Human Rights, the Laws of War, and Terrorism

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I

THE two terms—human rights and terror—look like a simple antithesis: human rights good, terror bad. My thesis is that the antithesis is not so simple. Of course, human rights and terror stand opposed to each other. Terrorist acts violate the right to life, along with many other rights. But equally, human rights—notably the right to self-determination—have constituted a major justification for the resort to political violence, including acts of terror, in the twentieth century. In this article I will consider the relation between these concepts from two sides: from the limitations that human rights impose on counterterrorism, and from the justifications that human rights accord terror. My purpose is to put pressure on human rights as a moral system, and to show its strengths and its weaknesses.

Let us begin with human rights as the chief set of principles that limit the types of ethically permissible action in a war on terror. Human rights both define what we are supposed to stand for and tie our hands when we seek to defend ourselves. Tying our hands behind our own backs is neither popular nor easy; but fundamental to the idea of all rights doctrines is the idea of precommitment. To believe in rights is to say we will not do certain things to fellow citizens or fellow human beings, no matter what.

Human rights are the rights we have as human beings, and therefore are the ones we cannot lose. They are not connected to political or civil status, moral worth or conduct. Even if you are a

very bad human being you still have human rights. If this is so, it has to be true that terrorists have human rights. Why not? Once rights are distinguished from deserving and moral worth, they are the entitlement of even those who despise the very idea of rights.

Like Ulysses tying himself to the mast so that he will not be tempted by the Sirens' song, democratic states pre-commit themselves to respect rights even when they are sorely tempted to abridge, even abolish them.[1] Terrorism is one of the biggest tests of a society's willingness to abide by these precommitments. To the degree that terrorists exploit the freedoms of a free society to circulate, to evade detection and to plan attacks, they tempt societies to jettison these freedoms. This temptation is not new. Indeed, it is as old as law itself. The Romans had an adage, *salus populi primus lex*—the safety of the people is the ultimate law—that justified emergency measures for emergency circumstances. In these circumstances, law itself should be no barrier to the ultimate safety of the people. In the name of that principle, modern societies faced with terrorist threats—Italy, Spain, Great Britain, for example—have curtailed rights to political participation. Groups that do not dissociate themselves from terrorist activity are not allowed to compete for votes or hold office. People suspected of association with terrorist organizations may be interned or held without trial. These abridgements of rights may appear justified by *salus populi primus lex,* but they conflict with the idea that rights are either unconditional or they are worthless.

Terrorist states of emergency illuminate a neglected aspect of the supposed universality of human rights. Most discussions of universality focus on the issue of whether rights are universal across *cultures.* But there is an equally important sense in which human rights should be universal as between *persons* and as between normal *times* and times of emergency. Terrorist emergencies put these universalist commitments under strain. The reason is not just that terror causes fear and fearful majorities have it in their power to oppress minorities; it is also that they can do so with little direct cost to their own liberties and rights. As Ronald

Dworkin has pointed out, there is no general tradeoff between *our* liberty and *our* security in times of terrorist threat, but between *our* supposed security and the liberty of small suspect groups, like adult male Arabs and particularly the subset of these groups that are in violation of immigration regulations (Dworkin, 2002). These abridgements of the rights of a few are easy to justify politically when the threat of terrorism appears to endanger the majority. Rights exist, however, precisely to set limits to what fearful majorities can do.

The idea of rights as precommitments presupposes the idea that when we face the choice between our security and their liberty, we start from a predisposition against the amendment of principle. We do so principally because of the value to the majority of rights remaining as invariant and universal as possible. Rights will not have much value to us if they are easily taken away from others. So we all have an interest in making as few exceptions as possible.

Some civil libertarians believe that the rule of law implies that there should be no exceptions at all, no emergencies and no derogations. In fact, most constitutions and most international human rights covenants accept that temporary suspensions of rights can become necessary to the preservation of the constitutional fabric itself. So exceptions, emergencies, and derogations are necessary to constitutional survival. What the rule of law requires, as John Finn and other scholars have argued, is not invariance, but public justification (Finn, 1991: 32). International human rights law is not committed to absolute nonderogation of rights, but rather to limitation of derogation through an obligation to provide justification to accountable public bodies, especially the judiciary and elected legislatures.

The International Covenant on Civil and Political Rights allows states to derogate or suspend rights of political participation, habeas corpus, free assembly, immunity from arbitrary search and seizure, and freedom from detention before trial, but not absolute nonderogable rights such as immunity from torture,

cruel and unusual punishment, the infliction of death, or free belief. Nations that sign the covenant are required to publicly announce and justify their derogations to UN treaty bodies. Similar obligations to publicly justify derogation are written into the European Convention on Human Rights. This seeks to save what can be saved from the idea of absolute precommitment by focusing those precommitments on preserving terrorist suspects from absolute violations of personal integrity like torture and by insisting on accountability and public justification.[2]

Even if we hold the line on torture, on cruel and unusual punishment, the very fact that other rights—to free assembly or habeas corpus—are frequently derogated calls into question the idea that human rights are indivisible. We can believe, as a causal matter, that rights are indivisible, in the sense that having one right is a precondition for having another. (To use Amartya Sen's famous example, having a right to free speech and free assembly are indirect causal contributors to having a right to subsistence, since without the right to make your voice heard, you will be unable to protest when food runs short.) But this sense of causal interdependence is distinct from the idea that all rights are equally important in a time of emergency. We can still argue the rights are analytically indivisible, in Sen's sense, while admitting that in dangerous times, some rights just turn out to be more fundamental than others.

How should we think about emergency suspensions of rights? Do exceptions leave rules in ruins, or do they enable rules to survive? Are derogations of rights a lesser evil or a fatal compromise that jeopardizes their status in normal times? I will argue in favor of a lesser evil position, one that countenances democratically authorized abridgements of the liberties of some to preserve the liberties of all. In the wake of September 11, when no one knew how many cells Al Qaeda had in operation in the United States, it was legitimate to arrest and hold in administrative detention 1,200 people who had violated the terms of their immigration visas. But it was also incumbent on the authorities to process these

people through public administrative hearings as quickly as possible and to afford them legal counsel and contact with their families. The hearings have not been open and they have not been expeditious, but they have been subject to judicial review, and the Supreme Court will probably examine their final constitutionality. In these circumstances, the abridgement of the rights of these 1,200 people could be justified. But the justification becomes less compelling with each passing day that the executive fails to prove that the detainees constitute an actual or possible danger.

Abraham Lincoln's abridgement of habeas corpus during the Civil War would be a further example of a necessary derogation in time of emergency. These exceptions need not fatally compromise the rule of law. To maintain that they do is to assume that rights suspended in emergency are never restored in peacetime. All constitutions assume a distinction between the rules that apply in emergencies and those that apply in times of safety, and seek a way to manage emergencies so that they do not become permanent or permanently damaging. The position I take is essentially that of Abraham Lincoln in his justification of the suspension of habeas corpus during the Civil War. Lincoln's position, set out in his letter to Erastus Corning, was that suspension of habeas corpus in wartime did not jeopardize its status in peacetime. Exceptions, he argued, did not erode the status of rules. Without exceptions, he insisted, the rule could not be preserved (Letter to Erastus Corning, 1989: 457-460; Neely, 1991).

The problem with emergencies, as Lincoln saw, was not that they constitute a threat to constitutional principles in general. The problem with emergencies is whether they are justified in the specific circumstances. The problem is to identify what level of actual or apprehended threat constitutes a genuine emergency and to prove that the suspensions or abridgements of liberty are necessary to meet the threat, rather than simply offer a sop to public opinion. A recent scholarly evaluation of Canada's Bill C-36, enacted after September 11 to tighten Canada's anti-terrorist legislation, questioned whether the legislation did actually add

much to the criminal law already on the books to deal with the terrorist threat (Daniels, Macklem, and Roach, 2001). Similar arguments have been made about the Spanish ban on the Basque separatist party: does it actually contribute to the campaign against Basque terror or is it a political response to public outrage at terrorist attacks (Woodworth, 2001)? The real danger is the manipulation of opinion, the manufacture of danger by executive authorities who are seeking more power. The rule of law is not compromised by emergencies per se, but by politicized construal of risk to justify emergency measures that are not actually necessary to meet the threat at hand.

The test of whether state power can be held to account when it makes these decisions is not so much what the emergency or anti-terrorist laws says but rather whether the institutions of a free society do their jobs. It is, of course, the function of a legislature, a free press, a well-organized civil society and an independent judiciary to keep the executive under scrutiny. There have been few national emergencies where executives did not overstep the bounds, the internment of the Japanese by Roosevelt being the most egregious modern example. What this example seems to show is that institutions failed to do their proper job: the press kept silent, dissenting voices within the executive were stilled, and most important, the judiciary explicitly supported the executive (Robinson, 2001).

The example of the Japanese internment suggests that civil liberties are most at risk when a popular president, facing a genuine threat, uses his formidable power to manipulate both popular and congressional opinion. In the case of the Japanese internment, it appears that race played a malign part in undermining the ability of both the president and the judiciary to understand that a fundamental violation of the rights of Americans had occurred. The example illuminates the extent to which rights enforcement depends on institutionally diffused ideas of civic equality, which mean rights derogations for any group are understood as potential threats to all. It remains to be seen whether

Arab-American citizens, and Arabs with the entitlement to live, work, or study in the United States, benefit from this presumption of civic equality and hence of due process. That they have so far escaped the fate of the Japanese Americans is difficult to interpret: either we have learned from our history, or else, the worst is yet to come.

II

If we are at war with terror—and this seems more than a metaphor, for the reason that *they* are at war with *us*—then an additional question is not simply whether exceptional deviations from precommitments destroy the very idea of precommitments, but which precommitments—human rights or the laws of war—should apply in the circumstances. These two ethical systems are closely related, but they are also contradictory, and one way to understand the ethical complexity of a war against terror is to understand the differences between them.

Sometimes the laws of war and human rights overlap. In neither ethical system—whether the detainee is held as a prisoner of war under the Geneva Conventions or as a criminal suspect awaiting trial—is torture allowed. For a state party like the United States to hand a detainee over to another jurisdiction for interrogation where such prohibitions do not apply would make the United States responsible, as principal agent, for the conduct of its proxy.

Sometimes—as in the case of torture—human rights and the laws of war impose the same ethical limitation on counterterror strategies. But at other points they diverge. In combat operations, using the armed forces of a state, you can shoot to kill; if you are conducting police operations only, you cannot or at least should not. In the case of Al Qaeda, which was a full-scale military formation with extensive training camps, munitions, stocks, and supplies, a military response to its threat was unavoidable. In other

forms of terrorism, police operations may be sufficient and the appropriate ethical and operational limitations on deadly force should apply.

The larger point here is that human rights cannot serve as a complete guide for action when terrorists wage war against a state. Because of its fundamental commitment to the right to life, human rights is inherently a pacifist doctrine, and were societies to pre-commit to pacifist limitations, they would disarm themselves against mortal threat.

Moving beyond the limitations imposed by human rights does not mean passing from ethical limitation to barbarism. It simply means passing from one strategy of precommitment—human rights—to another: the laws of war. The laws of war seek to save, for conditions where combat is necessary, those ethical restraints that are built into human rights.

More complicated is the relation between the laws of war and standard criminal law. The laws of war hold that it is unlawful to kill a disarmed combatant taken prisoner. Further, prisoners must be released upon conclusion of hostilities. American criminal law sees the same situation very differently. A terrorist transferred to an American criminal court and tried as a civilian defendant may face the death penalty or substantial periods of imprisonment. The Bush administration's handling of terrorist prisoners suggests that it picks its ethical restraints according to convenience. It abides by some of the laws of war for detainees at Guantánamo, respecting their religious rights, for example. But it will not grant them formal prisoner of war status, since that would require posthostilities release. So the Guantánamo detainees are in a legal limbo, under the control of a detaining power who allows Red Cross visits and other aspects of Geneva Convention protection while refusing others, such as tribunal determination of status. Still other terrorist detainees the United States seeks to indict and punish have been taken to federal court, where prosecutors can seek the death penalty. A third category of non-United States citizen detainees may have their cases

determined by the military tribunals created by executive order of the president. Those troubled by this ethical inconsistency might ask whether the handling of terrorism can always be consistent, given that terrorists themselves confound categories, seeking civilian guises to escape detection and then using military training and tactics to mount attacks. Moreover, a consistent application of laws of war doctrine might require the release of individuals who constitute a threat. What may matter more than strict consistency, or at least be more attainable than strict consistency, is public accountability.

But then the issue arises: accountable to whom? The American position is that the executive should be accountable only to American courts and the American Congress. Yet it is holding prisoners while reserving the right to decide which of its international obligations under the Geneva Conventions do or do not apply. This makes the United States judge and jury in a matter affecting the human rights of detainees and this is precisely what the Geneva Convention regime is designed to prevent. This position more or less guarantees that the reciprocity on which the regime depends will break down when Americans are taken prisoner.

Since Al Qaeda has the characteristics of a criminal cell and a military formation, it is inevitable that the moral principles governing the combat against it should conflict. Where the action against Al Qaeda is primarily a civilian police operation, the rules regarding search and seizure, arrest, use of deadly force, and the civil liberties protections regarding detention and trial should be in force as much as possible. Where derogations or exceptions are required, they must be publicly justified and approved by court order. Where the actions are primarily military, the laws of war should apply—and since these are international instruments, the United States should accept international accountability for its actions, especially with noncitizen detainees.

III

Thus far, I have looked at human rights and the laws of war as precommitment strategies designed to restrain our conduct in a war on terror and keep it within the confines of justice. Now I want to look at human rights and terror from a less familiar standpoint: the point of view of terrorists. It is not sufficiently appreciated that human rights—in particular the right to self-determination—also serve as an important justification for terror. Wherever subject or oppressed peoples seeking self-rule turn to terror, they do so in the name of this human right. The entire anticolonial resistance to imperial rule—in India, Algeria, Vietnam, to name only the epochal examples—was justified by the human right to self-determination. In some cases, notably Algeria, the anticolonial struggle turned to terror and justified the means as a necessity in the battle for freedom. The Palestinian struggle is a struggle for human rights, and acts of terror find justification in the claim to self-determination.

Human rights do not *motivate* terror—it is hard to see how they could motivate since they expressly enjoin us against taking human life—but this does not prevent them from serving as an important *justification* for acts of terror. For ordinary terrorists, terror is a way of life, a business, a means of exercising, consolidating, and increasing power in their own communities. Terrorism, by and large, is a career rather than a moral commitment, and it is generally motivated, as a daily matter, by the same matters that motivate criminality: hope of profit, love of violence for its own sake, and the glamour of the underworld life. Yet terrorism is not just criminality, since it seeks to attract civilian support and it does so by making political claims that are grounded in moral principles. So if human rights do not often feature as a direct motivation, they do figure as a justification, in the form of the claim, among the Irish terrorists, for example, that the people of Ireland should rule themselves free of British occupation. Of course, this human rights claim is specious at any number of lev-

els, especially in the Irish Republican claim that theirs has some automatic right to trump the equal and competing claim of the Loyalist community to enjoy their own self-determination, in the form of continued association with the British crown.

The complex relationship between human rights and terror is even better illuminated by the events of September 11. The apocalyptic nihilists who attacked on September 11 did not leave behind demands or justifications. But their acts have been interpreted by their supporters to have been in the name of the rights of the Palestinians and the rights of believers to worship in holy places free of foreign—that is, American—occupation. To be sure, it would be political idiocy to regard Al Qaeda as a human rights organization. The so-called martyrs defended their actions in the language of Islamic eschatology, not in the language of rights. Moreover, their intentions were apocalyptic, not political: to humiliate the archenemy of Islam and secure martyrdom in the process. Yet the enduring impact of September 11 depends not just on its shattering violence, but also on the degree to which the event was justified by millions of Palestinians and others in the Muslim world as an act in defense of a pair of linked rights claims.

What are we to make of the uses of human rights as a justification for terror? Obviously, the contradiction between the two is flagrant, and it would be easy to conclude the whole matter by saying that human rights must never be paired with violence of any kind as a vocabulary of justification. If believing in human rights means anything, it means believing that killing civilians for political purposes can never be justified. In short, there are no—and there cannot be—deserving victims of political violence. Terror justifies itself through a belief in the idea that victims deserve their fate, or at least if they do not deserve their fate, then that their fate is a secondary matter. Thus for a committed terrorist, there are no innocent civilians. Civilians who benefit from or collaborate with occupation or oppression are just as guilty as the agents of the state directly responsible for the oppression. For a human rights believer, this violates the bedrock of human rights,

the Kantian idea that human beings are ends in themselves, never to be sacrificed, coerced, or destroyed for the sake of even the noblest end.

If this is so, how can we reconcile this prohibition against the instrumental use of human beings for political purposes with the equal commitment within human rights to a collective right to self-determination? The obvious answer—and it leads to problems we will deal with later —is that human rights endorse collective self-determination as a goal without at the same time endorsing any and all means of struggle. Indeed, a consistent belief in human rights would only endorse nonviolent means of civil disobedience as an appropriate tactic for securing self-determination.

But that, of course, is not how the human right to self-determination is commonly understood (that is, as a right to self-government that can only be met, consistent with human rights principles, through peaceful negotiation and, if that fails, through nonviolent protest). Instead, when human rights language is used, it figures as a moral trump, as a table-clearing, game-winning claim to moral entitlement. In this more indirect sense, as a language of closed self-righteousness, human rights can pass from justification to actual motivation for terror.

Palestinians frequently argue as if their self-determination claim was a trump when, both as a matter of practical politics and as a matter of ethics, the real issue is to reconcile their justified claims with other equally justified claims held by Israelis. The same type of trumping argument is used by Irish Republicans in the face of Loyalist claims. All too frequently two or more claims to self-determination are competing for the same political space. Human rights principles—since they enjoin respect and observance of the right to life—would imply that the two or more claims must be reconciled through peaceful negotiation, not through war or terror.

Human rights principles thus justify self-determination struggles but also specify two practical ethical limits on waging a strug-

gle for self-determination. The first is an injunction against violence, and the second is an injunction to respect the self-determination claims of others, through negotiation and deliberation.

Fine counsels, I hear you say. But there is an obvious objection. Moral perfectionism is often a way to keep the weak in submission and human rights is certainly a form of moral perfectionism. Telling the Palestinians to return to nonviolence and to accept the competing rights of the Israelis might be to condemn them to political failure inside a Bantustan. Certainly that is how my morally perfectionist arguments would be rebutted were I to go to the Jenin refugee camp and attempt to make myself heard. The human rights principles I have adduced—nonviolence and deliberation—seem only to disarm the weak and entrench the injustice of the strong.

So what are we to do? We might conclude at this point with the hypothetical speculation that had these two principles been observed in the Palestinian struggle, they might now be in the possession of a viable state of their own, rather than caught in the nightmare of a war of terror without end, inside a Bantustan under permanent military occupation. I happen to believe this is true, but it is, to say the least, a hypothetical truth. We do not know what would have happened had the Palestinians been led by nonviolent leaders with a commitment to deliberation. We do not know what would have happened had Zionism's historical founders recognized the competing Palestinian claim to self-determination and if their Israeli successors had understood the folly and injustice of permanent occupation in time to reverse course. Historical analogies from other struggles suggest that those who follow the dual counsel of nonviolence and deliberation are not always condemned to morally honorable defeat. Sometimes they even win. Strict adherence to nonviolence and deliberation have won historic victories—consider the success of Gandhi against the British or Martin Luther King against the southern segregationists. These victories, it might be added, were all the more heroic since they were achieved in the face of almost

constant provocations to repay violence with violence. But we can hardly address the claims of the oppressed with the comforting thought that in the end right will prevail. All too often it does not. And we must consider seriously the claim that for the weak to observe human rights is to deliver them up, defenseless, to the ruthlessness of the strong. This argument from weakness is a fundamental part of the ethical justification of acts of terror in pursuit of a self-determination claim. Where a state or occupying power possesses overwhelming military force, people fighting for freedom often argue that they will go down to defeat if they confine their struggle to nonviolent protest or if they seek to directly challenge the military might of the other side. The only tactic that converts weakness into strength is terrorism—hitting the enemy where it is most vulnerable, its civilian population. This is more than a tactical argument in favor of "asymmetrical" methods. It has a moral element. The weak must have the right to fight dirty; otherwise the strong will always win. If you oblige the weak to fight clean, injustice will always triumph. Here the ethical justification is in the form of a lesser evil argument. To overcome the greater evil of injustice and oppression, the weak must be entitled to resort to the lesser evil. If they do not, ethical scruple will condemn them to an eternity of subjugation. Greater and lesser evil arguments are often used by the other side—that is, by states fighting terrorism. They argue in favor of the lesser evil of suspending civil liberties in order that the greater evil of terrorism can be defeated. So if one side can make use of a lesser evil argument, why can't the other?

We cannot resolve this problem with the piety that the weak are best served by not surrendering the high moral ground. This is sometimes true historically, but it is a council of perfection, which the weak have reason to reject when it is argued by the strong. Moreover, human rights principles themselves are not an ethics of resignation, but a call to struggle. To claim that human rights never justify the violation of the rights of others is to associate human rights with political quietism, with submission to oppres-

sion. But human rights are not an ethics of quietism. The European liberal political tradition incubated the idea of human rights, yet Locke and Jefferson explicitly reserve a right for the oppressed—the weak— to rise up in revolt against intolerable conditions: against the strong. What is Jefferson's Declaration of Independence but a reasoned defense of the necessity of political violence to overthrow imperial oppression? The right of revolution, enshrined in Enlightenment liberal political theory, implies that political freedom is so valuable, so much the precondition for the safe enjoyment of any rights at all, that its defense can justify acts of armed resistance that, of necessity, will violate the rights of others. This connection between rights and armed resistance is deep and historically enduring. Rights would not be rights (that is, ultimate claims) unless they were worth defending, if necessary, at the price of one's life. To fight for a right does not necessarily require violating the rights of others. But it may. If the American revolutionaries had not taken up arms, and drawn blood in doing so, they would not have won their freedom. There is thus a historical but also conceptual connection between the very idea of a codified set of ultimate commitments and ultimate immunities, and the necessity, in situations of extremity, to resort to violence to preserve, restore, or establish them in the face of tyranny or usurpation (Honore, 1988; Miller, 1984).

But let us be clear. The right of revolution is not a human right. It is contained within the liberal tradition that gave birth to human rights, but revolution itself—its justification, morality and a mode of action—is not articulated within the human rights tradition. The 1948 Universal Declaration of Human Rights confines the right of revolution to its preamble: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." But the meaning of this reference is clearly a message of warning to states: they must entrench human rights or risk rebellion. It is not an endorsement of a right to rebellion as such, but rather the statement that rebel-

lion becomes inevitable when essential rights are repeatedly denied.

The ambiguous place of revolution in the antechamber of the founding rights document exposes the limitations of human rights as a system of ultimate commitments. For these ultimate commitments—to respect, preserve, and defend human life and the exercise of human freedom—do not tell us what we are entitled to do when these values are denied, when oppression and tyranny crush the essential human aspirations defined in the human rights lexicon.

Indeed, if we seek answers to the question—what is permitted when rising up against oppression and tyranny?—we need to pass out of the rubric of human rights altogether and consider the body of reflection and codification known as the laws of war. The two systems of moral reflection are linked. The laws of war seek to protect the essential commitments of human rights; that is, to maintain the dignity and inviolability of combatants and noncombatants. But they are written for the situation that arises when the primary human right—to life—has been abrogated by a state of war, when states or parties to a conflict have declared their right to take up arms and to kill. This is the situation in which the question of revolution is posed—when a state has declared war on its own citizens and they take up arms to resist. The laws of war essentially seek to save what can be saved of the humanitarian impulse of human rights once violence has begun. The laws of war do not define when the resort to violence is justified, but they seek to regulate conduct once violence is chosen as a method of struggle. The first Additional Protocol of the Geneva Conventions, signed by many states in 1977, seeks to regulate the violence used in struggles for self-determination. The types of struggle that come within the terms of the convention are those concerned to overthrow "colonial domination and alien occupation" as well as "racist regimes" that deny the exercise of self-determination. This protocol insists that the same rules of proportionality and civilian immunity that govern the

conduct of regular soldiers should apply to insurgents, militiamen, and other forces taking up an armed struggle (Greenwood, 1996).

The very idea of civilian immunity illustrates the difference between the universalistic framework of human rights and the particularistic framework of the laws of war. Laws of war distinguish minutely between the moral status of various human actors—combatants, noncombatants, civilians, military, prisoners, medical staff—while human rights principles explicitly reject moral discriminations based on status. From a human rights perspective, civilian immunity is an incoherent moral principle, inconsistent with the equal respect due all human beings. From a law of war perspective, it is the principle that preserves some measure of ethical discrimination in the midst of combat.

Thus, if we view national liberation struggles exclusively through a human rights lens, we are forced to conclude that they must discipline themselves to follow the two rules of nonviolence and deliberation. This may condemn them to political failure. If we believe that their oppression is such that it justifies turning to violence as a last resort, then the ethics of their struggle passes out of human rights and into the rules of the laws of war. These rules these expressly forbid the targeting of civilians.

If we sum up at this point, I am saying that there is an ethical way to defend the use of violence in support of a self-determination claim: as a last resort, when nonviolent, deliberative means have been exhausted, and provided that violence obeys the rules of war relating to civilian immunity. To be sure, this limits the struggle for freedom. You cannot fight dirty, you must take on military targets, not civilian ones, but at least you are not required to turn the other cheek when you are faced with assault and oppression. Those who observe such rules deserve the name of freedom fighters. Those who do not, deserve the name of terrorist.

Why would any one fighting for freedom subject their struggle to ethical restraint when terrorism is so often successful? There is

no easy answer to the question. The motives for observing restraint might include wanting to maintain a certain moral identity to oneself and one's followers, together with a consequentialist calculation that targeting civilians would alienate valuable support. What counts as valuable support depends critically on whether the struggle needs international approval to succeed. Struggles that need such support may be more willing to subject themselves to ethical restraint than those that believe they can win on their own terms. Either way, it must be confessed that willingness to keep on the right side of the terrorist/freedom-fighter distinction depends rather less on the intrinsic appeal of human rights principles and more on the international political incentives that exist to reward restraint.

In 1981, the African National Congress (ANC) became the first national liberation movement to commit itself to obey the Geneva Conventions in its armed struggle against the apartheid regime in South Africa. It did so to gain further international support and to assert that its own moral identity was different from the government it was fighting. In the end, of course, it did secure international support, but its conduct did not always conform to the high moral identity it had defined for itself. As the Truth and Reconciliation Commission discovered, torture and nonjudicial execution of prisoners, as well as terrorist attacks on civilian targets, occurred during the liberation struggle. It is to the credit of the ANC government that it accepted public accountability for these acts, by testifying to the Truth and Reconciliation Commission hearings. But if even a movement keenly conscious of its international reputation could have committed crimes in the prosecution of a just struggle, it is unclear how movements less concerned with their moral reputation will accept ethical restraint. But this at least suggests that one way to reduce terrorism is to create incentives for liberation movements to comply with the Geneva Conventions during armed struggle and to penalize them, with international ostracism, when they do not.

IV

Terrorism exposes the limitations of human rights as an ethical system. Human rights may not be quietist, but they might be pacifist—enjoining resistance, but never up to the point of violence. The pacifism of human rights strikes me as a limitation essential to its nature, but nonetheless one that condemns the oppressed to eventual defeat and submission. A struggle for freedom, justified by human rights, can only win if it exits from human rights as a moral system.

There is a conflict, then, between human rights as a deontological system of prior commitments—we will not do certain things to human beings no matter what—and an ethics of struggle that must argue that certain ends, like freedom from intolerable oppression, do justify certain means, namely the taking of human life. I cannot see any way around this conflict, but it does not follow that if you abandon pure deontological principle in the midst of a struggle for freedom, you abandon all moral restraints on the pursuit of your objective. The alternative, as I see it, is not between human rights and barbarism, but to understand that two ethical systems, not one, are in play, and that the resort to violence is not the end of ethical restraint, but simply the passage into the domain of ethics ruled by the laws of war.

The choice between the laws of war framework and the human rights framework is not a choice between barbarism and civilization, between law and lawlessness, between ethics and pure expediency. It is a choice between two competing moral frames of reference, and we have to understand what moral frame of reference we are in, and in what situation.

The real question about political violence is whether it is truly a last resort or something else. There may be cases where there are no peaceful political means available to the weak, or where the means are so stacked against them—I am thinking here of the systematic disenfranchisement of minorities—that resort, first to nonviolent protest, and then to armed struggle, may ultimately be

justified. No defense of politics as an alternative to violence is honest unless such politics actually does offer an alternative venue for the weak to make their case heard.

But the test as to whether a political system meets the needs of the weak is not whether the case of the weak succeeds, but whether it can be heard and in some way accommodated. The test of whether violence is justified is also stringent: the interests in question must be serious and their denial a very basic denial of essential human rights; the failure to accommodate these interests must be repeated and must genuinely shut the door to further redress. Finally, the test of whether violent action is justified depends on whether all peaceful, deliberative courses have been genuinely exhausted and nonviolence protest has come up short on a matter, again, that involves a fundamental human right.

Time and again—and the examples here are the Basque separatists, the Tamil Tigers, the Irish nationalists, and yes, the Palestinians too—violence is not resorted to as a last resort, after exhausting good faith efforts to exploit all peaceful and legitimate means of political action, including nonviolent protest, but as a *first* resort. The weak conclude: Let's go the fast way. The fast way is to kill as many civilians as possible to get the world to take notice. Let's kill as many civilians as we can to provoke the other side into a downward spiral of repression and violence that will delegitimate them in the eyes of their supporters and the world at large. This is what the French so rightly call *la politique du pire.*

La politique du pire does away with the core of politics that is deliberation, the business of actually persuading other human beings that you are right and they are wrong. The horror of terrorism is that it is a politics that seeks the death of politics, a practice that wants to replace dialogue, discussion, debate, protest, and the arts by which we maintain some control over human violence with violence alone. The reason that Osama bin Laden is the enemy of the human race is not just that he cares so little about human life, but that he will not reason or argue with anyone. He is not interested in joining any argument with anyone.

He would rather terrify or intimidate. So in understanding what we do not like about terror, it is not simply that it kills human beings. It also kills politics, the one process we have devised that masters violence in the name of justice. This is what truly entitles us to say that Osama bin Laden and his like are enemies of the human race and that our relations with them should be relations of war.

Notes

[1]On Ulysess and the Sirens and on precommitment in general and in relation to constitutions and rights regimes, see Elster (2000, esp. p. 104), and Elster (1979: 36-40); see also Homer (12:36-60). A more fully developed version of the arguments in this paper will be made in my forthcoming Gifford Lectures at Edinburgh University, "The Lesser Evil: Political Ethics in an Age of Terror" (2003).

[2]In 2001, the British government informed the Council of Europe that it was derogating from its European Convention obligations in relation to the detention of terrorist suspects.

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