

The Ethics of Counterinsurgency

Keith Pavlischek

The term “irregular warfare” has become a catch-all label for those forms of warfare that are neither conventional (that is, involving the land, sea, and air forces of belligerent states using traditional tactics) nor nuclear. It applies to both insurgency and counterinsurgency warfare; it also applies to counter-terrorist and “direct action” missions of special forces and to stabilization, training, and reconstruction operations. The U.S. military efforts today in Iraq and Afghanistan are decidedly examples of irregular warfare; so was much of the Vietnam War. And it is likely that the United States will be involved in more irregular conflicts in the years ahead. As the most recent iteration of the U.S. National Defense Strategy puts it:

U.S. dominance in conventional warfare has given prospective adversaries, particularly non-state actors and their state sponsors, strong motivation to adopt asymmetric methods to counter our advantages. For this reason, we must display a mastery of irregular warfare comparable to that which we possess in conventional combat.

Secretary of Defense Robert M. Gates has driven the point home in speeches, arguing that the United States is “much more likely to engage in asymmetric conflict than conventional conflict” in the years ahead, and that we must “ensure that the capabilities gained and counterinsurgency lessons learned from Iraq and Afghanistan” are institutionalized in the military and the defense bureaucracy.

That is no small order. As Gates and others have noted, making irregular warfare a core competency will require carefully balancing doctrine, training, and resources so the U.S. defense establishment doesn’t lose any of its present institutional, cultural, and technological strengths. And there is a further complication: American assumptions about and cultural dispositions toward war do not easily accommodate irregular warfare. In a fine 2006 monograph, Colin S. Gray, a professor of international politics and strategic studies at the University of Reading in the United Kingdom, compiled a list of more than a dozen characteristics of “the

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American way of war” that must be overcome if the United States is to improve its performance against the strategic “menace posed by irregular enemies.” Americans, for example, tend to think of war apolitically, astringently, and ahistorically; our optimistic penchant for an “engineering fix” inevitably leads us to “attempt the impossible”; we are not rich in the “cultural empathy” needed to engage minds; and we are too dependent on technology, firepower, and large-scale missions. We are also, Gray argues, too impatient and too sensitive to casualties: “If the United States is serious about combating irregular enemies in a way that stands a reasonable prospect of success, it will have to send its soldiers into harm’s way to a degree that could promote acute political discomfort” since irregular warfare often requires getting “up close and personal” with an enemy. (The 2006 Army and Marine Corps *Counterinsurgency Field Manual*, which will be taken up in detail later, represents a valuable institutional effort to address many of these problems.)

Gray’s helpful summary makes clear both that Americans are not instinctively good at irregular warfare and that we warily view it as unnecessary and strategically flawed. But in addition to the cultural and historical reasons Gray lists, it seems likely that some Americans are hesitant to support their nation’s involvement in irregular warfare for *moral* reasons, intuitively believing that, when compared to conventional warfare, irregular warfare is somehow ethically dubious or less noble—in a word, more “dirty.”

Is there indeed an ethical difference between conventional and irregular warfare? Is there something inherent in the nature and conduct of irregular warfare—particularly insurgency or counterinsurgency warfare—that makes it morally distinct from conventional warfare?

Two sorts of people can be expected to reject this question out of hand. The most stringent realist defender of *realpolitik* will insist that questions like these are meaningless, perhaps even absurd, because strategy alone matters; different types of warfare are only important insofar as they imply different tactical means to strategic ends. A staunch pacifist, meanwhile, will reach the same conclusion for the opposite reason: suggestions that there might be ethically important differences between types of warfare would be to miss the larger point about the immoral nature of any and all war.

However, those who inhabit that broad moral terrain commonly referred to as the just war tradition understand that (*contra* the strict pacifists) some wars must be fought and that (*contra* the strict realists) some wars are fought immorally. It is therefore critically important to sort out the moral distinctions between conventional and irregular warfare—

especially insurgency and counterinsurgency warfare, as seen in the Iraq conflict. Counterinsurgency warfare is not ethically different from conventional warfare. Insurgency warfare, by contrast, is fundamentally ethically different from conventional warfare. But while insurgency warfare is almost always unethical, counterinsurgency can be waged ethically.

Insurgency, Terrorism, and Noncombatants

Irregular forces have always had a rather ambiguous status in both law and morality. To understand why that is so, first consider a hypothetical example of ethically problematic conduct in conventional warfare. Suppose I am a military or political leader engaged in a conventional war who is concerned with protecting a military asset, an important weapon or weapon system, or any number of troops from being attacked by my enemy's indirect fire—his artillery, rockets, mortars, and so forth. Suppose also that I know the scruples of my enemy, those not merely against intentionally targeting civilian noncombatants, but also against harming them from “collateral damage.” Knowing this, I conclude that my assets will more likely be preserved by placing them in close proximity to civilian infrastructure—schools, hospitals, fire stations, and other public safety facilities. What are we to make of this tactic, ethically speaking?

Let's now revise the hypothetical: Suppose now that the civilians in the area immediately surrounding the target decide that it might be prudent to leave. Knowing that this will place my military assets in direct line of attack, I decide to use forcible measures to prevent civilians from leaving the area by cordoning it off with roadblocks and patrols, as well as through a few selected public executions. What should we say about *this* tactic, ethically speaking?

What makes the first scenario ethically questionable is that by placing my military assets in close proximity to civilian noncombatants and civilian infrastructure, I have deliberately enlarged the range of civilians who may legitimately be killed by my enemy indirectly, becoming human collateral damage. I have not increased the number of civilians subject to *direct attack*, but rather I have sought to preserve military advantage by making it likelier that my enemy will kill more civilians *indirectly and unintentionally*. In the second scenario, the ethical problem has shifted: I now have sought to gain or preserve military advantage by killing (or threatening to kill) civilians *directly and intentionally*.

These two scenarios taken from conventional warfare help clarify the fundamental ethical problem raised by irregular warfare. If you grant that

there is something wrong when conventional combatants use civilians as shields to protect combatants or military advantage, or when they deliberately kill or terrorize civilians to do the same, then analogous actions would also be immoral and unethical in irregular warfare.

This is why all insurgency warfare is ethically suspect: morally reprehensible hostage-shield tactics are an intrinsic and unavoidable part of insurgency warfare. University of Edinburgh theologian Oliver O'Donovan puts it well in his 2003 book *The Just War Revisited*:

Within the general class of civil—or, as it is usually called today, “internal”—armed conflict there is a special problem with insurgency campaigns waged by non-governmental armies that, sometimes by choice but often by necessity, pursue a strategy of disseminating active armed units *invisibly through the civil population*. This puts the whole population in the position of a hostage shield, compelling a conventional military response to incur high levels of non-combatant damage—and adding insult to injury, no doubt, by exploiting the damage subsequently for propaganda purposes. [Emphasis added.]

We might want to quibble with O'Donovan's suggestion that insurgents pursue their hostage-shield tactics sometimes by choice but “often by necessity.” What is the nature of this “necessity”? After all, rebels organized in opposition to their government have chosen to forgo a range of options—traditional political organization, nonviolent civil disobedience, armed opposition using more conventional means (perhaps with foreign support)—in their opposition to the government. Their decision to use the larger civilian population as a hostage shield is always by choice.

This is simply a matter of definition: If combatants in a civil or internal conflict choose to refrain from using civilian shields as a tactical means, their effort cannot be classified as an insurgency. Insurgents mingle and hide among civilian populations, usually only exposing themselves when they attack. Insurgency warfare is nicely summed up in Chairman Mao's maxim, “The [people] may be likened to water and the [army] to the fish who inhabit it.” Were non-governmental rebel forces to engage in armed conflict without hiding under civilian cover, then they would not be insurgents; their effort would be more like conventional or “regular” warfare.

It is necessary to remember that there are gradations even within the realm of morally problematic warfare. The actions of the commander in the first scenario described above may be morally reprehensible, but they are less morally reprehensible than the commander in the second scenario, who terrorized and killed civilians. Although the terms have

been conflated in recent public usage, insurgents are not necessarily also terrorists. The commander in the first scenario above, for example, is not necessarily a terrorist. This distinction is worth keeping in mind, as O'Donovan argues:

Insurgents may also be terrorists in fact; in the public mind, understandably enough, they are almost so by definition. Yet the difference is not to be dismissed lightly; every step towards restraint gains some ground for the civilizing of armed conflict. To the extent that insurgents desist from immediate acts of terror, they display a higher level of respect for the demands of justice, even if their exploitation of the civil population as hostages fails to display respect at a very high level.

While modern insurgencies in practice almost always tend to employ terrorist tactics—as is the case in Iraq today—it is important to acknowledge the difference. Ethically, there is a relevant distinction between, on the one hand, making it likely that your enemy will kill noncombatants indirectly, and, on the other, directly killing noncombatants yourself. And it is also of legal consequence, since the past century has seen the rise of international legal incentives to “regularize” insurgents, as well as legal disincentives to discourage them from resorting to terrorist tactics.

Regularizing Insurgency

Governments have historically been reluctant to treat rebel forces as legitimate combatants. The American Civil War is a notable exception—although even then, the Union was confronted with the problem of irregular forces. Major General Henry W. Halleck, the General-in-Chief of the Union Army, sought guidance from Columbia University Professor Francis Lieber on how to respond to rebel authorities that were asserting “the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines.” Lieber answered with the pamphlet *Guerrilla Parties*—an attempt, as just war theorist James Turner Johnson puts it, “to define an appropriate place for guerrillas in warfare, to regularize this form of irregular war.” In 1863, it was incorporated into General Orders No. 100, the famous Lieber Code, regulating military conduct in war:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so

with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

At the heart of Lieber's view of how war should be fought was the distinction between combatants and civilians and the conviction that, as American University professor David Bosco explained in a recent article in *The American Scholar*, "civilian life and property should be spared whenever possible."

The influence of Lieber's work and General Orders No. 100 on subsequent attempts by the international community in the Hague and Geneva conventions to offer incentives to regularize the warfare of militias and guerrilla forces cannot be underestimated. As early as the Fourth Hague Convention of 1907, legal incentives were promulgated to prevent militias fighting an otherwise conventional war against their own governments from descending into insurgency warfare. Most notably, if captured, rebel forces functioning as armed militias would be granted the privileges of prisoners of war. Thus, if they were members of a militia commanded by a superior responsible for his subordinates, if they wore an identifying emblem distinguishable at a distance, if they carried their arms openly, and if they conducted their operations in accordance with the laws and customs of war, they would be immune from prosecution and interrogation (not to mention being summarily shot on sight). In the 1947 Third Geneva Convention, prisoner of war status went beyond mere militias fighting in support of regular forces to "organized resistance movements" abiding by those same standards.

Naturally, if belligerents were to accept these conditions, it would have been extremely difficult if not impossible to conduct an insurgency operation—one that moves, to use O'Donovan's words, "invisibly through the civil population." Furthermore, it would have rendered inconceivable the extension of prisoner of war status to insurgents who resort to terrorist tactics.

It only remains to be added that this "preferential option against insurgencies" has historically been the predominant view of Western theological, moral, and political traditions. Insurgencies represented a use of armed force by people who did not have the proper authority to use it (the *jus ad bellum* criteria of right authority), and they increased

suffering by breaking down whatever order, justice, and peace the society had. Under the influence of movements of national liberation and the like, modern sensibilities have tended to romanticize insurgencies. But more recent confrontation with jihadists may well cause us to reconsider the wisdom of the traditional position.

Meanwhile, the laws of war with regard to irregular forces have more recently taken a turn away from incentivizing the civilizing of war.

Counterinsurgency—Tactics and Ethics

What about counterinsurgency? The fundamental ethical question is no different today than when the theologian Paul Ramsey posed it forty years ago in a classic Vietnam-era essay: “How is it possible, if it is indeed possible, to mount a morally acceptable counterinsurgency operation?” Can a counterinsurgency effort “abide by the distinction between legitimate and illegitimate military objectives while insurgency deliberately does not”?

Military scholar Edward N. Luttwak is among those who believe that it is not possible to successfully conduct a morally acceptable counterinsurgency strategy. In a provocative 2007 article in *Harper's*, he argued that the “methods and tactics of counterinsurgency warfare” in the new *Counterinsurgency Field Manual* constitute nothing less than military “malpractice.” (The *Field Manual*, published in late 2006, was written by a team working for Army General David H. Petraeus and Marine General James N. Mattis; it applies to both the Army and the Marine Corps.) Reviewing a draft of the *Field Manual*, Luttwak considered it profoundly misguided and argued that the only surefire way of defeating an insurgency—indeed, an “easy and reliable way of defeating all insurgencies everywhere”—is to use conventional forces to terrorize the civilians who, advertently or not, shelter the insurgent forces.

To make his case, Luttwak cites historical examples of conventional forces that crushed insurgencies. The Turks of the Ottoman Empire, for example, controlled entire provinces “with a few feared janissaries and a squadron or two of cavalry.” These forces didn’t have to hunt down rebels; they simply demanded their surrender from locals. According to Luttwak, “massacre once in a while remained an effective warning for decades.” Before that, imperial Rome with a mere 300,000 soldiers could not disperse its infantry throughout all of the empire’s cities, towns, and hamlets. “Instead, they relied on deterrence, which was periodically reinforced by exemplary punishments. Most inhabitants of the empire never rebelled after their initial conquest.” And during the Second World War, “terrible

reprisals to deter any form of resistance were standard operating procedure for the German armed forces.” Luttwak thinks that this willingness to out-terrorize insurgents is a “necessary and sufficient condition of a tranquil occupation.”

For Luttwak the choice is stark. If counterinsurgency is to be effective, it must necessarily resort to direct and intentional attacks on the civilian population as a means to deter insurgents. The moral equivalent of this strategy in conventional warfare would be to hold that, as in the first hypothetical scenario above, once my enemy has decided to use the surrounding civilian population as a hostage-shield in order to protect his conventional military assets, I am excused from normal military obligations to refrain from directly and intentionally attacking civilians. It would suggest, in fact, that I am now free to attack civilians as a *means* to attack a legitimate target. It is as if my opponent’s “original sin” has relieved me of the *jus in bello* requirement of noncombatant immunity.

Luttwak acknowledges that Americans are not willing to fight insurgents using this method, a refusal he calls “principled and inevitable.” This acknowledgment speaks to the extent to which the requirements of just warfare—the principles of discrimination and proportionality and of noncombatant immunity—have become internalized in the war-planning and war-fighting doctrine of the U.S. defense establishment. And indeed, those just war principles are at the core of the newly emerging American counterinsurgency doctrine. The protection and security of, and the provision of basic goods and services to, the civilian population—the waters in which the insurgent fish swim—is the very essence of the strategy presented in the *Field Manual*.

To be sure, Luttwak is correct that terror-employing conventional forces can effectively crush an insurgency—although as the examples he cites suggest, such tactics are more befitting an imperial power than a state with the concerns and interests of the United States. But it is far from clear that terrorizing civilians is the *only* way to defeat an insurgency. Indeed, the success of the 2007 surge of U.S. forces in Iraq would seem to indicate that an insurgency can be beaten with a smarter and far more restrained force than Luttwak proposes. Other authorities in counterinsurgency warfare believe that “out-terrorizing” insurgents through reprisals, mass executions, and collective punishments is not as effective as Luttwak suggests—and to the extent that it is successful, it is so only in the short term. For instance, David Kilcullen, a former lieutenant colonel in the Australian Army who has served as an advisor to General Petraeus and to the U.S. Department of State, has argued:

The methods Dr. Luttwak mentions are thus not a prescription for success, but a recipe for disaster. As he quickly admits, U.S. and Coalition forces would never consider such methods for a moment. And this is just as well, since this approach does not work. The best method we know of, despite its imperfections, has worked in numerous campaigns over several decades, and is the one we are now using [in Iraq]: counterinsurgency.

What's more, because the key aim of counterinsurgency is severing the link between insurgents and the civilian population, the *Field Manual* suggests that there are several paradoxes of counterinsurgency operations that distinguish them from conventional combat:

- Sometimes, the more you protect your force, the less secure you may be.
- Sometimes, the more force is used, the less effective it is.
- The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.
- Sometimes doing nothing is the best reaction.
- Some of the best weapons for counterinsurgents do not shoot.
- The host nation doing something tolerably is normally better than us doing it well.
- If a tactic works this week, it might not work next week.
- If it works in this province, it might not work in the next.
- Tactical success guarantees nothing.
- Many important decisions are not made by generals.

The upshot of these paradoxes is a doctrinal emphasis on restraint in the use of deadly force or “kinetic” means, even against legitimate military objectives. This emphasis is so pronounced that an intense debate has erupted among experienced soldiers and scholars over whether the *Field Manual* has, as one writer has put it, “removed the essence of war—fighting—from its pages,” and needlessly dismissed the value of tactical combat. Describing this “Great Debate of sorts” recently in *The Atlantic*, Boston University professor Andrew J. Bacevich suggests that an “emerging Petraeus Doctrine” is supplanting the Powell Doctrine of overwhelming force which “assumed that future American wars would be brief, decisive, and infrequent.” The U.S. Army, he writes, is now

entering “an era in which armed conflict will be protracted, ambiguous, and continuous—with the application of force becoming a lesser part of the soldier’s repertoire.”

Bacevich may overstate the extent of the transformation underway, but he is right to note that change is afoot. If the United States has a strategic interest in selectively fighting insurgencies, then it is morally bound to structure a counterinsurgency force that will adhere to the traditional laws and customs of war.

Whom Does International Law Protect?

While to this point ethics have been dealt with somewhat in the abstract, a final word should be added about the current status of the international law. The two are not unrelated. Recall the underlying reasons for the laws of war with regard to irregular forces: to provide incentives for them to regularize and avoid hostage-shield tactics, and to provide disincentives for them to resort to terrorism. But we have good reason to believe that these laws have in recent decades become detached from their original purpose. We are faced with a rather stark irony: While the United States is devising ways to ethically mount counterinsurgencies, insurgents who employ terrorist tactics are receiving new protections under international law.

Take, for example, Protocol I, a 1977 treaty that contained amendments to the Geneva Conventions. Most controversial is its Article 44, which relaxed the traditional Geneva standards requiring combatants to distinguish themselves from the civilian population by wearing a “fixed distinctive sign recognizable at a distance.” Under Protocol I, combatants are required to be thus distinguished from civilians *only when they are actually engaged in an attack*, or find themselves in military preparation for an attack. Although 168 nations have ratified or acceded to the Protocols as of late 2008, the United States has consistently refused to ratify the treaty. President Reagan articulated the fundamental reason in a 1987 message to the Senate:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called “war of national liberation.” Whether such wars are international or non-international should turn exclusively on objective reality, not on one’s view of the moral qualities of each conflict. To rest on such subjective distinctions based

on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form.

President Reagan's position, it should be noted, was endorsed by both the *New York Times* and the *Washington Post*. Since 9/11, some have argued that the United States is bound to Protocol I because it has become "common international law"—but since the U.S. did not ratify Protocol I, the Bush administration decided that in the conflict with Al Qaeda and the war in Afghanistan, the Third Geneva Convention did not confer prisoner of war status on Al Qaeda terrorists or members of the Taliban who did not wear uniforms or comply with the laws of war.

But the insurgency in Iraq was another matter. Within days of being confirmed as head of the Justice Department's Office of Legal Counsel in October 2003, Jack L. Goldsmith was asked to render an opinion on "whether the Fourth Geneva Convention protected terrorists in Iraq." While it had already been decided that the Third Geneva Convention did not confer POW status on Al Qaeda terrorists, this was a different question.

The Fourth Geneva Convention is concerned with the duties of an occupying power and the treatment of civilians. While expressly denying protection to those who are citizens of neutral or allied nations, the Fourth Convention contemplates some legal protection for "spies and saboteurs," a class of belligerents, Goldsmith writes in his 2007 book *The Terror Presidency*, "that might be thought to include terrorists." Goldsmith tells us that government lawyers from the State Department, Defense Department, CIA, and National Security Council all reached a consensus: "the convention protected all Iraqis, including those who were members of Al Qaeda or any other terrorist group, but not Al Qaeda terrorists from foreign countries who entered Iraq after the occupation began." Goldsmith agreed. When Goldsmith relayed the decision to White House Counsel Alberto Gonzales, who had requested the opinion in the first

place, Gonzales responded, “Jack, I don’t see how terrorists who violate the laws of war can get the protections of the laws of war.” Goldsmith proceeded to explain to him how the government lawyers had interpreted the laws of war.

Let us set aside the question of whether Goldsmith and his legal brethren reached a correct legal judgment. And let us also set aside the important (especially in light of the abuses at Abu Ghraib) prudential utilitarian concern that for the sake of good military order and for the purpose of denying our enemies a propaganda victory, perhaps all insurgents and terrorists captured on the battlefield should be treated in accordance with the Third Geneva Convention. We must still ask whether such a strict interpretation of the laws of war may undermine the very purpose of the laws of war. We now have a situation in which hidden terrorists who have plighted their troth to an international terrorist network are entitled to the same treatment as indigenous insurgents who refrain from terrorist tactics while fighting an occupying army.

Goldsmith admits to feeling troubled by his legal call: “I had just made a decision that conferred legal protections on the terrorists who were killing U.S. soldiers and threatening the Iraq project.” But the problem is not merely that American soldiers were being killed by terrorists; American soldiers are, after all, legitimate military targets. The problem is that the Iraqi people that the American soldiers were trying to protect were being killed by terrorists. It is those innocents that international law, through incentives and sanctions, should seek to protect. That mission, for the foreseeable future, will be in the hands of a well-trained and equipped counterinsurgency force. We can only hope that a morally-informed international legal structure eventually catches up with a morally-informed U.S. counterinsurgency doctrine.