

TERRORISTS

Neither Soldiers nor Criminals



Amitai Etzioni

IN CURRENT HOSTILITIES in Iraq, Afghanistan, parts of Pakistan, and elsewhere, from Colombia to the Horn of Africa, nonstate actors—in particular, terrorists and insurgents who act like terrorists—play a much larger role than they did during WWI, WWII, and the Korean War. In these wars between states, the accepted rules of war, embodied in documents such as the Geneva Conventions, applied much more readily than in contemporary conflicts. Currently, conventional armies that seek to adhere to the rules of war are disadvantaged and are under pressure to circumvent the rules. These conditions suggest that work is needed to modify and update these rules.

Changes to the rules of war would hardly be unprecedented. The First Geneva Convention, dealing with the treatment of battlefield casualties, did not exist until 1864, and since then additional conventions have been agreed upon and other rules of war have been modified. The same holds for “international law,” which some people evoke as if it was etched in stone and unambiguous—but is actually neither. Indeed, even in well-established democratic societies, laws are constantly recast. For instance, there was no constitutional right to privacy in the United States until 1965, and the way we now understand the 1st Amendment (the right to free speech) was formed in the 1920s. In both cases no changes were made in the text of the Constitution, but new interpretations were employed to bring the Constitution—as a living document—in line with the normative precepts of changing times. Hence, it stands to reason that the new threats to security now posed by nonstate actors—several of whom have a global reach, are supported by massive religious radical movements, and have potential access to weapons of mass destruction (WMD)—demand modifications in the interpretations, if not the texts, of the rules of war.

A New World

Unfortunately, the advocates of two major approaches to counterterrorism have dug in their heels and stand in the way of the needed adaptations. On the one side are those who speak of a “war on terror,” which implies that terrorists ought to be treated like soldiers who, under the current rules of

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PHOTO: The sun sets behind the Commissions building where the U.S. military held preliminary hearings for four detainees charged with conspiracy to commit war crimes, Guantanamo Naval Base, Guantanamo Bay, Cuba, August 2004. (AFP, Mark Wilson)

war, can be detained without being charged or tried until the end of the war. On the other side are those who favor treating terrorists like criminals, endowed with the rights and privileges accorded to citizens of democratic societies who have been accused but not yet convicted of having committed a crime. Both approaches, we shall see shortly, have serious shortcomings, and hence invite the quest for a third way.

The ambiguities surrounding the current characterization of terrorists are illustrated by the following: Should one bring them to trial in the United States, like criminals? They are likely to walk. (The few cases brought before American judges, even conservative ones, were decided against the government. As noted by Benjamin Wittes and Zaahira Wyne of the Brookings Institution, the U.S. District Court for the District of Columbia has thus far issued rulings in habeas cases for 29 Guantanamo detainees—24 of which it held to be unlawfully detained.) Should we hold them until the war ends? Even if it lasts 100 years? Send them home? Many nations refuse to accept them, and such a release violates various international laws concerning sending people to countries where they might face torture or execution. Bring them to military tribunals? The evidence against them—often obtained on the battlefield—frequently does not satisfy even these less demanding tribunals. (Wittes reports that military prosecutors have estimated that even under the Military Commissions Act they have enough evidence to be able to bring to trial at best only 80 Guantanamo detainees.)

The effect of these considerations, and the legal and normative confusion they reflect, is best understood with reference to the field of law and economics. This field, which studies the incentives and disincentives generated by public policies and laws, has shown that it is counter to the public interest to enact laws and design policies that, however unwittingly, promote undesired behavior through perverse incentive structures. The ongoing confusion surrounding the status of what I call “combatant civilians” caught on the battlefield in Afghanistan, Iraq, and in other parts of the world—highlighted by the complexities the United States faces in dealing with those locked up at Guantanamo Bay—has produced a set of perverse incentives. As a result of this widespread legal confusion, some commanders in the field, Special Forces, and CIA agents are

tempted to not take prisoners (the most extreme side effect); to turn terrorists over to other forces not bound by American legal concepts, such as the Afghan military or the Iraqi police; or to ship them to secret prisons (extraordinary renditions)—all to avoid having to treat them either as prisoners of war (POW) or as criminal suspects! Moreover, missions are scaled back because collateral damage is considered too high, while—we shall see—some of those damaged are actually civilians who volunteered to assist and serve terrorists. Also, as a result of the confusion, America’s reputation is tarnished, the legitimacy of our operations is questioned, and opposition to counterterrorism measures is growing at home. There must be a better way.

Neither Fish nor Fowl

Before I outline a third category to which terrorists do belong, and the implications of this reclassification for the way they are to be treated both during armed conflicts (that is, while fighting them on the battlefield) and once they are caught, I will first briefly spell out the main reasons they should be treated as neither soldiers nor criminals. In proceeding, I use a common definition of terrorists as individuals who seek to drive fear into a population by acts of violence in order to advance their goals in a *sub rosa* manner. Terrorists, as a rule, wear no insignia that identifies them as combatants, resort to a large variety of other means to make themselves indistinguishable from noncombatant civilians, and often use civilians’ vehicles, homes, and public facilities, such as schools and places of worship, for their terrorist acts.

Academics like to dwell on matters of definition, often disregarding that practically all definitions are fuzzy at the edges. One matter of this definition should be cleared up, though. Several scholars hold that the individuals at issue qualify as terrorists only if they attack noncombatants or if they attack combatants while concealing themselves as noncombatants; if they limit themselves to openly attacking combatants, they do not qualify as terrorists. An open attack on combatants may qualify one as an enemy combatant (as in insurgency) but not as a terrorist. I suggest that one should rely much more on the observation that terrorists pass themselves off as noncombatant civilians for the purpose of stratagem, which is a cardinal factor affording them

advantages over conventional armies and which turns confronting them into a highly asymmetric armed conflict.

After the battle of Waterloo, Napoleon is said to have asked why he was not given any cover. His artillery officer responded that he had six reasons: first of all, he was out of shells—Napoleon responded, “Never mind the other five reasons.” In a similar vein, the characterizations of terrorists as soldiers or as criminals have such fatal flaws that there is hardly a need for an extended discussion of the finer and secondary points that can be made as to why neither category fits.

Soldiers are agents of a state, which can be held responsible for their conduct; states can be deterred from violating the rules of war by cajoling, incentives, and threats of retaliation. In contrast, most terrorists and insurgents are not agents of a state, nor are they necessarily members of a group currently qualifying for POW status under international law. They often act in parts of the world that lack effective government, or are supported by foreign governments, but only indirectly, and hence one often cannot determine whether they fight for, say, Iran or on their own. Even when they are affiliated with a state or are part of a government, as Hezbollah is in Lebanon, the national government often is unable to control their actions.

The fact that terrorists are typically not agents of an identifiable state is particularly an issue as we face what is widely considered by far the greatest threat to our security, that of our allies, and to world peace—the use of weapons of mass destruction by terrorists. Although nuclear forensics has made some progress, there is considerable likelihood that in the event of a terrorist nuclear attack, we would be unable to ascertain from whom the terrorists acquired their weapons and how. (Was it handed to them? Did they bribe their way in or did they steal it in the dead of night?) This absence of a “return address” and the resulting inability to deter WMD attacks with the threat of retaliation alone ought

to lead one to recognize that terrorists cannot be treated like soldiers.

Furthermore, the notion that terrorists are akin to soldiers wrongly presumes that there is a clear line that separates them from civilians who—it is widely agreed although not always honored—ought to be spared hostile acts as much as possible. In WWII it was considered highly troubling when civilians were deliberately targeted (as distinct from injured as “collateral damage”), for instance in London, Dresden, Tokyo, Hiroshima, and Nagasaki—given that here the difference between civilians and military targets was clear and well-understood, but ignored. In contemporary conflicts, in which non-state actors play a large and increasing role, such distinctions often cannot be readily made.

Terrorists capitalize on the blurring of the line between soldiers and civilians by acting like civilians as long as it suits their purpose, then deploying their arms and attacking before quickly slipping back into their civilian status. To the extent that American Soldiers and Marines adhere to the old rules, they are often expected to wait until the civilians reveal themselves as combatants before engaging them, and even then they cannot respond with full force because both terrorists and insurgents often hide in civilian homes and public facilities as they launch their attacks. True soldiers do not hide behind the skirts—or burqas—of civilians or under their beds, nor do they use their homes, schools, and places of worship to store their weapons.

The media reports with great regularity that American soldiers, bombers, or drones killed “X” number fighters and “Y” number civilians in Afghanistan, Pakistan, or in Iraq. When I read these reports, I wonder how the media can tell who is who. As someone who engaged in close-quarter combat, I suggest that this clarity is very often missing during the conflict (and by no means is it always available after the fact). It hence may be possible for the media to make such distinctions sometimes (especially if they are willing to rely on the word of the local

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A U.S. Marine from 3d Battalion, 8th Marine Regiment, and an Afghan National Police officer provide security in Delaram, Farah, Afghanistan, 23 March 2009.

population), but often such a line cannot be drawn by those engaging in battle. Ergo, such a line cannot serve as the basis for dealing with fighters who act like and locate themselves among civilians.

In short, characterizing terrorists as soldiers greatly hampers our security if we abide by the rules of war, and casts doubt on the legitimacy of our actions if we do not. Often we end up on both wrong ends of this stick.

The reasons terrorists cannot be treated as criminals are equally strong. By far the most important of these, which alone should stop all suggestion of subjecting terrorists to the criminal justice system, is that security requires that the primary goal of dealing with terrorists be *preventing* attacks rather than prosecuting the perpetrators after the attack has occurred. This is particularly evident when we concern ourselves with terrorists who may acquire weapons of mass destruction. It also holds for many terrorists who are willing to commit suicide during their attack and hence clearly cannot be tried, and who are not going to pay mind to what might be done to them after their assault. Finally, even terrorists not bent on committing suicide attacks are often “true believers” who are willing to proceed despite whatever the legal system may throw at them. All these kinds—those who may use WMD, the suicide bombers, and the “mere” fanatics—are best prevented from proceeding rather than vainly trying to prosecute them after the fact, and most cannot be effectively deterred by the criminal justice system.

In contrast to the need for prevention, law enforcement often springs into action after a criminal has acted—when a body is found, a bank is robbed, or a child is kidnapped. By and large, the criminal law approach is retrospective rather than prospective. Law enforcement assumes that punishment after the fact serves to deter future crimes (not to eliminate them, but to keep them at a socially acceptable level). True, to some extent law enforcement can be modified to adapt to the terrorist challenge. For instance, greater use can be made of statutes already in place to act against those who engage

in conspiracy to commit a crime, that is, those who plan to strike. However, significant kinds of preventive action cannot be accommodated within the law enforcement regime. These include acts that subject a considerable number of people to surveillance or interrogation or even administrative detention—without any individualized suspicion. The aim in such cases is to disrupt *possible* planning of attacks without necessarily charging anybody with anything, or to pry loose some information through what under criminal law would be considered fishing expeditions. For example, in 2002-2003, the FBI invited 10,000 Iraqi-Americans to be interviewed, without claiming that any of them were terrorists or supported terrorists. If a police department did the same thing to fight crime (say, invited 10,000 members of any given ethnic or racial group to come to police headquarters to be interviewed about drug deals in their neighborhood), I expect a major political storm would ensue. Representatives of

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the given groups, civil rights advocates, and select public leaders would complain about racial profiling, and the police chief involved might well not last the week. All this illustrates that prospective approaches that are deemed necessary to fight terrorism cannot be used to curb crime, which relies greatly on retrospective approaches.

Following normal criminal procedures also makes the prevention of terrorist attacks and the prosecution of captured terrorists more difficult. First, collecting evidence that will hold up in a normal criminal court while in the combat zones and ungoverned regions in which many terrorists are captured is often not practical. And, to quote Matthew Waxman, a professor of law at Columbia University, the criminal justice system “is deliberately tilted in favor of defendants so that few if any innocents will be punished, but the higher stakes of terrorism cannot allow the same likelihood that some guilty persons will go free.”

Additionally, most violent criminals act as individuals while most terrorists act in groups. Hence, the criminal procedures of open arrest records, charging suspects within 48 hours or so, and speedy trials in open court all undermine the fight against terrorism. Counterterrorism requires time to capture other members of the cell before they realize that one of their members has been apprehended, to decipher their records, and to prevent other attacks that might be under way. Also, security demands that authorities do not reveal to other terrorists their means and methods, which means that often one cannot allow them to face their accusers. (Imagine having to bring in a CIA agent or Muslim collaborator that we succeeded in placing high in the Iranian command—in order to have him testify in open court about the ways he found out that X, Y, and Z are members of an Iranian sleeper cell of terrorists in the United States) In short, terrorists should not be treated as criminals any more than as soldiers. They are a distinct breed that requires a distinct treatment.

The Third Way

The distinct rules for engaging terrorists have not been worked out, in part because the two camps are each locked into their soldiers/civilians or criminal/innocent legal and normative precepts. Indeed, we badly need a group of top notch legal thinkers *combined with people who have extensive combat*

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experience to work out these rules. I turn next to outline select preliminary guidelines concerning the ways to deal with terrorists during armed conflicts and in future counterterrorism campaigns, as well as with those individuals already detained. I am hardly alone in trying to help develop this highly unpopular position. Columbia University’s Phillip Bobbitt goes down this unbeaten path in his valuable *Terror and Consent: The Wars for the Twenty-First Century*, in which he implores policymakers to stop relying on outdated legal and strategic thinking in dealing with terrorism. Much more detailed work is carried out in the outstanding book *Law and the Long War* by Benjamin Wittes, a senior fellow at the Brookings Institution. Both agree that there is a need for distinct legal and normative precepts for dealing with terrorists. (One may ask why I hold that this third approach is very unpopular despite the fact that both books received rave reviews, as did my much more limited attempt to deal with this issue in *The Financial Times* on 22 August 2007. I reached this conclusion by noting that despite the warm welcome to these texts, so far they have been almost completely ignored by policy makers, most legal scholars, and most assuredly by advocates of human and individual rights.)

For each of the following suggested guidelines, much remains to be worked out and surely additional criteria are called for. They mainly serve to illustrate the third approach:

Terrorists are entitled to select basic human rights. Merely because they are human beings, terrorists have basic rights. Although terrorists should be treated as civilians who have forfeited many rights, certain basic rights should be considered inviolate even for them. They should not be killed when they can be safely detained and held, nor should they be subjected to torture.¹ Other basic rights are implied in the examination that follows; for instance, concerning their rights not to be detained indefinitely and to an institutionalized review of their status.

Special detention authority. Terrorists cannot be held until the end of the war (the way POW may be) because the armed conflict with terrorists may last for a hundred years or peter out without any clear endpoint. There will be no signing of a peace treaty with Bin Laden on top of a battleship, and if there was one, it would not mean much to other terrorist groups. Also, holding anybody without review for an indefinite period is a gross violation of basic human rights, and one that can be readily remedied. Detained terrorists should be subject to periodic review by a special authority to determine if they can be safely released or if their history warrants further detention. Note that while much attention has been paid by the media to the plight of those detained, little attention has been paid to those that have been released and proceeded to commit acts of terror, particularly, killing civilians. For instance, Abdallah Saleh al-Ajmi, a former Guantanamo Bay detainee, was repatriated to Kuwait as per a prisoner transfer agreement with the U.S. In his trial in Kuwait, al-Ajmi was acquitted and then released. About two years after his release from Guantanamo, al-Ajmi killed 13 Iraqi soldiers in a suicide bombing.

At the same time, terrorists should not be incarcerated for a set period of time, the way criminals are, depending on the gravity of their attack. The main purpose of detention is to *prevent* them from attacking again rather than to punish them for their crime. Thus, if the conflict between Israel and the Palestinians is finally settled and the settlement is faithfully implemented, those terrorists jailed by Israel and by Palestinian authority can be released. Charging terrorists with a crime within 48 hours of capture or releasing them, the way criminals are treated in the United States, will not do as it does not allow enough time for essential counterterrorism measures. (Various extended periods, but not unlimited ones, that have been set in law in democratic societies provide a precedent of sorts. For instance, in the UK, criminal suspects are usually held only 48 hours without being charged, but

legislation now allows that time to run up to 28 days for terrorists.)

Many related issues remain to be worked out, including how to ensure that preventive detention is not used too widely and which procedures should be used to determine who can be released. (For such a discussion see Matthew Waxman's article in the *Journal of National Security Law and Policy*, "Administrative Detention of Terrorists: Why Detain, and Detain Whom?")

A National Security Court. Neal Katyal, a highly respected legal scholar and the new Principal Deputy Solicitor General of the United States, favors a separate judicial authority for dealing with terrorists: a congressionally created national security court. Unlike a military commission, this court would be overseen by federal judges with life tenure, and detainees would have the right to appeal decisions—appeals which would then be reviewed by a second set of federal judges. But unlike a civilian court, detainees would not receive the full panoply of criminal protections (for instance, they would not be allowed to face all their accusers, if these include, say, CIA agents working covertly), and the national security court would also have different evidentiary standards than civilian courts (such as allowing the introduction of certain kinds of hearsay as evidence).

Similarly, Wittes points out that so far the main steps in the U.S. to develop a systematic position on dealing with captured terrorists have been taken by the executive (various presidential declarations, orders and "findings") and the courts (including decisions such as *Rasul vs. Bush* and *Hamdan vs. Rumsfeld*). He criticizes this approach, and instead suggests that Congress should formulate a distinct legal architecture to deal with terrorists by authorizing the creation of a national security court, with rules and practices less exacting than those that govern domestic criminal courts, but in which terrorists are granted more legal rights and protections than the current Combatant Status Review Tribunals.

Wittes also favors that the standards for admissible evidence be lower than for domestic criminal cases; the court should bar the admission of evidence gleaned from torture, but, aside from that, "probative material—even hearsay or physical evidence whose chain of custody or handling would not be adequate in a criminal trial—ought to be fair game."²

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Terrorists cannot gain full access to all the evidence against them, which criminals are entitled to, without creating very large security risks. Even for parts of the evidence to be revealed, I favor allowing terrorists to choose among lawyers who have security clearance. (This also greatly curtails the possibility that the lawyers will serve as go-betweens for terrorists and their compatriots, as was the case with lawyer Lynne Stewart.)

There is much room for differences about the specific nature and workings of the national security court. For instance, I would rather call it a national security review board to stress that it is not a typical court. However the main point is incontestable: *Terrorists must be tried in different ways than criminals and soldiers are tried.*³

Surveillance of civilians. A major tool of counterterrorism is to identify the attackers before they strike, an essential element of a prevention strategy. Surveillance has a key role to play in such efforts. It entails allowing computers (which do not “read” messages and hence cannot violate privacy) to screen the billions of messages transmitted through cyberspace as well as old-fashioned phone lines. It is a highly obsolete notion to suggest that in order to conduct this kind of surveillance the government must first submit evidence to a court that there is individualized probable cause for suspicion—the way we typically deal with criminals. All messages that pass through public spaces (as distinct from, for instance, within one’s home) might be screened to identify likely terrorism suspects who then can be submitted to closer scrutiny.

The notion that one can and should deal differently with Americans versus others is also highly anachronistic. I often ask civil rights advocates when was the last time that they were asked to show their passport when they sent an email or used their cell phone. That is, most times there is no way of determining the nationality of those who communicate through modern technology. The rule of thumb used for a long time by American authorities, such as those at the National Security Agency, has been that if the message is coming from American territory or sent to someone who is in American territory, it is presumed to involve an American. This assumption leads to absurd results, all favorable to terrorists. For instance, numerous messages (such as emails/phone calls/text messages) sent between many dif-

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ferent parts of the world, say, from Latin American to Europe, pass digitally through the United States; these cannot be legally scrutinized as long as the said rule is followed. Above all, it’s quite possible terrorists will be among the over 50 million visitors who come to the United States each year, and that before they strike, these terrorists will contact their masters overseas, as the 9/11 attackers did, as well as those who attacked other nations, such as the United Kingdom and Spain. This suggests that all messages be initially screened, in the limited sense that computers determine whether they actually should be read or their patterns further examined.

One effective way to ensure that mass surveillance is not abused is to set up a review board that will examine regularly the way data are collected and used, and that will issue annual reports to the public on its findings. The fact that both the U.S. Department of Homeland Security and the Office of the Director of National Intelligence have privacy officers is also a step in the desired direction. This kind of oversight works largely after the fact, rather than slowing to a crawl the collection of information, which is the case if each act of surveillance must be reviewed by a special court before it is undertaken. Such oversight points to the right balance between allowing the government to advance security and subject these efforts to public scrutiny.

Armed conflict zones and combatant civilians. The greatest difficulties concern the battlefield itself. Imagine that a U.S. Navy destroyer in foreign waters is approached at great speed by a boat, or a truck is racing toward an American checkpoint in Afghanistan. If this were a conventional war and the boat or truck were carrying soldiers of the other side and was marked with the insignias of the army we were contending with, they would be stopped by an uninhibited use of arms (under most circumstances). If, though, these vehicles have no markings and look like civilian means of transportation, and if the occupants are wearing civilian clothing, the way



U.S. Army, SSG Isaac A. Graham

Afghan National Policemen man a guard shack on the road leading across the Pakistan/Afghanistan border below checkpoint 7 in the Tirzaye district of the Khowst province of Afghanistan, 27 March 2007.

they ought to be faced is, at least legally speaking, ambiguous. Often, as was the case with the USS *Cole* and at various checkpoints in Afghanistan and Iraq, terrorists are allowed much more leeway than soldiers of an opposing army would be granted—to the disadvantage of our conventional forces.

Under the new suggested rules, the United States and other nations working to prevent terrorist attacks in a contested area, say, the southern region of Afghanistan or an Iraqi city in which security has not been established, would declare the area an armed conflict zone. This would entail warning people that all those who approach troops or their facilities and who seem to pose a threat will be treated accordingly. This could mean, for instance, that in societies like Iraq in which most males carry firearms, people would be advised to either stay out of armed conflict zones or leave their weapons behind.

Such armed conflict zones could also be declared around ships in international waters. If boats that act in ways that suggest hostile intent enter such a zone, (say, 200 hundred yards around a ship), they would be warned to leave or surrender; if they refused

and ignored a warning shot, they would be treated as a hostile force. In this case, if they are innocent civilians who happen to go fishing next to one of our ships, they would not be harmed.

Furthermore, civilians who carry out combat-like missions or provide support for such missions—I call them combatant civilians, the proper characterization of terrorists—would be treated as if they were a hostile force. For instance, if civilians act as spotters or intelligence agents, carry ammunition and replace weapons, or house terrorists—they would be treated like terrorists. A mental experiment might help in considering this matter. Assume a U.S. military unit is coming under mortar fire. The American forces identify a person with field glasses on a rooftop overlooking the area. He also has a walkie-talkie. As more and more rounds of shells are coming in, it becomes apparent that someone is clearly providing feedback to the attackers as their aim is improving. If this person was wearing the uniform of a soldier, he would not be spared. Just because he wears civilian clothes—in an armed conflict zone—he would not be treated any differently.

At the same time, civilians who go about their work without any overt signs or evidence that they are combatants should be treated by the old rules, as individuals that are to be protected from military strikes as much as possible. Thus, shooting women and children (as was reported to have happened at one point in Gaza), carrying out retribution killings (as was reported to have happened in Haditha in Iraq), or burning down a village (as took place in Mai Lai) are as gross a violation of the new rules as they were of the old ones.

The main point behind these specifics, which surely can be adjusted to take into account differences in circumstances, is that terrorists, by acting like innocent civilians, are endangering the safety and rights of true civilians. And, that civilians who act as combatants, even if they only serve as support troops, forfeit many of their rights as noncombatants. They force conventional armies and police seeking to establish basic security in a conflict zone to drop the obsolescent line that treats differently soldiers, who in war are a fair target, and civilians. *A new line should be drawn between combatant and noncombatant civilians.* It will allow security forces to deal with all those who carry arms in the armed conflict zone, carry out combat-like or

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combat support missions, or who seem intent on attacking our forces or those we seek to protect.

This is much less of a change in policy than it might seem at first. The various U.S. military forces, and those of other nations, all follow one set or another of rules of engagement, aside from (but consistent with) the rules of war. These typically allow the troops to take whatever measures they require in self-defense. For instance, the standing U.S. Army rules of engagement state, “A commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend that commander’s unit and other U.S. forces in the vicinity from a hostile act or demonstration of hostile intent.”⁴ This rule could be interpreted to apply to defending against civilian attacks and points to similar forms of engagement to those previously outlined. However, these rules leave it open-ended as to what self-defense entails. The suggested additional guidelines should hence be viewed as seeking to spell out what self-defense entails, although it is true that no set of rules can cover all the permutations that arise in combat situations. Other precedents for the approach here outlined are found in the periods in which even democracies have declared a state of emergency or martial law. For instance, in April 2004, during the U.S. military operation in Fallujah, the military made announcements on local radio and distributed leaflets asking residents to stay in their homes.

The concept that underlines the armed conflict zone, which may need considerable additional deliberation, is the separation of combatant and noncombatant civilians, to protect the latter and forcefully deal with the first. Will they undermine counterterrorism drives by alienating the civilian population? Will armed conflict zones cause us to lose the peace, even if they help us to win the armed conflict? That is, do these counterterrorism tactics undermine the strategic goals of the conflict? Is it not best to instead proceed to develop the economic, civil society, and political life of the areas involved?

As I showed in detail elsewhere, without first establishing basic security, development cannot proceed.⁵ And regimes that do not provide for elementary safety lose not just their legitimacy but also their credibility. Second, there are limitations on what one can achieve through development.⁶ To reduce corruption to tolerable levels, to elevate national commitments to a level in which they trump tribal ones, to modernize an economy, and to build a civil society takes decades and many billions of dollars, at best. Winning the hearts and minds of the population (to the extent that it can be achieved) supplements measures that enforce safety, but safety cannot be based on it in areas in which terrorists take hold and in which significant elements of the civilian population are combatants.

Above all, to demand that civilians who raise their arms against us be treated like noncombatants until they choose to reveal their colors, and to allow them to slip back into this status whenever it helps advance their goals, imposes several costs. The most obvious ones are casualties on our side. Such an approach also generates perverse incentives for nations with conventional armies to circumvent the rules, to find some *sub rosa* way to deal with combatant civilians. Redefining the rules of armed conflicts is not just a much more effective way, but also a much more legitimate way, of dealing with violent nonstate actors.

Tomorrow’s Freedom Fighters?

There are those who say that those we consider terrorists today will be considered freedom fighters tomorrow—and some people already view them in this way. As I see it, deliberately killing a human being, or merely terrorizing one, is a morally flawed act. There are conditions under which this act is justified, as in self-defense, or legal, as when a court orders an execution, or the president orders the army to defend the nation. However, none of this makes killing and terror “good”; we are always commanded to see whether we can achieve the same purpose without killing or terror—for example, using non-lethal means such as tasers in law enforcement and taking the enemy soldiers as POWs rather than killing them, once they no longer endanger us.

While killing and terrorism are always morally flawed means, there is no moral equivalency in

terms of the purposes for which they are applied. Those who use these means to overthrow a tyrannical government (for instance, members of the underground in France who fought the Nazis during WWII) may deserve our support, while those who use them to undermine a democracy (for instance, those who attacked the United States on 9/11, and those who attacked Spain and Britain in the following years)—deserve special condemnation. *However, the fact that some purposes are noble and others foul does not make the means used good.* Hence, while not all combatants are created equal—while some may indeed be today's or tomorrow's freedom fighters—none of them are engaged in regime change in ways that one should consider morally superior to nonlethal means.

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How Far Can One Go?

Up to a point, these and other such counterterrorism measures might be viewed as merely modifications of the criminal justice system or as a hybrid of that system and the laws of war. However, given the scope and number of differences involved, together they amount to a distinct approach. This is most evident when we acknowledge that the prevention of terrorist acts requires questioning and even detaining some people who have not yet violated any law.

The preceding suggestions are merely ways to launch and foster the explorations of the third approach, one that faces considerable resistance from both sides of the political spectrum. They are far from a worked-out model that can be implemented as public policy without considerable additional deliberation and modification. Above all, for the distinct treatment of terrorists to be fully embraced, it must gain acceptance among the public of the United States and its allies (a difficult enough task) while also being viewed as legitimate by people around the world. It hence requires transnational dialogues and the develop-

ment of new norms and agreements—say, a new Geneva Convention—which, to reiterate, would be hardly the first time these conventions have been significantly altered.

When all is said and done, one might differ about how far one can go in preventing terrorism and how to best deal with terrorists, but still agree that it makes little sense to treat them either as criminals or as soldiers. At issue is not a matter of neat classifications, but ways to maintain the institutions of a free society while also protecting it from devastating attacks.

Behind many of the discussions of the issue at hand—especially by those who have never been involved in combat—is a sub-text, a quest for a clean war, one in which no bystanders are hurt, collateral damage is minimized if not avoided all together, and strikes are “surgical.” Thus, for instance, various observers objected to the use of airpower in Kosovo—and recently of bombers and drones in Afghanistan and Pakistan—and urged greater reliance on land troops, because they hoped that these troops might be able to better separate civilians from fighters.

As I see it, the same respect for human life and for human rights takes one elsewhere. One must recognize that, although some measures can be taken to protect noncombatant civilians, at the end of the day some such civilians are very likely to be hurt. Hence, the best way to minimize innocent civilian casualties is to exhaust all other means possible to deal with conflict short of armed interventions—to go the extra mile, to ignore provocations, to invite intermediaries, to turn the other cheek and to avoid, if at all possible, an armed clash. Fighting is by nature bloody. Although it can be tidied up to some extent, ultimately it is tragic and best avoided if at all possible. However, when an armed conflict is forced on a people by those who bomb our heartland, killing thousands of innocent civilians working at their desks, an appropriate response requires dealing with the attackers as terrorists, and not being hobbled by obsolete precepts and rules. The time has come to recognize that those who abuse their civilian status by pretending to be civilians but acting like terrorists forfeit many of the rights of true civilians without acquiring the privileges due to soldiers. **MR**

NOTES

1. It remains to be worked out what should be considered torture. It can be defined so broadly that it would block most interrogation techniques—for instance, if it encompasses a ban on humiliating the detainees and it leaves up to them to define what is humiliating—or so narrowly that waterboarding and many other cruel measures would be allowed as long as they do not lead to organ failure. It goes without saying that the suggested guidelines' use would be much hampered unless the definition is worked out, presumably somewhere in between these two extremes.

2. Benjamin Wittes. *Law and the Long War* (New York: The Penguin Press, 2008) 165.

3. Nor can they be tried as soldiers, as much of the evidence is not admissible in military commissions either.

4. Chairman of the Joint Chiefs of Staff Instruction, *Standing Rules of Engagement for U.S. Forces*, 15 January 2000, A-3.

5. Amitai Etzioni, *Security First: For a Muscular, Moral Foreign Policy* (New Haven, CT: Yale, 2007); Amitai Etzioni, *The Moral Dimension: Toward a New Economics* (New York: Free Press, 1988).

6. Amitai Etzioni, "Reconstruction: An Agenda" in *Statebuilding and Intervention: Policies, Practices, and Paradigms*, ed., David Chandler (New York: Routledge Press, 2009) 101-21.

The following is a letter sent to Professor Etzioni from a senior officer in Afghanistan in direct response to this article. *Military Review* considers it a valuable insight to the issues raised in Professor Etzioni's discussion.

Dear Professor,

I thought the concept of armed conflict zones particularly useful. I know that informally we have done similar things but it is usually by an ad hoc series of population and resources control measures such as establishing curfews, PSYOPS announcements about a restrictive weapons policy, etc. We should absolutely have a set of measures grouped together for use in an armed conflict zone. The measures could be modified of course, but in general there would be a well known established set of procedures. I'm going to have a Judge Advocate look into the idea and see if we can at least establish a procedure for us to use while deployed.

The enemy in southern Afghanistan is actually more akin to guerrillas. They do employ terrorist tactics—but these kinds of tactics are largely learned from Arabs and other foreign fighters. (The Afghan [insurgent] has a tradition of using IEDs, but even during the Soviet era they used them more like traditional tactical mines; suicide bombing in Afghanistan is a recent tactic.)

Afghans also employ tactics to intimidate and terrorize a local population but there is a difference in approach and intent between brigands, war lords, and Taliban. But in the end, most of the Taliban that we will fight rely on light infantry tactics and organization and not terrorism. That is the substantial thing we have to consider in our approach to this war, too. Al Qaeda is a global threat that relies on terrorism, and the use of special operations forces to attack and decapitate leadership may be effective. Local and regional forces who enable Al Qaeda, like the Taliban, on the other hand, fight as guerrillas, and they must be defeated by conventional forces because formations, and not simply leaders or networks, have to be attacked and destroyed. Conventional forces are the only organizations with the means for such a task.

Unfortunately our Army had not adopted a counter-guerrilla strategy and instead is focused on stability operations and on the idea that reconstruction (even in areas that were never constructed) will have value.