

# Upholding the Principle of Distinction in Counter-Terrorist Operations: A Dialogue

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**ABSTRACT** *Asa Kasher and Amos Yadlin have recently argued for a revised principle of distinction under which states should prioritize the protection of their own soldiers over that of noncombatants in certain combat scenarios. The situations that they envision are those in which a state's army is forced to fight terrorists on terrain which is not under the state's effective control. Kasher dramatizes the argument that the soldiers' safety should be prioritized by setting up a hypothetical conversation between the state and a soldier who asks 'Why should my state prefer an enemy citizen over me?' Kasher challenges his readers to offer the soldier a morally compelling answer. This article responds to Kasher's challenge by presenting a dialogue in which a commander (representing the state) offers the soldier four arguments which together provide a convincing answer. The commander grounds his arguments in differences in the amount of choice exercised by soldiers and civilians, the divergent ways the operation can be expected to impact on them, the different obligations they each have to the state, and the likely consequences of emphasizing the safety of soldiers over civilians. The dialogue provides support for the 'double intention' reading of the principle of distinction championed by Michael Walzer.*

**KEY WORDS:** Principle of distinction, counter-terrorism, targeted killing, civilian immunity, double intention

## Introduction

In a series of recent articles Professor Asa Kasher of Tel Aviv University and Major General Amos Yadlin of the Israel Defense Forces (IDF) have advanced a forceful argument for revising the humanitarian principle of distinction that lies at the core of both the law of armed conflict and just war theory (Kasher & Yadlin 2005a, 2005b, 2005c, 2009, Kasher 2007). Specifically, they challenge the adequacy of the crude conventional distinction between combatant and noncombatant in the context of current asymmetrical conflicts between states and terrorist groups, and the general obligation that follows from it to respect civilians' immunity from combat operations even at an increased risk to soldiers. They focus in particular on the

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exemplary case of what they call ‘targeted preventions of terror’ but which are also sometimes referred to as ‘targeted killings’ or ‘assassinations’. In regard to such operations, they argue for a more nuanced set of distinctions that take account of (a) whether civilians are under the effective control of the state carrying out counter-terror operations, and (b) whether the civilians are involved (directly or indirectly) in terrorism themselves. One important implication of Kasher and Yadlin’s revised principle of distinction would be that in certain circumstances states would be warranted in prioritizing the safety of their own combatants over that of certain civilians. Although this is not necessarily inconsistent with some historical accounts of the principle of distinction, it does clash with standard contemporary interpretations of the principle, including the seminal ‘double intention’ account championed by Michael Walzer. This article offers a critique of Kasher and Yadlin’s proposed revision of the principle of distinction and a defense of Walzer’s interpretation.

The issue at stake – whether to embrace or reject Kasher and Yadlin’s revised principle of distinction in regard to counter-terror operations – is of more than just scholarly interest. Both Kasher and Yadlin are closely connected with the IDF and their opinions may well be thought to influence its practice. In addition to holding the Laura Schwarz-Kipp Chair in Professional Ethics and the Philosophy of Practice at Tel Aviv University, Kasher is also a longstanding and influential advisor to the Israeli military who drafted the IDF ethical code of conduct in the mid-1990s. Major General Yadlin is not only the current head of Israeli Military Intelligence, but is also a former Commander of the IDF College of National Defense.

Moreover, while Kasher and Yadlin assert that their views are ‘not necessarily those of the IDF College of National Defense, the IDF or the State of Israel’ (Kasher & Yadlin 2005a: 41), this disclaimer does not tell the whole story. The ‘military ethics of fighting terror’ that Kasher and Yadlin articulate and defend were developed and first presented in 2003 when they were members of a team at the IDF College of National Defense, and their recommendations were subsequently approved in principle and employed as training guidelines (Kasher & Yadlin 2005a: 45; Harel 2009). Following Israel’s recent Operation *Cast Lead* in the Gaza Strip, *Haaretz* military correspondent Amos Harel and others charged that ‘the guidelines suggested in the [2005 Kasher and Yadlin] article are indeed the ones that govern the IDF’s conduct in battle’ (Margalit & Walzer 2009: 21; Harel 2009). Indeed, according to Harel, Kasher himself confirmed in an interview that the army operated during the Gaza operation in accordance with the code of conduct for counter-terror operations that he and Yadlin had helped to develop (Harel 2009). According to United Nations reports more than 1300 Palestinians were killed in the Gaza operation, in contrast with 13 Israelis (the IDF reported 1,166 Palestinian dead, at least 709 of whom were ‘ Hamas terror operatives’) (United Nations Radio 2003; Lappin 2009). The casualties connected with Operation *Cast Lead* have occasioned enormous controversy both within Israel and around the world over the rules of engagement employed by the IDF. Of course, not all of those casualties, and particularly not all of the

civilian ones, can be attributed to the IDF's interpretation and application of the principle of distinction. Nonetheless, it is highly plausible that the kinds of argument advanced by Kasher and Yadlin have influenced Israeli combat practices, and in at least some cases those practices have affected the numbers of combat casualties and civilian casualties in particular. So, grappling with Kasher and Yadlin's arguments is not only of scholarly interest, but also of urgent moral importance.

In his most recent article advocating his revised principle of distinction, Kasher suggests an evocative thought experiment. He asks his readers to imagine a conversation between a state and one of its soldiers who is being sent on a dangerous mission that demonstrates a 'preference to risk him rather than risking [harm to] an enemy citizen' (Kasher 2007: 166). The soldier asks the state why it is justified in unnecessarily risking his life in this way. Kasher challenges his readers to offer an answer.

This article takes up Kasher's challenge and suggests four moral arguments that could be offered to justify the contemporary reading of the principle of distinction and so for rejecting Kasher and Yadlin's revision of the principle. In the spirit of his thought experiment, it proposes the arguments in the context of a dialogue between a state (in the person of a commander) and a soldier who has posed Kasher's question of justification. The commander attempts to satisfy the soldier. While not all of the commander's arguments are successful, this article suggests, *contra* Kasher, that a sufficient moral case can be offered to uphold standard contemporary interpretations of the principle of distinction such as that offered by Walzer. Before turning to the dialogue, however, a brief overview of the principle of distinction is provided with the intention of clarifying how the contemporary readings of the principle differ from traditional accounts and where Kasher and Yadlin's revision challenges these contemporary interpretations.

### **The Principle of Distinction**

The principle of distinction has long been a central component of just war theory and comprises the core of the contemporary humanitarian law of armed conflict. The principle imposes an obligation on parties to a conflict to distinguish between combatants, who are legitimate targets of attack, and civilians, who are not. In essence, it forbids intentional attacks on noncombatants. The principle does not, however, preclude all harm to noncombatants. It has always been understood that the conduct of warfare will almost inevitably produce some harm to civilians.

The key traditional issues in determining whether harm to civilians violates the principle of distinction have been 'intentionality' and 'proportionality'. In essence, harm to noncombatants could be justifiable under the principle of distinction if it arises (a) as a concomitant of an otherwise legal military operation 'intended' solely against a legitimate military target (i.e. the doctrine of double effect)<sup>1</sup>, and (b) if the target's importance is proportional to the foreseeable likely harm to noncombatants (i.e. the principle of proportionality). In many traditional accounts of the principle of distinction,

operations had only to meet these two criteria to be justifiable. One implication of such accounts is that so long as an operation was planned with right intention and the expected collateral damage was proportionate to the value of its military objectives, commanders were under no further obligation to employ tactics intended to reduce the danger to civilians.

However, traditional accounts of this sort have long been subject to criticism as too vague and too lax. In particular, the calculus of proportionality seems dangerously obscure. How can civilian lives be measured against the importance of military objectives? Moreover, the question of intention is in large part subjective – commanders can almost always point to some military objective of operations, even if their intention is deliberately to punish a civilian population (that is, even if the military objectives are in fact of secondary importance). Similarly, the matter of ‘anticipated’ civilian casualties seems open to manipulation. Finally, as noted above, once the criteria are met, the principle of distinction on the traditional reading provides no further protection to civilians in the actual conduct of military operations.

For these reasons, many contemporary commentators have sought to strengthen the principle of distinction (e.g. Lee 2004). The most influential attempt was made by Michael Walzer in his 1977 classic *Just and Unjust Wars*. Walzer (1977: 156) argues that noncombatants have ‘a right that “due care” be taken’ not to subject them to unnecessary risk. This right emanates from the same source as the principle of distinction itself: life is precious and should be safeguarded as far as possible, consistent with the conduct of hostilities – hence the ‘immunity’ of those not directly involved in the war effort (ibid.: 146). Such people are ‘innocent’ in the sense that they are not direct participants in the war effort and, therefore, themselves pose no direct threat to combatants. They are also ‘defenseless’ in the sense that they lack the right to defend themselves by engaging in combat (or at least they retain their immunity only so long as they refrain from doing so). The principle of distinction thus serves the purpose of immunizing the innocent and defenseless from deliberate and unnecessary destruction. It thus restrains the destructive effects of war on those most vulnerable and least involved. The right of ‘due care’ is a logical extension of the principle of distinction flowing from that same purpose.

Walzer (1977: 156) therefore proposes that the principle of distinction be read as involving ‘a positive commitment to save civilian lives’. In essence, the state must not only intend that a legitimate military objective be achieved, but also that the unintended harms attendant on it be minimized – it must demonstrate a ‘*double intention*’ (ibid.: 155). One important implication of this reading is that where there is a tactical trade-off between increased danger to combatants and civilians, the *increased risk must be borne by the combatants*: ‘if saving civilian lives means risking soldier’s [sic] lives, the risk must be accepted’ (ibid.: 156). Indeed, Walzer (1977: 155) insists that the risk to civilians must be reduced ‘as far as possible’. Evidently, Walzer’s extension of the principle of distinction primarily addresses the conduct of operations rather than their proportionality or the intention behind them, but the need

to shift risk primarily onto soldiers may also have the beneficial side-effect of restraining the willingness of commanders to undertake operations that would incur such obligations (and hence may supplement the restraints of double effect and proportionality).

In sharp contrast with standard contemporary interpretations of the principle of distinction like Walzer's, however, Kasher and Yadlin argue that, in certain circumstances (in particular, when it comes to fighting terrorism), the state should privilege the safety of its own combatants over that of foreign civilians who are not under its effective control. They base this argument on what they term 'the Principle of Self-Defense Duty'. This principle asserts that it is 'the prime duty of a democratic state to effectively defend its citizens against any danger posed to their lives and well being' (Kasher & Yadlin 2005b: 8). At the moment, they argue that 'the defense of citizens from terror' is 'the prime duty' of the Israeli state 'since the danger posed by terror is new and is of a special nature'. Moreover, they stress, soldiers *are* citizens. Therefore, the Principle of Self-Defense Duty establishes the priority of soldiers' lives and well-being over those of persons who are neither citizens nor under the state's effective control (and hence under its protection, such as visitors or permanent residents) (ibid.: 13, 16).

As noted above, the exemplary case that Kasher and Yadlin treat is that of Israeli 'targeted killings'. In these contexts they additionally argue that the simple distinction between combatants and civilians, with a priority on protecting the latter, is too crude to do justice to the complexities of such operations. They stress that terrorists frequently hide among civilians and present themselves as civilians. Insofar as this occurs outside Israel's area of effective control, it can do little to prevent terrorists from hiding among civilians. This rather reflects a failure of local political authorities. By consequence, Israel 'does not have to shoulder responsibility for the fact that persons who are involved in terror operate in the vicinity of persons who are not' (ibid.: 18). Israel, therefore, need not accept increased risk to its soldiers.

In view of these considerations, Kasher and Yadlin offer instead a six-category scale running from those whom the state has the greatest obligation to protect to those to whom it owes the least such obligation. According to them, the state has a moral duty to pursue the following outcomes in order:

- (d.1) Minimum injury to the lives of one's own citizens who are not combatants during combat;
- (d.2) Minimum injury to the lives of other persons (outside the state) who are not involved in terror, when they are under the effective control of the state;
- (d.3) Minimum injury to the lives of the *combatants of the state in the course of their combat operations*;
- (d.4) Minimum injury to *the lives of other persons (outside the state) who are not involved in terror, when they are not under the effective control of the state*;
- (d.5) Minimum injury to the lives of other persons (outside the state) who are indirectly involved in terror acts or activities;
- (d.6) Injury as required to the liberties or lives of other persons (outside the state) who are directly involved in terrorist acts or activities. (Kasher & Yadlin 2005a: 49, 2005b: 15; Kasher 2007: 165, emphasis added)

A striking feature of this moral scale is that the state's moral duty to protect its own combatants (duty 3) is ranked above its duty to protect some (although not all) civilians (duties 4 and 5), including some civilians who are 'not involved in terror' (duty 4). Kasher and Yadlin's scale can indeed be seen as applying the low traditional principle of distinction protections for civilians to those outside the state's effective control while at the same time accepting the higher contemporary standards of civilian protection (like Walzer's) for noncombatants within the state or subject to its effective control. One consequence of Kasher and Yadlin's moral scale is that if Israeli officials are compelled, in order to prevent a terrorist attack, to carry out a targeted killing operation outside their area of effective control (such as in Gaza, Lebanon, or parts of the West Bank, presumably), and there are two plans before them, one of which imposes more danger on their own combatants and one of which imposes more danger on foreign civilians, then they *should* choose the latter. Kasher and Yadlin's primary justification for this is that the IDF is compelled to carry out the operation amidst a hostile population at a location not of its own choosing. It is the terrorist group that has chosen to operate in the midst of vulnerable civilians. In such circumstances, to ask Israeli soldiers to shoulder a highly elevated degree of risk in order to minimize the danger to foreign civilians (not under Israel's effective control) would violate the state's primary obligation to protect its own citizens (Kasher and Yadlin 2005a: 51–53, 2005b: 18). Kasher and Yadlin thus argue that the principle of distinction should be revised to take account of such cases.

### **The Thought Experiment**

In support of his case for revising the principle of distinction, Kasher offers the following thought experiment:

Let us imagine a conversation between a state and one of its combatants. Being sent on a mission that involves risking his life, the combatant asks his state, actually [in the person of] his commander, why it is justified, on the moral grounds of the basic principles of democracy and military ethics, to send him on such a mission. (Kasher 2007: 165–166)

This is a credible and important challenge, and the remainder of this article takes it up in the form of a dialogue within Kasher's thought experiment. It offers a defense of Walzer's reading of the principle of distinction.

For the purposes of the subsequent dialogue, Kasher's thought experiment is elaborated as follows. State officials have credible intelligence that a terrorist attack is imminent. They have determined that a targeted killing is the only plausible means of preventing what could be a devastating attack. However, the only place that they can be sure of pre-empting those preparing to carry out the attack is on the outskirts of city X located across their border, but in a territory which is not formally recognized as sovereign.<sup>2</sup> They can either (a) hit the location with an air strike, or (b) send troops in on the ground. Both plans have an equal chance of success, but plan 'a' is believed to involve a significantly higher danger to local civilians, while plan 'b' involves

a significantly higher risk to the state's soldiers.<sup>3</sup> State officials have opted for plan 'b' in coherence with the standard contemporary understanding of the principle of distinction. The Commander has just briefed the soldiers being sent in first in the operation. Before proceeding, however, he invites anyone who has concerns to raise them. A soldier assigned to the operation raises his hand and politely suggests that the operation poses too high a risk to himself and his fellow soldiers. He suggests that it is morally wrong to send men on such a mission given the availability of an equally plausible alternative that would avoid the risk to them (i.e. plan 'a' – the air strike). 'Why', he asks the Commander, 'is it justified on the moral grounds of the basic principles of democracy and military ethics, to send me and my comrades on such a mission?'

### **The Dialogue**

Commander: Well, for one thing, the rules of war as currently understood require us to distinguish between combatants and civilians and to protect the latter over the former. You are a combatant. Most of the people living in the city are civilians. We are therefore required to design our mission so that the burden of risk is borne primarily by you and your comrades.

Soldier: I understand that. But that answer only begs the question, sir. I am not asking you what the conventional rule is, but what the moral justification behind it is. Fighting against terrorists, who do not wear uniforms and hide among civilians, is clearly different from conventional wars, so it may be that different rules should apply. If we are forced to fight terrorists in the midst of civilian populations because they have chosen this field of battle, then I don't see why we must take responsibility for the fact that civilians may be exposed. Why are we morally bound to follow the conventional rule under such unconventional circumstances?

Commander: But even in conventional wars, it's not as if the army always gets to pick and choose its fields of battle. Sometimes concentrations of enemy forces are in the vicinity of civilian centers, maybe even deliberately. The fact that they are does not warrant us in discounting civilians' lives in relation to those of our soldiers. We are still required to distinguish between soldiers and civilians and to direct our military operations solely against the former. As you know, in those circumstances the principle of proportionality would permit us to undertake operations that pose some danger to civilians, provided that it is a necessary corollary to the pursuit of a legitimate military objective which is proportional to the danger of collateral damage, and that we take appropriate precautions to minimize the danger to civilians including assuming more risk to soldiers. So the circumstances you describe are not so unconventional, and it makes sense to adhere to the conventional laws.

Soldier: Now we're back to quoting conventional laws of war. My point is that I'm not sure why they apply. And that is not simply a matter of not choosing the

battlefield. It's a whole new constellation of factors including terrorists' wholesale and systematic defiance of the rules of war. Why should I die, and leave my family unprotected, to uphold rules that they flout with impunity?

Commander: Well, terrorism is hardly new. In the first century CE the *sicarii* murdered their enemies on the streets of Jerusalem. And even the deliberate use of military-scale force against civilians is hardly new – think of Hitler's Blitz. The standards of just war and humanitarian law were formulated to distinguish and discourage such crimes. So I'm still not convinced that there is a compelling reason to assume that the conventional rules of war do not apply to an armed struggle with enemies who employ terror. Because an enemy violates the rules of war, it does not justify us in doing so. Consider, if an enemy killed some POWs, would we be justified in killing an equal number? No. What we would be justified in doing would be bringing the war criminals to justice. The moral imperatives and corresponding laws are not, and never were intended to be, conditional on reciprocity. Each side is independently bound to uphold them. So I'm not sure that either the question of the choice of battlefield or the question of breaches of law throws the authority of the core principles of just war or humanitarian law into question.

Still, we don't need a specific trigger to justify examining the moral bases of the laws. They should always withstand scrutiny. So let's consider the challenge you raise. As I understand it, you want to know if the state can offer you compelling moral reasons for putting your life at higher risk in order to reduce the risk to civilians (not under its effective control) in the course of the 'targeted killing' operation we've planned.

Soldier: I don't have my case exclusively in mind, but it can serve as a good case study.

Commander: Alright. I will offer you four such reasons. They can be described as (i) choice, (ii) benefit, (iii) obligation, and (iv) effect. I hope that you'll find at least one of them convincing – although I think you will be moved by more than one.

Soldier: I'm listening, sir.

Commander: Let's begin with the first argument – 'choice'. You chose to serve, while those civilians in the targeted city did not choose to be in the line of fire. You therefore bear a moral responsibility for your choice that they do not share. As a result, it would be unjust to discount their risk in relation to yours. You must bear the consequences of your choice, they should not. So we should accept the danger of sending in soldiers on the ground and forego the airstrike option.

Soldier: I did not choose. I am performing my mandatory service, sir. I have a wife and children. All things considered, I would prefer to be at home running my business. Of course, I'm willing to fight for my country *if*



*necessary*. But before I undertake this hazardous mission, and put the welfare of my family at stake, I want to be convinced that the state has the right to risk me in preference to people who are not citizens – and indeed who may be supporters of terrorism. Insofar as they support terrorist activities, are they not making a choice, and contributing to the creation of the situation that places them at risk?

Commander: Well, I think we can agree that people who we know beyond reasonable doubt are systematically carrying out attacks on our civilians may be treated as combatants, and are subject to attack. Yet even in those cases we are committed to arresting them if we can, for practical, moral and legal reasons (after all, we haven't actually established their combat status through a judicial process). You're also right that some apparent civilians make a moral choice by directly and substantially supporting terrorists' activities without fighting themselves or becoming actual targets. For example, they may supply terrorists with guns or bombs, knowing how these are going to be used. And if we are able to identify such persons with certainty and specificity, then we can examine the seriousness of their involvement and decide whether it is sufficiently direct and substantial to justify treating them as combatants. But I don't agree that because some such people exist that we have a moral warrant to disregard the immunity of all civilians in city X. After all, I'm sure that you won't want to say that civilians surrender their immunity simply because they happen to be nearby to, or even because they may sympathize with, terrorist groups. And, of course, some among the local civilian population may be wholly opposed to terrorist groups. Surely we are not morally warranted in discounting their immunity and opting for dangerous airstrikes in order to maximize the safety of our own soldiers. Wouldn't that give them a serious moral grievance against us?

Soldier: Perhaps, if they were uninvolved. But even if they merely cheer acts of terror, shouldn't they bear some of the consequences of what they encourage?

Commander: Well, I think that we must assume that people in the city X are civilians unless we have specific and persuasive evidence to the contrary. Correspondingly, we must assume that they have made no choice that would justify stripping them of their immunity and unnecessarily endangering them unless we have evidence to the contrary – and I don't think evidence of sympathy is sufficient – after all, people shouldn't lose their immunity for what they feel or think. To be a combatant they must pose a direct threat.

At the same time, your point that many soldiers are doing mandatory service and have also not chosen to expose themselves to danger is well-taken. It provides a good reason for asking for volunteers to undertake the most hazardous operations, at least wherever possible. But I wonder if the point is as decisive as it seems. After all, you and other conscripts have exercised a degree of choice: you have chosen to remain in this country knowing the well-publicized requirements for national service. In that sense you could be said to have chosen to serve.

Soldier: So the choice that you think I have is to abandon my home, family, nation and state and immigrate to a foreign land to begin life anew. I don't consider that much of a choice.

Commander: Well, it can certainly be seen as a pretty constrained choice. But it's worth remembering that that may also be the kind of choice facing civilians who find themselves living in areas in which terrorist groups operate. They may be able to move away (or, given the scope of terrorist activities and the difficulties of immigration they may not), but at best only at some of the same kinds of costs. They may not consider that much of a choice either.

So I guess this argument from 'choice' ends in a loose stalemate, neither providing a strong basis for preferring danger to soldiers or to civilians. It is safest to assume that neither has fully 'chosen' their roles (although I still think that this argument would have real bite in relation to volunteer soldiers and armies).

Soldier: I'll accept that provisionally. But this first result can't help you. You're making a positive claim for endangering soldiers rather than civilians, and that's what you're doing with this plan you propose. I'm still waiting for a convincing moral rationale for doing this.

Commander: Let's consider my second argument, which involves 'benefits'. It goes like this: the operation is being undertaken to improve the security of your country, and so of your family, friends and co-citizens. It is you and they who stand to gain – not the civilians in city X. It is therefore citizens like you who should bear the risk of the operation – not the civilians in the target zone; so we should go in on the ground and not rely on airstrikes.

Soldier: But people in the combat zone may well benefit from the elimination of the terrorists. Terrorists often tyrannize the local population. Certainly, they frequently expose them to dangerous retaliations. So the people in the target city will also gain if the terrorists are removed from their midst.

Commander: At best, improvements in local security would be an unintended by-product of our operations. We don't carry out military operations to improve the security of non-citizens. Moreover, it is in many cases doubtful that locals would perceive the elimination of some terrorists as actually contributing to their security. Indeed, many locals will not perceive our targets as terrorists at all. They are often seen as heroes of resistance (think, for example, of Hezbollah in the eyes of many Lebanese, especially in the South). In a case like Gaza, Hamas is assuming the role of government and providing some public order and goods. Correspondingly, the elimination of their people will be perceived to diminish rather than improve security – and in fact in some cases it may well do so. It is experienced then as a serious harm. Of course, you may argue that in spite of the subjective harm the condition of the local citizens is nonetheless objectively improved, but such an argument would be at best very difficult in the face of a strong subjective

perception of harm. And indeed, in at least some cases we clearly do an objective harm, especially when we end up injuring or killing civilians in the course of an operation. Now, if we are acting to protect ourselves, even at the risk of doing harm to civilians there, it stands to reason that we should bear the brunt of the risk in undertaking such operations. So once again we should go in on the ground and not rely on airstrikes.

Soldier: Well, I'm not convinced that what we're doing represents a moral harm. After all, we're trying to prevent acts of terrorism. Yes, these acts are generally directed against us, and so preventing them is mainly intended to protect us. But we didn't create the situation in which such acts are being carried out. It's the civilians over there who are supporting acts of terror, even if it's only in spirit, and therefore creating an environment conducive to such acts. So they are responsible for bringing about the whole circumstance – or at least they are more responsible than me. So I ask again, why should my life be put at risk rather than theirs?

Commander: For one thing, many of the civilians in question are not going to accept your view that they are responsible for creating conditions conducive to acts of terrorism. They think we are. I suspect in fact that it is rather a shared responsibility, but the question of historical responsibility for current circumstances is vast, hugely complicated, and unlikely to be resolved to everyone's satisfaction. Still, I think that you will agree with the much narrower point that the immediate purpose of operations is to improve our security, and the further claim that if that is our purpose then we are morally obligated to assume some of the risk to our combatants that goes with that.

Still, you may understandably be dissatisfied with the level of risk that we are assuming, and may want to know why you are morally obligated to assume that degree of risk, while the risk to civilians in the operational zone is correspondingly diminished. So let me offer you a third line of argument that may help. This argument concerns 'obligation'.

Soldier: Alright.

Commander: The argument goes like this: you benefit from the membership in the political community that we work to protect. You benefit from its laws, institutions, programs, and the civil society that these support. Indeed, as a citizen in a liberal-democratic political community, you are assured of a voice in shaping these institutions. But this favorable environment is not maintained without cost. And insofar as you are a beneficiary of it, and a participant in shaping it, the state has a moral basis to call upon you to share in the burdens of its maintenance and protection, including serving in the armed forces, and discharging the ethical obligations that come with that public service, including assuming appropriate risk. Notice, none of this is true of civilians who are not under the state's effective control. They have not generally shared in the benefits of citizenship, and are therefore under no moral obligation to undertake risk in its name. So the state is in a position to call upon you to

take risks on its behalf, but not on them. Accordingly, if there is a risk that must be allocated between parties, the state not only can, but *should*, ask you to assume the greater bulk of the risk. It therefore has a moral case for upholding the contemporary understanding of the principle of distinction and for sending soldiers like you in on the ground rather than relying on airstrikes.

Soldier: But I'm not arguing that I shouldn't have to assume any risk. As I've said, I fully acknowledge the obligation to defend my country when necessary. I understand that assuming risk is part of being a soldier. My question is why I must assume risk that is not strictly necessary on behalf of foreign civilians.

Commander: Well, I've tried to show why the state not only has good moral reasons to ask you to defend it as a soldier, but also why it has grounds for asking you to share a greater degree of risk in executing its operations than non-citizen noncombatants (that is, more of what you term 'unnecessary risk'). But perhaps I can reinforce this argument by pointing out that assuming such risk is widely understood as part of what it means to be a soldier today. For example, the IDF's own ethical code, 'the Spirit of the IDF', provides, under its value of 'Purity of Arms', that 'IDF soldiers will not use their weapons and force to harm human beings who are not combatants . . . and will do *all in their power* to avoid causing harm to their lives, bodies, dignities and property' (IDF 2009, emphasis added). Here, 'all in their power' may certainly include assuming some additional risk (although property obviously warrants less risk than life). This commitment in turn reflects one of the IDF's three 'Basic Values', specifically 'Human Dignity' – 'Every human being is of value regardless of his or her origin, religion, nationality, gender, status or position'. And this commitment is by no means unique. According to the current *U.S. Army & Marine Corps Counterinsurgency Field Manual*, the standard of moral and ethical conduct 'obligates soldiers and Marines to accept some risk to minimize harm to noncombatants' (U.S. Army & Marine Corps 2007: 244). Specifically, it asserts that 'Proportionality and Discrimination require combatants not only to minimize the harm to noncombatants but also to make *positive commitments* to . . . assume *additional risk* to minimize potential harms' (ibid.: 247, emphasis added). So, I'm arguing that the state has the right to ask you to defend it as a soldier, and that part of the ethics of soldiering, of what it properly means to be a soldier today, is to be prepared to assume some additional risk where possible to reduce harms to noncombatants.

Soldier: Well, that seems an unreasonably high ethical standard to impose on soldiers. I mean, what if the strategy that best protects civilians is effectively suicidal for soldiers? Are you seriously saying that soldiers would be ethically required to march into certain death?

Commander: A fair question. And the answer is 'no'. Here the US Manual again puts it well: 'At the same time, combatants are not required to take so

much risk that they fail in their mission or forfeit their lives' (U.S. Army & Marine Corps 2007: 245). As this suggests, the ethical requirement for 'due care' cannot require a choice of means that is effectively suicidal or impossible. In essence, I take this to mean that we are required to design missions, where possible, so that *the majority* of risk is borne by soldiers where this *substantially reduces* risk to civilians and does not render the operation unviable (for example, by making it suicidal or impossible). Obviously, these standards require a degree of judgment. But in our estimate of the current operation before us, the chances for success on the ground and with the airstrike are equally good, and while the risk to soldiers like yourself will be increased with the ground operation, it will not be unreasonably high, and the result will be to substantially reduce the danger to local civilians.

Soldier: I fear that our estimates both of the risks involved here, and of what qualifies as reasonable, differ.

Commander: Fair enough. But let's lay our differing estimates aside for just a moment. Do you agree that the state has a case *in principle* for asking you to assume some risk on behalf of civilians who are not under its effective control?

Soldier: No, not yet. But I'll admit that there is something in the argument about an obligation to serve and an ethics of service.

Commander: Good. Now let me offer you a final argument of a more consequential nature. This is what I've called the argument from 'effect'. It goes like this: if the state were to offload the risk of targeting operations onto the local civilians, it would produce two bad outcomes (and maybe a third and fourth): (a) it would sow hostility within the populations subjected to risk; and (b) it would muddy the distinction between terrorist acts; and legitimate counter-terrorist operations. A further related effect is that it might (c) make it more difficult to eventually move towards a peaceful resolution to the political situation – although this is admittedly a more distant and controversial effect. Another thing that worries me is that (d) if the army could rationalize collateral harm to civilians simply by appeal to the necessity to maximize the security of its own soldiers, it might be tempted to undertake a great many more operations that pose a serious threat to civilians not under its effective control. It might then end up doing a lot more harm – a result which is not only bad in itself, but would feed back into the first two harms ((a) and (b)).

Anyway, I won't say more about the latter two concerns ((c) and (d)) because they are somewhat speculative. But let me explain what I mean by the first two ((a) and (b)). There seems little room for doubt that targeting operations that seem reckless in relation to civilian injuries will generate increased local hostility. This will especially be the case if, as is likely, the result of such recklessness is increased civilian casualties. Now, I want to suggest that growing hostility and distrust are bad in and of themselves. But

they are even worse if, as seems likely, they lead to increased support for, and cooperation with, the very terrorist groups we are trying to combat. In that case, our targeting operations may well prove counter-productive.

Moreover, the increased support effect is likely to be exacerbated if the distinction between terrorist and counter-terrorist operations becomes more blurred. Although there is a great deal of controversy around what defines terrorist actions, they are most conventionally understood to involve the deliberate harming of civilians in pursuit of a political agenda. Counter-terror operations are understood as directed exclusively against terrorists with the intention of preventing attacks and thereby protecting civilians. However, if we privilege the safety of combatants over civilians not under our effective control, then we open ourselves to the moral charge that we are no different from the terrorists: we are deliberately putting civilians at risk, and in some cases harming them, in pursuit of a political agenda – improving our own domestic security, not negotiating over our political policies, etc. I'm not saying that we would become terrorists. I think that there would still be distinctions worth defending. I'm just saying that the distinctions would be much finer and, in many cases, difficult to defend to the world and to ourselves – it's much better if we can sincerely say that terrorist attacks are intended to kill as many civilians as possible whereas counter-terrorist operations are ultimately devoted to the protection of civilians.

Soldier: That's all very well, but I notice that you yourself don't even maintain that there would be a complete collapse of the distinction between terrorism and counter-terrorist operations. You're just saying that from the perspective of 'publicity' it would be more convenient to maintain the sharpest of distinctions. And you speculate on the impact these distinctions would have on the psychology of civilians in the zones of operation, and on the world community as a whole. But I don't find your speculations terribly persuasive. I think that the civilian populations in question are implacably hostile to us anyway, and that we are unlikely to find much support for our preventive operations among our allies or indeed 'the world community' anyway. Most importantly, all of these considerations seem to me weak and doubtful when compared with the immediate prospect of losing my life and leaving my family bereft – through absolutely no choice of my own.

Commander: So, am I right then in thinking that you do see some of the negative consequences I see in privileging combatants over civilians – but you don't think that they're as serious as I do, and certainly not as serious as the increased risk to you? But still, aren't these consequential concerns at least an additional contributor to the arguments from benefit and obligation?

Soldier: The arguments from effect may add something but not much. And I'd like to remind you that some of your attempted arguments, like the one from choice, really went nowhere at all. But more to the point: I think that you may be exaggerating the force even of your remaining arguments. In particular, there is something that you may have overlooked in your argument

from obligation. If the soldier, even the conscripted soldier, has an obligation to the state that nurtured him or her which includes risking life and limb, then doesn't the state also have an obligation to the soldier to continue to nurture him or her by, among other things, minimizing the risk to life and limb? This is not an obligation the state has to foreign citizens (not under its effective control), who are not obligated to fight its wars, pay its taxes, or comply with its laws. In short, the state owes something to its own citizens (including its citizen soldiers) that it does not owe to citizens or residents of other political jurisdictions. So when the state commits to protect citizens over soldiers, shouldn't it be only its own citizens it commits to protect rather than foreign citizens?

Commander: That's a strong point, but I think it is a little too simplistic. Of course, states have a very basic obligation to protect their own citizens. (Obviously soldiers present a special case, because the state is permitted to put them at risk to increase the safety of civilian citizens.) But the state also has external obligations, to other states and the world community. These include the obligation to uphold two forms of international rules, what is sometimes termed *jus gentium* (the general 'law of nations' or basic norms of the international system), and *jus inter gentes* (the 'law between the peoples' or the particular international treaties, conventions and agreements to which the state is party). There is no doubt that the core of the principle of distinction – the idea of civilian immunity – is deeply embedded in both the general law of nations and the specific treaties to which virtually all states, including Israel, are party (including the Geneva Conventions). My point here is that the state's obligation to protect its own citizens, although extremely important, cannot function as a trump here, overwhelming all other considerations. It is rather one of a number of fundamental duties that states must carefully balance in the light of the kinds of moral and practical considerations we've been discussing. Indeed, I think that the principles of military necessity and proportionality, and more recently the principle of double intention, are best thought of as ways of trying to balance internal obligations (such as the safety of the state's own citizens, especially noncombatants) with external obligations (to respect the immunity of foreign civilians). Thus, states may defend their citizens with military force, but only insofar as its actions are necessary and proportionate and designed with an eye to protecting foreign civilians (thus minimizing harm). Over time these principles have also become international norms.

Moreover, I just don't think that it's intuitively believable that states are generally obligated to always prioritize the safety of their own citizens or citizen-soldiers. If, for example, states were obligated to always prioritize the safety of their own citizens then wouldn't they be obligated when at war to bomb an enemy's cities into oblivion if that might end the war faster (and therefore improve the security of their own citizens, including soldiers)? That is obviously unacceptable. Even critics of the principle of 'double intention' don't generally question whether we are bound by the general principles of distinction and proportionality, even when they interfere with the optimal

protection of a state's own citizens. In other words, virtually everyone accepts that states have multiple and potentially conflicting moral obligations and must seek for a stable and effective balance. The upshot of these multiple obligations for present purposes is that in cases where the protection of the state's own citizens requires that foreign civilians (not under its effective control) are placed at risk, the state may take forceful action but is obligated to seek to reduce that risk to noncombatants even at the cost of significantly increasing the risk to its own soldiers. Do you agree?

Soldier: Well, I'm not entirely convinced. It does not sound to me like there is any logical necessity in the way the principle of distinction is framed today. It is simply a point of compromise. But it could as easily be agreed that in situations where civilians are necessarily at risk, we should equally balance the security of civilians and soldiers, or do so slightly in favor of soldiers.

Commander: Well, you're perfectly right that there is something crude and artificial about the reduction of the entire world into two opposed categories of combatants and civilians, and that in at least some circumstances the general principle of always protecting civilians may raise difficult moral issues. States could agree, and indeed historically have agreed, to different definitions of the two categories and to different ways of properly balancing risk between them. But the contemporary rules we commonly recognize today, such as the standard of double intention, do nonetheless seem commonsensical and therefore carry a force beyond simply having marked a point of compromise. Consider, for example, that it is states that finally authorize military operations, and these states have an obvious and strong interest, as you note, in the preservation of their own soldiers. They don't have nearly as strong an immediate interest in the protection of foreign civilians (especially when not under their effective control). So if one wants to retain an equilibrium of interests, then states need to be pushed hard to carefully consider and protect the interests of foreign civilians. If we were to allow states to prioritize the protection of their own soldiers, then we would be courting the danger of allowing the competing interest of foreigners outside the state's own effective control to be swept away entirely. On the other hand, by setting high standards for the protection of foreign civilians, states gain the expectation that their own citizens will benefit from restraints on enemy exercises of military force (just as by agreeing to treat enemy POWs well they improve the prospects for their own soldiers when captured).

Soldier: I'm not entirely satisfied with the manner in which you've just shifted from talking about ways to fulfill fundamental moral obligations, to commonsensical calculations about likely results. I still see a state's obligation to the security of its own citizens as primary, although perhaps in balance with other things including obligations to other states. And I'm not satisfied with your pragmatic rationale for *always* favoring the protection of civilians. If you're going to focus on pragmatics, why not say that the agreement is limited to states (who may be expected to behave reciprocally), but not to



terrorist groups (which are not party to the agreements and cannot be expected to uphold them)? In the case of terrorist groups, any consideration for enemy civilians has already obviously been swept away.

Commander: But isn't that essentially what we do? We treat international terrorist groups differently from states. That's why we are permitted (within certain limits) to treat direct participants in terrorist activities as combatants rather than civilians even though they don't wear uniforms, and aren't part of normal armies. In essence, terrorists lose their civilian immunity entirely, at least for a time. But the issue here is not how to treat the terrorists themselves – we agree that we can treat them as combatants – but how to treat other people who are not directly involved in terrorist activities but who happen to be nearby – in this case in city X. Why should the fact that terrorists are nearby deprive them of standard civilian protections (the same protections we claim for our own civilians, and that we are rightly outraged when terrorists violate)?

Soldier: Unless perhaps an active terrorist entity itself becomes the local political authority.

Commander: Well, I grant you that that might present an especially difficult case which could diminish the pragmatic rationale for generally prioritizing the protection of civilians, especially if this terrorist entity clearly repudiated the existing laws of war. Admittedly, this would effectively eliminate the expectation of respect for the state's own civilians or POWs. But because a terrorist group assumes political authority does not necessarily mean that all persons under its authority can be treated as part of that group (after all, some citizens may be wholly opposed to it or wholly apolitical). So the moral question remains, why does the seizure of power by a terrorist group warrant effectively stripping local civilians of their conventional combat immunity?

Moreover, there may be some additional practical reasons for not doing so. In particular, there may be some better alternatives when a terrorist group assumes authority than when dealing with an underground terrorist organization. For example, in assuming political authority a terrorist group takes on public responsibilities and becomes vulnerable to forms of pressure to which it was previously less susceptible. For example, if it continues to sponsor or tolerate acts of terror against its neighbors, such action (or inaction) could become a potential *casus belli*, leading to the legal use of military force to remove it. Short of armed force, the political authority could be isolated internationally and subjected to international economic, social and political sanctions. It could also be prosecuted in international courts. But all of this pressure to comply with international standards is only possible because the terrorist political authority stands out as a morally reprehensible violator of international standards. This isolation and pressure is only effective because states demonstrate their own commitment to these moral standards. So, in addition to the moral argument, there remains also a kind – although a different kind – of pragmatic value in upholding the priority of

protecting civilians even in the face of a terrorist political authority trying to defy those standards.

Soldier: Those are some pretty big and distant responsibilities to impose on a few conscripted soldiers who have everything to lose.

Commander: Yes, that's true. It is a heavy burden to be sure. But let's break this down. First, laying aside the exceptional circumstance of a terrorist political authority, do you agree that the state can make a moral case for asking a soldier to undertake a targeting operation wherein he or she accepts a higher degree of risk in order to diminish the risk to foreign civilians (not under the state's effective control)? Do you see the force of the arguments from benefit and obligation, and at least some residual strength in the argument from effects?

Soldier: Little from the argument from effects. But something, I suppose.

Commander: So you accept that, outside of certain exceptional circumstances, the state can make a moral case for upholding the standard contemporary understanding of distinction, and consequently can accept a greater risk to you to protect foreign civilians outside of its effective control (and hence opt, for example, for a ground operation rather than an airstrike).

Soldier: Yes.

Commander: So, the only remaining issue is the exceptional case of counter-terror operations in foreign territory controlled by a terrorist authority. Here we agreed that the moral status of the foreign civilians had not changed (unless they were directly involved in acts of terrorism), and that consequently they have the same claim to combat immunity as our own civilians. Further, we agreed that while some of the practical benefits to the state's citizens of upholding conventional standards of civilian protection would be lost, others (connected, for example, with isolating the terrorist authority and pressuring it to comply with accepted standards of civilized behavior) would be gained.

Soldier: Yes, but these so-called benefits are of distant and dubious value.

Commander: Well . . . perhaps. Still, the moral argument remains. But let me come back to this issue in a minute. First, I want to back up a step, going back to our general arguments concerning obligation and benefit. Do you still agree that the state has a claim on the soldier, via obligation and benefit, to undertake a degree of risk on its behalf?

Soldier: Yes.

Commander: Would it have these same claims in confronting a terrorist organization that had assumed political authority?

Soldier: Yes, those claims would remain the same, because they relate to internal obligations not external. But the political rationale for exercising those claims is cast into doubt, because the additional risk to the soldier no longer improves the safety of the state's own civilians (or POWs).

Commander: Fair enough. In the exceptional case of a terrorist authority, the costs and benefits would be more difficult to weigh. But who should be the proper final authority in evaluating those weights, and hence over whether we should comply with or defy international conventions: should it be soldiers like us? Or should it be the political authorities we've elected to lead us?

Soldier: The leaders, obviously. But what if their judgment is faulty?

Commander: Well, that would be excellent reason for voting them out of office. But that's not the question at issue today. Our question is whether the state has sufficient moral grounds to ask soldiers to assume a greater risk to protect civilians who are not under its effective control if, in the best judgment of its leaders, such an operation is in the best interest of the political community. In other words, can the state offer a sufficient moral case to warrant asking you to go in on the ground today rather than employing an airstrike? If they are the proper judges of what is in the public interest (at least between elections), and they have a legitimate claim to ask soldiers to assume risk, based on benefit and obligation (and possibly some consequential considerations as well), then don't they have a legitimate basis for directing us to conduct a higher-risk ground operation rather than a lower-risk airstrike, even in territory under the control of a terrorist group?

Soldier: Possibly, yes, in the short term. But it will be the soldiers who will, once again, be bearing the consequences of their mistakes. Well, if enough of us survive then maybe they'll eventually have to answer at the polls for their bad judgment.

Commander: Fair enough. But there's no election today. So enough with the kibitzing. Get off your duff and let's move out. We've got a ground operation to conduct.

## Notes

<sup>1</sup> The traditional doctrine of double effect as seminally formulated by Thomas Aquinas recognizes that actions may have multiple effects and asserts that sometimes a harmful side effect may be justifiable provided that the actor intends only to produce a distinct and justifiable effect. For example, Aquinas notes that 'one's action in defending oneself can have two effects: saving of one's life and slaying the aggressor' (Aquinas 2003: 170). He argues that as long as one aims only at the first effect, of saving one's own life, and, he adds, uses force in proportion to that end, the unintended second (harmful) effect, of slaying the aggressor, is justifiable. Similarly, Aquinas argues that public authorities may legitimately employ lethal force in collective self-defense, provided that they act only with the intention of securing that public good (and not, for example, 'motivated by private animosity'; see *ibid.*: 170).

<sup>2</sup> I set aside the issue of sovereignty here because it does not apply to the cases Kasher and Yadlin are most concerned with, and because it adds an additional factor of complexity. I do not suggest that the issue

of sovereignty would necessarily decide the matter either way, only that it would require additional discussion that for reasons of space must be foregone here.

<sup>3</sup> I do not mean by this to suggest that ground operations always impose a lower danger to local civilians than airstrikes, and therefore should always be preferred. All that is suggested here is that at least sometimes they do pose less danger to civilians, and that this is one of those cases.

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