

Purity of Arms and the Immunity of Non-Combatants: An Unconditional Prohibition

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Ethics, particularly military ethics, the philosophy of the Halakhah (Jewish law), and Halakhic studies, recognize two views in distinguishing between combatants and noncombatants: the standard approach and the nonstandard approach. The standard approach tends to blur the distinction between combatants and noncombatants and lumps together the morally culpable and the guiltless. For reasons that are obvious to all, this division does not work. The nonstandard approach presents the opposite approach, drawing a clear line between combatants and noncombatants. I would like to present a third approach, which, in my opinion, is simpler and more rational in every way. Very often, discussions of guerilla warfare fail to note the critical discrepancy between that kind of warfare and terrorism. What the two have in common is that they are operated by irregular forces. The difference between them, however, is that according to its classical definition, guerilla warfare implies actions taken by irregular forces against combatants, whereas terrorism involves actions against noncombatants. However, in truth, even regular forces can engage in terrorist acts. In my opinion, the view that a state cannot engage in terrorism, meaning that no act that the state perpetrates can be called an act of terror simply by virtue of the fact that it is performed by the state, is somewhat dated. Clearly, countries like to raise that argument, but the notion of state-initiated terrorism is obviously not out of the ordinary, and is in fact quite straightforward. Guerilla warfare therefore constitutes one form of activity by irregular forces against combatants or an army, in effect, against a state or a state-sponsored force, whereas terrorism involves an intentional attack

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on civilians. There are further terms and conditions to define an operation as an act of terror, but this is the crux of the matter.

When this type of terrorism is discussed, it generates moral condemnation, and clearly the people who direct rockets at civilian population centers are considered terrorists. This is beyond doubt or discussion because they intentionally target a civilian noncombatant population. Our moral condemnation of terrorism was echoed by President George W. Bush when he declared war on terrorism after the 9/11 attacks in a statement that can be paraphrased as follows: "It makes no difference what your goal is, and no matter how justified it is; attacks on civilians are simply unlawful and proscribed. Regardless of how justified your cause is, and whether it was motivated by the desire to obtain national liberation, wage war against evil, or fight against imperialism – certain actions are simply not done." In essence, that which characterizes terrorism and that Bush tried to combat with the support of the world is what breeds the basic revulsion that decent people feel toward it. This is precisely the point: that unrelated to its goals, terrorism targets non-fighting civilians.

I agree that the end does not justify the means. I believe that in the enlightened world, and even in the semi-enlightened world, universal condemnation of terrorism is a sentiment that is very deeply ingrained in all human beings. Perhaps describing this feeling as "universal" is a bit exaggerated, but there is certainly vehement and very widespread denunciation of terrorism – and this is the core of the matter.

As Israelis, terrorism is, sadly, a familiar phenomenon. Our natural aversion from, and repudiation of, the terrorism from which we suffer from time to time, and the moral abhorrence we feel toward terrorism is the basis for our war against it. I therefore find it difficult to accept the argument that this attitude is based only on some kind of consensus. The moral distaste for terrorism, the absolute negation of the intentional use of offensive means against noncombatants, underlies the hallowed principle of the immunity of noncombatants. This is more than a convention; it is such an obvious and undisputed moral element that it renders all theories about it redundant.

What people often tend to hold against philosophy is that it seems to search for ever-finer distinctions and complex academic concepts. This is true. Philosophers do indeed delve into hair-splitting discussions. At times this seems to be a dreary undertaking, involving quibbling over

theoretical notions when matters are actually crystal clear, clearer than any other explanation we can come up with. The source of our abhorrence of terrorists derives from the fact that they intentionally target noncombatant civilians.

What needs to be explained is not the noncombatants' immunity. Of course noncombatants have immunity: that is beyond dispute. The question is why it is permissible to harm soldiers, who are sometimes called up to duty, who believe that their war is just, and who operate under pressure or coercion. Still, they are not holding a gun at this moment and are not directing fire at us. It is necessary to explain in very clear and unambiguous terms what justifies the killing of these soldiers.

The above-mentioned third approach, which I am presenting herein, claims that soldiers are not automatically morally culpable, but when they shoot at me, the justification for killing them becomes an act of self-defense. The problem is that this ostensibly vindicates only hitting a very small subgroup of soldiers, because most soldiers do not in fact engage in shooting. What then is the acceptable ratio between those who shoot and those who refrain from shooting? Is it 1:8, or maybe 1:10? This depends on the effectiveness of the military organization, and this factor can conceivably drive the ratio even higher, since most of the troops do not even cock their guns. Certainly international law, as well as elementary ethics, sanctions killing soldiers in general. This leads to the tough philosophical question of how to rationalize and explain the license to harm soldiers who are not shooting without extending this license to apply to harming all the people on the other side, including women and children.

There are answers to this quandary. Everyone acknowledges that wars, even asymmetrical wars, cannot be adequately characterized as a mass brawl or a squabble between 1,000, 2,000, or even 1 million people on the one side against several thousands or millions on the other side. They are not a duel multiplied by a large factor. War and warfare are interactions between groups and organizations, and the same exact characterization of an army's actions – not as the sum total of its individual members' actions but as the collective operation of an organized entity – is critical for the understanding and the moral-ethical perception of the phenomenon of war and warfare. Therefore, in the case of regular armies, anyone who belongs to a fighting organization, or in short, anyone who wears a uniform, is part of that organization. He enables it to function; he is the one who returns

the fire at those who shoot first, and this makes him part of the threat. It is therefore permissible and legitimate to take action against him in self-defense. Obviously, the act of self-defense, when carried out by soldiers, is more than just an act of protecting their own personal lives; it is an act taken in defense of the collective as part of the defense of the sovereign existence of the nation that they are protecting.

In short, this is the essence and epitome of the dilemma. What needs justification is not the question of the immunity of noncombatants, but rather the question, why not be a pacifist? This is a very serious question. Why is it permissible to kill the enemy's soldiers in war even though on an individual basis, none of the troops are culpable, or any more culpable than the politicians or the civilians on the other side? The dilemma concerns not the personal moral guilt of a certain individual. The challenge, therefore, is to explain how we can justify the injuring of soldiers. Surely the soldiers themselves understand this problematic issue. If, in a scenario that currently sounds surreal, war breaks out between Israel and Syria, when an Israeli soldier shoots at the Syrian soldier, he will not think of himself as a murderer. The Syrian soldier who fires at the Israeli will likewise not consider the Israeli soldier as a killer. Soldiers worldwide understand very well that fighting against each other is part of the deal.

By contrast, soldiers from any side who intentionally attack civilians are terrorists. It is impossible to reconcile the solidarity with, and the deep moral condemnation of, abhorrent terrorism – a sentiment that is shared by the entire Israeli population, by President George W. Bush, and many others in the world – without, in the same breath, also endorsing the absolute prohibition on attacking the foe's noncombatants. These are the two sides of the same coin. If we want to loosen the reins and forego the prohibition on harming noncombatants, a ban widely referred to in Israel as "the purity of arms" or morality in warfare, we must by the same token also relax our condemnation of, and revulsion toward, terrorism. If we rightfully denounce terrorism because of its heinous support for the dastardly belief that the end justifies the means, and when those means involve killing noncombatants, then we ourselves must also clearly adhere to the prohibition on harming noncombatants. In fact, the chapter on "the purity of arms" in the IDF's ethical code, known as *The IDF Spirit*, explicitly states that IDF soldiers are not allowed to use their weapons or apply force against noncombatants.

When we talk about noncombatants in the context of combat in a densely-populated area, we refer to fighting against guerilla fighters. In the Israeli context, we have been fighting against both guerillas and, very often, also against terrorists. The Israeli government and the media, which refer to the perpetrators as *mehablim* (literally, terrorists or “ruiners”), thus obscure the distinction by calling both those who operate locally or on a limited scale and exclusively against IDF soldiers, as well as those who plant bombs, *mehablim* – as was the case with the Netanya Park Hotel attack at the Passover Seder in 2002, when 30 civilians were killed and 140 others were injured. This fudges and confuses the public discourse. We have been dealing with guerilla fighters who are fighting against our soldiers, and with terrorists. Very often these are the same people, but this is not always the case.

When they fight against noncombatants, they target civilians. This makes them terrorists. In this context, the question of who is a combatant is tricky, especially as they do not wear uniforms, although, clearly, and for a variety of reasons, it is unrealistic to demand that they wear them. Yet whom do we define as combatants or as noncombatants on the other side? Here Israel seems to have set a precedent in drawing a distinction between “involved” and “uninvolved” parties. In other words, although it is impossible to establish a fighter’s specific rank, and since he does not always wear a uniform or carry the soldier’s ID associating him with any fighting body, nonetheless he is *de facto* an involved party. He either prepares bombs or orders the fighters to fire missiles at civilians or soldiers. That certainly makes him involved. In this sense, the conceptual and operational differentiation is decidedly called for, as these are not combatants who fit the same category as regular army personnel, but combatants who can instead be seen as “involved” parties. Amending this definition was absolutely necessary, but it requires some fine-tuning to facilitate a precise definition. Ultimately, we will have a distinction between involved and uninvolved parties that from the moral-ethical aspect will be completely congruent with the classic distinction that we must continue to endorse and that *The IDF Spirit* continues to uphold to this very day, namely the distinction between combatants and noncombatants, between involved and uninvolved parties. As for harming uninvolved parties or parties that had not been defined as involved, the prohibition on harming noncombatants, civilians, or innocent victims as per their common

definition – though not in the moral sense, but in the traditional sense that is commonly acceptable in such cases – applies as always.

To recap: What warrants justification is the harming of combatants, or involved parties. The ban on harming civilians, uninvolved parties, or non-combatants is the alpha and omega of “Thou shalt not kill.” No special rationalization for that is necessary. Hence our loathing of terrorists for systematically and intentionally violating that prohibition. There is no need for any intricate philosophical debate, consensual theory, or any other theory to rationalize these sentiments. What we need is to define the group of combatants or the members of the involved party as a group that has forfeited its immunity, and as one against which we are entitled, indeed, are obligated to, act. In this sense, the Biblical proscription against killing is universal. The Mishnaic sages said: “Beloved is man, that he was created in His image” [Avot Tractate 3:14], and “If anyone saves a single life, it is as if he saved a whole world” [Sanhedrin 4:5]. The equal value of every human being as such, and the fact that all humans are all included in the commandment “Thou shalt not kill,” plus the fact that that very same unconditional immunity applies to noncombatants, remains firmly in effect. Yet this immunity excludes someone who becomes a combatant, an involved party, or a member of an organization that uses force and constitutes a threat, against whom one has the license to act.

We have thus far discussed intentional and deliberate injuries. The required amendment of the “purity of arms” section ought to say that we shall not use force to harm noncombatants or uninvolved parties. Yet what about the collateral damage and unintended harm? In recent years, a heated debate has been held all over the world, and certainly in Israel, concerning the balance between the safety and wellbeing of our soldiers versus the safety of the other side’s civilians. Plainly, the safest way for our soldiers to protect themselves is not to get embroiled in such situations in the first place. Thus, when soldiers join a justified military operation, they must a priori take into account the certain risk that is involved in carrying out that just and necessary mission. They thus jeopardize both their own lives and, if they observe the rules of “purity of arms,” they are also susceptible to causing incidental and unintentional harm to the civilian population, particularly when that fighting takes place in densely populated areas. In this context, the question is not the one that has sometimes been raised, i.e., whether the troops must risk their own lives to save other civilians’ lives,

but the more direct one, which asks whether soldiers are allowed to put civilians in danger to save their own lives. The proper prism through which this debate should be examined should be that of course the operation itself endangers everyone – the soldiers, the other side’s combatants, and the involved parties on the other side – but this is not really a moral quandary. This is something we rightfully want to undertake. The problem, however, is that this compromises both our own soldiers as well as the civilians on the other side. The ethical question, therefore, should be: What is the appropriate balance between the two? To argue that the soldiers must disregard their own wellbeing and safety and ignore those of their forces as they endeavor to do everything they can not to endanger the other side’s civilians is clearly just as irrational as the opposite: to claim that soldiers may engage in something that endangers the other side’s civilians in order to maximize their own safety and achieve a state of supposedly zero risks to themselves. The proper balance between the two is the quintessential question.