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Democracy Facing Terrorism: Human Rights and Military Ethics

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This chapter provides a conceptual framework for presentation, explanation, and justification of practices Israel has used over decades for facing terrorism. These practices are related to fighting terrorists and their supporters, usually but not always outside areas of Israeli effective control, and respecting human and civil rights within the confines of Israel and areas under its effective control.

The ability to successfully fight the enemies of Israel has for many decades now been an essential ingredient of Israel's collective identity. This is not the only element of the collective identity: Israel has a democratic regime and is the nation-state of the Jewish people. But the necessity to put the ability to fight to frequent use in fighting an enemy served as the natural grounds for the development of an ethics of fighting enemies shaped by the fundamental values of the state and by the universal nature of Israel's military activity.

During periods of wars and military operations, Israel has maintained a democratic regime that ought to combine the duties of defending Israelis by military activities and of respecting human and civil rights as extensively as possible. Our starting point will be a couple of fundamental principles that guide military activities within the framework of a democratic state, be it Israel, the United States, the United Kingdom, or any other such state.

The military ethics of fighting terrorists as implemented by Israel and other democracies rests on two pillars that are of a universal nature and are directly related to the life and wellbeing of all. The first principle is the *right and duty of self-defense*. The well-known right of self-defense is commonly invoked by a state when it is unjustifiably attacked by another state. It is on a par with a person's right to defend oneself if unjustifiably attacked by another person or a group. The right of self-defense is well-entrenched in the morally oriented Just War Doctrine, international law, and the UN charter.¹

The *right* of self-defense is invoked on the level of international relations. The *duty* of self-defense is discharged on the level of intra-national relations. It is the duty of a democratic state to protect its citizens against every mortal jeopardy they might face. This is an essential component of the democratic state's duty to maintain the infrastructure of citizens' life of liberty and meaning.

The idea of the *duty of self-defense* represents an important extension to the set of values, norms, and laws that govern warfare in a democratic state and its society of citizens. Although war and terrorism seemingly take place in the arena of international relationships, actually they have essential elements that play roles in the space of domestic relationships between governments and citizens.

The second pillar of military ethics of fighting terrorism, guiding warfare in Israel and other democracies, is the *duty to respect human dignity*. Put in a nutshell, respecting human dignity means (a) manifesting a special positive attitude towards persons: you never treat persons

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for your benefit, as if they are merely your instruments; (b) manifesting this attitude towards persons *qua* persons, no matter who they are; and (c) respecting the essence of personhood by confining activity that affects persons in a way that restricts their liberty to what is compellingly justified under the circumstances: Every bill of rights of a democracy thus restricts every power of restricting liberties.

Notice that the second principle, which pertains to *human* dignity, is by no means restricted in the case of Israel, for example, to citizens or other persons under Israel's effective control, such as inhabitants or foreign workers. It pertains to Palestinians in Gaza who are not involved in the creation of terrorist danger (so-called "innocents"), as is manifest in considerations of collateral damage and even to the terrorists themselves when kill-or-capture options are carefully considered.

In democratic states, human dignity is not only *respected* but also *protected* by a variety of means, including laws, executive agencies, and judicial decisions.

It is commonly acceptable and morally justifiable that no state shoulder responsibility for the affairs of enemy civilians that is on a par with the responsibility it shoulders to the situation of its own ones. Special duties are parts of the essence of relationships within a family, a community, and a state.

These two pillars are meant to be applied together under all circumstances. During war or any other military activity, the principle of self-defense is what establishes the *ends*, an effective defense of people and their state, while the second principle adds restrictions imposed on the *means* used in pursuit of the ends. Generally speaking, the latter principle requires indefatigable efforts to diminish or "alleviate the calamities of war."²

By and large, our principles are shared by all democratic states which guide the activities of their military forces. It is, however, noticeable that the IDF is the only military force that has included in its values *Human Life* and *Purity of Arms* (meaning Restraint of Force), which reflect these fundamental principles. The latter value imposes on every military action ethical restrictions beyond what is required by international law.

I suggested the inclusion of these values when I worked on the draft of the first IDF Code of Ethics in the early 1990s. When I presented the draft to Chief of Staff Lt. General Ehud Barak, the IDF General Staff, and commanders in about 100 IDF units, I encountered no objection to that major suggestion, not even a single one among the numerous comments I heard, recorded, and later took into account. I have often been asked, what is Jewish about the Code of Ethics of the IDF, the military force of the democratic nation-state of the Jewish people? My answer included pointing out that these two values are rooted in the Jewish religious and moral traditions of the sanctity of human life and self-restraint.

Self-defense is not restricted to activities directly related to ongoing attacks by an enemy. Considerations of self-defense apply to actual jeopardy as well as to potential imminent jeopardy. Consider the example of rockets launched by the Hamas into most parts of Israel. Iron Dome batteries protect Israelis against the rockets very impressively though not to a full extent. Iron Dome batteries scored over 90 percent rocket interception rate during Operation Protective Edge, which means that an additional type of protection was required against several hundred rockets that were not intercepted. Self-defense requires destroying rocket production and warehouses – all a natural additional method of self-defense.

Considerations of possible deterrence are also involved in applying the principle of self-defense. To use the examples of Operation Protective Edge, the move from a mission of *diminishing* rocket jeopardy to a mission of *eliminating* rocket jeopardy involves the idea of creating a state of deterrence, that is a state of mind on the enemy leadership's part, in which they avoid attacking their rival based on what they expect would be the response of the rival if attacked. The enemy expects that the response is going to be devastating or at least conspicuously much more significant than anything the enemy might intend to be gained by an attack on its rival. Thus, diminishing the danger of rockets by a thorough military

operation destroying rocket launchers, production sites, and warehouses, as well as of killing or capturing terrorists who are involved in producing or using them against Israelis are expected to create a state of deterrence.

Importantly, deterrence is a byproduct of the military operation. Strictly speaking, it is not one of its ends that can be pursued on its own. Troops should not be put into risk and collateral damage should not be caused for the sake of deterrence solely; however, as a byproduct of military activity, deterrence is most desirable.

During Operation Protective Edge, I went for a meeting in the Rabin Base of the IDF General Staff in Tel Aviv. At the entrance hall I saw a board full of notes on the operation. At the top was a message about the operation from an IDF Division commander, a major general. In regards to the current operation, the major general added a qualification I had not encountered in the media reports, namely “without escalation.”

This is a very significant qualification, practically but also morally and ethically. In Sun Tzu’s classical *Art of War*, he said, “If someone is victorious in battle and succeeds in attack but does not exploit the achievements, it is disastrous.” The qualification of “without escalation” does not follow Sun Tzu’s saying. It manifests a highly important consequence of the principle of respecting human dignity, which we have already encountered in passing, the *fundamental principle of minimizing damages of war and other military activities*: minimize the damages of war, to the best of your abilities, under the circumstances of effective self-defense.

Distinction and Proportionality

Two principles that Israel and other democracies adhere to under such circumstances are clearly related to this fundamental principle, namely *the principle of distinction* and *the principle of proportionality*.

The basic idea of distinction includes a clear and morally excellent method of reducing casualties among citizens, the most important type of war calamity: “You avoid attacking my noncombatant citizens, and I avoid attacking your noncombatant citizens.”

Warfare for self-defense is not thereby forbidden, but it is conducted in a way that shows respect for human dignity. States have usually accepted the principle of distinction and to a significant extent complied with it mainly on the grounds of its reciprocity, which is politically prudent to adhere to.

Now, what should be our attitude towards the principle of distinction when reciprocity has disappeared, when the enemy has totally eliminated, as a matter of strategy, any trace of the distinction between combatants and noncombatants? Hamas is unscrupulous in violating every norm in the book. How should Israel react? Here again, you see the combination maintained by democracies of effective self-defense and respect for human dignity.

The Israeli reply is clear, reflecting an old Jewish tradition: We do not adjust our principles to the standards of Hamas or other enemies. All of the latter rest on a single principle: Hamas’ ends sanctify Hamas’ means, which include violation of each and every norm at Hamas’ easiest convenience. The Israeli values and basic principles, including adherence to the principles of distinction and proportionality, do not vary with the circumstances. What does vary is the nature of military activity, according to doctrines, procedures, rules of engagement (ROEs), and commands that fit the nature of war on terrorists, all of which ought to be compatible with the Israeli fundamental principles, IDF values and principles, and international law appropriately interpreted and extended.³

Israel faces two major problems in applying norms of distinction. The first one is the deliberate attempts of noncombatants to obstruct military activity against terrorists by being present at sites used by terrorists for attacks on Israelis. Do dozens of noncombatants on the roof of a building that is directly involved in terrorist attacks on Israelis render the

building immune from Israeli attacks by their mere presence on the roof? The answer is indeed in the negative. If the mere presence of noncombatants in the vicinity of terrorists required such immunity from attack, it would mean that thereby Israel lost its ability to protect its citizens against attacks performed by terrorists hiding behind their fellow noncombatants, which is tantamount to Israel having lost its right of self-defense, which is absurd. Generally, the IDF uses a variety of clear warning methods meant to remove noncombatants from the battle fields between combatants, including distribution of leaflets, making personal phone calls, and using the “knock on the roof” procedure. When the noncombatants refuse to move away from the terrorists, they render themselves human shields of the terrorists. Human shields may be attacked together with the terrorist, but attempts should be made to minimize damage among them, even though they are accomplices of terrorist activities. Strictly speaking, such persons should not be counted as collateral damage if hit, but still they should be shown as much compassion as possible, without aborting the mission or parts thereof and without risking combatants more than they are anyway at risk under the circumstances. Once again, activities are governed by a combination of two duties: effective self-defense and respect for human dignity.

The second problem is related to what I have called in previous publications “the soldier’s question.”⁴ Recall the fact that most of the IDF combatants, in particular in the army and navy, are conscripts. A citizen in military uniform is entitled to ask the state, as well as the IDF and his commanders, why restrictions have been imposed on his activity as a citizen in military uniform. In particular, the IDF and the commanders owe him a justification of their decisions to order him to participate in dangerous missions. Most of the time answers and justifications are readily available, e.g. it is necessary to have a conscription system and reserve units. However, under some circumstances, it seems there is no compelling justification, as required by the duty to respect the human dignity of the soldier, who is a citizen in military uniform. When a soldier participates in combat, he faces a high level of risk, which is usually justified on the grounds of the nature of the mission, the accomplishment of which is of military necessity or at least of high significance in defending the citizens and their state. If the soldier is required to face risk of a higher level in order to save the life of an enemy noncombatant who has repeatedly ignored warnings and refused to move from the area, his tacit demand for justification of raising the level of risk for the sake of an enemy who refused to evacuate the place cannot be met. A command, if there ever has been one, to prefer over a conscript combatant an enemy noncombatant who has refused to move away, let alone one who deliberately decided to serve as a human shield of terrorists, would be morally unjustifiable.

When it is impossible to accomplish a military mission without jeopardy to the life of a terrorist’s neighbors who are not involved in any terrorist activity, proportionality norms are invoked. Notice that such norms are very ancient in origin and have a rich history of deep philosophical, theological, and legal discussions. A commander who considers the possibility of carrying out a military mission is usually best equipped to evaluate what is going to be the military advantage of accomplishing the mission, in terms of its contribution to obtaining the ends of the operation. He is also best equipped to assess the probable collateral damage expected under the circumstances.⁵

A major component of proportionality considerations requires the military advantage expected justifying the collateral damage expected, so that excessive force does not cause collateral damage larger than necessary. Importantly, norms of proportionality allow collateral damage under some circumstances. Hence, claims that the very fact that neighbors of a terrorist were killed shows that the military activity was unjustified – are wrong. Comparison of numbers of casualties on both sides of the battlefield is also conceptually wrong.

An additional norm of proportionality is that even if the military advantage of a mission justifies the expected collateral damage, efforts should be made to minimize the expected collateral damage. Israeli and U.S.-targeted killing activity includes an OR (operations research) stage in which the best method of targeting is sought, one that involves a high

probability of killing the terrorist and an optimally low number of collateral casualties. Again, effective self-defense is practically combined with showing respect to human dignity by trying to minimize collateral damage.

A claim has been made that an Israeli action against an actively dangerous terrorist in Gaza in the vicinity of his non-terrorist neighbors should not differ from an Israeli action against a terrorist in Tel Aviv, assuming he managed to infiltrate into the state, reach the city, and position himself in the vicinity of Tel Aviv residents. I cannot imagine Israel respecting such an implausible and unjustifiable demand. Israel won't attack a terrorist in Tel Aviv and cause collateral damage among its citizens, because it ought to provide its citizens with effective protection of their life. Other means will be used to neutralize the terrorist that are at the disposal of a state acting within its own territory in cooperation with its own population.

Israel won't resort to police ethics when acting against a terrorist in Gaza, since it does not shoulder responsibility to the proximity of terrorists to non-terrorists in an area not under its effective control and cannot neutralize the terrorist the same way it is expected to do it in Tel Aviv. Israel does not owe the non-terrorist neighbors more than adherence to proportionality considerations and practical efforts to minimize collateral damage. No state owes more than that to enemy citizens in the vicinity of a terrorist. It is quite amazing to hear demands that Israel be more restricted in defending its citizenry than any other democratic state under similar conditions. No democratic state is going to eliminate the distinction between military ethics and police ethics, which would mean violating the principle of the duty of self-defense, the principle of the duty to respect human dignity or both. Israel is not and should not be an exception.

Internal Security and Liberty

We have so far outlined major principles that guide a democratic state such as Israel in providing its citizens with effective military defense while always showing respect for human dignity. Our discussion has pertained to "external" cases, i.e. to military operations that involve non-combatants on both sides of the border between the state and adjacent territories such as Gaza. We turn now to a brief discussion of "internal" cases, i.e. to restrictions that are imposed on the liberties of Israeli citizens on the grounds of home security considerations.

On the most abstract level of the depiction of democracy, citizens of the state have basic rights that enable them to enjoy all the basic liberties required for a person to shape one's life and its meaning on the grounds of one's values and views. Such liberties are protected in a democracy by its constitution and by institutions that protect its implementation, first and foremost the Supreme Court. Each basic right to enjoy some basic liberty is always restricted, because absolute liberties, on which no restriction has been imposed, are bound to constantly clash with each other. One is not allowed to enter one's neighbor's home on the grounds of freedom of movement or disclose details of his medical record on grounds of freedom of speech. The restrictions imposed on a basic liberty, in the legal framework of delineating the correlated rights, are determined by the risks involved if the liberty is not restricted.

When home security problems are under consideration, restrictions may be imposed on basic liberties to secure life, health and well-being of citizens facing enemy hostile activities. Since the danger created by an enemy varies with its practices, restrictions of basic liberties also vary with the developments of enemy's methods. We are all accustomed to airport restrictions imposed on our privacy, and we accept them as justified as long as we believe that they are necessary for our security. The details are debatable, as usual in every democracy when authorities restrict liberties, but the underlying principle is justifiable, enabling the state to effectively secure the citizens and constantly respect human dignity.

Here, I mention a few restrictions on liberty that have been discussed in Israel in the context of a possible introduction of new legislation. An issue that has attracted much attention in

the United States and elsewhere is using methods of interrogation that count as torture, cruel, inhuman, or degrading, and which count as war crimes. Israel forbids such methods of interrogation and has not changed the ethical principles that govern interrogation since 1999 when the Supreme Court made a decision on the narrow legal grounds of authority on interrogation methods.

Another issue related to fighting terrorism is administrative detention of a suspect. Holding a person in prison within this framework is done on the grounds of an administrative rather than a judicial decision, as a preventive measure against terrorism. Such decisions are made on grounds of the 1979 Emergency Authorities Law (detention) which authorizes detention under certain security-related conditions. In some occasions, the law was used to detain Jews who had been allegedly involved in gravely unlawful activities against Palestinians. Israel has always been, legally speaking, under emergency conditions which allow such detention. Figures of detained persons vary with the intensity of hostilities experienced or thus prevented.

A third method of fighting terrorism that should be mentioned is house demolition. Such actions can take place when the house was used by a person directly involved in a fatal terroristic action. Since house demolition is explained and justified as a deterrence method, every once in a while a debate emerges on the facts: does it serve deterrence or perhaps rather the opposite? Accordingly, there were periods when the policy was to avoid house demolition, but the present policy is different.

When these Methods Are Used

Torture, cruelty, inhuman or degrading treatment, administrative detention, and house demolition are all harsh measures of fighting terrorism. A democratic state, which is committed to the protection of human dignity, should not use any of them unless it can be shown to be justifiable under certain circumstances.

First of all, highly reliable intelligence is required. This is a precondition that is not difficult to properly fulfill in the Israeli context of fighting terrorism.

Secondly, the judicial involvement of an appropriate type is required when restrictions are imposed on human liberties. Adequate access to a court is usually available to the persons who are going to be affected by the measures taken.

Thirdly, the actions planned or performed should be compatible with the democratic conception of protecting human dignity, not in the strict sense of what is allowed by the present law which is a product of long and complicated historical processes, but rather in the broad sense of the moral foundations of that conception. Morally speaking, extreme policies are not justifiable. Free resort to torture is indeed immoral, because it often involves using excessive force. On the other hand, an absolute ban on, say, degrading treatment of suspects, when at stake are issues of life and death of possible victims of an action planned or performed by the suspect is an excessive restraint.

Consequently, the moral considerations are usually related to the justifiable delineation of usage. One could have assumed that such delineations would undergo constant major revisions, given the significant changes of the nature of the conflict, but actually, this has not happened, probably because the basic principles apply to all circumstances. However, in 2016, the Knesset enacted a comprehensive law of Fighting Terrorism, which not only incorporates into a unified law many previous legal arrangements but also extended the sphere of fighting terrorism and included in it many forms of support of terrorism and terrorists. The most fundamental principles have, however, been left intact.

In addition to a discussion of the above-mentioned special measures of fighting terrorism, one should consider the general situation with respect to the inhabitants of belligerently occupied territories who are not citizens of the occupying state. The military regime, presumed to be short-lived and eventually replaced by a peace accord, is not democratic, all

the more so the occupied territory had not been democratically ruled before the war. Thus, the due regime of liberties does not prevail in such territories. As long as the military regime is temporary and is about to end, this lack of fully fledged liberties is acceptable. But when the situation lasts for decades, liberties should be carefully and significantly restored, bringing the extent to which human dignity is respected as close as possible to democratic standards, without harming the security of the citizens, which is an aspect of their self-defense.

Finally, a few words about *Peace*: Without taking sides in political debates about the future of certain territories, Jerusalem, refugees and related issues, we have to emphasize the moral duty of a democracy is to pursue peace for the benefit of all populations concerned. From a military ethics perspective, peace is the ultimate “Iron Dome,” so to speak, the best protection of Israeli combatants and non-combatants, as well as non-combatants on the other side of the border, from the dangers of war. Peace ought to be pursued by every government, through appropriate negotiations.

* * *

Notes

¹ For a most influential modern presentation of the doctrine, see Michal Walzer’s seminal *Just and Unjust War*, New York: Basic Books, 1977; 4th edition, 2006. For detailed presentation of all aspects of the doctrine, see: *Ethics of War and Conflict, Vols I-IV*, edited by Asa Kasher, Abingdon: Routledge, 2014, Vol. II.

² This phrase appeared in the first paragraph of the 1868 Saint Petersburg Declaration Renouncing the Use, in Times of War, of Certain Explosive Projectiles.

³ For a detailed presentation, see Asa Kasher and Amos Yadlin, “Military Ethics of Fighting Terror: An Israeli Perspective”, *Journal of Military Ethics* 4(1) 3-32; reprinted in *Ethics of War and Conflict* [see footnote 2] Vol. III, chapter 51.

⁴ See, for example, “The Principle of Distinction,” *Journal of Military Ethics* 6(2) (2007) 152-167, accompanied by a reply by Michael Walzer.

⁵ Battalion commanders and more senior commanders have on their staff “population officers” whose duty involves alerting their commanders to all possibilities of collateral damage.

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