



DEFEATING TERRORISM

STRATEGIC ISSUE ANALYSIS



Ethical Issues in Counterterrorism Warfare

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Conclusions:

- Even in the war against terrorists, attacks must be discriminate and proportionate.
- Attacks can legally and morally be directed against all those reasonably believed to be involved in a wide circle of conspiracy.
- Tenets of military necessity and double effect may permit some collateral damage.
- Terrorists are not entitled to protection of the Geneva Convention, but are they truly outside the protection of any law?

Introduction.

Much has been said and written in recent weeks about the changed nature of “warfare” as it pertains to responding to the attacks on the Pentagon and the World Trade Center. That attacks of such vast scale are made directly on U.S. soil by nonstate actors poses important new questions for military leaders and planners charged with conceiving an appropriate and effective response.

The established moral and legal traditions of just war are similarly challenged. Forged almost entirely in the context of interstate war, those traditions are also pressed to adapt to the new and unforeseen character of a “war against terrorism.” This paper is a preliminary effort to extrapolate and apply existing fundamental moral principles of just war theory to this novel military and political terrain.

Fundamental Moral Principles.

The theoretical framework of the just war tradition provides two separate moral assessments of uses of military force. The first, *jus ad bellum* (right or justice toward war) attempts to determine which sets of

political and military circumstances are sufficiently grave to warrant a military response. It focuses on the “just cause” element of war, and attempts to determine whether use of force to redress a given wrong has a reasonable hope of success and whether nonviolent alternatives have been attempted (the “last resort” criterion) to redress the grievance. Given the horrendous loss of innocent American (and other) life in these recent attacks, it is without serious question that a just cause exists to use military force in response. However, legitimate questions remain regarding reasonable hope of success given the difficult and diffuse nature of the perpetrators of these events. Indeed, the very definition of success in conflict of this sort is to some degree ambiguous.

The second body of assessments concerns *jus in bello*, right conduct of military operations. The central ideas here concern *discrimination* (using force against those who are morally and legally responsible for the attack and not deliberately against others) and *proportionality* (a reasonable balance between the damage done in the responding attack and the military value of the targets destroyed).

These fundamental moral principles continue to have force, even in the quite different “war” in which we are now engaged.

***Jus ad bellum* Considerations.**

The scale and nature of the terrorist attacks on the United States without question warrant a military response. The important questions about *jus ad bellum* are confined to the other questions the just war tradition requires us to ask regarding the ability to respond to those attacks with military force that will, in fact, respond to the attackers themselves and be effective in responding to the wrong received.

Just cause requires that we identify with accuracy those responsible and hold them to be the sole objects of legitimate attack. Who are those agents? In the first instance, those directly responsible for funding and directing the activities of the now-deceased hijackers. There is a tremendous intelligence demand to identify those agents correctly. But, having identified them to a moral certainty (a standard far short of what would be required by legal criteria of proof, it should be noted) there is no moral objection to targeting them. Indeed, one of the benefits of framing these operations as “war” rather than “law enforcement” is that it does not require the ideal outcome to be the apprehension and trial of the perpetrators. Instead, it countenances their direct elimination by military means if possible.

What of the claim that we may legitimately attack those who harbor terrorists, even if they are not directly involved in authorizing their activities? The justification for attacking them has two aspects: first, it holds them accountable for activities which they knew, or should have known, were being conducted in their territories and did nothing to stop; second, it serves as a deterrent to motivate other states and sponsors to be more vigilant and aware of the activities of such groups on their soil.

How far ought the moral permission to attack parties not directly involved extend? I would propose application of a standard from American civil law: the “reasonable person” (or “reasonable man”) standard of proof. This standard asks not what an individual knew, as a matter of fact, about a given situation or set of facts. Instead, it asks what a reasonable and prudent person in a similar situation should know. Thus, even if a person or government truthfully asserts that they were unaware of the activities of a terrorist cell in their territory, this does not provide moral immunity from attack. This standard asks not what they *did* know, but what they *ought to have known* had they exercised the diligence and degree of inquiry a reasonable person in their circumstance would have exercised.

Also, legitimate targets include more than those who have carried out or are actively engaged in preparing to carry out attacks against U.S. citizens and forces. There will presumably be numerous individuals who, in various ways, assisted or harbored attackers, or who possessed knowledge of planned attacks. From a moral perspective, the circle of legitimate targets surely includes at least these individuals. A rough analog for the principle here is the civil law standard for criminal conspiracy: all those within the circle of the conspiracy are legitimate targets. The analogy is not perfect, but in general it justifies attacks on those who possessed information about the contemplated terrorist activity or who supplied weapons, training, funding, or safe harbor to the actors, even if they did not possess full knowledge of their intent.

***Jus in bello* Considerations.**

How do ethical considerations constrain the manner of attack against legitimate adversaries? The traditional requirements of just war continue to have application in this kind of war. Attacks must be *discriminate* and they must be *proportionate*. Discrimination requires that attacks be made on persons and

military objects in ways that permit successful attack on them with a minimum of damage to innocent persons and objects. In practical terms, this requires as much precision as possible in determination of the location and nature of targets. Further, it requires choice of weapons and tactics that are most likely accurately to hit the object of the attack with a minimum of damage to surrounding areas and personnel.

Proportionality imposes an essentially common-sense requirement that the damage done in the attack is in some reasonable relation to the value and nature of the target. To use a simple example: if the target is a small cell of individuals in a single building, the obliteration of the entire town in which the structure sits would be disproportionate.

Two important real world considerations bear on this discussion. The first is military necessity. Military necessity permits actions that might otherwise be ethically questionable. For example, if there simply are no practical alternative means of attacking a legitimate target, weapons and tactics that are less than ideal in terms of their discrimination and proportionality may be acceptable. It is important not to confuse military *necessity* with military *convenience*. The obligation of military personnel is to assume some risk in the effort to protect innocents. However, situations can certainly arise in which there simply is not time or any alternative means of attacking in a given situation. There, military necessity generates the permission to proceed with the attack.

The other consideration is the tendency of adversaries of this type to co-locate themselves and their military resources with civilians and civilian structures in order to gain some sense of protection from such human shields. Obviously, when possible, every effort should be made to separate legitimate targets from such shields. But when that is not possible, it is acceptable to proceed with the attack, foreseeing that innocent persons and property will be

destroyed. The moral principle underlying this judgment is known as "double effect," and permits such actions insofar as the agent sincerely can claim (as would be the case here) that the destruction of the innocents was not part of the plan or intention, but merely an unavoidable by-product of legitimate military action.

It is important to note, however, that there can be no just war justification for a response to these attacks with attacks of a similar character on other societies. Not only would this constitute an unethical and illegal attack on innocent parties, it would almost certainly erode the moral "high ground" and widespread political support the United States currently enjoys.

The Moral Status of the Adversary.

The individuals who initiated the terror attacks are clearly not "soldiers" in any moral or legal sense. They, and others who operate as they did from the cover of civilian identities, are not entitled to any of the protections of the war convention. This means that, if captured, they are not entitled to the benevolent quarantine of the POW convention or of domestic criminal law. For the purposes of effective response to these individuals, as well as future deterrence, it may be highly undesirable even if they are captured to carry out the extensive due process of criminal proceedings. If we can identify culpable individuals to a moral certainty, their swift and direct elimination by military means is morally acceptable and probably preferable in terms of the goals of the policy.

However, as this conflict proceeds, especially if ground operations commence against fixed targets, one may foresee that individuals and groups may come to operate against U.S. forces as organized military units. It is important to keep in mind that, no matter how horrific the origins of this conflict, if and when this occurs and such groups begin

to behave as organized units, to carry weapons openly, and to wear some kind of distinctive dress or badge, they become assimilated to the war convention. At that point, close moral and legal analysis will be required to determine the degree to which they become entitled to the status of "combatant" and are given the Geneva Convention protection that status provides. The previous permission for swift elimination applies to the period in which they operate with civilian "cover." Should elements of the adversary force eventually choose to operate as an organized military force, the long-term importance of universal respect for the Geneva Convention's provision would make our treating them at that point as soldiers under the law the preferred course of action.



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