paradigm of law-enforcement; yet, the experience of Western states suggests the opposite. In their circumstances, the problem is not sufficiently serious to warrant abandoning the criminal justice model of counter-terrorism. The British state, for instance, dealt with Northern Irish terrorists using the criminal justice system, with the police taking primacy in the counter-terrorist struggle, and with normal standards of legal evidence being required to arrest and convict suspects. Policies which went beyond this, and which would have been justified under the Kasher/Yadlin model, such as the internment without trial of terrorist suspects in the 1970s and an alleged 'shoot-to-kill' policy, proved to be entirely counter-productive, playing into the hands of the terrorists' propagandists. Actions like these and others which are justified under their model, such as assassination or the creation under principle C1 of what are in effect free-fire zones, create the impression of a government which does not respect due process, and as such has no legitimacy. They are politically fatal.

It also needs to be said that terrorism varies so significantly in scale and form that drawing broad conclusions is extremely difficult. The Animal Liberation Front is, according to most definitions, a terrorist group, but it is far removed from the terrorists in Iraq. Law-enforcement methods might be inadequate in the latter case; certainly not in the former.

[2] See, for instance, the data assembled by the Memorial Institute for the Prevention of Terrorism, available online at: http://www.tkb.org/ChartModule.jsp. See also the ITERATE database on terrorist incidents, in Todd Sandler and Walter Enders, 'An economic perspective on transnational terrorism,' *The University of Alabama Economic, Finance and Legal Studies Working Paper Series*, Working Paper No. 03–04–02. Available online via http://www.cha.ua.edu.

The Political Nature of Terrorism

The distinction drawn between insurgency and terrorism by Kasher and Yadlin is also problematic. In political situations such as Palestine and Iraq, many terrorist actions take place within the context of an insurgency, and the same people often carry out acts which could be defined both as terrorist and insurgent. How does one tell who is the terrorist and who the insurgent, who merits treatment under one set of rules and who merits treatment under another? On the ground, it will be next to impossible for soldiers and policemen to make these distinctions, leading to confusion and inevitable mistakes.

In fact, the doctrine of the British Army makes little distinction between terrorism and insurgency and espouses similar principles for combating both. The first and most significant of these principles is 'Recognition of the political nature of the problem and, accordingly, the solution.' Military action which is contrary to the political strategy must be avoided, however necessary it may appear to be.

Kasher and Yadlin appear to view fighting terrorism in almost purely military terms. In their discussion of 'Time Span Priorities' they state that 'it is far from obvious' that claims that being less aggressive in fighting terror leads to better results 'are warranted.' In fact, there is plenty of evidence to support those claims. Take, for instance, the example of the French during the Battle of Algiers in 1957. It would appear that the use of torture of terrorist suspects in 'ticking-bomb' scenarios would be permissible, even obligatory (lest harm be done by inaction), under the Kasher/Yadlin model, and that the authors would, therefore, believe that the actions of the French military in Algiers were ethical. In the short term, they were certainly effective. By the use of mass arrests and torture, the French paratroopers, led by General Massu, destroyed the FLN terrorist organisation in Algiers with great rapidity. But as Alistair Horne has pointed out:

> In Algeria the rifts created by torture led to a further, decisive step in eradicating any Muslim 'third force' of *interlocuteurs valables* with whom a compromise peace might have been negotiated; while in France the stunning cumulative impact it had was to materially help persuade public opinion years later that France had to wash her hands of the *sale guerre*. As Paul Teitgen [Secretary-General of the Prefecture in Algiers] remarked: 'All right, Massu won the Battle of Algiers; but that meant losing the war.'[3]

This lesson has had to be learnt over and over again in combating both terrorism and insurgency. As Major General Peter Chiarelli and Major Patrick Michaelis have noted regarding operations of Task Force Baghdad in Iraq:

> The task force concluded that erosion of enemy influence through direct action … *only* led to one confirmable conclusion – you ultimately pushed those on the fence into the insurgent category … Kinetic operations would provide the definable short-term wins we are comfortable with as an Army, but, ultimately, would be our undoing.[4]

[3] Alistair Horne, *A savage war of peace: Algeria 1954–1962* (London: Macmillan, 1977), pp. 206–7.

[4] Maj. Gen. Peter W. Chiarelli & Major Patrick R. Michaelis, 'Winning the peace: The requirement for full-spectrum operations,' *Military Review*, vol. LXXXV, no. 4, July–August 2005, p. 8.

In an article entitled 'The Ethics of Counter-terrorism,' Lieutenant General Sir Alistair Irwin, formerly British General Officer Commanding Northern Ireland, and a man with immense counter-terrorist experience, notes that a system of *asymmetric morality* exists in counter-terrorist struggles. The public expects the terrorists to behave improperly, but it does not expect the same of the state; the state is held to a higher standard, and so 'The opprobrium that attaches to national institutions that act illegally is infinitely greater than anything that attaches to the terrorists themselves.'[5] However unfair this may seem to some to be, it is a political reality. Democracies must not only be purer than pure but must also *appear* to be so, if they are to succeed against terrorism.

Irwin cites an example which should surely resonate with Kasher and Yadlin: that of the Stern Gang member Alexander Rubowitz, who in 1947 was assassinated by British soldiers who believed that they had a free hand in dealing with Jewish terrorists. Under the Kasher/Yadlin model, this sort of targeted killing would appear to be warranted. In practice, the result was the retaliatory murder of two British NCOs, followed by 'violent reprisals by troops and police in Tel Aviv [which] culminated in the machine-gunning of Jewish shops and cafés by police armoured cars. Five people were killed,' and support for the Stern Gang increased.[6] Irwin concludes his article by citing Albert Camus, 'It is better to suffer certain injustices than to commit them.' The military gain of action against terrorists is often outweighed by the harm to the political strategy. This is the advice of an experienced counter-terrorism officer.

Over-reliance on Good Intelligence

A primary reason why the principles of the Kasher/Yadlin model are potentially counter-productive if put into practice is that intelligence is imperfect, and consequently the forces of the government will arrest, if not assassinate and torture, the wrong people at least some of the time. People under pressure have an alarming habit of exaggerating dangers and of assuming that they have good intelligence when they do not. Perhaps this is not a problem with the Israel Defence Forces, as Israeli intelligence services have a reputation for efficiency, and Kasher and Yadlin's confidence in intelligence may suit their own country's circumstances. Inhabitants of other countries would be right to be less confident. The British police, for instance, have so far shot only two people in their pursuit of Islamist terrorists. Both were completely innocent – a 100% record of error. Coalition forces' intelligence in Iraq has been notoriously poor, leading to the arrests of tens of thousands of men against most of whom there is very little or no evidence. For every successful assassination (such as that of the terrorist leader Zarqawi, in which, incidentally, a child was also killed), there have been several which have struck entirely the wrong target. Counter-terrorism relies heavily on human intelligence, but as Michael Herman, a

[5] Alistair Irwin, 'The ethics of counter-terrorism,' in Patrick Mileham (ed.), *War and morality*, Whitehall Paper 61 (London: RUSI, 2004), p. 97.

[6] Ibid, p. 100

former secretary of the British Joint Intelligence Committee, has written, 'Humint has a reputation with its users for unreliable information.'[7] Repeated error is simply unavoidable in this sort of situation.

The politician or police chief knows that there will be relatively little backlash from the public if he orders the killing or arrest of people who turn out not to be terrorists, whereas the backlash will be enormous if he fails to take action and a terrorist atrocity takes place. He will, therefore, tend to assume the worst and act when action is not necessary. As regards the Maximin principle (Principle B4, p.3. in Kasher and Yadlin's paper), this assumption of the worst case may seem valid in an individual instance, but when applied in case after case, it will cause huge numbers of injustices. The target population will soon understand that the military and police forces care little for their lives and well-being. It is also dangerous to lower the level of probability required to take action as the danger increases, as suggested by Kasher and Yadlin. The greatest dangers are also the least likely; consequently, if one lowers the level of evidence required to act against the most dangerous threats, one will even more certainly end up repeatedly taking unnecessary action. The authors' logic only makes sense if negative consequences result only from inaction and never from action. This is exactly the error in thinking which led to the invasion of Iraq in pursuit of non-existent weapons of mass destruction ('they might not exist, but if they do...').[8] The imperfections of intelligence, and of people's interpretations of it, will, if the authors' model is followed, lead to this error being repeated time and time again.

Force Protection

Kasher and Yadlin place too much weight on 'force protection.' They note that Israel has a citizen army, and argue that the life of a citizen-soldier should be considered as of equal worth to that of any other citizen, and that 'the fact that persons involved in terror are depicted as non-combatants is not a reason for jeopardizing the combatant's life in their pursuit.' But, of course, most Western countries do not have conscript armies, but armed forces consisting exclusively of volunteers. General Sir John Hackett pointed out that 'The essential basis of military life is the ordered application of force under an unlimited liability. It is the unlimited liability which sets the man who embraces this life somewhat apart. He will be (or should be) always a citizen. So long as he serves he will never be a civilian.'[9] Admiral James Stockdale, an exemplar of American leadership, noted in his model of moral leadership that it consists among other things of 'being willing … to accept costs and

[7] Michael Herman, *Intelligence power in peace and war* (Cambridge: Cambridge University Press, 1996), p. 65.

[8] The Kasher/Yadlin position is, in essence, that put forward by the 'precautionary principle' favoured by environmentalists – that if in doubt about the harmful consequences of something one should act to prevent it. As I have explained elsewhere, however, the precautionary principle is a very shaky one on which to take action, and can just as easily justify inaction: see Paul Robinson, *Doing less with less* (Exeter: Imprint Academic, 2005), Appendix 8.

[9] General Sir John Hackett, *The profession of arms* (London: Times Publishing Company, 1963), p. 23.

pay a price personally and being willing to ask, even order, those subordinate to you, those close to you, to accept similar costs and to pay a similar price.'[10]

The emphasis on force protection runs counter to this sense that the spiritual base of the soldier's profession lies in the willingness for self-sacrifice. While it may not be the intent of principles of the sort espoused by Kasher and Yadlin, once such ideas have permeated down the chain of command to the private manning a checkpoint, the idea will be pretty clear – 'If in any doubt, shoot. Keep yourself alive. Your life is worth more to us than theirs.' This is a recipe for excessive force.

Compatriot Preference

Particularly problematic is Kasher and Yadlin's list of 'Priorities on Grounds of Duties.' It makes a great deal of sense that the primary duty of a state is to its citizens, as indeed the primary duty of a parent is to his or her children, not to the children of others. However, I believe that the situation is rather more complicated than Kasher and Yadlin maintain, and that the priorities they list are both philosophically contestable and, if put into practice, likely to be counter-productive in the context of counter-terrorism.

Philosophical literature on compatriot preference suggests that in general terms such a preference should exist, but that it is not entirely clear why it should.[11] Furthermore, the literature suggests that it does not exist in all circumstances; on the contrary, in some circumstances compatriots have fewer rights than others, and the state has greater obligations to those who are not its citizens. In short, while the principle has some basis in general terms, it is not an absolute.

Robert Goodin, for instance, notes that,

> At least in some respects, we are obliged to be more scrupulous – not less – in our treatment of nonnationals than we are in the treatment of our compatriots. … at least some of our general duties to those beyond our borders are at least sometimes more compelling, morally speaking, than at least some of our special duties to our fellow citizens.[12]

As Goodin notes, the state can conscript citizens, but not non-citizens, could permit pollution within its own boundaries, but would be in breach of its moral obligations if it allowed the pollution to spread over its borders, and so on. Sometimes, we have a moral obligation to treat others better than we treat our own. As Goodin writes,

> We may legitimately impose burdens upon those standing in special relationships to us that we may not impose upon those in no special relation to us,

[10] Cited in Albert C. Pierce, 'Vice Admiral Stockdale: A life of masterful existence and graceful eloquence,' *Shipmate*, October 2005, p. 16.

[11] See, for instance, Andrew Mason, 'Special obligations to compatriots,' *Ethics*, vol. 107, no. 3, April 1997, pp. 427–47, and Richard Vernon, 'Compatriot preference? Is there a case?', *Politics and Ethics Review*, vol. 2, no. 1, 2006, pp. 1–18.

[12] Robert Goodin, 'What is so special about our fellow countrymen?,' *Ethics*, vol. 98, no. 4, July 1988, p. 663.

> merely because we have special rights against them, and they have special duties toward us. … When we say that nonnationals (especially non-resident nonnationals) may not be treated in such ways, that is merely to say that we have no special claims against them nor they any such special duties toward us.[13]

Annette Baier, one of the proponents of the 'ethics of care,' notes that one of the problems with traditional ethical systems is that they assume chosen relationships between equals. They have little, if anything, to say about relationships which are unequal and unchosen.[14] The relationships between, for instance, the Palestinians and the Israelis, or the Iraqis and the UK–US coalition, are unequal and unchosen. The Palestinians and Iraqis did not choose to have their land occupied by others, and the Israelis and the Anglo-American forces have an overwhelming preponderance of power. This gives the latter a special obligation of care towards those who have not chosen to be subject to their power.

Let us look at this situation from another perspective – that of the occupied people. They are given no choice in the matter. They are subject to the authority of others, who state openly, according to the Kasher/Yadlin principles, that they value their own lives more. Why should those people accept such a situation? Is it not to be expected (even if not excused) that in these circumstances extremism will flourish and terrorism arise?

I would therefore concur with David Rodin that in situations of unequal power, 'one may require the strong party to take exceptionally rigorous steps to ensure that they do not harm non-combatants. … This may require the stronger side to assume risks for its own force to ensure that they do not expose civilians to unavoidable risk of harm.'[15]

The Ethics of the Strong

We come here to the fundamental weakness of the Kasher/Yadlin theory, which is that it represents the *ethics of the strong*. Its principles are not universally applicable; they fail the test of Kant's categorical imperative; they are principles which the strong are happy to use against the weak, but which they would never accept if used against themselves.

Let us take the example of Abu Hamza, the radical Islamic cleric who was recently convicted of terrorist offences in the United Kingdom. The offences in question took place over a period of years, during which the British authorities left Hamza free to continue his terrorist activity. This included support given by Hamza to terrorists in the Yemen. Now imagine that you are responsible for counter-terrorism in the Yemen. You know that in the UK there is a man who is aiding and abetting activities which are killing Yemeni citizens. You also know that the UK authorities are turning a blind eye to this – they are in effect 'harbouring a terrorist.' According to the Kasher/Yadlin model, therefore, it would have been absolutely

[13] Ibid, p. 674.

[14] Annette C. Baier, *Moral prejudices: Essays on ethics* (Cambridge, MA: Harvard University Press, 1994), pp. 28–9.

[15] David Rodin, 'The ethics of asymmetric war,' in Richard Sorabji & David Rodin (eds), *The ethics of war: Shared problems in different traditions* (Aldershot: Ashgate, 2006), p. 161.

ethical for the Yemenis to fly an unmanned aerial vehicle over London and drop a bomb on Finsbury Park Mosque. Now let us imagine further that such an event happened, killing Hamza, but also a number of passers-by on their way to the nearby Arsenal football ground. Again, according to the Kasher/Yadlin model, this would be acceptable, because the Yemen government's primary responsibility is to its own citizens, and the collateral damage among UK citizens, while regrettable, is of lesser moral significance.

Now, should such a thing have come to pass, do Kasher and Yadlin really believe that the British government and British people would have accepted the deaths of their citizens as morally justifiable? I find that absolutely incredible. Not for one moment is it feasible that the British would simply have said to themselves that it was quite acceptable for the Yemenis to kill British citizens because Abu Hamza was a terrorist and the Yemenis have a right to defend themselves. The British would have been outraged, just as the people at the receiving end of identical actions undertaken by Israeli and American bombers have been outraged. So, why might some people think that the principles put forward by Kasher and Yadlin are acceptable? Because, I would conjecture, we know very well that no Yemeni UAV is ever going to drop a bomb on Finsbury Park Mosque. We can safely propose these ideas, because we know that we are never going to be the targets. If we were, we would suddenly find them much less convincing.

Kasher and Yadlin's ethics are, therefore, the ethics of the strong. Terrorism, however, is the tactic of the weak. We cannot imagine for one second that the weak will accept these principles. Instead, they will see them as a mere tool for giving moral justification to the exercise of oppression. That may not be correct, but what matters is not so much the truth as what people believe to be the truth. In the eyes of those suffering from the tactics permitted under the Kasher/Yadlin rules, the rules will appear as yet another reason why those imposing them are oppressors who need to be resisted.

Conclusion

Kasher and Yadlin, I fear, look at the ethics of counter-terrorism solely through the eyes of the counter-terrorist forces. They do not consider the impact of their principles on the population group from which the terrorists draw their support. The cumulative effect of their model if applied in practice will be to create among the members of that population a sense that they are second-class people, whose rights and whose lives and property come second to maintaining the dominance of the group which is in power over them (as indeed they explicitly do under principle B.2.d.). I regret, therefore, that I find the Kasher/Yadlin theory more likely to worsen the problem of terrorism than to alleviate it.

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