

Justice Beyond Question? Military Responses to International Terrorism and Just War Theory

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INTRODUCTION

Within the field of international relations, the right of states to protect their territory and the lives of their citizens against another state's aggression has become widely recognized. Strong consensus also exists in terms of the conditions under which the use of force is considered to be morally justifiable (Just War Doctrine). However, the issue of whether states are morally permitted to use force against non-state actors has not yet been as widely agreed upon. Still, in the past three decades pre-emptive and retaliatory air strikes against terrorist facilities, punitive action against states hosting terrorists and assassinations of terrorist operatives have often been used. These operations have set an important precedent indicating that some countries have reached sufficient agreement regarding the moral feasibility of a military response. As is the case in inter-state warfare, it makes intuitive sense that certain restrictions to the use of force should apply in the case of non-state actors as well. The normative issue of this paper deals with the circumstances under which states are morally justified to use force against non-state actors and the rules that they are obligated to follow in the process.

The recent trends in international terrorism make this topic increasingly important. The decline of state sponsorship of terrorist groups after the end of the Cold War makes the political and economic tools previously used to pressure state sponsors less relevant. States have to respond to international terrorist attacks directly, which raises the issue of violation of sovereign territory where the country itself is not the intended target. Since U.S. intelligence agencies have agreed that transnational terrorism is the country's greatest outside threat, framing moral-response guidelines becomes essential, as many future conflicts may be fought against an ambiguously defined enemy that is not directly tied to any particular state. And even though a number of authors have already discussed the problem of responding to terrorist attacks via military means, the majority of them have concentrated on effectiveness rather than on ethical issues associated with the use of military force.

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In the course of this paper, an attempt is made to apply the Just War theory to states' military responses to terrorist attacks. Since this theory was designed to regulate state-to-state warfare, its use for the purposes of judging actions against non-state actors will require slight modifications. But as one author notes, 'interstate warfare is only the most conventional form of political violence'.¹ It therefore seems plausible to use the Just War framework for unconventional purposes as well.

The greatest limitation of this paper lies in the fact that even though most cultures do have some sort of a tradition concerning the justifications and limitations of war, the Just War Theory *per se* is a Western concept, having its roots in Stoic philosophy and early Christian teachings. Another problem is constituted by the fact that there is little cross-cultural consensus in place on issues surrounding terrorism. The difficulties experienced by the United Nations in the process of attempting to arrive at a common definition of what constitutes this phenomenon clearly demonstrate this point. The realization that other cultures may view the issue of terrorism and the response thereof from an entirely different perspective is important, as cross-cultural factors will have direct impact on perceptions of concerned parties, whether they be allies or targets.

Part I of this paper will examine different ethical viewpoints on individual criteria of the Just War Theory. The purpose of this section is to provide a balanced overview of all possible perspectives, and therefore the presented ideas are not necessarily representative of my personal opinion. In Part II, historical case studies will be used to evaluate two basic military policies: the policy of assassinations of terrorist operatives and the use of air strikes in retaliation for attacks by non-state actors. In Part III, I will present my personal interpretation of the criteria presented and frame a just military response to terrorism.

PART I

Traditional Just War theory is a concept, which argues that war can, under certain circumstances, be morally justified. This theory considers war to be an evil act but realizes that there are cases of 'tragic necessity' when innocents must be protected from aggressors, in which case a just war can be seen as a 'lesser evil' than inaction.² To make the distinction between just and unjust wars, Just War theorists use several criteria, usually divided into two categories: the right to enter war (*jus ad bellum*) and rightful conduct during war (*jus in bello*). In our case, the most relevant criteria for *jus ad bellum* are: legitimate authority, just cause, right intent, last resort, probability of success, proportionality, and discrimination. In the *jus in bello* context, they are proportionality and discrimination. Under this theory, the use of force in response to terrorism is justifiable, if the operation passes the 'Just War test.' It is important to note that in order to pass this test, the action must pass all of the above-mentioned criteria; it is not enough to fulfil only some of them.

As mentioned in the introduction, applying Just War theory in cases of military response to attacks perpetrated by non-state actors requires a modified explanation of the traditional criteria. This section will present an overview of possible interpretations.

Jus ad Bellum

Just cause

This criterion can be defined as a very good reason to use force.³ In our case, this variable can be divided into two subcategories. The first addresses the *cause of the terrorists*. According to some authors, examination of the terrorist motivations must precede any military action by the state. They contend that states have to make a reflective moral judgment of their adversary before they can decide to strike back.⁴ According to Burchael, there may be instances where the grievance is justified and in that case retaliation is not morally acceptable.⁵ Under Just War doctrine, ideology or religion are not considered to be a just cause. The right to self-determination, on the other hand, can be a justified reason, under the condition that it is achievable without the violation of just claims of others.⁶ Implicitly, if a terrorist organization fighting for self-determination attacks, the presented interpretation would consider a military response by the state to be morally unjustifiable. As one might expect, this argumentation has its opponents. They contend that even if grievances of terrorist groups are justifiable, the terrorist acts themselves can never be legitimate and that even legitimate causes can never justify terrorism.⁷ Proponents of this argument would probably be in strong opposition to the notion that states are obligated to evaluate the cause of the terrorist before striking back.

The second subcategory deals with the *cause of the state*. At first glance, this seems to be straightforward: the state was attacked, so it is clear that it has the right to respond. This principle also has a legal justification under Article 51 of the U.N. Charter, which defines the right of self-defense.⁸ But few real-life cases are so clear-cut. Neil Livingstone, a well-known terrorism scholar, defines three types of proactive responses to terrorism: pre-emption, reprisal and retribution.⁹

According to the Just War theory, preemptive attacks by the state are allowed under the condition that evidence of immediate danger exists. But due to the covert nature of terrorism, uncovering attacks in advance is going to be extremely difficult. If, however, sufficient evidence does exist, preemptive strikes are morally justifiable. At the same time it is important to note that such situations constitute a substantial practical problem, as the presentation of adequate evidence to the public runs the risk of jeopardizing the anonymity of intelligence sources.

Reprisals are defined as coercive measures following an offensive strike by the adversary, which are intended to punish and deter future attacks. It follows that in order to be just, a reprisal must be directly related to a specific incident that by itself was a violation of the war convention.¹⁰ Several problems can also be identified in such a policy. Some observers note that only a short window of opportunity exists in which reprisals can effectively be linked to a preceding incident. Some even argue that such a time frame is under normal circumstances no more than 72 hours. After that public and world opinion will have trouble connecting the response to the terrorist attack.¹¹ This argumentation, however, seems unreasonable. If danger of such confusion indeed exists, the original attack was probably not significant enough to be justly retaliated for in the first place.

Retribution is defined as 'turning the hunters into the hunted'.¹² The case for this type of action is based primarily on utilitarian grounds. Proponents of this argument hold that states should not be obligated to wait for terrorists to strike in order to act; measures should be taken to undermine terrorists' confidence, disrupt their activities, force them to spend their time on defensive measures as opposed to planning, and scare off potential recruits. It is also often argued that reprisals suit the purpose of domestic morale hardening, as citizens are likely to be less psychologically affected by terrorist acts if they believe that their government is using all possible means to fight the terrorists. The often-mentioned moral case for retribution argues that it may be more humane than air strikes, because it limits collateral damage and concentrates on punishing specific individuals.¹³ Opponents of this argument contend that by matching tactics of their enemy, states themselves become terrorists.¹⁴

Legitimate authority

This criterion can also be divided into two sub-categories: legitimate authority of the state and that of the terrorist group. In the context of the *terrorist group*, some authors maintain that acknowledgement of the group's leadership as a legitimate authority must precede military action by the state.¹⁵ An act committed by a group whose legitimate authority the state does not recognize is a criminal act and should be treated as such. It follows that if a state fails to recognize a group's leadership as its formal adversary, it denies itself the possibility to declare the group a legitimate military target under the Just War doctrine.¹⁶ It is important to note that this argument stems from the Cold War period, where the impossibility of pursuing a criminal investigation on enemy territory had usually been compensated by the shift of responsibility for an attack onto the state supporting the guilty party, providing that such shift did not run the risk of a worldwide confrontation. In today's international environment, where the terrorist organization itself may be more powerful than its hosting state, it would be morally difficult to simply hold the state responsible for being too weak to restrict terrorist activity coming from its territory. Along the same lines, some may find it hard to accept a scenario in which terrorists who were impossible to capture and bring to trial by conventional means would have to be left alone because the state did not acknowledge their legitimate authority.

In the context of the *state*, legitimate authority is established when the decision to strike back at terrorists is made by the country's official government, providing that such government is seen by the people themselves as their representative. In democratic societies, decisions to use force are made by a popularly elected body so this criterion rarely presents a problem. But Livingstone maintains that force in the abstract and irrespective of an actual terrorist incident will never gather a great deal of public support.¹⁷ Still, he is convinced that 'public officials must lead the public opinion rather than simply follow it'.¹⁸ This however, raises another important question in terms of what level of propaganda is acceptable in a governmental anti-terrorist campaign. As noted by the well-known social psychologist Albert Bandura: 'People seldom condemn military operations—in fact they even create justifications for them when they are directed at persons who have been de-

prived of their humaneness.¹⁹ This means that by portraying terrorists in inhumane terms, such as 'killers', 'evildoers', or 'fanatics', the government can always gather enough public support for a military strike, regardless of circumstances. At this point it is important to emphasize that public support alone does not entitle governments to use any means that violate other criteria of the Just War Doctrine.

Right intent

The Just War doctrine requires that states' military actions are motivated by good intentions and that no other undeclared motivation plays a significant role. For instance, states are allowed to enter a conflict with the intention of self-defense, provided other objectives, such as economic gain, are not strongly present. States must also resist what the former Soviet minister Vyacheslav Molotov called the 'logic of war', defined as 'the tendency once one resorts to arms to pursue goals that would not by themselves be sufficient enough to use armed forces in the first place'.²⁰ Terrorism cannot be an excuse for the afflicted state to seize territory or to force a change of leadership in another country. The right intent criterion in the traditional sense also calls for the aim of a military response to be an eventual partnership with the enemy, as opposed to a total defeat.²¹ In other words, the intention must be to 'prevent injustice, to respond to injustice and to re-establish a just peace'.²² It seems unrealistic, however, to normatively ask states to seek partnership with their enemy in the counter-terrorism context, since terrorism is usually considered to be a criminal activity and criminals are not perceived as credible partners. Applicability of this criterion is extremely case sensitive and greatly depends on whether the terrorist struggle itself passes the Just War test. If it does, the state should seek an eventual compromise. Proponents of the view that terrorism can be justified under no circumstances would, of course, be in opposition to this argument.

Last resort

Last resort is a controversial variable, due to the fact that most Western governments declare a policy of 'no negotiations' with terrorists, claiming that such action would only invite further terrorist violence. While this argument makes intuitive sense, such policy raises important questions for applied ethics. Some authors contend that the satisfaction of terrorists' demands should always be the first possibility to be considered.²³ This argumentation does not imply that states should always yield to terrorists, but holds that the terrorists should not be denied this possibility simply based on who they are.²⁴ In the traditional interpretation of the Just War theory, reprisals should not be used unless other options have first been seriously considered and found unsuitable. The respected ethics scholar Michael Walzer, however, notes that if a reprisal were to be indeed an option of last resort, there would be nothing else that could be done in case of failure, but to repeat the reprisal.²⁵ Reprisals in peacetime are in fact a first resort after diplomacy fails. But Walzer still holds that this option should remain available to states, as it represents the only military measure available short of war and as it is preferable to war due to its limited nature.²⁶ Some go as far as arguing that force should be used whenever we judge that force is justified and not simply as a last resort, maintaining that when interpreted in this way, it would never be employed.²⁷

Probability of success

It is difficult to determine whether military retaliation has ever any probability of success. Even though a vast amount of research has been conducted on the topic of effectiveness of military measures in counter-terrorism, no clear-cut conclusions can be drawn. The findings are very case-sensitive and depend largely on the context in which force has been used, as well as on the methods of measurement, availability of relevant data and interpretation of the data.

The probability of success of a military action will primarily depend on the desired outcome of the operation. States must ask whether their actions will have the desired effect such as elimination of the threat, or whether the effect will be counter-productive in terms of increasing sympathy for the terrorist group. And even though providing satisfactory answers will be difficult, states must still make a prospective judgment. If they conclude that violence is very unlikely to achieve the desired goal, the probability of success criterion requires them to not pursue a military response. In the words of Michael Walzer, 'if a reprisal is certain to fail, it should not be tried. But whenever some substantial chance of success exists, it is a legitimate resort as no state can be required to passively endure attacks upon its citizens.'²⁸ It is important to recognize however, that not everyone agrees with his view. Utilitarians, for example, argue that terrorists can only be deterred if they see that the government is ready to use any means available to punish them. The government's options should therefore not be limited to 'pseudo-moral' grounds. Opponents of the use of any force in response to terrorism, on the other hand, argue that retaliatory attacks will only escalate the vicious circle of violence and they therefore never have a reasonable likelihood of success.

Proportionality

In the *jus ad bellum* context, proportionality is a 'cost-benefit analysis' closely associated with the previous criterion. States are obligated to assess both the costs and the benefits in terms of international and domestic sympathy, financial expenditures, and the loss of troops. If the costs of the use of force outweigh its benefits, the action fails the Just War test. In practice, however, consensus on the overall net benefits will be difficult to reach, as each individual will naturally place a different value on each cost and each benefit. Further, an actual cost-benefit analysis in the purely technical sense of the term will be difficult to conduct on issues that are concerned with other values than sheer efficiency and in cases where the value of individual costs and benefits cannot be expressed by a dollar figure. Most variables involved in assessing ethical issues fall into this category.

Jus in Bello

Proportionality

In the *jus in bello* context, leaders have to weigh costs and benefits of their actions in terms of casualties in proportion to military gain. If an operation results in the death of many soldiers, and the achieved objective is of little overall significance, the action will fail the proportionality criteria. Also, states' responses have to be proportional in relation to the original incident to which the state is reacting.

This principle is called backward proportionality. It means that although life cannot be balanced against life, the military response must be similar in character and scope to the original terrorist attack. In other words, the response should be an 'eye-for-an-eye' and not an 'eye-for-ten-eyes' affair.

Discrimination

Even if the original attack was aimed at civilians, this criterion prohibits retaliation of any kind. Armed forces are not allowed to target civilians and must expend extra effort to keep the risk to civilians to a minimum.²⁹ This requires accurate identification of the enemy, which is often difficult due to the covert nature of the terrorist act. Unless states have indisputable evidence that the terrorist group to be targeted is truly responsible for the act which prompted retaliation, states run a high risk of violating the discrimination criteria by attacking the wrong party. This criterion also requires governments to take into account the impact of retaliation on the state on whose territory it occurs. If this state does not support the terrorist group but is extensively affected by the retaliation, the discrimination criteria may be violated.

PART II

This section will attempt to apply the ethical framework defined in the previous part to three case studies. The purpose of these case studies is not to present an exhaustive application of the Just War Theory, but rather to illustrate the general ethical dilemmas associated with military responses to terrorism. After a brief description of the cases and their outcomes, a comparative analysis of the respective policies in relation to individual Just War criteria will be provided.

Israel's assassinations policy—Mitzvam Elohim (1970s—present)

On September 5, 1972, members of the PLO's (Palestine Liberation Organization) Black September Organization stormed Israel's dormitory at the Olympic Village in Munich. The attackers killed two Israeli athletes and kidnapped 9 others, who were later also killed as a result of a failed rescue operation.³⁰ The intention of these attacks was to publicize the struggle for an independent Palestinian state. While these attacks succeeded in attracting worldwide attention they eventually backfired, as the Israelis responded by instituting the so-called 'Mitzvam Elohim' or 'Wrath of God' operations, which were essentially assassinations of terrorist operatives by members of the Israeli intelligence services in response to alleged terrorist activity.³¹

In order to demonstrate the mixed outcomes of these operations, we can compare three well-known cases. In the most successful operation, Fathi Shiqaqi, the principal leader of Palestinian Islamic Jihad (PIJ), was assassinated in Malta in October 1995. He was then replaced by a much weaker leader, Ramadan Abdullah Shallah, who was constantly challenged from inside of the PIJ and was thus unable to restore the group's operational capabilities.³²

A much less successful operation was carried out three months later, when HAMAS' bomb-making expert Yahya Ayyash was killed by a bomb planted in his cell-phone. In retaliation, perhaps also motivated by the desire to demonstrate that

its capability had not diminished, HAMAS stepped up its activities and carried out three suicide bombings over the next two months, killing 65 people.³³

Probably the greatest failure of the Mitzvam Elohim was the operation that took place in Norway in 1973. A young Moroccan waiter was mistakenly killed by Israeli agents in the belief that he was Ali Hassan Salameh, the Black September's operations chief. Apparently the waiter, whose appearance closely resembled Salameh, had been set up by the Black September agents who knew that the death of an innocent civilian would create a rapid public opinion shift against the Israeli practice of assassinations.³⁴

Although the Wrath of God was reportedly disbanded after this incident, its work continued and Salameh was eventually killed by Mossad agents in 1979.³⁵ The Israeli assassinations policy has in fact survived in various forms to date.

Operation El Dorado Canyon (1986)

*On April 5, 1986, a bomb detonated in the La Belle Discotheque in Berlin, killing two American soldiers and wounding 62 others. Shortly afterwards, the U.S. intelligence community intercepted communications between Berlin and Tripoli indicating Libyan involvement. In retaliation for this attack, the United States launched an Air Force and Navy fighter-bombers operation against Libya.*³⁶

On April 15, 1986, U.S. planes bombed two areas in Libya. Eighteen Air Force F-111 bombers that had taken off from Great Britain struck an airport, military barracks, and a port outside Tripoli. In another attack, Navy A-6 and A-7 planes struck Libyan bases near Benghazi.³⁷ Even though the targets were military, 36 civilians were killed and 93 others were wounded.³⁸ Minor damage occurred to a number of embassies as well as residences of ambassadors, and Libyan leader Muammar Qadhafi's one-year-old adopted daughter was killed.³⁹

Operation Infinite Reach (1998)

On August 7, 1998, bombings of American embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania killed over 224 people and injured more than 5000 others.⁴⁰

On August 20, 2001, the U.S. launched the 'Operation Infinite Reach', a Tomahawk cruise missile attack against a number of facilities associated with the network of Osama bin Laden, the main suspect of the bombings. The targets included six training camps belonging to the al Qaida organization and the al-Shifa pharmaceutical factory in Khartoum, Sudan, which U.S. intelligence sources suspected of producing VX nerve gas for bin Laden. As a result of the operation, training camps in Afghanistan had reportedly been destroyed, over a 100 people were killed and about 100 others were wounded. The casualties were believed to be primarily trainees and instructors in the camps.⁴¹ The al-Shifa plant in the Sudan was with the exception of three sections completely destroyed by explosions and fire. One person was killed and ten others were injured.⁴²

Just cause

The *just cause of the state* could be established in all three cases by the fact that the operations were formulated as responses to specific acts of terrorism and

that they were executed within a reasonable time-frame. In the Israeli context however, it is currently no longer feasible to establish a directional causal relationship between the attack and the response, given the ongoing nature of the violent exchange. Also, a significant problem is presented by the fact that the Israeli government acknowledges only certain operations and denies others, hindering any inquiry into the justifications and evidence used to determine the target of each particular assassination.

As we have seen in the previous section, the *just cause of the opponent* is difficult to assess objectively. This can be clearly demonstrated on the example of organizations perpetrating attacks in Israel. The debate about the legitimacy of Palestinian claims for an independent state is a topic for books and thus beyond the scope of this paper. In general, it's probably safe to assess that the right of establishment of an independent Palestinian state is a just cause in itself, as long as it does not violate the just claims of others (such as the goal of pushing Israel into the sea). At the same time, it could be argued that two of the three mentioned terrorist organizations are fighting for the sake of religion, this making their cause unjust. However, it should be stressed that despite the use of radical Islamic rhetoric, the goals of HAMAS are of a primarily political nature. PIJ's claims, on the other hand, tend to fall more into the religious sector and are therefore not valid according to traditional Just War theory. This also applies to the cause of Osama bin Laden and his organization. Even though some grievances that the group claims to address have a merit, its principal motivation seems to be more closely related to the process of the struggle itself rather than to the proclaimed goals. This can clearly be demonstrated by the group's search for an enemy at the end of the Afghan War, when al Qaida turned against the U.S. only after it failed to get involved in the fight against Saddam Hussein in 1991. Another indicator is the catchall nature of the group's agenda, which for example includes revenge for the nuclear bombs dropped on Hiroshima and Nagasaki.

Libyan involvement in the Berlin discotheque attack was also most likely an act of revenge, a motivation that is not permissible by the Just War theory. The bombing appears to have been a reaction to President Reagan's imposition of economic boycott on Libya in January 1986, after the country's involvement in international terrorism became public knowledge.⁴³

Legitimate authority

In all three cases, the legitimate authority of the state seems to have been fulfilled, as the reprisals were instituted directly by the respective democratically-elected governments. And while public support for specific measures undertaken by the government is not necessarily a pre-condition of legitimate authority, it can provide a useful conformation tool. In regards to public support for the Israeli assassinations policy, Yossi Alpher of the Tel Aviv University has claimed that 'upwards of 70 per cent of the Israeli public support (it), while 30 per cent want to see more aggressive tactics used'.⁴⁴ While this statistic is certainly exaggerated, as it leaves no room for critics, it is apparent that the number of objections to this policy coming from the inside Israel is low. In the case of the Libya bombing it is also clear that the action enjoyed wide public support. According to the Washing-

ton Post/ABC poll, 76 per cent of Americans approved of the bombing, even though only 30 per cent believed that the action would reduce terrorism.⁴⁵ The air strikes on Afghanistan and the Sudan received similar support in a poll taken several months after the raid, where 74 per cent of respondents expressed their support for the policy of bombing of terrorist bases.⁴⁶

Rightful intent

All three cases seem to more or less pass the rightful intent criterion, providing that it is indeed possible to assassinate someone with good intentions. Despite the fact that the operations Infinite Reach and El Dorado Canyon were not defined as such, they too, in fact, were targeted killings. The cruise missiles flying to Afghanistan were attempting to eliminate bin Laden, who was supposed to hold a meeting at one of the camps and whom the US intelligence community was allegedly tracking via his cell phone.⁴⁷ Similarly, the bombs dropped on Tripoli were not far from eliminating Qadhafi, when they hit close enough to kill the colonel's adopted daughter. This case raises some questions, as the operation could be perceived as an attempt to exchange Libya's political leadership, an illegal act under the Just War theory.

All three of the Israeli operations described in this section were targeted at actual operatives directly responsible for particular acts of violence. At the same time, there have been other cases in which no evidence of the targets' involvement in terrorist acts was made available. The use of assassinations could in those cases be seen as a compensation for the lack of sufficient evidence to try the suspects in court, which is strictly forbidden by Just War theory.

Probability of success

The three selected Mitzvam Elohim operations provide a good framework for assessing the probability of success of the policy of assassinations of terrorist leaders. Some authors point out that the difference of outcomes in assassinations of Shallah and Ayyash were partly caused by organizational structures of their groups. While Shallah played an exceptionally dominant role within PIJ, HAMAS has never been so dependent on a single leader.⁴⁸ In the case of the assassination attempt on Salameh, Neil Livingstone argues that despite its failure, the operation had direct influence on the Black September's disintegration in late 1973. He claims that after the operation, the remaining members of the group were so demoralized and fearful of being assassinated that the group lost its cohesion and fell apart.⁴⁹ Livingstone concludes that 'the activities of the Israeli counter-terrorist operation had not ended Palestinian terrorism but had certainly disrupted its operations and undermined its capability to carry out sophisticated attacks'.⁵⁰ It is clear that effectiveness of assassinations is extremely case sensitive. Elimination of particular leaders can sharply weaken the capability of their group and can thus reduce terrorism; the assassination of others will only escalate violence and will therefore be counter-productive.⁵¹

The effectiveness of the 1986 bombing of Libya has been the topic of much debate. If the goal was to decrease or even to eliminate Libya's involvement in international terrorism, the operation was clearly a failure. Based on the RAND – St.

Andrews University Chronology of International Terrorism, at least 15 incidents in 1987 and 8 in 1988 have been linked to Libya.⁵² This indicates that Libya increased, rather than decreased its involvement in anti-American terrorist acts as a result of the air strikes. According to some sources, Libya also augmented its support for the IRA in retaliation for the British role in the campaign.⁵³ Based on statistical data analysis of international terrorist incidents, no significant difference between attacks perpetrated before and after the bombing of Libya has been observed, other than a shift in tactics (from hostage-taking to bombings).⁵⁴ Even the U.S. State Department's evaluation written a year after the raid commented: 'We have little doubt that the U.S. air raids on Libya in 1986 contributed heavily to Qadhafi's subsequent caution. At the same time, however, we are equally sure that he continued planning for anti-U.S. attacks involving the use of surrogate groups to disguise Libyan responsibility.'⁵⁵

In the case of Operation Infinite Reach, it is difficult to assess reliably its *effectiveness* in reducing bin Laden's offensive, as only little time has passed since the air strikes. Until recently, it seemed that the operation had succeeded in disturbing bin Laden's terrorist activities, either through destruction of logistics or through deterrence. Bin Laden was not able to carry out his threats of severe retaliation; the only incident he has been linked to since the air strike was the bombing of USS Cole in Yemen on October 12, 2000. However, the attacks of September 11th seemed to have made this argument invalid.

Some authors note that the effect of destroying the training camps was limited, because the ruined logistics were easily replaceable. But apart from physical destruction, the attack may have disrupted organizational procedures such as planning and training. Pressure to pay more attention to physical security may have reduced bin Laden's immediate focus on terrorist activities, but it evidently did not prevent future operations from happening.⁵⁶

Proportionality

Proportionality in the *jus ad bellum* context requires factoring in of potential benefits and costs of the planned operation. It is difficult to assess the benefits in terms of the number of lives saved by an assassination of a terrorist operative. It is arguably even more difficult to compare the value of a single life to a dollar figure or to the value of international opinion. Still, it is clear that the assassinations policy has received an almost unanimously negative reaction from abroad. The 1973 incident, for example, caused a crisis in Israeli-Jordanian relations, as King Hussein threatened to break off diplomatic ties.⁵⁷ The 2001 assassinations campaign was also strongly condemned by the European Union as well as the U.S., Israel's greatest ally.⁵⁸ And even though the 9–11 attacks have silenced many critics of the Israeli policy, the opposition to a systematic assassinations campaign still appears to be strong.

The Libya case does not provide much room for optimism, either. As for the argument that air strikes can have a deterrent effect on potential terrorists elsewhere, statistics suggest an increase, rather than a decrease in terrorist attacks against U.S. targets worldwide following the operation.⁵⁹ Also, the political effect of the strike was one of rallying the populace behind Qadhafi at the domestic lev-

el, and a wave of criticism of the operation at the international level.⁶⁰ On a positive note, the air raid had an unintended effect in that it provided an incentive to European nations to become more serious about imposing sanctions against Libya, in the attempt to prevent further military operations by the U.S.⁶¹ Arguably, it also served the purpose of increasing public morale.⁶²

The cost benefit analysis of Operation Infinite Reach also seems to be tilted more toward the costs, as there were several major factors that undermined the perceived legitimacy of the attack. First, there was the 'Wag the Dog'⁶³ scenario resulting from the fact that President Clinton ordered the air strike only three days after he admitted in a televised broadcast, that he had been misleading the public about the nature of his relationship with Monica Lewinsky. Critics have argued that the air strikes were intended to divert public attention from the erupting scandal.⁶⁴ Second, there was the al-Shifa controversy. The factory that supplied 50–60 per cent of Sudan's pharmaceuticals seems to have been targeted without sufficient evidence of chemical weapons production inside the plant. Al-Shifa was not heavily guarded, which is uncharacteristic for a clandestine chemical weapons facility. Moreover, the soil sample that was supposed to provide evidence that a VX precursor was present at the plant was for an unknown reason tested at a private laboratory, instead of a governmental facility specializing in chemical weapons. Also, the precursor (EMPTA) does have legitimate uses and is not banned by the Chemical Weapons Convention, as the US government initially claimed. Finally, al-Shifa was reportedly substituted for an unnamed target in Sudan at the last minute, apparently without enough evidence of its link to bin Laden.⁶⁵ Besides these controversies over target selection and timing, the fact that a country as powerful as the United States had to fire 80 Tomahawk cruise missiles in order to retaliate against a sub-national entity and still failed to reach their target might have increased bin Laden's perceived status and amplified the number of recruits for his organization.

Last resort

In contrast to Israel, where many counter-terrorist tools were tried prior to resorting to assassinations, the bombing of Libya was by no means an action of last resort. This was demonstrated two years later when the bombing of Pan Am flight 103, in which 270 people were killed, was not reciprocated by a military action. Instead, international sanctions were imposed on Libya and seven years later Qadhafi handed over the suspects. But it is true that in this case it took two years to assemble enough evidence to indicate Libya's involvement and the time for striking militarily had arguably passed. Conversely, in the examined case the US intelligence community gathered enough evidence immediately, in the form of communication intercepts that President Reagan later revealed to the public.⁶⁶

The question of last resort in the case of Afghanistan and the Sudan is fairly clear. Even though the air strike was more of a first resort, it would probably be unrealistic to ask the U.S. government to try to pursue a dialogue with a non-state actor who is not interested in negotiations. And while it would be easy to simply accuse the U.S. government of not trying out other options, the ineffectiveness of the UN sanctions in forcing the Taliban regime in Afghanistan to hand

over bin Laden because of the Pashtunwali (Pashtun tribal code of conduct), or the unrealistic scenario of bin Laden's arrest in the Khandahar region clearly demonstrate the unavailability of traditional means.⁶⁷ The military operation did therefore represent a plausible last resort option, as it was the most acceptable tool available.

Proportionality and Discrimination in the Jus in Bello context

Fulfillment of both of these criteria was arguably a strong point of the Israeli campaign, due to the fact that the assassinations did not involve much risk to Israeli soldiers, and that by singling out individual actors, the campaign limited the number of civilian casualties. At the same time, some civilians did in fact die in several Mitzvam Elohim operations, but this was usually caused by error and not by intention.

Both of these criteria present problems for the Libya case, since the retaliation for two dead and 62 injured *soldiers* resulted in 36 deaths and 93 injuries among *civilians*. The only possible argument with which one could defend the operation is that the selected targets were military and that the civilian casualties were unintended. While this is most likely the case, a military action the only result of which is 'collateral damage' could hardly be presented as successful by any standard. Another interesting question is raised by the fact that Libya as a state was targeted in retaliation for a non-state terrorist attack. In this case the deferment of responsibility onto Libya seems to have been legitimate, as the country's leadership apparently initiated and sponsored the operation, and that can be reasonably interpreted as an attack by Libya.

The Operation Infinite Reach seems to have satisfied both of the proportionality and discrimination criteria in the case of strikes on the terrorist training camps in Afghanistan, where mainly instructors and trainees were hit. In contrast, the al-Shifa bombing appears to have violated both of these criteria, based on the evidence mentioned above. Even though the number of civilian casualties resulting from the attack was low, the destruction of a major source of antibiotics in a country as poor as the Sudan could have had unforeseeable consequences.

Overall evaluation

Taken as a whole, some Mitzvam Elohim operations have been more successful in disrupting terrorist operations than others. At the same time, despite receiving support at the domestic level, they have been almost universally condemned at the international stage. Also, the fact that this practice has become an automated response has diminished its justification as a measure of last resort. Along these lines, the case for the just cause criterion is also weakened, as in many cases it is not possible to establish a clear connection between an assassinated terrorist and a terrorist incident. In conclusion: while isolated cases such as the Fathi Shiqaqi assassination in Malta have arguably passed the Just War test, the Israeli practice judged as a whole remains far from a legitimate response.

The U.S. strikes against Libya in 1986 produced mixed outcomes as well. While their impact on domestic constituency was positive in terms of increasing public morale, their effectiveness in regards to reducing Libya's involvement in interna-

tional terrorism was minimal. From the standpoint of applied ethics, the operation was arguably legitimate in the *ius ad bellum* context, but failed the *ius in bello* part of the Just War test.

The air strikes against training camps in Afghanistan arguably passed the Just War test, despite the doubts about the timing of the strike. The same, however, cannot be said of the strike in the Sudan, which appears to have targeted a civilian pharmaceutical plant without sufficient evidence of its link to any terrorist activity.

All of the presented cases clearly illustrate the basic ethical dilemmas associated with assassinations and air strikes. All of them included elements of both retribution and deterrence, providing punishment for specific acts of violence while also attempting to deter such acts in the future. Further questions arise: Is it morally feasible to carry out either measure in the absence of one of these two elements? What level of evidence provides an acceptable proof of responsibility? What extent of terrorist violence is sufficient to warrant an assassination or an air strike? What level of collateral damage is tolerable? These are all difficult questions that deserve further research.

PART III

As has become evident throughout the course of this paper, different positions can be taken on the issue of using force in response to terrorism. These positions range from absolute rejection based on the argument that by using force the state itself is becoming a terrorist, to claims that no limits on governmental action should be set, as they eliminate the possibility of an effective response. The Just War theory stands somewhere in between these extremes and therefore seems to be a suitable approach. However, as also became apparent, the theory itself is open to interpretation. In this section, my personal viewpoint on the issue will be presented.

As has been suggested, the *just cause* criterion is satisfied when a state first is attacked and when the perpetrators of the attack lack a legitimate justification for their actions. In the real world this is not simple to determine, as virtually no action can be completely just or completely unjust. In most instances the terrorists' claims will have some merit and it will be the form of their struggle, rather than the cause, which will be the source of protest. In the rare event of a complete absence of a legitimate claim, the terrorists will most likely be suffering from psychological distortions, which would under normal circumstances prevent their sentencing in a court of law. Would we in such cases still have the right to retaliate militarily? Fortunately, psychopathic individuals have trouble operating in groups and are therefore unlikely to possess the capability to operate internationally; terrorism at the domestic level, on the other hand, will be a law-enforcement matter and will not be subject to a military response.

Preemptive strikes can be justified only under extraordinary circumstances. Even though the traditional Just War theory does not allow states to attack when the threat is not imminent, there are scenarios in which an exception should be made. If, for example, evidence exists that a terrorist group has acquired especially destructive means of attack such as weapons of mass destruction in

a *weaponized* form, a preventive action could be justified. However, the likelihood of a non-state actor reaching this level is very low and thus the importance of sufficient evidence needs to especially be stressed.

The same condition applies to assassinations. There can be instances where assassinations are morally justifiable, for instance when they represent the only way to disable a terrorist mastermind. An argument can also be made for their positive role in reducing operational capabilities and destroying the hierarchical system of an exceptionally violent terrorist group. The argument that assassinations will only provoke further terrorist activity has some merit, but it should be borne in mind that terrorist groups are not limited solely by motivations, but also by capabilities. A well-targeted disruptive attack can destroy the group's ability to retaliate, so the escalation of violence following a governmental offensive is not a given. At the same time it should be stressed that such measures should only be applied in extraordinary cases as opposed to becoming an automated reflex. Importantly, states should not overestimate the deterrent value of assassinations, as most terrorists show a willingness to die in the process of their struggle. The threat of death can only deter those who insist on staying alive. In this context, the current Israeli approach of attempting to scare off suicide bombers by the threat of assassination is highly dubious.

Legitimate authority is satisfied when the decision to strike has been made by the state's official government and when this government is perceived by the people as their representative. In the contemporary world, the best way to insure legitimate authority is to build an international coalition, in which as many states as possible would directly participate in or at least express support for the operation. Governments should at least attempt to build such a coalition prior to proceeding with military measures. At the domestic level, getting popular support for operations is not difficult as terrorist attacks commonly trigger the desire to do 'something', and military strikes are visible measures that at the same time satisfy our natural tendency to reciprocate violence in kind. However, governments should not be allowed to use this sentiment to justify any type of a response and should keep in mind that they are still bound by other Just War criteria. I am also inclined to say that governments should not be allowed to use an unreasonable level of propaganda in building public support for a military retaliation, but this topic is outside of the scope of this paper.

To fulfill the *rightful intent* in accordance with the traditional Just War theory, governments must resist the temptation to pursue an agenda outside of punishing and deterring acts of terrorism. This raises an important question of whether eradication of illicit crops, the production of which is used to finance terrorist operations, or the removal of 'irrational' regimes that are notorious for harbouring terrorists, is a justifiable strategy. I am inclined to say 'yes', under the condition that such measures are directly related to the terrorist attack, and that an honest effort to negotiate a peaceful resolution with the regime had first been made. At the same time, states should not be allowed to set up a new government themselves after the old regime had been removed. Another crucial component of the good intentions condition is a clear definition of goals *prior* to the commencement of a military operation. This will allow for an unambiguous distinction between original and

mutated goals. At the same time, it will be critical to define these goals realistically, so that a reasonable probability of success of achieving these goals exists and so that *an effective face-saving mechanism is in place*. The latter plays an essential role in allowing the government to stop the operation if it decides to do so, without being perceived as a loser. In the absence of such a mechanism, a great danger of violating the rightful intent criterion exists, as governments will feel pressured to continue the operation even after they've reached the point of concluding that there is not much more the operation can accomplish.

As mentioned above, a clear and concrete definition of goals needs to precede a military operation in order to insure a *reasonable likelihood of success*. A broadly defined goal such as 'eradication of terrorism' is predestined to fail and an operation under such a vague banner should not be undertaken. As we have seen in the examined case studies, no universal proof of (in)effectiveness of military measures in reducing terrorism has been observed thus far. Military operations can therefore be perceived as morale boosting exercises that attempt to punish and deter terrorist acts. Not that this is necessarily inadequate, but governments need to understand the limitations of using military measures in order to make good decisions. It should be kept in mind that the likelihood of overestimating the deterrent value of military responses is high. Governments often fail to understand that their actions could serve the terrorists in fulfilling their goals. Many groups follow what is sometimes called a 'counter-value strategy'—by forcing the state to respond to their attacks, they create an illusion of a reciprocal armed struggle in which they are to be perceived as soldiers rather than criminals or terrorists.⁶⁸ By responding militarily, the state is doing them a favor by legitimizing their fight in the eyes of onlookers. Also, states must realize that for amorphous or ad hoc terrorist groups, there may be no suitable military target to retaliate against at all.

Retaliation is never a *last resort* per se. As Michael Walzer correctly noted, if a reprisal were to be indeed the option of last resort, there would be nothing else that could be done in case of failure, but to repeat the reprisal.⁶⁹ At the same time, governments should not be obligated to pursue unreasonable options solely to fulfil this criterion. A special challenge is represented by the policy of 'no negotiations', which many countries declare but few in fact follow. This policy rests on the sound logic that negotiations with terrorists will only invite further terrorist violence. As this explanation makes sense, I do not hold that governments are obligated to negotiate directly with terrorist groups prior to proceeding with military strikes. However, a serious attempt must be made to negotiate with the state whose territory is about to be violated. Such negotiations should explore the possibility of handing over the guilty party when it is under the state's control, or the possibility of cooperation in cases where the local government is too weak to control the groups operating from its territory. If these negotiations fail because of the given state's unwillingness to cooperate, the government of the afflicted country should have the right to pursue military means against the targets of liable terrorists.

Most short term operations do not have a problem passing the *proportionality* criterion in the jus ad bellum context as the traditional reprisals involve a bombing or an assassination and such operations tend to keep the costs in terms of loss

of troops on the low side. However, operations that involve an invasion of ground troops need to be carefully evaluated in terms of the likely costs compared to possible benefits.

Counter-terrorist operations should be judged not only by the justification under which they are carried out, but also by the manner in which they are executed (*jus in bello*). Of major concern in this instance are the criteria of *backward proportionality and discrimination*. If the original terrorist attack resulted in a limited loss of life, the retaliation also has to keep casualties to a minimum. And even if the terrorists targeted civilians, states are strictly forbidden from doing the same. This, in reality, might present a practical problem due to the covert nature of terrorism; terrorists may intentionally hide among the civilian population to disable the possibility of their precise targeting. Still, states have the right to pursue the suspects as long as they make an honest effort to exclude civilian casualties. Intentional targeting of civilians in an attempt to demoralize the terrorists and to deter potential recruits should be firmly forbidden, as the use of such tactics puts the state at the moral level of indiscriminate terrorists.

CONCLUSION

Surprisingly little has been written to date on the ethical issues involved in using force in response to terrorism; the contemporary debate seems to oscillate around the term 'effectiveness' instead. In this debate, a perceived tradeoff between an effective and a moral response plays a major part. One side argues that by moral restrictions the states counter-terrorist policy will be reduced to a policy 'without teeth'. The other side contends that by striking militarily, states will only feed the circle of violence and will provide their non-state adversaries with increased support. Both sides of the argument make sense, but what this debate is missing is the fact that the dichotomy between an effective and an ethical military response to terrorism is *not* a zero-sum game. The main point to be made is that by following the rules discussed in this paper, the likelihood of occurrence of counter-productive results of military response to terrorism will be significantly reduced and this will implicitly result in increased effectiveness of the response itself. If, on the other hand, governments do not extend the effort to make their struggle against terrorism a just one, the growth in number of recruits and sympathizers of the attacked terrorist organization will replace or even exceed any inflicted losses in operational capability of the group and the response will end up being counter-productive. In conclusion: a military response can be both moral and effective. At the same time, we should not expect to completely remove the aspiration to pursue political goals by violent means through the use of retaliatory air strikes and assassinations only. Aggressive measures will not make the grievances underlying terrorist struggles disappear. To be successful, these measures can only be a part of a more comprehensive strategy.

ENDNOTES

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MILITARY RESPONSES TO INTERNATIONAL TERRORISM

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