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Ethics on the radar: exploring the relevance of ethics support in counterterrorism

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I. Introductory part

1. Introduction

1.1 Research problem and field

Impact of 9/11 on counterterrorism practice

When two airplanes hit the twin towers of the World Trade Center in New York and one the Pentagon in Washington on 11 September 2001 (the 9/11 incident), the decision seemed to be made quite quickly that the fourth hijacked commercial airliner on the radar heading towards Washington would be shot down as soon as the plane would approach the capital (National Commission, 2003: 28-30). The plane never reached Washington and crashed in the fields nearby Shanksville in Pennsylvania. But in a post-9/11 world, the decision to shoot down a hijacked airplane with innocent citizens aboard in order to prevent a terrorist attack is considered a practical option in many countries, including the Netherlands (Ministry of Security and Justice, 2016: 18; National Coordinator for Counterterrorism and Security, A). In Germany, however, the law regulating such an option was judged as being unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht, 2006). Apparently, there are differences between approaches even among democratic states in Europe as far as the legitimacy and legality of killing citizens to prevent an attack by a reportedly hijacked airplane is concerned. The differences illustrated by the case of the hijacked plane symbolize more general differences between counterterrorism strategies in a fragmented international legal order (Van den Herik and Schrijver, 2013: 22; Zanetti, 2005). The impact of 9/11 to the practice of counterterrorism implies a broadening of the repertoire of counterterrorism under increased political and public pressure which causes many ethical dilemmas.

Pre-emption of terrorist threats

Since the iconic events of 9/11, many Western capitals have faced terrorist attacks that shocked societies and their democratic legal orders. Sometimes those events led to a legal state of emergency, as happened in France after the attacks of 13 November 2015. In other cases, like in Boston (2013), Paris after the Charlie Hebdo attacks (January of 2015), or Brussels (2015), it was more as if a state of emergency had been proclaimed. During the hunt for the attackers on the run in Boston or the lockdown of downtown Brussels after the threat level

was raised to the highest level, it felt like as if some kind of state of emergency had been put in place (Noordegraaf et al., 2017: 18). Contributions from the academic community to the debate about the ethics of counterterrorism reflect the notion of emergency with the suggestion to apply exceptionalism in counterterrorism and "... set [...] aside [...] standard moral and legal frameworks in favour of new ones" (Taylor, 2018: 140). Treating counterterrorism as exceptionalism would not only challenge the current framework of the democratic legal order in which counterterrorism professionals are operating. It could unintentionally meet the more abstract terrorist goals of undermining democratic decision-making and could even be "the seed of tomorrow's insoluble problem" (Irwin, 2004: 100) and lead to a general state of exception (Agamben, 2005).

Therefore counterterrorism professionals are advised to resist the call for exceptionalism and to remain acting within the framework of the democratic legal order (Baum, 2009; Clifford, 2016: 71; Prantl, 2008). In order to be able to do so, they need concrete tools to deal with ethical dilemmas. In spite of the importance of the events on 11 September 2001, a hijacked airplane on a suicide terrorist mission is not the most representative case of ethical issues counterterrorism professionals face on a daily basis as most of the ethical issues are more related to routine issues. Nevertheless, the urgency to prevent attacks and to be proactive, leads to an increased pressure on societies and their professionals to anticipate threats and risks (Beck, 2007: 39; De Goede, 2008: 163). Pre-emptive counterterrorism implies that ethical dilemmas inherent to counterterrorism are permanently present and potentially intense in nature. This situation calls for a conscious re-creating of human dignity in counterterrorism "on a virtually perpetual basis" (Van Baarda and Verweij, 2009: 508) as well.

Guidance of ethics within legal order

Key concern to counterterrorism professionals is how to do their work in a both effective and morally responsible way (Verweij, 2005: 223). Ethics can provide guidance to counterterrorism professionals in addition to the law. Of course, in a democratic legal order, the law has a foundational character. At the same time "a society cannot function with politics and law alone since they are eventually dependant on moral reasoning" (Geraedts, 2006: 31). The limitations of law in providing ethical guidance can be characterized by three different aspects: the

issue of interpretation, the outcome of political decision-making, and the bottom line of legality. First of all, laws remain subject to interpretation. In the practice of counterterrorism the same law can allow a whole range of operational action with an even wider range of ethical implications. Second, laws remain the outcome of political decision-making and follow societal change as reflected in law. Legal norms “remain valid as long as they have not been invalidated in the way which the legal order itself determines” (Kelsen, 1945: 117). The idea that law does not provide sufficient guidance for action has also been observed within the practice of counterterrorism. The law can rather be considered as “the ethical position of a majority of society at a particular point in time” (Expert quoted in Reding et al., 2013: 8). Third, through laws, politics establishes nothing more than the bottom-line of legality (Geraeds, 2006: 31). In the context of public administration, the concept of obedience to authority expressed through laws, however, has to be considered “too narrow for today’s multi-level governance” (Demmke and Moilanen, 2011: 6). Politics and law are therefore dependent on ethics deliberations to guide actions of counterterrorism professionals and to address the ethical dilemmas they are facing.

Ethics support in counterterrorism

Ethics support has the potential to provide guidance in the field of counterterrorism like it has in the field of public administration before. However, it seems that there is no substantial body of literature on this issue when this research started, showing that ethics is not really on the radar of researchers. This impression arose from overviewing academic publications in English, Dutch, German and French within the field of counterterrorism while working as a professional over the last fifteen years. Nevertheless, a few important pieces of literature have been available on this issue when I started my Ph.D. research in 2014 (Browning, 2011; Ignatieff, 2004; Irwin, 2004; Meggle, 2005; Miller, 2009; Thornton, 2011; Van Leeuwen, 2003; Verweij, 2005; Wellman, 2013). The relative scarcity of literature on ethics and counterterrorism amidst the abundance of literature on terrorism raises the question whether an institutionalized discipline of applied ethics and ethics support, as it exists in, for example, biomedical ethics (Beauchamp and Childress, 2009), defence (Van Baarle, 2018; De Graaff et al., 2014; Kennedy et al., 2011), policing (Hillebrand,

2012; Nap, 2014), or engineering (Van Gorp, 2005), exist at all for the field of counterterrorism.

In fact, ethics support has proven to support professionals in their dealing with ethical dilemmas in different societal sectors already. These experiences offer opportunities to explore the added value of ethics support in counterterrorism (Reding et al., 2013). Moral case deliberation is one of the tools of ethics support that has been of proven added value in other societal sectors (Abma et al., 2010; Molewijk 2014; Molewijk et al., 2008; Reding et al., 2013) and has been considered as relevant to the practice of counterterrorism (Weidema and Molewijk, 2017). In this thesis, moral case deliberation will be applied within the practice of counterterrorism in order to explore its added value to counterterrorism professionals.

This research intends to contribute to the discussion of ethics in relation to counterterrorism in the world of academics and practitioners (Cohen, 2015; Schön, 1983; Willigenburg, 1991) and will draw on a multidisciplinary connection between philosophy, applied ethics, political science, sociology, and counterterrorism and security studies. Doing so, this research can also contribute to a better understanding about the backgrounds of counterterrorism professionals and the characteristics of their work. This can provide anthropological and sociological insights into the practice of counterterrorism. It is encouraging to see that throughout the years of my Ph.D. research the academic contributions to the discussion about the ethics of counterterrorism has grown (Ammicht Quinn, 2017; Badde-Revue and Ruffo de Calabre, 2018; Burke et al., 2016, 2014; Clifford, 2016; Deutscher Präventionstag, 2016; Taylor, 2018). However, this thesis can, in spite of the growing academic interest in this broader issue, still be considered as the first contribution to the issue of ethics support within the practice of counterterrorism.

Research field

This thesis is rooted within the context of counterterrorism in the Netherlands. The initiative of this thesis goes back to the decision of the first Dutch National Coordinator for Counterterrorism to consider the ethics of counterterrorism as a strategic theme for the government. My involvement in this strategic endeavour

led to three publications: First, my contributions to a conference on ethics and counterterrorism I organized have been collected in a Dutch book (Kowalski and Meeder, 2011). Second, a study on the lessons from other societal fields and their relevance to handling ethical dilemmas in the field of counterterrorism has been initiated by the National Coordinator for Counterterrorism and Security and performed by RAND Europe (Reding et al., 2013). Third, I put together as editor an English publication on the different aspects of the ethics of counterterrorism, which contained 13 articles from 16 authors (Kowalski, 2017a).

Many people associate counterterrorism activities with the work of intelligence services. Consequently, it would be fair to expect that a study like this one would address the practice of intelligence services as well. This is not the case. As mentioned, there are no studies on the relevance of ethics support and counterterrorism at all. Obviously, this does not have to imply that intelligence services are not addressing those issues internally. But to study these issues within an intelligence service as an outsider, even as former intelligence professional like myself, is so far not possible. Nevertheless, as this thesis shows, there are still opportunities to study the ethical challenges within the practice of counterterrorism outside intelligence services.

The practice of counterterrorism has broadened during the last decade as many societal actors began to engage in countering terrorism. One aspect of this broadening has been the rise of a coordination community on an international level (Persson, 2013; Van der Veer et al., 2019). The basic task of the national coordinators for counterterrorism is to coordinate the efforts of all actors involved in counterterrorism. As legal, administrative, and political developments differ from country to country, there is no blueprint of tasks and responsibilities of the members of the coordination community. In some countries, coordination might be focussed primarily on analytical issues (as in the case of Spain and Belgium). In other countries, responsibilities in operational and/or policy issues might belong to the competences of the individual national coordinators as well (as in the US or the Netherlands).

The research of this thesis has been executed within one national part of the coordination community, the Office of the National Coordinator for Counterterrorism and Security in the Netherlands. The Dutch National Coordinator for Counterterrorism and Security's strategic choice to address

ethical issues, combined with the employment of the author of this thesis by the same organization, made it possible to conduct such sensitive research into the practice of counterterrorism. The potential benefits of the opportunity to explore the relevance of ethics support to the practice of counterterrorism outweigh the potential limitations, such as the proximity between the researcher and the research population.

1.2 Research questions

Countering terrorism goes hand in hand with facing ethical dilemmas (Abels, 2017; Van Buuren, 2017; Den Boer, 2017; Van Leeuwen, 2017). These ethical dilemmas seem to differ in kind and are often complex in nature as reflected in the literature when this research started (Irwin, 2004; Meggle, 2005; Miller, 2009; Van Leeuwen, 2003; Verweij, 2005). During the course of the research of this thesis the academic interest into ethics and counterterrorism has grown (Ammicht Quinn, 2016; Badde-Revue and Ruffo de Calabre, 2018; Burke et al., 2016, 2014; Clifford, 2016; Deutscher Präventionstag, 2016; Taylor, 2018). So far, it seems that there is only rudimentary institutional attention devoted to the (professional) ethics of counterterrorism professionals. The institutional dimension implies that organizations involved in counterterrorism have not publicly singled out an office, bureau, representative, commissioner, committee etc. to address ethics within the practice of counterterrorism. In addition, little research has been done on the ethics of counterterrorism in general and the dealing with ethical issues by counterterrorism professionals in particular (Van Elk, 2017a; McGraw, 2011; Miller, 2009; Reding et al., 2013; Wellman, 2013;). Other societal sectors like health care, police, and defence benefit from ethics support in their professional and personal capacities to deal with ethical issues, as proven by evaluations and scientific studies (Van Baarle, 2018; De Graaff, 2016; Hartman et al., 2016; Nap, 2014).

This thesis intends to clarify the added value of ethics support to professionals with the field of counterterrorism, as understood as a practice. In a case study, one of the methods of ethics support, moral case deliberation (Molewijk et al., 2008; Stolper, 2016; Weidema, 2014), will be applied amongst a selected group of counterterrorism professionals in the Netherlands. This thesis is explorative of nature and addresses in its empirical part the practice of counterterrorism within the Dutch National Coordinator for Counterterrorism and Security.

The main research question of this thesis is as follows:

What is the current relevance of the ethics of counterterrorism and what is the added value of ethics support within the practice of counterterrorism?

The theoretical part of the research addresses the following research sub-questions:

1. What is the relevance of key ethical approaches for dealing with ethical dilemmas in counterterrorism?
2. What can the concept of 'compromise' contribute to the handling of ethical dilemmas in 'counterterrorism as practice'?
3. How can the ethical issues faced by counterterrorism professionals be categorised?

The empirical part deals with the following research sub-questions:

4. How are counterterrorism professionals in the Netherlands dealing with ethical dilemmas?
5. What is the relevance of the method of moral case deliberation to the practice of counterterrorism?
6. What is the added value of applying the method of moral case deliberation among counterterrorism professionals in the Netherlands to the practice of counterterrorism?

1.3 Research relevance

The relevance of researching the added value of ethics support to the field of counterterrorism is fourfold. First of all, this research aims to contribute to the conceptual and practical development of dealing with ethical issues and what morally “good” counterterrorism entails. At times in which the threat of terrorism is high and considered by many experts as long-lasting (Neumann, 2016) such a contribution would be useful to society as a whole in dealing with terrorism.

Second, the findings of this research can support professionals in their dealing with ethical dilemmas (Weidema and Molewijk, 2017), helping to improve the day-to-day practice of counterterrorism professionals.

Third, having counterterrorism professionals that are well equipped to handle ethical dilemmas can also correspond with the societal interest in the legitimacy of democratic counterterrorism. During the counterterrorism efforts in the post-9/11 period this issue has been put on many national agendas and the international agenda, as reflected by the establishment of the ‘Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (United Nations, 2014).

Last but not least, the overall scientific debate on the added value of ethics support in professional practices can be enriched. This could enhance the body of knowledge on ethics in professional practices more generally. In the long run it could indirectly help professionals to handle ethical issues in dynamic areas of work within and beyond the practice of counterterrorism.

1.4 Research context, scope and outline

Research context

In this section the overall context of this thesis will be characterised. In addition, the scope of this thesis will be demarcated. Explaining this context is key to obtaining a full understanding of the issue at stake (Hollis and Smith, 1990). Without an understanding of the context, the practice of counterterrorism and the involved issues cannot be put into perspective. The context of current counterterrorism is complex and in itself worthy of a separate study.

The context of current counterterrorism can best be described by two general concepts. Those concepts reflect the challenges posed to counterterrorism, since they focus on the dimension of risks and the effects of those risks on society on the one hand, and societal actors (like governments) engaged in minimising those risks on the other hand. The guiding concepts here are the 'world risk society' as coined by Beck (Beck, 1986; Beck, 2007) and the 'liquid times' as conceptualized by Bauman (Bauman 2010, 2007; Bauman and Lyon, 2013; Munters, 1998). Those concepts are directly related to terrorism and the practice of counterterrorism. They are treated here and elaborated below, as they have the power to shape or at least influence the context of counterterrorism in which practices of counterterrorism take place.

The first concept explaining the current context of counterterrorism is the concept of the world risk society. Our society can be characterized as a world risk society by the political dramatization and exploitation of global risks and the perpetual anticipation of risk in the aftermath of 9/11 (Beck, 2007: 39). This concept builds on the older concept of risk society, in which societal and technological threats are democratized and in principle aimed at all layers of society (Beck, 1986: 26). This sociological concept has become widely known and embraced, partly due to the fact that the publication coincided with the disaster of the nuclear power plant in Chernobyl in 1986, which affected all citizens across large parts of Europe equally. In the light of global threats like jihadist terrorism, Beck in 2007 transformed his concept into the world risk society, in which global communities not only face risks but must handle a new phenomenon: anticipation of those risks. This anticipation of perceived or real risks changes the way in which politics handle risks and societies feel and face risks. In the field of counterterrorism, the dimension of anticipation specifically

dominates the design of policies (Beck, 2007) and, therefore, also the daily work of practitioners. Often, the remaining risks constitute ethical dilemmas due to conflicting values (Bakker, 2015b).

The second concept that partly explains the contemporary context of counterterrorism is the theory of liquid times, as developed by the sociologist Bauman in 2007. According to Bauman, we live in an age of uncertainty caused by specific developments that transform the character of modernity, in which it is difficult to provide collective security to nations and communities. In short, we live in a liquid modernity. All efforts to handle insecurities have to take place under conditions of endemic uncertainties (Bauman, 2007; Bauman, 2010).² This “hotbed of uncertainties”, as Bauman puts it, can be characterized by five developments. First, modernity has passed into a liquid phase in which social structures are short-lived and fluid, changing within the span of an individual’s life. Second, power and politics are increasingly separated due to shifting power constellations in global or extraterritorial spaces. Third, solidarity within societal communities is declining to the level of individual interests or, at most, those of networks. Fourth, there is a decline in long-term thinking, planning and acting leading to a split between politics and individual lives. The responsibility to solve the challenges is, fifth, increasingly put on the shoulders of individuals (Bauman 2007: 1-4).

Research scope

Before diving deeper into this thesis, it is important to clarify what this thesis is not addressing and why. First of all, this thesis will not address the potential ethics of terrorism, a dimension that is widely discussed in literature claiming to address the ethics of counterterrorism (Steinhoff, 2007; Wellman, 2013; Van Elk, 2017b). Many of these discussions thrive on an unclear definition of terrorism in which certain expressions of political violence are considered as justified.

Wellmann, for example, acknowledges on the one hand that terrorism is never morally innocent. On the other hand, he presents ambiguous thoughts on the

² Less useful in Bauman’s concept is the allocation of crucial responsibility for this situation to “surplus people”, or a global elite, which seems to be more of an ideological theoretical framework than a factual analysis of the situation.

ethics of terrorism when stating "... an act of terrorism might be morally justified. It could be justified when the importance of the human rights it protects together with the balance of the resulting benefits and harms outweigh the importance of the human rights it violates together with the harms it creates" (Wellman, 2013: 131). Such a relativist take on terrorism nurtures an idea of some kind of proportional terrorism. Given the ongoing discussions about the definition of terrorism among scholars and participants of political conflicts, it is unlikely that the introduction of the concept or perhaps even fiction of proportional terrorism will contribute to a solution of any of those debates. A clear distinction between the definition of terrorism, political activism, and resistance can help to avoid getting lost in the unsolvable debate of perceived ethical terrorism.

Second, evident forms of torture will not be scrutinized from an ethical perspective. Potential harms to populations as consequence of counterterrorism operations will not be addressed either (Eckenwiler and Hunt, 2014).

Waterboarding, extraordinary rendition, state of emergency, exchange of data and intelligence, preventive detention of returning foreign terrorist fighters and the aforementioned preventive downing of a hijacked airplane: there seem to be many measures taken under the umbrella of counterterrorism that involve ethical issues (Ammicht Quinn, 2016; Bakker, 2015b; Miller, 2009; Van Elk, 2017b; Wellman, 2013). Not all of them will be discussed here although all those issues can imply ethical dilemmas to those counterterrorism professionals involved. This research focuses on ethical issues occurring within a democratic state like the Netherlands. This excludes situations beyond international law, like torture (Hersh, 2004; Intelligence and Security Committee of Parliament, 2008; Risen, 2014; Rizzo, 2014; Scahill, 2016; Senate Select Committee on Intelligence, 2012; United Nations, 2014). Torture was within the Western world mainly an issue in the United States where waterboarding and enhanced interrogation was legal between 2002 and 2009 (Hersh, 2004; Senate Select Committee on Intelligence, 2004). Whether it was useful is a different story. Ignatieff, an important intellectual within the debate on the ethics of counterterrorism, is not convinced about such an approach of exceptionalism: "Extreme measures, like torture, preventive detention, and arbitrary arrest, typically win the battle but lose the larger war. Even cynics know that Pyrrhic victories are worse than useless" (Ignatieff, 2004: 20).

Counterterrorism in the years after 9/11 has also shown that many false terrorism alerts, that in many cases temporarily paralyzed public life, could be traced back to wrong statements made during torture (Suskind, 2006). According to a special oversight committee of the US Senate, torture was not an effective means of acquiring intelligence or gaining cooperation from detainees. The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness (Senate Select Committee on Intelligence, 2012). Torture was not applied in the Netherlands. Also other major tensions with, or violations of, human rights have not been identified in a special research commissioned by the Dutch government (Van Kempen and Van der Voort, 2010: 125-129). This has been scrutinized in a report to parliament in the first evaluation of counterterrorism in the decade after 9/11 (National Coordinator for Counterterrorism, 2011). The main conclusion of this research was that there were no major tensions between counterterrorism and the Dutch constitution or international humanitarian law in that period (Van Kempen and Van der Voort, 2010).

Research outline

This thesis is subdivided into four parts: an introductory, a theoretical, an empirical, and a concluding part. The introductory part begins with a general introduction of the thesis in Chapter 1. In Chapter 2 the research design will be presented by addressing methodology, limitations, research ethics, and definitions. Regarding each chapter, it will be demonstrated which methodology or mix of methodologies is used to answer the research sub-questions of each chapter. In addition, the limitations of this research will be identified and, as far as possible, juxtaposed with either mitigation opportunities or an explanation of the potential benefits of the proposed methodology. In addition, the research ethics as well as the research protocol will be clarified. Last but not least, key concepts and definitions will be presented.

The theoretical part discusses key ethical approaches in light of their relevance for the practice of counterterrorism and provides an analysis that leads to the suggestion of a typology of ethical issues for counterterrorism professionals. This theoretical part consists of three chapters. Chapter 3 will explore what key

ethical approaches can contribute to the practice of counterterrorism. Key ethical approaches will be identified and applied to the practice of counterterrorism in order to explore their relevance. The purpose of Chapter 4 is to clarify how key ethical approaches can be bridged with the concepts of compromise and practical wisdom and what the effect on the practice of counterterrorism could be. Chapter 5 will identify the kinds of ethical issues counterterrorism professionals are facing. Drawing on international and national literature, I will provide an analysis that leads to the proposition of a typology of ethical issues in counterterrorism. This typology differentiates between different levels and categories.

The empirical part of this thesis explores the handling of ethical dilemmas by counterterrorism professionals and the relevance of ethics support to the practice of counterterrorism. The empirical part also contains three chapters. Chapter 6 will attempt to draw up an inventory of how counterterrorism professionals are dealing with ethical dilemmas. In Chapter 7, moral case deliberation, as one of the central tools of ethics support in the medical sector, will be explored as a point of departure for the subsequent application of this tool of ethics support. Doing so, it will be argued why moral case deliberation is relevant for, and applicable within, the practice of counterterrorism. Chapter 8 will reflect on the experiences with moral case deliberation at the Office of the Dutch National Coordinator for Counterterrorism and Security. In addition, it presents an analysis of the added value of moral case deliberations based on the preliminary reception of this tool by counterterrorism professionals at the National Coordinator for Counterterrorism and Security in the Netherlands.

The concluding part of this thesis will answer, in Chapter 9, the research questions and provide the general conclusions of this thesis. Moreover, it reflects on key aspects of this research as well as on future research, policies, and practices regarding the ethics of counterterrorism. As already mentioned, the limitations of the research have to be taken into account here given its explorative nature.

This thesis is motivated by the need to address ethics in the field of counterterrorism and to consider the special responsibilities of states, as holders of the monopoly of violence and as sole authorized implementers of special

powers. These unique responsibilities of states are part of the practice of counterterrorism and are to be implemented both inside and outside intelligence services. Or, as the Deputy Assistant Director of Central Intelligence for Analysis and Production of the CIA put it, in the context of counterterrorism:

"... Intelligence officers need to address, individually and collectively, the issues of the ethics of their profession. ... In the end, as professionals, we are left not just with an external check of ... formal rules, but with an internal sense of what is right and wrong" (Nolte, 2007).