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

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II. Theoretical part

3. Key ethical approaches and their relevance for counterterrorism

In this chapter the relevance of key ethical approaches for dealing with ethical dilemmas in counterterrorism will be explored. As already suggested, there is an intrinsic relationship between counterterrorism and ethics which makes it even more accurate to discuss the ethics of counterterrorism. However, there is no commonly accepted ethics regulating or guiding counterterrorism in democratic societies like the Netherlands. Instead, there are multiple ethical approaches that can be distinguished, with different implications for the daily work of counterterrorism professionals. In this chapter key ethical approaches will be introduced and put into the perspective of the practice of counterterrorism. The research question to be answered in this chapter is: What is the relevance of key ethical approaches for dealing with ethical dilemmas in counterterrorism?

After an introduction into the concept of 'practice', three key ethical approaches will be introduced: the consequentialist, deontological and virtue-ethical approach. All three approaches will be evaluated from the perspective of the practice of counterterrorism. These approaches are presented because they can be considered as the three major approaches in the field of ethics (Fenner, 2008; Sandel 2009/2013; Van Hees et al., 2014). The relevance of these key ethical approaches in dealing with ethical dilemmas in the practice of counterterrorism will be explored in light of the difference between external and internal goods of a practice in general (Macintyre, 1981; Knight, 1988).

3.1 Introducing the concept of practice to counterterrorism

When looking at the relevance of ethical approaches to counterterrorism practitioners, it appears that the concept of counterterrorism as practice has not yet been defined in an ethical debate. In this research, the definition of practice as established by the philosopher Macintyre will be used (Macintyre, 1981). Critical reflections on this definition have not, so far, challenged the plausibility of this definition and its usefulness to base further research on (Stout, 1988). Practice, according to Macintyre, has to be understood as

> "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended" (Macintyre 1981: 218).

The practice of counterterrorism will be seen in this research as one of those cooperative human activities, however, the focus of this research is limited to governmental actors. Even within governmental actors there seem to be so many differences between intelligence services, public prosecutors, law enforcement, prison authorities, schools, universities and so on, that it seems difficult to consider them as one practice. Given their shared goal to counter terrorism and their often coordinated activities to reach that goal, it makes sense to consider their overall involvement as part of a practice of counterterrorism. This can be illustrated by the fact that the national counterterrorism strategy serves as a common underlying framework for action. How the concept of the practice of counterterrorism has to be understood in more detail can be clarified by looking at how the criteria that are part of the theoretical concept of practice relate to the concept of the practice of counterterrorism.

Counterterrorism practice is characterized by a couple of criteria such as history, relationship between participants in practice and their skills. The historical dimension underlines the different backgrounds of all participants in a practice. Without neglecting the histories, performances and shortcomings of different participants in a practice, Macintyre underlines that "we cannot be initiated into a practice without accepting the authority of the best standards realized so far"

(Macintyre, 1981: 221). Applying this condition to the field of counterterrorism requires an acceptance of the current state of action by participating actors in counterterrorism, in order to be able to establish counterterrorism practice as a concept at all. Another criterion of a practice is, according to Macintyre, a certain kind of relationship between those participating in a practice. This means that counterterrorism practice can be defined by relationships of involved professionals who share goals and standards that inform their practices (Macintyre, 1981: 223). This brings the criterion of skills into play. Within the concept of practice, skills are defined more broadly than just technical skills. Those technical skills are "transformed and enriched by these extensions of human powers and by that regard for its own internal goods which are partially definitive of each particular practice or type of practice" (Macintyre, 1981: 225). Applying this dimension to counterterrorism practice is not easy, given the abstract description in Macintyre's theory on one hand, and the fact that this concept has not yet been applied to the field of counterterrorism on the other.

In the remainder of this chapter, a fictional but realistic case will be taken as an example to discuss key ethical concepts and their relevance for the practice of counterterrorism. This reflection also serves to clarify the external and internal goods of the concept of practice in the field of counterterrorism. Whereas the external goods attached to a practice are shaped by the incidents of social circumstances, the internal goods can only be achieved by participating in the practice itself (Macintyre, 1981). The internal goods of counterterrorism therefore imply to the professional participation within the practice of counterterrorism, including the dealing with all attached ethical issues, whereas external goods of counterterrorism are reflected by institutions, hierarchical positions or remuneration. The functions of institutions in the field of counterterrorism are especially concerned with external goods; meanwhile, internal goods are created and reproduced in the practice of counterterrorism. When exploring the relevance of key ethical concepts to the practice of counterterrorism, it seems crucial to explore the internal goods of counterterrorism and to relate them to the external goods accordingly. "… [W]e shall be unable to write a true history of practices and institutions unless that history is also one of the virtues and vices. For the ability of a practice to retain its integrity will depend on the way in which the virtues can be and are exercised

in sustaining the institutional forms which are the social bearers of the practice" (Macintyre 1981: 227).

Although the use of the concept of practice could be considered from a theoretical perspective as some kind of positive bias towards the virtue ethics, the next section will introduce all key ethical approaches to the practice of counterterrorism without any bias towards any of the key approaches in particular.

3.2 Introducing key ethical approaches to the practice of counterterrorism

In this section I will map the key ethical approaches. Roughly speaking, there are three relevant ethical approaches in this connection: the consequentialist approach, which focuses on the intended goal; the deontological approach, which focuses on a certain obligation and underlying values regardless of the consequences; and the virtue-ethical approach, which puts virtues at the center.

Should we shoot down a hijacked commercial airliner to prevent a greater tragedy or not? The answer to this and less spectacular ethical dilemmas in counterterrorism depends in essence on the ethical approach you apply when faced with such a dilemma (Dupuis, 1998; Dupuis, 2003). The difference between dilemmas cannot be assessed based on their initial or outer appearances because rather routine issues can have grave outcomes. In addition, grave cases like the one of a suspicious plane occur frequently as a case without having grave outcomes. Nevertheless, the regular dealing with a potentially grave dilemma makes it a routine dilemma at the same time. Of course, there are many factual and practical issues at stake when such a situation occurs. Do we know for sure that the plane is hijacked? Do we know for sure what target the plane is heading for? Are there sufficient means to evacuate the projected target and to minimize the effect of the aircraft having turned into a weapon in the hands of terrorists? But any way of resolving such a dilemma is based on a - perhaps implicit - approach that sets the stage for any action. Answering the above factual questions, for example, implies that you are considering a preventive downing. An alternative approach could be to not engage in such preventive action at all and follow a mitigation strategy, like evacuating the potential targets. Another option could be to consider such an option only if certain criteria are met. Which alternative approaches are relevant here, and would it be possible to reconcile those approaches?

As mentioned in the above, literature on the subject of ethics of counterterrorism is scarce. The mapping of the different ethical approaches will therefore draw upon literature from many disciplines, translated to the field of counterterrorism. The field of intelligence – although a quite prominent part of counterterrorism – is only one of the fields of this mapping exercise (Fenner, 2008; Van Hees et al., 2014; Sandel, 2009/2013). Other disciplines that have been drawn from are

ethics support in general and ethics support in the fields of healthcare (Molewijk, 2008; Molewijk, 2015; Weidema, 2014; Stolper, 2016), defence (Wortel and Bosch, 2011; De Graaf, 2016; De Graaf et al., 2014), and police (Nap, 2014) in particular. Given the fact that intelligence has to be considered as a cornerstone of counterterrorism, it will receive special focus at a later point in this thesis.

Here, I will only highlight the core notion of these approaches at the expense of philosophical nuances. For the goal here is to identify the core of the approaches and relate them to the practice of counterterrorism.

Under the first approach, the consequentialist approach, shooting down a hijacked airplane to prevent a greater disaster could be justified. 'Consequentialist' refers to the Greek *telos* that can be translated as goal or end. This concept has been coined by Aristotle and has, throughout history, guided many to justify their means to come to a specific end (Aristotle, 1999). Currently, the dominant consequentialist school is utilitarianism, as developed primarily by Bentham (Bentham 2016/1780). Under this approach, ethical decisions are based on ensuring the happiness of as many people as possible, irrespective of individual rights. In the case of the hijacked plane the consequentialist approach focuses on the intended outcome of preventing the plane being used as weapon against a target on the ground. The potential death of crew and passengers would be justifiable given this intended outcome and the lower number of victims that would result when shooting down the plane before it hits the perceived target. In the scant body of literature on the ethics of counterterrorism, this approach has also been dubbed "the lesser evil" by the Canadian academic Ignatieff (Ignatieff, 2004). This is in essence a utilitarian argument. Although a prominent concept in security discourses, the concept of the lesser evil becomes problematic if the proportionality of evil and lesser evil remains unquestioned, as any bigger evil could imply a justifiable lesser evil (Klöcker, 2009 quoted in Ammicht Quinn, 2016: 13). Eventually, we reach a stage where it might become difficult to contain the scope of the lesser evil once the bigger evil has diminished, or where, in the worst case, the lesser evil might even be of an unlimited scope.

Under the second approach, the deontological approach, you would likely not consider shooting down a plane and killing anyone for the sake of someone else. 'Deontological' refers to the Greek *deon* which can be translated as obligation

and duty. This concept is rooted in the philosophy of Kant and has, throughout history, been adhered to by societies in which values merged with law and that founded democratic legal orders. Its core notion is the categorical imperative, which says that one should act only according to the maxim that one would like to become a universal law at the same time (Kant, 1977/1785). In the case of the airliner, this implies that the obligation not to kill its passengers prevails and the responsibility at stake is entirely centered on compliance with this obligation, regardless of the factual outcome of the situation. From the perspective of ethics of counterterrorism, this approach can be considered as not actively interfering in undesirable events in progress, regardless of the outcome and without weighing which course of action would cause less harm. This is due to the fact that the 'categorical imperative' is absolute and would need to be accompanied by a 'pragmatic imperative' looking into the actual circumstances and providing provisional suggestions informing the ethical decision making (Ammicht Quinn, 2016: 9).

Under the third approach, the virtue-ethical approach, the case of the hijacked plane would be decided in accordance with what the involved individuals would deem the best course of action according to their character. 'Virtue-ethical' refers to the Greek *arete*, which means excellence or virtue. This approach is also often referred to as virtue ethics and, as the name suggests, centers on the virtues of an individual. Aristotle and Plato, when first developing the concept, identified four cardinal virtues: prudence, courage, temperance and justice (Audi, 2015). Acting in an ethically sound manner would not imply, as is often assumed, finding the right balance between the one or more antithetical virtues relevant in a specific case. Being virtuous is more about establishing distance from individual emotions and developing an emotional and intellectual attitude that enables individuals to act ethically just in any situation (Fenner 2008: 212-213). This quest to develop an attitude suitable to act in an ethical manner seems to offer some way out from the limitations of the previous approaches by presenting a sound ethical navigation suitable to different contextual circumstances (Beauchamp and Childress, 2009: 383).

3.3 Analysis and discussion

In this section I will assess the usefulness of these approaches within the practice of counterterrorism. As far as practical examples are concerned, this section will not discuss any of the many secret cases in the field of counterterrorism. Instead, the key ethical approaches will be applied to the fictional but conceivable dilemma of a potentially hijacked plane, as considered from my background of professional expertise in counterterrorism. The case is whether to have the military preventively shoot down a commercial airliner that is suspected of being hijacked by suicide terrorists. This case forms the backdrop of a theatre play by lawyer and writer Schirach (Schirach, 2014). The play focuses on a court case against a jet pilot who shot down a plane against explicit orders, and it leaves the sentencing up to the audience of each specific performance.[3]

This scenario has earlier also been discussed by Seumas. He broke this dilemma down to the tension between "whether refrain from protecting the lives of the innocent many (those in the building and its surrounds) or intentionally to kill the innocent few passengers (relatively speaking) and to protect the lives of the innocent many (and given the passengers were almost certain to be killed in any case)". He saw it as a situation that would "give rise to acute moral dilemmas for any human agent who has the opportunity to intervene; generally, such human agents will be, in fact, senior political, military or police personnel" (Miller, 2009: 126). Here, this scenario will be used to run through different ethical approaches and test their usefulness within the practice of counterterrorism.

From a practitioner's point of view, the consequentialist approach seems to offer a flexible framework to do what seems to be best and to justify potential negative or unavoidable consequences. It seems to empower professionals dealing with many different cases. However, simply putting the intended goals or consequences center stage does not guide to the identification of the intended goals and the process of moving towards those goals. What is the best goal? How can it be realized? Furthermore, if the goal is to save lives that are threatened by

[3] For a brief reflection on this theatre play see also: http://leidensafetyandsecurityblog.nl/articles/shooting-down-a-hijacked-plane-to-prevent-worse.

a plane turned into a potential weapon, there is no convincing reason for killing some in order to save others. Do a larger number of lives have more value than a smaller number? Even if this were so, the ratio of potential lives saved to lives taken that would justify taking this approach would still need to be determined. Other questions pop up as well. Would this ratio be different if heads of states or religious leaders would be on board, or if the passengers included close relatives of decision-makers or air force pilots? And would it be possible to construct a consistent policy based on the underlying assumptions and appreciation of values to guide future governmental action not only in the field of counterterrorism but in other fields of society as well?

Although the goal-oriented consequentialist approach seems to offer flexible and practical points of reference that might empower professionals to act in different contexts, it remains difficult to come up with a clear-cut application of this approach. First of all, it seems that this approach neglects to provide an explicit evaluation of underlying assumptions and values. Complicated ethical questions, like whether more lives have more value than fewer lives, seem to stay unaddressed or at are at least answered unconvincingly, at the expense of individual lives. Second, it seems that the goal is instrumentalized and neglects crucial operational details. In fact, the realization of the intention to save more lives by taking fewer lives depends on circumstantial factors. In our example, the justifiability of the action would very much depend on an assessment of the certainty of the information about the terrorist intent, and the operational capability of both the terrorists and the air force. Moreover, the options available to mitigate the effects on the ground - for example, by evacuating the targets - could upset the balance between lives taken and lives saved as well. All in all, this approach does not offer a consistent framework for future comparable situations in view of its untested or unconvincing assumptions and values, as well as the subordinate role of circumstantial and operational details.

The deontological approach more or less reflects the accountability framework of counterterrorism in a Western European context under the prevailing rule of law (De Goede, 2008). So far, this framework offers respect for human rights, predictability of state action, and accountability. It is an anchor that helps prevent misconduct by states and state agents. Nevertheless, this approach

embodies some limitations to counterterrorism practitioners. First and foremost, it seems that ethical dilemmas in the dynamic practical work environment cannot be addressed sufficiently by such a static or - as it has been put in the above - absolute approach. The obligations resulting from the approach are binding and strict and could, in the hijacked plane scenario, put counterterrorism professionals in the position of a helpless spectator. This position would be strengthened by the limited interpretational space regarding the law in the light of overarching obligations.

The second limitation of this approach is related to the neglect of changing contexts. Situations in the field of aviation security or other areas might evolve in such a way that embracing deontology would not provide practical solutions to urgent questions. Take, for example, the rise of terrorist attacks in the field of aviation or other critical threats to Western countries. How should we proceed when ruled by overarching obligations that do not evolve in tandem with actual practice? In the end, although this framework offers a set of obligations guided by law, situations are likely to occur in which those obligations do not meet the interpretational needs of the practitioners in continuously changing contexts, or do not respond sufficiently to changing contexts.

For practitioners of counterterrorism, the navigational capacities of the virtue-ethical approach can be a useful point of departure when dealing with cases such as the hijacked plane, without being preoccupied by either calculations on the expected outcome (consequentialism) or obedience to set rules (deontology). At the same time, it appears that this approach embodies a couple of limitations that prevent it from becoming a satisfactory solution for counterterrorism practitioners. First, there is the risk that virtues are considered as being, more or less by nature, an individual phenomenon. Who is a virtuous person, and when? Whom to contact in a case like our hijacked plane scenario: a specific functionary, as protocol dictates, or someone known as being a virtuous person? Should we let the officer on duty decide? Second, it seems that this approach might not be a recipe for consistency. It is rather problematic to individualize handling ethical dilemmas in counterterrorism. Counterterrorism within a democracy requires not only accountability but also consistency. These requirements are difficult to meet using an approach based on the state of

virtuosity of the individual. The answer to the question of how to act in the case of a hijacked plane should not depend on the level of virtuosity of the individual on duty at that moment.

Nevertheless, this virtue-centered approach could, to a certain degree, be translated to the collective or societal level and improve the training provided to professionals, as the theory of virtues is also based on the idea of fitness of the individual, based on training (Fenner 2008: 212; Goodstein, 2000). Third, given the overarching political nature of terrorism, it remains rather unclear how genuine and independent individual virtues can prevail in the light of challenges on the community level. Community and political pressure, both real and perceived, could challenge and eventually influence virtues and the actions based on those virtues. In the end, in spite of offering an answer to the limitations of the previous approaches, this approach also fails to offer counterterrorism practitioners a satisfactory practical approach, depending as it does on the individual development of virtues and the potential vulnerability of individual judgement in the light of potential influences from the societal or political level. It would not meet the criteria of democratic accountability and continuity either.

The three key ethical approaches, their core meaning, and the strengths and weaknesses of their relevance to the practice of counterterrorism have been summarized in Figure 1.

Figure 1

Key ethical approaches and their relevance to counterterrorism

Philosophical approach	Core meaning	Relevance to practice of CT: strengths	Relevance to practice of CT: weaknesses
Consequentialist	Goal	• Flexible framework • Empowering professionals	• Unclear/unconvincing evaluation of assumptions and values • Goal as goal in itself
Deontological	Obligation	• Accountable framework • Rule of law	• Static in dynamic practice • Neglecting changing circumstances
Virtue-ethical	Virtue	• Contextual navigation • Improving training on collective level	• Individualization of values • No recipe for consistency • Lack of democratic accountability and continuity

3.4 Conclusions

This chapter explores the relevance of key ethical approaches for the dealing of ethical dilemmas in counterterrorism. The quick review of these three major philosophical approaches to ethics reveals that none of them offers a sound approach to the practice of counterterrorism in a liquid world risk society. The three approaches explored are the consequentialist, deontological, and virtue-ethical approach. In the light of the extreme yet realistic case of an hijacked commercial airliner, the strengths and weaknesses of these approaches, as far as the relevance to the practice of counterterrorism is concerned, are identified. Roughly speaking, it turned out that all approaches by themselves offer some guidance to counterterrorism professionals. At the same time, it becomes clear that considerable weaknesses remain and that those weaknesses cannot be compensated for within the individual approaches.

This leads to the conclusion that at this point these approaches cannot be prioritized in terms of their relevance to the practice of counterterrorism. The virtue-ethical approach, however, implies the strongest ground for a reflective and contextual identification of internal goods and their connection to external goods. Nevertheless, it remains undisputed that all approaches offer both theoretical inspiration and concrete guidance to handle ethical dilemmas in counterterrorism. Therefore, it is worthwhile to consider whether it is possible to reconcile (parts of) the approaches. One still might have to handle the possibility that there are no ideal approaches in this complex world. But before doing so, I will explore the possibility of striking a compromise between opposing principles and underlying values of key ethical approaches, without even pretending to bridge gaps between centuries of philosophy.